



INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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CERTIFICATE

LION MEXICO CONSOLIDATED L.P.

v.

UNITED MEXICAN STATES

(ICSID CASE NO. ARB(AF)/15/2)

I hereby certify that the attached documents are true copies of the English and Spanish versions of the Tribunal's Award dated September 20, 2021.

A handwritten signature in black ink, appearing to read "Meg Kinnear", written in a cursive style.

Meg Kinnear
Secretary-General

Washington, D.C., September 20, 2021



INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

LION MEXICO CONSOLIDATED LP
Claimant

v.

UNITED MEXICAN STATES
Respondent

(ICSID Case No. ARB(AF)/15/2)

AWARD

Members of the Tribunal

Juan Fernández-Armesto, President of the Tribunal
David J.A. Cairns, Arbitrator
Laurence Boisson de Chazournes, Arbitrator

Secretary of the Tribunal

Francisco Grob

Assistant to the Tribunal

Adam Jankowski

Washington D.C., September 20, 2021

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REPRESENTATION OF THE PARTIES

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GLOSSARY OF TERMS AND ABBREVIATIONS

Américas I	One of the two high-end mixed-use skyscrapers planned under the Guadalajara Project to be built in the city of Guadalajara, State of Jalisco
Américas II	One of the two high-end mixed-use skyscrapers planned under the Guadalajara Project to be built in the city of Guadalajara, State of Jalisco
Arechederra	Witness statement of Jose Arechederra
Canada Submission	Non-Disputing Party Submission of the Government of Canada submitted on June 21, 2019
CM	Claimant's Memorial dated March 13, 2017
CR	Claimant's Reply on the Merits dated February 21, 2019
CPHB	Claimant's Post-Hearing Brief dated October 1, 2019
CC Jalisco	Civil Code of Jalisco
CC Nayarit	Civil Code of Nayarit
C&C Capital	C&C Capital, S.A. de C.V., a company owned or controlled by Sr. Cárdenas
C&C Ingeniería	C&C Ingeniería y Proyectos, S.A. de C.V., a company owned or controlled by Sr. Cárdenas
Clarion	Clarion Partners, L.P., a real estate investment management company founded in New York in 1982, which manages real estate investments for institutional investors
Commercial Code [of Mexico]	Commercial Code of Mexico of 1889, with amendments, as under exhibit Zamora I-3
Costs of the Proceeding	The fees and expenses of the members of the Tribunal and the expenses and charges of the Secretariat
CPC Jalisco	Civil Procedure Code of Jalisco

Credit Agreements	Three contracts signed by Lion with companies owned or controlled by Sr. Cárdenas in February, June and September 2007, making and governing the Loans
Debtors	Two Mexican companies, Inmobiliaria Bains, S.A. de C.V and C&C Capital, S.A. de C.V., the borrowing party in three loans made by Lion
Defense Expenses	The expenses incurred by the Parties in connection with the proceeding
First Loan	Loan, in the form of a “Credit Agreement”, between Lion (as Lender), Inmobiliaria Bains (as Borrower) and C&C Ingeniería, another company of Sr. Cárdenas (as joint and several obligor). It was signed on February 27, 2007, for the amount of US \$15,000,000 plus interest
First Note	Note issued by Inmobiliaria Bains in favor of Lion for US \$15,000,000 on February 28, 2007
Juez de lo Civil	The 39 th Civil Court in Mexico City, before which the Foreclosing Proceedings were initiated
Foreclosure Proceedings	<i>Juicio Hipotecario</i> ; Foreclosure proceedings initiated on 3 April 2012 by Lion against the Debtors, to enforce the Nayarit Mortgage
Guadalajara Mortgage 1	Mortgage securing the Second Loan, granted by C&C Capital in favor of Lion over one of the properties pertaining to the Guadalajara Project on June 13, 2007
Guadalajara Mortgage 2	Mortgage securing the Third loan, granted by C&C Capital in favor of Lion over one of the properties pertaining to the Guadalajara Project on September 26, 2007
Guadalajara Project	Real estate project that consisted of two high-end mixed-use skyscrapers (Américas I and Américas II), which were to be built by Sr. Cárdenas’s companies in Guadalajara, State of Jalisco
Guadalajara Properties	Real estate covered by the two Guadalajara Mortgages, where the Guadalajara Project was intended to be developed
Hearing	The hearing on the Merits held at the World Bank Headquarters in Washington D.C. on July 22-14, 2019
Hendricks	Witness statement of James Hendricks

HT	Transcripts of the Merits Hearing
ICSID	International Centre for Settlement of Investment Disputes
ICSID AF Rules	International Center for Settlement of Investment Disputes Additionally Facility Rules
Inmobiliaria Bains	Inmobiliaria Bains, S.A. de C.V. a company owned or controlled by Cárdenas
Lion/ Claimant	Claimant. Lion Mexico Consolidated L.P. is a partnership constituted under the laws of Quebec (Canada), with its main place of business in Texas (USA)
H1	Lion's Opening Statement Presentation of July 22, 2019
Loans	Three loans that Lion made in 2007 to two Mexican companies owned or controlled by Sr. Cárdenas, for a principal amount of approximately US \$32.8 million. The Loans were secured by the three Mortgages and the issue of three Notes
Mexico/ Respondent	United Mexican States
Mortgages	Mortgages that secured the three Loans given by Lion in 2007, signed before a public notary in the Spanish language and subject to Mexican Law, namely the laws of the States of Jalisco and Nayarit
NAFTA	North American Free Trade Agreement between the United States, Canada and Mexico, which entered into force in January 1, 1994
Nayarit Project	Real estate project to be developed by Sr. Cárdenas's companies in Bahía de Banderas, State of Nayarit, Mexico
Nayarit Property	Real estate covered by the Nayarit Mortgage, where the Nayarit Project was intended to be developed
Nayarit Mortgage	Mortgage granted by Inmobiliaria Bains in favor of Lion over the Nayarit Project property on April 2, 2008
Notes	Notes formalizing the three Loans made by Lion in 2007, issued under Mexican law, and submitted to the exclusive jurisdiction of the courts of Mexico D.F.

Paparinskis	M. Paparinskis, “The International Minimum Standard and Fair and Equitable Treatment”, Oxford Monographies in International Law, 2013
Paulsson Lecture	J. Paulsson, "Issues Arising from Finding of Denial of Justice," <i>Recueil des cours / Collected Courses</i> 405 (2020): [i]-74.
Payne I	First witness statement of Onay Payne
Payne II	Second witness statement of Onay Payne
Parties	The Claimant and the Respondent together
PO	Procedural Order
Properties	The Nayarit Property and the Guadalajara Properties, together
RCM	Respondent’s Counter Memorial dated October 26, 2018
RfA	Request for Arbitration submitted by Lion against Mexico and dated December 11, 2015
RPHB	Respondent’s Post-Hearing Brief dated October 1, 2019
RR	Respondent’s Rejoinder dated June 3, 2019
Second Loan	Loan, in the form of a “Credit Agreement”, between Lion (as Lender), C&C Capital (as Borrower) and Inmobiliaria Bains (as joint and several obligor). It was signed on June 13, 2007, for the amount of US \$12,450,000 plus interest
Second Note	Noted issued by C&C Capital in favor of Lion for US \$12,450,000 on June 14, 2007
Third Loan	Loan, in the form of a “Credit Agreement”, between Lion (as Lender), C&C Capital (as Borrower) and Inmobiliaria Bains (as joint and several obligor). It was signed on September 26, 2007, for the amount of US \$5,355,479 plus interest
Third Note	Note issued by C&C Capital in favor of Lion for US \$5,355,479 on September 29, 2007
USA Submission	Non-Disputing Party Submission of the United States of America submitted on June 21, 2019

VCLT	Vienna Convention on the Law of Treaties, adopted on 23 May 1969 and opened for signature on 23 May 1969
Zamora Hearing Presentation	Claimant's expert report presentation by Mr. Rodrigo Zamora Etcharren at the Merits Hearing
Zamora I	Claimant's expert report prepared by Mr. Rodrigo Zamora Etcharren dated March 6, 2017
Zamora II	Claimant's expert report prepared by Mr. Rodrigo Zamora Etcharren dated October 23, 2017
Zamora III	Claimant's expert report prepared by Mr. Rodrigo Zamora Etcharren dated January 18, 2018
Zamora IV	Claimant's expert report prepared by Mr. Rodrigo Zamora Etcharren dated February 2, 2019

LIST OF CASES

<i>ADC</i>	<i>ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary</i> , ICSID Case No. ARB/03/16, Award (27 September 2006), Exhibit CLA-212
<i>ADF</i>	<i>ADF Group Inc. v. United States of America</i> , ICSID Case No. ARB (AF)/00/1, Award (9 January 2003)
<i>Al-Bahloul</i>	<i>Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan</i> , SCC Case No. V (064/2008) , Partial Award on Jurisdiction and Liability (2 September 2009), Exhibit CLA-220
<i>Ambatielos</i>	<i>The Ambatielos Claim</i> (Greece, United Kingdom of Great Britain and Northern Ireland), Award (6 March 1956), 12 U.N.R.I.A.A. 83 at 119, Exhibit CLA-249
<i>Ambiente Ufficio</i>	<i>Ambiente Ufficio S.p.A. and others v. Argentine Republic</i> , ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013), Exhibit CLA-291
<i>Amco Asia II</i>	<i>Amco Asia Corporation and others v. Republic of Indonesia</i> , ICSID Case No. ARB/81/1, Award (20 November 1984), Exhibit CLA-213
<i>Apotex</i>	<i>Apotex Inc. v. United States of America, NAFTA/UNCITRAL</i> , Award (June 14, 2013), Exhibit RL-061
<i>ATA Construction</i>	<i>ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan</i> , ICSID Case No. ARB/08/2, Award (18 May 2010)
<i>Azinian</i>	<i>Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States</i> , ICSID Case No. ARB (AF)/97/2, Award (1 November 1999), Exhibit CLA-187
<i>Azurix</i>	<i>Azurix Corp. v. The Argentine Republic</i> , ICSID Case No. ARB/01/12, Award (14 July 2006)
<i>Ballistini</i>	<i>Ballistini case, French-Venezuelan Commission</i> (1902), Award (1905), 10 U.N.R.I.A.A. 18 at 20, Exhibit CLA-253 (Unofficial Translation from French)
<i>Barcelona Traction</i>	<i>Case concerning the Barcelona Traction, Light and Power Company, Limited</i> , Judgment (Merits) (5 February 1970), I.C.J. Reports 3 (1970); Exhibit CLA 235
<i>Chattin</i>	<i>B. E. Chattin (United States.) v. United Mexican States</i> , General Claims Commission, Award (23 July 1927), 4 U.N.R.I.A.A. 282, Exhibit CLA-250
<i>Chemtura</i>	<i>Chemtura Corporation v. Government of Canada</i> , UNCITRAL Award (2 August 2010), Exhibit CLA-139

<i>Chevron I</i>	<i>Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador</i> , Partial Award on the Merits (30 March 2010), Exhibit CLA-279
<i>Chevron II</i>	<i>Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (II)</i> , Second Partial Award on Track II dated 30 August 2018
<i>CMS</i>	<i>CMS Gas Transmission Company v. The Republic of Argentina</i> , ICSID Case No. ARB/01/8, Award (12 May 2005)
<i>Chorzów Factory</i>	<i>Case Concerning the Factory at Chorzów</i> (claim for indemnity) (merits), Judgment (13 September 1928), P.C.I.J. Series A No. 17, Exhibit CLA-180
<i>Churchill Mining</i>	<i>Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia</i> , ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, Exhibit RL-100
<i>Corona Materials</i>	<i>Corona Materials, LLC v Dominican Republic</i> , ICSID Case No ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, Exhibit RL-067
<i>Cotesworth & Powell</i>	<i>Award Pronounced in the case of Cotesworth and Powell</i> , in H. La Fontaine, <i>Pasicrisie Internationale: Historie Documentaire des Arbitrages Internationaux</i> (1902), Exhibit CLA-239 and RL-103
<i>Dan Cake</i>	<i>Dan Cake S.A. v. Hungary</i> , ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability (24 August 2015), Exhibit CLA-597
<i>Diallo</i>	<i>Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)</i> , Judgment (Preliminary Objections) (24 May 2007), I.C.J. REPORTS 582 (2007) at p. 600, Exhibit CLA-285
<i>Duke Energy</i>	<i>Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador</i> , ICSID Case No. ARB/04/19, Award of 18 August 2008
<i>El Oro Mining</i>	<i>El Oro Mining and Railway Company (Ltd.) (Great Britain) v. United Mexican States</i> , Great-Britain and Mexico Claims Commission, Award (18 June 1931), 5 U.N.R.I.A.A. p. 191, Exhibit CLA-243
<i>Eli Lilly</i>	<i>Eli Lilly and Company v. The Government of Canada</i> , UNCITRAL, ICSID Case No. UNCT/14/2, Final Award (16 March 2017), Exhibit CLA-564
<i>ELSI</i>	<i>Elettronica Sicula s.p.a., (ELSI), (United States of America v. Italy)</i> , Judgment (20 July 1989), I.C.J. REPORTS (1989), at p. 47, Exhibit CLA-234

<i>Fabiani</i>	<i>Case of Fabiani (France v. Venezuela)</i> , Award (30 December 1896), 5 MOORE’S HISTORY AND DIGEST OF THE ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 4878, Exhibit CLA-236.
<i>Finnish Vessels</i>	<i>Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war</i> , Award (9 May 1934), 3 U.N.R.I.A.A. 1479, Exhibit CLA-649
<i>Flughafen</i>	<i>Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/10/19, Award (18 November 2014)
<i>Gami</i>	<i>Gami Investments Inc. v. United Mexican States</i> , Award (15 November 2004), Exhibit CLA-616
<i>Glamis Gold</i>	<i>Glamis Gold, Ltd. v. The United States of America</i> , (UNCITRAL) Award (8 June 2009), Exhibit CLA-142
<i>Idler</i>	<i>Jacob Idler v. The United States of Venezuela</i> , Claim No. 2, Award, 14 July 1890, United States and Venezuelan Commission, Opinions, at pp. 155-172, Exhibit CLA-255
<i>Interhandel</i>	<i>Interhandel, Preliminary Objections, Judgment</i> , I.C.J. Reports 1959
<i>Jan de Nul</i>	<i>Jan de Nul N.V. v. Arab Republic of Egypt</i> , ICSID Case No. ARB/04/13, Award (6 November 2008), Exhibit CLA-240
<i>Krederi</i>	<i>Krederi Ltd. v. Ukraine</i> , ICSID Case No. ARB/14/17, Excerpts of Award dated 2 July 2018
<i>Loewen</i>	<i>Loewen Group, Inc. and Raymond L. Loewen v. United States of America</i> , ICSID Case No. ARB(AF)/98/3, Award (23 June 2003), Exhibit CLA-168.
<i>Merrill</i>	<i>Merrill & Ring Forestry L.P. v Canada</i> , (UNCITRAL) Award (31 March 2010), Exhibit CLA-615
<i>Metalclad</i>	<i>Metalclad Corporation v. The United Mexican States</i> , ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), Exhibit CLA-149
<i>Middle East Cement</i>	<i>Middle Cement Middle East Cement Shipping and Handling Co v. Arab Republic of Egypt</i> , ICSID Case No. ARB/99/6, Award (12 April 2012), Exhibit CLA-211
<i>Mondev</i>	<i>Mondev International Ltd. v United States of America</i> , ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), Exhibit CLA-086
<i>MTD v. Chile</i>	<i>MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile</i> , ICSID Case No. ARB/01/7, Award, 25 May 2004, Exhibit RL-085
<i>Neer</i>	<i>L. Fay, H. Neer and Pauline Neer (USA) v. United Mexican States</i> , RIAA, Volume IV pp. 60-66, 15 October 1926, Exhibit CLA-277

<i>Norwegian Loans</i>	<i>Certain Norwegian Loans, Judgment, I.C.J. Reports 1957</i>
<i>OI</i>	<i>OI European Group B.V. v Bolivarian Republic of Venezuela, ICSID Case No ARB/11/25, Award, 10 March 2015, Exhibit RL-068</i>
<i>Oostergetel</i>	<i>Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, UNCITRAL Final Award (23 April 2012), Exhibit CLA-260.</i>
<i>Pantehniki</i>	<i>Pantehniki S.A. Contractors & Engineers v. Republic of Albania, ICSID Case No. ARB/07/21, Award (30 July 2009), Exhibit CLA-276</i>
<i>Pey Casado</i>	<i>Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Final Award (8 May 2008), Exhibit CLA-202</i>
<i>Philip Morris v. Uruguay</i>	<i>Philip Morris Brands Salr, Philip Morris Products S.A. and ABAL Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016, Exhibit RL-066</i>
<i>Renée Rose Levy</i>	<i>Renée Rose Levy de Levi v. Republic of Peru, ICSID Case No. ARB/10/17, Award, 26 February 2014, Exhibit RL-101</i>
<i>Joseph F. Rihani</i>	<i>Joseph F. Rihani, American Mexican Claims Commission, Decision No. 27-C (1942), 1948AM. MEX. CLAIMS REP. 254, Exhibit CLA-251</i>
<i>Robert E. Brown</i>	<i>Robert E. Brown (United States) v. Great Britain, Award (23 November 1923), 6 U.N.R.I.A.A. 120 at 129, Exhibit CLA-294</i>
<i>Saluka</i>	<i>Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award of 17 March 2006</i>
<i>Saipem</i>	<i>Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Award (30 June 2009), Exhibit CLA-185</i>
<i>Toto Construzioni</i>	<i>Toto Construzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009), Exhibit CLA-244</i>
<i>Vivendi</i>	<i>Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award (20 August 2007), Exhibit CLA-310</i>
<i>Waste Management II</i>	<i>Waste Management v. Mexico, Case N° ARB(AF)/00/3, (30 April 2004), Exhibit CLA-200</i>

I. INTRODUCTION

1. On December 11, 2015, the International Centre for Settlement of Investment Disputes [“**ICSID**”] received a request for arbitration [the “**RfA**”] submitted by Lion Mexico Consolidated L.P. [“**Lion**” or “**Claimant**”], a company constituted under the laws of Quebec, Canada, against the United Mexican States [“**Mexico**” or “**Respondent**”].
2. The RfA was made pursuant to Arts. 1116, 1120, and 1122 of the North American Free Trade Agreement [“**NAFTA**”]¹. It included a request for approval of access to the Additional Facility of the Centre.
3. On December 23, 2015, the Secretary-General registered the RfA and approved access to the Additional Facility pursuant to Art. 4 of the ICSID Additional Facility Rules [“**ICSID AF Rules**”].
4. The Tribunal was officially constituted on July 26, 2016, after all the arbitrators accepted their appointments and the proceedings were deemed to have begun.
5. At the time of this Award, the Tribunal is composed of three following members:

Mr. Juan Fernández-Armesto
Chairman – Spanish national
Appointed by agreement of the Secretary-General on
July 20, 2016.
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Mr. David J.A. Cairns
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Appointed by Claimant on March 10, 2016.
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Prof. Laurence Boisson de Chazournes

¹ RfA, para. 7.

Co-Arbitrator – French/Swiss national
Appointed by Respondent on February 2, 2018.
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II. THE PARTIES

6. This arbitration takes place between Lion Mexico Consolidated L.P. (Canada) and the United Mexican States, a sovereign state.

1. CLAIMANT: LION MEXICO CONSOLIDATED L.P.

7. Claimant is Lion Mexico Consolidated L.P., a partnership incorporated and registered under the laws of the Province of Quebec, Canada. Its main place of business and unified domicile for notifications is the following:

1717 McKinney Avenue, Suite 1900
Dallas, Texas 75202
United States of America²

8. Claimant is represented in this arbitration by:

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² RfA, para. 2, and Exh. C-1.

2. RESPONDENT: UNITED MEXICAN STATES

9. Respondent is the United Mexican States, a sovereign State.

10. The Respondent is represented in this arbitration by the following counsel:

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11. Henceforth, Claimant and Respondent will together be referred to as the “**Parties**”.

III. PROCEDURAL HISTORY

12. On December 11, 2015, Lion submitted to the ICSID a RfA against Mexico pursuant to Art. 36 of the ICSID Convention and on the basis of the NAFTA, between the United States of America, Canada and the United Mexican States, which entered into force on January 1, 1994. On December 23, 2015, the Secretary-General of ICSID registered the RfA and approved access to the Additional Facility pursuant to Art. 4 of the ICSID AF Rules.
13. The Tribunal was constituted on July 27, 2016, in accordance with Art. 6(3) of the ICSID AF Rules and was originally composed of Juan Fernández-Armesto a national of Spain, President, appointed by the Secretary-General pursuant to agreement of the Parties; David J.A. Cairns, a national of Great Britain and New Zealand, appointed by the Claimant; and Ricardo Ramírez Hernández, a national of Mexico, appointed by the Respondent. The Tribunal was reconstituted on February 6, 2018, with the appointment of Laurence Boisson de Chazournes, following the resignation of Ricardo Ramírez Hernández.
14. In the course of the proceeding, the Tribunal issued a Decision on the Respondent's Preliminary Objection under Art. 45(6) of the ICSID AF Rules, dated December 12, 2016, a Decision on the Non-Disputing Party's Application, dated May 23, 2017, a Decision on Bifurcation, dated May 29, 2017, and a Decision on Jurisdiction, dated July 30, 2018. The full procedural history of this case is described in these decisions.
15. The Decision on Jurisdiction forms part of this Award and is appended as Annex A. In the Decision on Jurisdiction, the Tribunal dismissed Respondent's jurisdictional objection and declared that³:
 - the Mortgages qualify as an investment, and
 - the Notes do not qualify as an investment.
16. The procedural details of this proceeding following the Decision on Jurisdiction are summarized below.
17. In accordance with section 17.1 of Procedural Order No. 1 [**"PO 1"**], Mexico submitted a document production schedule. Claimant filed its response and final version of the document production schedule containing both Parties' arguments, agreements and disagreements and requests the Tribunal to decide on the production of documents.

³ Decision on Jurisdiction, para. 266.

18. On September 3, 2018, the Tribunal issued **Procedural Order No. 6** deciding on Mexico's request for production of documents.
19. On September 5, 2018, the updated procedural calendar (Annex A to PO 1) was transmitted to the Parties.
20. On October 2, 2018, following the Parties' document production exchanges, the Respondent informed the Tribunal that, in light of the confidential nature of some of the documents, the Claimant requested a Confidentiality Order for the protection of confidential information. The Parties agreed on the content of such order, which they attached with their communication for the Tribunal's approval and issuance.
21. On October 11, 2018, the Tribunal issued **Procedural Order No. 7** embodying the Parties' agreement with regards to the treatment of confidential documents.
22. On October 26, 2018, following an agreed extension, Mexico submitted its **Counter-Memorial on the Merits**, attaching 33 factual exhibits⁴, 60 legal authorities⁵, one witness statement (Raúl Calva Balderrama), three legal expert reports, prepared by the law firm Sánchez Devanny, Dr. Raúl Plasencia Villanueva and Dr. José Ovalle Favela, and a valuation expert report, prepared by CBRE.
23. On November 7, 2018, as agreed by the Parties, the Tribunal issued an amended procedural calendar (Annex A to PO 1).
24. On November 12, 2018, the Claimant submitted a document production request in accordance with section 17.1 of PO 1. On December 13, 2018, Mexico filed its response and final version of the document production schedule containing both Parties' arguments, agreements and disagreements and requests for the Tribunal to decide on the production of documents.
25. On January 3, 2019, the Tribunal issued **Procedural Order No. 8** deciding on the Claimant's requests for production of documents. On January 8, 2019, the Claimant submitted a request for the Tribunal to reconsider one of the document requests which was ruled to be overbroad. On January 29, 2019, after receiving comments from Mexico, the Tribunal rejected the Claimant's request for reconsideration.
26. On February 7, 2019, as agreed by the Parties, the Tribunal issued an amended procedural calendar (Annex A to PO 1).

⁴ Exhs. R-001 to R-033.

⁵ Exhs. RL-039 to RL-098.

27. On February 21, 2019, the Claimant filed its **Reply on the Merits** together with 40 factual exhibits⁶ and 218 legal authorities,⁷ a second witness statement of Ms. Onay Payne, a fourth legal expert report by Mr. Rodrigo Zamora (which attached 20 legal authorities) and the expert valuation report and rebuttal report of Mr. Richard Marchitelli of Cushman Wakefield.
28. On May 28, 2019, the United States of America wrote to the Tribunal requesting permission to file a submission on questions of treaty interpretation under NAFTA Art. 1128.
29. On June 3, 2019, following an agreed extension, the Respondent filed its **Rejoinder on the Merits** together with 9 factual exhibits⁸ and 21 legal authorities,⁹ a second expert report of Dr. José Ovalle Favela, and a second valuation expert report prepared by CBRE.
30. On June 5, 2019, the ICSID Secretariat transmitted to the Parties a draft **Procedural Order No. 9** [“**PO 9**”] concerning the organization of the hearing and inviting the Parties to confer and agree on the items addressed therein. The Parties were also informed that a pre-hearing conference would take place on June 24, 2019.
31. On June 11, 2019, the Tribunal informed the United States that it had no objection to the proposal made on May 28, 2019 and therefore their submission should be filed by June 21, 2019.
32. On June 14, 2019, following an agreed extension, each Party submitted the preliminary list of witnesses and experts for cross-examination at the hearing.
33. On June 18, 2019, the Parties submitted a joint draft of PO 9 indicating the items on which they agreed and their respective positions regarding the items on which they did not agree. On June 21, 2019, the Tribunal provided the Parties the corresponding agenda of the items to be discussed in the pre-hearing conference.
34. Also, on June 21, 2019, the United States of America and the Government of Canada each file a written submission as a non-disputing State Party pursuant to Art. 1128 of NAFTA.
35. On June 24, 2019, the Tribunal held a pre-hearing organizational meeting with the Parties by teleconference.

⁶ Exhs. C-157 to C-197.

⁷ Exhs. CLA-493 to CLA-710.

⁸ Exhs. R-034 to R-042.

⁹ Exhs. RL-099 to RL-119.

36. On June 26, 2019, the Tribunal issued **PO 9** concerning the organization of the hearing.
37. On July 4, 2019, the Claimant informed the Tribunal that it did not wish to cross-examine Dr. Raúl Plascencia (Respondent’s legal expert) and Mr. Raúl Calva (Respondent’s witness). The Tribunal invited Mexico to comment on Claimant’s communication and on July 11, 2019, Mexico informed the Tribunal that it did not have any comments with respect to Claimant’s communication of July 4, 2019. Mexico further stated that it did not wish to cross examine Mr. José Arechederra Tovar (Claimant’s witness) and requested that Mr. Diego Gómez Haro and Mr. Alfonso López Lajud from the law firm Sánchez Devanny be examined by video conference.
38. On July 15, 2019, Claimant responded to the Tribunal’s invitation regarding the examination of Mr. Gómez Haro and Mr. López Lajud by videoconference and a possibility of amending the timetable for the hearing. Claimant also requested leave to introduce a new document on record.
39. On July 17, 2019, the Tribunal transmitted to the Parties a modified schedule from Procedural Order No. 9, with regard to interrogation of the witnesses and experts. The Tribunal also informed the Parties that it would decide on Claimant’s request to introduce a new document to the record at the beginning of the hearing, after hearing Respondent’s position on the matter¹⁰.
40. A hearing on the merits was held in Washington, D.C. from July 22, 2019 to July 24, 2019 [the “**Hearing**”]. The following persons were present at the Hearing:

TRIBUNAL	
Prof. Juan Fernández-Armesto	President
Dr. David J.A. Cairns	Arbitrator
Prof. Laurence Boisson de Chazournes	Arbitrator

ASSISTANT TO THE TRIBUNAL	
Mr. Luis Fernando Rodríguez	

ICSID SECRETARIAT	
Ms. Catherine Kettlewell	Legal Counsel

¹⁰ Claimant’s request to introduce the legal exhibit on the methodologies for the valuation of real estate identified in its letter of July 10, 2019. The Tribunal ultimately did not need to make a decision as Respondent agreed to the introduction of the evidence into the case file at the beginning of the hearing, see HT, p. 19.

CLAIMANT	
<i>Counsel:</i>	
Mr. Robert J. Kriss	Mayer Brown
Mr. Dany Khayat	Mayer Brown
Mr. Alejandro López Ortiz	Mayer Brown
Mr. José Caicedo	Mayer Brown
Ms. Patricia Ugalde	Mayer Brown
Mr. Emiliano Represa	Mayer Brown
Mr. Timothy J. Keeler	Mayer Brown
Ms. Elaine Liu	Mayer Brown
<i>Parties:</i>	
Ms. Onay Payne	Clarion Partners
Ms. Renee Castro	Clarion Partners
<i>Witnesses:</i>	
Ms. Onay Payne	Clarion Partners
Mr. James C. Hendricks	Clarion Partners
<i>Experts:</i>	
Mr. Rodrigo Zamora	Galicia Abogados
Mr. Richard Marchitelli	Cushman & Wakefield
Mr. Cory Savik	Cushman & Wakefield

RESPONDENT	
<i>Counsel:</i>	
Mr. Orlando Pérez Gárate	Secretaría de Economía
Ms. Cindy Rayo Zapata	Secretaría de Economía
Mr. Geovanni Hernández Salvador	Secretaría de Economía
Ms. Blanca del Carmen Martínez Mendoza	Secretaría de Economía
Mr. Aristeo López Sánchez	Secretaría de Economía
Ministro Gerardo Lameda Díaz Pérez	Secretaría de Economía
Mr. Pedro de la Rosa	Embajada de México
Mr. J. Cameron Mowatt	Tereposky & DeRose LLP
Ms. Jennifer Radford	Tereposky & DeRose LLP
Mr. Vincent DeRose	Tereposky & DeRose LLP
Mr. Alejandro Barragan	Tereposky & DeRose LLP
Ms. Ximena Iturriaga	Tereposky & DeRose LLP

Mr. Kun Hui	Tereposky & DeRose LLP
Mr. Stephan E. Becker	Pillsbury Winthrop Shaw Pittman LLP
Mr. Jorge Vera	Pillsbury Winthrop Shaw Pittman LLP
Experts:	
Mr. José Ovalle Favela	Legal Expert
Mr. Chris G. Maugeri	Damages Expert (CBRE)
Mr. Alfredo Rosas	Damages Expert (CBRE)

NON-DISPUTING PARTIES	
Ms. Nicole Thornton	U.S. Department of State
Mr. John Blanck	U.S. Department of State
Mr. Khalil Gharbieh	Office of the U.S. Trade Representative
Ms. Amanda Blunt	Office of the U.S. Trade Representative

INTERPRETERS	
Ms. Charles Roberts	English-Spanish Interpreter
Ms. Judith Letendre	English-Spanish Interpreter
Ms. Sonia Berah	English-Spanish Interpreter

COURT REPORTERS	
Mr. Dante Rinaldi	Spanish Court Reporter
Mr. Dionisio Rinaldi	Spanish Court Reporter
Ms. Dawn Larson	English Court Reporter

41. During the Hearing, the following witnesses and experts were examined:

On behalf of the Claimant:

Ms. Onay Payne
 Mr. James C. Hendricks
 Mr. Rodrigo Zamora
 Mr. Richard Marchitelli (for Cushman Wakefield)

On behalf of the Respondent:

Mr. José Ovalle Favela
 Mr. Alfredo Rosas (for CBRE)

42. On August 1, 2019, the Tribunal invited the Parties to i) agree on a schedule for the next procedural steps; ii) submit electronic copies of the exhibits they agreed to introduce during the hearing; and iii) to confer and agree about the introduction of the two Supreme Court decisions that were addressed in Mr. Zamora's expert presentation. The Tribunal also posed questions to the Parties to be addressed in their post-hearing briefs.
43. On August 6, 2019, Mexico confirmed that the electronic versions of the exhibits¹¹ submitted during the Hearing had been uploaded to the Box folder created for this case.
44. On August 7, 2019, the Parties informed the Tribunal on their agreement for the dates for their post-hearing briefs and statement of costs, their disagreement on the filing of replies on costs and on the introduction of the two Supreme Court decisions.
45. On August 9, 2019, the Tribunal confirmed the Parties agreed scheduled for the filing of post-hearing briefs and statement of costs, informed them that a second round on costs was not necessary and admitted into the record the decisions of the Mexican Supreme Court and of the *Tribunal Colegiado*.
46. On August 12, 2019, the Claimant confirmed that electronic versions of the exhibits¹² submitted during the hearing and the Supreme Court decisions had been uploaded to the Box folder created for this case.
47. The Parties filed simultaneous **Post-Hearing Briefs**¹³ on October 1, 2019.
48. The Parties filed simultaneous **Statement of Costs** with the corresponding supporting invoices on October 22, 2019.
49. On November 6, 2019, the Tribunal invited the Respondent to provide answer on the President of the Tribunal's proposal made during the hearing to render the Award in English, following by a subsequent Spanish translation.
50. On November 11, 2019, Mexico informed the Tribunal that it wished for the Award to be issued simultaneously in English and Spanish in accordance with section 12.11 of PO 1.
51. On May 14, 2020, the Centre informed the Parties that during Mr. Francisco's Grob's paternity leave, Ms. Catherine Kettlewell, ICSID Legal Counsel, would serve as Secretary of the Tribunal.

¹¹ Exhs. R-43 to R-50.

¹² Exhs. C-198 to C-201.

¹³ Claimant filed its Post-Hearing Brief together with Annexes I through III.

52. On September 25, 2020, Mr. Francisco Grob returned from paternity leave.
53. On December 11, 2020, Mr. Luis Fernando Rodríguez ceased to serve as the Assistant to the Tribunal and the Tribunal proposed that Mr. Adam Jankowski serve as the new Assistant to the Tribunal. On January 7, 2021 the Parties confirmed the appointment of Mr. Adam Jankowski as the Assistant to the Tribunal.
54. The proceeding was closed on July 19, 2021.

IV. FACTS

55. This section describes the factual background of the dispute, which for the most part remains undisputed between the Parties.

1. LION’S INVESTMENT IN MEXICO

56. Claimant, Lion Mexico Consolidated L.P., is a limited partnership constituted under the laws of Quebec (Canada), with its main place of business in Texas (USA). Lion was created and is managed by Clarion Partners, L.P. [“**Clarion**”], a real estate investment management company founded in New York in 1982, which manages real estate investments for institutional investors¹⁴.

57. Lion had been making investments in Mexico for over ten years. Over that period, Lion had provided more than US \$800 million of capital to entities doing business in Mexico, to be used in developing a wide array of real estate properties, such as hotels, office buildings, residences, warehouses, and resorts¹⁵. Wishing to develop further investment opportunities in Mexico, Clarion engaged a specialized broker, and through this channel Sr. Héctor Cárdenas Curiel [“**Sr. Cárdenas**”], a Mexican businessman, was introduced¹⁶. Sr. Cárdenas was presented as a developer seeking funding for the development of two significant real estate projects: the “**Nayarit Project**” and the “**Guadalajara Project**”.

1.1 SR. CÁRDENAS’S PROJECTS: NAYARIT AND GUADALAJARA

58. Mr. Hendricks, the managing director at Clarion during the period from 2006 through 2015, confirmed in his Witness Statement that Sr. Cárdenas enjoyed the reputation of a “trusted business partner of respected developers¹⁷”. However, the preliminary inquiries did not extend to Cárdenas’s father-in-law, a Sr. Garsin, a person with a “big banking relationship at Bansi Bank¹⁸” and apparently a powerful figure in the State of Jalisco, who also became involved in the project.

59. The Nayarit Project included an ocean-front residential and resort development in Bahía de Banderas, State of Nayarit¹⁹. The development plan called for a mixed-use high-end resort to be anchored by a Ritz Carlton hotel, 1,500 luxury residential units,

¹⁴ Exh. C-32.

¹⁵ CM, para. 6.

¹⁶ Arechederra, para. 9.

¹⁷ Hendricks, para. 8.

¹⁸ HT, p. 497.

¹⁹ Hendricks, para. 7.

extensive amenity offerings, and two ocean-front golf courses, to be developed on 855 hectares (2,100 acres) with 2.8 miles of ocean frontage²⁰.

60. The Guadalajara Project²¹ consisted of two high-end mixed-use skyscrapers, to be built on approximately 15,000 m² (3.74 acre) in the city of Guadalajara, State of Jalisco²².
61. Sr. Cárdenas's plans for the development of the Nayarit and the Guadalajara Projects were preliminary and incomplete at the time he requested capital from Lion to acquire land and begin limited infrastructure development²³. Lion was willing to provide capital for the development of these projects subject to certain requirements, accepted by Sr. Cárdenas, including the following:
 - The granting of mortgages to Lion over the land acquired by Sr. Cárdenas and on the subsequent improvements made on that land²⁴; and
 - The issuance of promissory notes as unconditional commitments to repay the money owed to Lion, with certain procedural privileges under Mexican law²⁵.

1.2 THE THREE SETS OF TRANSACTIONS

62. In February, June and September 2007, Lion made three loans for financing the purchase of the properties for the Nayarit Project and the Guadalajara Project [the "**Loans**"], as well as working capital.

A. The first set of transactions

63. The first loan took the form of a "Credit Agreement" between Lion (as Lender), Inmobiliaria Bains, S.A. de C.V. [**"Inmobiliaria Bains"**] (as Borrower) and C&C Ingeniería, S.A. de C.V. [**"C&C Ingeniería"**] as joint and several obligor – Inmobiliaria Bains and C&C Ingeniería were two companies owned by Cárdenas. The first loan was signed on February 28, 2007 and had a term of 18 months. Its original due date was August 28, 2008. The loan was for the amount of US \$15,000,000, which accrued ordinary interest at a rate of 18% per year, capitalized every three months, and in the event of a default, a default interest rate of 25% [the "**First Loan**"]²⁶.
64. The Credit Agreement was written in English and governed by the laws of Mexico²⁷.

²⁰ Exh. C-33.

²¹ Hendricks, para. 7.

²² Exh. C-35 and Exh. C-36.

²³ Hendricks, para. 9 and CI, paras. 17 and 18.

²⁴ Exh. C-33 and Exh. C-35.

²⁵ Hendricks, para. 9.

²⁶ Exh. C-8.

²⁷ Exh. C-8.

65. The contract provided for the granting of a mortgage (clause four) and the issue of a non-negotiable promissory note (clause two, 2.2(5)) to secure the loan. It enclosed an Exhibit A (with the “Form of Mortgage”) and an Exhibit B (with the “Form of Note”).

The First Note

66. On the same day, Inmobiliaria Bains issued the first promissory note in favor of Lion for US \$15,000,000, plus ordinary interest at a rate of 18% per year, capitalized every three months, and in the event of default, an interest rate of 25% [**“First Note”**].
67. The original maturity date of the First Note was August 28, 2008. The First Note was substituted four times, resulting in a final maturity date as of September 30, 2009²⁸.
68. The First Note (as would the other two) was issued under Mexican law, drafted both in English and Spanish (with the Spanish version governing) and submitted to the exclusive and irrevocable jurisdiction of the courts of Mexico City.

The Nayarit Mortgage

69. About one year after the signing of the Credit Agreement, on April 2, 2008, Inmobiliaria Bains granted in favor of Lion the **“Nayarit Mortgage”** over the Nayarit Project property, located in the Municipality of Bahía de Banderas²⁹.
70. The Nayarit Mortgage was drafted in Spanish and subject to the laws of the State of Nayarit³⁰. It was recorded at the Office of the *Registro Público de la Propiedad y de Comercio* (Public Registry) [**“Registro Público”**] of Bucerías, Nayarit, on May 19, 2008³¹.
71. The Nayarit Mortgage in its final form would secure not just the First, but all three Loans, including both principal and interest.

²⁸ Exh. C-153 (Versions of the First Note dated February 28, 2007; February 28, 2007; August 28, 2008; January 20, 2009; March 31, 2009; and July 7, 2009. The initial version of the First Note was signed in two separate promissory notes for US\$9,177,020.25 and US\$5,822,979.75 (totaling US\$15 million), respectively, with the same original maturity date for both of them (August 28, 2008). All subsequent versions of the First Note were issued in a single promissory note for US\$15 million.

²⁹ Exh. C-10.

³⁰ Zamora II, paras. 144 and 147.

³¹ The Nayarit Mortgage replaced two previous mortgages in favor of Lion, which were subsequently cancelled: a mortgage issued on February 28, 2007, and another on June 13, 2007. While on February 28, 2007, the mortgage only secured the First Loan, it was subsequently replaced to also cover the Second Loan (on June 13, 2007) and Third Loan (on April 2, 2008), respectively, Protocol Mortgage No. 92.496 of April 2, 2008, recorded under Book 285, section II, A-13 of the Public Property and Commercial Registry of Bucerías, Nayarit on May 19, 2008 / April 2, 2008. See Exh. C-010.

B. The second set of transactions

72. The second loan also took the form of a “Credit Agreement”, between Lion (as Lender), C&C Capital, S.A. de C.V. [“**C&C Capital**”] another company owned by Cárdenas (as Borrower) and Inmobiliaria Bains (as joint and several obligor). It was signed on June 13, 2007, around three months after the first set of transactions, and had a term of 90 calendar days. Its original due date was September 12, 2007. The loan was for the amount of US \$12,450,000 which accrued ordinary interest at a rate of 18% per year, capitalized every three months, and in the event of a default, an interest rate of 25% [the “**Second Loan**”]³².
73. The contract provided for the granting of a mortgage (clause four) and the issue of a non-negotiable promissory note (clause two, 2.2(2)) to secure the loan. It also enclosed an Exhibit A (with the “Form of Mortgage”) and an Exhibit B (with the “Form of Note”).
74. The Credit Agreement was again written in English and governed by the laws of Mexico³³.

The Second Note

75. The day after the signing of the Credit Agreement, on June 14, 2007 C&C Capital issued the second note [“**Second Note**”] in favor of Lion for US\$12,450,000 plus ordinary interest at a rate of 18% per year, capitalized every three months, and in the event of default, an interest rate of 25%³⁴.
76. The original maturity date of the Second Note was September 14, 2007. The Second Note was substituted seven times, leading to a final maturity date of September 30, 2009³⁵.

The Guadalajara Mortgage 1

77. The “**Guadalajara Mortgage 1**” secured the Second Loan, including both capital and interest. It was granted on June 13, 2007, the date of execution of the Credit Agreement, by Bansi S.A., as trustee, as per the instruction of C&C Capital, as founder and beneficiary of the trust, in favor of Lion, over one of the properties pertaining to the Guadalajara Project³⁶.

³² Exh. C-12.

³³ Exh. C-8.

³⁴ Exh. C-13.

³⁵ Exh. C-154, Copy of the versions of the Second Note dated June 14, 2007; September 12, 2007, December 25, 2007; March 30, 2008; September 30, 2008; January 20, 2009; and July 7, 2009. The 6th modified version of the Second Note, issued on March 31, 2009 and cancelled on July 7, 2009, is not available.

³⁶ Exh. C-14.

78. The Guadalajara Mortgage 1 was subject to the laws of the State of Jalisco and was recorded at that *Registro Público* about five months later, on November 23, 2007.

C. The third set of transactions

79. The third loan again took the form of a “Credit Agreement” between Lion (as Lender), C&C Capital (as Borrower) and Inmobiliaria Bains (as joint and several obligor). It was signed on September 26, 2007 and had a term of 90 calendar days. Its original due date was December 26, 2007. The loan was for the amount of US \$5,355,479, which accrued ordinary interest at a rate of 18% per year, capitalized every three months, and in the event of default, an interest rate of 25% [the “**Third Loan**”]³⁷.
80. The contract provided for the granting of a mortgage (clause four) and the issuance of a non-negotiable promissory note (clause two, 2.1(5)) to secure the loan. It was again accompanied by an Exhibit A (the “Form of Mortgage”) and an Exhibit B (the “Form of Note”).
81. The Credit Agreement was written in English and governed by the laws of Mexico³⁸.

The Third Note

82. C&C Capital issued the Third Note [“**Third Note**”] on September 26, 2007, the date of execution of the Credit Agreement, in favor of Lion for US \$5,355,479 plus ordinary interest at a rate of 18% per year, capitalized every three months, and in the event of a default, a default interest rate of 25%. Inmobiliaria Bains signed as joint and several obligor³⁹.
83. The original maturity date of the Third Note was December 25, 2007. The Third Note was substituted six times, resulting in a final maturity as of September 30, 2009⁴⁰.

The Guadalajara Mortgage 2

84. The “**Guadalajara Mortgage 2**” secured the Third Loan, including both capital and interest. It was granted on the day of execution of the Credit Agreement, September 26, 2007, by Bansi S.A., as trustee, as per the instruction of C&C Capital, as founder and

³⁷ Exh. C-152, which contains the signature of Lion and the correct original “Due Date” of 90 days at Clause 1.1(7) complements Exh. C-16. There is no dispute between the Parties on this maturity date of 90 days: it is the one indicated at the RfA, para. 34(c), and was acknowledged by Mexico at Mexico’s Preliminary Objection, paras. 40 and 41.

³⁸ Exh. C-16.

³⁹ Exh. C-152.

⁴⁰ Exh. C-155, Copy of the versions of the Third Note dated December 25, 2007; March 30, 2008; September 30, 2008; January 20, 2009; and July 7, 2009. The initial, issued on September 26, 2007 and cancelled on December 25, 2007 and the 5th modified version of the Third Note, issued on March 31, 2009 and cancelled on July 7, 2009, are not available.

beneficiary of the trust, in favor of Lion, over one of the properties pertaining to the Guadalajara Project⁴¹.

85. The Guadalajara Mortgage 2 was subject to the law of Jalisco and was recorded at the *Registro Público* of that State on December 6, 2007.

2. THE DEFAULTS

86. None of the initial deadlines for the repayment of any of the three Loans were met. Sr. Cárdenas requested and obtained a series of time extensions: from March 2008 through July 2009 Lion signed maturity date extensions on the First Loan four times⁴², on the Second Loan seven times⁴³, and on the Third Loan six times⁴⁴.

87. The last payment date on the three transactions was, ultimately, September 30, 2009, and the debtors failed to satisfy the outstanding amounts by that date. All three Loans were declared in default and interest at the default rate began to accrue on October 1, 2009.

88. Lion sent its first invoice to Sr. Cárdenas for the outstanding principal and interest payments due on April 16, 2010⁴⁵. The amounts due on that invoice, calculated and dated as of March 31, 2010, totaled US \$26,618,972 for the Nayarit Project and US \$29,649,835 for the Guadalajara Project.

89. Subsequent invoices were sent on July 14, 2010⁴⁶; October 11, 2010⁴⁷; February 14, 2011⁴⁸; April 12, 2011⁴⁹, and July 29, 2011⁵⁰. The amounts due on the latest invoices sent, calculated and dated as of June 30, 2011, were US \$36,041,328.45 for the Nayarit Project and US \$40,065,210.38 for the Guadalajara Project⁵¹.

90. According to Lion, no payments were ever made.

3. THE NEGOTIATIONS BETWEEN LION AND SR. CÁRDENAS

91. Lion initiated negotiations and held meetings with Sr. Cárdenas, trying to find an amicable solution to the breach and to avoid initiating formal foreclosure

⁴¹ Exh. C-156, which complements Exh. C-18, which did not include the annexes of the protocol.

⁴² Exh. C-11.

⁴³ Exh. C-15.

⁴⁴ Exh. C-19.

⁴⁵ Exh. C-37.

⁴⁶ Exh. C-38.

⁴⁷ Exh. C-39.

⁴⁸ Exh. C-40.

⁴⁹ Exh. C-42.

⁵⁰ Exh. C-42.

⁵¹ CM, para. 27.

proceedings⁵². Between September and December 2011 Lion and a representative of Cárdenas discussed the restructuring of the debt according to a term sheet. Such proposal never contemplated the cancellation of the Mortgages, nor the possibility that Lion become a shareholder in Cárdenas's companies⁵³. A restructuring term sheet was eventually signed by Sr. Cárdenas in October 2011 on behalf of the borrowers under the three Loan Agreements [the "**Debtors**"], but was not accepted by Lion, as it did not adhere to all the requirements advocated by Lion in the negotiations⁵⁴.

92. The discussions continued until February 2012, without Lion and Sr. Cárdenas reaching an agreement⁵⁵. On February 17, 2012 Lion took a first step towards the enforcement of the Mortgages: it served the Debtors with a formal request demanding payment of the amounts owed plus interest, under penalty of initiating foreclosure actions⁵⁶.

4. THE CANCELLATION LAWSUIT

93. On March 13, 2012, unbeknown to Lion, which was still engaged in *bona fide* negotiations with Sr. Cárdenas⁵⁷, the Debtors filed a fraudulent lawsuit [the "**Cancellation Lawsuit**", the proceeding will be referred to as the "**Cancellation Proceeding**"] against Lion before the *Juez Noveno de lo Mercantil* of the State of Jalisco [the "*Juez de lo Mercantil*"].

94. Under the applicable State laws, mortgages registered in the *Registro Público* can be cancelled through a judgement issued by a competent judge⁵⁸. The Cancellation Lawsuit was the first step in a complex judicial fraud scheme by Sr. Cárdenas to avoid the imminent foreclosure of the Mortgages. It is clear that Sr. Cárdenas organised this fraudulent scheme because:

- He was the person who controlled the Debtors and the beneficiary of the cancellation of the Mortgages;
- The fraud purported to transfer jurisdiction over the Mortgages from the Courts of Mexico DF to the Courts of Jalisco, precisely where Sr. Cárdenas resided and was well-established;
- The scheme required the designation of a false address for the service of Lion, and the collaboration of a person at the false address; this role was fulfilled by a

⁵² CM, para. 28.

⁵³ Exh. C-43.

⁵⁴ *Ibid.*

⁵⁵ CM, para. 31. In fact, Lion claims that negotiations continued as far as until December 2012, CM, para. 32.

⁵⁶ Exh. C-45.

⁵⁷ CM, paras. 31-33, Exh. C-43.

⁵⁸ CC Jalisco, Art. 2581, CC Nayarit, Art. 2312, discussed in Zamora II, para. 175, footnote 156.

lawyer called Lic. José Isaac López Medina, who appeared to be an associate of Sr. Cárdenas;

- The fraudulent scheme eventually required the impersonation of a representative of Lion (Sr. José Javier Tovar Arechederra). This was achieved using a copy of Sr. Arechederra's driving licence on the same date that the driving licence was deposited with security at the venue of the meeting organized by Sr. Cárdenas;
- The Tribunal finally notes that Mexico, while refusing to outright admit that fraud had indeed been perpetrated by the Debtors, argues that the "alleged multi-level fraud" was so complex and sophisticated that its judicial system could not withstand it⁵⁹.

95. The objective of the first part of Sr. Cárdenas's fraudulent scheme was to obtain a judgement, register it in the *Registros Públicos*, and thus legally extinguish the Mortgages, making any foreclosure impossible. The second part of the fraudulent scheme was then to preclude any possibility for Lion to file an *amparo* procedure, which would have rectified the previous cancellation of the mortgages. The fraudulent scheme required an impressive knowledge of the intricacies of the Mexican procedural system, suggesting that Sr. Cárdenas was assisted by an experienced legal mastermind.

4.1 JUDICIAL ENFORCEMENT OF THE (FALSE) *TÉRMINOS*

96. As a first step, the Debtors approached their local *Juez de lo Mercantil* in Jalisco and requested judicial enforcement of a settlement contract, presented only in the form of a photocopy, titled "*Términos para pago de los contratos de crédito*" [the "*Términos*"] and allegedly executed four months before, on November 14, 2011, between Lion and the Debtors⁶⁰.

97. The Debtors' prayer for relief in the Cancellation Lawsuit reads as follows:

"PRESTACIONES

A) *Por la DECLARACION JUDICIAL que se haga por parte de su Señoría en el sentido de que la demandada "LION MEXICO CONSOLIDATED, L.P." está obligada al CUMPLIMIENTO CABAL de todas las obligaciones que asumió y que dimanar a su cargo del documento base de la acción que las partes denominamos "TERMINOS PARA PAGO DE LOS CONTRATOS DE CREDITO"*" [Emphasis added]

98. The Debtors were thus seeking a judicial order granting specific enforcement of the obligations purportedly assumed by Lion in the *Términos*: under what seemed to be the terms of this agreement, Lion had accepted the cancellation of all pending debts against

⁵⁹ RR, para. 230.

⁶⁰ Exh. C-56, p. 4.

the Debtors, the cancellation of the Mortgages securing such debt in the *Registro Público*, and the return of the Notes to the Debtors, and in exchange the Debtors had undertaken to issue and to deliver to Lion a participation in Sr. Cárdenas's companies⁶¹.

99. The Debtors now alleged that Lion had defaulted on the obligations assumed in the *Términos* and requested the *Juez de lo Mercantil* to order specific performance, resulting in the cancellation of the Mortgages in the *Registro Público*.

100. The *Términos* included two further important elements of legal engineering:

101. First, the *Términos* purported to contain a clause awarding jurisdiction to the Courts of Jalisco. While all the Promissory Notes attributed jurisdiction to the Courts of Mexico City, far away from Sr. Cárdenas's main place of business, the *Términos* granted jurisdiction to the Courts of Jalisco⁶²:

“8. Jurisdicción y Competencia Para la interpretación, cumplimiento y ejecución del presente convenio [...] las partes se someten [...] a los Tribunales del Primer Partido Judicial del Estado de Jalisco, renunciando a cualquier otro fuero o jurisdicción que por razón de convenio previo o domicilio actual o futuro pudiese corresponderles”.

102. Second, the *Términos* included an address for service of process in Jalisco and the name of a process agent. While the Loans provided 3141 Hood Street, Suite 700 Dallas, Texas 75219⁶³ as Lion's address, with a copy to an address in Mexico at Paseo de los Tamarindos 400-B, Piso 8, Bosque de las Lomas, 05120 Mexico, D.F.⁶⁴, oddly the *Términos* identified a Jalisco lawyer⁶⁵ and an address in Jalisco⁶⁶:

“7. Domicilio para recibir notificaciones y autorizados [Lion] señala como domicilio para recibir cualquier tipo de comunicación relativa a la presente propuesta y notificaciones el de la finca marcada con el número 95 Despacho 7 de la calle Tomás V. Gómez, Colonia Ladrón de Guevara, en el municipio de Guadalajara, Jalisco y como autorizados para recibirlas y acusar recibo de las mismas a los Licenciados Emilio González de Castilla del Valle y Jose Isaac López Medina”.

⁶¹ Exh. C-53, p. 7.

⁶² *Ibid.*

⁶³ Exh. C-08, p. 15, Exh. C-12, p.16 and Exh. C-16, pp. 15-16.

⁶⁴ *Ibid.*

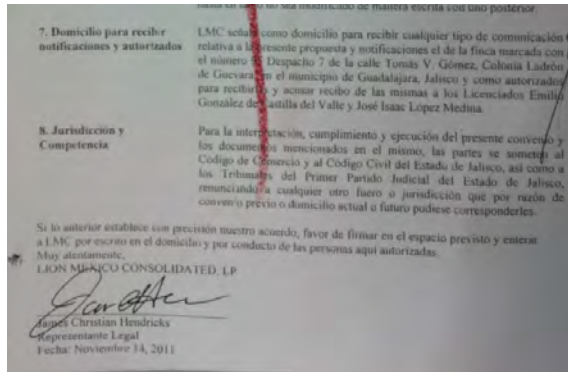
⁶⁵ Claimant's expert witness confirmed, when asked by the President at the Hearing, that it is not a usual practice in Mexico to enumerate persons authorized to receive communications by name, rather than referring to addresses only, see HT, pp. 546-547. In this case, the *Términos* provide the name of a well-known México DF lawyer (González de Castilla), who did not participate in the scheme, and whose name was inserted to give credibility to the clause, and of a Jalisco lawyer (López Medina), who actually received the notifications, never informed Lion of such fact and who seems to have acted as Cárdenas's straw man.

⁶⁶ Exh. C-53, p. 7.

4.2 THE *TÉRMINOS* DOCUMENT IS A FORGERY

103. The Tribunal is convinced that the *Términos* are in fact a forgery [and will refer to the document frequently as the “**Forged Settlement Agreement**” or “**Forged Agreement**”]. In reaching this conclusion, the Tribunal finds the following evidence compelling:

- The Forged Agreement purports to have been signed by Lion’s legal representative in Mexico, Mr. James Christian Hendricks⁶⁷; Mr. Hendricks appeared as a witness in this procedure, and gave sworn evidence that he never signed the document and that the signature appended to the document (shown below) is false⁶⁸;



- Lic. González de Castilla, the other lawyer allegedly designated by Lion as a person authorized to receive notifications in the *Términos*, and a well-known and highly respected professional, has declared in the presence of a Public Notary that: (i) he was not authorized by Lion or by any other company to receive any notification in Guadalajara; (ii) he did not know the said address nor the other person allegedly authorized; and (iii) he had no professional dealings in Guadalajara⁶⁹;
- Since the very moment that Lion obtained knowledge of the existence of the Forged Agreement in mid-December 2012⁷⁰, it has consistently averred that the document is a forgery; Lion has repeated the averment in this procedure⁷¹;

⁶⁷ Exh. C-53, p. 8.

⁶⁸ HT, p. 444; Hendricks, para. 27.

⁶⁹ Exh. C-54.

⁷⁰ Payne I, para. 13, HT, pp. 486-487.

⁷¹ HT, pp. 29, 38, 141; CPHB, paras. 92-97, CM, para. 42.

- Lion has repeatedly tried to obtain a declaration from the Mexican civil Courts, confirming the forgery of the *Términos*⁷²; although the Mexican civil Courts have never rendered a judgement confirming the existence of forgery, Claimant says that such refusal is improper and tainted by denial of justice;
- Upon gaining knowledge of the *Términos*, Lion initiated criminal actions against Sr. Cárdenas⁷³, some of which were ongoing at the time of the filing of Post-Hearing Briefs⁷⁴.
- The Forged Agreement purports to formalize a settlement, in which Lion agrees to cancel the Loans, the Notes and the Mortgages in exchange for a participation in Sr. Cárdenas's companies; there is no contemporary evidence proving that in the negotiations between Lion and Sr. Cárdenas such solution was ever discussed; to the contrary, the evidentiary record shows that Lion's intention during the negotiation was to obtain repayment of the Loans, and if the negotiation failed, to foreclose on the Mortgages⁷⁵;
- It is unlikely that Lion, a well advised Canadian company, which had insisted that in its previous agreements with Sr. Cárdenas and his companies jurisdiction should lie with the Courts of Mexico City, would accept that the *Términos*, the settlement agreement finalizing the relationship, be subject to the jurisdiction of the Courts of Jalisco; it is even more unlikely that Lion additionally would have consented to designate an obscure lawyer in Jalisco, related to Cárdenas, and with whom Lion had never had relations, as its process agent, authorized to receive all types of notifications;
- There is a final argument: confronted with Claimant's averment in the present arbitration that the Forged Settlement indeed is a forgery, Mexico has failed to dispute this statement⁷⁶.

4.3 *EMPLAZAMIENTO AND DECLARATION EN REBELDÍA*

104. Two weeks after the filing of the Cancellation Lawsuit, on April 3, 2012 the *actuario* (a court officer of the *Juez de lo Mercantil*) attempted a first service of process [the "*emplazamiento*"] at the address identified in clause 7 of the Forged Settlement Agreement. The service attempt was done on Lic. José Isaac López Medina⁷⁷, one of

⁷² The multiple attempts by Lion to prove the forgery are discussed under Section 7: Lion's attempts to remedy the cancellation of the Mortgages.

⁷³ CR, paras. 187-192, RCM, paras. 8, 118-133.

⁷⁴ E.g., Criminal Action No. 4713/2016, see CPHB, paras. 40-42.

⁷⁵ Exh. C-43.

⁷⁶ CPHB, paras. 63-65, CR, para. 71., RPHB, para. 67, RR, para. 94.

⁷⁷ Exh. C-52.

the two lawyers identified in the Forged Agreement⁷⁸, who apparently had his office at that address.

105. Confronted by the *actuário*, Lic. López Medina formally declared that no legal representative of Lion was present in his office in order to receive the *emplazamiento*. Upon receipt of this representation, the *actuário* withdrew, announcing that he would return the next day.
106. At the second visit, which occurred next day, the *actuário* decided to make the *emplazamiento* against Lion through a *notificación por cédula* delivered to the person who was at the address, Lic. López Medina⁷⁹.
107. Lic. López Medina accepted the *emplazamiento* and received a copy of the judicial file (“*autos*”).
108. Being unaware that a Court procedure against it was pending before the *Juez de lo Mercantil* of Jalisco, Lion inevitably failed to appear within the statutory time-limit.
109. The consequence of this failure was that six weeks thereafter, on May 22, 2012, Lion was declared *en rebeldía* by the *Juez de lo Mercantil* through notification via *boletín judicial*⁸⁰ (a judicial bulletin)⁸¹.
110. Two weeks after the declaration *en rebeldía*, on June 6, 2012 the Debtors submitted their evidence before the *Juez de lo Mercantil*, including the Mortgage deeds and Minutes of the General Shareholders Meeting of C&C Capital. All the evidence marshalled by the Debtors was admitted six days later, on June 12, 2012⁸².

4.4 THE JUDGMENT OF THE *JUEZ DE LO MERCANTIL*

111. Just two weeks after the submission of evidence, on June 27, 2012 the *Juez de lo Mercantil*, acting solely on the basis of the evidence marshalled by the Debtors, and without any participation of Lion, declared the Loans settled and ordered Lion to cancel the Mortgages and return the Notes [the “**Cancellation Judgment**”]⁸³. From the filing of the Cancellation Lawsuit to the rendering of the Cancellation Judgment, only 170 days had lapsed.

⁷⁸ Exh. C-53.

⁷⁹ Exhs. C-52 and C-52, CR, paras. 95-96.

⁸⁰ Exh. C-73.

⁸¹ Claimant’s expert explains that while the Commerce Code as well Mexico’s procedural codes and statutes provide for different methods of *emplazamiento*, including through *boletín judicial* and *estrados*, for the initial notification of a defendant, only personal service is legally accepted, see Zamora I, para. 142 and footnotes therein. This is not disputed by Mexico.

⁸² Exh. C-57.8.

⁸³ Exh. C-78, pp. 53-54.

The Cancellation Judgement *causa estado*

112. A few days thereafter, on August 8, 2012, and at the request of the Debtors, the *Juez de lo Mercantil*, declared that the Cancellation Judgement “*causa estado por ministerio de la ley*”, i.e. that it has become *res iudicata*, there being no possibility of submitting a *recurso de apelación*. The reason given by the Judge for his decision precluding any further appeal was that the amount claimed in the procedure was less than MEX 500,000 (approximately USD 25,000)⁸⁴.
113. The decision is difficult to understand, because the principal amount of the Loans settled and Mortgages terminated amounted to tens of millions of dollars. Be that as it may, the decision was highly relevant, because it deprived Lion of any possibility of launching an ordinary appeal against the Cancellation Judgement.

The Cancellation Judgement is enforced

114. In a subsequent procedural decision, the *Juez de lo Mercantil* gave Lion a peremptory term of three days to voluntarily comply with the Cancellation Judgement⁸⁵. Lion, who was still unaware of the Cancellation Proceeding, failed to comply and on August 30, 2012 the *Juez de lo Mercantil* ordered the *Registro Público* of Jalisco to cancel the Guadalajara Mortgages⁸⁶ and that of Nayarit to do the same with the Nayarit Mortgage⁸⁷.
115. The *Registro Público* of Jalisco did so on September 7, 2012⁸⁸. The cancellation of the Nayarit Mortgage was recorded on October 19, 2012⁸⁹. Upon these registrations, all three Mortgages became extinct for all legal purposes.

5. FALSE AMPARO PROCEEDINGS

116. The Debtors’ scheme did not end here.
117. Having orchestrated the cancellation of the Mortgages, the Debtors wanted to ensure that Lion, upon being appraised of the Cancellation Judgment, would encounter considerable procedural obstacles in seeking to reverse such decision.
118. *Pro memoria*: Lion had already been deprived of any possibility of appeal against the Cancellation Judgement, the *Juez de lo Mercantil* having decided, upon the request of

⁸⁴ Exh. C-79 “*Causar estado*”, pursuant to the definition under CLA-216.

⁸⁵ Exh. C-79.

⁸⁶ Exh. C-84.

⁸⁷ This was done through a request for assistance of the 1st Civil Judge in Bucerías, Nayarit to send a following request for cancellation to the *Registro Público* in Nayarit.; Exh. C-86.

⁸⁸ Exh. C-85.

⁸⁹ *Registro Público* in Nayarit informs about cancellation, 19 October 2012, Exh. C-88.

the Debtors, that the amount in dispute was less than MEX 500,000 and that as a consequence thereof the respondent was not entitled to appeal.

119. The Debtors, well advised on the intricacies of the Mexican procedural system, were aware that the other viable avenue for reversal of the Cancellation Judgment required Lion to initiate an *Amparo* procedure. As explained by Claimant’s legal expert, a *juicio de Amparo* is a general challenge procedure governed by the *Ley de Amparo*, which seeks to revert violations of human rights as afforded to citizens and aliens under Mexico’s Constitution⁹⁰.
120. The Debtors developed a further fraudulent scheme to disrupt the eventual *Amparo* to be filed in due course by Lion. The scheme would develop in two stages, which were to occur before Lion became aware of the Cancellation Judgment (and filed a real *Amparo*):
- in the first stage, a person falsely alleging to be a legal representative of Lion would present a request for *Amparo* purporting to act on behalf of Lion; and
 - in the second, that person would abandon the *Amparo*.
121. The purpose of this scheme was to prevent Lion, when it eventually obtained knowledge of what had happened, from presenting a proper *Amparo*: Art. 73 of the *Ley de Amparo* provides a list of eighteen causes for the finding of inadmissibility of an *Amparo*, including when an *Amparo* is based on the same facts as a previously abandoned one⁹¹. Under this rule, Lion’s proper *Amparo* would be inadmissible, because a previous *Amparo* relating to the same facts, had already been submitted and then abandoned. To revert this inadmissibility finding, Lion would have to prove that the person who had submitted and then abandoned the False *Amparo*, purporting to be a representative of Lion, was in fact not authorized by Lion to act on its behalf – an endeavour fraught with difficulties which in the actual facts proved impossible.
122. In order to file an *Amparo* falsely in the name of Lion, the Debtors needed to gain access to a copy of the case file, which in turn could only be obtained by a person holding a power of attorney. Sr. Cárdenas knew from the documents which accompanied one of Lion’s requests for payment, that a certain Sr. José Javier Tovar Arechederra was one of Lion’s representatives in Mexico. All that was needed was to impersonate Sr. Arechederra.

⁹⁰ Zamora I, para. 79.

⁹¹ Zamora I-004, Ley de Amparo, Article 73, fracciones III and IX - “El juicio de amparo es improcedente: [...]III.- Contra leyes o actos que sean materia de otro juicio de amparo que se encuentre pendiente de resolución, ya sea en primera o única instancia, o en revisión, promovido por el mismo quejoso, contra las mismas autoridades y por el propio acto reclamado, aunque las violaciones constitucionales sean diversas; IX.- Contra actos consumados de un modo irreparable”.

5.1 THE IMPERSONATION OF SR. ARECHEDERRA

123. On the same day when the Cancellation Judgment was issued, someone impersonating Mr. Arechederra went to a Notary in Jalisco to obtain a copy of the power of attorney granted to the real Mr. Arechederra⁹².

[Two years later this Notary Public would be arrested on charges of fraud and forgery of documents, subsequently fined and suspended as a Notary Public and eventually permanently disbarred by the State of Jalisco⁹³]

124. The plan was not yet fully completed. Sr. Cárdenas still required a document confirming the impostor's identity as Sr. Arechederra. On July 6, 2012, Sr. Cárdenas summoned the real Sr. Arechederra to a meeting in Jalisco (the city where the *Juez de lo Mercantil* is located)⁹⁴. Sr. Arechederra left his driver's license at the security control of the building where the meeting took place⁹⁵.
125. On the same day, July 6, 2012, an impostor using the same driver's license⁹⁶ to identify himself as Sr. Arechederra, filed with the *Juez de lo Mercantil* a request for a certified copy of the entire case file⁹⁷, on behalf of Lion, exhibiting the power of attorney obtained from the Notary⁹⁸.
126. With the copy of the case file, on August 7, 2012 an *Amparo* against the Cancellation Judgment, purportedly signed by Sr. Arechederra on behalf of Lion, was submitted at the Jalisco Courts [the "**False Amparo**"]⁹⁹.

5.2 THE FALSE AMPARO

127. The Tribunal is convinced that Sr. Arechederra never actually signed the False *Amparo* on behalf of Lion. In coming to this conclusion, the Tribunal finds the following evidence compelling:
- Sr. Arechederra corroborated by his sworn testimony at the Hearing that he never carried out any of the above actions¹⁰⁰;

⁹² CM, paras. 75-77.

⁹³ CR, para. 130, CM, para. 78.

⁹⁴ CM, para. 67.

⁹⁵ Arechederra I, para 16.

⁹⁶ Exh. C-58, p. 4.

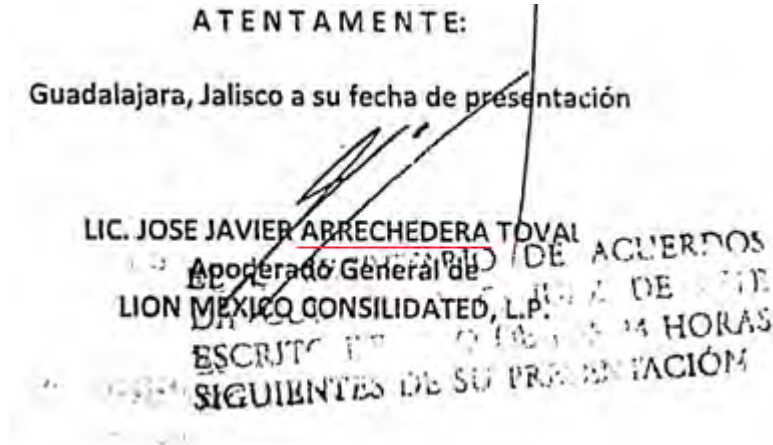
⁹⁷ Exh. C-58.

⁹⁸ Exh. C-77.

⁹⁹ Exh. C-64.

¹⁰⁰ Arechederra I, paras. 21 and 31; Exh. C-115. Ms. Payne explained that José Arechederra did not sign either the request for copies of the Cancellation Lawsuit file dated 6 July 2012 or the False Amparo.

- Sr. Arechederra's stamp signature under the False Request for Copies contains a typographical mistake (*Arrechadera* instead of *Arechederra*)¹⁰¹ – it is unlikely that the real Sr. Arechederra would be using a stamp signature containing not one but two typos in his name;



- Mr. Arechederra has submitted a voucher from the airport¹⁰² confirming that it would have been physically impossible for him to file the request for the certified copy, obtain it, sign its receipt, and make it to the airport within an hour¹⁰³;
- The False *Amparo* designated as domicile for notifications to Lion “*los estrados del Juzgado que en turno conozca de la presente demanda*”¹⁰⁴, i.e, the notice board of the competent Court which would judge the False *Amparo*; and not the address of Lion’s lawyers, as was the case in the Loans¹⁰⁵ when an address in Mexico was given for Lion;
- Lastly, Mexico has not denied that the False *Amparo* was filed by someone else than the real Sr. Arechederra.

128. The False *Amparo* was (on purpose) filed with a procedural deficiency: the person submitting the request failed to attach sufficient copies as required under Mexican

¹⁰¹ Exh. C-58, p.3, see *infra*.

¹⁰² Exh. C-59; Exh. C-60.

¹⁰³ CM, para. 69.

¹⁰⁴ Exh. C-64, p. 2.

¹⁰⁵ Exh. C-08, p. 15, Exh. C-12, p.16 and Exh. C-16, pp. 15-16.

procedural law¹⁰⁶. The *Juez* in charge of the *Amparo* notified Lion of this mistake (through the *estrados*) granting Lion three days to remedy the deficiency¹⁰⁷.

[The possibility of amending this procedural deficiency is noteworthy, as it contrasts with the treatment given to the real Lion, when it filed the proper *Amparo*: it was never granted an opportunity to cure an alleged defect in the power of attorney of the person signing an *ampliación de demanda*.]

129. The very purpose of the False *Amparo* was to be filed and then to be abandoned. Consequently, no copies were ever delivered, and the procedural deficiency was never corrected. Consequently, on August 17, 2012, the *Juez* dismissed the False *Amparo*¹⁰⁸ and on September 6, 2012 declared this decision to be final and not subject to appeal¹⁰⁹.
130. The effects came to haunt Lion when it eventually filed the proper *Amparo*.

6. LION FORECLOSES ON THE (SOON TO BE CANCELLED) NAYARIT MORTGAGE

131. In the meantime, Lion was still unaware that the Debtors had filed the Cancellation Lawsuit in the local Courts of Jalisco, seeking enforcement of a Forged Settlement Agreement, that the *emplazamiento* had been delivered to an obscure lawyer in Jalisco, that Lion had been declared *en rebeldía* and that the Cancellation Judgement had been rendered in favour of the Debtors, cancelling the outstanding Loans and Mortgages.
132. Lion continued its *bona fide* negotiations with Cárdenas, but in view of the persistence of the default, on April 3, 2012 Lion finally decided to foreclose, but only on one of the three Mortgages: it initiated a *juicio especial hipotecario* [the “**Juicio Hipotecario**”]¹¹⁰ before the *Juez Trigésimo Noveno de lo Civil de México D.F.* [the “*Juez de lo Civil*”]¹¹¹, against the Debtors, seeking to enforce the Nayarit Mortgage. Lion decided not to foreclose on the Guadalajara Mortgage, trying to minimize costs and with the hope that filing one foreclosure proceeding would incentivize Sr. Cárdenas to pay the outstanding amounts¹¹².

Difficulties in the *emplazamiento*

133. The attempts to notify the *Juicio Hipotecario* to the various Debtors commenced on April 26, 2012, but it would take several years until all the mortgagors could be properly served (*emplazados*)¹¹³: Lion requested the *Juez de lo Civil* to serve

¹⁰⁶ CM, para. 84.

¹⁰⁷ Exh. C-65.

¹⁰⁸ Exh. C-66.

¹⁰⁹ Exh. C-67.

¹¹⁰ Exh. C-44.

¹¹¹ Exh. C-46.

¹¹² CM, para. 35.

¹¹³ CM, para. 38.

Inmobiliaria Bains 13 times, providing nine different addresses in both Jalisco and Nayarit; the courts of Jalisco and Nayarit – acting at the request of the *Juez de lo Civil* – were unable to notify the company¹¹⁴ and this situation prevented the *Juicio Hipotecario* from progressing for more than three years¹¹⁵.

Anotación preventiva

134. While Lion was trying to notify the *Juicio Hipotecario* to the Debtors, it requested and obtained an order from the *Juez de lo Civil* in México D.F., instructing the *Registro Público* in Bucerías to make a preventive annotation in the books setting forth the existence of a foreclosure procedure [the “*Anotación Preventiva*”]. The Registrar did so on May 3, 2012 and added that this *Anotación Preventiva* would guarantee the “*inmovilidad registral*” of the real estate, preventing any future annotation which could disrupt the proper development of the *Juicio Hipotecario*¹¹⁶:

“[L]o anterior para efectos de que dicha inscripción sirva como inmovilidad registral con la finalidad de que no se pueda verificarse (sic) en la finca hipotecada ningún embargo, toma de posesión, diligencia precautoria o cualquier otra que entorpezca el curso del juicio”.

135. The *Anotación Preventiva* was made on May 3, 2012, a month and a half before the Cancellation Judgment (dated June 27, 2012), and in theory prevented any future annotation which could disrupt the *Juicio Hipotecario*.
136. Notwithstanding this fact, upon rendering the Cancellation Judgement, the *Juez de lo Mercantil* of Jalisco sent (through a local Court) an *oficio* to the *Registro Público de Bucerías*, requesting cancellation of the Mortgage (“*solicito a Usted, cancele la hipoteca*”)¹¹⁷ The Registrar, disregarding the existence of the previous *Anotación Preventiva*, registered the cancellation of the Mortgage in the *Registro Público* on October 16, 2012, the security thus becoming null and void¹¹⁸:

¹¹⁴ Exhs. C-47-50.

¹¹⁵ CM, para.38

¹¹⁶ Exh. C-157.

¹¹⁷ Exh. C-87.

¹¹⁸ Exh. C- 157, pp. 4-5.



Guadalajara Mortgages

137. Since Lion had chosen only to enforce the Nayarit Mortgage, but not the Guadalajara Mortgage, no *Anotación Preventiva* was ever issued in relation to the Guadalajara Mortgages, and the security was cancelled, upon an *oficio* of the *Jefe de lo Mercantil* of Jalisco of August 30, 2012¹¹⁹.

7. LION'S ATTEMPTS TO REMEDY THE CANCELLATION OF THE MORTGAGES

138. In mid-December 2012 Lion was astonished to learn, through informal sources, of the cancellation of the Mortgages¹²⁰.

139. Lion immediately turned to trying to undo the cancellation.

140. Mexican procedural law allows for the institution of *Amparo* proceedings to overturn judicial decisions. There are two different types of *Amparo* procedures: *Amparo directo* and *Amparo indirecto*. The *Amparo directo* is most commonly filed against final judgments, and the *Amparo indirecto* against certain procedural orders, or against actions taken after the case ends or against persons who did not participate in proceedings¹²¹.

141. The *Amparo* claim has to be filed by the person affected by the act which is challenged (known as the *acto reclamado*). Other parties to the *Amparo* procedure are

- the authorities who dictated, promulgated, published, ordered, executed or tried to execute the *acto reclamado* (*autoridades responsables*), and
- the affected party's counterparty in the procedure in which the challenged action was issued or executed (known as the *tercero perjudicado*)¹²².

¹¹⁹ Exh. C-84.

¹²⁰ Payne I, para. 13, HT, pp. 486-487.

¹²¹ Zamora I, para. 85.

¹²² Zamora I, para. 82.

7.1 LION FILES AN AMPARO INDIRECTO

142. On December 18, 2012 Lion filed an *Amparo indirecto* lawsuit¹²³ [“**Real Amparo**”, also “**Amparo claim**” and “**Amparo lawsuit**” (as opposed to the previous False Amparo)] before the *Juez de Distrito en Materia Civil* in Jalisco [“**Juez de Distrito**”].
143. The claim was brought against the *Juez de lo Mercantil*, against his Secretary and against the officers responsible for the *Registros Públicos* of Nayarit and Bucerías¹²⁴. The Debtors were designated in the *Amparo* claim as *terceros perjudicados* (aggrieved third parties)¹²⁵.
144. The *actos reclamados* included, among others, the lack of proper notification of Lion in the Cancellation Lawsuit:

“La falta de emplazamiento al quejoso y todas y cada una de las actuaciones y resoluciones relativas al juicio Ordinario Mercantil radicado ante el Juzgado Mercantil del Primer Partido Judicial del Estado de Jalisco”¹²⁶.

7.2 ATTEMPTS TO CLAIM FORGERY

145. Initially, Lion started the *Amparo indirecto* to obtain declaratory relief that it had never been properly served by the *Juez de lo Mercantil*. It did not include any reference to the Forged Settlement Agreement, because the specific content of the Forged Agreement only became known to Lion when the *Juez de lo Mercantil* filed an *informe* as part of the *Amparo* proceeding¹²⁷.

The ampliación de demanda

146. Upon receiving this information, on January 28, 2013 Lion filed an *ampliación de la demanda* (extension request) of the *Amparo* lawsuit, explaining that the service made by the *Juez de lo Mercantil* was based on a forged document and should thus be deemed nonexistent¹²⁸:

“La falta de emplazamiento legal a la hoy quejosa [i.e. Lion] [...] debido a que el supuesto emplazamiento [...] se hizo en un domicilio que no es de la hoy quejosa [...]. Amén de que el supuesto domicilio donde de practicó dicho emplazamiento, fue señalado en un documento que no fue suscrito por mi mandante ni por persona alguna con facultades, ya que la firma que se advierte

¹²³ Exh. C-91.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ Exh. C-91, at p. 2.

¹²⁷ HT, p. 140; H1, p. 6; Exh. C-97, p. 4.

¹²⁸ Exh. C-97, p. 3.

en el mismo es completamente falsa por no proceder del puño y letra a quien se atribuye.” [Emphasis added]

147. Lion’s forgery claim was accompanied by, *inter alia*¹²⁹:
- a graphological expert report to prove that the signature in the Forged Agreement did not belong to Mr. Hendricks, and
 - emails between a broker retained by Lion and Sr. Cárdenas to demonstrate that, after the Forged Agreement was supposedly signed in November 2011, Lion and Cárdenas were still holding discussions on the terms of the repayment of the Loans.
148. By *proveído* (procedural decision) of January 30, 2013 [the “**Dismissal Proveído**”] the *Secretario del Juzgado de Distrito* [i.e. the clerk of the *Juez de Distrito*] in Jalisco dismissed the *ampliación* of the *Amparo* submitted by Lion, arguing that¹³⁰
- “dichos actos ya fueron precisados desde el escrito inicial de demanda”.*
149. Frustrated by this postponement, Lion brought, on February 6, 2013, an “*incidente de falsedad de documento*” before the *Juez de Distrito*, claiming again that the Forged Agreement was the result of fraud¹³¹.
150. On April 10, 2013, the *Juez de Distrito* stated that he would decide in due course on the admissibility of the proposed graphological expertise on the authenticity of the Forged Settlement Agreement¹³². And on April 19, 2013, the *Juez de Distrito* once again decided to postpone his decision on the admissibility of the evidence, because of a *queja* proceeding which was subsequently initiated and which will be dealt with in the next section¹³³.

7.3 THE DISMISSAL OF EVIDENCE ON THE FORGERY

151. While the decision on the admission of evidence was pending before the *Juez de Distrito*, one of the Debtors, C&C Ingeniería, filed as a *tercero perjudicado* two *quejas*¹³⁴ before the *Segundo Tribunal Colegiado en Materia Civil del Tercer Circuito*

¹³⁰ Exh. C-103, p. 4.

¹³¹ Exh. C-107.

¹³² Exh. C-106, p. 10.

¹³³ Exh. C-180, p. 2 (“*se reserva a proveer lo que en derecho corresponda*”).

¹³⁴ The orders and judgments issued in *Amparo* proceedings are themselves subject to three different challenges: *revisión*, *queja* and *reclamación*. In an *Amparo indirecto*, such as the one filed by Lion, the most common challenges are *queja* against different procedural orders (specifically those that cause irreparable harm) and *revisión* against the *Juez de Distrito*’s final judgment, both of which are decided by a *Tribunal Colegiado de Circuito*, referred to as *Tribunal de Queja*, see Zamora I, para. 87.

[the “*Tribunal de Queja*”] against the Dismissal *Proveído* issued by the Secretary of the Court¹³⁵ and the April 10, 2013 decision of the *Juez de Distrito*¹³⁶. C&C Ingeniería argued that Lion’s *ampliación de demanda* was inadmissible, because it had not been properly signed on Lion’s behalf.

152. Lion for its part also submitted a *queja* against the same decision, because it precluded Lion from claiming that the Forged Settlement Agreement was a forgery and the origin of the improper service¹³⁷.
153. The *Tribunal de Queja* dismissed Lion’s *queja* and sided with C&C Ingeniería: the appeal court ruled that the *ampliación de la demanda*, which Lion had filed, was inadmissible, because it had not been properly signed on behalf of Lion: it should have been signed by Lion’s legal representative and not by the attorney empowered by Lion to act on its behalf in the *Amparo* proceedings¹³⁸.
154. Lion was not given an opportunity to cure the alleged procedural defect, although the *ampliación de demanda* aimed at proving that Lion, an alien company operating in Mexico, had been the victim of an elaborate fraud to avoid its proper *emplazamiento*.

[This stands in stark contrast with the treatment granted to the complainants when the False *Amparo* was submitted without the requisite copies. In that instance, the *Juez* accorded the complainants the chance to cure the formalistic deficiency.]

The decisions of the *Juez de Distrito*

155. Once the *queja* had been resolved, the *Juez de Distrito* resumed his work, and in accordance with the decision of the *Tribunal de Queja* resolved that all evidence linked to the forgery claim should be dismissed (both the evidence already admitted and the evidence still pending admission)¹³⁹.
156. Thereafter the *Juez de Distrito* rendered a specific ruling on Lion’s separate motion (“*incidente de falsedad de documento*”). The judge dismissed it on the grounds that the allegedly false document (the Forged Settlement Agreement) was not related to the subject-matter of the *Amparo* Proceeding¹⁴⁰.

¹³⁵ Exh. C-181.

¹³⁶ C&C Ingeniería’s *queja*, No. 37/2013 against *Juez de Distrito*’s decision of April 10, 2013, referenced under CM, p. 34, footnote 164 (but not included in the list of exhibits).

¹³⁷ Exh. C-182.

¹³⁸ RCM, para. 92, citing Exh. C-105, p. 3-4 and Exh. R-19.

¹³⁹ Exhi C-105, pp. 8-9.

¹⁴⁰ Exh. C-108.

Forgery is excluded from the scope of the *Amparo*

157. Be that as it may, from that date on, the scope of the *Amparo* did not include any inquiry into the issue whether the Settlement Agreement had been forged; it was assumed that the Settlement Agreement was valid and binding, having been properly executed by Lion. The scope of the *Amparo* was reduced to the question whether the *emplazamiento* had or not been properly executed in accordance with Mexican law. And – congruently with this reduced scope of investigation – all evidence in the file seeking to prove the forgery of the Settlement Agreement was expurgated.

7.4 THE AMPARO JUDGMENT

158. On December 4, 2013, the *Juez de Distrito* delivered his decision denying Lion protection against the Cancellation Judgment [the “***Amparo Judgment***”]¹⁴¹.

“[...] R E S U E L V E: ÚNICO. LA JUSTICIA DE LA UNIÓN NO AMPARA NI PROTEGE A LION MEXICO CONSOLIDATED, L.P., contra los actos que reclama del JUEZ Y DEL SECRETARIO EJECUTOR, AMBOS ADSCRITOS AL JUZGADO NOVENO DE LO MERCANTIL DEL PRIMER PARTIDO JUDICIAL DEL ESTADO DE JALISCO. [...]” [Capitals in the original]

159. The *Amparo Judgement* is a 67-page document, which in its “*Resultando*” summarizes the procedure, and which then reasons the decision in seven “*Considerandos*”.

Sr. Arechederra’s signature had been forged

160. As a preliminary question, the *Juez de Distrito* analyzes Lion’s allegation that on July 6, 2012 Sr. Arechederra’s signature had been forged in the false request for copy before the *Juzgado de lo Mercantil* – see section 5.1. *supra*. (The issue was relevant, because if it had been true that on July 6, 2012 Lion had been aware of the Cancellation Judgement, the *Amparo* would have been inadmissible due to the statute of limitations).
161. The *Amparo Judgement*, after weighing the expert evidence marshalled by the parties, concludes that Sr. Arechederra’s signature indeed had been forged, that the request for copy had indeed been false, and that consequently Lion’s request for *Amparo* was not time barred¹⁴².

Sr. Cárdenas is in prison

162. The *Amparo Judgement* also acknowledges that Sr. Arechederra and Lion had filed a criminal action against Sr. Cárdenas, accusing him of having forged his signature on various documents, and that on September 26, 2013 the criminal judge had ordered the

¹⁴¹ Exh. C-115, pp. 66-67.

¹⁴² Exh. C-115, p. 39.

imprisonment of Sr. Cárdenas for this crime. However, the *Amparo* Judge accorded little weight to this piece of evidence¹⁴³.

No discussion of forgery of the Settlement Agreement

163. Notwithstanding the finding that at least on one occasion Sr. Arechederra's signature had been forged, and that Sr. Cárdenas was in prison for alleged forgeries of documents, the *Amparo* judgement does not even discuss Lion's argument that the Settlement Agreement might also have been forged: since the *ampliación de demanda* had been dismissed (because it had been signed by Lion's attorney, but not by a legal representative), any issue relating to the falsehood of the Settlement Agreement was off limits in the *Amparo* procedure.
164. The *Amparo* Judgement consequently assumes that the Settlement Agreement was validly executed on Lion's behalf. There being a valid Settlement Agreement with a designation of process agent and an address for service of process, the *Juez de Distrito* dismisses Lion's argument that the *emplazamiento* should have been made in Dallas, Texas, USA, and in accordance with the applicable international treaties¹⁴⁴.
165. Instead, the *Juez de Distrito* discusses at length a minor incident in the way the fraudulent *emplazamiento* had taken place: in accordance with the Settlement Agreement the notification should have been made at Calle Tomás V. Gómez 95, *despacho 7*. But in reality, the *actuário* went to the same address, but to a different office: *despacho 5*.
166. The *Juez de Distrito* finds that this "minor defect" does not invalidate the *emplazamiento*, because the *actuário* was able to locate Lic. López Medina, who, in accordance with the Settlement Agreement, was the person designated by Lion as process agent¹⁴⁵.

7.5 THE RECURSO DE REVISIÓN

167. Lion was not satisfied with the *Amparo* Judgement. On December 19, 2013 Lion filed a *recurso de revisión* [the "**Recurso de Revisión**"], seeking its revocation, the granting of protection to Lion's constitutional rights and the finding that the Cancellation Lawsuit and related acts were null and void¹⁴⁶.
168. Among other reasons, Lion explicitly challenged the *Amparo* Judgment, arguing that the *Juez de Distrito* had disregarded Lion's claim that the Settlement Agreement had been forged, using the argument that the falsehood was unrelated to the dispute and

¹⁴³ Exh. C-115, p. 61.

¹⁴⁴ Exh. C-155, p. 47.

¹⁴⁵ Exh. C-155, p. 53

¹⁴⁶ Exh. C-116, pp. 46-57.

that the defendants in the *Amparo* had not participated in the alleged forgery. Lion explained that the falsehood of the Settlement Agreement was indeed relevant for the *Amparo*, because Lion's *emplazamiento* had been delivered to Lic. López Medina, Lion's purported process agent designated in the Settlement Agreement. If the Settlement Agreement was a forgery, the designation of Lic. López Medina was false, and the *emplazamiento* had not been properly made¹⁴⁷.

169. At first, the *Recurso de Revisión* was assigned to the *Cuarto Tribunal Colegiado en Materia Civil del Tercer Circuito*¹⁴⁸. However, it was later decided that the *Recurso de Revisión* should instead be heard by the same court that had rejected Lion's earlier *queja* regarding the *decisión sobre la ampliación* (the *Segundo Tribunal del Tercer Circuito*, referred to in this Award as "*Tribunal de Queja*")¹⁴⁹.

The False *Amparo* surfaces

170. Up to this point, Claimant had undertaken at least four formal attempts requesting that it be authorized to allege in the *Amparo* that the Settlement Agreement was indeed a forgery, and to marshal evidence proving this allegation. Yet the *Tribunal de Queja*, once again, decided not to investigate the issue of forgery nor to admit any evidence to prove it – but this time for a different reason.
171. More than 16 months after the initiation of the *Recurso de Revisión*, on April 17, 2015, the *Tribunal de Queja* surprisingly decided to remand the case back to the *Juez de Distrito* for a totally different purpose: to determine whether Lion's *Amparo* proceeding was inadmissible, a different *Amparo* relating to the same facts having been filed at an earlier date and thereafter abandoned.
172. *Pro memoria*: the False *Amparo* had been fraudulently filed and then abandoned by someone impersonating Sr. Arechederra, Lion's representative in Mexico – with the purpose of obstructing the real *Amparo* which Lion was expected to submit in due course.
173. When the *Tribunal de Queja* raised the issue of the False *Amparo* it came as a total surprise:
- For the last 16 months of *Amparo* proceeding no party and no prior court had ever referred to this admissibility issue¹⁵⁰;

¹⁴⁷ Exh. C-116, pp. 16-17.

¹⁴⁸ CM, para. 155.

¹⁴⁹ CM, para. 156, citing, Exh. C-118.

¹⁵⁰ Exh. C-119.

- The same *Tribunal de Queja* had also failed to raise the issue when it first intervened in these proceedings, to adjudicate the appeal against interlocutory decisions of the *Juez de Distrito*;
 - The *Tribunal de Queja* decided *sua sponte*, and over a year into the *recurso de revisión*, to raise the existence of the False *Amparo*; the only reason given by the *Tribunal de Queja* to justify its decision was that an unidentified administrative official had informed the Court of the existence of the previous *Amparo*¹⁵¹.
174. As regards the remand procedure, the *Tribunal de Queja* ordered that it should be restricted to adjudicating the admissibility issue, explicitly prohibiting the parties to marshal new evidence regarding the falsehood of the Settlement Agreement¹⁵² and instructing the *Juez de Distrito* not to analyze Lion's allegation that such Agreement had been forged¹⁵³.
175. After three years of judicial battling, Lion still had no decision confirming the falsehood of the Forged Settlement Agreement and now it was fighting to prove that it should not be deprived of *Amparo* recourse – the only way to overturn the wrongful cancellation of the Mortgages.

7.6 THE REMAND AMPARO

176. The fact that Lion was being tried by the same judge who had already dismissed evidence on the forgery did not discourage Lion from bringing once more a petition to admit evidence on the fraudulent nature of the Forged Settlement Agreement¹⁵⁴. And, since Lion had only acquired knowledge of the False *Amparo*'s existence at this point, it also provided evidence pointing to the inauthenticity of the False *Amparo*¹⁵⁵.
177. On September 23, 2015 the *Juez de Distrito* only accepted the graphology expert report and a brief filing on the False *Amparo* as evidence¹⁵⁶. The *Juez de Distrito* used formalistic reasoning to reject further evidence provided by Lion¹⁵⁷.

¹⁵¹ Exh. C-119, p. 21.

¹⁵² Exh. C-119, p. 18

¹⁵³ Exh. C-119, pp. 17-18.

¹⁵⁴ Exh. C-121.

¹⁵⁵ Exh. C-122.

¹⁵⁶ Exh. C-123.

¹⁵⁷ Exh. C-123: Sr. Arechederra's testimony could not be admitted because it was rendered by Claimant's legal counsel and raised a risk of bias; additionally, the Court found that Claimant incorrectly submitted a questionnaire that included identical questions for Sr. Arechederra and Mr. Baer, a type of evidence that is forbidden under the applicable law, see RR, para. 119 together with footnote within, invoking inadmissibility of such evidence under Art. 150 of the *Amparo* law.

Lion's withdrawal

178. At that point Claimant had spent almost three years in lawsuits before Mexican civil courts trying to undo the fraudulent cancellation of the Mortgages. It had achieved very little:
- Lion had filed an *Amparo*, but its recurring attempts that the scope of the procedure be extended to cover the forgery of the Settlement Agreement (a fact which Lion only learned after it had filed the *Amparo*) and that it be authorized to marshal evidence proving the forgery, had been repeatedly dismissed by the first instance *Juez de Distrito* and in second instance by the *Tribunal de Queja*, for a purely formalistic reason: the *ampliación de la demanda* had been signed on behalf of Lion by its attorney and not by its legal representative - a minor procedural defect Lion was never offered the opportunity to remedy;
 - Unable to submit that the Settlement Agreement had been forged, Lion's *Amparo* had been dismissed by the first instance *Juez de Distrito*; in the *Amparo* Judgement the *Juez de Distrito* assumed the Settlement Agreement to be valid and binding and concluded that Lion's *emplazamiento* had been properly served on Lic. López Medina, Lion's process agent as identified in the Forged Settlement Agreement – an obscure attorney, with whom Lion had never had any relationship and who failed to inform Lion;
 - On appeal against the *Amparo* Judgement, the second instance *Tribunal de Queja*, whom Lion had asked to review a further time the prohibition to argue the forgery issue, did not take up this question; instead the *Tribunal de Queja*, in an unexpected move, made *sua sponte* the decision to remand the procedure back to the first instance Judge, with a strictly limited remit: to review whether the *Amparo* had been properly admitted, in light of the existence of a previous *Amparo* (the False *Amparo* – a decoy procedure filed fraudulently by the Debtors to derail the admissibility of the real *Amparo*);
 - Upon the instructions of the *Tribunal de Queja*, the *Juez de Distrito* again denied Lion's request to expand the scope of the remand, so that the *Amparo* could encompass the forgery of the Settlement Agreement.
179. On December 11, 2015 Lion waived the *Amparo* lawsuit. Lion says that it took this decision, because it believed it was futile to continue:
- On the one hand, had Lion pursued the Remand *Amparo*, Mexico could have argued in this arbitration that Lion's expropriation claim under NAFTA Article 1110

would be inadmissible pursuant to NAFTA Article 1121(2), which sets a three-year time limit to bring claims¹⁵⁸;

- On the other hand, the circumstances made it clear that further pursuit of Lion's claims, before the same court that had ruled against it before, on the basis on the same evidence admitted previously, and barring admission of other relevant evidence, was futile;
- Additionally, the graphological evidence that was in fact admitted, with the experts opinions two-to-one in favour of the authenticity of the False *Amparo*, made it even less likely that the Remand *Amparo* would make a ruling in favour of Lion¹⁵⁹.

8. CRIMINAL PROCEEDINGS AND THE FATE OF THE NAYARIT PROPERTY

180. At the time of the filing of Post-Hearing Briefs, three criminal proceedings concerning the alleged irregularities of which Lion says it has been a victim were pending resolution:

- A criminal action¹⁶⁰ had been brought against Sr. Cárdenas in connection with the Forged Settlement Agreement and the false request for copy; the investigation phase had been completely exhausted; Sr. Cárdenas, in his defense, had initiated *Amparos* No. 610/2017 and No. 1518/2018; the criminal proceedings were halted until those *Amparos* were resolved¹⁶¹;
- A criminal action¹⁶² had been brought against Sr. Cárdenas concerning the False *Amparo*; at the time of the filing of the Post-Hearing Briefs, this proceeding was at the initial investigation phase, before the Prosecutor's Office in Jalisco; the Prosecutor was in the process of analyzing the matter to bring charges formally (the "*imputación*")¹⁶³;
- A criminal¹⁶⁴ action had been brought against Sr. Cárdenas for the sale of the Nayarit Property; at the time of the final Party submissions, the proceeding was at the initial investigation phase, before the Prosecutor's Office in Jalisco¹⁶⁵.

181. Other criminal proceedings initiated by Lion against Sr. Cárdenas had already been finalized at this point, with the *Amparo* Judgment stating that Sr. Cárdenas was in jail

¹⁵⁸ CM, para. 171.

¹⁵⁹ CM, paras. 171-176.

¹⁶⁰ No. 4713/2016.

¹⁶¹ CPHB, p. 40, RPHB para. 189.

¹⁶² No. 121667/2017.

¹⁶³ CPHB, para. 41. RPHB para. 189.

¹⁶⁴ No. 83426/2017.

¹⁶⁵ CPHB, para. 42, RPHB para. 189.

at the time of the rendering of the decision. Implicitly referring to the stature of Sr. Cárdenas's father-in-law and the apparent leniency of Jalisco courts towards Sr. Cárdenas, Ms. Onay Payne (one of Lion's representatives) stated at the Hearing that they were able to "get him [Sr. Cárdenas] behind bars", but "not for long"¹⁶⁶.

182. On July 27, 2016, Inmobiliaria Bains sold the Nayarit Property to "*Hotelera los Tules*"¹⁶⁷. This sale operation was recorded by the *Registro Público* of Bucerías on May 16, 2017. In the course of one of the criminal proceedings against Sr. Cárdenas, the judge issued a freeze order, suspending temporarily the development of the property.
183. Claimant was not aware of further developments¹⁶⁸.

¹⁶⁶ HT, p. 500.

¹⁶⁷ CPHB, para. 49, RPHB, para.

¹⁶⁸ CPHB, p. 49, Exh. C-167, p. 7, Exh. R-33, p. 13, Exh. C-157, p. 70, Exh. C-167, p. 8, Exh. R-33. Also, see CR, para. 190.

V. RELIEF SOUGHT BY THE PARTIES

184. Lion's requests the following relief in its Post-Hearing Brief¹⁶⁹:

"The Claimant respectfully request the Tribunal:

a. To declare that Mexico has breached its obligations under Articles 1110 and 1105 of NAFTA and international law;

b. To order Mexico to pay the Claimant the amount of US\$81,992,752 as compensation for the loss caused by the cancellation of the Mortgages with interest at the rate mentioned under (e) below;

c. To order Mexico to pay the Claimant the legal fees incurred in the Mexican court proceedings in a minimum amount of US\$2,212,004.53 as a result of the cancellation of the Mortgages with interest at the rate mentioned under (e) below;

d. To order Mexico to pay the Claimant whatever amount is assessed against LMC by the Mexican courts (currently valued at US\$14,853,013.73) as a result of the waiver of the Foreclosure Proceedings as per Article 1121 of NAFTA;

e. To order Mexico to pay interest on the amounts under (b) to (c) at the Mexican Legal rate provided by Article 362 of the Mexican Commercial Code compounded monthly (i.e., 6%), through the date of full and effective payment of those amounts as from:

(i) 31 March 2015 for the lost value of the Mortgages;

(ii) 31 December 2015 to reimburse LMC for the attorney's fees and costs it incurred in Mexican court proceedings;

f. To order Mexico to reimburse Claimants all their reasonable legal costs and fees in connection with this arbitration with interest as of the date of the award at the interest rate mentioned above at (e); and

g. Any other remedies that the Tribunal consider appropriate in the circumstances given Mexico's breaches"

185. Mexico's request for relief in its Rejoinder is as follows¹⁷⁰:

"For all of the foregoing reasons, the Respondent requests:

- an Order dismissing the Claimant's Claim in its entirety;

¹⁶⁹ CPHB, para. 320.

¹⁷⁰ RR, paras. 634 and 635.

- an Order that the Claimant indemnify the Respondent for its costs incurred in this arbitration, including its legal costs and the travel expenses occurred by its legal team, witnesses, and experts; and
- such other relief as the Respondent may request and this Tribunal may deem appropriate.

635. In the alternative, in the unlikely event that the Tribunal concludes that the Respondent is internationally liable for a breach of its obligations under NAFTA Article 1110 and/or NAFTA Article 1105, the Respondent requests:

- that the amount of damages be determined on the basis of the CBRE reports and Sanchez Devanny opinion, which put the value of the property, net of foreclosure fees and expenses, at USD \$47,060,068.57;
- *minus* the deduction that the Tribunal finds appropriate to avoid double recovery and to account for the Claimant's contributory fault;
- *plus* an award of interest based on a relatively low and risk-free rate applicable to U.S. dollar denominated amounts, such as the U.S. Treasury Bill with annual compounding; and
- any such other relief as the Respondent may request and this Tribunal may deem appropriate".

186. In its Post-Hearing Brief Respondent specified that¹⁷¹:

“[...] any damages found must be subject to a deduction for contributory fault of at least 50% and closer to 100% since the Claimant would not have suffered any losses had it not acted negligently and with a lack of due care”.

¹⁷¹ RPHB, para. 217.

VI. MERITS

187. Lion has brought this arbitration against Mexico to address Mexico's alleged:

- judicial and administrative expropriation of Lion's investment under NAFTA Art. 1110¹⁷²;
- alternatively, Mexico's denial of justice as a failure to provide fair and equitable treatment under NAFTA Art. 1105, and
- alternatively, the failure to grant Lion's investment full protection and security under NAFTA Art. 1105.

General rule: No judicial expropriation without denial of justice

188. While expropriation constitutes Claimant's primary claim¹⁷³, the Tribunal observes that liability for expropriation under Art. 1110 arising from the decisions of domestic courts requires a finding of a denial of justice.

189. This is agreed upon by both of the Non-Disputing Parties in their submissions:

- The USA states that¹⁷⁴:

“Decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants do not give rise to a claim for expropriation under Article 1110(1). Moreover, the United States has not recognized the concept of “judicial takings” as a matter of domestic law [...]”
- Canada in turn asserts that¹⁷⁵:

“A domestic court's bona fide adjudication as to whether a property right exists under domestic law cannot be recast as an expropriation of that property. A neutral and independent judicial determination that a property right is invalid under domestic law, unless it can be impugned as a denial of justice, does not give rise to separate claim of expropriation under customary international law. International tribunals have followed this approach.”

¹⁷² Claimant alleges that it suffered a judicial expropriation of the Mortgages through the Cancellation Judgment which eventually also resulted in an administrative expropriation through the cancellation of the Mortgages in the Public Registry (See CM, para. 260 and CPHB, para. 179 *et seq.*).

¹⁷³ CPHB, paras. 143-150, CR, paras. 200-202, CM, paras. 201-203, 233-236.

¹⁷⁴ USA Submission, para. 20.

¹⁷⁵ Canada Submission, para. 12.

190. This position is buttressed by the *Loewen* tribunal, which stated the following about a judicial expropriation claim presented as an alternative to denial of justice¹⁷⁶:

“Claimant’s reliance on Article 1110 adds nothing to the claim based on Article 1105. In the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if Loewen established a denial of justice under 1105”.

191. A similar view has been expressed by legal scholars, *inter alia*, by Paparinskis, who in his seminal treatise on the international minimum standard and fair and equitable treatment has opined that

“[w]hile taking of property through the judicial process could be said to constitute expropriation, the rules and criteria to be applied for establishing the breach should come from denial of justice”¹⁷⁷.

Exceptions to the rule

192. There is an exception to the general rule, acknowledged explicitly by both the USA and Canada in their submissions – whenever it can be proved that the courts were not neutral and independent, especially from the other branches of power of the host State.

193. The USA has opined that¹⁷⁸:

“Of course, where a judiciary is not separate from other organs of the State and those organs (executive or legislative) direct or otherwise interfere with a domestic court decision so as to cause an effective expropriation, these executive or legislative acts may form the basis of a separate claim under Article 1110, depending on the circumstances.”

194. The submission by Canada confirms the exception by stating that “[a] neutral and independent judicial determination [...] does not give rise to separate claim of expropriation under customary international law¹⁷⁹”, thus implying that such a separate claim could be found valid if the judicial determination under question was not neutral or independent.

195. In the current case, the Tribunal does not find sufficient proof to apply the above exception:

- No proof has been marshalled as to the interference of the executive or legislative branches of Mexico’s government in the course of the local proceedings;

¹⁷⁶ *Loewen*, para. 141, quoted in Canada Submission, para. 12.

¹⁷⁷ M. Paparinskis, “The International Minimum Standard and Fair and Equitable Treatment”, 2013, p. 208.

¹⁷⁸ USA Submission, para. 21.

¹⁷⁹ Canada Submission, para. 12.

- Even though Claimant has presented allegations of bias by Mexico's courts¹⁸⁰, these are not substantiated by evidence; and
- The decisions of the courts failed to benefit the Respondent State.

196. Thus, the Tribunal finds that it must first adjudicate Lion's claim for denial of justice (VI.1), then it will analyse the requirement of exhaustion of local remedies (VI.2), establish its conclusions (VI.3) and finally devote a short chapter to Claimant's alternative claims (VI.4).

¹⁸⁰ I.e., with regard to the length of the notification process in the Foreclosure Proceeding compared with the swiftness of service and issuance of a decision in the Cancellation Proceeding or the excessive formality of the rejection of the *ampliación de demanda* when compared with the acceptance of a photocopy of the Forged Settlement Agreement instead of the required original.

VI.1. DENIAL OF JUSTICE

197. Claimant avers that it was denied justice by the Mexican judicial system.
198. The Tribunal will first make an introduction (1.), then it will provide a summary of Claimant's and Respondent's respective positions (2. and 3.) and finally it shall make a decision (4.).

1. OVERVIEW

199. Denial of justice, referred to as *denegación de justicia* in Spanish, is

“a defect in a country's organization of courts or administration of justice, resulting in the country's violating its international legal duties to protect aliens”¹⁸¹.

200. The concept reaches back to the Middle Ages¹⁸², when private reprisals were allowed against acts of injustice committed by actors of another State¹⁸³. It later evolved into diplomatic protection assumed by States¹⁸⁴. Traditionally, some authors perceived denial of justice as any internationally illegal treatment of aliens¹⁸⁵:

“A denial of justice, in a broad sense, occurs whenever a State, through any department or agency, fails to observe, with respect to an alien, any duty imposed by international law or by treaty with his country”,

201. However, currently a narrower view prevails, although there is much debate on what specific State actions constitute denial of justice: points of contention include whether the concept encompasses administrative acts, whether manifestly unjust court decisions on the merits can constitute denial of justice, and whether subjective elements, such as bad faith, should be required¹⁸⁶.

¹⁸¹ Black's Law Dictionary, Ninth Edition, p. 499.

¹⁸² See ILC Yearbook of the International Law Commission, 1957, Volume I, UN DoC/CN.4/SER.A/1957 155, quoted from Paparinskis, *op. cit.*, p. 47: “[the rules relating ... to denial of justice were centuries old, thus they could be found, stated in very modern terms [...] three hundred years before Grotius”.

¹⁸³ J. Paulsson, “Denial of Justice in International Law”, p. 13.

¹⁸⁴ *Ibid.*

¹⁸⁵ O. J. Lissitzyn, “The Meaning of the Term Denial of Justice in International Law”, *The American Journal of International Law* Vol. 30, No. 4 (Oct., 1936), p. 633, providing insight on multiple authors propagating such view.

¹⁸⁶ *Ibid.*, pp. 633-635.

202. In 1935, de Visscher famously described denial of justice as “one of the oldest and one of the worst elucidated [concepts] in international law”¹⁸⁷. Despite the passage of nearly a century, de Visscher’s statement still stands true.
203. Paulsson, one of the most prominent contemporary researchers on the subject, has defined denial of justice as follows¹⁸⁸:

“[d]enial of justice arises when proceedings are so faulty as to exclude all reasonable expectation of a fair decision [...]”.

204. Paulsson’s definition puts the emphasis on the active subject (judicial bodies of the host State) and on the wrongdoing (very grave breaches of due process to the detriment of the alien, which preclude the possibility of an unjust decision on the merits be reviewed).

Applicability under the NAFTA

205. Nowhere in the NAFTA treaty do the words “denial of justice” appear. The same happens in most investment treaties. There is, however, unanimous agreement among the Parties (including the Non-Disputing Parties) that denial of justice is an international wrong which breaches the fair and equitable treatment [“FET”] standard. Case law and doctrine reach the same conclusion¹⁸⁹.
206. Art. 1105 NAFTA delineates the FET standard:

“Article 1105: Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

207. Art. 1131(2) of the NAFTA states that an interpretation by the Free Trade Commission of a NAFTA provision “shall be binding on a Tribunal established under this Section”.
208. One such interpretation was provided on the protections under Art. 1105 of the NAFTA. The Interpretation Note of July 31, 2001 [the “**FTC Note**”] states as follows:

“[T]he Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions: [...]”

¹⁸⁷ Ch. de Visscher, “Le déni de justice en droit international”, *Recueil des cours*, Vol. 52, 1935, p. 369.

¹⁸⁸ J. Paulsson, “Denial of Justice in International Law”, p. 205.

¹⁸⁹ E.g., *Flughafen*, para. 630, *Jan de Nul*, para. 188; *Jan Oostergetel*, para. 272; *Pey Casado*, para. 655, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, para. 7.4.11. See also R. Dolzer and Ch. Schreuer, “Principles of International Investment Law”, 2008, OUP, p.142.

B. Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. [Emphasis added]

209. In light of the Interpretation Note, the protection to be accorded to investors under the FET and full protection and security standards is set at the level of “customary international law minimum standard of treatment of aliens”.
210. Since Claimant has brought a case of denial of justice by the Mexican Courts, the adjudication of this case requires that the Tribunal determine what “customary international law minimum standard of treatment of aliens” is expected from those Courts. Breach of that standard implies denial of justice.

1.1 PROCEDURAL AND SUBSTANTIVE DENIAL OF JUSTICE

211. In its Memorial, Claimant argues that the Minimum Standard of Treatment under Article 1105 (1) of the NAFTA incorporates a threefold protection for investors in their dealings with local Courts. Thus, local Courts are prohibited from:
- incurring unreasonable delay in administering justice¹⁹⁰,
 - refusing the investors access to justice¹⁹¹, and
 - rendering manifestly unjust and erroneous decisions that a competent judge would not have taken¹⁹².
212. In Claimant’s view, denial of justice can thus be subsumed in two great categories: procedural and substantive denial of justice.
213. Claimant’s Reply provides a more elaborate typology of denial of justice, introducing a two-fold differentiation into “*déni de justice*” and “*défi de justice*” proposed by the

¹⁹⁰ CM, para. 339.

¹⁹¹ CM, para. 444.

¹⁹² CM, para. 351.

*Institut de Droit International*¹⁹³ and a four-fold one under the Harvard Draft Convention¹⁹⁴, which includes substantive denial of justice as one of the categories¹⁹⁵:

“A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is

[i] a denial, unwarranted delay or obstruction of access to courts,

[ii] gross deficiency in the administration of judicial or remedial process,

[iii] failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or

[iv] a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice”.

214. In differentiating between substantive and procedural denial of justice, Lion finds support in *Oostergetel*¹⁹⁶.
215. Respondent in turn argues that denial of justice is always procedural¹⁹⁷.
216. Mexico retorts that the artificial distinction made by the *Oostergetel* tribunal is misleading and that ultimately it did not lead to the application of any other standard for denial of justice than the traditional, very high one¹⁹⁸. Respondent also claims that the Harvard Draft Convention and the *Institut de Droite Internationale’s* Draft Articles are irrelevant, because they lack customary law status¹⁹⁹.

The view of the Tribunal

217. The Tribunal agrees with Respondent, who convincingly argues that there is no “substantive denial of justice”. While the dichotomy between substantive and procedural denial of justice has indeed been adopted (to greater or lower endorsement) by some arbitral tribunals²⁰⁰, this differentiation is not useful. To determine whether a judgment was outrageous or egregious on the merits would require a tribunal to delve

¹⁹³ CR, para. 403, citing IDI, “Responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers”, 1927, Exh. CLA-618.

¹⁹⁴ “Responsibility of States for Damages Done in their Territory to the Person or Property of Foreigners”, 1928), Article 9, 23 AM. J. INT’L L. SPEC. SUP. 133 (1929), Exh. CLA-617, p. 173.

¹⁹⁵ CR, para. 102.

¹⁹⁶ CR, para. 408, citing *Oostergetel*, para. 275, Exh. RL-45.

¹⁹⁷ RR, para. 195-197.

¹⁹⁸ RR, paras. 203-209.

¹⁹⁹ RR, paras. 194, 210.

²⁰⁰ E.g., *Jan de Nul, Oostergetel*.

into the decision-making process under national law – it is trite to repeat that international tribunals cannot be and do not constitute domestic courts of appeal²⁰¹.

218. The Tribunal endorses Paulsson’s view that:

“in modern international law there is no place for substantive denial of justice [...] If a judgment is *grossly* unjust, it is because the victim has not been afforded fair treatment [...] Extreme cases should thus be dealt with on the footing that they are so unjustifiable that they could have been only the product of bias or some other violation of the right of *due process*²⁰²”

“[...] denial of justice is always procedural²⁰³.”

219. Paulsson adds that manoeuvring the line between what appears to be substantively unjust and what is unjust or erroneous because of gross procedural breaches is “the greatest difficulty of our subject” and explains that²⁰⁴:

“gross or notorious injustice - whatever the words used - is not a denial of justice merely because the conclusion appears to be demonstrably wrong in substance; it must impel the adjudicator to conclude that it could not have been reached by any impartial judicial body worthy of that name”.

1.2 TYPES

220. A review of case law and scholarly writings reveal that procedural denial of justice can be classified in subtypes: the right to access justice (**A.**); the right to be heard and to present one’s case (**B.**); and the right to obtain a decision without undue delay (**C.**). These are some of the separate manifestations of denial of justice and, if committed against an alien, constitute international wrongs which can be imputed against the State.

A. Denying an alien access to justice

221. The first category of procedural denial of justice is uncontroversial. Prof. Paparinskis writes²⁰⁵:

“The easiest case, accepted as uncontroversially wrongful under the Hague Conference, was a discriminatory denial of access to court, described in the Hague Texts as the situation where ‘the foreigner has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies’”.

²⁰¹ See e.g., Exh. CLA-272, E. Jiménez de Aréchaga, “International Law in the Past Third of a Century”, 159 *Recueil des cours* 267, 1978, p. 282.

²⁰² J. Paulsson, “Denial of Justice in International Law”, p. 82.

²⁰³ J. Paulsson, “Denial of Justice in International Law”, p. 98.

²⁰⁴ Paulsson Lecture, p. 31.

²⁰⁵ Paparinskis, p. 190, footnotes omitted.

222. He also provides the following examples²⁰⁶:

“[...] a purposeful disruption of the commencement of the proceedings, or even the absence of notification about proceedings that exclude the possibility to challenge them could all result in denial of justice”.

223. Freeman in turn explains due process under international law in the following words²⁰⁷:

“whenever judicial action is taken without giving the alien a hearing or without properly notifying him in order to prepare a defense; whenever misconduct of the judge in withholding, hiding or destroying papers essential to the foreigner’s cause is prejudicial in effect; whenever he has not been permitted to produce evidence or to summon valuable witnesses”.

224. Case law supports this view.

225. The judgment in *Ambatielos* offers insight into the basic right of foreigners to access local courts in pursuit of justice²⁰⁸:

“Thus, when ‘free access to the Courts’ is covenanted by a State in favour of the subjects or citizens of another State, the covenant is that the foreigner shall enjoy full freedom to appear before the courts for the protection or defence of his rights, whether as plaintiff or defendant; to bring any action provided or authorized by law [...]” [Emphasis added].

226. In *Idler* the US-Venezuela Commission found that the American claimant, Mr. Idler, was denied justice when the Supreme Court in Caracas gave him notice of an impending hearing without sufficient time for him to physically be able to appear in court²⁰⁹.

227. The *Cotesworth & Powell* tribunal described the following facts as an “absolute denial of justice”²¹⁰:

“Still, a plain violation of the substance of natural justice, as, for example, refusing to hear the party interested, or to allow him opportunity to produce proofs, amounts to the same thing as an absolute denial of justice”.

²⁰⁶ Paparinskis, p. 191, footnotes omitted.

²⁰⁷ Exh. CLA 190, A. V. Freeman, “The International Responsibility of States for Denial of Justice”, 1938, pp. 267-268.

²⁰⁸ *Ambatielos*, p. 111.

²⁰⁹ *Idler*, pp. 152-153.

²¹⁰ *Cotesworth & Powell*, p. 188.

228. *Al-Bahloul* explicitly recognized that due process breaches include not notifying the investor of hearings and that deciding in the investor's absence amounts to a gross violation of procedural rules²¹¹.
229. The right to access justice also extends to the right to lodge appeal. This aspect was discussed by the tribunal in *Al-Bahloul*, where the claimant alleged that his appeals were wrongfully rejected without regard to due process standards²¹² – the tribunal explicitly acknowledged that the allegations could constitute a denial of due process (but ultimately dismissed the claim because of the limited evidence on the record²¹³).

B. Denying an alien the right of defense or to present evidence

230. The violation of an alien's right of defense or to present evidence as an international wrong amounting to denial of justice has been universally recognized by academia²¹⁴.
231. Case law equally supports this view.
232. This was done by the aforementioned *Cotesworth & Powell* tribunal²¹⁵:

“Still, a plain violation of the substance of natural justice, as, for example, refusing to hear the party interested, or to allow him [an] opportunity to produce proofs, amounts to the same thing as an absolute denial of justice”. [Emphasis added]

233. In the *Ambatielos* ruling²¹⁶:

“the covenant is that the foreigner shall enjoy full freedom to [...] deliver any pleading by way of defence, set off or counterclaim; to engage Counsel; to adduce evidence, whether documentary or oral or of any other kind; to apply for bail; to lodge appeals and, in short, to use the Courts fully and to avail himself of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.”,

234. And the *Krederi* decision:

²¹¹ *Al-Bahloul*, para. 221.

²¹² *Al-Bahloul*, para. 82.

²¹³ *Al-Bahloul*, para. 227.

²¹⁴ For example, Paulsson states that “No serious international lawyer contests either of the first two [types of denial of justice]”, with reference to denial of access to justice and denial of justice for undue delay. See Paulsson Lecture, p. 30.

²¹⁵ *Cotesworth & Powell*, p. 188.

²¹⁶ *Ambatielos*, p. 111.

“[m]ost frequently a denial of justice may result from a serious defect in the adjudicative process, such as a violation of ... the right to be heard and to present evidence [...]”²¹⁷.”

235. The US-Mexico General Claims Commission in *Chattin* found that local courts displayed “a most astonishing lack of seriousness” because there was “no trace of an effort to have the two foremost pieces of evidence explained”, there was no inquiry made into verifying the statement of a key witness in the domestic prosecution proceedings and there was no effort to examine a witness who could have presented important exculpatory evidence²¹⁸.

236. In *Ballistini*, the claimant was denied a crucial piece of evidence necessary to make his case because the judge he accused of arbitrariness deliberately withheld the documents. The French-Venezuelan Commission found a denial of justice

“because the local authorities deprived Mr. Ballistini of the legal means of instituting before the competent tribunals the actions which the laws would authorize him in case he might improperly have been condemned to a criminal judgment.”²¹⁹”

237. In *Joseph F. Rihani*²²⁰, the Supreme Court of Justice of Mexico reversed the decisions of lower courts in enforcement proceedings because it claimed that critical evidence – that was clearly on the record and discussed by one of the justices – had in fact not been presented before it. The American Mexican Claims Commission found that there was denial of justice as²²¹:

“[I]n the face of the clear and indisputable evidence in the record to the contrary, more particularly in view of the fact that the, attention of the court had been drawn to such evidence by one of its members warrants the conclusion that the said court wilfully disregarded such evidence; that the decision of the court was lacking in good faith and that the same fell so far short of international standards as to amount to a denial of justice” [Emphasis added]

C. Prohibition of undue delay

238. The final type of procedural denial of justice concerns undue delay in the rendering of a judgement by the local Courts.

²¹⁷ *Krederi*, p. 61 para. 449 (iii).

²¹⁸ *Chattin*, p. 292, para. 22.

²¹⁹ *Ballistini*, p. 20.

²²⁰ *Joseph F. Rihani*, p. 254.

²²¹ *Joseph F. Rihani*, p. 258.

239. There is unanimous agreement by scholars that undue delay in the exercise of justice is a separate type of denial of justice²²².
240. As early as the *Fabiani*²²³ case discussed *supra*, international tribunals have agreed that “justice delayed is justice denied”. It is widely recognized that undue delay amounts to a denial of due process²²⁴.
241. It is common ground that there is no abstract manner of determining whether a particular period constitutes reasonable delay but each case should be scrutinized under the specific facts²²⁵. For example, in *Pey Casado*²²⁶, a period of seven years without rendering a first instance decision by local courts amounted to a denial of justice. In *El Oro Mining and Railway Co.*²²⁷, the Great Britain and Mexico Claims Commission found that the passage of nine years without a hearing in its case for compensation for having provided materials to the government, constituted a denial of justice. However, in *Oostergetel*, the length of local proceedings of two years was found not to be in breach of the international minimum standard²²⁸.
242. The tribunal in *Chevron* devised a widely recognized test for denial of justice for undue delay: it found that “some of the factors that may be considered are the complexity of the case, the behaviour of the litigants involved, the significance of the interests at stake in the case, and the behaviour of the Courts themselves”²²⁹.
243. The *Chevron* test was followed by the tribunal in *Oostergetel*²³⁰.
244. Similarly, the more recent *Toto Costruzioni*²³¹ decision, discussed in detail by both Parties in their submissions, has stated that²³²:

“There is not, under international law, a specific measure by which lapses of time may be condemned as excessive: the lapse is to be considered on a case-by-case

²²² For example, Paulsson states that “No serious international lawyer contests either of the first two [types of denial of justice]”, with reference to denial of access to justice and denial of justice for undue delay. Paulsson Lecture, p. 30.

²²³ *Fabiani*, pp. 4902 and 4904: “by encouraging a debtor’s ill-founded opposition has, if not refused to decide, at the very least provoked an unjustified delay [...] this last denial of justice alone would be sufficient to justify the diplomatic intervention and guarantee an award on damages against the Defendant State”.

²²⁴ See e.g., *Al-Bahloul*, para. 221, *Oostergetel*, pp. 73-77.

²²⁵ *Toto Costruzioni*, para. 155.

²²⁶ *Pey Casado*, para. 659.

²²⁷ *El Oro Mining*, p. 191, para. 9.

²²⁸ *Oostergetel*, paras. 208, 290.

²²⁹ *Chevron I*, para. 250.

²³⁰ *Oostergetel*, para. 290.

²³¹ CM, para. 342, RR, para. 249, citing *Toto Costruzioni*.

²³² *Toto Costruzioni*, para. 163.

basis, taking into account (i) the complexity of the matter; (ii) the need for celerity of decision; and (iii) the diligence of claimant in prosecuting its case.”

1.3 STANDARD

245. The Tribunal has already noted that denial of justice has been conceived by international customary law and that there is no treaty formula under the NAFTA (and most treaties for that matter) which can offer guidance on which judicial actions attributable to States amount to *justitia denegata*. Additionally, the Tribunal has decided that denial of justice can only be procedural.
246. The question remains, however: how to differentiate between procedural decisions properly adopted by local Courts, which are contrary to the alien’s interests, and those which amount to an international wrong and engage the responsibility of the State. To clarify this issue the Tribunal shall undertake a brief analysis of some of the major denial of justice cases²³³ starting with those of the 19th/20th century (**A.**), then it shall continue with more recent decisions (**B.**), present the Parties’ positions (**C.**) and reach a conclusion (**D.**).

A. Late 19th and early 20th century cases

247. At the turn of the 19th and 20th centuries, there was a proliferation of denial of justice decisions that still today serve as guidance for investment tribunals. On the other hand, certain ideas of the concept of denial of justice developed under these early decisions have been superseded²³⁴.
248. In *Cotesworth & Powell*, a decision from 1875, the international tribunal found multiple instances of denial of justice. A sentence of classification in bankruptcy proceedings was deemed unjust for illegally excluding claimants as common creditors and failing to notify them of the proceedings²³⁵. Additionally, a sentence issued without hearing the claimants in the case as plaintiffs in the suit was also found to constitute denial of justice²³⁶. Another denial arose from a one-year delay in notifying an important judicial sentence²³⁷. Finally, the tribunal identified a conflict between decisions made by the same courts²³⁸.

²³³ The Tribunal has excluded cases with negative finding of denial of justice, where the denial of justice was administrative rather than judicial, and where the basis for the judgment was judicial expropriation. Only analysing positive findings of judicial denial of justice and excluding instances of judicial expropriation, makes the vast majority of the case law discussed by the Parties inapposite.

²³⁴ See paras. 253-255, *infra*.

²³⁵ *Cotesworth & Powell*, p. 188, para. 2.

²³⁶ *Cotesworth & Powell*, p. 188, para. 5.

²³⁷ *Cotesworth & Powell*, p. 188, para. 5.

²³⁸ *Cotesworth & Powell*, p. 180, para. 2, p. 188, para. 5.

249. *Idler*, a case decided in 1890, concerned the use of an obscure legal remedy from medieval times, which allowed the reversal of any judgments or proceedings detrimental to the government, used by the State to annul previous Court decisions favourable to the alien. The US-Venezuela Commission found that the singular invocation of this ancient remedy by the Supreme Court of Venezuela served to circumvent enforcement of the decisions in favour of the alien and thus constituted a denial of justice²³⁹. The Commission also found that the claimant was denied justice because the notice of proceedings he was given made it impossible for him to appear in court²⁴⁰.
250. In *Fabiani*, a case from 1896, Venezuela was held responsible for denial of justice, because its courts refused to enforce an arbitral award of a French national against his Venezuelan partners due to strictly procedural arguments, which amounted to a “disguised refusal to rule” (“*refus déguisé de statuer*”²⁴¹). The arbitrator also found that the claimant was subjected to undue delay²⁴².
251. In *Ballistini*²⁴³, a decision of the French-Venezuelan Commission of 1902, a Venezuelan judge wrongfully rendered judgment for calumny and injuries against a foreigner. When Mr. Ballistini sued the judge, who apparently had issued an arbitrary decision to arrest him, the same judge withheld the necessary documentary evidence, making it impossible for Mr. Ballistini to make an effective case before local courts. The Commission found that the claimant had been denied justice:
- “[b]ecause the local authorities deprived Ballistini of the legal means of instituting before the competent tribunals the actions which the laws would authorize him in case he might improperly have been condemned to a criminal judgment”²⁴⁴.
252. In the *Chattin* case of 1928, the American-Mexican Claims Commission found a denial of justice. Mr. Chattin was arrested illegally and sentenced to two years of jail for embezzlement on the basis of spurious evidence, in a trial in which he was not duly informed regarding the charges brought against him and in which the Court hearings lasted as little as five minutes²⁴⁵. This was a landmark decision regarding basic procedural guarantees to be afforded to foreigners.

²³⁹ *Ibid.*, pp. 161, 164.

²⁴⁰ *Idler*, pp. 152-153.

²⁴¹ *Fabiani*, pp. 4900, 4904.

²⁴² *Ibid.*, p. 4904.

²⁴³ *Ballistini*, p. 20.

²⁴⁴ *Ibid.*, p. 20, para. 3.

²⁴⁵ *Chattin*, p. 290, para. 15.

The *Neer* case and the subjective element of denial of justice

253. One of the traditionally recognized leading cases on denial of justice is the 1926 award of the US-Mexico General Claims Commission in *L. F. H. Neer and Pauline Neer*. In its decision, the US-Mexico Commission laid out its standard²⁴⁶:

“[T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency”.

254. The imprint made by *Neer* on the concept of denial of justice has been palpable in investment arbitration awards²⁴⁷; however, it appears that the reliance on the case has rightfully declined in the recent years.

255. The *Mondev* tribunal was correct in stating that the facts in *Neer* were centred on a State’s alleged failure to carry out an effective police investigation into a foreigner’s murder, and are not apposite when discussing treatment of aliens under the FET standard²⁴⁸. As the *Azurix* tribunal found²⁴⁹:

“the traditional *Neer* formula ... reflects the traditional, and not necessarily the contemporary, definition of the customary minimum standard, at least in certain non-investment fields”.

256. Other tribunals have agreed that the *Neer* standard may have reflected the minimum standard – but only as of 1927 and not in contemporary times²⁵⁰.

257. Similarly, Paulsson writes that

“there should be no doubt that, to the extent that customary-law minimum standard has any role to play in the interpretation of investment treaties, the *Neer* formula is of limited import”²⁵¹.

²⁴⁶ *Neer*, p. 60.

²⁴⁷ E.g., *Glamis Gold* at para. 22.

²⁴⁸ *Mondev*, para. 115.

²⁴⁹ *Saluka*, para. 295.

²⁵⁰ See e.g., *Azurix*, para. 372, *Mondev*, paras. 116-117.

²⁵¹ J. Paulsson, G. Petrochilos, “*Neer-ly Mised?*”, *Miami Law Research Paper Series*, p. 257.

258. An additional reason why the *Neer* standard has become less relevant is that it explicitly requires the finding of bad faith²⁵². This notion has been rejected by NAFTA decisions concerning denial of justice²⁵³, and authors alike²⁵⁴.

B. Recent denial of justice decisions

259. The Parties have not drawn the Tribunal’s attention to any NAFTA decision with a positive finding of denial of justice.
260. The Tribunal will briefly analyse *Mondev* and *Loewen*, the two major cases discussed by the Parties. The Tribunal shall also discuss *Dan Cake* – a very recent award finding for denial of justice in a non-NAFTA case.

The *Mondev* case

261. The *Mondev* case (2002) concerned a failed investment in the USA by a Canadian construction company and involved a claim that the local authorities prevented the claimant from exercising an option to purchase a certain parcel of land. When the claimant filed a case before US courts, the jury found against the local authorities, a decision which was later overturned on appeal. The claimant then failed to obtain a judgment in its favour from the Massachusetts Supreme Court and the US Supreme Court rejected the case by not granting *certiorari*. According to the claimant, the Massachusetts Supreme Court deviated from its previous rulings to the extent that it had in effect applied “a new rule”.
262. The *Mondev* tribunal did not find that denial of justice had occurred as, in any common law jurisdiction, one may and should expect “new” judge-made law and the decisions taken by the US courts were not “extreme cases” that would amount to a denial of justice.
263. The *Mondev* tribunal found that denial of justice would require²⁵⁵:

“a wilful disregard of due process of law, [...] which shocks, or at least surprises, a sense of judicial propriety”.

²⁵² Exh. CLA-277, “[t]he treatment of an alien . . . should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency” [Emphasis added], *Neer*, pp. 61-62.

²⁵³ See e.g., *ADF*, para. 181, *Mondev*, paras. 116-117, *Loewen*, para. 132, *CMS*, para. 280, *Glamis Gold*, para. 627.

²⁵⁴ See e.g. Paulsson Lecture, pp. 34-35, Opinion of Christopher Greenwood, Q.C. of March 26, 2001 (on the denial of justice under international law) in *Loewen*, para. 64.

²⁵⁵ *Mondev*, para. 127 (footnote omitted).

264. Its analysis did not end here, however. The tribunal continued to explain that²⁵⁶:

“The Tribunal would stress that the word “surprises” does not occur in isolation. The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities”. [Emphasis added].

265. *Mondev* also determined that the threshold for establishing treatment in violation of the FET standard had evolved in the past century and that currently it does not require subjective elements on the part of the Host State such as bad faith²⁵⁷:

“To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat a foreign investment unfairly and inequitably without necessarily acting in bad faith [...] the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s”.

The *Loewen* case

266. In *Loewen* (2003), the other major case discussed by the Parties, a Canadian funeral home conglomerate challenged a Mississippi State Court jury award of USD 100 M in compensatory damages and USD 400 M in punitive damages on claims that included fraud and violations of Mississippi antitrust law. The claimant argued that, apart from the egregious damages decision by the Mississippi State court, it was also wronged by the application of civil procedure rules requiring it to post USD 625 M to stay execution of the judgment pending appeal.

267. Interestingly, the investment tribunal appeared to lean towards finding that claimant was indeed denied justice under the facts of the case²⁵⁸:

“After all, we have held that judicial wrongs may in principle be brought home to the State Party under Chapter Eleven, and have criticised the Mississippi

²⁵⁶ *Ibid.*

²⁵⁷ *Mondev*, paras. 116 and 123

²⁵⁸ *Loewen*, para. 241.

proceedings in the strongest terms. There was unfairness here towards the foreign investor”.

268. The *Loewen* tribunal used the following test, according to which denial of justice amounts to²⁵⁹:

“[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety”

269. *Loewen* also endorsed the *Mondev* view that under contemporary international customary law, bad faith or malicious intent is not required for a denial of justice²⁶⁰:

“Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice”.

270. However, the *Loewen* tribunal ultimately found that the claimant had failed to exhaust all available local remedies when it decided to reach a settlement rather than pursue its case before the US Supreme Court²⁶¹.

271. Apart from the claimant not having exhausted the available local remedies, *Loewen*’s claims were dismissed for lack of standing, due to claimant’s buyout by a company of the Host State (which led to claimant losing its status as a foreign investor under the NAFTA).

272. The Parties have dedicated a lengthy discussion to the *Mondev* and *Loewen* decisions. The Tribunal observes that these cases may offer assistance regarding the applicable standard of denial of justice in the abstract. The underlying facts of those cases, however, substantially differ from the ones in this case.

The *Dan Cake* case

273. In a recent non-NAFTA decision of 2015, the *Dan Cake* tribunal found denial of justice: under Hungarian law the claimant’s enterprise, that was in liquidation, was entitled to convene a composition hearing in order to seek an agreement with its creditors. Instead of following the established procedure, the Metropolitan Court of Budapest ordered claimant to submit a number of documents not required by law, and which the claimant was unable to provide. The tribunal considered that such order was

²⁵⁹ *Loewen*, para. 132.

²⁶⁰ *Loewen*, para. 132.

²⁶¹ *Loewen*, para. 217.

unnecessary and that it prejudged and denied the claimant's right to seek an agreement with its creditors²⁶².

274. Based on these grounds and taking into account that there was no appeal from the Court's order²⁶³, the tribunal found that the Court's conduct "[did] shock a sense of judicial propriety²⁶⁴" and that thus claimant had been denied justice.

C. The position of the Parties and the Non-Disputing Parties

275. The Tribunal shall briefly summarize the positions of Claimant and Respondent on the applicable standard for denial of justice. The Tribunal will also review the Non-Disputing Parties' observations on this matter in their NAFTA Art. 1128 submissions.

Claimant's position

276. Claimant argues that with respect to procedural denial of justice, the Tribunal should follow the *Oostergetel* tribunal and apply a standard that the procedural irregularities be "severe" and affect the outcome of the dispute and that any undue delay be "excessive"²⁶⁵.
277. Lion also claims that it is sufficient for it to prove that Mexico's courts failed to remedy the prior denial of justice, which consisted in the service of process made in a manner inconsistent with the applicable international standards and local law²⁶⁶.
278. Lion also attacks the *Mondev* standard proposed by Respondent by stating that the decision was based on an incorrect legal basis: that of arbitrariness rather than denial of justice²⁶⁷.

Mexico's position

279. Respondent in turn argues that a single very high standard should apply to all types of denial of justice²⁶⁸. This single standard for the finding of denial of justice should be based on the *Mondev* case²⁶⁹:

"[...] a wilful disregard of due process of law, ... which shocks, or at least surprises, a sense of judicial propriety."

²⁶² *Dan Cake*, para. 146.

²⁶³ *Dan Cake*, para. 55 and 154.

²⁶⁴ *Dan Cake*, paras. 145-146.

²⁶⁵ CR, para. 410, citing *Oostergetel*, paras. 286-290.

²⁶⁶ CR, paras. 422-425, 475.

²⁶⁷ CR, para. 399.

²⁶⁸ RR, paras. 185-186, 194.

²⁶⁹ RR, para. 173, RCM, para. 150, citing *Mondev*, para. 127.

280. According to Mexico, the *Mondev* tribunal was not wrong in referring to arbitrariness as part of NAFTA's Art. 1105 minimum standard of treatment. What the tribunal in *Mondev* did was to hold the criterion of arbitrariness "useful in the context of denial of justice"²⁷⁰, while fully acknowledging the difference between the two.
281. Mexico emphasizes that the standard for denial of justice is very high, summarizing its scope in the following words²⁷¹:

"The threshold to establish denial of justice is very high – e.g. requiring a 'notoriously unjust' or 'egregious' administration of justice 'which offends a sense of judicial propriety'. It does not suffice to establish that domestic adjudicators have erred, or misapplied or misinterpreted domestic law".

The USA's position

282. In its submission the USA explicitly identifies the denial of justice threshold as high²⁷², due to the principle of judicial independence, the particular nature of judicial action and the unique status of the judiciary in both international and municipal legal systems²⁷³. International tribunals should accord deference to domestic courts, whose judgments are presumed to be regular under international law to a higher degree than the actions of a State's legislative or administrative branch²⁷⁴.
283. The USA provides examples for denial of justice: an "obstruction of access to courts" or a "failure to provide those guarantees which are generally considered indispensable to the proper administration of justice"²⁷⁵.
284. The USA emphasizes the argument that domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law²⁷⁶.

Canada's position

285. Like the USA, Canada advocates for a high standard for denial of justice claims and evokes the traditional standard of Court actions or omissions being "extremely gross" or "egregious" or amounting to "an outrage, bad faith, wilful neglect of duty, or

²⁷⁰ *Mondev*, para. 127.

²⁷¹ RCM, para. 147.

²⁷² USA Submission, para. 8.

²⁷³ *Ibid.*

²⁷⁴ USA Submission, para. 8.

²⁷⁵ USA Submission, para. 19, citations omitted.

²⁷⁶ USA Submission, para. 7.

insufficiency of action apparent to any unbiased man”²⁷⁷. The high standard is amplified by the need of international tribunals to defer to local Courts²⁷⁸.

286. Canada lists as examples of denial of justice instances where there has been

“a refusal to entertain a suit or serious failure to adequately administer justice or if there has been a ‘clear and malicious misapplication of the law’ or if the judgment in question is so patently egregious that ‘it is impossible for a third party to recognize how an impartial judge could have reached the result in question”.

²⁷⁹

D. The Tribunal’s view

287. The very high standard adopted by *Mondev* has been endorsed by a multitude of tribunals, NAFTA²⁸⁰ and non-NAFTA²⁸¹ alike. The Tribunal also notes that the test has been proposed by Respondent²⁸² and endorsed by both Non-Disputing Parties²⁸³.

288. The Tribunal accepts the *Mondev* standard as a guide to adjudicate Lion’s denial of justice claim. However, some precisions are required in light of the arguments presented by the Parties.

289. The starting point for the tribunal in *Mondev* was the *ELSI* judgement. In this case the ICJ assessed the concept of “arbitrariness” under the Treaty of Friendship, Commerce and Navigation between the USA and Italy, in the context of a dispute concerning the requisition and forced liquidation of an insolvent Italian company wholly owned by a US corporation. In this setting the ICJ stated that arbitrariness was²⁸⁴:

“a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety”.

290. The *Mondev* tribunal replicated the above statement²⁸⁵. Taking this isolated sentence, Mexico has suggested that a finding of denial of justice requires “evidence of intention or malice, collusion, corruption, or flagrant abuse by the Respondent’s judicial system”²⁸⁶.

²⁷⁷ Canada Submission, para. 5, citations omitted.

²⁷⁸ Canada Submission, paras. 5-7.

²⁷⁹ Canada Submission, para. 5, citations omitted.

²⁸⁰ E.g., *Loewen*, para. 133, *Waste Management*, paras. 95, 98.

²⁸¹ E.g., *Chevron II*, para. 8.35, *Dan Cake*, para. 146, footnote 18.

²⁸² RR, para. 173, RCM, para. 150.

²⁸³ USA Submission, para. 7, Canada Submission, para. 6.

²⁸⁴ *ELSI*, para. 128.

²⁸⁵ *Mondev*, para. 127.

²⁸⁶ RR, para. 9. See also RR, paras. 223, 230.

291. The Tribunal does not agree with Mexico’s conclusion, which is only the result of an incomplete reading of the *Mondev* standard.

292. The *Mondev* tribunal acknowledge that the *ELSI* standard was defined in the context of evaluating arbitrariness, but considered it useful in further defining the test for denial of justice²⁸⁷. The tribunal continued stating that for denial of justice²⁸⁸:

“... the test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome...”.

293. The tribunal continued to frame this test within the standard of FET under Article 1105(1) of NAFTA²⁸⁹:

“In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment”.

294. In defining the test for denial of justice, nowhere does the *Mondev* tribunal allude to a subjective element. Moreover, in assessing international liability of the Contracting States under Article 1105(1) of NAFTA, the tribunal explicitly rejected this possibility²⁹⁰:

“To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith” [Emphasis added].

295. Other NAFTA tribunals have endorsed this view²⁹¹. For instance, the *Glamis Gold* tribunal stated²⁹²:

“The Tribunal emphasizes that, although bad faith may often be present in such a determination and its presence certainly will be determinative of a violation, a finding of bad faith is not a requirement for a breach of Article 1105(1).

296. The Tribunal agrees: a wilful and intentional illicit conduct by local Courts may serve as the grounds for a finding of denial of justice. Wilful intent thus, might be an

²⁸⁷ *Mondev*, para. 127.

²⁸⁸ *Ibid.*

²⁸⁹ *Mondev*, para. 127.

²⁹⁰ *Mondev*, para. 116.

²⁹¹ E.g., *ADF*, paras. 180-181, citing the *Mondev* award, *Eli Lilly*, para. 222 endorsing the standard from *Glamis Gold*.

²⁹² *Glamis Gold*, para. 627.

accessory element in discerning whether denial of justice has occurred, but it is not a necessary requirement.

297. The *Loewen* tribunal used a similar test, stressing that denial of justice is procedural²⁹³:

“[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety”.

298. *Loewen* also endorsed the *Mondev* view that under contemporary international customary law, bad faith or malicious intent is not required for a denial of justice claim, framed within the Fair and Equitable Treatment of Article 1105(1) NAFTA²⁹⁴:

“Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice”.

* * *

299. In conclusion, the test is an objective one: denial of justice requires a finding of an improper and egregious procedural conduct by the local courts (whether intentional or not), which does not meet the basic internationally accepted standards of administration of justice and due process, and which shocks or surprises the sense of judicial propriety.

2. CLAIMANT’S POSITION

300. Lion says that Mexico breached its duty to treat it in a fair and equitable manner through denying Lion justice in its pursuit of legal remedies against the Debtors: Claimant argues that it was not accorded proper due process rights, since first, it was not granted the opportunity to be heard and then, it was deprived of the legal means to defend its rights (2.1.); Lion also maintains that it suffered undue delay in the local proceedings (2.2.); finally, Lion argues that it complied with the exhaustion of local remedies rule (2.3.).

2.1 CLAIMANT WAS DENIED DUE PROCESS

301. Claimant argues that it was denied justice through the violation of its due process rights by being barred access to justice (A.) and being prevented from presenting its case before local courts and marshalling evidence to support it (B.).

²⁹³ *Loewen*, para. 132.

²⁹⁴ *Loewen*, para. 132.

A. Lion was denied access to justice

302. Claimant was denied the chance to participate before the *Juez de lo Mercantil* because it was never properly served.
303. Under Mexican law, proper notification by a Court is subject to making certain (“*cerciorarse*”) that the defendant indeed resides in the place where service is made; the service confirmation should explain the reason that led the Court to be certain (“*convencimiento*”)²⁹⁵. This obligation is enshrined in Arts. 111, 112 and 112 bis, of the Civil Procedure Code of Jalisco [“**CPC Jalisco**”]²⁹⁶. Additionally, Art. 279 of CPC Jalisco requires the *Juez de lo Mercantil* to “examine the legality of the service of process” (“*examinará la legalidad del emplazamiento*”) before declaring Lion in default²⁹⁷.
304. Lion argues that Mexico clearly failed to comply with these provisions.
305. *First*, the Court based the citation address solely on the domicile indicated by the plaintiff, designated in the Forged Settlement Agreement – a document which was not an original and bore no original signatures. This notwithstanding, the Court accepted the false information without further research²⁹⁸.
306. *Second* the Court’s *actuario* failed to “include particular reasons or objective proof”²⁹⁹, and to indicate the means upon which Lion’s domicile was corroborated; apparently, the Court’s *actuario* only relied on the word of the person served, Lic. José Isaac López Medina, although he provided no indication or proof of his position at Lion nor any evidence that he had representation powers³⁰⁰. According to Claimant, the *Juez de lo Mercantil* acted erroneously and failed to exercise diligence to ensure that Lion was properly served³⁰¹.
307. *Third*, Lion avers that notification by *cédula* was inappropriate given the circumstances of the case³⁰². According to Lion, notification by judicial bulletins or boards amounts to fictitious service of process, which is clearly inconsistent with the treatment to be given to a foreign company³⁰³. Service on Claimant by the *Juez de lo Mercantil* was

²⁹⁵ CR, para. 450.

²⁹⁶ CM, para. 328.

²⁹⁷ CR, para. 452, citing CPC Jalisco, Art. 279.

²⁹⁸ CR, para. 453, citing Exh. C-73.

²⁹⁹ Zamora I, para. 149, footnote 202, judicial precedent (first version), «debe expresar las razones particulares o medios de convicción [...] tanto objetivos (aquellos que aprecie directamente el funcionario), como subjetivos (los que le sean proporcionados por otras personas), para tener la certeza [...], ya que si carece de tales datos, no puede sostenerse jurídicamente la legalidad del emplazamiento» quoted by Claimant in CM, para. 236.

³⁰⁰ CR, paras. 87-90; CM, para. 327.

³⁰¹ CR, para. 103, CM, para. 328.

³⁰² CR, para. 461-475.

³⁰³ CR, para. 462.

inconsistent with two international treaties to which Mexico is party – the Inter-American Convention on Letters Rogatory (with its Additional Protocol) and the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters³⁰⁴ – personal service to Lion should have been made via an international cooperation mechanism³⁰⁵.

308. *Furthermore*, Claimant reinforces its argument by stating that a different standard for service was employed by judicial personnel with regard to the Debtors. For example, Claimant observes that while in average, it took a Court in Mexico 42 days to admit and serve a lawsuit³⁰⁶, the *Juez de lo Civil* failed to serve the *Juicio Hipotecario* on Inmobiliaria Bains for more than three years, and at the same time required only 22 days to serve the incorrect *emplazamiento* on Lion³⁰⁷.
309. *Finally*, Lion avers that it was limited in its pursuit of justice before local Courts, because it was barred from bringing an ordinary appeal against the Cancellation Judgment, due to an incorrect decision by the *Juez de lo Mercantil* granting said Judgment *res judicata* effect in only 42 days, at the request of the Debtors³⁰⁸.

B. Claimant was deprived of its right to exercise means of defense

310. Claimant says that it was not allowed to properly defend itself. Respondent denied it access to justice through its Courts' continuous failure to scrutinize the authenticity of the forged documents³⁰⁹:
311. *First*, the *Juez de lo Mercantil* should have looked *ex officio* into the nature of the Forged Settlement Agreement and the documentation indicating that Lion was a foreign company³¹⁰ before declaring Lion in default³¹¹.
312. *Second*, Mexico's Courts have denied Lion the opportunity to prove the forgery. Lion submitted the *ampliación de demanda* as soon as it gained knowledge of the facts underlying the forgery and cannot be blamed for not having raised the issue *ab initio*³¹². In Claimant's view, lack of service is a breach of such a magnitude under Mexican law that the *Juez de Distrito* should have allowed all evidence and arguments that are necessary to prove the circumstances of the allegedly illegal service³¹³, yet the *Juez de*

³⁰⁴ CR, paras. 438-446.

³⁰⁵ CR, paras. 446-447.

³⁰⁶ CM, para. 40, citing Exh. CLA-137.

³⁰⁷ CM, para. 40.

³⁰⁸ CPHB, para. 79; CM, paras. 270, 393.

³⁰⁹ CM, paras. 344-350.

³¹⁰ CR, para. 101, citing Zamora IV, para. 86.

³¹¹ CR, paras. 104-106.

³¹² CR, paras. 135-139.

³¹³ CR, para. 153.

Distrito dismissed any evidence pointing to the falsehood of the *emplazamiento*³¹⁴. And then the *Juez de Distrito*'s decision in the remand *Amparo* refused to admit Sr. Arechederra's testimony, thereby depriving Lion of the principal evidence that could prove that the person alleged to have signed the False Amparo did not do so³¹⁵.

313. *Third*, none of Mexico's Courts seized of Lion's proceedings ruled on the authenticity of the Forged Settlement Agreement. The *Juez de Distrito* refused to decide on the issue³¹⁶; the *Tribunal de Queja* refused as well³¹⁷, ruling that the question should be resolved after the False *Amparo* issue was decided in the Remand *Amparo*; and finally the *Juez de Distrito* refused³¹⁸, understanding that the *Tribunal de Queja* had excluded from the admissible evidence the evidence concerning the falsehood of the Forged Settlement Agreement³¹⁹. Ultimately, Lion's *Amparo* claim was thus frustrated.

2.2 MEXICO'S UNREASONABLE DELAY IN ADMINISTERING JUSTICE

314. According to Claimant, Mexico's Courts failed to decide Lion's *Amparo* claim within a reasonable time.
315. Claimant avers that the time required for the resolution of the *Amparo* lawsuit was at odds with the usual duration of such proceedings in Mexico. According to the statistics from the Mexican *Consejo de la Judicatura Federal*, the *Amparo* lawsuit took almost four times as long as the average for the same year³²⁰.
316. To determine if this delay is unreasonable and amounts to a denial of justice, international tribunals consider three features³²¹:
- The complexity of the matter: Claimant maintains that the claim submitted to the *Juez de Distrito* and the *Tribunal de Queja* was not complex; given that the service was performed at the address and to the person mentioned in the Forged Settlement Agreement, there was only one issue to be decided by the Courts in order to determine whether Lion was properly served – was the Forged Settlement Agreement authentic?³²² Claimant states that under normal circumstances, the authenticity of a document is a factual issue that is disposed of preliminarily as a procedural incident³²³.

³¹⁴ CR, para. 152.

³¹⁵ CM, para. 379.

³¹⁶ CR, paras. 130-141.

³¹⁷ CR, paras. 146-147.

³¹⁸ This time in the Remand *Amparo*.

³¹⁹ CR, paras. 155-157, CM, para. 379.

³²⁰ CM, para. 376.

³²¹ CM, para. 342, 364.

³²² CM, para. 366.

³²³ CM, para. 369.

- The procedural diligence of the interested parties: Claimant did not cause any undue delay through its actions during the Real *Amparo* proceedings³²⁴; as soon as it learned of the existence of the Forged Settlement Agreement, it filed a petition to challenge its authenticity³²⁵.
- Whether celerity is especially warranted to avoid harm generated in the legal situation of the person involved in the process: Lion submits that celerity was essential because the *Amparo* claim, as a remedy to ultimately prevent the cancellation of the Mortgages, would become ineffective as time went by³²⁶.

317. On a separate note, Claimant compares the delay in its claims with the unusual speed of the Cancellation Judgment, which deprived it of its investment in Mexico³²⁷.

2.3 CLAIMANT COMPLIED WITH THE EXHAUSTION OF LOCAL REMEDIES RULE

318. Claimant begins by stating that under international law, the State arguing that a party has failed to exhaust local remedies has the burden to prove the existence, availability and adequacy of such remedies³²⁸, and Mexico has failed to discharge this duty.

319. According to Lion, it fully complied with the exhaustion requirement as it did pursue all adequate remedies available to it³²⁹ (A.)

320. Notwithstanding, Lion was not required to exhaust all local remedies because:

- The remedies available were inadequate, ineffective and their exhaustion unreasonable³³⁰ (B.), and
- A denial of justice for undue delay claim is not subject to the exhaustion requirement³³¹ (C.).

³²⁴ CM, para. 374.

³²⁵ CM para. 132.

³²⁶ CM, para. 370-371.

³²⁷ CPHB, paras. 79-80.

³²⁸ CM, p. 390, citing *ELSI*, at p. 47, para. 62 (“it was for Italy to show, as a matter of fact, the existence of a remedy which was open to the United States stockholders and which they failed to employ”), *Diallo*, p. 600, para. 44, (“[i]t is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted 1.... Thus, in the present case 1...]; it is, on the other hand, for the DRC to prove that there were available and effective remedies in its domestic legal system against the decision to remove”).

³²⁹ CR, para. 420-421.

³³⁰ CR, paras. 506-520.

³³¹ CM, paras .392, 394.

A. Lion's claims did not require further action before Mexico's courts

321. Lion argues that the exhaustion of local remedies rule applies to those domestic recourses that are likely to be successful. In the case at hand, the remedies to be exhausted would be those which could reinstate the Mortgages to Lion; and Lion did pursue them³³². Lion was not required to initiate any proceedings other than the *Amparo* as it was not feasible for it to launch the *juicio de nulidad*, which offered inferior protection to the Amparo route. The criminal proceedings did not offer appropriate protection either.
322. Claimant elaborates on the concept of 'original judicial misconduct'³³³ and distinguishes between the initial wrong, the denial of justice and the exhaustion of local remedies, which requires the exhaustion of all adequate available remedies³³⁴. Following this threefold concept, Claimant avers that in the present case:
- The initial wrong would be the Debtors' fraudulent actions;
 - The denial of justice would be the breach of Lion's right to be heard by the *Juez de lo Mercantil* and
 - What followed after the Cancellation Proceeding (i.e., the *Amparo* Proceeding, the Revision Appeal Proceeding and the Remanded Proceeding) is the exhaustion of local remedies, where the "system" failed to correct the initial miscarriage of justice³³⁵.
323. Lion argues that, since all three elements were met, it did in fact exhaust the adequate available local remedies, thus complying with the exhaustion rule under international law³³⁶.

B. Lion was exempted from exhausting available local remedies

324. In any event, Claimant states that, under international law, it was exempted from the exhaustion rule as the local remedies were inadequate, ineffective and their exhaustion unreasonable³³⁷.

³³² CM, p. 400.

³³³ CR, para. 417 citing *Cotesworth & Powell*, p. 175.

³³⁴ CR, paras. 418-419.

³³⁵ CR, paras. 420-420.

³³⁶ CR, para. 421.

³³⁷ CPHB, paras. 226-230.

325. Lion uses the *Loewen* standard, stating that only “remedies which are effective and adequate and are reasonably available to the complainant in the circumstances in which it is situated” must be exhausted³³⁸.
326. According to Claimant, the rule provides that only effective remedies, i.e., those providing a reasonable possibility of an effective remedy, must be exhausted and such effectiveness is to be assessed in light of the circumstances in advance of resorting to the remedy (*ex ante*), rather than in light of the actual outcome of the case and in light of the nature of the violation the remedy is aimed at correcting³³⁹.
327. *Secondly*, only those remedies which can reasonably be demanded from the investor are to be exhausted. In the present arbitration, the remedies available to Lion were neither effective nor reasonable³⁴⁰:
- Lion’s secured returns on its investments were declining every day and Lion would never be made whole because the Debtors’ indebtedness continued to grow and exceeded the value of the collateral;
 - Pursuing the Remand *Amparo* would have been unreasonably inefficient and would likely have taken more than three additional years.

C. Denial of justice for undue delay does not require exhaustion

328. Claimant invokes the ILC Draft Articles on Diplomatic Protection to state that under customary international law, local remedies do not need to be exhausted when there is undue delay in obtaining justice and this delay may be attributed to the Host State³⁴¹.
329. Lion therefore submits that its denial of justice for undue delay claim is exempted from the exhaustion requirement³⁴².

3. MEXICO’S POSITION

330. Mexico avers that Lion was not denied access to justice as it was given proper opportunity to be heard and to exercise its right of defense (2.1.). Additionally, there was no unreasonable delay in the Courts’ proceedings (2.2.). Even if the Tribunal finds that Lion was denied justice, its claim should fail as it did not comply with the exhaustion of local remedies requirement (2.3.). Finally, Mexico presents a list of preliminary objections to Lion’s claims (2.4.).

³³⁸ CPHB, para. 226, citing *Loewen*, para. 168.

³³⁹ CPHB, para. 227; RR, paras. 511-512; CM, paras. 403-404.

³⁴⁰ CPHB, para. 227; CM, pp. 405 and 410.

³⁴¹ CM, para. 394, citing I.L.C. Draft Articles on Diplomatic Protection, Art. 15, Exh. CLA-284.

³⁴² CM, paras. 394 and 396

3.1 RESPONDENT FULLY ACCORDED CLAIMANT PROCEDURAL DUE PROCESS

331. Respondent argues that Lion was neither denied access to justice (A.) nor barred from defending its case and presenting documents to support it (B.).

A. Mexico's judiciary did not deny Claimant the opportunity to be heard

332. According to Mexico, Claimant's allegations that the *Juez de lo Mercantil* failed to properly serve it are mistaken³⁴³:

333. *First*, Mexico is also a victim of the Forged Settlement Agreement³⁴⁴. The *actuario* had no reason to doubt the authenticity of the Forged Settlement Agreement. Under Mexican law, a Judge has the obligation to verify that the document that serves as the basis for the legal action is compliant, but the Judge lacks power to question its authenticity³⁴⁵. According to Respondent, Claimant has provided no evidence to suggest that the *Juez* knew or should have known that the contact information was false³⁴⁶. Claimant also ignores the fact that the *Juez* had no *prima facie* reason not to rely on the documentation before him³⁴⁷.

334. *Second*, the *actuario*'s duty is limited to making sure "that service takes place at the domicile provided by the claimant"³⁴⁸. In this case:

- The *actuario* performed service at the address identified by the plaintiff; this service was directed at the legal representative of Lion, as confirmed by the *actuario*³⁴⁹.
- On the first attempt of service, dated 3 April, 2012, the *actuario* left a citation with Lic. López Medina ordering the legal representative to be present at a specified date and time to facilitate service; given the legal representative's absence, the *emplazamiento* could be effectuated upon any individual present at the time – in this case, it was Lic. López Medina, who was also identified in the Settlement Agreement as authorized to receive notification on behalf of Claimant³⁵⁰.

335. The *emplazamiento* was correct: according to the Supreme Court, the *emplazamiento* has to be performed with the legal representative³⁵¹ and, if this is not possible, the

³⁴³ CM, 70-79.

³⁴⁴ CRM, 64-65.

³⁴⁵ RCM, para. 73, citing Ovalle I, para. 87.

³⁴⁶ RCM, para. 72.

³⁴⁷ RR, para. 231.

³⁴⁸ RR, para. 75.

³⁴⁹ RR, para. 78, citing Ovalle II, para. 37.

³⁵⁰ RCM, paras. 76-77.

³⁵¹ RCM, para. 78.

actuário simply has to ask for the legal representative before performing service upon any other person present at the moment³⁵².

B. Claimant was accorded the right to exercise means of defense

336. *First*, if anyone is to be blamed for the Forged Settlement Agreement never being scrutinized by the judicial system in Mexico, it is Lion, whose negligence was the reason why the Courts could not admit the additional evidence³⁵³: Claimant should have included references to the alleged fraud in its original *Amparo* claim, rather than seeking to introduce them through the *ampliación de demanda*³⁵⁴.
337. Having failed to include fraud issues, the *Juez de Distrito* followed the law when it adjudicated a claim for improper notification (“*falta de emplazamiento*”) rather than a claim for forgery³⁵⁵. Therefore, the *Juez de Distrito* was bound to deliver the judgment that it did and Lion cannot claim a denial of justice due to its own negligence in pursuing its claims.
338. In its decision to dismiss the *ampliación de demanda*, the *Secretario del Juzgado de Distrito* acted in accordance with local law, which did not require him to grant Lion an opportunity to cure its procedural defects³⁵⁶. It was Lion who failed to demonstrate the necessary link between its claim and the Forged Settlement Agreement³⁵⁷.
339. When Claimant disagreed with the *Juez de Distrito*’s decision, it exercised its right to challenge it through a review proceeding, but lost³⁵⁸ due to one more failure to follow procedural law: the *ampliación de demanda* must be signed either by the aggrieved party or by its legal representative³⁵⁹. Lion does not appear to contest the fact that it filed its *ampliación de demanda* improperly³⁶⁰. Therefore, it was not denied the right to present evidence and defend its case.
340. *Second*, the *Juez de Distrito* in the Remand *Amparo* did not dismiss all of Lion’s evidence, but rather explained that some of it was already on the Court’s record³⁶¹; in any event, the *Juez de Distrito* was not empowered to admit new evidence in respect

³⁵² RCM, para. 78 citing Exh. RL-39: “NOTIFICACION A TRAVES DE UNA PERSONA DISTINTA DEL INTERESADO Y A PERSONAS MORALES REQUISITOS EN EL ACTA QUE SE LEVANTE”.

³⁵³ CRM, para. 95, RR, paras. 102 and 103.

³⁵⁴ RR, para. 245, citing Ovalle II, para. 108.

³⁵⁵ RR, para. 94-96.

³⁵⁶ RR, para. 100, citing Ovalle II, para. 91.

³⁵⁷ RR, para. 102.

³⁵⁸ RR, para. 105.

³⁵⁹ RR, paras. 246-247.

³⁶⁰ RCM, para. 95.

³⁶¹ RR, para. 268, with regard to the voicher purporting to prove that Mr. Arechederra could not have signed the False Request for Copies and the *Juez de Distrito*’s decision on the false nature of the False Request for Copies, citing Exh. C-123.

of the authenticity of the Forged Settlement Agreement in the Remand *Amparo* and acted in complete accordance with applicable procedural rules³⁶².

341. In conclusion, Claimant cannot claim that the decisions to dismiss the additional evidence were the result of an idiosyncratic or arbitrary decision³⁶³. By failing to follow the applicable procedural rules, Lion and not Mexico is responsible for Lion's inability to present evidence and defend its case before Mexico's Courts.

3.2 MEXICO'S COURTS DECIDED LION'S CLAIMS WITHIN A REASONABLE TIME

342. Respondent claims that the duration of each of the stages of the *Amparo* Proceeding was reasonable³⁶⁴:

- *First*, the *Amparo* Proceedings took one year to complete, which constitutes an appropriate time given its multiple complexities³⁶⁵;
- *Second*, the proceedings before the *Tribunal de Queja* took 16 months to complete, which once again was a justifiable time given the extraordinary complexities involved in it³⁶⁶;
- *Third*, the *Juez de Distrito* had only started analysing the Remand *Amparo* and cannot be blamed for not delivering a decision due to Claimant's premature withdrawal from the proceedings³⁶⁷.

343. Mexico avers that Claimant still had one or two years of litigation ahead had it chosen to continue, which would not constitute an unusual time given the complexity of the case³⁶⁸. Additionally, Lion is equally responsible for any delay as it waited for four years to initiate the *Juicio Hipotecario*³⁶⁹.

344. There is nothing in the duration of the proceedings that amounts to a wilful disregard of due process of law, which shocks, or at least surprises, a sense of judicial propriety. Thus, the duration of the local proceedings does not meet the threshold of a denial of justice through unreasonable delay³⁷⁰.

³⁶² RR, paras. 259-260.

³⁶³ CRM, para. 96.

³⁶⁴ RR, paras. 250-252.

³⁶⁵ RR, para. 251.

³⁶⁶ RR, paras. 261-263.

³⁶⁷ RR, paras. 273-274.

³⁶⁸ RPHB, para. 109.

³⁶⁹ Ibid.

³⁷⁰ RR, para. 252.

3.3 LION FAILED TO EXHAUST LOCAL REMEDIES

345. Mexico asserts that Lion did not comply with the requirement of the local remedies rule as it did not exhaust all available remedies (A.) and no futility exception is applicable (B.).

A. Claimant did not exhaust all available local remedies

346. Respondent says that Claimant is improperly using the current arbitration as an appeal of the *Amparo* judgment in lieu of Mexico's domestic legal system³⁷¹.

347. According to Mexico, international law accords the judiciary a greater presumption of regularity and requires a claimant to exhaust local remedies before initiating a denial of justice claim. Otherwise, the host State's judicial system would not have an opportunity to correct itself³⁷².

348. Respondent avers that Claimant did not exhaust all available local remedies: it could have and should have initiated a *nulidad de juicio concluido* proceeding and it has also not exhausted the criminal proceedings³⁷³.

349. Additionally, Respondent emphasizes that a denial of justice may only occur with regard to a State's entire judicial system and not separate judicial acts³⁷⁴; a claim of denial of justice can only be based on adjudicative measures that are final. Since Claimant has not exhausted all available options of seeking recourse under Mexican law, it is barred from pursuing a denial of justice claim³⁷⁵.

B. The futility exceptions to the exhaustion rule does not find application in the current case

350. According to Mexico, the futility standard is high and is not met here³⁷⁶. Instances of ineffectiveness and futility include situations where³⁷⁷:

- the local Courts have no jurisdiction over the dispute;
- the local Courts are notoriously lacking in independence;

³⁷¹ RR, para. 241.

³⁷² RCM, para. 169.

³⁷³ RPHB, paras. 116-118, RR, paras. 127-137, Ovalle II, para. 109.

³⁷⁴ RR, paras. 198-201.

³⁷⁵ RR, para. 126, RCM, para. 79.

³⁷⁶ RCM, para. 207.

³⁷⁷ RCM, para. 206, citing Exh. RL-51, pp. 118-119 citing J. Dugard, "Third Report on Diplomatic Protection to the ILC", *UN Doc. A/CN.4/523* and Add. 1, at pp. 14-17, paras. 38-44.

- the local Courts do not have the competence to grant an appropriate and adequate remedy; and
- the absence of an adequate system of judicial protection.

351. There has been no suggestion by Claimant of a lack of jurisdiction or independence or incompetence or inadequate judicial protection. In fact, Claimant was in the process of seeking remedy through the Remand *Amparo* when it prematurely and unnecessarily withdrew from the proceedings³⁷⁸.
352. Mexico argues that Lion failed to prove that there was an unavailability of obtaining recourse pursuant to *Apotex*, and instead simply abandoned local proceedings based on its perceived low likelihood of being granted its desired relief³⁷⁹.

3.4 LION IS BARRED FROM BRINGING ITS CLAIMS

353. Mexico additionally raises a number of preliminary objections to Lion's claims. These include:
- Lion is not protected under NAFTA Art. 1105, a rule which, according to Mexico, applies only to investments but not to investors³⁸⁰;
 - Lion failed to exercise due diligence and made irrational business decisions when it decided to grant the Loans to the Debtors, when it improvidently extended their maturities and postponed the decision to foreclose, and when it took the erroneous decision not to foreclose on the Guadalajara Mortgages³⁸¹; and
 - Mexico's Courts were confronted with a sophisticated fraud and acted appropriately. Additionally, Mexico's Courts should be excused because there is no allegation that its Judges acted with an intention of malice, or that their decisions were impaired by collusion or corruption³⁸².

³⁷⁸ RCM, para. 207.

³⁷⁹ RCM, paras. 210-212.

³⁸⁰ RR, para. 138; RCM, paras. 134-144.

³⁸¹ RPHB, paras. 14-60; RR, paras. 140-147.

³⁸² RPHB, para. 65-66; RR, paras. 2,9, 214, 220, 223,230; RCM, paras. 11 and 64.

4. THE TRIBUNAL'S DECISION

354. In the following section, the Tribunal will briefly analyse and dismiss Respondent's preliminary objections (4.1.); then it will establish that Lion was indeed denied justice by Mexico's judiciary, in breach of NAFTA Art. 1105 (4.2.), and thereafter dismiss Mexico's counterargument that Lion failed to exhaust available and reasonable local remedies (4.3.).

4.1 RESPONDENT'S PRELIMINARY OBJECTION

355. The Tribunal will first address Mexico's preliminary objections (summarized in section 3.4. *supra*):

NAFTA Art. 1105 protects investments and investors

356. Mexico's first argument is based on a literal reading of Art. 1105 of NAFTA, which provides that Mexico "shall accord to investments of investors" of the other treaty Parties treatment in accordance with international law, including FET and FPS. Respondent says that Art. 1105 only extends protection to investments, but not to investors³⁸³.

357. Contrary to Mexico's submission, the Tribunal finds that NAFTA Art. 1105 does indeed grant protection to Lion as an investor.

358. The FTC Interpretation Note equates the standard of protection to be applied under Art. 1105 of the NAFTA with the standard of "customary international law minimum standard of treatment of aliens". The reference to "aliens", in a context of investment protection, can only mean investors. A multitude of NAFTA Tribunals have also construed Art. 1105 as a source of protection for investors rather than solely for their investments³⁸⁴.

Lack of due diligence and irrational business decisions

359. The Tribunal is also unconvinced by Respondent's argument that Lion failed to exercise due diligence and made irrational business decisions.

360. When Lion took the business decision to grant various short-term loans to bridge finance the acquisition of certain real estate Claimant, it was already a seasoned investor in Mexico. To secure its rights, Claimant engaged Mexican counsel and formalized the transaction in the instruments which, under Mexican law, grant creditors the maximum level of legal certainty: *pagarés* and *hipotecas*. Mexico has failed to draw the Tribunal's attention to any other action (bar abstaining from investing in Mexico)

³⁸³ RR, para. 138, RCM, paras. 134-144.

³⁸⁴ See e.g., *Gami*, para. 91; *Chemtura*, para. 179; Exh. CLA-139; *Merrill*, para. 83.

which Claimant could have taken to improve its contractual rights and facilitate enforcement through the Courts.

361. The business decisions impugned by the Respondent were largely prior to the involvement of the Mexican courts. They form part of the factual and legal matrix submitted to the jurisdiction of the Mexican courts, and irrespective of the wisdom of these decisions (when viewed with hindsight) the Claimant was entitled to the protection of its rights by the Mexican courts in accordance with Mexican law.
362. Claimant cannot be blamed for its decision to negotiate with Sr. Cárdenas before launching a Court action to enforce the Mortgages. It was within Lion's discretion either, to try to reach an amicable solution with Sr. Cárdenas, or to seek foreclosure on the Guadalajara Properties. The relevant issue in the present case is whether Lion could effectively avail itself of the protection it was entitled to under Mexican law, if it opted to enforce the Mortgages.
363. The case law invoked by Mexico is inapposite³⁸⁵.

Fraud as an excuse

364. Finally, Respondent invites the Tribunal to take into account the contextual factors of the case which include³⁸⁶
- the existence of an alleged multi-level sophisticated fraud, and
 - the absence of allegation that the Mexican judiciary acted with an intention of malice, collusion, corruption, or flagrant abuse of judicial procedure.
365. Respondent avers that its Courts acted appropriately in the circumstances they faced³⁸⁷ and that they (like Claimant) also fell victim to Sr. Cárdenas's fraudulent scheme.
366. The Tribunal concurs with Mexico that the evidence marshalled in this case supports the conclusion that Sr. Cárdenas and the Debtors engaged in a sophisticated fraud, which resulted in the cancellation of the Mortgages in the *Registro Público*. But the existence of a fraud, however sophisticated, does not excuse the respondent State from its duty to have a properly functioning judicial system:
- Any proper judicial system must have robust safeguards, which minimize the risk that aliens are not properly notified of procedures filed against them, and that *in*

³⁸⁵ The *MTD v. Chile* tribunal explicitly dealt with a situation where the claimants' lack of diligence consisted in that they failed to "protect themselves contractually"; in cases *Churchill Mining* and *Renée Rose Levy* the tribunals decided that the BIT could not protect against usual business risks or their unwise business decisions. See: *MTD v. Chile*, para. 178; *Churchill Mining*, para. 506; *Renée Rose Levy*, para. 478.

³⁸⁶ RR, para. 223.

³⁸⁷ RPHB, para. 66.

absentia judgements against aliens are only adopted, when the Court is satisfied that the aliens have been properly notified and are aware that they are being sued;

- A properly functioning judicial system must avoid that false information maliciously provided to the Courts is used, without proper review, to the detriment of an unsuspecting third parties;
- Finally, the judicial system must offer effective solutions for situations when the falsehood of the party-provided information is detected once a judgment to the detriment of the alien has been rendered; in such cases, the system must facilitate that the aggrieved third party can make allegations and present evidence to overturn the wrongful judgement.

367. The Tribunal's finding that Lion has indeed suffered a denial of justice is based on the premise that the Mexican judicial system, in particular, the Courts of Jalisco, have failed to function properly, to the detriment of Lion, a protected investor under NAFTA (as will be further discussed in section 4.2. *infra*).

368. The Tribunal acknowledges that Lion is not alleging that Mexico's Courts acted in bad faith to the detriment of an alien, nor that they colluded with the fraudsters nor that the judicial decisions were tainted by corruption. The Tribunal will consequently accept as proven that the Mexican judicial system acted in good faith, without colluding with Sr. Cárdenas or the Debtors, and without any impairment by corruption. That said, the Tribunal has already established that a finding of bad faith, is not required to make an adjudication for denial of justice (see section 1.3D *supra*).

4.2 DENIAL OF JUSTICE

369. The starting point of any analysis of denial of justice must be an acknowledgement that in this area the Tribunal's powers are subject to strict limitations: the Tribunal is not a municipal Court of appeal; it should pay deference to decisions as to the merits properly adopted by municipal Courts, and should offer such Courts a wide margin of appreciation before the threshold of denial of justice is trespassed. The Tribunal also identifies with the presumption, set forth in *Chevron*, that municipal Courts have acted properly unless Claimant proves otherwise³⁸⁸.

370. In sum, the Tribunal accepts and supports the finding that the standard for a finding of denial of justice is high, and that Claimant must prove, to the Tribunal satisfaction, that the municipal Courts incurred in an improper and egregious procedural conduct which does not meet the basic internationally accepted standards of administration of justice and due process, and which shocks or surprises the sense of judicial propriety³⁸⁹.

³⁸⁸ *Chevron II*, para. 8.35.

³⁸⁹ See para. 296 *supra*.

371. Applying this high standard, the Tribunal is persuaded that Lion was indeed denied procedural justice in three respects:
- Lion was denied access to justice: Lion was, without its fault, never given the opportunity to defend itself in the Cancellation Proceeding (**A.**);
 - Lion was also denied the right to appeal the Cancellation Judgement: the *Juez de lo Mercantil*, the same authority who had rendered the Cancellation Judgment, adopted a subsequent decision, at the request of the Debtor, giving *res iudicata* effect (*causar estado*) to the Cancellation Judgement and preclosing any opportunity of appeal (**B.**);
 - Lion was also denied the right to allege in the *Amparo* Proceeding that the Forged Settlement Agreement had indeed been forged and to present evidence to prove this claim: three years into the *Amparo* Proceeding the forgery claim had still not been admitted within the *Amparo* Proceeding (**C.**).

A. Lion was denied access to justice

372. Lion, a Canadian corporation with corporate domicile in Dallas, Texas³⁹⁰, was never properly notified that it was being sued in the Cancellation Proceeding, which the Debtors had filed before the *Juez de lo Mercantil* in Jalisco, requesting the cancellation of the Mortgages. Being unaware of these Proceedings, Lion failed to appear before the *Juez* and failed to submit a defense. As a result, the *Juez* declared Lion *en rebeldía*, and without any further effort to ascertain whether Lion was aware of the Proceedings, issued the Cancellation Judgement *in absentia*, mandating that the Mortgages be forthwith cancelled.
373. The Cancellation Proceeding was procedurally faulty – Lion was never properly notified; and the consequences of the defective notification were devastating to its case. The conduct of the *Juez de lo Mercantil* by itself does not amount to a denial of justice. What is relevant, however, is that the Mexican judiciary never corrected this situation, despite multiple opportunities to do so at Lion’s request.
374. The Tribunal will first summarize the Parties’ positions (**a.**), the proven facts (**b.**) and the applicable law (**c.**) and then analyse why the conduct of the *Juez de lo Mercantil* is the basis of the denial of justice (**d.**).

³⁹⁰ Exh. C-1, p. 7.

a. Position of the Parties

375. Lion claims that it was denied access to justice by Mexico's courts – it was never notified of the Cancellation Lawsuit and thus never participated in it, and as a consequence was declared *en rebeldía* without fault.
376. This was due to the *actuuario* not performing basic diligence in the service³⁹¹ and the *Juez de lo Mercantil* sanctioning the faulty *emplazamiento* despite the applicable law requiring that he examine *de oficio y de manera exhaustiva* whether the defendant was duly served³⁹².
377. Mexico responds by stating that nothing in the *actuuario*'s service or the actions of the *Juez de lo Mercantil* was irregular. Both adhered to the standards prescribed by the applicable State and Federal Mexican law³⁹³.
378. Respondent says the *actuuario* duly confirmed that the address indicated in the basis for the service (*citatorio*) was the same as the one in the notice of service³⁹⁴. The *actuuario* additionally relied on the representation of Mr. Lopez Medina that the address was Lion's actual place of business and that he was authorized to receive notice on Lion's behalf³⁹⁵. These two elements of the *actuuario*'s conduct satisfy the level of scrutiny required by the applicable law³⁹⁶.
379. In any event, even if the Tribunal were to find irregularities in the *emplazamiento* or *declaración en rebeldía*, these would not be sufficient for a finding of denial of justice as recourse from the decision of the *Juez de lo Mercantil* was available to Claimant, which it did pursue³⁹⁷.

b. Facts

380. The Tribunal will summarize the facts that underlie the denial of access to justice to Lion by Mexico's Courts.
381. On April 3, 2012 the *actuuario* (a court officer of the *Juez de lo Mercantil*) attempted a first service of process [the "*emplazamiento*"] at the address identified in clause 7 of the Forged Settlement Agreement. The service attempt was made on Lic. José Isaac López Medina³⁹⁸, one of the two lawyers identified in the Forged Agreement³⁹⁹, who

³⁹¹ CPHB, paras. 66, 69; CR, paras. 78, 86-96; CM, paras. 96-98.

³⁹² CPHB, para. 71, 74; CR, paras. 103-105; CM, para. 99.

³⁹³ RPHB, paras. 70-71; RR, paras. 77-83, 85-87; RCM, paras. 72-78.

³⁹⁴ RPHB, para. 71; RR, para. 77; RCM, paras. 76-77.

³⁹⁵ RPHB, para. 71; RR, para. 77; RCM, paras. 76-77.

³⁹⁶ Ovalle II, para. 37.

³⁹⁷ RPHB, para. 74; RR, paras. 71-73; RCM, para. 79.

³⁹⁸ Exh. C-52.

³⁹⁹ Exh. C-53.

apparently had his office at that address. There is no evidence that Lion at any time had an office or other type of establishment at that address, or that it had ever had any business or professional relationship with Lic. López Medina.

382. Confronted by the *actuário*, Lic. López Medina formally declared that no legal representative of Lion was present in his office in order to receive the *emplazamiento* (a statement which evidently was true, Lic. López Medina himself never having had any power of attorney to represent Lion and no other director or representative of Lion being present). Upon receipt of this representation, the *actuário* withdrew, announcing that he would return the next day. There is no evidence that Lic. López Medina ever informed Lion of these facts.
383. At that second visit, which occurred next day, again no legal representative of Lion was present, since Lion was totally unaware of these occurrences in Jalisco. This being so, the *actuário* decided to make the *emplazamiento* against Lion through a *notificación por cédula* delivered to the person who was at the address, Lic. López Medina⁴⁰⁰.
384. Lic. López Medina accepted the *emplazamiento* and received a copy of the judicial file (“*autos*”). In the *emplazamiento* the *actuário* informed Lion that it had a 15-day period to appear before the *Juez de lo Mercantil* and submit its defense, and that if it failed to do so it would be held *en rebeldía*⁴⁰¹.
385. There is no evidence that Lic. López Medina, with whom Lion had no relationship⁴⁰², ever informed Lion that he had accepted the *emplazamiento*. Lion never received the *emplazamiento*⁴⁰³, and being unaware that a Court procedure against it was pending before the *Juez de lo Mercantil* of Jalisco, it inevitably failed to appear within the statutory time-limit.
386. The consequence of this failure was that six weeks thereafter, on May 22, 2012, Lion was declared *en rebeldía* by the *Juez de lo Mercantil* through notification via *boletín judicial*⁴⁰⁴ (a judicial bulletin)⁴⁰⁵. Since Lion was not in the habit of reviewing the *boletines judiciales* in Jalisco, nor required to do so, it was completely unaware that it had been declared *en rebeldía*.
387. Two weeks after the declaration *en rebeldía*, on June 6, 2012 the Debtors submitted their evidence before the *Juez de lo Mercantil*, including the Mortgage deeds and

⁴⁰⁰ Exh. C-52; CR, paras. 95-96.

⁴⁰¹ Exh. C 52, p. 2.

⁴⁰² CM, para. 50.

⁴⁰³ CM, paras. 133, 307.

⁴⁰⁴ Exh. C-73.

⁴⁰⁵ Claimant’s expert explains that while the Commerce Code as well Mexico’s procedural codes and statutes provide for different methods of *emplazamiento*, including through *boletín judicial* and *estrados*, for the initial notification of a defendant, only personal service is legally accepted, see Zamora I, para. 142 and footnotes therein. This is not disputed by Mexico.

Minutes of the General Shareholders Meeting of C&C Capital. All the evidence marshalled by the Debtors was admitted six days later, on June 12, 2012⁴⁰⁶.

388. Although some of these documents mentioned that Lion was a foreign company domiciled in the United States⁴⁰⁷, this information seems to have been overlooked or disregarded by the *Juez de lo Mercantil*, because he never made any attempt to notify Lion at any other address. All further communications of the *Juez de lo Mercantil* – including the final judgment – were simply affixed to the *estrados* (notice board), and Lion was presumed to have been properly notified⁴⁰⁸.
389. Just two weeks after the submission of evidence, on June 27, 2012 the *Juez de lo Mercantil*, acting solely on the basis of the evidence marshalled by the Debtors, and without any participation of Lion, declared the Loans totalling USD 32.85 M settled and ordered Lion to cancel the Mortgages and return the Notes through the Cancellation Judgment⁴⁰⁹. From the filing of the Cancellation Lawsuit to the rendering of the Cancellation Judgment, only 170 days had lapsed.
390. Both Parties' legal experts agreed at the Hearing that this constituted an unusually short duration⁴¹⁰.

c. Law

391. The Tribunal has already made findings on the nature of denial of justice and the standard that needs to be applied to the facts to decide whether a denial of justice occurred.
392. First, the Tribunal reiterates its view that denial of justice is always procedural⁴¹¹.
393. Secondly, the Tribunal has also established that denial of access to justice is considered denial of justice in its purest form and is a universally accepted type of this international wrong⁴¹². The case law and scholarly writings acknowledge that access to justice is impaired when a party is not notified of a proceeding that involves its rights and it is prevented from being heard by the local Courts.
394. Paparinskis recalls that⁴¹³

⁴⁰⁶ Exh. C-57.8.

⁴⁰⁷ Exh. C-74, which refers to Exh. C-10, p. 13; Exh. C-14, p.1 and Exh. R-13, p. 18.

⁴⁰⁸ CM, para. 101.

⁴⁰⁹ Exh. C-78, pp. 53-54.

⁴¹⁰ CPHB, para. 80; HT, pp. 711-712 (President Fernández-Armesto, Dr. Ovalle and Dr. Zamora).

⁴¹¹ See Section 1.1, *supra*.

⁴¹² See Section 1.2A, *supra*.

⁴¹³ Paparinskis, *op. cit.*, p. 191, footnotes omitted.

“[...] the absence of notification about proceedings that exclude the possibility to challenge them could all result in denial of justice”.

395. The *Ambatielos* decision also recognizes this basic rule of administration of justice⁴¹⁴:

“[...] the foreigner shall enjoy full freedom to appear before the courts for the protection or defence of his rights, whether as plaintiff or defendant; to bring any action provided or authorized by law [...]”.

396. Thirdly, based on the opinions of international scholars and the decisions of investment tribunals, the Tribunal has adopted the prevailing test: a positive finding of denial of justice requires an improper and egregious procedural conduct by the local courts (whether intentional or not), which does not meet the basic international accepted standards of administration of justice and due process, and which shocks or surprises the sense of judicial propriety.

d. Discussion

397. In a judicial proceeding, a basic principle of natural justice requires that the defendant, who is being sued, is properly notified of the terms of the claims, and is afforded the opportunity to appear before the Court, to rebut these claims, to make allegations and to present evidence.

398. Lion never knew that the Debtors had filed the Cancellation Proceeding against it before the *Juez de lo Mercantil* in Jalisco, and was denied the opportunity to make allegations or present evidence in that Procedure. It was not the Court, but rather third parties, which informed Lion about the existence of the Cancellation Proceeding, after the Cancellation Judgement had been rendered and had become *res iudicata*.

A deeply flawed *emplazamiento*

399. The *emplazamiento* performed on behalf of the *Juez de lo Mercantil* was deeply flawed.

400. The *actuário* served Lion *por cédula, i.e.*, via a notification which is not given directly to the respondent, but which can simply be handed to a defendant’s relatives, employees or domestic helper⁴¹⁵.

⁴¹⁴ *Ambatielos*, p. 111.

⁴¹⁵ CPC Jalisco, Article 112 bis, “La cédula, copias y citatorios, en los casos de los dos artículos anteriores, se entregarán a los parientes o empleados del interesado o en su defecto a cualesquiera otra persona que viva o se encuentre dentro del domicilio, después de que el notificador se hubiere cerciorado de que allí vive o de que es el principal asiento de sus negocios, de todo lo cual se asentará razón en la diligencia, incluyendo el medio o la fuente de que se valió o las fuentes de información a que tuvo que recurrir para adquirir la certeza señalada”, [Emphasis added]; Zamora IV, para. 59.

401. Lion's expert opines that such service requires a higher degree of certainty than ordinary service, with the *actuuario* having to ascertain that the person served is actually at the defendant's domicile, and that such person maintains one of the legally established categories of relationship with the defendant⁴¹⁶.
402. Mexico's expert admits that according to the applicable law, confirmation of service by the *actuuario* should explain the reason that led the *Juez* to be certain that the defendant factually resides in the place service is to be made⁴¹⁷.
403. The rules to be applied to the *emplazamiento* of Lion were enshrined in Arts. 112⁴¹⁸ and 112 bis⁴¹⁹ of the CPC Jalisco⁴²⁰.
404. The general rule is contained in Art. 112 CPC: The *emplazamiento* must be done personally on the respondent ("*se realiza personalmente con el demandado*"); if the respondent is not present when the *actuuario* arrives, a new visit is scheduled for the next day, and if the respondent is still absent, a *notificación por cédula* is admissible.
405. Art. 112 bis CPC the regulates the requirements for a valid *notificación por cédula*. The *cédula* can be delivered to a relative, an employee or to any person found at the domicile, subject to a specific requirement: the *actuuario* must verify that the defendant has at such domicile its principal place of business ("*después de que el notificador se hubiere cerciorado [...] de que es el principal asiento de sus negocios*").
406. The *emplazamiento* performed on Lic. López Medina by the *actuuario* does not satisfy this legal standard: it is clear from the minutes of service filed by the *actuuario* that he failed to obtain any evidence that could corroborate that the domicile set-forth in the Forged Settlement Agreement (that is, that "*número 95, despacho 7, de la calle Tomás V. Gómez, Colonia Ladrón de Guevara (Guadalajara, Jalisco)*") was indeed "*el principal asiento de los negocios*" of Lion LLC, a Canadian incorporated company). It is specially telling that the *actuuario* failed to challenge Lic. López Medina's authority, and never requested that the lawyer present any evidence linking himself to Lion.

⁴¹⁶ Zamora IV, para. 60, Zamora I, para. 149.

⁴¹⁷ Ovalle I, para. 98.

⁴¹⁸ CPC Jalisco, Article 112, "La diligencia de emplazamiento se realiza personalmente con el demandado; el servidor público judicial, deberá de cerciorarse de la identidad del mismo en la forma prevista por el artículo 70 de este Código, o, dar fe de que lo conoce; haciendo constar en el acta esa circunstancia. Si se trata de emplazamiento a juicio o de requerimiento y sólo si a la primera busca no se encuentra al demandado, se le dejará citatorio para hora fija del día siguiente; y si no espera, se le hará la notificación por cédula; [...]"

⁴¹⁹ CPC Jalisco, Article 112 bis, "La cédula, copias y citatorios, en los casos de los dos artículos anteriores, se entregarán a los parientes o empleados del interesado o en su defecto a cualesquiera otra persona que viva o se encuentre dentro del domicilio, después de que el notificador se hubiere cerciorado de que allí vive o de que es el principal asiento de sus negocios, de todo lo cual se asentará razón en la diligencia, incluyendo el medio o la fuente de que se valió o las fuentes de información a que tuvo que recurrir para adquirir la certeza señalada".

⁴²⁰ CM, para. 328.

407. Mexico’s experts argue that the *actuuario* was not obliged to verify the authenticity of the documents serving as the basis for service, and that he did not have the power to do so⁴²¹. However, another of Mexico’s experts accepted at the Hearing that the *actuuario* has authority to verify the address for the *emplazamiento*⁴²². Thus, it is clear that the mechanical checking of whether the address matches that in the *citatorio* is not sufficient to meet the standard required of the *actuuario* under the CPC Jalisco.
408. Moreover, the *citatorio*, which served as the basis for the address for notification, contains a discrepancy in the office number, when compared with the address provided in the Forged Settlement Agreement:
- The Forged Settlement Agreement stated that the address was “*número 95, despacho 7, de la calle Tomás V. Gómez, Colonia Ladrón de Guevara (Guadalajara, Jalisco)*”⁴²³.
 - The *citatorio* indicated office (“*despacho*”) 5, rather than the *despacho 7*⁴²⁴.

A deeply flawed *declaración en rebeldía*

409. But not only the *actuuario* failed to fulfil its task to ascertain that the *emplazamiento* was proper, so did also the *Juez de lo Mercantil*, who was required to scrutinize whether the *emplazamiento* had been completed without irregularities, before declaring Lion *en rebeldía*.
410. Under Mexican law, the effects of being *en rebeldía* are draconian: the procedure continues, without the participation of the person declared in default; furthermore the defendant is declared *confeso*; i.e. he/she is legally presumed to have accepted the facts as averred in the counterparty’s claim⁴²⁵. Based on such presumption, the *Juez de lo Mercantil* eventually would accept, without further inquiries, the truthfulness of the Forged Settlement Agreement and order its specific performance, including the cancellation of the Mortgages.
411. This is the reason why Art. 279 CPC requires the *Juez de lo Mercantil* to examine the legality of the service of process before issuing the *declaración en rebeldía*:

“Trascurrido el término del emplazamiento sin haber sido contestada la demanda, se hará la declaración de rebeldía y se observarán las prescripciones del capítulo I del Título Décimo Segundo de este Código. Para hacer la declaración de rebeldía, el juez examinará de oficio y de manera exhaustiva si las citaciones, notificaciones y emplazamientos fueron hechas al demandado en la forma

⁴²¹ Ovalle II, para. 37.

⁴²² HT, pp. 644-645.

⁴²³ Exh. C-53, p. 7.

⁴²⁴ Exh. C-23.

⁴²⁵ Exh. C-73.

establecida por este código caso contrario, deberá reponer el procedimiento sin esperar al dictado de la sentencia.” [Emphasis added]

412. The rule could not be clearer: before declaring respondent *en rebeldía*, the Judge must examine *ex officio* and exhaustively (“*de manera exhaustiva*”) whether the *emplazamiento* has been properly performed.
413. There is no indication in the case file⁴²⁶, of the *Juez de lo Mercantil* having performed any scrutiny with regard to the *emplazamiento*, let alone “examining [it] in an exhaustive manner”. The *Juez* mechanically corroborated and accepted that the service had been properly completed by his *actuuario*, and did not take any additional measure to verify that the respondent had been properly notified and was actually aware that it was being sued in Jalisco.
414. The omission is especially shocking, because the Cancellation Proceeding was not a minor case, but rather a complex procedure, which pitched a group of well-known local companies against a US-based corporation, which affected well-known and highly valuable pieces of real estate located within the State of Jalisco and which could result (and indeed resulted) in the cancellation of multi-million USD Mortgages granted in favour of the US creditor. Under these circumstances the Judge should have double-checked “*de manera exhaustiva*” that the respondent had been properly notified.
415. With a minimum of diligence, the *Juez de lo Mercantil* could and should have realized that Lion was a foreign company that needed to be served internationally. The information available to the *Juez de lo Mercantil* included:
- Lion’s denomination, “LP”, which does not correspond to any incorporation under Mexican law⁴²⁷;
 - A certified copy of the Nayarit Mortgage, where the actual domicile of Lion was specified to be in the US⁴²⁸;
 - Certified copies of the Guadalajara Mortgages, which state that Lion was a company constituted in conformity with the laws of Quebec, Canada⁴²⁹;
 - The mortgages included as attachments to the Loans, which explicitly state that Lion’s domicile is in the US⁴³⁰.

⁴²⁶ Exh. C-52; Exh. C-57-3.

⁴²⁷ CPHB, para. 61, also citing HT, pp. 645-646 (Dr. Ovalle).

⁴²⁸ Exh. C-10, p. 13.

⁴²⁹ Exh. C-14, p.1; Exh. C-18, p.1.

⁴³⁰ Exh. C-8, p. 16; Exh. C-12, p. 16; Exh.C-16, p. 15.

- The Minutes of the Shareholders' Meeting of C&C Capital and Inmobiliaria Bains, which also stated that Lion was a legal entity constituted pursuant to the laws of Quebec, Canada⁴³¹
416. The omission to verify whether the respondent had been properly notified was exacerbated when subsequent procedural steps and decisions were simply notified by means of a noticeboard in the courthouse. No additional effort was ever made, to ascertain whether Lion was aware of the developments within the Cancellation Proceeding⁴³². Lion was kept completely in the dark.
417. The lack of any diligence reached its zenith, when the *Juez de lo Mercantil* issued a default judgment, fully accepting the Debtors' claims. No attempt was made to ascertain that Claimant was duly informed of the decision, and of its right to lodge an appeal.

Case law

418. The Tribunal observes the similarity of the current facts with those in *Cotesworth & Powell*, where the tribunal decided that claimants had been denied justice because of the failure of the judge to summon the absent creditors in a bankruptcy proceeding and later also failing to notify them of the sentence of classification⁴³³. The net result was the same: the creditors were unable to participate in a proceeding in the same way that Lion was not given the opportunity to appear before the *Juez de lo Mercantil*.
419. Similarities may also be drawn between the situation in *Idler*, where the US-Mexico Claims Commission found a denial of the US plaintiff's access to justice, when he was notified of the upcoming hearing in Venezuela with insufficient time left for him to make the necessary travel to appear in court⁴³⁴. Lion was likewise given a formalistic notice to appear – on the *estrados* notice board in the State of Jalisco – which in fact amounted to a lack of effective notification. The end result is the same: an impediment to the aggrieved alien to appear before the local Court and defend its rights.
420. Finally, Lion's exclusion from the proceedings was exacerbated by the unusual swiftness of the Cancellation Proceeding. Both Parties' legal experts agreed at the Hearing that the 170 days that it took from the filing of the Cancellation Lawsuit to the rendering of the Cancellation Judgment constituted an unusually short duration⁴³⁵.
421. Applying the established legal standard, the Tribunal finds that depriving Lion of its right to appear before the *Juez de lo Mercantil* through a severely irregular

⁴³¹ Exh. R-13, p. 18.

⁴³² Exh. C-73.

⁴³³ *Cotesworth & Powell*, p. 188.

⁴³⁴ *Idler*, pp. 152-153.

⁴³⁵ CPHB, para. 80; HT, pp. 111-112 (President Fernández-Armesto, Dr. Ovalle and Dr. Zamora).

emplazamiento and *declaración en rebeldía* amounts to an improper and egregious procedural conduct by the local courts, which does not meet the basic international accepted standards of administration of justice and due process, and which shocks or surprises the sense of judicial propriety.

422. As will be analysed in the following sections, the Mexican judiciary never corrected this wrong, despite Lion's numerous requests to the judiciary to do so.

B. Lion was also denied the right to appeal the Cancellation Judgement

423. Once the Cancellation Judgement had been rendered, the Debtor approached the *Juez de lo Mercantil* (the same who had rendered the Cancellation Judgment), and alleging spurious arguments requested that the *Juez* give *res iudicata* effect (*causar estado*) to the Cancellation Judgement. The *Juez* did so, and barred any possibility of Lion, once it became aware of the Cancellation Judgement, to lodge an appeal.
424. The decision of the *Juez de lo Mercantil*, granting *res iudicata* status to the Cancellation Judgement, also constitutes a denial of justice.
425. The Tribunal will again apply a fourfold discussion comprising the Party positions (**a.**), the proven facts (**b.**) and the applicable law (**c.**) and an analysis of why the *causar estado* ruling by the *Juez de lo Mercantil* is another component of Mexico's Courts' actions amounting to denial of justice (**d.**).

a. Position of the Parties

426. Claimant says that, as with the Cancellation Proceeding, it was not properly served with the Cancellation Judgment⁴³⁶. On August 8, 2012 the *Juez de lo Mercantil* declared that Claimant had no right to appeal the Cancellation Judgment⁴³⁷ and, upon the Debtors request, issued an order to the Public Registries of Nayarit and Jalisco to cancel the Mortgages⁴³⁸.
427. Respondent does not offer any argumentation purporting to justify the *Juez's* decision.

b. Facts

428. On June 27, 2012 the *Juez de lo Mercantil*, acting solely on the basis of the evidence marshalled by the Debtors, and without any participation of Lion, issued the Cancellation Judgement, declaring the Loans settled and ordering Lion to cancel the Mortgages and return the Notes⁴³⁹.

⁴³⁶ CM, para. 108.

⁴³⁷ CM, para. 107.

⁴³⁸ CM, para. 111.

⁴³⁹ Exh. C-78, pp. 53-54.

429. A few weeks thereafter, on August 8, 2012, and at the request of the Debtors, the *Juez de lo Mercantil* declared that the Cancellation Judgement “*causa estado por ministerio de la ley*”, *i.e.* that it has become *res iudicata*, there being no possibility of submitting a *recurso de apelación*. The reason given by the Judge for his decision precluding any further appeal was that the amount claimed in the procedure was less than MEX 500,000 (approximately USD 25,000)⁴⁴⁰.
430. On August 30, 2012 the *Juez de lo Mercantil* ordered specific performance of the Cancellation Judgement, and instructed the *Registro Público* of Jalisco to cancel the Guadalajara Mortgages⁴⁴¹ and that of Nayarit to do the same with the Nayarit Mortgage⁴⁴². The *Registro Público* of Jalisco did so on September 7, 2012⁴⁴³. The cancellation of the Nayarit Mortgage was recorded on October 19, 2012⁴⁴⁴. Upon these registrations, all three Mortgages became extinct for all legal purposes.

c. The law

431. The Tribunal reiterates that denial of justice is always procedural and the test for denial of justice established by the Tribunal under Section VI.1.1.3D above, which remains applicable for the second analysis of facts: improper and egregious procedural conduct by the local courts (whether intentional or not), which does not meet the basic international accepted standards of administration of justice and due process, and which shocks or surprises the sense of judicial propriety.
432. Since the second denial of justice pondered by the Tribunal concerns the arbitrary closing of an avenue of appeal that was otherwise guaranteed to it by the law, the conduct of the *Juez de lo Mercantil* falls under the same type of wrong as the deeply flawed *emplazamiento*: denying Lion access to justice.
433. The Hague Texts similarly remind that an international wrong occurs when⁴⁴⁵:
- “the foreigner has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies”.
434. In the same vein, the tribunal in *Krederi* observed that one of the serious defects in the adjudicative process may take the form of a violation of

⁴⁴⁰ Exh. C-79 “*Causar estado*”, pursuant to the definition under CLA-216.

⁴⁴¹ Exh. C-84.

⁴⁴² This was done through a request for assistance of the 1st Civil Judge in Bucerías, Nayarit to send a following request for cancellation to the *Registro Público* in Nayarit; Exh. C-86.

⁴⁴³ Exh. C-85.

⁴⁴⁴ Exh. C-88.

⁴⁴⁵ Hague Texts (n 5) art, 9(2) quoted from Paparinskis, *op. cit.*, p. 190.

“[...] the right to be heard and to present evidence⁴⁴⁶”

435. In analysing whether Lion was denied access to justice through the *causar estado* ruling by the *Juez de lo Mercantil*, the same scholarly writing and case law find application as those cited under Section VI.1.1.2A, *supra*.

d. Discussion

436. The decision of the *Juez de lo Mercantil* to grant *estado* to the Cancellation Judgment was deeply flawed.

437. Under Mexican law, commercial cases of the first instance are subject to appeal. The Commercial Code of Mexico states the following:

“Artículo 1336.- Se llama apelación el recurso que se interpone para que el tribunal superior confirme, reforme o revoque las resoluciones del inferior que puedan ser impugnadas por la apelación, en los términos que se precisan en los artículos siguientes.

Artículo 1337.- Pueden apelar de una sentencia:

I. El litigante condenado en el fallo, si creyere haber recibido algún agravio [...]

438. The Commercial Code of Mexico foresees an exception to the general rule, when the value of the dispute is below the threshold of MEX 500,000, adjusted yearly for inflation⁴⁴⁷:

“Artículo 1340. La apelación no procede en juicios mercantiles cuando por su monto se ventilen en los juzgados de paz o de cuantía menor, o cuando el monto sea inferior a [MEX 500,000⁴⁴⁸] por concepto de suerte principal, debiendo actualizarse dicha cantidad en los términos previstos en el artículo 1339.”

439. The *Juez de lo Mercantil* offers no reasoning as to how he reached the conclusion that the value of the Cancellation Proceeding equalled less than MEX 500,000.

440. Instead, he automatically accepted the Debtors’ request, despite two types of evidence before him demonstrating the obviously superior value of the dispute: the Promissory Notes and the Mortgage deeds. The decision is difficult to understand, because the principal amount of the Loans settled and Mortgages terminated amounted to tens of millions of USD.

⁴⁴⁶ *Krederi*, para. 449 (iii).

⁴⁴⁷ Exh. CLA- 336, Zamora I-3, p. 136.

⁴⁴⁸ Art. 1349 additionally stipulates: “Corresponderá a la Secretaría de Economía actualizar cada año por inflación el monto expresado en pesos en el párrafo anterior y publicarlo en el Diario Oficial de la Federación, a más tardar el 30 de diciembre de cada año.”

441. The First Promissory Note was issued to Lion for USD 15 M⁴⁴⁹, the Second Note for USD 12.45 M⁴⁵⁰, and the Third Note for USD 5,355,479⁴⁵¹.
442. The deed for the Nayarit Mortgage, which covered all three Loans, contains explicit reference to all three of the aforementioned amounts⁴⁵²:

EXHIBIT C

Lic. José Visoso del Valle
Lic. Francisco José Visoso del Valle
Notarios números 92 y 145
del Distrito Federal

sucesivo el Contrato de Crédito) hasta por la cantidad de (\$15'000,000.00) QUINCE MILLONES DE DÓLARES, MONEDA DE CURSO LEGAL DE LOS ESTADOS UNIDOS DE AMÉRICA. -----
SEGUNDO.- CONTRATO DE CRÉDITO CON C&C CAPITAL.- Con fecha trece de Junio de dos mil siete, "C&C CAPITAL", SOCIEDAD ANÓNIMA DE CAPITAL VARIABLE, como Acreditada, "INMOBILIARIA BAINS", SOCIEDAD ANÓNIMA DE CAPITAL VARIABLE, como Obligado Solidario y LION MEXICO CONSOLIDATED, L.P., como Acreedor, celebraron un Contrato de Crédito, hasta por la cantidad de (\$12'450,000.00) DOCE MILLONES CUATROCIENTOS CINCUENTA MIL DÓLARES, MONEDA DE CURSO LEGAL LOS ESTADOS UNIDOS DE AMÉRICA. -----
TERCERO.- CONTRATO DE CRÉDITO CON C&C CAPITAL.- Con fecha veintiséis de septiembre de dos mil siete, "C&C CAPITAL", SOCIEDAD ANÓNIMA DE CAPITAL VARIABLE, como Acreditada, "INMOBILIARIA BAINS", SOCIEDAD ANÓNIMA DE CAPITAL VARIABLE, como Obligado Solidario y LION MEXICO CONSOLIDATED, L.P., como Acreedor, celebraron un Contrato de Crédito, hasta por la cantidad de (\$5'355,479.00) CINCO MILLONES TRESCIENTOS CINCUENTA Y CINCO

443. The Guadalajara 1 Mortgage, apart from referring to the value of the Second Loan, directly instructed the *Juez* of the equivalent in pesos, i.e. MEX 131,197,200⁴⁵³.

-----SEGUNDA.- CONTRAPRESTACIÓN.- Se fijó como contraprestación exclusivamente por las partes FIDEICOMISARIA-ENAJENANTE y la FIDEICOMISARIA-ADQUIRENTE, quienes instruyen respectivamente a "Scotiabank" y a "Bansi", que actúan únicamente como instituciones fiduciarias siguiendo instrucciones, la cantidad total de EE.UU.A.\$12,000,000.00 (DOCE MILLONES DE DÓLARES 00/100 MONEDA DE CURSO LEGAL EN LOS ESTADOS UNIDOS DE AMÉRICA), que en su equivalente en pesos, y en virtud de que el Tipo de Cambio para Solventar Obligaciones Denominadas en Moneda Extranjera Pagaderas en la República Mexicana, publicado por el Banco de México el día 13 trece de junio de 2007 dos mil siete, en el Diario Oficial de la Federación, es de \$10.9331 (DIEZ PESOS CON NUEVE MIL TRESCIENTOS TREINTA Y UN DIEZMILESIMOS MONEDA NACIONAL) por un dólar de los Estados Unidos de América, entonces la cantidad total a la contraprestación en Pesos Mexicanos corresponde a \$131.197.200.00 (CIENTO TREINTA Y UN MILLONES CIENTO NOVENTA Y SIETE MIL DOSCIENTOS PESOS, 00/100 MONEDA NACIONAL), misma cantidad que en Pesos Mexicanos se toma solamente para

⁴⁴⁹ Exh. C-9.

⁴⁵⁰ Exh. C-13.

⁴⁵¹ Exh. C-17.

⁴⁵² Exh. C-10, p. 3.

⁴⁵³ Exh. C-14, p. 5.

444. Finally, the Guadalajara 2 Mortgage deed also contains a reference to the value of the Third Loan at USD 5,355,479.

-----VI.- Que de conformidad con el Contrato de Crédito de fecha 26 veintiséis de septiembre de 2007 dos mil siete (según sea modificado ocasionalmente, en lo sucesivo el "Contrato de Crédito"), celebrado entre C&C CAPITAL, SOCIEDAD ANÓNIMA DE CAPITAL VARIABLE como acreditada (la "Acreditada") y LION MEXICO CONSOLIDATED, LP como acreditante (el "Acreditante"), el Acreditante ha acordado, entre otras cosas, otorgar un Préstamo (según dicho término se define en el Contrato de Crédito) a la Acreditada por la cantidad de hasta EE.UU.A.\$5,355,479.00 (CINCO MILLONES TRESCIENTOS CINCUENTA Y CINCO MIL CUATROCIENTOS SETENTA Y NUEVE DÓLARES 00/100) moneda en curso legal en los

445. Even disregarding the value of the Notes (which do not constitute a protected investment), the Judge had before him the Mortgage deeds, which also contain references to the value of the Loans, each of which was made for millions of dollars. The Guadalajara Mortgage 1 deed even contains an equivalent in Mexican pesos, which amounts to MEX 131,197,200 – *circa* two hundred and fifty times as much as the threshold for the possibility to bring appeal.
446. The *Juez de lo Mercantil* was well aware of this information. In its own Cancellation Judgment, the *Juez de lo Mercantil* acknowledged that the Mortgages had been established to secure the Loans for a total value of USD 32.8 M⁴⁵⁴.
447. The *Juez de lo Mercantil* thus blatantly failed to follow the procedure set out in the Commercial Code of Mexico when it granted *res iudicata* effect to the Cancellation Judgment. The decision was highly relevant, because Lion was denied the possibility to appeal the Cancellation Judgment, once again being subjected to the closing of a legal avenue before even realizing the existence of the Cancellation Proceeding. The only remaining alternative within the civil Court system was to launch an *Amparo*.
448. Applying the relevant test, the Tribunal finds that the decision granting *estado* effect to the Cancellation Judgment, patently disregarding the amount in dispute in the Cancellation Proceeding, and closing one of Lion's avenues of accessing justice before local Courts through an otherwise available appeal mechanism, amounts to improper and egregious procedural misconduct by the local courts, which does not meet the basic internationally accepted standards of administration of justice and due process, and which shocks or surprises the sense of judicial propriety.

C. Lion was denied the right to allege and prove the forgery of the Forged Settlement Agreement

449. Lion was also denied justice through the local Courts' consistent denial for Lion to present material and relevant evidence to effectively defend its case.

⁴⁵⁴ Exh. C-78, p. 6, 8 and 10.

450. The Tribunal will re-apply the previous structure for its reasoning, beginning with the Party positions (a.), moving on to the proven facts (b.) and the applicable law (c.) to finish with an analysis of why Mexico's Courts deprived Lion of its right to present evidence and defend its case, thus constituting a denial of justice (d.).

a. Position of the Parties

451. Lion avers that despite its multiple attempts to do so, Mexican courts barred it from presenting material and relevant evidence to defend its case in the local proceedings⁴⁵⁵.

452. Lion argues that Mexico's Courts have denied it the opportunity to prove the forgery. In Claimant's view, lack of service is a breach of such a magnitude under Mexican law that the *Juez de Distrito* should have allowed all evidence and arguments that are necessary to prove the circumstances of the allegedly illegal service⁴⁵⁶ under the *suplicia de la deficiencia de la queja* (supplement of the deficiency of the complaint)⁴⁵⁷, yet the *Juez de Distrito* dismissed any evidence pointing to the falsehood of the *emplazamiento* without granting Lion a chance to cure any formal deficiencies⁴⁵⁸.

453. Additionally, none of Mexico's Courts seized of Lion's proceedings ruled on the authenticity of the Forged Settlement Agreement. The *Juez de Distrito* refused to decide on the issue⁴⁵⁹; the *Tribunal de Queja* also⁴⁶⁰, ruling that the question should be resolved after the False *Amparo* issue was decided in the Remand *Amparo*; and the *Juez de Distrito*⁴⁶¹, understanding that the *Tribunal de Queja* had excluded from the admissible evidence the evidence concerning the falsehood of the Forged Settlement Agreement⁴⁶². Ultimately, Lion's *Amparo* claim was thus frustrated.

454. Mexico responds by arguing that Lion was not denied the right to present evidence and that all prejudice it allegedly suffered is attributable to its own negligent actions.

455. If anyone is to be blamed for the Forged Settlement Agreement never being scrutinized by the judicial system in Mexico, it is Lion, whose negligence was the reason why the Courts could not admit the additional evidence⁴⁶³: Claimant should have included

⁴⁵⁵ CM, paras. 344-350.

⁴⁵⁶ CR, para. 153.

⁴⁵⁷ Zamora IV, para. 122.

⁴⁵⁸ CR, para. 152.

⁴⁵⁹ CR, paras. 130-141.

⁴⁶⁰ CR, paras. 146-147.

⁴⁶¹ This time in the Remand *Amparo*.

⁴⁶² CR, paras. 155-157; CM, para. 379.

⁴⁶³ CRM, para. 95; RR, paras. 102 and 103.

references to the alleged fraud in its original *Amparo* claim, rather than seeking to introduce them through the *ampliación de demanda* ⁴⁶⁴.

456. As Lion failed to include allegations of fraud, the *Juez de Distrito* followed the law when it adjudicated a claim for improper notification (“*falta de emplazamiento*”) rather than a claim for forgery⁴⁶⁵. Therefore, the *Juez de Distrito* was bound to deliver the judgment that it did and Lion cannot claim a denial of justice due to its own negligence in pursuing its claims.
457. In its decision to dismiss the *ampliación de demanda*, the *Secretario del Juzgado de Distrito* acted in accordance with local law, which did not require him to grant Lion an opportunity to cure its procedural defects⁴⁶⁶. It was Lion who failed to demonstrate the necessary link between its claim and the Forged Settlement Agreement⁴⁶⁷.
458. When Claimant disagreed with the *Juez de Distrito*’s decision, it exercised its right to challenge it through a review proceeding, but lost⁴⁶⁸ due to one more failure to follow procedural law: an *ampliación de demanda* must be signed either by the aggrieved party or by its legal representative⁴⁶⁹. Lion does not appear to contest the fact that it filed its *ampliación de demanda* improperly⁴⁷⁰. Therefore, it was not denied the right to present evidence.
459. Additionally, the *Juez de Distrito* in the Remand *Amparo* did not dismiss all of Lion’s evidence, but rather explained that some of it was already on the Court’s record⁴⁷¹; in any event, the *Juez de Distrito* was not empowered to admit new evidence in respect of the authenticity of the Forged Settlement Agreement in the Remand *Amparo* and acted in complete accordance with applicable procedural rules⁴⁷².
460. According to Mexico, Lion cannot claim that the decisions to dismiss the additional evidence were the result of an idiosyncratic or arbitrary decision⁴⁷³. By failing to follow the applicable procedural rules, Lion is responsible for barring itself from presenting evidence to defend its case. Therefore, the claim that the Mexican judiciary failed to grant Claimant the right to defend itself and to present evidence should be rejected.

⁴⁶⁴ RR, para. 245, citing Ovalle II, para. 108.

⁴⁶⁵ RR, para. 94-96.

⁴⁶⁶ RR, para. paras. 99-100, citing Ovalle II, para. 91.

⁴⁶⁷ RR, para. 102.

⁴⁶⁸ RR, para. 105.

⁴⁶⁹ RR, paras. 246-247.

⁴⁷⁰ RCM, para. 95.

⁴⁷¹ RR, para. 268, with regard to the voucher purporting to prove that Mr. Arechederra could not have signed the False Request for Copies and the *Juez de Distrito*’s decision on the false character of the False Request for Copies, citing Exh. C-123.

⁴⁷² RR, paras. 259-260.

⁴⁷³ CRM, para. 96.

b. Facts

461. In the course of the local proceedings, Lion tried on multiple occasions to bring relevant evidence that could easily prove the illegality of service and justify the annulment of the Cancellation Judgment. However, the municipal Courts repeatedly denied Lion the possibility to do so.

Failed *ampliación de demanda*

462. In the Cancellation Judgment of June 27, 2012, the *Juez de lo Mercantil*, without Lion's participation, declared the Loans settled and ordered Lion to cancel the Mortgages and return the Notes⁴⁷⁴. In mid-December 2012, Lion learned about the existence, but not the details, of the Cancellation Judgment⁴⁷⁵.

463. Within the 15-day deadline to file an *Amparo*, the only available effective remedy, Lion filed its *Amparo* Lawsuit on December 19, 2012⁴⁷⁶, to challenge the cancellation of the Mortgages. Lion did not include any reference to the Forged Settlement Agreement, because it did not know of its existence: the Forged Agreement was only made known to Lion when the *Juez de lo Mercantil* filed an *informe* (report) in January 2013⁴⁷⁷.

464. Thus, Lion's initial *Amparo* claim was for improper *emplazamiento*, a broad category encompassing different causes, rather than the precise allegation of forgery.

465. Having obtained access to the Forged Settlement Agreement and the file of the Cancellation Proceeding, on January 28, 2013⁴⁷⁸, Lion filed an *ampliación de la demanda*, alleging the illegality of the service performed by the *actuuario* on the basis of the newly acquired information on the Forged Settlement Agreement⁴⁷⁹:

“La falta de emplazamiento legal a la hoy quejosa [i.e. Lion] [...] debido a que el supuesto emplazamiento [...] se hizo en un domicilio que no es de la hoy quejosa [...]. Amén de que el supuesto domicilio donde de practicó dicho emplazamiento, fue señalado en un documento que no fue suscrito por mi mandante ni por persona alguna con facultades, ya que la firma que se advierte en el mismo es completamente falsa por no proceder del puño y letra a quien se atribuye.” [Emphasis added]

466. Lion's forgery claim was accompanied by, *inter alia*⁴⁸⁰:

⁴⁷⁴ Exh. C-78, pp. 53-54.

⁴⁷⁵ Payne I, para. 13; HT, pp. 486-487.

⁴⁷⁶ CR, para. 131.

⁴⁷⁷ CR, paras. 138-139; HT, p. 140; H1, p. 6, below; Exh. C-97, p. 4.

⁴⁷⁸ CR, para. 138; Exh. C-97.

⁴⁷⁹ Exh. C-97, p. 3.

⁴⁸⁰ Exh. C-97; Exh. C-55; Exh. C-102.

- a graphological expert report to prove that the signature in the Forged Agreement did not belong to Mr. Hendricks, and
- emails between a broker retained by Lion and Sr. Cárdenas to demonstrate that, after the Forged Agreement was supposedly signed in November 2011, Lion and Sr. Cárdenas were still holding discussions on the terms of the repayment of the Loans.

467. This procedural step of extending the initial claim to include the (highly relevant) inauthenticity of the Forged Agreement, would become a stumbling block hindering the progression of the *Amparo* Proceeding and leading to its eventual demise.

468. The first step occurred on January 30, 2013: in a *proveído* the *Secretario del Juzgado de Distrito* in Jalisco dismissed the *ampliación* of the *Amparo* submitted by Lion, arguing that

*“dichos actos ya fueron precisados desde el escrito inicial de demanda”*⁴⁸¹

- a plainly wrong statement. The *Secretario* further admitted some (rather irrelevant) evidence attached to Lion’s forgery claim, but postponed the decision on the admissibility of the expert and witness evidence⁴⁸².

469. Frustrated by this postponement, Lion brought, on February 6, 2013, an *“incidente de falsedad de documento”* before the *Juez de Distrito*, claiming again that the Forged Agreement was the result of fraud⁴⁸³.

470. On April 10, 2013, the *Juez de Distrito* stated that he would decide in due course on the admissibility of the proposed graphological expertise on the authenticity of the Forged Settlement Agreement⁴⁸⁴. And on April 19, 2013 the *Juez de Distrito* once again decided to postpone his decision on the admissibility of the evidence, because of a *queja* proceeding which was subsequently initiated and which will be dealt with in the next section⁴⁸⁵.

Dismissal by the *Tribunal de Queja*

471. While the decision on the admission of evidence was pending before the *Juez de Distrito*, one of the Debtors, C&C Ingeniería, filed as a *tercero perjudicado* two

⁴⁸¹ Exh. C-103, p. 4.

⁴⁸² Exh. C-103, p. 5, see below.

⁴⁸³ Exh. C-107.

⁴⁸⁴ Exh. C-106, p. 10.

⁴⁸⁵ Exh. C-180, p. 2.

*quejas*⁴⁸⁶ before the *Tribunal de Queja* against the Dismissal *Proveído* issued by the Secretary of the Court⁴⁸⁷ and the April 10, 2013 decision of the *Juez de Distrito*. C&C Ingeniería argued that Lion's *ampliación de demanda* was inadmissible, because it had not been properly signed on Lion's behalf.

472. Lion for its part also submitted a *queja* against the same decision, because it precluded Lion from claiming that the Forged Settlement Agreement was a forgery and the origin of the improper service⁴⁸⁸.
473. The *Tribunal de Queja* dismissed Lion's *queja* and decided in favour of C&C Ingeniería: the appeal court ruled that the *ampliación de la demanda*, which Lion had filed, was inadmissible, because it had not been properly signed on behalf of Lion: it should have been signed by Lion's legal representative and not by the attorney empowered by Lion to act on its behalf in the *Amparo* proceedings⁴⁸⁹.
474. Lion was not given an opportunity to cure the alleged procedural defect, although the *ampliación de demanda* aimed at proving that Lion, an alien company operating in Mexico, had been the victim of an elaborate fraud to avoid its proper *emplazamiento*. This stands in stark contrast with the treatment granted to the complainants when the False *Amparo* was submitted without the requisite copies. In that instance, the *Juez* accorded the complainants the chance to cure the formalistic deficiency.

Failure of *incidente de falsedad de documento*

475. Once the *queja* had been resolved, the *Juez de Distrito* resumed his work, and in accordance with the decision of the *Tribunal de Queja* resolved that all evidence linked to the forgery claim should be dismissed (both the evidence already admitted and the evidence still pending admission)⁴⁹⁰.
476. Thereafter the *Juez de Distrito* rendered a specific ruling on Lion's separate motion ("*incidente de falsedad de documento*"). The judge dismissed it on the grounds that the allegedly false document (the Forged Settlement Agreement) was not related to the subject-matter of the *Amparo* Proceeding⁴⁹¹.

⁴⁸⁶ The orders and judgments issued in *Amparo* proceedings are themselves subject to three different challenges: *revisión*, *queja* and *reclamación*. In an *Amparo indirecto*, such as the one filed by Lion, the most common challenges are *queja* against different procedural orders (specifically those that cause irreparable harm) and *revisión* against the *Amparo* court's final judgment, both of which are decided by a *Tribunal Colegiado de Circuito* (Federal Circuit Court), see Zamora I, para. 87.

⁴⁸⁷ Exh. C-181.

⁴⁸⁸ Exh. C-182.

⁴⁸⁹ RCM, para. 92, citing Exh. C-105, p. 3-4 and Exh. R-19, see *infra*.

⁴⁹⁰ Exh. C-105, pp. 8-9.

⁴⁹¹ Exh. C-108.

477. In so deciding, the *Juez de Distrito* ignored the principle *fraus omnia corrumpit*: an *emplazamiento* obtained by fraud, involving the forgery of the document which purports to provide the address for service of process and the name of the process agent, is evidently unlawful, and can never constitute a proper *emplazamiento*.
478. Be that as it may, from that date on, the scope of the *Amparo* did not include any inquiry into the issue whether the Settlement Agreement had been forged; it was assumed that the Settlement Agreement was valid and binding, having been properly executed by Lion. The scope of the *Amparo* was reduced to the question whether the *emplazamiento* had or not been properly executed in accordance with Mexican law. And – congruently with this reduced scope of investigation – all evidence in the file seeking to prove the forgery of the Settlement Agreement was expurgated.

Failure to address forgery in *Amparo* Judgment

479. On December 4, 2013, the *Juez de Distrito* delivered the *Amparo* Judgment denying Lion protection against the Cancellation Judgment⁴⁹².

“[...] R E S U E L V E: ÚNICO. LA JUSTICIA DE LA UNIÓN NO AMPARA NI PROTEGE A LION MEXICO CONSOLIDATED, L.P., contra los actos que reclama del JUEZ Y DEL SECRETARIO EJECUTOR, AMBOS ADSCRITOS AL JUZGADO NOVENO DE LO MERCANTIL DEL PRIMER PARTIDO JUDICIAL DEL ESTADO DE JALISCO. [...]” [Capitals in the original]

480. The *Amparo Judgement* is a 67-page document, which in its “*Resultando*” summarizes the procedure, and which then reasons the decision in seven “*Considerandos*”.
481. As a preliminary question, the *Juez de Distrito* analyzes Lion’s allegation that on July 6, 2013 Sr. Arechederra’s signature had been forged in the false request for copy before the *Juzgado de lo Mercantil* – see section 5.1 *supra*. (The issue was relevant, because if it had been true that on July 6, 2013 Lion had been aware of the Cancellation Judgement, the *Amparo* would have been inadmissible due to the statute of limitations).
482. The *Amparo Judgement*, after weighing the expert and other evidence marshalled by the parties, concludes that Sr. Arechederra’s signature indeed had been forged, that the request for copy had indeed been false, and that consequently Lion’s request for *Amparo* was not time barred⁴⁹³.
483. The *Amparo Judgement* also acknowledges that Sr. Arechederra and Lion had filed a criminal action against Sr. Cárdenas, accusing him of having forged his signature on various documents, and that on 26 September 2013 the criminal judge had ordered the

⁴⁹² Exh. C-115, pp. 66-67.

⁴⁹³ Exh. C-115, p. 39.

imprisonment of Sr. Cárdenas for this crime. But the *Amparo* Judge accorded little weight to this piece of evidence⁴⁹⁴:

“[El auto de formal prisión] únicamente constituye un indicio que unido a otras pruebas, puede coadyuvar a la formación de prueba plena con las que se acrediten, en un momento dado, hechos diversos a los aquí demostrados”

484. Notwithstanding the finding that at least on one occasion Sr. Arechederra’s signature had been forged, and that Sr. Cárdenas was in prison for alleged forgeries of documents, the *Amparo* judgement does not even discuss Lion’s argument that the Settlement Agreement was also forged: since the *ampliación de demanda* had been dismissed (because it had been signed by Lion’s attorney, but not by a legal representative), any issue relating to the falsehood of the Settlement Agreement was off limits in the *Amparo* procedure.
485. The *Amparo* Judgement consequently assumes that the Settlement Agreement was validly executed on Lion’s behalf. There being a valid Settlement Agreement with a designation of process agent and an address for service of process, the *Juez de Distrito* dismisses Lion’s argument that the *emplazamiento* should have been made in Dallas, Texas, USA, and in accordance with the applicable international treaties⁴⁹⁵.
486. Instead, the *Juez de Distrito* discusses at length a minor incident in the way the fraudulent *emplazamiento* had taken place: in accordance with the Settlement Agreement the notification should have been made at Calle Tomás V. Gómez 95, *despacho 7*. But in reality, the *actuário* went to the same address, but to a different office: *despacho 5*.
487. The *Juez de Distrito* finds that this “minor defect” does not invalidate the *emplazamiento*, because the *actuário* was able to locate Lic. López Medina, who, in accordance with the Settlement Agreement, was the person designated by Lion as process agent⁴⁹⁶. The Judge’s very words are the following⁴⁹⁷:

“De ahí que, aun y cuando aparece que el emplazamiento a juicio de la ahora quejosa [Lion], se practicó en un domicilio diverso al pactado [...], ello de ninguna manera acarrea la consecuencia que [Lion] no estuviera enterada [del juicio], en razón que la diligencia de llamamiento a juicio se entendió personalmente con uno de sus autorizados para recibir cualquier tipo de comunicación [...]”. [Emphasis added]

⁴⁹⁴ Exh. C-115, p. 61.

⁴⁹⁵ Exh. C-155, p. 47.

⁴⁹⁶ Exh. C-155, p. 53

⁴⁹⁷ Exh. C-155, p. 54

488. The argument is straightforward: since the Settlement Agreement must be deemed valid and binding and Lic. López Medina is Lion's process agent, the *emplazamiento* made to Lic. López Medina, even if at the wrong address, is also valid and binding.

Failure to address forgery in *recurso de revisión*

489. Lion was not satisfied with the *Amparo* Judgement. On December 19, 2013 Lion filed the *recurso de revisión*, seeking its revocation, the granting of protection to Lion's constitutional rights and the finding that the Cancellation Lawsuit and related acts were null and void⁴⁹⁸.
490. Among other reasons, Lion explicitly challenged the *Amparo* Judgment, arguing that the *Juez de Distrito* had disregarded Lion's claim that the Settlement Agreement had been forged, with the erroneous argument that the falsehood was unrelated to the dispute and that the defendants in the *Amparo* had not participated in the alleged forgery. Lion explained that the falsehood of the Settlement Agreement was indeed relevant for the *Amparo*, because Lion's *emplazamiento* had been delivered to Lic. López Medina, Lion's purported process agent designated in the Settlement Agreement. If the Settlement Agreement was a forgery, the designation of Lic. López Medina was false, and the *emplazamiento* had not been properly made⁴⁹⁹.

Summary of Lion's efforts to introduce evidence

491. As outlined above, Lion attempted on multiple occasions to present evidence regarding the fraudulent character of the Forged Settlement Agreement and was denied at every attempt.
492. Lion filed a total of four petitions to submit evidence on the forgery and was denied the opportunity every single time. It did so in all possible instances:
- On January 28, 2013 Lion filed its *ampliación de la demanda*, explaining that the service made by the *Juez de lo Mercantil* was based on a forged document and should thus be deemed inexistent⁵⁰⁰;
 - On February 6, 2013, Lion brought an "*incidente de falsedad de documento*" before the *Juez de Distrito*, claiming again that the Forged Agreement was the result of fraud⁵⁰¹;

⁴⁹⁸ Exh. C-116, pp. 46-57.

⁴⁹⁹ Exh. C-116, pp. 16-17

⁵⁰⁰ Exh. C-97, p. 3.

⁵⁰¹ Exh. C-107.

- Separately, on February 8, 2013, Lion also submitted a *queja* against Dismissal *Proveído* as precluding it from claiming that the Forged Settlement Agreement was a forgery⁵⁰², and
- On December 19, 2013 as part of its *recurso de revisión*, Lion once again tried to claim the forgery of the *Términos* document⁵⁰³. However, it was barred from doing so by the express order of the *Tribunal de Queja* which forbade the *Juez de Distrito* to look into the issue in the Remand Proceeding.

c. The law

493. The Tribunal has already established that the third type of denial of justice occurs when municipal Courts prevent an alien from producing evidence to support its case⁵⁰⁴.

494. In *Cotesworth & Powell* the tribunal confirmed that

“[...] refusing to hear the party interested, or to allow him [an] opportunity to produce proofs, amounts to the same thing as an absolute denial of justice”.
[Emphasis added]

495. The right to present relevant and material evidence in the context of denial of justice has also been recognized by academia⁵⁰⁵:

“[When discussing procedural guarantees whose violation amounts to denial of justice] One strand of procedural improprieties related to equality of arms, in particular regarding the right of aliens to be notified about procedural developments, the right to be heard, the right to counsel, the right to call and confront witnesses, the right to produce evidence, and the right to public proceedings in criminal cases. [...]

[Equality of arms] may also apply regarding matters such as attendance of hearings, neutrality of the expert, the right to call witnesses, submit evidence, have the evidence considered by the court, comment on observations, and be informed about the reasons of challenged decisions.”

d. Discussion

496. The *Juez de Distrito* saw fit to decide on the correctness of the *emplazamiento* without first addressing whether the Settlement Agreement was in fact a forgery, which led to

⁵⁰² Exh. C-182.

⁵⁰³ Exh. C-116, pp. 16-17

⁵⁰⁴ See section I.2 B supra.

⁵⁰⁵ Paparinkis, *op. cit.*, pp. 193-194, 203, citations omitted.

rulings that are, in the Tribunal’s view, contradictory⁵⁰⁶. On July 5, 2013 the *Juez de Distrito* decided that the issue of the forgery of the Forged Settlement Agreement was not related to the subject-matter of the *Amparo* Proceeding⁵⁰⁷ and on December 4, 2013 the same *Juez de Distrito* decided, based on the Forged Settlement Agreement, that the *emplazamiento* was performed correctly. The Tribunal finds it logically apparent that the correctness of the *emplazamiento* hinges upon the truthfulness of the Settlement Agreement.

497. In *Cotesworth & Powell* the international tribunal found multiple denials of justice to claimants, including an instance of contradictory rulings by the same tribunal:

“That between the sentence of the superior tribunal of March 8, 1861, and that of April 2, 1862, by the same tribunal, there is a direct and irreconcilable contradiction. One recognized the authority of the claimant’s attorney to bring action; the other expressly denied it⁵⁰⁸”.

498. The Tribunal also finds it surprising that the *Juez de Distrito*, while explicitly acknowledging that on September 26, 2013 a criminal judge had ordered the imprisonment of Sr. Cárdenas precisely for the alleged forgery, did not find sufficient reason to scrutinize the veracity of the Forged Settlement Agreement⁵⁰⁹.

499. The reasoning behind the refusals to examine the Forged Settlement Agreement was always purely procedural and concerned minor mistakes by Lion which were curable – but Lion was never given the opportunity to correct them. The continuing rejections of Lion’s motions to present evidence on the false character of the Forged Settlement Agreement were based on dubious formalistic nuances of local procedural law.

500. Lion was blamed for not having alleged forgery in its initial *Amparo* claim, since Mexico avers that Lion was aware, as of December 17, 2012, that “[a] lawsuit was simulated, signatures were forged, *et cetera*⁵¹⁰”. But it has been proven that Lion did not have access to the relevant files, which included a copy of the Forged Settlement Agreement, until mid-January 2013⁵¹¹ and was pressured by the 15-day time limit to bring an *Amparo* from the date of taking notice of the Cancellation Judgment, which occurred on December 17, 2012⁵¹². At the moment of filing of the *Amparo*, Lion simply

⁵⁰⁶ The two rulings of the *Juez de Distrito* contradict each other: on July 5, 2013 the *Juez de Distrito* decided that there was: No need to deal with forgery of the Alleged Hendricks Document and on December 4, 2013: Proper service on the basis of the Alleged Hendricks Document (denying LMC’s *Amparo* Claim).

⁵⁰⁷ Exh. C-108.

⁵⁰⁸ *Cotesworth & Powell*, p. 180, para. 2; p. 188, para. 5.

⁵⁰⁹ Exh. C-115, p. 61.

⁵¹⁰ RPHB, para. 180, citing Mr. Hendricks, HT, p. 485.

⁵¹¹ CPHB, para. 39, citing Exh. C-96 and Exh. C-97, pp. 7, 19.

⁵¹² Payne I, para. 13; HT, pp. 486-487.

knew that a Cancellation Judgment had been rendered in a proceeding of which it was not aware. The Tribunal finds no error on Claimant's side.

501. The Tribunal is further persuaded by Lion's supported arguments that any formalistic errors in the filing of submissions were curable and that the *Juez de Distrito* should have provided Lion the opportunity to amend them⁵¹³. The failure to grant Lion a period to cure the formal deficiency stands in stark contrast not only to basic principles of due process under Mexican law⁵¹⁴, but also the actions of the *Juez del Primer Distrito*, who in the case of the False *Amparo* allowed a three-day period for the plaintiff to provide the requires six additional copies of the False *Amparo*⁵¹⁵.
502. Lion further avers that lack of service amounts to a fundamental breach under Mexican law and that the Mexican Supreme Court has established that, in such cases, the *amparo* court should offer protection to the aggrieved party, even if its arguments were insufficient or incomplete, through the institution of the so-called *suplencia de la deficiencia de la queja* (supplement of the deficiency of the complaint)⁵¹⁶. According to Lion's expert, the *suplencia de la deficiencia de la queja* gives the *Juez de amparo* the power to *ex officio* complement the *amparo* claim with any evidence that may be relevant to the case in furtherance of an aggrieved party's fundamental rights⁵¹⁷. Thus, the *Juez de Distrito* could have not only admitted the evidence proposed by Lion but also requested any other relevant evidence, given the gravity of the claim of lack of service. Respondent does not directly oppose Claimant's analysis of the *suplencia de la deficiencia de la queja*.

Case law

503. The Tribunal observes the similarity of the facts with those in *Idler*, where the respondent State invoked a seemingly valid legal basis (an ancient remedy inherited from a codification by Spanish Kings) to circumvent granting the claimant the execution of a judgment he should have been accorded under the law. Mexico was using a similar formalistic excuse – procedural requirements that were very minor in their nature and which did not apply in other circumstances – to bar Lion from exercising its right to defense before a court.
504. The Tribunal also takes note of the similarities of the situation affecting Lion with that of the French individual in the *Fabiani* arbitration, where a denial of justice was found because Mr. Fabiani was unable to obtain a decision granting *exequatur* by Venezuelan courts to a judgment in his favour against local defendants⁵¹⁸. Similarly, Lion was

⁵¹³ CR, paras. 482-495.

⁵¹⁴ CR, paras. 485-490.

⁵¹⁵ Exh. C-65.

⁵¹⁶ Zamora IV, para. 122.

⁵¹⁷ Zamora IV, para. 128.

⁵¹⁸ *Fabiani*, p. 4900.

unable to obtain a decision on the false character of the Forged Settlement Agreement from the local Courts, despite multiple diligent attempts to obtain such a ruling.

505. Having been refused the opportunity to produce evidence of the forgery, Lion had no means to prove that the *emplazamiento* was wrong. Lion was disarmed and unable to properly exercise its right to defense. Like in *Ballistini*, where the French-Venezuelan Commission made a finding of denial of justice

“[b]ecause the local authorities deprived Ballistini of the legal means of instituting before the competent tribunals the actions which the laws would authorize him”⁵¹⁹,

Lion was deprived by the local authorities of the legal means in the form of presenting relevant and material evidence, to defend its case.

D. Conclusion

506. In conclusion, coming back to Paulsson’s definition that “[d]enial of justice arises when proceedings are so faulty as to exclude all reasonable expectation of a fair decision [...]”, the Tribunal finds that Lion, after three years of fighting within the municipal judicial system, could not expect a fair decision within a reasonable timeframe.
507. Similarly, using the *Mondev* test proposed by Respondent, the Tribunal is convinced that Claimant suffered “a wilful disregard of due process of law, ... which shocks, or at least surprises, a sense of judicial propriety”: first, when Lion was not properly notified of the Cancellation Proceeding and was judged *in absentia*, and later when it was barred from effectively making its case that it had been the victim of fraud and from presenting relevant and material evidence, necessary to support its argument.
508. The Mexican Courts had four opportunities to address the question of the forgery of the Settlement Agreement. They did not do so for reasons which were unclear, contradictory within the same process, or purely formalistic. The Tribunal finds that the decisions of the Mexican Courts repeatedly denying Lion the right to present relevant and material evidence to defend its case, amount to an improper and egregious procedural conduct, which does not meet the basic internationally accepted standard of administration of justice and due process, and which shocks or surprises the sense of judicial propriety.
509. Having established that Mexico’s Courts denied Lion justice by restricting its access to justice and its right to defend itself and present evidence to support its case, the Tribunal does not need to look into whether Lion also suffered undue delay.

⁵¹⁹ *Ballistini*, p. 20, para. 3.

VI.2. EXHAUSTION OF LOCAL REMEDIES

510. Mexico presents a major counterargument to refute Lion’s claim for denial of justice: that Claimant decided to withdraw the *Amparo* claim, and that as a consequence of such withdrawal, it failed to exhaust local remedies – a requirement for a finding of denial of justice⁵²⁰.
511. Claimant does not deny that it withdrew the *Amparo* Proceeding, but argues that Lion pursued all adequate and effective remedies available to it, within the limits of reasonableness⁵²¹.
512. The Tribunal will first summarize the Parties’ positions (1.), then the relevant facts (2.), then the law regarding exhaustion of legal remedies, including its exceptions (3.), and finally discuss and dismiss Mexico’s counterargument (4.).

1. POSITION OF THE PARTIES

A. Claimant’s position

513. Claimant acknowledges that under international law a finding of denial of justice is premised on the claimant having exhausted local remedies, i.e. judicial measures which could result in the Mortgages being reinstated⁵²². Claimant adds that the exhaustion rule has to be applied with some degree of flexibility and without excessive formalism⁵²³.
514. Claimant explains that it pursued the *Amparo* proceedings, the only avenue which was open to it: it was forced to choose between either filing an *Amparo* claim or a *nullidad de juicio concluido* [also “**nullity proceeding**”] action. According to Lion, it was impossible for it to bring both an *Amparo* claim and a nullity proceeding in the same matter⁵²⁴. It further argues that the criminal proceedings are not adequate to deal with contractual issues, and pursuing the case further in criminal courts would not have led to binding findings for civil courts⁵²⁵.
515. Claimant adds that it filed and pursued the *Amparo Proceedings*, until it became obvious that continuation was futile, whereupon it decided to withdraw such Proceedings.

⁵²⁰ RR, para 168.

⁵²¹ CR, paras. 506-520.

⁵²² CM, p. 400.

⁵²³ CM, para 401.

⁵²⁴ CPHB, para. 94.

⁵²⁵ CPHB, para. 227.

516. Claimant's arguments are the following:

a. Undue delay

517. Claimant says that, as codified by the International Law Commission, local remedies do not need to be exhausted when there is undue delay in the remedial process, attributable to the State. And in this case, the *Amparo* Proceedings were excessively and unreasonably long and continuation of the *Amparo* Proceeding would have extended that unreasonable delay at least by 2.5 years⁵²⁶.

b. Mexico's lack of diligence

518. Claimant avers that the withdrawal of the *Amparo* Proceedings became necessary due to Mexico's own lack of diligence. The *Amparo* Courts could and should have raised the existence of the False *Amparo* much earlier, in early 2013. If the *Amparo* Courts would have been diligent, Lion would have had the opportunity to exhaust the *Amparo* Proceedings within the three-year time limit provided for by NAFTA Article 1116⁵²⁷.

519. Lion did everything that was reasonable, but, despite its best efforts, Mexican Courts did not provide effective means to reverse the cancellation of the Mortgages within a reasonable period. Mexico cannot rely on the ineffectiveness of its own system to prevent a finding of denial of justice⁵²⁸.

c. Continuation of the *Amparo* Proceeding was not necessary

520. As a second argument, Claimant says it was not required to continue with the *Amparo* Proceedings, because such proceedings did not meet the test (established in the *Loewen* decision) of being adequate, effective and reasonably available:

521. First, as regards adequacy, Claimant says that the *Amparo* Proceedings were the only adequate proceedings available to undo the cancellation of the Mortgages⁵²⁹.

522. Second, as regards the effectiveness criterion, Claimant adds that the most likely outcome of the Remand *Amparo* would have been for the *Juez de Distrito* to decide that the *Amparo* was inadmissible⁵³⁰. But in the most optimistic scenario, assuming that the *Juez de Distrito* had decided that the False *Amparo* indeed was a fraudulent machination, Lion would then have to re-submit its initial appeal to the *Tribunal de Queja*, requesting the opportunity to prove that the Forged Settlement Agreement had been falsified. However, the same *Tribunal de Queja* had already ruled that no hearing

⁵²⁶ CPHB, 224.

⁵²⁷ CM, para 417.

⁵²⁸ CM, para 423.

⁵²⁹ CPHB, para 227.

⁵³⁰ CPHB, para 229.

would be allowed; there was no reason to assume that the *Tribunal de Queja* would change its position, and there was no appeal to the Supreme Court⁵³¹.

523. Claimant adds a second argument: even if the *Juez de Distrito* and then the *Tribunal de Queja* had decided in its favour, the result would be a finding that Lion had not been properly served in the Cancellation Lawsuit – but not the reestablishment of the Mortgages. The Cancellation Lawsuit would be reopened before the *Juez de lo Mercantil*, and a new series of proceedings, taking between 18 and 36 months, would have to be started, to annul the Cancellation Judgement and reinstall the Mortgages⁵³²
524. Third, concerning reasonableness, Claimant avers that even under the most favourable scenario, the exhaustion of the *Amparo* Proceedings would have lasted an additional 2.5 to 3.5 years as of December 2015, resulting in a delay of six years for a simple and straightforward *Amparo*⁵³³.
525. Claimant adds that pursuing further *Amparo* Proceedings would have required Lion to definitively waive its judicial expropriation claim before NAFTA tribunals, due to the three-year time limits established in Art. 1116 and 1117 NAFTA – an unreasonable requirement⁵³⁴.

B. Respondent's position

526. As a starting point, Mexico asserts that under international law, exhaustion of local remedies is a requirement for a finding of denial of justice, as acknowledged by publicists, State practice, NAFTA jurisprudence and non-NAFTA jurisprudence⁵³⁵.

The unavailability exception

527. Mexico acknowledges that exhaustion of local remedies knows one exception, which is however subject to a high test: unavailability. An aggrieved alien does not have to exhaust local remedies that are not available. Respondent says that the NAFTA jurisprudence focuses on availability, not on futility. Provided that remedies are available, Claimant is required to exhaust them⁵³⁶. Mexico says that the threshold test of unavailability was set in *Loewen* and *Apotex*⁵³⁷.
528. Turning to the facts, Mexico says Claimant did not exhaust all proceedings which in accordance with Mexican law were available:

⁵³¹ CPHB, para 227.

⁵³² CM, para 410.

⁵³³ CPHB, para 227

⁵³⁴ CR, paras. 521-537; CPHB, para. 227.

⁵³⁵ RCM, paras. 168-204.

⁵³⁶ RCM, para. 208; RR, paras. 281-291.

⁵³⁷ CR, para. 281.

529. First, Respondent says that Lion failed to exhaust other avenues under Mexican law to avoiding the cancellation of the Mortgages, like a *mulidad de juicio concluido* action⁵³⁸ or the criminal proceedings already initiated by Lion⁵³⁹.
530. Second, Mexico disagrees with Claimant’s argument that continuing with the Amparo Proceedings would have been ineffective. In Respondent’s view, Claimant essentially is arguing that the *Tribunal de Queja* and the Supreme Court were unlikely to render any decision in its favour. However, as the *Apotex* tribunal announced, what matters is not the likelihood that the higher judicial authority would have granted the relief the Claimant sought, but simply the availability of further remedies. In this case a multitude of remedies existed⁵⁴⁰. Respondent also denies that the Mexican Courts incurred in unreasonable delay, or that the expected duration of the remedy procedures would be unreasonable⁵⁴¹.
531. Third, as regards Claimant’s argument that it was obliged to withdraw the Amparo Proceedings, because the three-year limit established in Art. 1116 and 1117 NAFTA was approaching, Respondent says that the time limitations imposed by these provisions begins on the date on which there is “knowledge of the alleged breach”. Since local remedies must be exhausted before it can be determined if justice has been denied, the limitation period had not started to run at the time the *Amparo* Proceedings were abandoned. Thus, the entire rationale for the Claimant abandoning the proceeding was unfounded⁵⁴².
532. Finally, Mexico submits that the Claimant was not required to withdraw from the *Amparo* Proceedings to comply with the waiver requirement established in NAFTA Art. 1121, because the *Amparo* Proceedings fall within the exception of NAFTA Art. 1121(1)(b) (“except for proceedings for injunctive, declaratory or other extraordinary relief, not involving payment of damages”)⁵⁴³.

2. FACTS

533. On December 18, 2012 Lion filed an *Amparo indirecto* lawsuit⁵⁴⁴ before the *Juez de Distrito* in Jalisco. The *Amparo* was based on a breach of Art. 14 and 16 of *Constitución Política* of Mexico, and the *actos reclamados* included the lack of proper *emplazamiento* of Lion in the Cancellation Lawsuit.

⁵³⁸ HT, pp. 654-657; RR, paras. 126, 136; RCM, para. 79, citing Ovalle I, paras. 94-95.

⁵³⁹ RPHB, paras. 116, 118, citing HT, p. 773.

⁵⁴⁰ RR, para. 310

⁵⁴¹ RR, para. 313, 319.

⁵⁴² RR, para. 337.

⁵⁴³ RR, para 350.

⁵⁴⁴ Exh. C-91.

534. The development of the *Amparo* Proceedings has been described in section IV.7 above. Suffice it to say here that more than two years after the initial filing of the *Amparo*, on April 17, 2015, the *Tribunal de Queja* decided *sua sponte* to remand the case back to the *Juez de Distrito*, with the limited purpose to determine whether Lion's *Amparo* proceeding was inadmissible, a different *Amparo* relating to the same facts having been filed at an earlier date and thereafter abandoned.
535. When the *Tribunal de Queja* raised the issue of the False *Amparo* it came as a total surprise:
- For the last 16 months of *Amparo* proceeding no party and no prior court had ever referred to this admissibility issue⁵⁴⁵;
 - The same *Tribunal de Queja* had also failed to raise the issue when it first intervened in these proceedings, to adjudicate an appeal against interlocutory decisions of the *Juez de Distrito*;
 - The *Tribunal de Queja* decided *sua sponte*, and over a year into the *recurso de revisión*, to raise the existence of the False *Amparo*; the only reason given by the *Tribunal de Queja* to justify its decision was that an unidentified administrative official had informed the Court of the existence of the previous *Amparo*⁵⁴⁶.
536. As regards the remand procedure, the *Tribunal de Queja* ordered that it should be restricted to adjudicating the admissibility issue, explicitly prohibiting the parties from presenting new evidence regarding the falsehood of the Settlement Agreement⁵⁴⁷ and instructing the *Juez de Distrito* not to analyze Lion's allegation that such Agreement had been forged⁵⁴⁸.
537. After three years of judicial battling, Lion still had no decision confirming the falsehood of the Forged Settlement Agreement, and after the remand decision it was fighting to prove that it should not be deprived of the *Amparo* recourse – the only way to overturn the wrongful cancellation of the Mortgages.

The Remand *Amparo*

538. The fact that the Remand *Amparo* was being tried by the same judge who had already dismissed evidence on the forgery, did not discourage Lion from bringing once more a petition to admit evidence on the fraudulent nature of the Forged Settlement⁵⁴⁹. And,

⁵⁴⁵ Exh. C-119.

⁵⁴⁶ Exh. C-119, p. 21.

⁵⁴⁷ Exh. C-119, p. 18

⁵⁴⁸ Exh. C-119, pp. 17-18.

⁵⁴⁹ Exh. C-121.

since Lion had only acquired knowledge of the False *Amparo*'s existence at this point, it also provided evidence pointing to the inauthenticity of the False *Amparo*⁵⁵⁰.

539. On September 23, 2015 the *Juez de Distrito* only accepted the graphology expert report and a brief filing on the False *Amparo* as evidence⁵⁵¹. The *Juez de Distrito* used formalistic reasoning to reject further evidence provided by Lion⁵⁵².

Lion's withdrawal

540. On December 11, 2015 Lion decided to withdraw the *Amparo* Proceedings in their entirety.

3. THE LAW

541. Lion's claim for denial of justice is based on Art. 1105 of NAFTA, which provides that Mexico shall accord to investments of protected investors treatment in accordance with international law, including FET. The FTC Interpretation Note equates the standard of protection to be applied under Art. 1105 of the NAFTA with the standard of "customary international law minimum standard of treatment of aliens".

542. This "minimum standard of treatment" incorporates denial of justice, together with its traditional requirement that the aggrieved investor, to be authorized to proceed against the State, must first have exhausted all legal remedies available in the municipal Court system and must have lodged appeals up to the highest instance (**A.**). The requirement is, however, subject to an exception: exhaustion is unnecessary in situations where lodging an appeal would be obviously futile (**B.**)

A. The requirement

543. The rule of exhaustion of local remedies derives from the customary international law principle that, prior to bringing an international claim, the foreign national must have first resorted to the host State's legal remedies to obtain redress.

⁵⁵⁰ Exh. C-122.

⁵⁵¹ Exh. C-123.

⁵⁵² Exh. C-123: Sr. Arechederra's testimony could not be admitted because it was rendered by Claimant's legal counsel and raised a risk of bias; additionally, the Court found that Claimant incorrectly submitted a questionnaire that included identical questions for Sr. Arechederra and Mr. Baer, a type of evidence that is forbidden under the applicable law, see RR, para. 119 together with footnote within, invoking inadmissibility of such evidence under Art. 150 of the *Amparo* law.

544. This principle of customary international law was developed in the context of diplomatic protection in the *Interhandel* and *ELSI* cases⁵⁵³. In *Interhandel* the ICJ stated that⁵⁵⁴:

“The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law [...] Before resort may be had to an international court ... it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system”.

545. The ILC Draft Articles on Diplomatic Protection records this well-established principle in Article 14.

Article 14. Exhaustion of local remedies

1. A State may not present an international claim in respect of an injury to a national [...] before the injured person has, subject to draft article 15, exhausted all local remedies”.

The exhaustion rule in investment protection cases

546. It is unanimously accepted that the exhaustion rule is a substantial element of denial of justice and applies beyond diplomatic protection. Professor James Crawford, rapporteur on State Responsibility of the ILC, said that⁵⁵⁵:

“the exhaustion of local remedies rule is not limited to diplomatic protection”.

547. The academic writings on investment protection support this view. Paulsson recalls that:

“[f]or a foreigner’s international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself⁵⁵⁶”.

548. Professor Paparinskis in turn states that:

⁵⁵³ *Interhandel*; *ELSI*.

⁵⁵⁴ *Interhandel*, p. 27.

⁵⁵⁵ State Responsibility, Document A/CN.4/517 and Add.1 – Fourth report on State responsibility, by Mr. James Crawford, Special Rapporteur.

⁵⁵⁶ J. Paulsson, “Denial of Justice in International Law”, p. 108.

“[i]t is accepted that denial of justice becomes internationally wrongful only after the whole system of administration of justice has been put to the test by exhaustion of local remedies⁵⁵⁷”.

549. The Tribunal concurs: a claim for denial of justice only becomes ripe when the remedies available in the legal system of the host State to impeach the decision have been exhausted. The underlying reasons for this requirement are twofold:

- It guarantees that the host State’s judicial system is provided with an opportunity to rectify errors in the decision of lower court instances, and
- It guarantees that international tribunals do not become appeal Courts for dissatisfied investors.

Case law

550. Investment tribunals in the context of NAFTA have endorsed the same conclusion⁵⁵⁸. The Tribunal in *Loewen* specifically stated that a claim for denial of justice within Article 1105 NAFTA, incorporated the exhaustion requirement⁵⁵⁹:

“The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision. The requirement has application to breaches of Articles 1102 and 1110 as well as Article 1105”.

551. The *Waste Management II* tribunal, for instance, stated in the context of assessing a denial of justice claim that⁵⁶⁰:

“The system must be tried and have failed, and thus in this context the notion of exhaustion of local remedies is incorporated into the substantive standard and is not only a procedural prerequisite to an international claim”.

552. Investment tribunals in non-NAFTA cases have come to the same conclusion. For example, in *OI European Group B.V.* the tribunal emphasized the need to give the host State’s judicial system an opportunity to rectify its mistakes so as to avoid the use of international law as a system of appeals against judgments unfavourable to investors:

“International Law cannot become a convenient system to appeal any domestic court decision the investor disagrees with. Before it can be established under

⁵⁵⁷ M. Paparinskis, *op. cit.*, p. 182 [Footnote omitted].

⁵⁵⁸ See e.g., *Loewen*, paras. 150-156, *Waste Management II*, para. 97, *Apotex*, para. 282 and other decisions discussed *infra*. The position in *Mondev* is exceptional and not shared by this Tribunal.

⁵⁵⁹ *Loewen*, para. 156.

⁵⁶⁰ *Waste Management II*, para. 97.

International Law that a State's legal system has committed a wrong, it is essential to provide it with a chance to correct its own mistake"⁵⁶¹.

Non-Disputing Parties

553. The United States⁵⁶² and Canada⁵⁶³ have defended the same position in their Non-Disputing Party submissions:

- The USA says that the international responsibility of States may only be invoked with respect to final judicial acts, unless recourse to further domestic remedies is obviously futile or manifestly ineffective⁵⁶⁴; judicial acts only result in a breach of Article 1105(1) if the justice system as a whole, as validated by a court of the highest instance, produces a denial of justice⁵⁶⁵;
- Canada also submits that a denial of justice claim must be preceded by the local court decisions reaching finality at the court of last resort of the State's judiciary⁵⁶⁶.

B. The exception of obvious futility

554. The requirement that local remedies be exhausted is subject to an exception: an alien cannot be required to take a measure or lodge an appeal which will not remedy the international wrong.

a. The position of the Parties and the Non-Disputing Parties

555. The precise scope of the exception to the rule of exhaustion of local remedies has been much discussed by the Parties:

- Lion says that the claimant must only exhaust remedies which are adequate, effective and reasonable⁵⁶⁷, while
- Mexico submits that the only remedies which do not have to be exhausted are those which are unavailable, adding that NAFTA jurisprudence (*Loewen, Apotex*) focuses on availability, not on futility⁵⁶⁸.

⁵⁶¹ *OI*, paras. 533-536.

⁵⁶² USA Submission, paras. 11-14.

⁵⁶³ Canada Submission, paras. 7-8.

⁵⁶⁴ USA Submission, para. 11.

⁵⁶⁵ USA Submission, paras. 12-13.

⁵⁶⁶ Canada Submission, para. 7, citations omitted.

⁵⁶⁷ CPHB, para. 227.

⁵⁶⁸ RR, para. 280.

556. The Non-Disputing Parties have also presented their views on the exception to the rule of exhaustion:

- The USA recognizes that the exhaustion rule does not apply whenever further recourse for a claimant is obviously futile or manifestly ineffective⁵⁶⁹; further remedies are obviously futile where there “was no justice to exhaust⁵⁷⁰”; but it is not enough for a claimant to allege the “absence of a reasonable prospect of success or the improbability of success, which are both less strict tests⁵⁷¹”.
- Canada also acknowledges that the rule gives way whenever it would be “demonstrably futile” to pursue local remedies⁵⁷²; whether recourse to further appeals of a domestic court judgment is futile is “a fact-specific inquiry taking into consideration the availability, adequacy and effectiveness of the remedy”⁵⁷³.

b. Position of the Tribunal

557. Mexico argues that under NAFTA the only remedies which do not have to be exhausted are those which are “unavailable”, adding that NAFTA jurisprudence equates unavailability with futility. Mexico seeks support in two NAFTA cases *Loewen* and *Apotex*.

558. Mexico’s position is excessively restrictive. It implies that an investor is obliged to pursue all available remedies, even if there is no reasonable prospect that the request or appeal will effectively undo the international wrong.

559. Scholars in the realm of investment protection, such as Paulsson, suggest that the appropriate test should be more flexible, and based on the formulation of Judge Lauterpacht in his separate opinion the *Norwegian Loans* case: the remedies that ought to be pursued are those which offer a “reasonable possibility of an effective remedy”⁵⁷⁴. Paulsson explains that⁵⁷⁵:

“[t]he victim of a denial of justice is not required to pursue improbable remedies. Nor is he required to contrive indirect or extravagant applications beyond the ordinary path of a frontal attempt to have the judgment by which he was unjustly treated set aside, or to be granted a trial he was denied”.

⁵⁶⁹ USA Submission, paras. 12-13.

⁵⁷⁰ USA Submission, para. 14, citations omitted.

⁵⁷¹ USA Submission, para. 14.

⁵⁷² Canada Submission, para. 7, citations omitted.

⁵⁷³ Canada Submission, para. 8.

⁵⁷⁴ J. Paulsson, “Denial of Justice in International Law”, p. 118; *Norwegian Loans*, p. 39.

⁵⁷⁵ J. Paulsson, “Denial of Justice in International Law”, p. 113.

560. Prof. Amerasinghe describes the exception as follows⁵⁷⁶:

“The test of obvious futility clearly requires more than the probability of failure or the improbability of success, but perhaps less than the absolute certainty of failure. The test may be said to require evidence from which it could reasonably be concluded that the remedy would be ineffective”.

561. The ILC has recorded this exception in its Draft Articles on Diplomatic Protection:

“Article 15. Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(a) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress”.

562. In the Tribunal’s opinion, the exhaustion rule is subject to two categories of exceptions: an aggrieved alien is only required to pursue remedies

- which are reasonably available (i), and
- which have an expectation that they will be effective, *i.e.* the measure or appeal has a reasonable prospect of correcting the judicial wrong committed by the lower courts (ii).

Reasonable availability

563. (i) The first facet of the exhaustion rule is that the aggrieved alien must launch all remedies, which are not extravagant, and take them to the highest judicial instance in the land.

564. The burden on Claimant is not to pursue all possible remedies, but only those which are reasonably available. In the words of Paulsson⁵⁷⁷:

“[t]he victim of a denial of justice is not to pursue improbable remedies. Nor is he required to contrive indirect or extravagant applications beyond the ordinary path of a frontal attempt to have the judgment by which he was unjustly treated set aside, or to be granted a trial he was denied”.

565. Prof. Amerasinghe supports the same conclusion⁵⁷⁸:

⁵⁷⁶ Ch. Amerasinghe, “Local Remedies in International Law”, Cambridge, 2004, p. 206.

⁵⁷⁷ J. Paulsson, “Denial of Justice in International Law”, p. 113.

⁵⁷⁸ Ch. Amerasinghe, *op. cit.*, p. 181.

“An aggrieved alien is bound only to exhaust those remedies that are available to him. The requirement thus postulated has been described in terms of accessibility”.

566. In its Commentary to the ILC Draft on Diplomatic Protection, the ILC recalls that the “reasonable availability” test is supported by judicial decisions that considered that remedies need not be exhausted when⁵⁷⁹:

“[...] the local court has no jurisdiction over the dispute in question; the national legislation justifying the acts of which the alien complains will not be reviewed by local courts; the local courts are notoriously lacking in independence; there is a consistent and well-established line of precedents adverse to the alien; the local courts do not have the competence to grant an appropriate and adequate remedy to the alien; or the respondent State does not have an adequate system of judicial protection”.

Effectiveness

567. (ii) The aggrieved alien is not under an obligation to resort to an appeal which, although available, was obviously futile. As Prof. Amerasinghe explains, this exception⁵⁸⁰

“was a compromise between the interests of the respondent state in having a fair opportunity of doing justice by its own means and those of the alien in having the most efficient justice done at the lowest cost in the quickest way”.

568. The seminal case establishing this exception was the 1934 *Finnish Vessels Arbitration*, which held that a claimant is not obliged to resort to an appeal, provided that such remedy was “obviously futile”⁵⁸¹. In the specific case the arbitrator found that where the finding of fact by a lower instance court was final, and the success of the claimant’s case depended on a different finding of fact, an appeal to a higher Court was obviously futile⁵⁸².

569. This initial threshold has been lowered by several decisions that followed. In the *Ambatielos Case*, the Arbitration Commission said that⁵⁸³:

“It is the whole system of legal protection, as provided by municipal law, which must have been put to the test [...]. It is clear, however, that [the exhaustion rule] cannot be strained too far. Taken literally, it would imply that the fact of having

⁵⁷⁹ Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10).

⁵⁸⁰ Ch. Amerasinghe, *op. cit.*, p. 205.

⁵⁸¹ *Finnish Vessels*, p. 1504.

⁵⁸² *Finnish Vessels*, p. 1543.

⁵⁸³ *Ambatielos*, p. 120.

neglected to make use of some means of procedure — even one which is not important to the defence of the action — would suffice to allow a defendant State to claim that local remedies have not been exhausted, and that, therefore, an international action cannot be brought. This would confer on the rule of the prior exhaustion of local remedies a scope which is unacceptable”.

570. In the *Norwegian Loans* case, Judge Lauterpacht issued a separate opinion proposing a lower threshold with regard to effectiveness, which has gathered support in the writings of jurists⁵⁸⁴. He stated that:

“The requirement of exhaustion of local remedies is not a purely technical or rigid rule. It is a rule which international tribunals have applied with a considerable degree of elasticity [...]

571. Judge Lauterpacht suggested that the exhaustion rule should be put aside where there was no “reasonable possibility” for the complainant to obtain “an effective remedy”⁵⁸⁵.

Case law

572. The tribunal in *Apotex* relied on the more rigid “obvious futility” test⁵⁸⁶. Other tribunals, such as *Loewen*, resorted to the standards of “effectiveness” and “reasonable availability” of the remedies. The tribunal in *ATA Construction* considered that the complainant has to exhaust those remedies that are “plausibly available”⁵⁸⁷; and in *Jan de Nul*, the tribunal said that the exception applied when “there is no effective remedy or no reasonable prospect of success”⁵⁸⁸.

573. A less rigid approach to the exceptions has been also applied in the non-NAFTA investment cases. In *Duke Energy*:

“[t]he Claimants are right to point out that there is no obligation to pursue ‘improbable’ remedies.”⁵⁸⁹

574. The *Ambiente Ufficio* tribunal also qualified the rule as applicable only to reasonably available remedies⁵⁹⁰:

⁵⁸⁴ See Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10), p. 47.

⁵⁸⁵ *Norwegian Loans*, p. 39.

⁵⁸⁶ *Apotex*, para. 276.

⁵⁸⁷ *ATA Construction*, para. 107.

⁵⁸⁸ *Jan de Nul*, para. 258.

⁵⁸⁹ *Duke Energy*, para. 400.

⁵⁹⁰ *Ambiente Ufficio*, para. 599.

“It appears to be generally accepted in international law that obligations requiring an individual to approach a State’s local courts before a claim may be taken to the international plane do not apply unconditionally. [...] only those remedies must be used which are available ‘as a matter of reasonable possibility.’”

* * *

575. In conclusion, the Tribunal finds that an investor who has suffered denial of justice is only required to exhaust remedies:

- which are reasonably available, and
- which have an expectation that they will be effective, *i.e.* the measure or the appeal have a reasonable prospect of correcting the judicial wrong suffered by the alien.

4. DISCUSSION

576. Mexico argues that Claimant did not exhaust local remedies:

- Claimant should have pursued other adequate remedies (and specifically the *nulidad del juicio concluido*), but failed to do;
- Claimant wrongly withdrew the Amparo Proceedings; Claimant’s argument is simply an assumption that the *Tribunal de Queja* and the Supreme Court were unlikely to render any decision in its favour.

577. Respondent also denies that the Mexican Courts incurred in unreasonable delay, or that the expected duration of the remedy procedures would be unreasonable⁵⁹¹.

578. Lion defends the contrary position: it avers that

- Mexico incurred in undue delay⁵⁹²,
- Mexico failed to provide effective means to reverse the cancellation of the Mortgages⁵⁹³,
- The *Amparo* Proceedings were the only adequate proceedings available⁵⁹⁴.
- Continuation of the *Amparo* Proceedings was obviously futile⁵⁹⁵,

⁵⁹¹ RR, paras. 313 and 319.

⁵⁹² CPHB 224.

⁵⁹³ CM para 423.

⁵⁹⁴ CPHB para 227.

⁵⁹⁵ CPHB para 229.

- The finalization of the *Amparo* Proceedings would only have resulted in a finding that the *emplazamiento* in the Cancellation Lawsuit had been improperly made – requiring a new procedure to reinstate the validity of the Mortgages;
- Exhaustion of local remedies would in total have lasted six years – an unreasonable period of time⁵⁹⁶.

Decision

579. The Tribunal decides in favour of Lion for three reasons:

- The *Amparo* was the only remedy, reasonably available to the Claimant, to undo the cancellation of the Mortgages (**A.**);
- Lion sought redress before the highest Court available within the Amparo proceeding (**B.**);
- Claimant unsuccessfully pursued the *Amparo* Proceedings for three years before the two available instances, and withdrew such Proceedings at a time when continuation would have been obviously futile and no effective redress would be obtained (**C.**).

A. The Amparo was the appropriate remedy

580. In the present case, the international wrong committed by Mexico consists in a denial of justice: Mexico’s judicial system has denied Lion access to justice by failing to correct the Cancellation Lawsuit, by denying Lion the right to appeal the Cancellation Judgement and finally has denied Lion the right to allege and prove the forgery of the Forged Settlement Agreement. As a result of the denial of justice, the Mortgages, Lion’s protected investments, have been cancelled and Claimant has lost the protection afforded by these securities.

581. For Lion the detrimental effects of the Cancellation Proceeding were twofold:

- First, the Judgement ordered the cancellation of the Mortgages – and this was quickly accomplished, because the Judge ordered specific performance of the decision and by October 2012 the *Registros Públicos* had cancelled the Mortgages, which were extinguished for all legal purposes;
- Second, the *Juez de lo Mercantil* also issued a decision, declaring that the Cancellation Judgement had become *res iudicata*, and precluding the possibility that Lion launch a *recurso de apelación*.

⁵⁹⁶ CPHB, para 227.

582. When Lion finally obtained knowledge of the existence of the Cancellation Judgement, this decision had already become *res iudicata* – the ordinary *recurso de apelación* was not any longer available. In the circumstances, Lion had, in principle, to choose between two procedures:

- The *recurso de Amparo*; or
- The *recurso de nulidad de juicio concluido*.

583. *Amparo* proceedings are an established institution under State and Federal law of Mexico, and represent the ordinary means to obtain protection from the Courts when constitutional rights have been breached⁵⁹⁷. The *recurso de nulidad de juicio concluido* is an institution developed by Mexican jurisprudence, which is not codified under the law of Jalisco or at the Federal level, which can only be used in extraordinary circumstances to request the annulment of certain civil judgments which are already *causa juzgada*.

584. The Parties' experts discussed whether Lion could have had access to a *recurso de nulidad de juicio concluido*. Mexico's legal expert – Dr. Ovalle – acknowledged that this type of remedy was not available to Lion under Codes of Civil Procedure of Jalisco and Nayarit⁵⁹⁸.

Recurso de nulidad de juicio concluido

585. Dr. Ovalle, however, suggests that Lion could have initiated a *recurso de nulidad de juicio concluido*, based on a supplementary application of the Code for Civil Procedure of the Federal District (which regulates the *nulidad del juicio concluido*) and applies to supplement proceedings under the Commercial Code, pursuant to its Article 1054⁵⁹⁹. Dr. Ovalle says that the Mexican Supreme Court has established jurisprudence endorsing this possibility by allowing a party to initiate a *juicio de nulidad* in civil proceedings under specific circumstances⁶⁰⁰. Dr. Ovalle refers to extracts of the jurisprudence of the Mexican Supreme Court applying this doctrine, in a case of the 1960s regarding *prescripción adquisitiva de dominio* (the doctrine of adverse

⁵⁹⁷ Zamora I, para. 79.

⁵⁹⁸ Ovalle II, para. 60.

⁵⁹⁹ Ovalle I, para. 94.

⁶⁰⁰ Ovalle I, para. 93.

possession)⁶⁰¹ and a case of 2001, regarding a judgement of *estado civil* (marital status)⁶⁰².

586. Dr. Zamora – Lion’s legal expert – does not agree: he acknowledges the general jurisprudence of the Mexican Supreme Court that allows the supplementary application of the Code for Civil Procedure of the Federal District to civil proceedings before the civil Courts of the Mexican States only in certain cases. Dr. Zamora cites additional jurisprudence that has clarified that the supplementary application of the Code for Civil Procedure of the Federal District to commercial proceedings does not include access to the remedies or appeals not governed in the Commercial Code⁶⁰³:

“De conformidad con el artículo 1054 del Código de Comercio, la aplicación supletoria de la legislación local en los juicios mercantiles no debe entenderse de un modo absoluto, sino con las restricciones que el propio numeral señala [...] tratándose de recursos, mismos que se encuentran reglamentados adecuadamente en ese cuerpo normativo, no existe la citada supletoriedad, en virtud de que tal legislación cuenta con un sistema propio y completo de recursos, razón por la cual no puede sostenerse que deba aplicarse lo dispuesto por el referido artículo 1054 del Código de Comercio”.

587. In particular, with respect to the suppletory application of the *nulidad del juicio concluido*, the jurisprudence says that it is available in civil proceedings of “*materia civil*”, however, it clarifies that⁶⁰⁴:

“Ahora bien, esta figura jurídica [nulidad de juicio concluido] es improcedente contra juicios mercantiles tramitados conforme al Código de Comercio, ello en razón de que no prevé dicha nulidad, ni alguna similar mediante la cual pueda dejarse insubsistente lo resuelto en un proceso anterior, aunado a que no cabe la supletoriedad del código procesal civil citado, ya que no fue voluntad del legislador hacer excepciones a la cosa juzgada en materia mercantil”.

588. Based on the above considerations, the Tribunal is not convinced that the *recurso de nulidad de juicio concluido* was reasonable available to Lion in order to revert the Cancellation Judgment, which is undisputedly, *materia mercantil* and not *materia civil*.

⁶⁰¹ Ovalle I, p. 24, citing to Tesis de Jurisprudencia. “Nulidad de Juicio Concluido, declarada en otro juicio posterior. Casos en que procede. Aclaraciones a la tesis de jurisprudencia número 714”. Registro 814296, Informes, p. 72.

⁶⁰² Ovalle II, p. 25, citing to Tesis de Jurisprudencia. “Nulidad de Juicio Concluido. Sólo procede respecto del proceso fraudulento”. Número 296 del Apéndice al Semanario Judicial de la Federación, 1917-2000, t. IV, p. 249, registro 913238.

⁶⁰³ Zamora IV, para. 37 citing to Tesis: VI.2o. J/20. Registro: 204861. Tomo II, Julio de 1995. Semanario Judicial de la Federación y su Gaceta. Novena Época. Tribunales Colegiados de Circuito. Jurisprudencia. Materia(s): Civil. Página: 154.

⁶⁰⁴ Exh. R-41.

589. But even if Claimant could, due to a favourable interpretation, overcome the limitation that the scope of the *nulidad de juicio concluido* is restricted to judgments of *materia civil*, it would encounter an additional hurdle: as pointed by Dr. Zamora, in a judgment of 2008, the Mexican Supreme Court declared the unconstitutionality of a provision of the *nulidad de juicio concluido* regulated in Code for Civil Procedure of the Federal District⁶⁰⁵, because it violated the principle of legal certainty⁶⁰⁶. Since then, a party seeking a *nulidad de juicio concluido* is required to provide evidence that the judgement impugned was rendered on the basis of a document that has been declared false. Lion would have to first file a criminal complaint seeking a declaration by the criminal Courts, that the Settlement Agreement was a forged document. Only then, could Lion try to initiate the *nulidad de juicio concluido*, with the hope that the Mexican courts would create new jurisprudence and extend the scope of this extraordinary remedy to a case of *materia mercantil*.
590. In any event, Claimant was also precluded from launching successively an *Amparo* and a *nulidad de juicio concluido*. The filing of an *Amparo* precludes the subsequent presentation of a *recurso de nulidad de juicio concluido*. Although Respondent's expert testified at the Hearing that the *nulidad de juicio concluido* and the *Amparo* are not mutually exclusive⁶⁰⁷, the Tribunal agrees with Claimant that they are, based on Art. 73 of the *Amparo* law⁶⁰⁸:

“CAPITULO VIII De los casos de improcedencia

Artículo 73.- El juicio de amparo es improcedente:

[...] XIV.- Cuando se esté tramitando ante los tribunales ordinarios algún recurso o defensa legal propuesta por el quejoso que pueda tener por efecto modificar, revocar o nulificar el acto reclamado”.

591. Claimant chose the *Amparo* route. That this decision was the reasonably available remedy is proven by the Debtors foresight: anticipating that Lion would eventually launch an *Amparo* (and not a *recurso de nulidad de juicio concluido*, which was not reasonably available), the Debtors prepared the False *Amparo* Proceedings, a machination intended to forestall (as it eventually did) Lion's rightful *Amparo*.
592. Based on the above, the Tribunal believes that Claimant resorted to the reasonable available remedy in the given circumstances.

⁶⁰⁵ Article 737 A, *Fracción II, última parte*.

⁶⁰⁶ Zamora, IV, para. 43, citing to Tesis: P./J. 88/2008. Registro: 168856. Tomo XXVIII, Septiembre de 2008. Semanario Judicial de la Federación y su Gaceta. Novena Época. Pleno. Jurisprudencia. Materia(s): Constitucional, Civil. Página: 600 (Exh. Zamora IV-188).

⁶⁰⁷ HT, p. 656.

⁶⁰⁸ Exh. CLA-308.

Criminal proceedings

593. Claimant also launched criminal proceedings, which are still ongoing. The criminal proceedings also did not constitute a viable alternative avenue for Lion to pursue its economic claims, due to the vastly different character of criminal proceedings and the impossibility of obtaining the reversal of the Cancellation Judgment and the reinstatement of the Mortgages. Thus, Claimant is not required to first reach judicial finality in their respect to bring its NAFTA Art. 1105 claim.

B. The Tribunal de Queja was the highest Court available within the Amparo Proceeding

594. The rule of exhaustion requires that the aggrieved alien obtain a ruling rendered by highest court in the host State⁶⁰⁹. Claimant says that the *Tribunal de Queja* was acting as the Court of highest instance in the *Amparo* Proceedings and that there was no possibility for Claimant to bring its case to the Supreme Court of Mexico – an allegation which has not been challenged by Mexico⁶¹⁰.

595. It is, thus, undisputed that Lion had taken its case to the highest available authority: the *recurso de revisión* brought the *Amparo* before the *Tribunal de Queja*, which was the highest authority available in the *Amparo* lawsuit.

C. Claimant was entitled to withdraw from the Amparo Proceeding

596. On December 11, 2015 Lion waived the *Amparo* lawsuit.

597. At that point Claimant had spent almost three years in *Amparo* lawsuits before Mexican Courts, trying to undo the fraudulent cancellation of the Mortgages. It had achieved very little:

- Lion had been deprived, by an idiosyncratic decision of the *Juez de lo Mercantil*, of filing an ordinary appeal against the Cancellation Judgment (issued by the same *Juez de lo Mercantil*);
- The only avenue open to Lion had been an *Amparo*, which it filed as soon as it became aware of the Cancellation Judgment, but at a time when it still did not know that the Debtors had based their case on the Forged Settlement Agreement; Lion's recurring attempts to extend the scope of the *Amparo* to cover the forgery of the Settlement Agreement and to present evidence proving such forgery, had been dismissed by the first instance *Juez de Distrito* and in second instance by the *Tribunal de Queja*, for a purely formalistic reason: the *ampliación de la*

⁶⁰⁹ RR, paras. 180, 198-201; RCM, para. 188.

⁶¹⁰ CPHB, para. 227, citing HT, 592-593 (Mr. Zamora); RR, para. 310.

demanda had been signed on behalf of Lion by its attorney and not by its legal representative - a minor procedural defect Lion was never offered the opportunity to remedy;

- Unable to submit that the Settlement Agreement had been forged, Lion's *Amparo* had been dismissed by the first instance *Juez de Distrito*; in the *Amparo* Judgement the *Juez de Distrito* assumed the Settlement Agreement to be valid and binding and concluded that Lion's *emplazamiento* had been properly served on Lic. López Medina, Lion's process agent as identified in the Forged Settlement Agreement - an obscure attorney, with whom Lion had never had any relationship and who failed to inform Lion;
- On appeal against the *Amparo* Judgement, the second instance *Tribunal de Queja*, whom Lion had asked to review a further time the prohibition to argue the forgery issue, did not take up this question; instead the *Tribunal de Queja*, in an unexpected move, made *sua sponte* the decision to remand the procedure back to the first instance Judge, with a strictly limited remit: to review whether the *Amparo* had been properly admitted, in light of the existence of a previous *Amparo* (the False *Amparo* – a decoy procedure filed fraudulently by the Debtors to derail the admissibility of the real *Amparo*);
- Upon the instructions of the *Tribunal de Queja*, the *Juez de Distrito* again denied Lion's request to expand the scope of the remand, so that the *Amparo* could encompass the forgery of the Settlement Agreement.

598. According to Claimant's expert⁶¹¹, the best-case scenario for the progression of the *Amparo* would have required an additional period of between 18 to 30 months to finalize; a positive outcome in favour of Lion would have resulted in the Cancellation Proceeding being held anew, which would take one to two more years⁶¹².

599. But Claimant's prospects for a best-case scenario were limited:

- First, the *Tribunal de Queja* remanded the case to the *Juez de Distrito* with a strictly limited mandate: to only look into the admissibility of the *Amparo* proceedings (in view of the False *Amparo*), explicitly prohibiting the *Juez de Distrito* from discussing the issue of the forgery of the Settlement Agreement, which constituted the cornerstone of Lion's *Amparo* Lawsuit;
- Secondly, Lion's case was going to be heard by the same *Juez de Distrito* who had already dismissed the *Amparo* in the first instance, and

⁶¹¹ Zamora Hearing Presentation, pp. 12-13.

⁶¹² Zamora Hearing Presentation, p. 13.

- Thirdly, in this Remand *Amparo*, Lion filed a motion alleging the forgery of Mr. Arechederra's signature in the False *Amparo* and requested the *Juez de Distrito* to hear the testimony of Mr. Arechederra. The *Juez de Distrito* rejected the testimony and relied only on three expert reports to determine the authenticity of signature stamped in the False *Amparo*. Lion and one of the Debtors (Bains) appointed each an expert and the *Juez de Distrito* appointed a third expert. Lion's expert certified that the signature was not of Mr. Arechederra. However, the Debtor and the Court appointed experts arrived to the opposite conclusion, considering that the signature in the False *Amparo* was indeed of Mr. Arechederra's⁶¹³.

600. At this point, the fate of the Remand *Amparo* was in jeopardy: it is most likely that the *Juez de Distrito* would have ruled that the False *Amparo* was authentic, thereby making Lion's real *Amparo* inadmissible and rendering any further legal actions obviously futile.

[*Pro memoria*, Lion had lodged an incident at the outset of the *Amparo* proceeding alleging that on July 6, 2012 Sr. Arechederra's signature had been forged in the false request for copy before the *Juzgado de lo Mercantil*. In that instance, two of the three experts (Lion's expert and the one appointed by the *Juez de Distrito*) had concluded that the signature had been forged⁶¹⁴. Based on the experts' evidence, the *Juez de Distrito* had accepted the falsehood of the signature stamped on the July 6, 2012 request for copy before the *Juzgado de lo Mercantil*⁶¹⁵. That the first signature of Mr. Arechederra had been forged, would seem to support the conclusion that his second signature had also been forged – the purpose of the machination was to file the False *Amparo*, which required two signatures.]

601. Thus, Claimant was further away from annulling the cancellation of the Mortgages than it was at the outset of the local proceedings. Moreover, it had little prospect of success, since Lion was prohibited from presenting evidence to prove the forgery and the *Juez de Distrito* had already once decided against its position. And even if Lion was successful, the effect of the *amparo* would be limited to a declaration that the *emplazamiento* in the Cancellation Judgement had been improperly made. A new procedure before the *Juez de lo Mercantil* would be required, to annul the Cancellation Judgement, which already had the *status* of *cosa juzgada* – a process that would at least require three years for the Cancellation Judgment to be overturned.
602. It is at this point when Lion abandoned all hope to obtain redress from the Mexican judiciary and waived the *Amparo* lawsuit.
603. In sum, Lion was put in a situation where three years into the *Amparo* Proceeding the only point of discussion was whether such proceedings were admissible at all. In three

⁶¹³ Zamora I, para. 191.

⁶¹⁴ Exh. C-115, pp. 31-34 and 36-39.

⁶¹⁵ See para. 161 *supra*; Exh. C-115, p. 39.

years of litigation, Lion was unable to obtain from the Mexican judiciary a recognition that it had been subject to such a manifest fraud and identity theft, that would effectively result in the reversal of the cancellation of the Mortgages. It is difficult to accept that Lion did not exhaust all reasonable and available remedies with a reasonable prospect of reversing the denial of justice it had suffered.

Case law

604. Case law supports the Tribunal’s finding.
605. In the historic *Montano* case between the US and Peru, the Umpire rejected the US Government objection of non-exhaustion of local remedies and upheld Peru’s claim. He wrote⁶¹⁶:

“The obligation of a stranger to exhaust the remedies which nations have for obtaining justice, before soliciting the protection of his government, ought to be understood in a rational manner, that such obligation does not make delusive the rights of the foreigner”.

606. The Peruvian claimant, a Sr. Montano, had obtained a US Federal judgement in his favour, but it remained unenforced due to the negligence of a US Marshal charged with its execution. The US government considered that claimant should have lodged a complaint against the Marshal, which led the Umpire to ironically reject the US position saying that “what Montano gained by the sentence was the right to bring forward another complaint”.
607. The situation is similar in the present case: even if Claimant were to succeed in the *Amparo* Proceedings, what it would have gained is an acknowledgement that it had been improperly notified in the Cancellation Proceeding, and that these Proceedings should be repeated, upon proper notification of the American company.
608. Lion also finds itself in a similar position to the claimant in *Saipem*, who pursued local remedies for two and a half years until it became evident that continuing to litigate in local courts would have amounted to pursuing “improbable remedies”⁶¹⁷:

“It is undisputed that Saipem had already litigated the issue of the arbitral misconduct for more than two and a half years in front of different courts in Bangladesh before being served with the decision revoking the power of the ICC Tribunal. It can thus be held to have exerted reasonable local remedies, having spent considerable time and money seeking to obtain redress without success

⁶¹⁶ *Peru v. US*, Moore, “Arbitrations”, 1630 at p. 1637, quoted from Paulsson, “Denial of Justice in International Law”, p. 112.

⁶¹⁷ *Saipem*, para. 183.

although the allegation of misconduct was clearly ill-founded. Requiring it to do more and file appeals would amount to holding it to "improbable" remedies.”

* * *

609. In sum, the Tribunal finds that Lion exhausted the reasonable available remedies that could have reversed the cancellation of the Mortgages. Lion was excused from continuing the Amparo proceeding in light of its obvious futility in the sense of its lack of any reasonable prospect of reversing the cancellation of the Mortgages.

VI.3. CONCLUSION

610. The Tribunal's assessment of the facts of the present case and its conclusions on Lion's denial of justice claim are restricted to the conduct of the Courts of Jalisco with respect to the Cancellation and Amparo Proceedings. The Tribunal does not purport to pass judgement on the propriety or efficiency of the entire Mexican judicial system, for which this Tribunal has the utmost respect.
611. The Tribunal has held that Lion was wrongfully denied the right to appear before the *Juez de lo Mercantil* in the Cancellation Proceeding that resulted in the cancellation of the Mortgages. This was caused by a deeply flawed *emplazamiento* and *declaración en rebeldía* that the Mexican judicial system never corrected.
612. Lion was further deprived from the right to appeal the Cancellation Judgment, based on an improper procedural decision that patently disregarded municipal law: the *Juez de lo Mercantil* deemed that the value of the Cancellation Proceeding was less than MEX 500,000 (*circa* USD 25,200). This decision was adopted despite the knowledge
- that the Cancellation Judgment had the effect of removing the security for the Loans with a total value of USD 32.8 M; and
 - that the creditor had been declared in *rebeldía*.
613. Finally, when Lion sought to remedy this situation through the *Amparo* proceeding, the two instances available (*Juez del Distrito* and *Tribunal de Queja*) refused Lion's repeated requests to be authorized to present evidence and allegations that it had been subject to a sophisticated fraud that had resulted in the loss of its investment.
614. The Tribunal has also concluded that Lion pursued the reasonably available remedies within the Mexican judicial system that should have effectively restored its rights; and that after several attempts to obtain redress, these remedies proved ineffective and obviously futile.
615. In view of all of the above, the Tribunal concludes that Mexico incurred in denial of justice and failed to provide Lion fair and equitable treatment under NAFTA Art. 1105.

VI.4. THE ALTERNATIVE CLAIMS

616. Claimant has formulated, in the alternative, two additional claims:
- For judicial and administrative expropriation of Lion's investment under NAFTA Art. 1110; and
 - For failure to grant Lion's investment full protection and security under NAFTA Art. 1105.
617. Claimant says that Mexico would be liable to award the same compensation for a breach of denial of justice or for any of the breaches alleged as alternative claims⁶¹⁸.
618. The Tribunal has concluded that Mexico is responsible for a denial of justice in breach of NAFTA Art. 1105, and consequently Lion is entitled to compensation (to be established in the next section). Consequently, Lion's alternative claims are moot.

⁶¹⁸ CPHB, paras. 143, 186, 243 and 247.

VII. QUANTUM

619. NAFTA Art. 1135(1)(a) provides for the award of monetary damages and applicable interest where a Party is found to have violated a Chapter Eleven provision. In the previous sections the Tribunal determined that Mexico breached the FET standard enshrined in NAFTA Art. 1105 through a denial of justice.
620. The NAFTA does not provide rules for the awarding of compensation in denial of justice claims, in breach of Art. 1105 – unlike in expropriation claims under Art. 1110. Consequently, the Tribunal must seek the appropriate standard in customary international law.

Customary international law

621. The seminal case dealing with compensation under customary international law is the PCIJ's *Chorzów Factory*⁶¹⁹, a decision from 1928 which, despite the passage of nearly a century, remains a precedent which is extensively used by investment tribunals. It established the principle of full reparation for the injury caused, even if the treaty serving as the basis of the dispute does not contain a specific provision requiring full indemnification of the wronged party.
622. The PCIJ found that:
- “[...] reparation must, so far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law”.
623. The customary international law principle of full reparation has been embodied in Art. 31(1) of the ILC's Articles on State Responsibility, which states that:
- “1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act”.
624. Customary international law thus mandates that breaches by the host State of the obligations assumed under NAFTA Art. 1105, should be remedied by granting the wronged investor full reparation for the injury caused.

⁶¹⁹ *Chorzów Factory*, Exh. CLA-180.

625. Additional guidance is provided by Art. 34 of the ILC Articles on State Responsibility, which states that:

“Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter”.

626. In the present case, Claimant seeks solely reparation in the form of compensation, and Respondent has not proposed that instead it should grant restitution or satisfaction. The Tribunal must consequently award a compensation sufficient to “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed⁶²⁰”.

627. Full reparation by compensation requires that the Claimant, as regards its investment, be restored to the situation in which it would have been, had a breach not occurred. The appropriate methodology to establish the impairment suffered by Claimant’s investment requires a three-step approach⁶²¹:

- In a first step, the Tribunal must value Claimant’s investment (in this case the Mortgages) on a certain valuation date, under the assumption that no international wrong had occurred – the so called “But For Scenario”;
- In a second step, the Tribunal must determine the actual value of the investment, taking into consideration the effects of the breach – the so called “As Is Scenario”;
- In a final step, the difference between the But For and As Is values of the investment must be calculated, such difference representing the impairment suffered by the investment due to the host State’s wrongful action.

628. Claimant is additionally entitled to any additional damages suffered as a consequence of the breach, to the extent that such damages have been incurred and can be proven.

Valuation date

629. Determination of the impairment suffered by Claimant’s investment requires selecting an appropriate valuation date. The Parties hold different positions:

- Claimant estimates that in the judicial foreclosure action it would have acquired the Properties without an auction (since the debt exceeded the value of the

⁶²⁰ *Chorzów Factory*, p. 47.

⁶²¹ See *Chorzów Factory*, p. 51; *Burlington*, para. 357.

collaterals) and that it would have re-sold the Properties by March 31, 2015; Lion proposes that this date should act as valuation date for all Mortgages⁶²²;

- Respondent, on the other hand, says that the valuation dates should be separate for each Mortgage, and proposes September 7 and October 16, 2012 – the dates immediately before the cancellation of the Guadalajara and the Nayarit Mortgages in the *Registro Público*⁶²³.

630. The Tribunal finds Claimant’s proposed valuation date to be purely hypothetical and premised on a large number of uncertainties. The only certain date in Claimant’s But For Scenario is the start of the Foreclosure Proceeding for the Nayarit Property; the rest of the counter-factual milestones are purely hypothetical – including the commencement of foreclosure proceedings regarding the Guadalajara Properties, the ending of both foreclosure proceedings with a judgment ordering foreclosure and assignment of the Properties to Lion, and ultimately, the possibility of selling these Properties at arms’ length to third parties around March 2015. The Tribunal lacks sufficient evidence to make a proper estimation as to when these events may have happened.

631. In this situation, the Tribunal prefers the valuation date proposed by Respondent: Mexico’s denial of justice occurred over several judicial instances and an extensive period of time; but the origin of the denial of justice can be pinpointed to the Cancellation Judgment issued by the *Juez de lo Mercantil*, and the subsequent cancellation of the Mortgages by the Public Registries. There is also no doubt that such cancellation was a harmful act: it caused the extinction of the Mortgages and stripped Claimant’s Loans of the collateral which guaranteed repayment. It thus is appropriate that the impairment of the investment be calculated as of the date of cancellation of each Mortgage.

632. In conclusion, the valuation dates should be September 7, 2012 for the Guadalajara Mortgages and October 16, 2012 for the Nayarit Mortgage.

* * *

633. Claimant specifically requests the following categories of compensation⁶²⁴:

- The first category is the impairment suffered by the investment, to be calculated as the value of the Mortgages in the But For Scenario (equal to the market value of the Properties, minus transaction costs) minus the value in the As Is Scenario (nil) (VII.1.);

⁶²² CPHB, para. 248; Zamora II, para. 201.

⁶²³ CBRE Nayarit I, p. 63 and CBRE Guadalajara I, p. 59.

⁶²⁴ CPHB, para. 320.

- The second category are certain Legal Fees which Claimant says could arise as a consequence of the withdrawal of the Foreclosure Proceeding (**VII.2**);
- The third category are certain expenses and fees incurred in the exhaustion of local remedies (**VII.3**).

VII.1. IMPAIRMENT OF THE INVESTMENT

634. The first category of compensation requested by Claimant is the impairment allegedly suffered by its investment, the three Mortgages, to be calculated as the value of the Mortgages in the But For Scenario minus the value in the As Is Scenario.

But For Scenario

635. Claimant submits that the value of the Mortgages in the But For Scenario should be equal to the market value of the Properties as of the valuation date, minus transaction costs. In Lion's opinion, had it not been for Mexico's breach, it would have been able to acquire the Nayarit and Guadalajara Properties in the Foreclosure Proceedings and promptly re-sell them to a willing third party, using the sales price to set off (part of) the amounts due under the Loans⁶²⁵.

636. This proposition has not been opposed by Mexico.

637. The Tribunal agrees: were it not for the Cancellation Judgment issued by the *Juez de lo Mercantil* and the failure of Mexico's judicial system to correct this Judgment, in breach of the FET standard, the Mortgage registrations in the Nayarit and Guadalajara Public Registries would never have been cancelled. Upon default of the secured Loans, Lion would have instituted Foreclosure Proceedings, which would have resulted in the judicial enforcement of the Mortgages and in the assignment of the Properties to Lion – assignment of the mortgaged asset to the creditor (and not foreclosure by public auction) is the rule provided for by Mexican Law when the secured debt exceeds the market value of the mortgaged asset⁶²⁶.

638. In the present case, the secured debt in fact exceeded the value of the Properties: the Nayarit Mortgage was granted to secure the three Loans, and the two Guadalajara Mortgages secured the Second Loan and Third Loan respectively. By October 2012 the total debt under the three Loans amounted to approximately USD 104 M (USD 49,4 M under the First Loan, USD 38,9 M under the Second Loan and USD 15,9 under the Third Loan)⁶²⁷. As will be explained *infra*, the value of the Properties as of October 2012 was less than the debts secured by each of the Mortgages⁶²⁸.

⁶²⁵ CPHB, para. 248.

⁶²⁶ Zamora II, para. 201.

⁶²⁷ The last invoice that Lion sent to Sr. Cárdenas for the payment of the debt is as of June 30, 2011 and it records a total debt of USD 76 M (See para. 89 *supra*; CM, para. 27; Exh. C-42). With default interests running, the debt increased by October 2012 to USD 104 M.

⁶²⁸ See para. 761 *infra*

639. It is also safe to assume that, upon assignment of the Properties, Lion would have eventually sold them to a willing third party to recover its loans⁶²⁹.

Foreclosure costs

640. In the But For Scenario, the assignment and re-sale of the Properties would imply certain foreclosure costs. Claimant agrees that such costs be deducted from the compensation and avers that the costs include⁶³⁰:

- Public Registry and Notary fees, plus transfer taxes, which amount to 4.6% of the Nayarit Property sales price and 0.7% of the sales price of the Guadalajara Properties;
- plus an amount in MEX⁶³¹ and USD 50,000 in legal fees.

641. Respondent has not questioned these amounts, and instead has focused its disagreement on the value of the Properties.

Valuation of the Properties

642. Both Parties have engaged valuation experts to determine the market value of the Properties: Claimant presented the expert opinion of Mr. Marchitelli, who works for Cushman & Wakefield, and Respondent relied on the valuation carried out by a team from CBRE.

643. The valuation of an asset, whether an enterprise, or as in this case, real estate, is a complex exercise, which requires the election of a certain methodology, the definition of certain hypotheses, the calculation of certain variables and, at the end of the day, the making by the valuer of certain estimations. Depending on these factors, different valuers may reach materially different results.

644. In this case, Claimant seeks damages of USD 85.9M, based on its expert's proposed valuation of the Properties⁶³². Respondent's expert, on the other hand, arrives at a much more conservative figure, proposing a valuation of USD 47M⁶³³.

645. Given the wide spectrum of results that different valuations may yield, tribunals need to retain a certain margin of appreciation in determining the final compensation due. This does not mean that the tribunal becomes an *amiable compositeur*, because the tribunal's margin of appreciation can only be exercised in a reasoned manner and

⁶²⁹ See paras. 762 and 763 *infra*.

⁶³⁰ Payne II, Appendix B.

⁶³¹ 100,700.69 + 3% on the balance of the price – 3,736,575.01.

⁶³² Payne II, para. 11; H-4, p. 11 and 27

⁶³³ RR, para. 635.

within the boundaries of the principles of international law for the calculation of damages⁶³⁴.

646. In determining Lion's compensation for Mexico's NAFTA breach the Tribunal will take as its starting point the valuations of the Properties that each of the Parties' experts have presented. The Tribunal will thereafter make an adjustment, to reflect the actual value of the Properties and the Mortgages, in the specific circumstances of this case.
647. The Tribunal will first assess the market values of the Nayarit Property (1.) and of the Guadalajara Properties (2.), as calculated by the experts; it will then make certain adjustments to reflect the proper calculation of the impairment suffered by the investments (3.); and finally, will address and dismiss Respondent's ancillary arguments that purport to reduce the compensation due (4.).

1. THE MARKET VALUE OF THE NAYARIT PROPERTY

648. The Nayarit Property is located on Banderas Bay, in an area known as Distiladeras⁶³⁵. It is an unimproved, oceanfront tract that covers an area of approximately 373,558 m²⁶³⁶:



649. Through the property runs an old double lane road, close to the beach, which links the cities of Punta Mita and La Cruz [the "Old Road"].

⁶³⁴ *Rusoro*, para. 642; *Gold Reserve*, para. 686.

⁶³⁵ *Cushman I*, p. 9.

⁶³⁶ *Cushman I*, p. 10.

The Collaboration Agreement

650. On July 30, 2008 the Nayarit State Government and Inmobiliaria Bains (one of Sr. Cárdenas's companies) signed a collaboration agreement [the "**Collaboration Agreement**"]⁶³⁷. The agreement acknowledged that Inmobiliaria Bains held the Nayarit Property and that the Old Road ran across it⁶³⁸. The Old Road, however, did not have its "*derecho de vía liberado*" and this was both problematic and irregular⁶³⁹. To resolve that situation, the Nayarit State Government planned on building a new road linking the same two cities (Punta de Mita and La Cruz) but farther away from the coast⁶⁴⁰ [the "**New Highway**"].
651. Pursuant to the Collaboration Agreement:
- The Government undertook to give the possession of the Old Road to Inmobiliaria Bains⁶⁴¹ as soon as the works of the New Highway were completed⁶⁴² (which were supposed to last eight months⁶⁴³);
 - Inmobiliaria Bains would transfer an area of land for the construction of the New Highway⁶⁴⁴ and contribute to a portion of the building costs⁶⁴⁵, estimated at MEX 23.5 M, by bank check issued at that moment in favour of the Government⁶⁴⁶.
652. There is no dispute that the New Highway is presently in use, and so still is the Old Road.
653. As will be seen further below, the implications of having the Old Road transverse the Nayarit Property is one of the main points of departure between the experts.
654. This is an aerial photograph of the area, depicting the Old Road, the Nayarit Property and the New Highway⁶⁴⁷:

⁶³⁷ Exh. C-188.

⁶³⁸ Whereas 2.4.

⁶³⁹ Whereas 1.3.

⁶⁴⁰ Whereas 2.5.

⁶⁴¹ Clause Segunda e).

⁶⁴² Clause Sexta.

⁶⁴³ Clause Séptima.

⁶⁴⁴ Clause Tercera a).

⁶⁴⁵ Clause Tercera b).

⁶⁴⁶ Clause Quinta.

⁶⁴⁷ H4, p. 4.



* * *

655. Both experts were tasked with the estimation of the market value of the Nayarit Property, assuming that its highest and best use is for tourist-related development, including hotels, condominiums and single-family homes⁶⁴⁸.
656. Claimant's valuation was based on a sales comparison approach⁶⁴⁹ (1.1); Respondent's expert used the same approach⁶⁵⁰, but validated the results with a residual methodology (1.2). The experts' valuations differ by USD 27.3 M⁶⁵¹. The Tribunal will have to determine which valuation is preferable (1.3).

1.1 CLAIMANT'S VALUATION

657. Mr. Marchitelli from Cushman & Wakefield made a special assumption regarding the valuation of the Nayarit Property: since the Collaboration Agreement foresaw that Inmobiliaria Bains would gain full possession of the Old Road once the New Highway

⁶⁴⁸ Cushman I, p. 11. CBRE Nayarit I, p. 48.

⁶⁴⁹ Cushman I, p. 3.

⁶⁵⁰ CBRE Nayarit I, p. 51.

⁶⁵¹ Claimant proposes a value of USD 48.6 M in October 2012; Respondent suggested MEX 274,739,000 in October 2012. Respondent's Rejoinder, para. 542 mentions that CBRE values the Nayarit Property as of October 2012 at USD 21.3 M. RPHB, para. 134 refers to a difference of USD 8.3 M but confuses the Nayarit Property's value with the Guadalajara Properties' one.

was built, Mr. Marchitelli assumed that the Old Road would be an integral part of the Nayarit Property and that the strip of land of the Old Road would be developed together with the rest of the Nayarit Property as a single plot⁶⁵².

658. Based on the above special assumption, the expert sought comparable properties with ocean frontage. He identified seven sales of parcels of vacant land in the same market area as the Nayarit Property that are suitable for residential and/or hospitality development⁶⁵³.

659. A summary of the comparables⁶⁵⁴ and their location⁶⁵⁵ follows:

LAND SALES SUMMARY							
Sale No.	Property Location	Sale Date	Sale Price (US\$)	Site Size (m ²)	Site Size (Ha.)	Price US/m ²	Frontage (m) Beach Ocean
5	Fraction A - San Ignacio de la Cruz	--	--	373,558	37.36	--	460 1,050
1	La Solana, Punta Mita	Dec-13	\$30,460,000	161,874	16.19	\$188.17	196 796
2	Playa Pontoque, Carr. A Punta Mita	Jun-16	\$76,000,000	360,000	36.00	\$211.11	490 660
3	El Izote, Fracc. La Reserva	Sep-16	\$86,815,547	891,783	89.18	\$97.35	1,100 1,100
4	Rosewood Lot H-4-R-19, Mandarin	Nov-16	\$23,266,234	215,000	21.50	\$108.22	260 735
5	Playa Amor, Carr. A Punta Mita	Dec-17	\$7,500,000	40,029	4.00	\$187.36	64 78
6	Highway to Punta Mita Lots RU-4A & RT-16	Offering	\$10,500,000	74,536	7.45	\$140.87	125 125
7	Highway to Punta Mita Lots H-5B1 & B2	Offering	\$40,000,000	237,802	23.78	\$168.21	377 377



⁶⁵² Cushman I, p. 11.

⁶⁵³ Cushman I, p. 14.

⁶⁵⁴ Cushman I, p. 17.

⁶⁵⁵ Cushman I, p. 18.

660. The expert took the valuations of those seven properties and first, adjusted them for the difference in time between the date of the conveyance of title for each sale and the most recent comparable sale. Mr. Marchitelli increased the price for each comparable by the increase in the Mexican National Consumer Price Index during the same period⁶⁵⁶. After this adjustment for market conditions, the prices ranged from USD 105.88/m² to USD 232.26/m²⁶⁵⁷.
661. Secondly, the expert adjusted the prices upward or downward depending on whether the comparables' location, size, ocean frontage and marketability were better or worse than the Nayarit Property's⁶⁵⁸; and then weighted the prices according to his expertise⁶⁵⁹.
662. As a result, the expert believes USD 160 per m² (as of December 2017), in total, USD 59,769,280 to be a market value for the Nayarit Property⁶⁶⁰. The expert suggests using the Mexican National Consumer Price Index to convert that market value to terms of the date of valuation⁶⁶¹. The value as of March 31, 2015 would be USD 53.3 M⁶⁶².

Respondent's criticism

663. CBRE does not accept USD 160/m² as a reasonable price for the Nayarit Property. Especially, taking into consideration that the Nayarit Property was sold in July 2016 for MEX 803.69/m² – this means that, if Mr. Marchitelli was correct, the property would have increased its value by almost 400%⁶⁶³.
664. Additionally, Respondent makes the following comments on the comparables sales chosen by Mr. Marchitelli:
- Sales 1, 2, 3 and 4 were adjusted upward artificially because of inflation⁶⁶⁴; and, if anything, inflation adjustments should be made taking the average of past five years' Mexican National Consumer Price Index⁶⁶⁵;

⁶⁵⁶ Cushman I, p. 19.

⁶⁵⁷ Cushman I, p. 20.

⁶⁵⁸ Cushman I, p. 20.

⁶⁵⁹ Cushman I, p. 21.

⁶⁶⁰ Cushman I, p. 21.

⁶⁶¹ Cushman I, p. 22.

⁶⁶² H4, p. 11.

⁶⁶³ CBRE II, p. 15.

⁶⁶⁴ CBRE II, p. 15.

⁶⁶⁵ CBRE II, p. 16.

- Sale 1 was a plot sold in conjunction with a Four Seasons hotel; it is however unclear how Mr. Marchitelli decided to allocate to the plot USD 30.46 M out of the total sale price⁶⁶⁶;
- Sale 2 (Playa Pontoque) is an inexistent closing: the alleged buyer has informed CBRE that it never acquired the property⁶⁶⁷;
- Sale 4 (Rosewood) is part of a larger development, including infrastructure, which added value to the plot, but no downward adjustment was made in comparison to the Nayarit Property, which is not part of a master plan development⁶⁶⁸;
- Sale 6 consists of two parcels with different uses each⁶⁶⁹ (a 20,000 m² parcel with tourist zoning and USD 120/m², and a second parcel of 54,500 m² with residential zoning classification⁶⁷⁰) – a downward adjustment is necessary to account for the fact that it is a listing price, not a sales price⁶⁷¹;
- Sale 7 should also be adjusted downward because it is a listing and has a better location than the Nayarit Property⁶⁷².

1.2 RESPONDENT'S VALUATION

665. Respondent's expert does not agree with Claimant's special assumption that the Old Road would become an integral part of the Nayarit Property; the property should be valued as it is⁶⁷³. Hence, Respondent's expert divides the 373,558 m² of the Nayarit Property into three distinct areas⁶⁷⁴:

- Ocean frontage: 139,465 m² (A.);
- View on the sea: 204,496 m² (B.);
- Old Road and utility poles⁶⁷⁵: 29,596.9 m².

666. The expert values the first two areas separately. The third area is disregarded, as it would not be subject to development.

⁶⁶⁶ RPHB, para. 160.

⁶⁶⁷ CBRE II, p. 17.

⁶⁶⁸ RPHB, para. 155.

⁶⁶⁹ CBRE II, p. 17.

⁶⁷⁰ HT, p. 865. The price of the second parcel was not disclosed.

⁶⁷¹ CBRE II, p. 18.

⁶⁷² CBRE II, p. 19.

⁶⁷³ CBRE II, p. 20.

⁶⁷⁴ CBRE Nayarit I, p. 53.

⁶⁷⁵ CBRE Nayarit I, p. 18.

A. Ocean frontage

667. The expert took four closed sales and two listings as comparable data⁶⁷⁶:

RESUMEN VENTA DE TERRENOS - RIVIERA NAYARIT								
No.	Dirección	Fecha Transacción	Área Terreno (m ²)	Precio Venta (MX\$)	Precio Venta (MX\$/m ²)	Ubicación	Infraestructura	Uso de Suelo
1	Terreno Denominado "El Izote", Fraccionamiento La Reserva, Bahía de Banderas, Nayarit	Sep-16	891,783	\$1,670,634,665	\$1,873.36	Frente de Playa	Parcial	Turístico
2	Carretera Cruz de Huanacastle - Punta de Mita SN, Bahía de Banderas, Nayarit	Jul-16	900,000	\$750,190,792	\$833.55	Frente de Playa	Completa	Turístico - Residencial
3	Fracción de Terreno Denominado "La Mandarina", Bahía de Banderas, Nayarit	Aug-12	25,000	\$36,257,375	\$1,450.30	Frente de Playa	Completa	Turístico
4	Lote de Terreno Identificado como RU-1, RU-2, RU-3, RT15, RT15A y Polígono 1B, Carretera Punta Mita - a la Cruz de Huanacastle, Punta Pantoque, en el Municipio de Bucaneras, Nayarit	Aug-17	135,056	\$170,000,000	\$1,258.73	Frente de Playa	Parcial	Turístico
OFERTAS ACTUALES								
L4	Terreno Sayulita, Nayarit	Listing	110,000	\$166,320,000	\$1,512.00	Frente de Playa	Parcial	Turístico
L5	Terreno Vista Hermosa, Sayulita, Nayarit	Listing	890,000	\$1,345,680,000	\$1,512.00	Frente de Playa	Parcial	Turístico

668. CBRE then applied adjusting factors in view of zone, location, desirability, infrastructure and marketability⁶⁷⁷. The expert obtained normalised values per m², which were then weighted⁶⁷⁸. Finally, CBRE calculated the average of the quadratic and the harmonic means at MEX 1,380/m² which was then multiplied by 139,465 m² of ocean frontage; this results in a value of MEX 192,450,000⁶⁷⁹ as of October 8, 2018.

B. View on the sea

669. The expert found two closed sales and five listings with a view on the sea⁶⁸⁰

RESUMEN VENTA DE TERRENOS - RIVIERA NAYARIT										
No.	Dirección	Fecha Transacción	Área Terreno (m ²)	Precio Venta (MX\$)	Precio Venta (MX\$/m ²)	Precio Venta (US\$/m ²)	Fuente	Infraestructura	Uso de Suelo	
3	Camino Viejo a La Cruz de Huanacastle SN, Bahía de Banderas, Nayarit	Oct-15	384,272	35,700	\$8,242,949	\$230.89	\$21.45	Vista al Mar	En breña	Habitacional
5	Fracción de Terreno Denominado "Villas San Pancho", Bahía de Banderas Nayarit	Dec-11	1,174,343	109,100	\$76,209,030	\$698.52	\$64.90	Vista al Mar	Completa	Turístico
OFERTAS ACTUALES										
L1	Terreno Playa Punta Burro, Bahía de Banderas, Nayarit	Listing	2,431,567	225,900	\$453,600,000	\$2,007.97	—	Vista al Mar	Parcial	Turístico
L2	Terreno Breña, Bahía de Banderas, Nayarit	Listing	225,929	20,989	\$13,326,500	\$634.91	—	Vista al Mar	Parcial	Turístico
L3	Terreno Rancho Primavera, Punta Mita, Nayarit	Listing	161,168	14,973	\$5,575,500	\$372.37	—	Vista al Mar	Parcial	Turístico
L6	Terreno Cruz de Huanacastle, Nayarit	Listing	18,836,843	1,750,000	\$1,400,000,000	\$800.00	—	Vista al Mar	Parcial	Turístico
L7	Terreno Tondoroque, Bucaneras, Nayarit	Listing	32,000	5	\$3,150,000	\$1,035.94	—	Vista al Mar	Parcial	Turístico
Fracción A del Predio Rústico denominada "San Ignacio de la Cruz", Cruz de Huanacastle, Bahía de Banderas, Nayarit, Mexico (Porción Vista al Mar)		—	2,201,177	204,496.00	—	—	—	Frente de Playa y Vista	Parcial	T - Desarrollo Turístico

⁶⁷⁶ CBRE Nayarit I, p. 54.

⁶⁷⁷ CBRE Nayarit I, p. 56.

⁶⁷⁸ CBRE Nayarit I, p. 57.

⁶⁷⁹ CBRE Nayarit I, p. 57.

⁶⁸⁰ CBRE Nayarit I, p. 54.

670. The above values were adjusted using the same factors just considered⁶⁸¹. The means of the normalised value per m² was MEX 750⁶⁸², which multiplied by 204,496 m² results in a value of MEX 153,350,000⁶⁸³.
671. In total, both strips of land are valued at MEX 345,800,000⁶⁸⁴ as of October 2018; in order to bring this amount back to valuation date – October 16, 2012 – the expert applies the Mexican National Consumer Price Index⁶⁸⁵. The value as of October 16, 2012 is MEX 274,739,000⁶⁸⁶.
672. CBRE also adopts a residual method to confirm the above result. That method infers value assuming that a hypothetical development of the land would be possible⁶⁸⁷.
673. In this case, the expert projects a sale of the Nayarit Property for tourism use⁶⁸⁸. 39,600 m² would be destined to the construction of a hotel and 29,484 m² for residential use, with an approximate construction and sales time of 14 months for the hotel and a sales period of up to 10 years for the residential area⁶⁸⁹, with varying annual sales ratio⁶⁹⁰.
674. CBRE projects an income of MEX 4,800,000 per key for the hotel and MEX 4,910,000 for each residential room⁶⁹¹, as a starting price which will increase annually by 4%⁶⁹². The expert then deducts costs and expenses to obtain the free cash flows, which are

Componente Residencial				
Inventario	Unidades	Superficie (m2 / Unidad)	COS:	30%
Categoría			CUS:	3.0
Vivienda Residencial	234	126	Superficie Total de Terreno	204,496
			Superficie de Construcción	29,484
			Superficie de Vialidad	20,450
Total	234	29,484	Superficie de Amenidades	51,124

Componente Hotelero				
Inventario	Part. (%)	Cuartos	CUS	1.2
Hotel 1	24%	120	COS	30%
Hotel 2	24%	120	Superficie de Construcción	39,600
Hotel 3	25%	125	Superficie Total de Terreno	139,485
Hotel 4	26%	130	Superficie de Vialidades	4,752
Total Vendible:	100%	495		

Densidad Máxima de 35.5 Cuartos/ha para un total de 495 Cuartos Hoteleros

⁶⁸¹ CBRE Nayarit I, p. 58.
⁶⁸² CBRE Nayarit I, p. 58.
⁶⁸³ CBRE Nayarit I, p. 59.
⁶⁸⁴ CBRE Nayarit I, p. 60.
⁶⁸⁵ CBRE Nayarit I, p. 63.
⁶⁸⁶ CBRE Nayarit I, p. 63.
⁶⁸⁷ CBRE Nayarit I, p. 65.
⁶⁸⁸ CBRE Nayarit I, p. 66.
⁶⁸⁹ CBRE Nayarit I, p. 66.
⁶⁹⁰ CBRE Nayarit I, p. 68.
⁶⁹¹ CBRE Nayarit I, p. 67.
⁶⁹² CBRE Nayarit I, p. 68.

discounted at 20% annually for the hotel⁶⁹³ and 18% for the residential area⁶⁹⁴; the expert obtains a net value of MEX 344,612,500⁶⁹⁵:

Claimant's criticism

675. Mr. Marchitelli does not agree with CBRE's report, which arrives at a value of the Nayarit Property equivalent to USD 48.22/ m²⁶⁹⁶. Claimant takes issue with a number of premises assumed by CBRE:

- By dividing the Nayarit Property into two discrete geographical areas, disregarding the Collaboration Agreement, its full development potential and true highest and best use was not acknowledged⁶⁹⁷;
- Comparable 2 was sold on July 29, 2016 for USD 45.12/m², as a distressed sale, the seller being an entity controlled by Sr. Cárdenas⁶⁹⁸ and Comparable 4 was also a distressed sale⁶⁹⁹; but the very definition of market value used also by CBRE, provides that transactions are made without duress and the seller is under no compulsion to sell⁷⁰⁰;
- Offering 2 is a property more than 30 km away from the beach – it is not acceptable as a comparable property for an ocean view property⁷⁰¹;
- Adjustment factors based on whether there is access through fewer or more roads only make sense when valuing urban property⁷⁰²;
- The land residual method is inherently unreliable because of the many assumptions that need to be used⁷⁰³, which are totally unsupported⁷⁰⁴;

1.3 THE TRIBUNAL'S DECISION

676. The Tribunal finds that, in order to reach a decision on the adequate value of the Nayarit Property, it must perform a double analysis: how, if at all, the Old Road should impact

⁶⁹³ CBRE Nayarit I, p. 73.

⁶⁹⁴ CBRE Nayarit I, p. 71.

⁶⁹⁵ CBRE Nayarit I, p. 69.

⁶⁹⁶ Cushman II, p. 6.

⁶⁹⁷ Cushman II, p. 8.

⁶⁹⁸ Cushman II, p. 6.

⁶⁹⁹ H4, p. 19.

⁷⁰⁰ Cushman II, p. 7.

⁷⁰¹ HT, p. 914.

⁷⁰² HT, pp. 932 and 933.

⁷⁰³ Cushman II, p. 9.

⁷⁰⁴ Cushman II, p. 10.

the valuation (A.); and which adjusted comparables should be used to determine the value of the Nayarit Property (B.).

A. Impact of Old Road

677. It is undisputed that, at valuation date, an Old Road crossed the Nayarit Property.
678. Respondent's expert suggests valuing the Nayarit Property as it is, with the Old Road dividing the Property in two plots: one ocean frontage and one with view on the sea. Claimant's expert, on the other hand, puts emphasis on the existence of a Collaboration Agreement by which the Government of Nayarit granted Inmobiliaria Bains full possession over the Old Road in exchange of land and money to build the New Highway; since the New Highway is already built, the expert believes that the Nayarit Property should be valued under the special assumption that the Old Road would be an integral part of the Property, and that it could be developed as a whole.
679. The Tribunal agrees with Claimant on this point.
680. The terms of the Collaboration Agreement are clear: upon completion of the New Highway, Inmobiliaria Bains would have complete possession over the Old Road to use it as it saw fit. Since there is no discussion that the Nayarit Property has more value without the Old Road⁷⁰⁵, it seems reasonable to assume that a prospective buyer would remove the Old Road and develop that strip of land together with the rest of the Nayarit Property.
681. In view of the above, the Nayarit Property will be considered, for valuation purposes, a single piece of land, apt for development as a whole, pursuant to its highest and best use.

B. Adjusted comparables

682. Both experts have valued the Nayarit Property through sales comparisons. Respondent's expert has also applied a residual use method, as a secondary approach for validation, a decision criticized by Claimant's expert⁷⁰⁶: the method allegedly is fraught with unsupported hypotheses⁷⁰⁷ and a minor change in any of these could have profound upward or downward effects on the value⁷⁰⁸.
683. The Tribunal notes that both experts have expressed their preference for sales comparison as the most appropriate method to estimate the value of the Nayarit Property; thus, to the extent that the Tribunal is satisfied that this approach renders an

⁷⁰⁵ HT, p. 830.

⁷⁰⁶ HT, p. 952.

⁷⁰⁷ Cushman II, p. 10.

⁷⁰⁸ Cushman II, p. 9.

appropriate value, there will be no need to perform a validation through the residual method.

684. Under the sales comparison approach the experts have each provided a list of comparables which, duly adjusted, could serve to estimate the Nayarit Property's value. But both experts have raised a number of critiques regarding the comparables and the adjustments proposed by the counter-expert. The Tribunal will analyse the suggested comparables and adjustments, one by one, starting with Mr. Marchitelli's (a.), followed by CBRE's (b.).

a. Claimant's adjusted comparables

685. Claimant's expert found seven comparables (five sales and two listings). Respondent's expert has taken issue with three of them:

- Sale 1 (La Solana): according to public information this plot together with a Four Seasons Resort was sold for roughly USD 200 M⁷⁰⁹, of which Mr. Marchitelli has allocated USD 30.46 M to the land; CBRE questions how Mr. Marchitelli decided which portion of the price related to the parcel and Mr. Marchitelli responded that the developer, contacted by a local valuer, confirmed the prices⁷¹⁰; the Tribunal sees no reason to strike Sale 1 as comparable: Respondent's expert has not denied the sale, nor has it challenged the reasonableness of the price allotted to the land, or suggested an alternative price – it simply questions Mr. Marchitelli's method, but the Tribunal notes that real estate transactions occur in a closed market, with scarce public data, and in these circumstances it seems reasonable to rely on local appraisers and on informal contacts with persons directly involved in the transactions to obtain information which would otherwise never reach the public.
- Sale 2 (Playa Pontoque): both experts agree that this sale was never consummated⁷¹¹; however, Mr. Marchitelli believes that Sale 2 at least shows a meeting of the minds⁷¹²; the Tribunal considers that if Sale 2 never became a closed deal, the proper way to proceed is to treat this sale as a listing and have its price adjusted accordingly.
- Sale 6: Respondent's expert avers that this plot actually consists of two parcels with different uses – one with 20,000 m² and USD 120/m² has tourist zoning, and the other of 54,500 m² has residential zoning classification⁷¹³; the Tribunal sees no cause to disregard Sale 6: in its residual approach, CBRE has acknowledged

⁷⁰⁹ HT, p. 822.

⁷¹⁰ HT, pp. 822 and 823.

⁷¹¹ CBRE II, p. 17. HT, p. 847.

⁷¹² HT, p. 847.

⁷¹³ HT, p. 865.

that the best development of the Nayarit Property would be as two distinct facilities (a hotel and a residential area) – it seems that Sale 6, *prima facie*, could similarly be developed separately as a hotel and as a residential area; and, since Respondent’s expert has not disclosed the price of the residential zoning parcel of Sale 6, the Tribunal cannot verify whether the average price provided by Mr. Marchitelli for both parcels (USD 140/m²) requires a downward adjustment.

686. In summary, the Tribunal decides that Sales 1, 2 and 6 are proper comparables; however, Sale 2 needs to be treated as a listing and thus adjusted accordingly. The following paragraphs will address issues regarding appropriate adjustment and weighting that need to be applied to all comparable sales.

Respondent’s expert

687. Respondent’s expert, in essence, took issue with two general adjustments undertaken by Mr. Marchitelli (**i.** and **ii.**) and suggested further downward adjustment on two comparables (**iii.**):

(i) Market conditions

688. Mr. Marchitelli valued the Nayarit Property as of December 2017, the date the transaction of Sale 5 (Playa Amor) took place. This is the latest date of all transactions used as comparables. The expert decided to bring the price of the other four previous transactions to December 2017 using the Mexican National Consumer Price Index.

689. Respondent’s expert finds that this procedure raises comparable prices artificially⁷¹⁴. And, if at all, inflation adjustments should be made using the average of the past five years’ Mexican National Consumer Price Index⁷¹⁵.

690. The Tribunal does not agree.

691. Claimant’s valuation relies on comparable sales which took place between December 2013 (Sale 1 – La Solana) and December 2017 (Sale 5 – Playa Amor). But a nominal price of 2013, in times of inflation, is worth less in 2017 – therefore, it becomes necessary to harmonise amounts set at different moments in time before performing a comparison.

692. To bring forward past amounts and normalise them in terms of inflation, the expert applies the Mexican National Consumer Price Index, an index which – in general terms – measures the evolution of the cost of living.

⁷¹⁴ CBRE II, p. 15.

⁷¹⁵ CBRE II, p. 16.

693. In contrast, CBRE has used unaltered nominal prices of transactions reaching back to August 2012 and December 2011⁷¹⁶ to infer a value of the Nayarit Property as of 8 October 2018 – the expert has, thus, assumed that the value of MEX has not changed between 2011/2012 and 2018; but the evolution of the Mexican National Consumer Price Index seems to suggest the opposite, as the following graph shows⁷¹⁷:



694. As to whether Mr. Marchitelli should have adjusted for inflation using the average National Consumer Price Index of the past five years⁷¹⁸, the Tribunal finds no support for such proposition. Claimant’s expert adjusted the past nominal prices to account for the increases in the National Consumer Price Index between transaction dates and December 2017; and did the same when discounting the December 2017 value to the valuation date⁷¹⁹. Mr. Marchitelli’s use of the National Consumer Price Index to bring amounts forward and backwards in time has been consistent.

695. Moreover, it seems that CBRE obviated the criticism just made, when it brought back the value of the Nayarit Property from October 2018 to October 2012 using the difference in the National Consumer Price Index between both dates (and not the average of the past five years)⁷²⁰.

(ii) Subjective adjustments

696. CBRE characterises the adjustments on the sales prices performed by Mr. Marchitelli as subjective and lacking explanations⁷²¹.

⁷¹⁶ CBRE Nayarit I, p. 54.

⁷¹⁷ Cushman I, Exhibit 6.

⁷¹⁸ CBRE II, p. 16.

⁷¹⁹ Cushman I, p. 23.

⁷²⁰ CBRE Nayarit I, p. 63.

⁷²¹ CBRE II, p. 16.

697. The Tribunal partially agrees with CBRE as all valuation procedures entail a degree of subjectivity. The appraiser decides, based on his or her expertise, what adjustment factors are relevant and how to weight the different comparables. But subjectivity does not equal randomness. The Tribunal is satisfied with the explanations provided by Mr. Marchitelli of the motivation underpinning the adjustment and weighting factors used⁷²² – this being said without prejudice to the Tribunal’s decision regarding further adjustments.
698. Finally, the Tribunal notes that CBRE’s valuation, and more particularly, the choice of normalisation⁷²³ and weighting⁷²⁴ factors is also premised on the subjectivity of the appraisers who drafted the report.

(iii) Further downward adjustment

699. Respondent has suggested performing an additional downward adjustment to two comparable sales:
- Sale 4 (Rosewood) is located in a large luxury development called La Mandarina, the master plan development of which foresees the construction of certain infrastructure which Mr. Marchitelli accepted would add value to the plot, yet no downward adjustment was made to account for the fact that the Nayarit Property has no master development plan⁷²⁵; the Tribunal agrees with Respondent that a downward adjustment is warranted – the Tribunal notes, however, that Sale 4 has been adjusted upward by Mr. Marchitelli because the Nayarit Property has, generally, a better location⁷²⁶; absent evidence on the specific weight to be attributed to adjustment factors for infrastructure and for general location, the Tribunal decides to weigh them equally, with the result that the new downward adjustment and the existing upward adjustment for general location cancel each other out.
 - Sale 7 should be adjusted downward because it is a listing and has a better location than the Nayarit Property⁷²⁷; the Tribunal notes that Sale 7 has already been adjusted downwards to reflect that it is a listing⁷²⁸ – no further adjustments seem necessary.

⁷²² Cushman I, pp. 20 and 21.

⁷²³ CBRE Nayarit I, pp. 56 and 58.

⁷²⁴ CBRE Nayarit I, pp. 57 and 58.

⁷²⁵ HT, p. 825.

⁷²⁶ Cushman I, p. 20.

⁷²⁷ CBRE II, p. 19.

⁷²⁸ Cushman I, p. 19.

700. In conclusion, the Tribunal decides to disregard the general location upward adjustment performed on Sale 4 by Mr. Marchitelli, to compensate for the warranted infrastructure downward adjustment which was lacking.

* * *

701. Mr. Marchitelli relied upon five sales and two listings which in view of the above decisions must be adjusted as follows⁷²⁹:

- Sale 3 (USD 105.88/m²) needs to be adjusted upwards for an inferior location and larger size than the Nayarit Property; in order to quantify these two upward adjustments, the Tribunal will rely on CBRE's expert opinion, according to which, the degree of desirability should translate into a 10% increase⁷³⁰ – since for Sale 3 two upward adjustments are warranted, the Tribunal will increase the price by a 1.2 factor; this results in USD 127.06/m².
- Sale 4 (USD 116.08/m²) needs only be adjusted upwards for having less beach area than the Nayarit Property – the other two proposed adjustments cancelled each other out, pursuant to the Tribunal's previous decision⁷³¹; the Tribunal will apply a 1.1 factor; this results in USD 127.69/m².
- Listing 6 (USD 140.87/m²) requires two downward adjustments for being larger than the Nayarit Property and a listing rather than a sale, and two upward adjustments for having less beach and an inferior configuration than the Nayarit Property – positive and negative adjustments that cancel each other out.
- Listing 7 (USD 168.31/m²) requires two downward adjustments for having a worse location than the Nayarit Property and being a listing, and an upward adjustment for having less beach – since a positive and a negative adjustment cancel each other out, the Tribunal must only adjust the listing price by applying a 0.9 factor (the factor used by CBRE to adjust listing prices⁷³²); the resulting price is USD 151.48/m²;
- Sale 5 (USD 187.36/m²) is adjusted downward for being larger than the Nayarit Property and upward twice for having less beach area and a more complicated shape – this means that the price needs to be increased by a factor of 1.1, USD 206.1/m².

⁷²⁹ Cushman I, p. 20.

⁷³⁰ CBRE Nayarit I, p. 56: good desirability has a factor of 1.1, high desirability of 1.2.

⁷³¹ See para. 699 *supra*.

⁷³² CBRE Nayarit I, p. 56.

- Sale 1 (USD 220.75/m²) is adjusted downward twice for being larger and in a better location and upward once for having less beach – in sum, the price will be adjusted by a factor of 0.9 to USD 198.67/m²;
- Sale 2 (USD 232.26/m²) is only adjusted upward once, to account for the fact that it has less beach area than the Nayarit Property; thus, the price will be augmented by a 1.1 factor, USD 255.5/m².

b. Respondent’s adjusted comparables

702. Respondent’s expert divided the Nayarit Property in two, on account of the Old Road: one parcel with ocean frontage and one with view over the sea; then the expert looked for comparables for each plot.
703. The Tribunal, however, has accepted as a special assumption that the Old Road is an integral part of the Nayarit Property and that it is subject to development together with the rest of the land. Thus, the Nayarit Property is a 373,558 m² ocean frontage plot. It follows that the comparables identified as sea view without ocean frontage are less suitable for estimating the value of an ocean frontage property such as the Nayarit one.
704. But CBRE also located four sales and two listings of parcels with ocean frontage. These transactions are *prima facie* eligible comparables. However, Claimant has made a number of criticisms, which will be addressed by the Tribunal:
- Comparables 2 and 4 should be disregarded because they were distressed sales⁷³³, sold at half the price commanded by properties without any sea frontage⁷³⁴; Respondent accepts that Comparable 2 was a distressed sale and should be eliminated from the analysis⁷³⁵ and, as Claimant points out, Mexico has not denied that Comparable 4 was a forced sale⁷³⁶; the Tribunal agrees: both experts were tasked with estimating the market value of the Nayarit Property⁷³⁷ and a distressed sale is outside the scope of market value.
 - No inflation adjustment was applied to pre-2018 comparables⁷³⁸: the Tribunal notes that CBRE uses the Mexican National Consumer Price Index to bring an October 2018 value back to an October 2012 value; however, when calculating the 2018 value, the expert takes transactions which occurred over a period covering from 2012 to 2017 at nominal value, without performing an inflation adjustment – this approach artificially brings down the price as when moving

⁷³³ HT, p. 788.

⁷³⁴ HT, p. 790.

⁷³⁵ HT, p. 905.

⁷³⁶ CPHB, para. 275.

⁷³⁷ Cushman I, p. 2: “I was requested to estimate the market value ...”. CBRE Nayarit I, p. 5: “El propósito del presente estudio es estimar el valor de mercado de la propiedad en estudio ...”.

⁷³⁸ CPHB, para. 278.

forward in time no upright adjustment is made but when projecting back, a downward adjustment is performed. Accordingly, the Tribunal determines that pre-2018 comparables must be subject to an inflation adjustment.

- No adjustment for amount of ocean frontage was made⁷³⁹ or for proximity to the Nayarit Property⁷⁴⁰: the Tribunal has already accepted that valuation is not an exact science, but rather open to and dependent on the expertise and subjectivity of the appraiser – the Tribunal accepts that CBRE, for good reason, favoured other adjustment factors over those two.
- CBRE adjusted the prices taking into account the number of roads through which the property is accessible, when in fact this would only be relevant for urban properties and Respondent’s expert agreed that this adjustment is not relevant to a beach property⁷⁴¹; the Tribunal will thus disregard this adjustment factor.

705. In summary, the Tribunal shall only consider comparables with ocean frontage and within this group will disregard Comparables 2 and 4 which are distressed sales (i.), apply an inflation adjustment (ii.), and not adjust any of the comparables in view of the number of roads through which the property has access (iii.).

706. (i) These are the remaining comparables – two sales and two listings⁷⁴²:

RESUMEN VENTA DE TERRENOS - RIVIERA NAYARIT								
No.	Dirección	Fecha Tramitación	Área Terreno (m ²)	Precio Venta (MX\$)	Precio Venta (MX\$/m ²)	Ubicación	Infraestructura	Uso de Suelo
1	Terreno Denominado "El Izote", Fraccionamiento La Reserva, Bahía de Banderas, Nayarit	Sep-16	891,783	\$1,670,634,665	\$1,873.36	Frente de Playa	Parcial	Turístico
2	Carretera Cruz de Huauacastle - Punta de Mita SN, Bahía de Banderas, Nayarit	Jul-16	900,000	\$750,190,792	\$833.55	Frente de Playa	Completa	Turístico - Residencial
3	Fracción de Terreno Denominado "La Mandarina", Bahía de Banderas, Nayarit	Aug-12	25,000	\$36,257,375	\$1,450.30	Frente de Playa	Completa	Turístico
4	Lote de Terreno Identificado como RU-1, RU-2, RU-3, RT15, RT15A y Polígono 1B, Carretera Punta Mita - a la Cruz de Huauacastle, Punta Pantoque, en el Municipio de Buenavista, Nayarit	Aug-17	185,056	\$170,000,000	\$1,258.73	Frente de Playa	Parcial	Turístico
OFERTAS ACTUALES								
L4	Terreno Sayulita, Nayarit	Listing	110,000	\$166,320,000	\$1,512.00	Frente de Playa	Parcial	Turístico
L5	Terreno Vista Hermosa, Sayulita, Nayarit	Listing	890,000	\$1,345,680,000	\$1,512.00	Frente de Playa	Parcial	Turístico

707. (ii) Comparables 1 and 3 need to be adjusted for inflation. Mr. Marchitelli has brought his comparables to December 2017 values; to enable comparison, the Tribunal will capitalise CBRE’s values to the same date. To do so, Mr. Marchitelli relied on the Mexican National Consumer Price Index published by the Federal Reserve Bank of St. Louis⁷⁴³. According to this publication:

⁷³⁹ CPHB, para. 255.

⁷⁴⁰ CPHB, para. 270.

⁷⁴¹ HT, pp. 932 and 933.

⁷⁴² CBRE Nayarit I, p. 54.

⁷⁴³ Cushman I, Exhibit 6. <https://fred.stlouisfed.org/series/MEXCPIALLMINMEI>

- In September 2016 the index was at 103.08389 whilst in December 2017 it was at 112.11382 – this means an upward change of the Comparable 1 September 2016 price by 1.08⁷⁴⁴: MEX 1,873.36/m² of September 2016 equal MEX 2,037.46/m² in December 2017;
 - In August 2012 the index was at 90.2298, whilst in December 2017 it was at 112.11382 – this requires an upward adjustment of the Comparable 3 August 2012 price by 1.24⁷⁴⁵: MEX 1,450.3/m² of August 2012 become MEX 1,802.05/m² in December 2017.
708. Since the comparables provided by CBRE are in MEX, while Mr. Marchitelli's are in USD, the Tribunal will convert all amounts into USD. Mr. Marchitelli concluded that the Nayarit Property was worth USD 160/m²⁷⁴⁶ or MEX 3,100/m²⁷⁴⁷ as of December 2017; this implies an exchange rate of 19.375 MEX/USD. Converted into USD at this exchange rate, CBRE's comparables look as follows:
- Comparable 1: MEX 2,037.46/m² in December 2017 is USD 105.16/m²;
 - Comparable 3: MEX 1,802.05/m² in December 2017 equals USD 93/m²;
 - Offerings 4 and 5: MEX 1,512/m² is 78.04 USD/m².
709. (iii) Compared to the Nayarit Property, the only adjustments performed by CBRE for normalisation purposes were⁷⁴⁸:
- On Comparable 3, for surface area (factor 0.92) and equipment (factor 1.05); this means, in average, a factor of 0.985 that applies to USD 93/m² and results in USD 91.61/m².
 - On Offerings 4 and 5 to account for the fact that their prices do not reflect a close sale (factor 0.9⁷⁴⁹); this implies that USD 78.04/m² sales price be reduced to USD 70.2/m².

* * *

710. The Tribunal has normalised all comparable transactions provided by both experts and arrives at the following prices per m²:

⁷⁴⁴ 112.11382/103.08389 = 1.08

⁷⁴⁵ 112.11382/90.2298 = 1.24

⁷⁴⁶ Cushman I, p. 21.

⁷⁴⁷ Cushman I, p. 24.

⁷⁴⁸ CBRE Nayarit I, p. 56.

⁷⁴⁹ CBRE Nayarit I, p. 56.

- Offering 4: USD 70.2/m²;
- Offering 5: USD 70.2/m²;
- Comparable 3: USD 91.61/m²;
- Comparable 1: USD 105.16/m²;
- Sale 3: USD 127.06/m²;
- Sale 4: USD 127.69/m²;
- Listing 6: USD 140.87/m²;
- Listing 7: USD 151.48/m²;
- Sale 1: USD 198.67/m²;
- Sale 5: USD 206.1/m²;
- Sale 2: USD 255.5/m².

711. Instead of calculating the arithmetic mean, Respondent's expert has proposed to use the average of the quadratic mean and the harmonic mean⁷⁵⁰.
712. Quadratic mean is often used when the sample has both positive and negative figures, which the arithmetic mean would cancel out – here, however, there are no negative figures. The harmonic mean is ordinarily used to calculate the average of ratios and, for positive data, the harmonic mean will always be the least of means – the Tribunal is seeking the average of integers, it thus sees no good reason to choose a mean which tends to minimise the average.
713. Since the different data have already been adjusted for purposes and weighted for normalisation, the arithmetic mean seems the most appropriate average: it places equal value on each element without additional distortions. The arithmetic mean of the prices of the different comparables is USD 140.42/m².
714. The above amount is set at December 2017; the valuation date of the Nayarit Property is, however, October 16, 2012⁷⁵¹. The Mexican National Consumer Index was 112.11382 in December 2017 and 91.08599 in October 2012; USD 140.42/m² brought back to October 2012 is USD 114.08/m². Multiplied by 373,558 m² it equals USD 42,615, 497.

⁷⁵⁰ CBRE Nayarit I, p. 54.

⁷⁵¹ See para. 632 *supra*.

715. At valuation date the Nayarit Property is estimated at USD 42,615, 497.
716. As anticipated⁷⁵², the Tribunal must now deduct the costs related to the foreclosure sale: 4.6% on the sales price plus USD 25,000; i.e. USD 1,985,313⁷⁵³.
717. The net market value of the Nayarit Property, at valuation date, is thus, **USD 40,630,184.**

2. THE MARKET VALUE OF THE GUADALAJARA PROPERTIES

718. The Guadalajara property consists of two adjacent plots of land which cover a total area of 15,478 m²⁷⁵⁴. The two plots are also known as Las Américas A and Las Américas B, with an area of 9,335 m² and 6,143 m², respectively⁷⁵⁵.
719. Las Américas A and B, although adjacent, pertain to different zoning districts, which impacts on the possible use of the land. Las Américas A is zoned for mixed use and Las Américas B for residential use⁷⁵⁶.
720. Here is an aerial photograph of the Guadalajara Properties⁷⁵⁷:



⁷⁵² See paras. 640 and 641 *supra*.

⁷⁵³ (USD 42,615, 497 * 4.6%) + USD 25,000.

⁷⁵⁴ Cushman I, p. 28.

⁷⁵⁵ CBRE Guadalajara I, p. 12.

⁷⁵⁶ CBRE II, p. 21.

⁷⁵⁷ H5, p. 20.

721. Claimant's expert estimated the fair market value of the Guadalajara Properties using a sales comparison approach (1.), as did Respondent's expert, but the latter also performed a residual value approach (2.). Although the experts performed their valuations under different premises, the results do not lie too far apart: there is a difference of opinion among the experts of USD 1.5M⁷⁵⁸. The Tribunal will determine which valuation is preferable (3.).

2.1 CLAIMANT'S VALUATION

722. Mr. Marchitelli acknowledges that Las Américas A and Las Américas B each has a different assigned use. However, he strongly believes that, when two adjacent plots are held by the same owner and have different uses, the owner may choose the use that renders the most value out of the two and develop the entire property for that use⁷⁵⁹. In this case, Mr. Marchitelli determines that the highest and best use is for a mixed-use development⁷⁶⁰.

723. The expert found six sales for analysis and one additional sale. Here is a summary of the comparables⁷⁶¹ and their locations⁷⁶²:

⁷⁵⁸ Claimant proposes USD 29.6 M September 2012, opposed to Respondent's suggested MEX 365,725,000 in September 2012. According to Respondent's Rejoinder, para. 542, Mexico values the Guadalajara Properties at USD 27.87 M.

⁷⁵⁹ HT, p. 794.

⁷⁶⁰ Cushman I, p. 29.

⁷⁶¹ Cushman I, p. 32.

⁷⁶² Cushman I, p. 33.



LAND SALES SUMMARY						
Sale No.	Property Location	Sale Date	Sale Price (US\$)	Site Size (m ²)	Site Size (Ha.)	Price US/m ²
S	Av. Americas 1785 & Av. Montevideo 2426	--	--	15,478	1.55	--
A	Av. Patria & Av. Universidad	Apr-13	\$28,000,000	14,000	1.40	\$2,000
B	Av. Patria 188 & Blvd. Puerta de Hierro	Jun-13	\$15,200,000	8,000	0.80	\$1,900
C	Av. Americas 1462 & Mar Mediterraneo	Oct-14	\$7,800,000	3,900	0.39	\$2,000
D	Av. Americas 1500, Col. Providencia	Jun-15	\$7,870,174	4,116	0.41	\$1,912
E	Av. Empresarios & Paseo de los Varreyes	Jul-15	\$8,957,151	4,000	0.40	\$2,239
F	Av. Patria, Col. Royal Country	Offering	\$38,220,000	18,200	1.82	\$2,100
OTHER SALES						
G	Av. Americas 1972, Col. Country Club	Aug-09	\$7,307,000	4,168	0.42	\$1,753

724. The expert made adjustments for market conditions⁷⁶³ and size⁷⁶⁴ and afterwards he weighted them according to his opinion⁷⁶⁵. This results in a value as of July 2015, of the Guadalajara Properties of USD 2,100 per m² or in total USD 32,503,800⁷⁶⁶.
725. In order to bring back that amount to the relevant valuation date, the expert suggests using the Mexican National Consumer Price Index⁷⁶⁷. The value as of March 31, 2015 is USD 32.6 M⁷⁶⁸.

Respondent's criticism

726. CBRE says that:

⁷⁶³ Cushman I, p. 34.

⁷⁶⁴ Cushman I, p. 35.

⁷⁶⁵ Cushman I, p. 35.

⁷⁶⁶ Cushman I, p. 35.

⁷⁶⁷ Cushman I, p. 36.

⁷⁶⁸ H4, p. 27.

- Sale B is a closing with erroneous information: the deed shows that, in reality, the surface was 7,580.23 m² and the sales price USD 12,282,076⁷⁶⁹.
- Sale G is a sale that happened more than nine years ago and should, thus, be considered irrelevant⁷⁷⁰.

2.2 RESPONDENT’S VALUATION

727. Because each of the Guadalajara Properties has a different use, CBRE assumes that they would be developed separately – each according to their highest and best use: Las Américas A (**A.**), for office use and Las Américas B (**B.**), for residential use⁷⁷¹. The expert strongly feels that the Guadalajara Properties cannot be valued as a single parcel, like Mr. Marchitelli did⁷⁷².

A. Las Américas A

728. The expert found five sales and three listings as comparables⁷⁷³:

RESUMEN VENTA DE TERRENOS MIXTOS - GUADALAJARA									
No.	Dirección	Fecha Transacción	Área Terreno (m ²)	Precio Venta (MEX\$)	Precio Venta (MEX\$/m ²)	Frente	Infraestructura	Uso de Suelo	
1	Av. De Las Americas 861, Guadalajara, Jalisco	Jul-16	15,000	\$202,500,000	\$13,500.00	Via Principal	Completo	Mixto	
2	Av. De Las Americas 1500, Guadalajara, Jalisco	Estimado 2015	2,700	\$121,824,000	\$45,120.00	Via Principal	Completo	Mixto	
3	Av. De Las Americas S/N, Guadalajara, Jalisco	Estimado 2014	4,000	\$100,000,000	\$25,000.00	Via Principal	Completo	Mixto	
4	Av. Patria 188, Puerta de Hierro, Zapopan, Jalisco	Jul-13	15,000	\$507,600,000	\$33,840.00	Via Principal	Completo	Mixto	
5	Av. De Las Empresarios 135, Puerta de Hierro, Zapopan, Jalisco	Jul-15	4,000	\$142,880,000	\$35,720.00	Via Secundaria	Completo	Mixto	
OFERTAS ACTUALES									
L1	Av. Lopez Mateos Sur 839, Jardines del bosque, Guadalajara, Jalisco	Listing	1,860	\$85,000,000	\$45,698.92	Principal	Parcial	RU-CF/MC-2(103)	
L2	Av. Lopez Mateos, Guadalajara, Jalisco	Actual	1,215	\$36,000,000	\$29,629.63	Via Principal	Parcial	AU 24, MC-3	
L3	Av. De las Americas 343, Altamira, Zapopan, Jalisco	Listing	1,020	\$32,000,000	\$31,372.55	Principal	Parcial	AU-UP-AT-PP-PH/MC-4	
			Av. Americas No. 1,785, Guadalajara, Jalisco, Mexico	9,335			Completo	AU 04, MD-2	

729. These comparables were adjusted for normalisation purposes⁷⁷⁴ and then, they were weighted according to CBRE’s expertise⁷⁷⁵; this resulted in an average value per m² of MEX 35,910⁷⁷⁶. In total, multiplied by 9,335 m² of area, it equals a value of MEX 335,200,000⁷⁷⁷.

⁷⁶⁹ CBRE II, p. 21.

⁷⁷⁰ CBRE II, p. 21.

⁷⁷¹ CBRE Guadalajara I, p. 44.

⁷⁷² CBRE II, p. 22.

⁷⁷³ CBRE Guadalajara I, p. 50.

⁷⁷⁴ CBRE Guadalajara I, p. 51.

⁷⁷⁵ CBRE Guadalajara I, p. 52.

⁷⁷⁶ CBRE Guadalajara I, p. 52.

⁷⁷⁷ CBRE Guadalajara I, p. 56.

730. The above amounts are as of October 2018; in order to bring them back to the valuation date – September 7, 2012, the date the Guadalajara *Registro Público* cancelled the mortgages – the expert uses the Mexican National Consumer Price Index. On this basis, as of September 7, 2012, Las Américas A was worth MEX 264,976,000⁷⁷⁸.
731. CBRE also applied a residual approach, to verify the previous valuation results. The expert assumes that Las Américas A could be sold for office use⁷⁷⁹, with 16 suites of 750 m² each on average with a monthly rent of MEX 410 per m²⁷⁸⁰; after deducting costs and expenses and discounting the free cash flows at a 16% annual rate this would give a value of MEX 338,472,900⁷⁸¹.

B. Las Américas B

732. The expert only found six listings⁷⁸²:

RESUMEN VENTA DE TERRENOS HABITACIONALES - GUADALAJARA								
No.	Dirección	Fecha Transacción	Área Terreno (m ²)	Precio Venta (MX\$)	Precio Venta (MX\$/m ²)	Frente	Infraestructura	Uso de Suelo
OFERTAS ACTUALES								
L1	Av. Mexico 2067, Colonia Ladrón de Guevara, Guadalajara, Jalisco	Listing	2,295	\$59,000,000	\$25,708.06	Principal	Completa	Habitacional/ Comercial
L2	Av. Patria 2085, Colomas Patria, Zapopan, Jalisco	Listing	1,800	\$41,400,000	\$23,000.00	Principal	Completa	Mixto (Construcción Habitacional)
L3	Av. Mexico, Ladrón de Guevara, Guadalajara, Jalisco	Listing	2,302	\$54,000,000	\$23,457.86	Principal	Completa	Mixto (Construcción Habitacional)
L4	Calle Barranquilla, Colonia Colomas Providencia, Guadalajara, Jalisco.	Listing	1,323	\$30,000,000	\$22,675.74	Principal	Completa	Mixto (Construcción Habitacional)
L5	Rinconada de las Proceras 1300, Jardines del Bosque, Guadalajara, Jalisco	Listing	2,276	\$70,755,000	\$31,087.43	Secundaria	Completa	Habitacional
L6	San Javier 1, Colinas de San Javier, Guadalajara, Jalisco	Listing	4,090	\$61,000,000	\$14,914.43	Secundaria	Completa	Habitacional
	Av. Montevideo No. 2426, Guadalajara, Jalisco, Mexico		6,143.00				Completa	AU 07, H2-V

733. These comparables were adjusted for normalisation purposes⁷⁸³ then weighted⁷⁸⁴, which resulted in an average value per m² of MEX 20,750⁷⁸⁵. Multiplied by 6,143 m² of area, this gives a value of MEX 127,450,000 as of October 2018⁷⁸⁶; brought back to September 7, 2012 it was MEX 100,749,000⁷⁸⁷.
734. According to the residual approach, Las Américas B could be developed for residential use⁷⁸⁸, into 30 units of 240 m² in average each, an average sales Price of MEX

⁷⁷⁸ CBRE Guadalajara I, p. 59.
⁷⁷⁹ CBRE Guadalajara I, p. 62.
⁷⁸⁰ CBRE Guadalajara I, p. 63.
⁷⁸¹ CBRE Guadalajara I, p. 64.
⁷⁸² CBRE Guadalajara I, p. 53.
⁷⁸³ CBRE Guadalajara I, p. 54.
⁷⁸⁴ CBRE Guadalajara I, p. 54.
⁷⁸⁵ CBRE Guadalajara I, p. 54.
⁷⁸⁶ CBRE Guadalajara I, p. 56.
⁷⁸⁷ CBRE Guadalajara I, p. 59.
⁷⁸⁸ CBRE Guadalajara I, p. 68.

11,200,000 increased by 4% annually and a sales period of four to five years⁷⁸⁹; deducting costs and expenses and discounting the free cash flows at 16% annually, this results in a value of MEX 131,960,700⁷⁹⁰.

Claimant's criticism

735. Mr. Marchitelli does not agree with the CBRE, for the following reasons:

- The report concludes that the property would be developed as two distinct parcels, but this does not maximise its value as required in the definition of highest and best use⁷⁹¹; the highest and best is a mixed use and this was acknowledged in an appraisal prepared on October 9, 2014⁷⁹²;
- The valuation of Las Américas B does not rely on a single comparable sale, it only uses listings⁷⁹³;
- The residual use method is not completely reliable: small changes in the variables can have dramatic impacts on the value⁷⁹⁴.

2.3 THE TRIBUNAL'S DECISION

736. The experts focus their disagreement on one main issue: whether the fact that Las Américas A and Las Américas B have different zoning uses warrants that they be valued separately.

737. It is undisputed that Las Américas A and Las Américas B are distinct plots, registered separately. But it is equally undebated that they are adjacent and belong to the same owner.

738. In essence, Mr. Marchitelli has valued the Guadalajara Properties as a single parcel according to a special assumption: that it is permitted to develop them jointly as a mixed-use property. The Tribunal, however, cannot accept the special assumption, which goes against the principle of valuing the property as it is, without proper evidence that would justify the assumption.

739. In the previous valuation of the Nayarit Property, Mr. Marchitelli brought evidence that the Old Road should be deemed an integral part of the Nayarit Property and the Tribunal, thus, validated that special assumption; but here, Mr. Marchitelli has failed to refer to any planning legislation which permits adjacent lands, which belong to the

⁷⁸⁹ CBRE Guadalajara I, p. 68.

⁷⁹⁰ CBRE Guadalajara I, p. 70.

⁷⁹¹ Cushman II, p. 11.

⁷⁹² Cushman II, p. 11.

⁷⁹³ Cushman II, p. 11.

⁷⁹⁴ HT, p. 800.

same owner, to be developed as one. Absent supporting evidence, the Tribunal cannot accept the proposed special assumption. Las Américas A and Las Américas B will, thus, be valued separately, each according to its own use.

740. The Tribunal will now estimate the value of Las Américas A (**A.**) and Las Américas B (**B.**) through a sales comparison approach, based on the comparables found by both experts. For reasons already anticipated⁷⁹⁵, the Tribunal, if satisfied with the resulting value, will not perform a secondary valuation through a residual use method.

A. Las Américas A

741. Las Américas A is a mixed-use plot. The Tribunal will first analyse Claimant's comparables (**a.**) and then Respondent's (**b.**).

a. Claimant's comparables

742. The Tribunal notes that almost all comparables identified by Mr. Marchitelli are mixed-use lands (Sales A – F); *prima facie* the Tribunal accepts this data as eligible comparables, subject to the appropriate adjustment *infra*.
743. CBRE has only taken issue with Sale B because it, allegedly, contains erroneous information (the surface was 7,580 m² and the sales price USD 12,282,076) – an allegation which has not been disputed. The corrected price per m² is, thus, USD 1,620 (not USD 1,900 as proposed by Mr. Marchitelli⁷⁹⁶). This price needs to be adjusted for inflation and brought forward to July 2015, by a factor of 1.0689⁷⁹⁷; this results in an actual (corrected) price of USD 1,732/m².
744. Mr. Marchitelli's sole additional adjustment is for size: smaller sites tend to sell for more unit price. Since the Guadalajara Properties will be valued separately, the Tribunal must determine whether the adjustments for size made by Mr. Marchitelli still apply, now that the subject property (Las Américas A) is reduced from 15,478 m² to only 9,335 m². The Tribunal notes that Sale B is the only comparable similar in size to Las Américas A (7,580 m²⁷⁹⁸, as opposed to 9,335 m²); Sales C, D and E have each an area of around 4,000 m² and thus need a downward adjustment; whilst Sales A and F (14,000 m² and 18,200 m², respectively) require an upward adjustment. Absent specific evidence on the weight attributed by Mr. Marchitelli to the size adjustment, for consistency reasons⁷⁹⁹ the Tribunal decides to apply a 0.1 factor upward or downward. The sales adjusted sales prices per m² are as follows:

⁷⁹⁵ See para. 683 *supra*.

⁷⁹⁶ Cushman I, p. 34.

⁷⁹⁷ Cushman I, p. 34. July 2015 index is 99,52798 and that of June 2013 is 93,11464.

⁷⁹⁸ As corrected by the Tribunal; see para. 743 *supra*.

⁷⁹⁹ See para. 701 *supra*.

- Sale D: the price is brought down from USD 1,915/m² to USD 1,723/m²;
- Sale C: the price is reduced from USD 2,027/m² to USD 1,824/m²;
- Sale F: the price needs to be raised from USD 2,100/m² to USD 2,310/m²;
- Sale A: the price will be augmented from USD 2,129/m² to USD 2,342/m²;
- Sale E: the price is minored from USD 2,239/m² to USD 2,015/m².

b. Respondent's comparables

745. CBRE has identified five sales comparables for mixed use and three listings⁸⁰⁰. The Tribunal will adjust the sales price to account for inflation (i.) and then it will convert all amounts into USD (ii.).
746. (i) As already seen in the valuation of the Nayarit Property, an adjustment of the comparable prices for inflation becomes necessary. All values will be adjusted in time to July 2015 – the date used by Mr. Marchitelli in his valuation – using the Mexican National Consumer Price Index⁸⁰¹:
- Comparable 1 dates from July 2016; in July 2016 the consumer price index was 102.17028, whilst in July 2015 it was 99.53, thus a factor of 0.974⁸⁰² needs to be applied – the sale price of MEX 15,341/m² is brought down to MEX 14,944/m².
 - Comparable 2 is from 2015; no month has been specified – absent this information, the Tribunal assumes that the sale took place in the mid-year and the sale price of MEX 46,442.7/m² need not be adjusted.
 - Comparable 3 is from 2014; lacking evidence on the month in which the transaction happened, the Tribunal will assume it happened in the mid-year – in July 2014 the consumer price index was 96.87454, whilst in July 2015 it was 99.53, thus a factor of 1.027⁸⁰³ needs to be applied – the sale price of MEX 34,786.64/m² is raised to MEX 35,739/m².
 - Comparable 4 is from July 2013; in July 2013 the consumer price index was 93.08379, whilst in July 2015 it was 99.53, thus a factor of 1.069⁸⁰⁴ needs to be applied – the sale price of MEX 38,454.55/m² is increased to MEX 41,117/m².

⁸⁰⁰ CBRE Guadalajara I, p. 51.

⁸⁰¹ Cushman I, Exhibit 6. <https://fred.stlouisfed.org/series/MEXCPIALLMINMEI>

⁸⁰² $99.53/102.17028 = 0.974$

⁸⁰³ $99.53/96.87454 = 1.027$

⁸⁰⁴ $99.53/93.08379 = 1.069$

- Comparable 5 is exactly from July 2015: the price of MEX 39,762.52/m² does not need to be adjusted.

747. (ii) Now that CBRE's comparables are adjusted for inflation, they need to be converted into USD and so do the three offerings. Mr. Marchitelli estimates the Guadalajara Properties to be worth USD 2,100/m²⁸⁰⁵ or MEX 32,000/m²⁸⁰⁶ in July 2015 – the exchange rate applied is 15.24 MEX/USD. The above sales prices converted into USD are as follows:

- Comparable 1: MEX 14,944/m² is USD 981/m²;
- Comparable 2: MEX 46,442.7/m² is USD 3,048/m²;
- Comparable 3: MEX 35,739/m² is USD 2,345/m²;
- Comparable 4: MEX 41,117/m² is USD 2,698/m²;
- Comparable 5: MEX 39,762.52/m² is USD 2,609/m²;
- Offering 1: MEX 48,616/m² is USD 3,190/m²;
- Offering 2: MEX 32,938/m² is USD 2,162/m²;
- Offering 3: MEX 36,536/m² is USD 2,398/m².

* * *

748. The Tribunal has now six sales from Mr. Marchitelli and the five comparables and three offerings from CBRE, with the following prices:

- Comparable 1: USD 981/m²;
- Sale D: USD 1,723/m²;
- Sale B: USD 1,732/m²;
- Sale C: USD 1,824/m²;
- Sale E: USD 2,015/m²;
- Offering 2 is USD 2,162/m²;

⁸⁰⁵ Cushman I, p. 35

⁸⁰⁶ Cushman I, p. 37.

- Sale F: USD 2,310/m²;
- Sale A: USD 2,342/m²;
- Comparable 3 is USD 2,345/m²;
- Offering 3 is USD 2,398/m²;
- Comparable 5 is USD 2,609/m²;
- Comparable 4 is USD 2,698/m²;
- Comparable 2 is USD 3,048/m²;
- Offering 1 is USD 3,190/m².

749. For reasons explained above, the Tribunal applies the arithmetic mean of the above prices: USD 2,241.29/m².

750. This amount is set at July 2015, whereas the valuation date of the Guadalajara Properties is September 7, 2012⁸⁰⁷. The Mexican National Consumer Index was 99.52798 in July 2015 and 90.62747 in September 2012. The average price is, thus, USD 2,040.86/m²⁸⁰⁸ in September 2012. Multiplied by 9,335m², it equals a total value of USD 19,051,406⁸⁰⁹.

B. Las Américas B

751. For las Américas B, with residential use, CBRE found six listings: three for residential use and another three for mixed use. Apparently, CBRE incorporated the mixed use listings because the plots were planned to be developed as residential home (*construcción habitacional*)⁸¹⁰. In view of a criticism made by CBRE, the Tribunal has accepted that each of the Guadalajara Properties be valued separately, on account of the different ground uses, and the Tribunal has disregarded the mixed used properties identified by Mr. Marchitelli as comparables for Las Américas B; consequently, the three mixed use listings relied upon by CBRE to value Las Américas B should equally be disregarded.

752. The Tribunal will estimate Las Américas B's values based on the other three listings with residential use found by CBRE and one additional sale for residential use identified by Mr. Marchitelli (Sale G). Mr. Marchitelli has questioned the relevance of the comparables, since they do not represent closed sales – the Tribunal accepts the

⁸⁰⁷ See para. 632 *supra*.

⁸⁰⁸ USD 2,241.29/m² * 90.62747/99.52798 = USD 2,040.86/m²

⁸⁰⁹ USD 2,040.86/m² * 9,335m² = 19,051,406

⁸¹⁰ CBRE Guadalajara I, p. 53.

critique and notes that CBRE has applied a 0.95 reducing factor to account for this fact⁸¹¹. In turn, CBRE suggests that Sale G be stricken because the sale took place in 2009 and thus would lack relevance – the Tribunal notes that Sale G is the only closed transaction and for this reason the Tribunal has decided not to disregard it.

753. Adjusted to July 2015, Sale G has a price of USD 2,168/m²⁸¹²; since the rest of the comparables are listings, they need not be adjusted for inflation⁸¹³, and just have to be converted into USD at the 15.24 MEX/USD exchange rate⁸¹⁴:

- Listing 1: MEX 21,884/m² is USD 1,436/m²;
- Listing 5: MEX 29,215/m² is USD 1,917/m²;
- Listing 6: MEX 18,104/m² is USD 1,188/m².

754. The arithmetic mean of the above data is USD 1,677/m².

755. This amount is set at July 2015. Adjusted to the valuation date, the sale price is reduced to USD 1,527.4/m². Multiplied by 6,143 m², it equals a total value of USD 9,382,669.

* * *

756. At the valuation date, September 7, 2012, Las Américas A is worth USD 19,051,406 and Las Américas B is valued at USD 9,382,669; in total, the estimated value of the Guadalajara Properties is USD 28,434,075.

757. The Tribunal needs now to deduct the foreclosure sales costs which are⁸¹⁵: 0.7% of the sales price, MEX 100,700.69 plus 3% on the balance price minus MEX 3,736,575, and UD 25,000 in legal fees.

758. The sales price has to be converted into MEX. Up to this point, as the the exchange rates were undisputed, the Tribunal has relied on the exchange rates used by Mr. Marchitelli; however, September 2012 was not a relevant date in Mr. Marchitelli's expert reports and he does not provide this information. In the absence of this input from the expert, the Tribunal has applied the exchange rate of September 7, 2012

⁸¹¹ CBRE Guadalajara I, p. 54.

⁸¹² Cushman I, p. 34.

⁸¹³ Since the listings are offerings made for an unspecified period of time, Mr. Marchitelli and CBRE do not adjust these values for inflation.

⁸¹⁴ See para. 747 *supra*.

⁸¹⁵ Payne II, Appendix B.

published in Mexico's official gazette⁸¹⁶: 13.0483. The sales price is, thus, MEX 371,016,615.

759. Costs in the amount of MEX 2,597,116⁸¹⁷ and MEX 14,964,753⁸¹⁸ accrue for Public Registry and Notary fees on the one hand, and for transfer taxes on the other; this results in a total amount of MEX 17,561,869, which converted back to USD is USD 1,345,912⁸¹⁹. Now USD 25,000 needs to be added for legal fees, i.e. USD 1,370,912.

760. The sales price minus associated costs is, thus, **USD 27,063,184**.

3. CALCULATION OF THE IMPAIRMENT

761. The Tribunal has determined the market value of the Nayarit Property on October 16, 2012, to be USD 40,630,184; and that of the Guadalajara Properties on September 7, 2012 to be USD 27,063,184.

762. Lion avers that the impairment of its investment, as a consequence of the breach, equates with the market value of the Properties: upon the Debtor's default and the filing of the Foreclosure Proceedings, Lion would have acquired ownership of the Properties *in lieu* of payment, and would promptly have re-sold the Properties to third parties through arms' length transactions, thereby securing the full market value of the Properties (*i.e.* approximately USD 67 M for all Properties, as established by the Tribunal with the experts' methodologies)⁸²⁰.

763. The Tribunal finds Lion's assumption far too optimistic.

764. Lion in essence assumes that in the But For Scenario, it would have succeeded in re-selling the Properties at full market value. This assumption disregards the substantial uncertainties and legal risks which Lion would have faced in its efforts to foreclose on the Mortgages and to re-sell the Properties, uncertainties and risks which are unrelated to Mexico's breaches of its NAFTA obligations.

765. These risks arise from the very terms of the Loans (speculatively high interest rates of 18% and 25% when the Loans were in default, and short maturities), and the personal characteristics of the Debtors selected by Claimant. These risks have been exacerbated by Sr. Cárdenas' obstinate (and as the facts show highly effective) defense of his legal rights, above and beyond the proper conduct required by Mexican law. The Tribunal considers that a hostile reaction by Sr. Cárdenas to the resale of valuable properties that he had owned and for many years had sought to develop is not a mere possibility but

⁸¹⁶https://www.dof.gob.mx/indicadores_detalle.php?cod_tipo_indicador=158&dfecha=06%2F09%2F2012&hfecha=11%2F09%2F2012

⁸¹⁷ (0.5% + 0.2%) * MEX 371,016,615.

⁸¹⁸ MEX 100,700.69 + 3% balance price (MEX 370,915,914) – MEX 3,736,575.

⁸¹⁹ MEX 17,561,869/13.0483 = USD 1,345,912

⁸²⁰ CPHB, para. 248; Zamora II, paras. 201 and 204.

close to a certainty. His willingness to engage in administrative and legal frauds and abuses to obtain his ends has been amply demonstrated in these proceedings as, unfortunately, has his effectiveness with these abuses within his home state of Jalisco.

766. Any possible re-sale of the Properties to a willing buyer would have faced the risks of obstructions and possible legal challenges by Sr. Cárdenas and the Debtors, in proceedings before the Courts of his home State, Jalisco. Most buyers would have shied away from assuming these risks; the few prepared to accept the uncertainty would only do so if offered a significant discount over market prices.
767. The necessity to offer discounts to prospective buyers has an important consequence: awarding Claimant the full market price of the Properties, would not result in re-establishing the situation which would have existed, absent Mexico's breach, but in a windfall profit. The proper compensation must be reduced by the probable discount a willing buyer would have applied.
768. How to calculate the correct percentage of discount?
769. No formula exists, and there is no set of precedents, from which a precise number could be induced. In situations like this, where the precise determination of damage is subject to uncertainty, tribunals are authorized to apply a degree of discretion. As the Annulment Committee in *Rumeli* said⁸²¹:

“The estimation of damages [...] is not an exact science. It is of the essence of such an exercise that the tribunal has a measure of discretion, since the final figure must of its nature be an approximation of the claimant's loss”.

770. In light of the above, the Tribunal finds that a discount of approximately 30% over the preliminary market value appropriately reflects the risks faced by prospective buyers: it is safe to assume that, upon foreclosure of the Mortgages, and delivery of ownership of the Properties to Lion, willing buyers would only have been prepared to pay to Lion approximately USD 47 M⁸²² (and not the full market value of USD 67 M) for the purchase of the Nayarit and the Guadalajara Properties.
771. The Tribunal's figure of USD 47 M is reinforced by the valuation provided by Respondent's expert, who used conservative parameters to establish the market price of the Properties, and, applying a completely different methodology, arrived at a similar figure⁸²³.

* * *

⁸²¹ *Rumeli*, Decision on Annulment, para. 179(5).

⁸²² $(1-30\%)(\text{USD } 40,630,184 + \text{USD } 27,063,184)$, rounded down to the nearest million

⁸²³ RR, para. 635.

772. Summing up, the Tribunal finds that in the But For Scenario the value of the Claimant's investment would have amounted to USD 47 M.
773. As regards the As Is Scenario, the Tribunal agrees with Claimant that the present value of the investment is nil – upon cancellation in the Property Registry the Mortgages have become extinguished and consequently worthless.
774. Therefore, the Tribunal determines that the compensation due to Lion, for the impairment suffered by its protected investment – the Nayarit and Guadalajara Mortgages – amounts to the difference in the values of the Mortgages in the But For and the As Is valuation, i.e. **USD 47,000,000** – and this is the sum awarded in Claimant's favour under this heading.

4. RESPONDENT'S ANCILLARY OBJECTIONS

775. Mexico submits two additional arguments to sustain that any compensation awarded to Lion should be reduced:

4.1 SHARES IN DEBTOR COMPANIES

A. Respondent's position

776. Mexico argues that, if Lion is awarded damages in this arbitration, the Tribunal should reduce the compensation in an amount equal to the value of the shares Lion owns in the Debtor companies⁸²⁴.
777. To this date, under Mexican law, the forgery of the Settlement Agreement has not been established and it remains legally effective. Pursuant to the Settlement Agreement, share certificates were issued in Lion's name. Thus, Lion is the owner of these shares, and therefore, their value must be subtracted from any compensation awarded by this Tribunal⁸²⁵.
778. In the course of criminal proceeding 137/2004, Sr. Cárdenas presented various expert reports calculating the book value of Lion's shares in order to sustain his allegation that Lion had not suffered damages as a consequence of his criminal behaviour. Respondent points out that, according to these reports, Lion's shares in the Debtor companies have a book value as of December 2012 of USD 81,8 M⁸²⁶.
779. Respondent does not share Claimant's position that Lion could assign its rights over the shares to Mexico, in order to avoid double recovery. Mexico has not accepted Claimant's offer and this Tribunal has no jurisdiction to order that Lion's shares be

⁸²⁴ RPHB, para. 11; RCM, para. 299.

⁸²⁵ RR, paras. 579 and 580.

⁸²⁶ RCM, para. 301, citing Exh. R-15 and Exh. R-16; RR, para. 583.

transferred to Mexico; and even if it did, there is no assurance that this transaction could legally take place under Mexican law⁸²⁷.

B. Claimant's position

780. Claimant rejects Respondent's proposition: Lion never acquired shares in the Debtor companies because no legal effects arose from the Forged Settlement Agreement⁸²⁸. The fact that the Debtors never recorded the increase of capital at the Commercial Registry, reveals that the whole operation was a sham⁸²⁹.
781. In any case, the valuation of the shares proposed by Respondent has not been established in a reliable manner. Claimant had no opportunity to rebut the reports presented by Sr. Cárdenas in the criminal proceedings, which were suspended by the Federal Attorney-General⁸³⁰.
782. Claimant says that, in order to avoid double recovery, it has offered to tender any rights it may have over these shares to Mexico, upon receiving the compensation due in this arbitration⁸³¹.

C. The Tribunal's decision

783. Respondent argues that any compensation due to Lion must be reduced in an amount equal to the value of the shares it owns in the Debtor companies. Claimant rejects this proposition, alleging that it never acquired ownership of any such shares.
784. The Tribunal has already established that the Settlement Agreement, in which Lion allegedly agreed to settle the debts owed by the Debtor companies and to cancel the Mortgages, in exchange for shares in these companies, was a forgery⁸³². *Quod nullum est, nullum effectum producit*. Furthermore, the increases of share capital in favour of Lion were never recorded in the Commercial Registry, with the consequence that the shares were never formally created⁸³³.
785. Finally, Respondent has not marshalled any convincing evidence proving the value of the shares in the Debtor companies allegedly owned by Lion. The valuation provided by Sr. Cárdenas himself, as defendant in a criminal case, is not persuasive.

⁸²⁷ RPHB, para. 197.

⁸²⁸ CR, para. 12 and 194

⁸²⁹ CR, para. 196

⁸³⁰ CR, para.197, citing Exh. C-173.

⁸³¹ CR, para. 199.

⁸³² See paras. 103 *et seq supra*.

⁸³³ CR, para 196, with reference to Exh. C-170 and C-171, certificates of records of C6C Capital and Inmobiliaria Bains at the Commercial Registry; these certificates show that other capital increases were duly registered.

786. In sum, the Tribunal concludes that Mexico has failed to prove that Lion is the rightful owner of any participation in the capital of the Debtor companies. And even if Lion were to have validly acquired such shareholdings (*quod non*), the Respondent has not marshalled convincing evidence establishing their proper value.

4.2 CRIMINAL PROCEEDINGS

A. The Parties' positions

787. Respondent says that Lion has a chance to obtain double recovery, because it can potentially claim reparation if Sr. Cárdenas is found criminally liable for fraud in any of the pending criminal proceedings⁸³⁴.

788. Claimant says that any hypothetical compensation that it may be awarded under the criminal proceedings cannot prevent it from obtaining the full compensation that is due under international law for Mexico's breaches. In any case, Claimant argues, the issue of double recovery in this case would be something to decide in the future by the Mexican courts when awarding any compensation to Lion⁸³⁵.

B. The Tribunal's decision

a. Facts

789. On April 18, 2013 Claimant submitted its first criminal action, 463/2013, before the criminal Court of Jalisco. The action was against Sr. Cárdenas and was based on the Forged Settlement Agreement and the request for certified copies of the Cancellation Proceeding, through the impersonation of Mr. Arechederra. The criminal Court of Jalisco dismissed the case for lack of sufficient evidence⁸³⁶.

790. On April 19, 2013 Lion filed a parallel action, this time before the criminal Courts of Mexico City (137/2014). The Mexico City Court dismissed the action on the ground that the facts were already being tried in Jalisco⁸³⁷.

791. Lion made a third attempt, on June 19, 2015, filing another action before the Office of the Attorney General of the State of Jalisco, which resulted in criminal proceedings 181/2016. The case was dismissed on the basis that the statute of limitations had expired⁸³⁸.

⁸³⁴ RCM, para. 576; Plascencia, para. 84; RPHB, paras. 117 and 202.

⁸³⁵ CPHB, para. 47.

⁸³⁶ Exh. R-20.

⁸³⁷ Exh. R-22.

⁸³⁸ RCM, para. 126.

792. Respondent's expert, Dr. Plascencia, declared with respect to the abovementioned proceedings that⁸³⁹:

“Del análisis de los expedientes queda claro que Lion Mexico Consolidated, ejerció las acciones, derecho y recursos correspondientes para tratar de demostrar los hechos aparentemente delictivos que le atribuía a Héctor Cárdenas, sin embargo, de las resoluciones dictadas por tres diferentes jueces penales en tres procedimientos distintos se desprende que no fue posible acreditar de los hechos denunciados la comisión de delito alguno”.

793. Lion was unable to obtain a criminal conviction of Sr. Cárdenas, and consequently, no reparation was granted.

794. Despite the above, Lion has persisted in its attempt to secure a criminal conviction against Sr. Cárdenas and has filed three additional criminal complaints that are currently pending. At the end of the Hearing, the Tribunal requested the Parties to inform the Tribunal on the status of these pending criminal proceedings:

- Criminal Action No. 4713/2016: in these proceedings Lion seeks a criminal conviction of Sr. Cárdenas with respect to the forgery of the Settlement Agreement and the impersonation of Mr. Arechederra; the proceedings remain suspended, pending two *Amparos* initiated by Sr. Cárdenas⁸⁴⁰;
- Criminal Action No. 121667/2017: these proceedings concern the forgery and fraud in relation to the filing of the False Amparo; the last information available is that the investigation phase is ongoing, and that no formal charges (*imputación*) have been issued against Sr. Cárdenas⁸⁴¹;
- Criminal Action No. 83426/2017: these proceedings concerning the sale by Sr. Cárdenas of the Nayarit Property, that was subject to a freeze order, is in the investigation phase and no formal charges (*imputación*) have been issued against Sr. Cárdenas⁸⁴².

b. Discussion

795. Respondent's main argument is that Lion may obtain double recovery, since it still has the potential right to be compensated if Sr. Cárdenas is found guilty under any of the criminal proceedings that are currently pending. Respondent says that the potential

⁸³⁹ Plascencia, para. 87.

⁸⁴⁰ CPHB, para. 40.

⁸⁴¹ CPHB, para. 41.

⁸⁴² CPHB, para. 42.

compensation of Lion in these criminal proceedings is guaranteed by the “land freezes” imposed by the Prosecutor on the Nayarit and Guadalajara Properties⁸⁴³.

796. To this date, however, no criminal conviction has been issued against Sr. Cárdenas, and no compensation has been awarded to Lion by any criminal Court. Respondent’s expert acknowledges that in the current proceedings a criminal conviction of Sr. Cárdenas is unlikely⁸⁴⁴. The criminal Courts have already dismissed Lion’s allegations for lack of evidence, and the statute of limitations and the principle *non bis in idem* make it now highly unlikely that a criminal conviction against Sr. Cárdenas be rendered.
797. Since the Mexican criminal Courts have until now failed to render any decision awarding compensation in favour of Lion, Respondent’s request that the compensation granted in this arbitration be reduced is moot.
798. If in the future any Mexican criminal Court is to issue a decision in favour of Lion, and by that time Lion has collected any of the amounts awarded in its favour in the present arbitration, it is for the Mexican Court to adopt the appropriate measures to avoid double recovery.

⁸⁴³ Plascencia, para. 106.

⁸⁴⁴ Plascencia, para. 97.

VII.2. LEGAL FEES ARISING FROM THE WITHDRAWAL OF THE FORECLOSURE PROCEEDING

799. Art. 1121(1)(b) of the NAFTA requires that, as a condition precedent to the submission of a claim to arbitration, investors withdraw from any parallel local judicial proceedings, except for injunctive, declaratory or other extraordinary proceedings not involving the payment of damages:

“Article 1121: Conditions Precedent to Submission of a Claim to Arbitration

1. A disputing investor may submit a claim under Article 1116 to arbitration only if:

[...]

(b) the investor [...] waive[s] [its] right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.” [Emphasis added]

800. Lion argues that it should be compensated by Mexico for *gastos, costas y perjuicios* [“**Legal Fees**”] it may be ordered to pay to the Debtors as a result of its withdrawal from the Foreclosure Proceeding⁸⁴⁵. Lion avers that it was required to abandon all local proceedings to comply with the waiver requirement of NAFTA Art. 1121(1)(b), which lists withdrawal from local proceedings as one of the conditions precedent to submitting a NAFTA arbitration claim⁸⁴⁶, and thus, such costs are ultimately a consequence of Mexico’s breach.

801. As to the quantification of these Legal Fees, at the time of the Parties’ latest submissions, a decision on the exact amount to be paid by Lion was pending before the *Juez de lo Civil*⁸⁴⁷, but according to an estimate by Lion, they could reach an amount of up to USD 14 M⁸⁴⁸.

⁸⁴⁵ CPHB, para. 312.

⁸⁴⁶ CPHB, para. 312,

⁸⁴⁷ CPHB, para. 315.

⁸⁴⁸ CPHB, para. 315, Annex II to CPHB, para. 18.

802. Mexico in turn claims that Lion was not required to withdraw from the Foreclosure Proceeding⁸⁴⁹. In fact, the decision to withdraw was “ill-advised”, as the NAFTA Art. 1121(1)(b) withdrawal requirement did not apply to the Foreclosure Proceeding⁸⁵⁰.
803. The Tribunal must, thus, analyse whether under NAFTA Art. 1121(1)(b) Lion was required to withdraw from the Foreclosure Proceeding and whether Legal Fees ordered by the local Courts as a consequence of such withdrawal, constitute part of the compensation due.
804. To adjudicate this question, the Tribunal will first establish the proper interpretation of Art. 1121(1)(b) of the NAFTA (1.), then it will analyse whether Lion was obliged to withdraw the Foreclosure Proceeding (2.) and finally it will discuss whether Mexico has to assume the Legal Fees which Claimant may eventually be forced to pay to the Debtors (3.)

1. THE PROPER INTERPRETATION OF ART. 1121(1)(B) NAFTA

805. Art. 1121(1)(b) of the NAFTA requires that a protected investor, before accessing international justice, must discontinue any existing parallel proceedings before the municipal Courts, relating to the same dispute. The rationale of the rule is twofold: to avoid contradicting decisions between the local Courts and international arbitration, and to prevent double recovery.

806. The Non-Disputing Parties hold the same opinion:

US⁸⁵¹: “The purpose of the waiver provision is to avoid the need for a respondent Party to litigate concurrent and overlapping proceedings in multiple forums, and to minimize not only the risk of double recovery, but also the risk of ‘conflicting outcomes (and thus legal uncertainty)’”.

Canada⁸⁵²: “The purpose of this provision is to preclude parallel litigation involving the payment of damages in order to avoid conflicting outcomes and double redress with respect to the same measure”.

807. *Thunderbird* offers a similar, teleological clarification on how to approach Art. 1121 of the NAFTA⁸⁵³:

“In construing Article 1121 of NAFTA, one must also take into account the rationale and purpose of that article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from

⁸⁴⁹ RPHB, para. 106.

⁸⁵⁰ RPHB, paras. 125, 127.

⁸⁵¹ USA submission, para. 25.

⁸⁵² Canada Submission, para. 9.

⁸⁵³ *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL (NAFTA), Arbitral Award, 26 January 2006, para. 118.

pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure". [Emphasis added]

808. In sum, under Art. 1121 NAFTA a prospective claimant is required to withdraw from any municipal procedure, if such procedure:
- could give rise to an outcome which conflicts with the result of the investment arbitration, or
 - can result in claimant being compensated twice for the same loss or damage.

Exceptions

809. NAFTA Art. 1121(1)(b) contains exceptions to the general rule of withdrawal; there are certain types of proceedings where the Treaty does not require a waiver as a condition precedent to the investor filing an investment arbitration.

810. The NAFTA has been executed in English, French and Spanish, all three versions being equally authentic⁸⁵⁴. As regards the exceptions to the waiver requirement, there are marked differences between the English and French texts, and the Spanish text of Art. 1121(1)(b).

811. In English, the exceptions to the general rule appear to concern three categories of proceedings:

"[...] except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party".

812. This is also the case in French:

"à l'exception d'une procédure d'injonction, d'une procédure déclaratoire ou d'un autre recours extraordinaire, ne supposant pas le paiement de dommages-intérêts, entrepris devant une juridiction administrative ou judiciaire".

813. While the Spanish version refers to one category ("*medidas precautorias*", i.e. injunctive measures) of threefold character:

"salvo los procedimientos en que se solicite la aplicación de medidas precautorias de carácter suspensivo, declaratorio o extraordinario, que no impliquen el pago de daños ante el tribunal administrativo o judicial". [Emphasis added]

⁸⁵⁴ Art. 33 of the VCLT acquiesced by Respondent at RR, para. 353.

814. Does a *Juicio Hipotecario* like the Foreclosure Proceeding fall within any of these exceptions?
815. In the Tribunal’s opinion, the answer is in the negative, whatever the version of the NAFTA Treaty is preferred (all being equally authentic).
816. The *Juicio Hipotecario* is an ordinary procedure, with the purpose of enforcing a mortgage through the judicial sale of the property and the delivery of the price obtained to the claimant, up to the amount and in payment of the secured debt. Consequently, a *Juicio Hipotecario* is not a “*medida precautoria*”, as required in the Spanish version of the rule.
817. If we turn to the English or French versions, the requirements for an exception are also not met. In a *Juicio Hipotecario* the relief requested by claimant consists in the judicial enforcement of the Mortgage, and the allocation of the price obtained to the payment of the debt. The relief does not meet the requirement for the exception to apply (“injunctive, declaratory or other extraordinary relief”); the NAFTA rule additionally requires that the relief does not “involv[e] the payment of damages” – a requirement which the *Juicio Hipotecario* again does not meet, since foreclosure of a mortgage involves the payment of a sum of money for the settlement of a debt.
818. In sum, the Foreclosure Proceeding is a *Juicio Hipotecario*, and as such is not included in any of the exceptions to the general rule that parallel proceedings must be withdrawn as a condition precedent for the filing of an investment arbitration.

2. LION WAS OBLIGED TO WITHDRAW THE FORECLOSURE PROCEEDING

819. The general rule under Art. 1121(1)(b) of the NAFTA is that before bringing a NAFTA claim, a claimant must withdraw any local proceedings “with respect” to the measure adopted by the host State that allegedly constitutes an international wrong.
820. According to Lion, the wording “with respect to” should be interpreted broadly⁸⁵⁵. Claimant argues that the Foreclosure Proceeding was intended to recover the value of the Mortgage, i.e., the investment – the same value as the compensation it seeks to recover in the current arbitration.
821. Respondent counters that the facts show that the Foreclosure Proceeding is not “with respect to” any of the measures giving rise to Lion’s claims⁸⁵⁶. Mexico’s argumentation

⁸⁵⁵ CR, para. 537, citing *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Submission of the United States of America, para. 6 (14 February 2014), Exhibit CLA-660.

⁸⁵⁶ RR, para. 349.

is summarized in its reiteration that “none of the measures at issue in this case have anything to do with the Foreclosure Proceedings”⁸⁵⁷.

Discussion

822. Does the Foreclosure Proceeding meet the test of being “with respect to” the international wrong committed by Mexico, and was Lion consequently obliged to withdraw before commencing this investment arbitration?
823. *Pro memoria*: in April 2012 Lion filed the Foreclosure Proceeding, a *Juicio Hipotecario*, before a *Juez de lo Civil* in Mexico D.F., seeking to enforce the Nayarit Mortgage (but not the Guadalajara Mortgage). The purpose of the Procedure was to realize the value of such security, by forcing its judicial sale and using the proceeds to settle Lion’s secured and unpaid obligations. The Foreclosure Proceeding never matured: Lion encountered numerous difficulties in the *emplazamiento* of the Debtors, and the *Juicio Hipotecario* stalled for more than three years. Eventually, before commencing this NAFTA arbitration, Claimant withdrew the Foreclosure Proceeding.
824. The international wrong committed by Mexico has been established in this Award:
- Lion was denied access to justice and was wrongfully prevented from participating in the Cancellation Proceeding, which eventually led to the cancellation of the Mortgages;
 - Lion was also wrongfully denied the right to appeal the Cancellation Judgement; and finally
 - Lion was wrongfully denied the right to allege and prove the forgery of the Forged Settlement Agreement,
- all in breach of Art. 1105 of the NAFTA.
825. The Tribunal has already established that one situation where Art. 1121 NAFTA requires a prospective claimant to withdraw a municipal procedure, is where such procedure can result in multiple compensation for the same loss or damage.
826. Lion found itself precisely in that situation.
827. In this arbitration Lion is asking to be compensated for its total loss resulting from the cancellation of the Nayarit Mortgage, and such loss is equal to the value of such Mortgage.

⁸⁵⁷ RPHB, para. 125, RR, para. 358.

828. The continuation of the Foreclosure Proceeding would indeed have created a risk of double recovery: if foreclosure of the Nayarit Mortgage had resulted in the recovery of any amount of money, the total compensation received by Claimant would have exceeded its total loss (equal to the value of the Mortgage and already compensated in these proceedings).
829. It is precisely to minimize this risk that Art. 1121 NAFTA requires that local proceedings be discontinued, as a condition precedent to the filing of a NAFTA arbitration.
830. In sum, the Tribunal concludes that Lion, to comply with the requirement of Art. 1121(1)(b) and secure the admissibility of this arbitration, was obliged to withdraw the Foreclosure Proceeding.
831. All that Lion did was to comply with this obligation.

3. DISCUSSION OF THE LEGAL FEES

832. An unintended consequence of the withdrawal of the Foreclosure Proceeding was the decision of the *Juez de lo Civil* ordering Lion to pay the Legal Fees (“*gastos, costas y perjuicios*”) suffered by the Debtor⁸⁵⁸. Despite Lion’s appeal in *Amparo*, Mexico’s Supreme Court ultimately upheld the original decision⁸⁵⁹: the municipal rule which requires that in foreclosure proceedings a withdrawing party assumes the Legal Fees incurred by the counterparty does not contravene the NAFTA⁸⁶⁰.
833. At the time of the Parties’ latest submissions, a decision on the exact amount to be paid by Lion was pending before the *Juez de lo Civil*⁸⁶¹. Lion says that the Debtor is claiming more than USD 14M, avers that it has asserted meritorious defences to such claim, but adds that there is a risk that the Mexican courts will mechanically apply Legal Fees in the amount of 6% of the amount in controversy⁸⁶².
834. The question which the Tribunal must decide is whether these Legal Fees (in whichever amount eventually established) have to be borne by Claimant or by Mexico.
835. Lion says that “but for Mexico’s breaches”, it would not have been required to waive the Foreclosure Proceeding and would not have incurred these liabilities.

⁸⁵⁸ Resolution of Civil Judge ordering the payment of costs and expenses by Lion, January 7, 2016, Exhibit C-191.

⁸⁵⁹ Annex II to CPHB, p. 3.

⁸⁶⁰ Supreme Court’s decision (*Amparo* revision) confirming the order for Lion to pay the costs, January 31, 2018, Exhibit C-192.

⁸⁶¹ CPHB, para. 315.

⁸⁶² CPHB, para. 315, Annex II to CPHB, para. 18.

836. The Tribunal has already established that the damages awarded must be sufficient (in the words of *Chorzów*) to “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed”⁸⁶³.
837. To do so, it is necessary to assume that Mexico had not committed any wrongful conduct. In such case, the Nayarit Mortgage would not have been cancelled, the Foreclosure Proceeding would eventually have been successful, the Nayarit Property would have been foreclosed, and the price obtained would have been used to pay the secured debts. In this scenario Lion would not have incurred any Legal Fees payable to the Debtor.
838. In reality what has happened is that the Mexican Court system has incurred in a denial of justice, which has resulted in the wrongful cancellation of the Nayarit Mortgage, and has forced Lion to seek redress through international arbitration. This award has already acknowledged that Lion is entitled to a compensation for the impairment of its investment. But this compensation does not wipe out all the consequences of Mexico’s wrongful act. As a requirement for the admissibility of this arbitration, Lion has been forced to withdraw the Foreclosure Proceeding, and to incur certain, still to be quantified, Legal Fees. Full reparation requires that Mexico assume the obligation of reimbursing Lion for such Legal Fees, in the amount finally established by the Mexican Courts and actually paid by Lion to the Debtor.
839. Lion, in turn, has a duty to mitigate its losses, and consequently must continue defending the claim for Legal Fees filed by the Debtor, with the same diligence as it would be defending its own interest, exhausting non-obviously futile local remedies. (There is no suggestion by Mexico that Lion up to now has breached its duty to mitigate).

⁸⁶³ *Chorzów Factory*, p. 47.

VII.3. EXPENSES INCURRED IN THE EXHAUSTION OF LOCAL REMEDIES

840. Lion claims that, apart from the costs incurred in the arbitration⁸⁶⁴, it is also entitled to recover its legal fees and expenses incurred in the Mexican proceedings, which amount to USD 2,212,004.53⁸⁶⁵.
841. Mexico disputes the number proposed by Lion. According to Mexico, Lion initially averred that its attorneys' fees and costs incurred in local proceedings amounted to USD 1,262,650, to suddenly increase that number to USD 2,212,004.53 without justification⁸⁶⁶.
842. Mexico additionally argues that the sole evidence supporting Lion's claim, an affidavit by Ms. Rodriguez, the Senior Vice President/Controller of Lion's parent company, providing that

“[t]o the best of [her] knowledge, the true and accurate amount of fees incurred by L[ion] for these matters to date is US 2,2,12,004.53”⁸⁶⁷,

is insufficient. Mexico points out that the affidavit is not accompanied by any explanation or supporting documentation, which confirms the accuracy of the proposed number. Additionally, Ms. Rodriguez was not a witness in the arbitration and since she was not cross-examined at the Hearing, Mexico would be severely prejudiced if the Tribunal took her statement to be accurate.

843. Thus, Mexico requests that the Tribunal dismiss the claim for damages for the legal fees and expenses incurred by Lion in the local proceedings⁸⁶⁸.

Decision of the Tribunal

844. Lion asks that Mexico reimbursed it an amount of USD 2,212,004.53, representing legal fees incurred in the Mexican proceedings.
845. Claimant has provided a detailed statement summarizing the expenses and fees incurred in this arbitration (this claim will be analysed in Section IX *infra*)⁸⁶⁹. However, for the costs incurred in the Mexican proceedings, Claimant has not provided a breakdown of the costs incurred, nor has it marshalled any invoices or receipts. The

⁸⁶⁴ See Section IX *infra*.

⁸⁶⁵ CPHB, para. 317, CR, para. 611, Exh. C-193.

of Clarion Partners indicating the attorney's fees incurred by LMC, 20 February 2019, Exhibit C-193.

⁸⁶⁶ RPHB, para. 135, RR, para. 612-616.

⁸⁶⁷ Exh. C-193.

⁸⁶⁸ RR, para. 616.

⁸⁶⁹ Claimant's Statement of Costs of October 22, 2019.

only evidence marshalled is a two-paragraph affidavit, executed by Ms. Karen Rodriguez, the Senior Vice President/Controller of Lion's parent company, stating that

“to the best of my knowledge and belief, the true and accurate amount of fees incurred by [Lion] for these matters [the Amparo Proceeding and the defense against Sr. Cárdenas' claim for Legal Fees] is US\$2,212,004.53”⁸⁷⁰.

846. Ms. Rodriguez has not provided any further evidence or details. No invoices are attached. The evidence was not submitted by means of a witness statement confirming her calculations, nor has Ms. Rodriguez appeared before this Tribunal to aver her declaration.
847. The Tribunal does not consider that the evidence submitted by Claimant is sufficient to support a claim for legal fees of more than USD 2 M, allegedly incurred before the Mexican Courts, in the course of defending its rights in the *Amparo* and in the Foreclosure Proceeding.
848. In any case, even assuming *arguendo* that Lion would have satisfied its burden of proving the legal fees incurred in the local proceedings, the Tribunal is not convinced that Mexico should bear these costs. The Tribunal has already established that a claim for denial of justice requires the aggrieved party to exhaust local remedies⁸⁷¹. If the exhaustion of local remedies had resulted in the Mexican judiciary correcting the wrongful cancellation of the Mortgages, the denial of justice would have been prevented – but Claimant would still have incurred local legal fees. Whether legal fees incurred in municipal procedures filed by the investor can be recovered and from whom, is a question to be settled by municipal law⁸⁷².

⁸⁷⁰ Exh. C-193.

⁸⁷¹ See para. 543 *supra*.

⁸⁷² *Petrobart*, p. 87.

VII.4. CONCLUSION

849. Claimant is seeking three categories of compensation:
850. The first category is the impairment suffered by Lion's investment (the Nayarit and the Guadalajara Mortgages), caused by Mexico's breach of the NAFTA obligations, such impairment to be calculated as the difference in the value of the Mortgages in the But For Scenario and in the As Is Scenario.
851. The Tribunal has concluded that in the But For Scenario the value of the Claimant's investment would have amounted to USD 47 M, while the value of the investment in the As Is Scenario is nil, the Mortgages having become extinguished and worthless. The compensation due to Lion, for the impairment suffered by its protected investment, amounts to the difference between both values, i.e., **USD 47,000,000** – and this is the sum awarded in Claimant's favour under this heading.
852. The second category are certain Legal Fees which Claimant says could arise as a consequence of the withdrawal of the Foreclosure Proceeding.
853. In the Tribunal's opinion, Lion was forced to withdraw the Foreclosure Proceeding in order to commence this NAFTA arbitration and to incur certain, still to be quantified, Legal Fees as a requirement for the admissibility of this arbitration under the NAFTA. Full reparation requires that Mexico assume the obligation of reimbursing Lion for such Legal Fees, in the amount finally established by the Mexican Courts and actually paid by Lion to the Debtors.
854. Lion, in turn, has a duty to mitigate its losses, and consequently must continue defending the claim for Legal Fees filed by the Debtors, with the same diligence as it would be defending its own interest, exhausting non-obviously futile local remedies.
855. The third category are certain expenses and fees incurred in the exhaustion of local remedies, which Claimant says amount to more than USD 2 M.
856. The Tribunal has dismissed this claim for lack of evidence and, subsidiarily, because the question of whether legal fees incurred by the investor in pursuing municipal procedures can be recovered, and from whom, is a question to be settled by municipal law in the very proceedings where the legal fees arise.

VIII. INTEREST

857. The Parties agree that the Tribunal should award interest as part of the compensation, if a breach is found to have occurred and the payment of compensation is ordered. They disagree, however, on the applicable interest rate, and whether the interest should be compounded.

1. CLAIMANT'S POSITION

858. Claimant seeks interest under the following conditions⁸⁷³:

859. *First*, full reparation requires payment of appropriate interest on any amounts awarded, in accordance with Art. 38(1) of the ILC Articles on State Responsibility. If the Claimant is to be kept economically whole, the amount of the final damages awarded must accrue interest⁸⁷⁴:

860. *Second*, the Mexican legal rate for commercial debts in default provided by Art. 362 of the Mexican Commercial Code (i.e., 6% per year) compounded on a monthly basis is warranted. Alternatively, Lion's interest should be that used by Mexican *Amparo* courts when awarding damages, i.e., the 28-day Interbank Equilibrium Interest Rate (TIEE)⁸⁷⁵.

861. *Third*, interest should accrue from 31 March 2015 until the date of full and effective payment⁸⁷⁶.

2. RESPONDENT'S POSITION

862. Mexico does not dispute that the Claimant would be entitled to interest on any amounts awarded, should the Tribunal hold Mexico liable for a breach of its obligations under the NAFTA. It also does not dispute that interest would be due from the date of the breach until the date in which the award is paid. Yet Mexico disagrees about the following aspects⁸⁷⁷:

863. *First*, the interest rate must be consistent with the currency in which the award is granted. Thus, for an award denominated in U.S. dollars, a relatively low or risk-free rate would be that of the U.S. Treasury Bills, and for an award denominated in Mexican pesos, it should be the 28-day CETES rate – *Certificados de la Tesorería de la*

⁸⁷³ CM, paras. 481-487; CR, paras. 612-624, CPHB, paras. 295-298.

⁸⁷⁴ CCM, para. 64.

⁸⁷⁵ CM, para. 487.

⁸⁷⁶ CPHB, paras. 318 and 320.

⁸⁷⁷ RCM, paras. 328-334; RR, paras. 621-633, RPHB, para. 137.

*Federación*⁸⁷⁸. In any case, it would be utterly inappropriate to apply a Mexican peso rate to a U.S. denominated amount, as the Claimant proposes.

864. *Second*, on the issue of how pre- and post-award interest should be calculated, there is no international consensus on whether interest should be calculated using simple or compounded interest. In the circumstances of this case, the Claimant should not be rewarded with compound interest⁸⁷⁹.

865. *Third*, there is no consensus among the tribunals that have ordered compound interest as to the compounding period, although the vast majority have opted for annual compounding. Thus, should the Tribunal opt for compounded interest, it should be annual compounding and not monthly compounding⁸⁸⁰.

3. THE TRIBUNAL'S DECISION

866. Article 1135 NAFTA says that

“Where a Tribunal makes a final award against a Party, the Tribunal may award [...]

(a) monetary damages and any applicable interest [...]”.

867. In line with this provision, prior NAFTA tribunals have recognized that interest forms an essential limb of the compensation due for a breach of the Treaty. The tribunal in *Metalclad*, for instance, stated that⁸⁸¹:

“interest becomes an integral part of the compensation itself, and should run consequently from the date when the State’s international responsibility became engaged”.

868. The Parties also agree that this Tribunal may award interest over the compensation ordered. The Parties, however, disagree on the applicable rate and the method of calculation of interest.

869. The Tribunal’s decision on interest, thus, must determine the applicable interest rate and the methodology for their calculation. The Tribunal must also fix the *dies a quo*, *dies ad quem* and the principal amount.

870. Since the Tribunal has determined that the compensation due to Lion is USD 47 M, that is the **“Principal Amount”**.

⁸⁷⁸ RR, para. 621. The rate applicable to 28 day Certificados de la Tesorería de la Federación

⁸⁷⁹ RR, para. 632.

⁸⁸⁰ RR, para. 632.

⁸⁸¹ *Metalclad*, para. 128, quoting *Asian Agricultural Products v. Sri Lanka* (4 ICSID Reports 245).

3.1 INTEREST RATE

871. Claimant has requested that interest be granted over the Principal Amount at the Mexican legal rate for commercial debts in default provided for by Art. 362 of the Mexican Commercial Code (i.e., 6% per year); or alternatively, the 28-day Interbank Equilibrium Interest Rate (TIIE), used by the Mexican *Amparo* courts when awarding damages.
872. Respondent says that the Tribunal should grant the rate applicable to U.S. Treasury Bills; and if the compensation is awarded in Mexican pesos, the rate should be the 28-day CETES rate.
873. The NAFTA does not establish an applicable interest rate for the compensation awarded by a tribunal for breaches of Article 1105 NAFTA. But Article 1110(4) NAFTA, which governs the appropriate compensation in cases of expropriation, provides that if payment is made in any G7 currency (and the USD forms part of this group of currencies), interest is to accrue at a commercially reasonable rate:
- “If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency [...]”. [Emphasis of the Tribunal]
874. In *Archer Daniels* the tribunal by analogy applied a “commercially reasonable rate” to a compensation due for breach of Article 1102 NAFTA (national treatment) and 1106 NAFTA (performance requirement)⁸⁸². In this case, the Tribunal shares the opinion that Article 1110(4) NAFTA may serve as guidance in a case consisting in the breach of the FET standard.
875. The rates proposed in this case by the Parties are not appropriate:
876. *First*, Claimant is claiming compensation denominated in USD, but it is requesting the Tribunal to award interests at a rate intended to be applied to a much weaker currency, the MEX, to debts denominated in MEX. This proposal is a *non sequitur*. The principle that the interest rate must be consistent with the currency of the principal is acknowledged in Article 1110(4) of the NAFTA, which states that “[i]f payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency ...”.
877. *Second*, Respondent does propose a rate applicable to debt in USD, such as the rate applicable to U.S. Treasury Bills; however, this is not a “commercially reasonable rate” – it is the rate accrued for financing the US Government, not for financing commercial enterprises.

⁸⁸² *Archer Daniels*, para. 296.

878. The Tribunal is of the view that LIBOR is the most widely use “commercially reasonable rate”, since it is universally accepted as a valid reference for the calculation of variable interest rates. LIBOR is determined by the equilibrium between supply and demand, representing the interest rate at which banks can borrow funds from other banks in the London interbank market; it is fixed daily by the British Bankers’ Association for different maturities and for different currencies.
879. Since the compensation is expressed in USD, the appropriate rate of reference for the calculation of interest should be LIBOR rates for six-month deposits denominated in USD.
880. LIBOR reflects the interest rate at which banks lend to each other money. Loans to customers invariably include a surcharge, and this surcharge must be inserted in the calculation of interest to reflect the financial loss caused to Lion by the temporary withholding of money. In the present market situation, the Tribunal finds that a margin of 2% is an appropriate margin, reflecting the surcharge that an average borrower would have to pay for obtaining financing based on LIBOR⁸⁸³.

3.2 CALCULATION METHODOLOGY

881. Lion has requested that interest should be compounded monthly, while Mexico proposes that simple interest be applied. Alternatively, Mexico says that if the Tribunal were to award compound interest, compounding ought to be carried out annually.
882. The question whether interest should be accumulated periodically to the principal has been the subject of diverging decisions in international investment case law. Older case law⁸⁸⁴ tended to repudiate this possibility, but more recent case law tends to accept annual or semi-annual capitalisation of unpaid interest.⁸⁸⁵
883. The Tribunal agrees with the more recent decisions. Loan agreements in which interest is calculated on the basis of LIBOR plus a margin usually include a provision that unpaid interest must be capitalized at the end of the interest period, and will thereafter be considered as capital and accrue interest. The financial reason for this provision is that an unpaid lender has to resort to the LIBOR market in order to fund the amounts due but defaulted, and the lender’s additional funding costs have to be covered by the defaulting borrower.
884. This principle implies that, if Claimant had taken out a LIBOR loan to anticipate the amount to which it is entitled under this Award, the bank would have insisted that unpaid interest be capitalised at the end of each interest period. Consequently, if

⁸⁸³ *Lemire (Award)*, para. 356; *PSEG*, para. 90; *Sempra*, para. 137; and *Rumeli*, para. 227

⁸⁸⁴ *CMS*, paras. 470-471.

⁸⁸⁵ *MTD*, para. 251; *PSEG*, para. 348; *Lemire (Award)*, para. 361.

Claimant is to be kept fully indemnified for the harm suffered, interest owed under the Award should be capitalised at the end of each 6-month interest period.

885. The Tribunal, thus, decides that due and unpaid interest shall be capitalized semi-annually, from the *dies a quo*.

3.3 *DIES A QUO AND DIES AD QUEM*

886. The Parties agree that interest shall accrue from the date of the breach until the date in which the award is paid⁸⁸⁶.

887. The Tribunal has already established that Mexico's denial of justice occurred over several instances, beginning with the Cancellation Judgment issued by the *Juez de lo Mercantil*, which ultimately resulted in the cancellation of the Mortgages on September 7 and October 16, 2012. The Tribunal has taken these dates as the valuation dates for establishing the value of the investments⁸⁸⁷. These dates also represent the proper *dies a quo*. To simplify calculation, the Tribunal decides that interest should start to accrue on October 1, 2012.

888. In light of the above, the Tribunal determines that the *dies a quo* shall be October 1, 2012 and the *dies ad quem* the date of effective payment.

* * *

889. In summary, the Tribunal decides that from October 1, 2012 until the date of payment, the principal amount of USD 47 M shall accrue interest at a rate of LIBOR for 6-month deposits denominated in USD, plus a 2% margin, compounded semi-annually, from the *dies a quo*.

⁸⁸⁶ CM, para. 482; RCM, para. 328.

⁸⁸⁷ See para. 632 *supra*.

IX. COSTS

890. Art. 1135 NAFTA states that

“A tribunal may also award costs in accordance with the applicable arbitration rules”.

891. Art. 58 of the Arbitration Rules of the Additional Facility establishes that

“(1) Unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne. The Tribunal may, to that end, call on the Secretariat and the parties to provide it with the information it needs in order to formulate the division of the cost of the proceeding between the parties.

(2) The decision of the Tribunal pursuant to paragraph (1) of this Article shall form part of the award”.

892. The Parties submitted their second statements of cost on October 22, 2019⁸⁸⁸. Neither of the Parties challenged the items or the amounts claimed by the counterparty.

893. The Parties have incurred two main categories of costs:

- the lodging fee and advance on costs paid to ICSID [the “**Costs of the Proceeding**”]; and
- the expenses incurred by the Parties to further their position in the arbitration [the “**Defense Expenses**”].

1. CLAIMANT’S POSITION

894. In its Statement of Costs, Claimant quantified its costs and expenses to a total of USD 8,040,276.32 for the entirety of the arbitral proceedings, which can be broken down to USD 2,093,647.41 incurred in the jurisdictional phase and USD 5,946,628.91 on merits and *quantum*.

895. Claimant requests the following amounts:

⁸⁸⁸ The Parties have presented their first statement of costs on April 23, 2018.

Costs of the proceedings

- ICSID Administrative costs: USD 625,000⁸⁸⁹.

Defense expenses

- Legal Fees: USD 7,193,071.72;
- Fees of legal and valuation Experts: USD 635,659.60;
- Expenses: USD 211,545.

896. Claimant requests the Tribunal to order Mexico to pay the entirety of its costs⁸⁹⁰.

2. RESPONDENT'S POSITION

897. In its Statement of Costs, Respondent claims that it has incurred costs and expenses amounting to a total of USD 2,962,113.35 in the current proceedings, which may be broken down to USD 1,469,033.57⁸⁹¹ for the jurisdictional phase and USD 1,493,079.78 for the merits phase⁸⁹².

Costs of Proceedings

- ICSID Administrative costs: USD 625,000⁸⁹³.

Defense Expenses

- Legal Fees: USD 2,166,845.36;
- Fees of legal and valuation Experts: USD 227,083.34;
- Expenses: USD 18,184.65.

898. Mexico requests the Tribunal to order that Lion to pay for the entirety of its costs⁸⁹⁴.

⁸⁸⁹ Claimant's Statement of Costs of October 22, 2019; ICSID's Interim Financial Statement 25 May 2021, recording Claimant's advance payment totalling USD 525,000; and ICSID Secretariat's letter of June 7, 2021, confirming Claimant's additional advance payment of USD 100,000.

⁸⁹⁰ Claimant's Statement of Costs of October 22, 2019.

⁸⁹¹ Respondent's Statement of Costs of April 23, 2018.

⁸⁹² Respondent's Statement of Costs of October 22, 2019 and ICSID's Letter of August 31, 2021.

⁸⁹³ ICSID's Interim Financial Statement May 25, 2021 and ICSID's Letter of August 31, 2021.

⁸⁹⁴ RR, para. 634.

3. THE TRIBUNAL'S DECISION

899. Art. 58 of the Arbitration Rules of Additional Facility establishes that

“(1) Unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne [...].”

3.1 CRITERIA FOR THE DECISION ON COSTS

900. Neither the Arbitration Rules of Additional Facility nor the NAFTA establish defined criteria for the apportionment of costs. Art. 58 of the Arbitration Rules of Additional Facility grant wide discretion to the Tribunal to decide how the costs of this arbitration shall be allocated.

901. Both Parties have requested that the other bear the costs of the proceedings. Claimant suggests that the Tribunal should apply the principle of “costs follow the event”⁸⁹⁵. Respondent has not opposed this proposition.

902. The Tribunal will adopt the principle that costs follows the event.

903. As regards the outcome of this procedure, each Party can legitimately claim that it has succeeded in part:

- Claimant partially succeeded in the jurisdictional phase, because the Tribunal accepted that the Mortgages qualified as a protected investment; however, Respondent also partially prevailed, to the extent that the Tribunal accepted Mexico's objection that the Notes were not protected investments.
- On the merits of the case Lion succeeded in its claim that Mexico breached Article 1105 NAFTA;
- On damages, Claimant requested compensation of USD 98.2 M⁸⁹⁶. Respondent argued that, if any compensation was due, it could not be greater than USD 47 M⁸⁹⁷; the Tribunal concluded, albeit with a different argumentation than that defended by Mexico, that the proper amount of compensation was indeed USD 47M.

⁸⁹⁵ Claimant's Statement of Costs of October 22, 2019, para. 14.

⁸⁹⁶ CPHB, para. 320: USD 81,992,752 as compensation for the cancellation of the Mortgages, UDS 2,212004,53 as legal fees incurred in the Mexican court proceedings and USD 14,853,013.73 for the cost of waiving the Foreclosure Proceedings.

⁸⁹⁷ RR, para. 635,

904. Taking into account that Lion has partially prevailed in its request for relief, the Tribunal decides that Mexico shall bear part of Claimant’s costs.

3.2 APPLICATION OF THE “COST FOLLOW THE EVENT” PRINCIPLE

905. The Tribunal will apply the principle that costs follow the event to the two main categories of Claimant’s costs: the Costs of the Proceedings and the Defence Expenses.

Costs of the Proceedings

906. The Costs of the Proceedings, including the fees and expenses of the Tribunal and the Tribunal’s Assistant, ICSID’s administrative fees and direct expenses, amount to:

Arbitrators’ fees and expenses

Prof. Juan Fernández-Armesto	USD 424,684.78
Prof. Laurence Boisson de Chazournes	USD 132,136.64
Mr. David. J.A. Cairns	USD 156,003.69
Mr. Ricardo Ramírez Hernández	USD 39,675.00
Mr. Luis Fernando Rodríguez (expenses)	USD 12,777.47
ICSID’s administrative fees	USD 242,000.00
Direct expenses (estimated)	USD 159,920.24
Total	USD 1,167,197.82

907. The above costs have been paid out of the advances made by the Parties in equal parts⁸⁹⁸. As a result, each Party’s share of the Costs of the Proceedings amounts to USD 583,598.91.

908. Lion claims the Costs of the Proceedings, i.e., the advances made by the Parties to cover the fees and expenses of the Tribunal and administrative fees of ICSID.

909. Claimant has succeeded in the overall outcome of the proceedings. The Tribunal, thus, finds that these costs should be assumed by Respondent.

⁸⁹⁸ The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

910. Accordingly, the Tribunal finds that Mexico must reimburse Claimant the totality of the Costs of the Proceeding paid by Claimant to ICSID (net of any final reimbursements made by ICSID).

Defense Expenses

911. As a first step, the Tribunal must establish the amount of reasonable defense expenses which a standard claimant has to incur, in order to properly present and defend its claim [**“Reasonable Defense Expenses”**]. Taking into consideration the complexity of the case, the amount in dispute and the work legal counsel and experts, the Tribunal considers that the Parties’ Reasonable Defense Expenses amount to USD 3M.

912. Mexico must only assume that part of Claimant’s Reasonable Defense Expenses that results from applying the principle that costs follow the event. To determine such amount, the Tribunal must:

- First, determine the main issues that have been decided;
- Second, give each legal issue a ponderation; and
- Third, determine the success rate of Claimant’s claims in each legal issue and apply it to Claimant’s Reasonable Defense Expenses.

913. In this arbitration, the Tribunal has made two significant decisions:

- Whether it had jurisdiction over the Mortgages and the Notes;
- Whether Mexico breached the NAFTA and the consequences thereof.

914. Claimant declared to have dedicated approximately 25% of their costs to the jurisdiction phase, while the remaining 75% to merits and quantum⁸⁹⁹. Thus, the Tribunal will assign each of the legal issues the weight apportioned by Claimant:

- Jurisdiction: 25% of USD 3 M amounts to USD 750,000;
- Merits and quantum: 75% of USD 3M amounts to USD 2,250,000.

915. The Tribunal must now determine Claimant’s rate of success in each legal issue:

- Jurisdiction: Claimant was successful in 50% of the jurisdictional objections, since the Tribunal accepted jurisdiction over the Mortgages, but rejected jurisdiction over the Notes; the Tribunal considers Claimant’s success rate in the jurisdiction phase of 50%.

⁸⁹⁹ Claimant’s Statement of Costs of October 22, 2019.

- Merits and quantum: Claimant was successful in its relief regarding Mexico's liability for denial of justice; with respect to the assessment of damages, the Tribunal granted approximately half of the amount claimed; in light of the foregoing, the Tribunal finds Claimant's success rate in the merits and quantum phase to be 60%.

916. The Tribunal will now apply the success rate to Claimant's Reasonable Defense Expenses for each legal issue:

- Jurisdiction: 50% of USD 750,000, which amounts to **USD 375,000**.
- Merits and Quantum: 60% of USD 2,250,000, which amounts to **USD 1,350,000**.

3.3 INTEREST

917. Claimant has requested that interest be granted over the amounts awarded as costs⁹⁰⁰.

918. The Tribunal agrees.

919. The Tribunal has already decided that the compensation awarded to Lion shall accrue interest at a rate of LIBOR for 6-month deposits denominated in USD plus a 2% margin, compounded semi-annually.

920. The same shall apply to the amounts Mexico is ordered to reimburse as costs.

921. The *dies a quo* shall be the date of issuance of this Award.

922. The *dies ad quem* shall be the date of effective payment.

* * *

923. In summary, Mexico shall reimburse Claimant (i) the Costs of the Proceedings paid by Claimant in the amount of USD 583,598.91 and (ii) USD 1,725,000 as Defense Expenses, plus (iii) interest on both amounts at a rate of LIBOR for six-months deposits denominated in USD, with a margin of 2%, compounded semi-annually from the date of this Award until the date of payment.

⁹⁰⁰ Claimant's Statement of Costs of October 22, 2019, para. 24, b).

X. DECISION

924. For the foregoing reasons, the Tribunal unanimously decides as follows:

1. DECLARES that the United Mexican States has breached NAFTA Art. 1105 by reason of denial of justice and a failure to provide Lion Mexico Consolidated L.P. with fair and equitable treatment.
2. ORDERS the United Mexican States pay to Lion Mexico Consolidated L.P. USD 47,000,000 as compensation for the breach declared in point 1 *supra*.
3. ORDERS the United Mexican States to reimburse to Lion Mexico Consolidated L.P. the Legal Fees arising out of the withdrawal of the Foreclosure Proceeding, in the amount finally established by the Mexican Courts and actually paid by Lion Mexico Consolidated L.P. to the Debtor.
4. ORDERS the United Mexican States to pay Lion Mexico Consolidated L.P. interest on the compensation awarded in point 2 *supra*, at the LIBOR rate applicable to six-months deposits denominated in USD, plus a margin of 2%, compounded semi-annually, from 1 October 2012 until the date of effective payment.
5. ORDERS the United Mexican States to pay to Lion Mexico Consolidated L.P. (i) USD 583,598.91 as the Costs of the Proceedings and (ii) USD 1,725,000 as Defense Expenses.
6. ORDERS the United Mexican States to pay Lion Mexico Consolidated L.P. interest on the amounts awarded in point 5 *supra*, at the LIBOR rate applicable to six-months deposits denominated in USD, plus a margin of 2%, compounded semi-annually, from the date of this Award until the date of effective payment.
7. DISMISSES all other claims and requests.

Place of arbitration: Washington D.C. (USA)

Date: September 20, 2021

Dr. David J.A. Cairns
Arbitrator

Date:

Prof. Laurence Boisson de Chazournes
Arbitrator

Date:

Arms

Prof. Juan Fernández-Armesto
President of the Tribunal

Date: September 9, 2021



Dr. David J.A. Cairns
Arbitrator

Date: September 2, 2021

Prof. Laurence Boisson de Chazournes
Arbitrator

Date:

Prof. Juan Fernández-Armesto
President of the Tribunal

Date:



Dr. David J.A. Cairns
Arbitrator

Prof. Laurence Boisson de Chazournes
Arbitrator

Date:

Date: August 26, 2021

Prof. Juan Fernández-Armesto
President of the Tribunal

Date: