

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
ADDITIONAL FACILITY RULES, WASHINGTON, D.C., USA**

**IN THE MATTER OF TWO CONJOINED ARBITRATIONS  
(ICSID CASES NOS. ARB (AF)/04/3 & ARB (AF)/04/4) BETWEEN:**

- (1) GEMPLUS S.A.
- (2) SLP S.A.
- (3) GEMPLUS INDUSTRIAL S.A. de C.V.

*First, Second and Third Claimants*

**-and-**

**THE UNITED MEXICAN STATES** *Respondent*

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**TALSUD S.A.** *Claimant*

**-and-**

**THE UNITED MEXICAN STATES** *Respondent*

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**AWARD**

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**THE ARBITRAL TRIBUNAL:**

**L. YVES FORTIER CC, QC  
EDUARDO MAGALLÓN GÓMEZ  
V. V. VEEDER, QC (PRESIDENT)**

*Secretaries to the Tribunal: Evgeniya Rubinina and Tomás Solís;*

*Administrative Assistant to the Tribunal: Alison G. FitzGerald*

**THE PARTIES' LEGAL REPRESENTATIVES:**

**Representing the Claimants:**

*Philippe Sands QC;  
David Fraser and  
Edward Poulton Esqs,  
Baker & Mackenzie.*

**Representing the Respondent:**

*Carlos Véjar Borrego  
Director General de Consultoría  
Jurídica de Negociaciones,  
Secretaría de Economía*

*Date of dispatch to the Parties: June 16, 2010*

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55.	Kantor, <i>Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence</i> (Kluwer, 2008)
56.	Kazazi, <i>Burden of Proof and Related Issues</i> (Kluwer, 1996)
57.	Ripinsky & Williams, <i>Damages in International Investment Law</i> (BIICL, 2008)
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## ***PART I: INTRODUCTION***

### ***(01) THE PARTIES***

- 1-1 *The Claimants:* The four Claimants in these two conjoined arbitration proceedings are (i) Gemplus S.A., (ii) SLP S.A., (iii) Gemplus Industrial S.A. de C.V., and (iv) Talsud S.A; and the Respondent in these two proceedings is the United Mexican States. The first three Claimants are collectively described below as “the Gemplus Claimants”.
- 1-2 *Gemplus:* Gemplus, S.A. (“Gemplus”) is a corporation organized under the laws of France, incorporated in 1988. Its principal place of business is Avenue du Pic de Bertagne, Parc d’activités de Gemenos, 13240 Gemenos, France. It is described below as (inter alia) “Gemplus” and “Gemplus France”.
- 1-3 *SLP:* SLP S.A. (“SLP”) is a corporation organised under the laws of France, incorporated in 1997. Its principal place of business is Avenue du Pic de Bertagne, Parc d’activités de Gemenos, 13240 Gemenos, France. It is described below as “SLP”.
- 1-4 *Gemplus Industrial:* Gemplus Industrial S.A. de C.V (“Gemplus Industrial”) is a corporation organized under the laws of Mexico, formed in 1996. Its principal place of business is Calle 9 Este No. 192, Ciudad Industrial del Valle de Cuernavaca, 62500 Jiutepec, Morelos, Mexico. It has been owned and controlled by SLP, which holds more than 99% of the company’s share capital. On 1 March 2008, Gemplus Industrial changed its name to Gemalto Mexico S.A. de C.V. It is described below as “Gemplus Industrial”.

- 1-5 *Talsud*: Talsud, S.A. (“Talsud”) is a corporation organized under the laws of Argentina, incorporated in 1988. Its principal place of business is Moreno 794, City of Buenos Aires, Argentina.
- 1-6 *The Claimants’ Legal Representatives*: The Claimants were represented in these proceedings by Philippe Sands QC, Matrix Chambers, Griffin Building, Gray’s Inn, London WC1R 5LN, United Kingdom; and David Fraser and Edward Poulton Esqs, all of Baker & Mackenzie, 100 New Bridge Street, London EC4V 6JA, United Kingdom. Alexis Martinez was also part of the team representing the Claimants until April 2010.
- 1-7 *The Respondent*: The Respondent is the United Mexican States, Secretaría de Economía, Dirección General de Inversión Extranjera, Insurgentes Sur 1940, piso 8 Col. Florida, Mexico Distrito Federal, C.P. 01030, Mexico.
- 1-8 *The Respondent’s Legal Representatives*: The Respondent was represented in these proceedings by Hugo Perezcano Díaz, Luis Alberto González García, Alejandra Treviño Solís and Geovanni Hernández Salvador, as part of the Ministry of the Economy, Alfonso Reyes No. 30, Piso 17, Colonia Condesa, C.P. 01640, Mexico, D.F., Mexico; Salvador Behar Lavalle, of the Embassy of Mexico in the United States of America, 1911 Pennsylvania Avenue, N.W., Washington, D.C. 20006, USA; J. Christopher Thomas QC, J. Cameron Mowatt, Alejandro Barragán, Mónica Jiménez Esqs, all of Thomas & Partners, 2211 West 4<sup>th</sup> Avenue, Suite 226, Vancouver, British Columbia, Canada, V6K 4S2; Stephan E. Becker and Sanjay J. Mullick Esqs, both of Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street, N.W., Washington, D.C. 20037-1128, USA.

## **(02) THE DISPUTE**

- 1-9 The Claimants claim damages against the Respondent for the latter’s several breaches of two bilateral investment treaties made by the Respondent with France and Argentina respectively, namely (i) as regards the Gemplus Claimants, the 1998 Agreement

between the Government of the Republic of France and the Government of the United Mexican States on the Reciprocal Promotion and Protection of Investments (the “France BIT”) and (ii) as regards Talsud, the 1996 Agreement between the Government of the Republic of Argentina and the Government of the United States of Mexico for the Reciprocal Promotion and Protection of Investments (the “Argentina BIT”).

- 1-10 The Claimants allege against the Respondent (a) unlawful expropriation, (b) unfair, inequitable and arbitrary treatment and (c) failure to provide full protection and security in regard to their investments in the Concessionaire, Renave S.A. de C.V. (part owned by the Claimants as to 49% of its shareholding), determined either as at 21 August 2000 or alternatively no later than 13 December 2002. (For ease of reference, references in this Award are made to this Concessionaire as “Renave” or the “Concessionaire”).
- 1-11 The Claimants advance their claims under the two BITs only; neither treaty contains any form of “umbrella clause”; and the Claimants do not advance any claims in contract, administrative law or private law against the Respondent, whether under the Concessionaire’s concession agreement made with the Respondent directly, derivatively or otherwise.
- 1-12 The Claimants claim damages in the total principal sum of 340 million pesos (equated to approximately US \$37 million) or alternatively 222 million pesos (equated to approximately US \$24 million), 29% of such sum for Talsud and 20% for the Gemplus Claimants, together with interest and costs.
- 1-13 According to their claim, the Claimants invested a total of 35.8 million pesos in their Concessionaire: 21.4 million pesos by Talsud and 14.5 million pesos by Gemplus between September 1999 and June 2001 (equivalent to about US \$3.3 million). The Claimants subsequently received from their Concessionaire dividends and the return of share capital totalling 39.4 million pesos, being 23.5 million for Talsud and 15.9 million for the Gemplus Claimants by 30 December 2002.

- 1-14 In October 2001, the Claimants complained to the Respondent of the unlawful treatment of their Concessionaire (as they saw it). Further complaints followed; but no amicable resolution of such complaints was reached between the Claimants and the Respondent.
- 1-15 On 10 August 2004, the Gemplus Claimants and Talsud simultaneously filed two Requests for Arbitration with the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”). Both Requests were registered by the ICSID Secretariat on 29 September 2004. Following the constitution of the Tribunal on 9 March 2005, it was agreed that the cases would be determined by the same tribunal and would be heard and dealt with together in as far as it remained practicable to do so.
- 1-16 The Claimants request a single award in these two cases, to which the Respondent has consented as to form.
- 1-17 In summary, the Respondent challenged the jurisdiction of this Tribunal to decide the Claimants’ claims (later limited to the Gemplus Claimants); and it also disputed liability, causation and the compensation claimed by all the Claimants.

### ***(03) THE ARBITRATION AGREEMENTS***

- 1-18 The two arbitration agreements separately invoked by the Claimants are contained, respectively in Article 9 of the France BIT (as to the Gemplus Claimants) and Article 10 of the Argentina BIT (as to Talsud). These provide as follows, as translated into English from the original texts in French and Spanish:

**(A) The “France BIT”**

*“Article 9*

*Resolution of Disputes between an Investor of one of the Contracting Parties and the other Contracting Party*

1. *This Article only applies to disputes between one Contracting Party and an investor of the other Contracting Party in relation to an alleged breach by the Contracting Party under this Agreement which causes loss or damage to the investor or his investment.*
2. *In relation to submission of a claim to arbitration:*
  - a) *An investor of one of the Contracting Parties may not allege that the other Contracting Party has breached an obligation under this Agreement, both in arbitration proceedings in accordance with this Article and in proceedings before a competent judicial or administrative tribunal of the former Contracting Party who is party to the dispute;*
  - b) *Also, when a company from one of the Contracting Parties, which is a legal person owned or controlled by an investor from the other Contracting Party, alleges, during the course of proceedings before a competent judicial or administrative tribunal of the Contracting Party involved in the proceedings, that the Contracting Party has breached an obligation under this Agreement, the investor may not allege the same breach in arbitration proceedings under this Article.*
3. *Any dispute under this Article shall be settled amicably between the Parties concerned.*
4. *A dispute under this Article may be submitted to arbitration, provided that six months have passed since the events giving rise to the request for arbitration occurs, but in any event no later than four years from the date when the investor first became aware or should have become aware of the events giving rise to the dispute, and that the investor has delivered to the Contracting Party that is a party to the dispute written notification of its intention to submit a claim to arbitration at least 60 days in advance:*

i) *before the International Centre for Settlement of Investment Disputes (“The Centre”), established under the Convention on the Settlement of Investment Disputes between States and Nationals from other States (“the ICSID Convention”), if the investor’s Contracting Party and the Contracting Party which is a party to the dispute are both signatories to the ICSID Convention;*

ii) *before the Centre in accordance with the Rules of the Additional Facility of ICSID, if either the Contracting Party of the investor or the Contracting Party which is a party to the dispute but not both is a party to the ICSID Convention;*

iii) *before an ad hoc arbitration tribunal constituted in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL”);*

iv) *before the International Chamber of Commerce, by an ad hoc tribunal constituted in accordance with its arbitration rules.*

5. *The arbitration shall be governed by the applicable rules of arbitration except to the extent modified by this Article.*
6. *Unless otherwise agreed between the Parties to the dispute, the arbitration tribunal shall be composed of three members. Each disputing party shall nominate one member and two members will agree on the appointment of a third member, who shall act as president.*

*The members of the tribunal shall have experience in international law and in investment matters.*

*Where an arbitration has not been constituted within 90 days of the date and the claim was submitted to arbitration, either because one disputing party has not nominated a member or because the two nominated members have not agreed a president, the Secretary General of ICSID, at the request of any one of the disputing Parties, shall appoint at his discretion the member or members not yet appointed. However, in appointing the president, the Secretary General of ICSID shall ensure that the president is not a national of one of the Contracting Parties.*



7. *A tribunal constituted in accordance with this Article shall decide the dispute by majority vote in accordance with the terms of this Agreement and any applicable rules and principles of international law.*
8. *Arbitration awards may provide for the following types of remedy:*
  - a) *a declaration that the Contracting Party has breached its obligations under this Agreement;*
  - b) *monetary indemnification including interest incurred from the occurrence of the loss or damage to the date of the payment;*
  - c) *restitution in kind, where this is appropriate, except if the Contracting Party pays monetary indemnification in place of restitution where such restitution is not feasible; and*
  - d) *with the consent of both disputing Parties, any other form of remedy.*

*Arbitral awards shall be final and binding only on the disputing Parties and only in respect of the particular case.*

*The final award shall only be published with the written consent of both disputing Parties.*

*An arbitration tribunal cannot order a Contracting Party to pay punitive damages.”*

**(B) The “Argentina BIT”**

*“Article 10: Dispute Settlement between an Investor and the Contracting Party which has received the Investment*

1. *All disputes arising from the provisions of this Agreement between an investor of one Contracting Party and the other Contracting Party, shall, as far as possible, be resolved amicably or by negotiation.*
2. *This Article and the corresponding Annex establish a mechanism for the resolution of investment disputes, which arise from the date of entry into force of this Agreement, and ensure both equal*

*treatment between investors from the Contracting Parties in accordance with the principle of international reciprocity and due process before an impartial arbitration tribunal, when appropriate.*

3. *If the dispute has not been resolved within six months of the date when the relevant disputing party raised the dispute, it may be submitted, at the investor's request:*
  - *to the competent court of the Contracting Party in whose territory the investment was made; or*
  - *to international arbitration under the terms and conditions established in paragraph (4).*

*Once an investor has submitted the dispute to the jurisdiction of the Contracting Party involved or to international arbitration, the election of either of these procedures shall be final.*

4. *The investor shall notify in writing the Contracting Party of its intention to submit the dispute to international arbitration at least 90 days in advance, a term which may run parallel to the second half of the term to which paragraph (3) refers.*

*In the event of recourse to international arbitration, the investor may submit the dispute under:*

- a) *the International Convention on the Settlement of Investment Disputes between States and Nationals from other States, signed in Washington on 18 March 1965, ("the ICSID Convention"), when both Contracting Parties are signatories thereof; the Rules of the Additional Facility of the International Centre for the Settlement of Investment Disputes ("ICSID") when one of the Contract Parties is a signatory of the ICSID Convention; or*
  - b) *the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), approved by the General Assembly of the United Nations on 15 December, 1976.*
5. *The arbitration body shall rule on the disputes submitted for its consideration on the basis of the provisions of this Agreement and the applicable rules and principles of international law. The interpretation of a provision in this Agreement made by the Contracting Parties, by mutual agreement in writing, shall be*

*binding upon any arbitration body established in accordance with this Agreement.*

6. *The arbitration award shall be limited to determining whether a Contracting Party has breached this Agreement, whether this breach has caused a loss to the investor and, if so:-*
  - a) *fix the amount of compensatory indemnification for the damage suffered;*
  - b) *restitution of property or, if that is not possible, the corresponding compensatory indemnification.*
  - c) *any applicable interest.*

*The arbitration body may not order payment of punitive damages.*

*The award shall not affect the rights of any third Parties under applicable local legislation.*

7. *Arbitration awards shall be final and binding for the Parties to the dispute. Each Contracting Party shall enforce them pursuant to its legislation; otherwise the investor may have recourse to enforcement of an arbitration award under the ICSID Convention, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958 (“New York Convention”) or the Inter-American Convention on International Commercial Arbitration, signed in Panama, on 30 January, 1975 (“Inter-American Convention”). For the purposes of Article One of the New York Convention, the claim submitted to arbitration shall be held to have arisen from a commercial relationship or transaction.*
8. *In all investment arbitrations, a Contracting Party may not allege, either as defence, counterclaim, objection to compensation or any other action, that the investor received or will receive, pursuant to an insurance contract or warranty agreement, indemnification of other compensation for all or part of the alleged loss.”*

1-19 *ICSID Arbitration (Additional Facility) Rules:* It was agreed by the Parties that these proceedings were subject to the ICSID Arbitration (Additional Facility) Rules in force since 1 January 2003, except to the extent modified in the Argentina BIT and France BIT, respectively, at the First Session: see below.

(It is agreed that the Annex to the Argentina BIT is not relevant for present purposes: see Article 10(2) of the Argentina BIT cited above).

***(04) THE ARBITRAL TRIBUNAL***

1-20 The Arbitral Tribunal was constituted on 9 March 2005 and was comprised of three members:

- (1) L. Yves Fortier, CC, QC, a national of Canada, appointed as Arbitrator by the Claimants by letter dated 12 November 2004, of Ogilvy Renault LLP, now of 1 Place Ville Marie, Suite 2500, Montréal QC, H3B 1R1, Canada;
- (2) Eduardo Magallón Gómez, a national of Mexico, appointed as Arbitrator by the Respondent by letter dated 12 January 2005, of Magallón, Peniche y Del Pino Abogados, Fuego 719, Col. Jardines del Pedregal, México, DF 01900, Mexico; and
- (3) V.V. Veeder, QC, a national of the United Kingdom, as President of the Arbitral Tribunal, appointed by the Parties by letters dated 22 February and 23 February 2005, of Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2E 3EG, United Kingdom.

1-21 Ms Evgeniya Rubinina and Mr Tomás Solís were successively appointed Secretaries to the Tribunal; and Ms Alison G. FitzGerald was appointed, by consent of the Parties, as Administrative Assistant to the Tribunal.

***(05) THE ARBITRAL PROCEDURE***

1-22 *The First Session:* The First Session was held on 4 May 2005 at the seat of the Centre in Washington, D.C., U.S.A. During this First Session it was agreed, among other things, that the place of proceedings would be the seat of the Centre in Washington, D.C.

- 1-23 It was further agreed that both arbitrations should be determined by the same tribunal and that the cases should be conjoined, i.e. heard and decided together in so far as it was practicable to do so. It was agreed, at that stage and subject to further order, that questions concerning the merits and those concerning damages should be considered separately, in successive phases of these proceedings. (As recited below, this order for bifurcation was later superseded by an order for “debifurcation”).
- 1-24 *Written Phase:* The Parties agreed that there would be four consecutive written pleadings within each phase of the proceedings: a Memorial by the Claimant, a Counter-Memorial by the Respondent, a Reply and a Rejoinder. It was further agreed that the Parties would present their complete case with their Memorial and Counter-Memorial, respectively, including all documentary evidence, witness statements, and expert reports.
- 1-25 *Memorials:* In the first written phase the Claimants filed their Memorial on 13 October 2005 (“Memorial”); the Respondent filed its Counter-Memorial on 31 May 2006 (“Counter-Memorial”); the Claimants filed their Reply on 12 October 2006 (“Reply”); and the Respondent filed its Rejoinder on 12 April 2007 (“Rejoinder”). In the second written phase, the Claimants filed their Memorial on Quantum on 12 April 2007 (“Quan. Mem.”); the Respondent filed its Counter-Memorial on Quantum on 19 July 2007 (“Quan. CM”); the Claimants filed their Reply on Quantum on 14 September 2007 (“Quan. Rep.”); and the Respondent filed its Rejoinder on Quantum on 16 November 2007 (“Quan. Rej.”).
- 1-26 *Witness Statements:* The following written witness statements were submitted by the Claimants: the witness statement of Mr José Eduardo Salgado; the first, second, and third witness statements of Mr Roberto Armando Siegrist; the first, second and third witness statements of Mr Víctor Taíariol; the first and second witness statements of Ms María Elena Barrera Sánchez; and the witness statement of Mr José Rojas.
- 1-27 The written witness statement of Mr Guillermo Bilbao González was also submitted by the Claimants; but the Claimants did not make this witness available for cross-

examination as requested by the Respondent. Accordingly, the Tribunal has placed no reliance upon it for the purpose of the decisions recorded in this Award.

- 1-28 The following written witness statements were submitted by the Respondent: the witness statement of Mr Javier Martín Gallardo Guzmán, the witness statement of Ms María Jimena Valverde Valdés, the witness statement of Ms María de la Esperanza Guadalupe Gómez Mont Urueta, the witness statement of Dr Herminio Blanco Mendoza,; the witness statement of Mr Guillermo González Lozano; a letter from Mr Miguel B. de Erice Rodríguez dated 25 February 2008; and a letter from Mr Adolfo Durañona dated 13 March 2008.
- 1-29 *Expert Reports:* The following expert reports were submitted by the Claimants: the expert opinion of Mr Patrick Kinsch, the expert opinion of Mr José Antonio Chávez Vargas, the expert opinion of Mr Luis Enrique Graham Tapia, the LECG/Horwath letter of 7 October 2005, the LECG/Horwath letter of 9 October 2006, the LECG/Horwath report of 27 April 2007, and the LECG/Horwath report of 12 September 2007.
- 1-30 The following expert reports were submitted by the Respondent: the expert opinion of Dr. Carla Huerta, the Pablo Rión & Associates report of 18 July 2007, and the Pablo Rión & Associates report of 13 November 2007.
- 1-31 *“Debifurcation”:* By letter dated 17 January 2007, the Claimants requested that the proceedings be “debifurcated”, i.e. to re-join the questions of liability and quantum. The Respondent opposed this request by letter dated 19 January 2007.
- 1-32 One month later, by letter dated 14 February 2007, the Claimants supplemented their reasons for joining the issues of liability and quantum in reply to the Respondent’s objection.
- 1-33 On 20 February 2007, the Tribunal held a procedural meeting by telephone conference-call during which the Parties further expressed their views on the issue of “debifurcation”.

1-34 By letter dated 9 March 2007, the Tribunal informed the Parties of its decision to “debifurcate”, re-joining the questions of liability and quantum. The Tribunal further fixed the dates for the joined hearing on liability and quantum from 18 February to 29 February 2008.

1-35 *Main Hearing*: The first part of the main hearing took place over eight days from 18 February to 27 February 2008. The Parties made their respective opening statements on the first day: for the Claimants, Mr Sands and Mr Fraser [D1.8 & 98] and for the Respondent, Mr González and Mr Thomas [D1.132 & 179]. The Parties made their respective closing statements on the last day: for the Claimants, Mr Sands and Mr Fraser [D8.1689 & 1770] and for the Respondent, Mr González, Mr Thomas and Mr Mowatt [D8.1790, 1803 & 1901].

(References to the verbatim transcript of the oral hearings are made thus: “D1.132” signifies the first day of the main hearing, 18 February 2008, at page 132 of the transcript. Also in reference to the verbatim transcripts, the Tribunal has used their English version, and, whenever possible, it has resorted to the Spanish transcripts for the purposes of the Spanish version of this Award, or it has otherwise included a Spanish translation of the relevant portions of the English transcripts.)

1-36 The following witnesses gave oral evidence at the first part of the main hearing:

*For the Claimants*: Mr Eduardo Salgado [D2.242-355]; Mr Roberto Siegrist [D2.356-491 & D3.500-567]; Mr Víctor Taíariol [D3.587-721]; Ms María Elena Barrera [D3.730-736, D4.745-812]; Mr José Rojas [D4.813-55]; and Mr Charles Tormo [D4.857-59, 861-948, 950-59].

*For the Respondent*: Mr Herminio Blanco [D5.968-1100]; Ms Jimena Valverde [D5.1102-1161]; Ms Esperanza Gómez-Mont [D6.1172-1346]; Mr Guillermo González [D6.1347-1375]; Mr Javier Gallardo [D6.1376-1400 & D7.1408 & 1460-64]; and Mr Pablo Ríon [D7.1465-1647].

1-37 The second part of the main hearing took place on 28 May 2008. The following witnesses gave further oral evidence: for the Claimants: Mr Taíariol [D9.1978-2052];

and Mr Siegrist [D9.2052-94]; and for the Respondent: Mr Miguel de Erice [D9.2094-2207].

- 1-38 *Post-Hearing Submissions:* By letter dated 10 March 2008, the Tribunal invited the Parties to provide written post-hearing submissions by 4 April 2008 and to address certain queries set out by the Tribunal in its letter, in their respective submissions.
- 1-39 On 4 April 2008, the Parties each submitted written post-hearing submissions in accordance with the Tribunal's request.
- 1-40 *Costs Submissions:* Upon the conclusion of the first part of the main hearing in February 2008, the Tribunal ordered the Parties to provide written submissions on costs.
- 1-41 During the second part of the main hearing on 28 May 2008, the Tribunal extended the date for providing cost submissions to 16 June 2008.
- 1-42 On 16 June 2008, the Parties respectively made their submissions on costs.
- 1-43 *Further Submissions:* By letter dated 1 October 2008, the Tribunal invited the Parties to provide further written submissions on costs and certain other matters. By letter dated 7 October 2008, the Tribunal provided, at the request of the Respondent, clarification as to the submissions sought in its letter of 1 October 2008.
- 1-44 On 17 October 2008, the Parties respectively made further written submissions in accordance with the Tribunal's letters of 1 and 7 October 2008.
- 1-45 By letter dated 31 October 2008, the Respondent made further written submissions on costs, in accordance with the Tribunal's direction in its letter of 1 October 2008.
- 1-46 By email correspondence dated 3 November 2008, the Claimants objected to certain aspects of the Respondent's supplemental costs submissions.
- 1-47 By letter dated 3 November 2008, the Tribunal invited the Respondent to reply to the Claimants' objections.



- 1-48 By letter dated 4 November 2008, the Respondent submitted its reply to the Claimants' objections.
- 1-49 *Closure of the Proceedings:* By letter dated 30 November 2009, further to the letter dated 1 October 2008, the Secretary of the Tribunal informed the Parties that the Tribunal had declared the proceeding closed in accordance with Article 44(1) of the ICSID Arbitration (Additional Facility) Rules.

***(06) THE PARTIES' FINAL CLAIMS FOR RELIEF***

- 1-50 *The Gemplus Claimants:* By their Request for Arbitration, the Gemplus Claimants seek the following relief:
- (i) a declaration that the Government of Mexico has acted arbitrarily and (1) has failed to accord the Claimants' investments fair and equitable treatment; (2) has failed to accord the Claimants' investments no less favourable treatment and/or most favoured nation treatment; (3) has breached its treaty obligation not to harm the management, maintenance, use, enjoyment or order of such investments with arbitrary or discriminatory measures; (4) has expropriated and dispossessed the Claimants' investments without just cause and without compensation; and/or (5) has adopted measures equivalent to expropriation without just cause and without compensation;
  - (ii) their losses set out at paragraph 52 of their Request for Arbitration: "The investment of Gemplus/SLP/Gemplus Industrial is quantified as (a) 20% of the profits that Renave would have made during the initial 10-year Concession period and the further 10-year term pursuant to Article 19 of the Concession Agreement; alternatively (b) the value, immediately prior to the expropriation and breach of the BITs, of Gemplus Industrial's shareholding in Renave, if to be

quantified by any measure other than (a); alternatively (c) such other quantification as may be assessed.”

- (iii) interest pursuant to Article 5.3 of the France BIT; and
- (iv) legal costs and costs of this arbitration, including ICSID and Tribunal fees.

1-51 *Talsud:* By its Request for Arbitration, Talsud seeks the same relief as the Gemplus Claimants save that the cross-references are made to paragraph 46 of its Request for Arbitration (as to losses) and Article 5.4 of the Argentina BIT (as to interest).

1-52 *Final Relief:* The Claimants seek the following relief from the Tribunal, as finally formulated:

(A) *Gemplus, SLP and Gemplus Industrial:*

- (1) Rejection of the Respondent’s objections to jurisdiction as without merit;
- (2) Damages for violations of Articles 4.1, 4.2, 4.3, 5.2 and 5.3 of the France BIT;
- (3) Their share of the costs of these arbitration proceedings, including but not limited to expert and legal fees and disbursements and the costs of the Arbitral Tribunal;
- (4) An assessment of the share of the costs incurred by the Gemplus Claimants to the date of the Award and an order that the Respondent is liable to pay for those costs;
- (5) Interest on the sums claimed in subparagraphs (2), (3) and (4) until such time as they are paid.

(B) *Talsud:*

- (1) Rejection of the Respondent’s objection to jurisdiction as without merit;

- (2) Damages for violations of Articles 3.1, 3.2, 5.1, 5.2 and 5.3 of the Argentina BIT;
- (3) Its share of the costs of these arbitration proceedings, including but not limited to expert and legal fees and disbursements and the costs of the Arbitral Tribunal;
- (4) An assessment of the share of the costs incurred by Talsud to the date of the Award and an order that the Respondent is liable to pay for those costs;
- (5) Interest on the sums claimed in subparagraphs (2), (3) and (4) until such time as they are paid.

1-53 *The Respondent:* The Respondent seeks from the Tribunal (i) as to jurisdiction, the dismissal of the Gemplus Claimants' claim for lack of standing; and (ii) as to the merits (including quantum), the dismissal of the Claimants' claims in their entirety, with a corresponding order on costs.

## ***PART II: THE PRINCIPAL ISSUES***

### ***(01) INTRODUCTION***

- 2-1 The Parties' written and oral submissions in these arbitration proceedings are very extensive. The Tribunal has, where convenient, reproduced parts of the Parties' submissions in the body of this Award, as far as possible in the Parties' own original words (to facilitate this Award's two versions in English and Spanish). It is of course not possible to incorporate in this Award the entirety of the Parties' submissions, both written and oral, made during the course of these arbitration proceedings.
- 2-2 The summaries below are made for the sole purpose of explaining the Tribunal's general approach in this Award. The Tribunal has nevertheless considered the full submissions of the Parties in identifying the principal issues listed below and in arriving at its decisions on all issues addressed in this Award.
- 2-3 As indicated below, the determination of many of these issues is significantly dependent upon facts. For this reason, the Tribunal's approach is first determined by its findings of fact, set out in Part IV of this Award.

### ***(02) LIST OF PRINCIPAL ISSUES***

- 2-4 The following principal issues arise from the Claimants' Claims and the Respondent's Defence, listing them in turn: (A) Jurisdiction; (B) Liability - General Approach; (C) Fair and Equitable Treatment; (D) Expropriation; (E) Full Protection and Security; (F)

NLF/MFN Treatment; (G) Causation and Fault; (H) Damages – General Approach; (I) Lost Future Profits; (J) Past Payments to Claimants; (K) Currency and Interest; and (L) Legal and Arbitration Costs.

***(03) ISSUE A: JURISDICTION***

2-5 This first issue arises in connection with the Tribunal’s jurisdiction under Article 45(4) of the ICSID Arbitration (Additional Facility) Rules. Whilst the Respondent originally raised jurisdictional objections in connection with both Talsud and the Gemplus Claimants’ claims, it has maintained its objections only in respect of the Tribunal’s jurisdiction over the latter. This issue is addressed below in Part V of this Award.

***(i) The Respondent’s Case***

2-6 The Respondent’s jurisdictional claim relates to the Gemplus Claimants’ “standing” to bring their claim. Specifically, the Respondent contends that the continuous chain of ownership and nationality of the Gemplus Claimants’ claims has been broken with the legal effect, under international law and the France BIT, that each of the Gemplus Claimants lacks any standing to advance its claim in these proceedings.

***(ii) The Claimants’ Case***

2-7 The Gemplus Claimants contend that the Respondent’s jurisdictional arguments are flawed in several respects. In essence, the Gemplus Claimants submit that the several corporate transactions entered into by the Gemplus Claimants prior to and following the filing of their Request for Arbitration did not affect their right respectively to present their claim under the France BIT. In the alternative, they submit that in the event this right was lost by Gemplus, it is held by SLP.

#### ***(04) ISSUE B: LIABILITY - GENERAL APPROACH***

2-8 This issue addresses the general approach to the merits espoused by each of the Parties, including the legal character of the claims presented, the relevance of the domestic proceedings involving the Concessionaire in Mexico, the contractual landscape to the Claimants' claims and the applicable standard of proof. This issue is addressed below in Part VI of this Award.

##### ***(i) The Claimants' Case***

2-9 The Claimants submit that their claims are treaty-based claims, but that it is open to the Tribunal to take into account the underlying factual circumstances of these claims, including the contractual relationship between the Concessionaire and the Respondent, relying for support in this regard on the ICSID awards in *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic* and *Azurix v. Argentina*. The Claimants further submit that the Respondent's approach in regard to the matter of deference owed by this Tribunal to the governmental decisions of the Respondent is "misconceived", contending that no measure of deference is justified in this case. Finally, as regards the standard of proof, the Claimants contend that the standard applicable is set forth in the two BITs.

##### ***(ii) The Respondent's Case***

2-10 The Respondent contends that the Claimants' claims are contract claims, not treaty claims, and that these claims fall within the exclusive jurisdiction of the Mexican courts. Even if the claims could be treated as treaty claims, the Respondent submits that this Tribunal must have "due deference" to governmental decisions, relying upon the standard of deference articulated by the tribunal in *S.D. Myers v. Canada*. Finally, as regards the applicable standard of proof, the Respondent contends that the Claimants face a heavier burden in making out their claims for treaty breach than is normally the case in proving breach of contract, characterizing the standard of proof as "high".

**(05) ISSUE C: FAIR AND EQUITABLE TREATMENT**

2-11 This issue relates to the first of the Claimants' principal claims for treaty breach and in particular whether the Respondent treated the Claimants unfairly and inequitably in breach of Article 3 of the Argentina BIT and Article 4 of the France BIT. This issue is addressed below in Part VII of this Award.

**(i) The Claimants' Case**

2-12 The Claimants plead their fair and equitable treatment claim in three parts: (1) transparency and protection of the investor's legitimate expectations; (2) due process and the absence of arbitration; and (3) good faith. The Claimants also plead a fourth argument as regards (4) "arbitrary and/or discriminatory measures or to harm the management, maintenance, use, enjoyment or order of Talsud's investment".

2-13 As regards the first part, the Claimants contend that the measures taken by Mexico following the arrest of Mr Cavallo (on 24 August 2000) were neither consistent nor transparent, relying on the principles of transparency and predictability articulated by the tribunals in *Metalclad v. Mexico* and *Tecmed v. Mexico*.

2-14 As regards the second part, the Claimants submit that the Respondent interfered with their investment through the technical and administrative interventions (from 29 August 2000 onwards), described as unlawful, arbitrary and capricious and having no justification by reason or necessity. The subsequent Requisition of the Concessionaire (on 25 June 2001) and the Revocation of the Concession (on 13 December 2002) are described as further infringements of the fair and equitable treatment standard, being arbitrary and carried out by the Respondent without due process.

2-15 As regards the third part, the Claimants contend that the various acts of the Respondent beginning on 21 August 2000 up to the Revocation of the Concession on 13 December 2002 evidence a material lack of good faith by the Respondent.

- 2-16 Finally, as regards the last part in connection with the treatment of Talsud's investment, the Claimants invoke a distinct provision of the Argentina BIT (Article 3) which precludes a Party to the BIT from prejudicing "the management, maintenance, use, enjoyment, or disposition" of an investor's investments through arbitrary or discriminatory measures. The Claimants rely on the same arguments in connection with the arbitrariness of the acts of the Mexican authorities following the arrest of Mr Cavallo on 24 August 2000.
- 2-17 The Claimants reject the Respondent's response based on local remedies and, in particular, its invocation of the *Waste Management* award as inapposite to the facts of this case. The Claimants submit that they have not brought, nor have they participated in, any legal proceedings before the Mexican courts; and, in any event, the Claimants submit that the issue of local remedies is irrelevant in the case of a claim for expropriation under both BITs.

**(ii) The Respondent's Case**

- 2-18 The Respondent rejects each of the Claimants' claims of unfair and inequitable treatment. Beginning with the Claimants' expectations, the Respondent maintains that the Secretariat acted at all times on the basis of the criteria set forth in the legal framework governing the Concession, exercising its legal rights and defending its measures in the proper forum, *i.e.* the Mexican courts.
- 2-19 Turning to the Claimants' due process argument, the Respondent submits that there is simply no evidence that the Secretariat acted in "wilful disregard" of due process, citing the standard for proving arbitrariness articulated by the International Court of Justice in *ELSI (United States of America v. Italy)*.
- 2-20 As concerns the third element of the Claimants' claim, the Respondent contends that it acted at all times in good faith, pointing also to the affirmation of its reasons for intervention in the course of the Revocation proceedings and later the legal challenge of the administrative intervention.



2-21 Finally, the Respondent contends, on the basis of the principles set forth in *Azinian v. Mexico* and *Waste Management v. Mexico* (among other legal materials), that it is not open to the Claimants to impugn acts of the Secretariat which have been validated by the Mexican courts; nor may this Tribunal review the decisions of those courts for any error in applying domestic law. The Respondent also rejects the Claimants' argument that the availability of local remedies is relevant only in the case of a fair and equitable treatment claim and not in the case of an expropriation claim, submitting that the tribunals in *Azinian* and *Waste Management* based the dismissal of the claimant's expropriation claim on the resort to local remedies.

***(06) ISSUE D: EXPROPRIATION***

2-22 This issue relates to the second of the Claimants' principal claims for treaty breach and in particular whether the Respondent expropriated the Claimants' investment in violation of the requirements set forth in Article 5 of the Argentina and France BITs. This issue is addressed below in Part VIII of this Award.

***(i) The Claimants' Case***

2-23 The Claimants submit that the measures taken by the Respondent during the period prior to the Revocation of the Concession amounted to an indirect expropriation of their investment and (or in the alternative) that the Revocation constituted a direct expropriation of their investment. The Claimants contend that the Respondent's conduct during this period fell outside any contractual scope and was a clear exercise of the Respondent's sovereign authority. The Claimants further contend that the Respondent's actions were unlawful because they were not justified on grounds of public interest or utility, and they were not accompanied by the payment of adequate compensation, both of which are requirements in the two BITs.

- 2-24 The Claimants reject the Respondent's argument that the acts constituting expropriation were lawful because they were taken pursuant to rights under the Concession Agreement and Mexican law. In any event, the Claimants submit, relying on the *Tecmed v. Mexico* award, that the Respondent's acts were unjustified and disproportionate, amounting therefore to unlawful expropriation.
- 2-25 Finally, relying upon the requirements of the two BITs in respect of the obligation to pay compensation, the Claimants contend that the Respondent's failure to pay compensation to the Claimants in accordance with the fair market value of their investment on its own renders the expropriation unlawful.

**(ii) *The Respondent's Case***

- 2-26 The Respondent denies that an expropriation claim can be made out on the facts of this case, describing the various acts about which the Claimants complain as reasonable and legitimate. The Respondent further submits, in particular with regard to the Requisition and the Revocation, that it simply exercised a right or power contemplated in the Concession Agreement.
- 2-27 The Respondent also submits, relying on *Waste Management v. Mexico* and *Azurix Corp. v. Argentina* (among other awards), that where a state instrumentality has contracted with an investment of a foreign investor, the tribunal must look at the terms of the contract in order to determine whether the State is acting as co-contractor. In this case, the Respondent submits that it possessed contractual rights of audit, inspection, intervention, termination, requisition and revocation; and that the exercise of these rights cannot be considered a termination or variance of the Concessionaire's contractual rights by means not contemplated by the Concession Agreement.
- 2-28 In the alternative, the Respondent contends that in the event that the Tribunal does not accept its submission as to the circumstances which led to the exercise of the Respondent's legal rights, the resort to local remedies "in and of itself disposes of the Claimants' grievances".

**(07) ISSUE E: PROTECTION AND SECURITY**

2-29 This issue relates to the third of the Claimants' claims for treaty breach, namely whether the Respondent granted the Claimants' investment appropriate protection and security consistent with Article 3 of the Argentina BIT and Article 4 of the France BIT. This issue is addressed below in Part IX of this Award.

**(i) The Claimants' Case**

2-30 The Claimants submit that the scope of the full protection and security provisions in the two BITs extend beyond protection from physical violence and threats and incorporates a much broader requirement to protect the position of investors and their investments, relying on the discussion of this issue in the awards in *CME v. Czech Republic*, *Goetz v. Burundi* and *Rankin v. Iran*, among other cases.

2-31 In this regard, the Claimants submit that the Respondent's various acts and omissions undermined the stability of the investment environment in which they had to operate and frustrated their legitimate expectations, thereby giving rise to this independent claim for breach of the Respondent's obligations to accord full and complete protection and security for their investment.

**(ii) The Respondent's Case**

2-32 The Respondent rejects this claim as a "make weight", cautioning that "full protection and security" should not be compared with fair and equitable treatment.

2-33 The Respondent further relies upon the award in *Asian Agricultural Products Limited v. Republic of Sri Lanka* in support of its submission that the concept of full protection and security must not be read more broadly than its plain meaning, which refers to the State's obligation to afford protection to a foreign investor or its property in situations of threatened harm, such as civil conflict or some other disturbance of the peace.

***(08) ISSUE F: NLF/MFN TREATMENT***

2-34 This issue relates to the fourth and final of the Claimants' claims for treaty breach, albeit advanced as a conditional answer to a possible defence by the Respondent, namely whether the Respondent granted to the Claimants no less favourable / most favoured nation ("NLF/MFN") treatment consistent with Article 3 of the Argentina BIT and Article 4 of the France BIT. This issue is addressed below in Part X of this Award.

***(i) The Claimants' Case***

2-35 The Claimants contend that the Respondent is precluded from relying on the national security exception in the Argentina BIT as a defence, by virtue of the MFN provision in that BIT, because there is no national security exclusion in the France BIT.

***(ii) The Respondent's Case***

2-36 The Respondent submits that the Claimants' arguments in connection with these treaty provisions are anticipatory of a defence not in fact advanced by the Respondent. As a matter of principle, however, the Respondent disagrees that an MFN provision, such as that contained in the Argentina BIT, can override a national security clause, such as contained in the same Argentina BIT.

***(09) ISSUE G: CAUSATION AND FAULT***

2-37 This issue relates to the matter of causation in connection with the Claimants' treaty claims, in particular whether any unlawful act or omission by the Respondent caused the Claimants' loss and whether any fault of the Claimants contributed to that loss, such that any amount of compensation should be reduced or extinguished. This issue is addressed below in Part XI of this Award.

*(i) The Claimants' Case*

- 2-38 The Claimants submit that they have suffered loss as a direct result of the Respondent's expropriation of their investments and the failure by the Respondent to provide fair and equitable treatment and full protection and security in respect of their investments.
- 2-39 The Claimants reject the Respondent's case that they contributed themselves to their losses and that therefore any compensation should be reduced or extinguished accordingly.

*(ii) The Respondent's Case*

- 2-40 The Respondent contends that Article 39 of the International Law Commission's draft Articles on State Responsibility should preclude any recovery in these arbitrations because the Claimants contributed to any injury they may have suffered because Talsud was responsible for the appointment of Mr Cavallo as General Director of the Concessionaire. In the Respondent's submission, whatever prospects the Registry may have had for public acceptance and viability (in August 2000) were destroyed by the Cavallo incident.
- 2-41 In the alternative, the Respondent submits that any recovery should be reduced by 50% to account for the Claimants' contributory fault.

***(10) ISSUE H: COMPENSATION – GENERAL APPROACH***

- 2-42 This issue relates to the legal approaches respectively advanced by the Claimants and the Respondent in respect of the Tribunal's assessment of compensation, assuming a finding of liability and causation on one of the above-described principal claims. This issue is addressed below in Part XII of this Award.

*(i) The Claimants' Case*

2-43 The Claimants' primary submission is that the market value measure of compensation contained in the two BITs is virtually identical and reflects the standard of compensation prescribed by the Permanent Court of International Justice ("PCIJ") in the *Chorzów Factory* case for unlawful expropriations, that is full reparation so as to "wipe out all the consequences of the unlawful act" and re-establish the situation which likely would have existed if that unlawful act had not been committed. This standard, the Claimants' submit, includes the potential to recover future lost profits.

*(ii) The Respondent's Case*

2-44 The Respondent agrees with the Claimants that the standard of compensation contained in the BITs is materially the same and reflects the standard set forth by the PCIJ in *Chorzów Factory*. However, the Respondent contests the Claimants' assertion that this standard entitles the Claimants to recover compensation prescribed in the BIT, plus loss of profits.

***(11) ISSUE I: COMPENSATION – LOST FUTURE PROFITS***

2-45 This issue relates to the particular method of calculating damages for a breach of one or both of the BITs advocated respectively by the Parties. This issue is addressed below in Part XIII of this Award.

*(i) The Claimants' Case*

2-46 The Claimants submit that where an asset is not publicly traded and there is no open market for it, as in this case, its value must be established by reference to its "likely value in a hypothetical market". Drawing on the arbitral jurisprudence of the U.S.-Iran Claims Tribunal, the Claimants consider that the market value is the price that a willing buyer would pay to a willing seller in circumstances in which each had good

information, each desired to maximize his financial gain and neither was under duress or threat.

2-47 Based on this methodology, the Claimants contend that the ‘Income Approach’, which relies on a discounted cash flow (“DCF”) model, is the most appropriate method to value their investments.

2-48 The Claimants submit that the relevant date from which to calculate compensation, under the two BITs, is the date immediately preceding the acts or omissions that rendered the expropriation irreversible. This date is, in the Claimants’ submission, no later than 20 August 2000, the date preceding the Respondent’s decision on 21 August 2000 to postpone the deadline for the registration of used vehicles.

2-49 Whilst the Claimants assess the value of their investments as at two other potential valuation dates put to them by the Tribunal, *i.e.* 27 June 2001 and 13 December 2002, the Claimants maintain their submission that a DCF analysis is the only method available to achieve full reparation for their losses in this case.

2-50 With regard to the Claimants’ other treaty claims, it is submitted that the same standard of compensation applies, relying upon the tribunal’s decision in the *Vivendi v. Argentina* award to the effect that the level of damages flowing from different treaty breaches was equivalent.

***(ii) The Respondent’s Case***

2-51 The Respondent submits that, in the circumstances of this case, the ‘asset value’ and ‘declared tax value’ methods should be preferred over the DCF method. Highlighting the difficulties associated with exclusive reliance on the DCF method, also identified in awards by the Iran-U.S. Claims Tribunal, the Respondent contends that the DCF method is inappropriate here because there is no proven track record of profitable operations at the Claimants’ chosen valuation date.

2-52 As to the alternative potential valuation dates identified by the Tribunal, the Respondent contends that the Claimants’ valuation methodology is similarly inappropriate.

2-53 Finally, the Respondent submits that, consistent with the *Chorzów Factory* case, the results of one valuation method must be tested against the results of the other methods in order to avoid “speculative or undue awards of damages”.

***(12) ISSUE J: PAST PAYMENTS TO CLAIMANTS***

2-54 This issue relates to the sum of payments effected by the Respondent to the Claimants prior to the termination of the Concession, and the appropriate accounting of that sum in connection with the amounts claimed as compensation by the Claimants in these proceedings. This issue is addressed below in Part XIV of this Award.

***(i) The Claimants’ Case***

2-55 The Claimants contend that the losses which they sustained due to the Respondent’s unlawful acts and omissions far exceeds the amounts disbursed to the Claimants through cash distributions effected by the Respondent.

***(ii) The Respondent’s Case***

2-56 The Respondent submits that the Claimants were, in effect, made whole by the disbursements made to the Claimants in the form of dividends and return of capital.

***(13) ISSUE K: CURRENCY AND INTEREST***

2-57 This issue relates to the appropriate currency, rate and amount of pre- and post-award interest that may be owing on any principal amount awarded by the Tribunal as compensation. This issue is addressed below in Part XVI of this Award.



*(i) The Claimants' Case*

2-58 The Claimants submit that the BITs respectively require interest at a “reasonable commercial rate” and at “the applicable market rate”. Additionally, while the BITs are silent on whether interest should be compounded, the Claimants contend that current arbitral practice supports the compounding of interest. As a result, the Claimants identify the CETES 364 day Mexican government bond rate, compounded annually, as the appropriate rate applicable to pre-award interest, with the award expressed in US dollars.

*(ii) The Respondent's Case*

2-59 The Respondent argues that interest should be calculated according to the Mexican CETES rates, but submits that the 28-day rate is a more commonly used indicator than the 364 day rate; and that it would satisfy the requirements of the BITs. The Respondent objects to the compounding of interest on any amount awarded to the Claimants, submitting that an award of simple interest is adequate in the circumstances of these arbitrations.

***(14) ISSUE L: LEGAL AND ARBITRATION COSTS***

2-60 This issue relates to the allocation and amount, if any, of costs amongst the Parties associated with these arbitration proceedings. This issue is addressed below in Part XVII of this Award.

*(i) The Claimants' Case*

2-61 The Claimants begin their submissions on costs with the general principle that the losing party should pay the reasonable costs incurred by the successful party in these proceedings. However, in any event, the Claimants contend that the Respondent should

bear the costs which the Claimants incurred in order to address the Respondent's jurisdictional objections and to attend the supplemental hearing on 28 May 2008.

**(ii) *The Respondent's Case***

2-62 The Respondent submits that the Claimants' arguments on costs assume, wrongly, that the measures taken by Mexico were unlawful. The Respondent further contends that its defence against the Claimants' claims was conducted responsibly, rejecting any suggestion that it presented its case deficiently. The Respondent adds that if the Tribunal should decide that this is a case in which the successful claimants ought to recover costs, costs should at a minimum be awarded in the Respondent's favour in respect of the expenses occasioned by Mr. Taíariol's testimony at the supplemental hearing.

2-63 ***Conclusion & Summary and Operative Part:*** The Tribunal sets out its "Conclusion and Summary" in Part XV; and this Award's Operative Part is contained in Part XVIII below.

## ***PART III: THE PRINCIPAL TEXTS***

### ***(01) INTRODUCTION***

- 3-1 It is necessary here to set out, in full, relevant extracts from the two principal texts to which reference is made later below: the France BIT (as regards the Gemplus Claimants) and the Argentina BIT (as regards Talsud).

### ***(02) THE FRANCE BIT***

- 3-2 *Preamble:* The France BIT provides in its preamble that the Contracting Parties are “DESIRING to strengthen their economic co-operation between the two States and to create favourable conditions for Mexican investments in France and French investments in Mexico” and “CONVINCED that promoting and protecting such investments will stimulate transfers of capital and technology between the two countries in the interests of their economic development”.

- 3-3 *Article 2:* Article 2 sets out the scope of application of the BIT as follows:

#### ***“ARTICLE 2***

##### ***Scope of Application of this Agreement***

- 1. It is understood that investments covered by this Agreement are those which have already been made or might be made after this Agreement enters into force, in accordance with the laws of the Contracting Party on whose territory or in whose maritime zone the investments are made.*

2. *This Agreement applies to the territory and maritime zone of each of the Contracting Parties.*
3. *Nothing in this Agreement shall be interpreted so as to prevent either Contracting Party from taking any measure to control investments made by foreign investors and the way in which these investors carry out their investments, within the framework of measures aiming to preserve and encourage cultural and linguistic diversity.”*

3-4 *Articles 4 and 5: Articles 4 and 5 set out the substantive protections invoked in part by the Gemplus Claimants, providing in their entirety as follows:*

*“ARTICLE 4*

*Protection and Treatment of Investments*

1. *Each of the Contracting Parties undertakes to ensure, within its territory and its maritime zone, a fair and equitable treatment, in accordance with principles of International Law, of investments made by investors of the other Contracting Party and shall ensure that the exercise of their recognized rights shall not be impeded either in law or in practice.*
2. *Each of the Contracting Parties shall grant, within its territory and maritime zone, to investors of the other Contracting Party a treatment no less favourable than it would grant its own investors or treatment granted to investors of the Most Favoured Nation, if the latter is more favourable, with regard to their investments and the operation, administration, maintenance, use, enjoyment or disposition of such investments.*

*Notwithstanding the principle of national treatment, each of the Contracting Parties may require an investor from the other Contracting Party, or a company located in its territory which is owned or controlled by said investor, to provide routine information relating to its investments for statistical purposes.*

*This treatment shall not, however, extend to privileges granted by a Contracting Party to investors from a third State pursuant to its participation or its association with a free trade area, a customs union, a common market or any other form of regional economic organization.*

*The provisions of this article shall not apply to fiscal matters.*

3. *Investments made by investors of one Contracting Party within the territory or the maritime zone of the other Contracting Party shall benefit from full and complete protection and security within the territory and maritime zone.*

4. *Each Contracting Party shall favourably examine, within the framework of its domestic law, applications for the entry and the authorization to reside, work and travel presented by nationals of a Contracting Party, pursuant to an investment made within the territory or maritime zone of the other Contracting Party.”*

*“ARTICLE 5*

*Expropriation and Indemnification*

1. *Neither Contracting Party shall nationalize or expropriate directly or indirectly, or take any other measure of equivalent effect, with respect to an investment of the other Contracting Party in its territory or its maritime zone, except:*
  - i) *for reasons of public interest;*
  - ii) *provided that such measures are non-discriminatory;*
  - iii) *in accordance with due process;*
  - iv) *on payment of indemnification in accordance with the provisions of paragraphs 2 and 3 of this Article.*
2. *Indemnification shall be paid without delay, shall be freely transferable and fully realizable.*
3. *The indemnification shall be equivalent to the fair market value or, in the absence of such value, to the actual value of the expropriated or nationalized investment immediately before the expropriation or nationalization was carried out and shall not reflect any changes in the value which arise as a result of the expropriation becoming known prior to the date of expropriation. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property and any other criteria which, in the circumstances, are appropriate to determine fair market value. The aforementioned indemnification, its amount and its mode of payment shall be fixed no later than the date of deprivation. Indemnification will be subject to interest calculated at the applicable rate until the date of payment.”*

### **(03) THE ARGENTINA BIT**

3-5 *Preamble:* The preamble to the Argentina BIT is somewhat more extensive, providing as follows:

*“DESIRING to strengthen the ties of friendship between their nations and seeking to extend and intensify the economic relationship between the Contracting Parties, particularly with regard to the investments made by investors of one Contracting Party in the territory of the other Contracting Party;*

*ACKNOWLEDGING that a bilateral agreement on the promotion and protection of investments is necessary to foster economic development and stimulate the flow of capital and technology between the Contracting Parties;*

*WISHING to create favourable conditions for investment of investors from one Contracting Party in the territory of the other Contracting Party, in accordance with the principle of international reciprocity;”*

3-6 *Article 2:* Article 2 sets out the scope of application of the Argentina BIT, providing as follows:

*“ARTICLE 2. Scope of Application*

- 1. This Agreement applies to measures adopted or maintained by a Contracting Party in relation to the investors of a Contracting Party as regards its investments and the investments made by those investors in the territory of the other Contracting Party.*
- 2. This Agreement applies to the whole territory of the Contracting Parties as defined in Article First, paragraph (6). The provisions of this Agreement shall prevail over any incompatible rule which exists in the domestic law of the Contracting Parties.*
- 3. With regard to the provisions foreseen in Articles Fourth and Tenth, natural persons who are nationals of one Contracting Party and who are domiciled in the territory of the other Contracting Party in which the investment is located, may only avail themselves of the treatment granted by this Contracting Party to its own nationals.*

4. *This Agreement shall apply to all investments made before or after its entry into force, but the provisions of this Agreement shall not be applicable to any disputes, claims or differences of any kind which arose before the date of its entry into force.*
5. *This Agreement shall not apply to:*
  - a. *economic activities reserved to the State pursuant to the legislation of each Contracting Party;*
  - b. *measures adopted by a Contracting Party for reasons of national security or public order;*
  - c. *financial services except as authorized by the legislation of each Contracting Party.*
6. *Article Third shall not apply to any measure which a Contracting Party still maintains pursuant to its legislation in force at the time this Agreement enters into force. As of this date, any incompatible measure which a Contracting Party adopts shall not be more restrictive than those in place at the time this Agreement enters into force.”*

3-7 *Articles 3 and 5:* Articles 3 and 5 set out the substantive protections invoked in part by Talsud, providing in their entirety as follows:

*“ARTICLE 3. National Treatment and Most Favoured Nation Treatment*

- 1.- *Each Contracting Party shall ensure at all times a fair and equitable treatment of all investors and investments of investors of the other Contracting Party, and shall not damage the management, maintenance, use, enjoyment or disposition of their investments through arbitrary or discriminatory measures.*
- 2.- *Each Contracting Party, after admitting in its territory investments from investors of the other Contracting Party, shall provide full legal protection to those investors and their investments and shall grant them a treatment no less favourable than that granted to investors and investments of its own investors or investors from third States.*
- 3.- *If a Contracting Party grants special treatment to investors or investments of investors coming from a third State, as a result of agreements containing provisions to avoid double taxation, create free trade areas, customs unions, common markets, regional agreements, economic or monetary unions or other similar institutions, that Contracting Party shall not be obliged to grant such treatment to investors or investments of investors of the other Contracting Party.*

- 4.- *Each Contracting Party shall grant the investors of the other Contracting Party, in respect of investments which suffer losses in their territory due to armed conflicts, a state of national emergency or insurrection, no less favourable treatment than that granted to its own investors or to investors of a third State, with regard to restitution, indemnification, compensation or other redress.”*

*“ARTICLE 5. Expropriation and Indemnification*

- 1.- *Neither of the Contracting Parties may nationalize or expropriate, either directly or indirectly, an investment of an investor of the other Contracting Party in its territory or adopt any measures equivalent to the expropriation or nationalization of that investment, except:*
- a) for reasons of public utility;*
  - b) on a non-discriminatory basis;*
  - c) in accordance with due process; and*
  - d) with indemnification, pursuant to paragraphs (2) through (4).*
- 2.- *The indemnification shall be equivalent to the market value of the expropriated investment immediately before the expropriatory measure was implemented (“date of expropriation”) or before the expropriatory measure was made public. The valuation criteria shall include current value, declared tax value of tangible goods, and other criteria that are appropriate to determine market value.*
- 3.- *Indemnification shall be paid without delay, fully realizable and freely transferable.*
- 4.- *The amount paid shall be no less than the equivalent amount which would have been paid as indemnification on the date of expropriation in a freely-convertible currency on the international financial market, that currency having been converted to the standard market quotation on the date of valuation, plus interest corresponding to a reasonable commercial rate for that currency until the date of payment.”*



## ***PART IV: THE PRINCIPAL FACTS***

### ***(A) INTRODUCTION***

- 4-1 Before reciting the relevant facts in the chronology of principal facts below, as found by the Tribunal, it is helpful to describe briefly the several persons and entities involved in this case.
- 4-2 *Gemplus*: Mr Eduardo Salgado was an officer of Gemplus and Legal Director for Latin America for the Gemplus group of companies until 2006. Mr José Rojas was an employee of Gemplus until 2006 and remained thereafter an employee of Gemalto, a company jointly formed by Gemplus and Axalto Holding N.V. (Mr Salgado and Mr Rojas were called as witnesses).
- 4-3 *Talsud*: Mr Víctor Taíariol was and remains President of Talsud. Mr Roberto Siegrist acted as an adviser to Talsud until 1999. Mr Ricardo Cavallo was and remains a shareholder in Talsud. (Mr Taíariol and Mr Siegrist were called as witnesses; Mr Cavallo could not be called as a witness).
- 4-4 *Mr Henry Davis*: Mr Henry Davis Signoret, of Aplicaciones Informáticas S.A. de C.V. owned and/or controlled the Henry Davis group of companies in Mexico. Neither Mr Davis nor Aplicaciones Informáticas was a party to these arbitration proceedings, nor was either represented before this Tribunal.
- 4-5 *The Concessionaire*: The Concessionaire (also called “Renave”) was incorporated on 6 September 1999. Mr Cavallo was the Concessionaire’s General Director until 23 August 2000. On 25 August 2000, Mr Guillermo Bilbao was appointed General Director of Renave, retroactive to 23 August 2000 (He did not appear as a witness). Ms María Elena Barrera served as Director of Administration and Finance under Mr Bilbao for a

brief period in 2000, prior to the appointment of Mr Erasmo Marín as Administrative Intervenor; and she stayed with Renave to the closure of its operations (Ms Barrera was called as a witness).

- 4-6 *The Secretariat:* Dr Herminio Blanco Mendoza was the Secretary at the Secretariat of Commerce and Industrial Development (also known as “SECOFI” or the “Secretariat”), from 1994 to until December 2000 (Dr Blanco was called as a witness). The Under-Secretary was Dr Ramos Tercero, who served in this capacity from 1994 until his sudden death on 6 September 2000. Under the new political administration formed on 1 January 2001 by President Fox, the Secretary of the new Secretariat, the name of which was changed to the “Secretariat of the Economy”, was Dr Derbez (who was not called as a witness).
- 4-7 Mr Javier Gallardo was a partner in the Mexico City law firm of Creel, García-Cuellar and Müggenburg until 2006, when he formed his own firm. He was contracted by Casa de Bolsa Bancomer, S.A. in 1998 to assist in developing the legal structure for implementation of the Concession by SECOFI (he was called as a witness).
- 4-8 Mr Guillermo González Lozano was part of the Second Administrative Intervention under Ms Gómez-Mont in 2001 and the requisition or seizure of Renave in 2002, responsible in some measure for the financial and administrative aspects of the Concessionaire during these periods (he was called as a witness).
- 4-9 Ms Jimena Valverde was Director of Judicial Affairs of the Juridical Matters Unit of SECOFI from 1996 to 2003, at which time she was promoted to Head of the Juridical Matters Unit (she was called as a witness).
- 4-10 The first “intervener” was Mr Erasmo Marín, from September 2000 to May 2001 (who was not called as a witness). The second intervener was Ms. Esperanza Gómez-Mont (who was called as a witness).

**(B) THE PRINCIPAL CHRONOLOGY**

- 4-11 As already indicated, the Tribunal sets out below the principal factual basis for its decisions in this Award in the form of an overall chronology. Where disputed by the Parties, the Tribunal has established these facts primarily from the contemporary documentation adduced in evidence by the Parties, supplemented by testimony of their factual witnesses (both oral and written) as provided to the Tribunal in these arbitration proceedings.
- 4-12 Many of the events in this chronology are concurrent and several overlap significantly. It is therefore convenient at times to break up the chronology into different subjects to avoid unnecessary repetition as far as possible. Where texts are quoted from the original Spanish, the quotations are taken from English translations, either agreed between the Parties or settled by the Tribunal.

**(01) Antecedents to the National Vehicle Registry**

- 4-13 **1995:** The chronology starts in 1995, with the renewed initiative within Mexico for a national vehicle registry. It was prompted, in part, by a concern that the absence of such a registry facilitated criminal activity, particularly car-theft and organized crime generally. This initiative was included in the national development programme advanced in 1995 by the newly-elected President of Mexico (Mr Ernesto Zedillo of the PRI) and the Federal Government, adopting a proposal made by the opposition PAN party. National vehicle registries had been proposed earlier in Mexico; but none of these proposals had succeeded. At this time, some states operated their own state registry (but others did not); such regional systems operated with rudimentary technology; there was no co-ordination between states or between states and federal agencies; and there was no comprehensive registration of used vehicles.

- 4-14 The national development programme described the principal objectives for the new national vehicle registry as two-fold: first, protecting the property assets of Mexican citizens; and second, combating crime. Vehicles represented (then as now) an important part of property owned by Mexicans; and there were increasing social concerns over the widespread theft of vehicles, as well as related criminal activity such as kidnappings and robberies. This had led to strong public support for the creation of a secure national database containing all relevant information relating to the ownership of both used and new vehicles, as well as all vehicles imported into Mexico.
- 4-15 As all prior initiatives had failed, it was determined within the Federal Government that, under this new proposal, the national vehicle registry should be operated by a private concessionaire.

**(02) *The National Vehicle Registry Act***

- 4-16 **1997:** In December 1997, President Zedillo's Federal Government introduced a bill to create the National Registry of Motor Vehicles (the "Registry", also known as "Renave" but here distinct from the future Concessionaire). The National Vehicle Registry Act (the "Act") was approved by Mexico's Congress of the Union in April 1998 and published in the Official Bulletin on 2 June 1998. The regulations supplementing the Act were published on 27 April 2000.
- 4-17 *The Act:* The purpose of the Act was to put into place a modern and efficient national system of vehicle registration to safeguard the vehicular property of Mexican citizens, provide security with regard to commercial transactions involving vehicles and prevent illegal vehicle trade in Mexico.
- 4-18 The Act specifically empowered the Secretariat to undertake certain activities for the proper operation of the Registry, including the following:

- To establish the rules to which the reception, storage and transmission of the Registry’s information should be subject and, in general, the operation, functioning and administration of the public service it provides;
- To operate and, as the case may be, to concession and regulate the Registry’s operation;
- To enter into coordination agreements with the state and Federal District governments, in order to facilitate the Registry’s coverage, to try to achieve its proper functioning and effect the exchange of information;
- To collaborate with the National System of Public Security for the fulfillment of its objectives; and
- To verify the compliance with this law, and if applicable, to penalize infractions of the same.<sup>1</sup>

4-19 In regard to the operation of the Registry, the Act provided for the creation of a “Renave Advisory Committee”, to be made up of various government offices and automotive industry associations, for the purpose of advising on issues relative to the integration, organization and operation of the Registry.

4-20 The Act set out in detail the terms and functioning of the Registry itself. Among other requirements, the Registry was to operate as a public service under the responsibility of the Secretariat and was to maintain a database of information on each vehicle to be provided by the authorities, manufacturers, assemblers, dealers, insurers, private parties or any other source.<sup>2</sup> Furthermore, the database was to remain the exclusive property of the Secretariat.

4-21 The Registry was to contain specific information about each vehicle registered in the database, including: (i) the vehicle’s identification number, (ii) the vehicle’s essential characteristics; (iii) the name and domicile of the vehicle’s owner; (iv) notices updating this information; and (v) any other information established in the regulations.<sup>3</sup>

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<sup>1</sup> See *National Vehicle Registry Act*, Article 3.

<sup>2</sup> See *National Vehicle Registry Act*, Article 5.

<sup>3</sup> See *National Vehicle Registry Act*, Article 9.

- 4-22 Information related to theft and recovery of vehicles was to be provided by the National System of Public Security pursuant to Article 8 through co-ordination agreements established for this purpose.
- 4-23 In the Tribunal’s view, it is manifestly self-evident that much of the information to be recorded in the Registry’s database would be confidential and would be so regarded both by vehicle-owners particularly and by the public generally.
- 4-24 The Act also prescribed conditions for concessions operating the Registry, including mandatory terms to be included in an eventual ‘title of concession’ or concession agreement with a concessionaire.
- 4-25 *Article 16:* Article 16 prescribed criteria that prospective concessionaires had to meet in order to qualify to operate the Registry:

*“Article 16. The Secretariat may grant one or more concessions for the provision of the public service of the Register, to those who meet the following requirements:*

- I. Being a corporation with variable capital incorporated under Mexican laws.*
- II. Having a corporate capital without right to withdraw and paid in full, and that cannot be less than that set by the Secretariat, and*
- III. Demonstrate its technical, administrative and financial capacity.*

*Foreign investment may participate up to no more than 49% of the concessionaire’s capital stock. A favourable resolution from the National Commission of Foreign Investment is required for foreign investors to participate in a higher percentage.”*

Accordingly, the concessionaire had to be a Mexican entity; and if there were to be any foreign interest, the foreign investor would have to invest in that Mexican entity.

- 4-26 *Article 17:* Concessions were to be granted for a period up to ten years, after which the concession could be extended “at the Secretariat’s discretion” for an additional maximum period of ten years, “provided that the concessionaire has complied with the conditions foreseen in the concession and requests it not later than three years before its

conclusion”. Accordingly, the maximum term for a concession was to be twenty years; but it could be ten years or less.

4-27 *Articles 21, 22 & 24:* The grounds for termination and revocation of the concession were set forth in Articles 21 and 22, respectively. Amongst the grounds identified in Article 21 for termination was revocation. Article 24 provided for indemnification in cases where termination was due to reasons of public utility or interest.

4-28 *Article 25:* The Secretariat also had the power, pursuant to Article 25 of the Act to “requisition” the Registry on national security grounds. Article 25 provided as follows:

*“Article 25. In case of any imminent peril for the national security, the country’s peace or the national economy, the Secretariat may request the operations centre and other facilities, immovable or movable goods and equipment used for the Registry’s operation. The Secretariat shall be equally entitled to use the staff working for the operating companies whenever it deems it necessary. The requisition shall last as long as the conditions that prompted it subsist.”*

4-29 *Article 26:* Finally, the Act established infringing conduct under the Act and correlative sanctions for those infringements. Amongst conduct proscribed in Article 26 was the concessionaire’s “failure to comply with any of its obligations”. An infringement of Article 26 gave rise to incremental monetary sanctions ranging from a fine of 500 “minimum wages”<sup>4</sup> for minor infractions to 30,000 minimum wages for more serious infractions.

### ***(03) The Concession Tender and Bidding***

4-30 **1999:** In February 1999, the Secretariat published the bidding rules for the concession’s tender. One month later, on 26 March 1999, a committee was created with a mandate of ensuring the compliance of the tendering process with applicable regulations. Outside

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<sup>4</sup> “Minimum wages” are defined in Article 27 of the Act as the daily general minimum wage in force in the Federal District at the time the infringement took place.

consultants were engaged to conduct the tender within the framework established by the Secretariat. This framework was comprised of three elements: (1) design, control and oversight by the Federal Government; (2) private operation of the Registry; and (3) active involvement of State administrations.

4-31 The Secretariat instructed consultants, Casa de Bolsa Bancomer, S.A. de C.V. (“CBB”), GEO Grupo de Economistas y Asociados, S.C. (“GEA”), Tecnofin, S.A. de C.V. (“Tecnofin”) and Creel, Garcia Cuellar y Muggenburg, S.C. (“Creel”) (collectively, the “Consultants”) to prepare an informational overview of the project for entities interested in participating in the concession’s tender. This overview described the Registry’s general purpose as providing an information source that would enable Mexican citizens to know the legal status and ownership of vehicles circulating in the country’s territory from the point of manufacture (or importation) to their final removal from circulation.

4-32 In order to achieve this purpose, the Registry was to have the following characteristics:

Completeness	That includes all the possible sources of creation, destruction and modification of the legal status of vehicles
Binding nature	That assures the maximum coverage and usefulness of the information
National coverage	That attains the necessary centralization of the information to meet national problems That improves the safety of the register by controlling only one database
Public access	That provides information to the agents participating in the automobile markets – including individuals – financial and insurance agents, to promote its better operation
Automated	That shall be designed taking advantage of the available equipment and communication technology, which shall allow to rely on updated information



- 4-33 On 29 March 1999, the Secretariat published an invitation to tender. One of the bidders was a Consortium comprising Talsud, Gemplus, and Mr Henry Davis Signoret. In accordance with Article 16 of the Act, the concessionaire was to be a Mexican legal entity, with its ownership split as to 51% for the Henry Davis Group, as to 29% for Talsud and 20% for Gemplus.
- 4-34 On 3 May 1999, the Consortium presented a formal request for registration as a bidder. There were 91 bidders for the project; and 45 of those bidders, from 24 consortia, were registered as bidders by 21 May 1999. It was clearly a project which was attractive to private investors both within and without Mexico.
- 4-35 On 21 May 1999, the Secretariat issued a prospectus which anticipated the registration of both used vehicles and new vehicles, but which recognized that used vehicles would constitute the vast bulk of the registrations within the new Registry. The registration of new vehicles would be relatively straightforward because it would be made mainly through car dealerships at the point of sale when the car was purchased in Mexico. It was known that the registration of used vehicles raised more complex issues; and it was appreciated that, at least initially, the registration of used vehicles would be less profitable or even loss-making, requiring it to be subsidized by the registration of new vehicles (which would be more profitable). Over time, however, it was expected that the registration of used vehicles would become profitable. It was always envisaged that both used and new vehicles would be registered; and there was no intent or plan to register only used or only new vehicles.
- 4-36 On 30 July 1999, the Consortium and five other bidders were permitted to file their bids with the Secretariat.
- 4-37 On 6 August 1999, the Consortium demonstrated its proposed system; and on 20 August 1999, the Secretariat opened the economic proposals submitted by the remaining bidders.

- 4-38 On 27 August 1999, the Secretariat awarded the Concession to the Consortium; and on 15 September 1999, the Secretariat and the Concessionaire concluded the Concession Agreement (to which the Tribunal returns in more detail below).
- 4-39 The Claimants, at a late stage of these arbitration proceedings, appeared to criticise this bidding procedure, adopting allegations made by others elsewhere that the award of the concession to the Consortium had been influenced by corruption. In the cross-examination of Dr Blanco, Leading Counsel for the Claimants questioned, in particular, whether certain transparency measures taken during the bidding process, such as the video-taping of meetings, were the result of concerns that there might later be allegations of irregularities [D5.993].
- 4-40 This was perhaps a surprising line of attack on the Respondent's case and on Dr Blanco as a witness, given that the Claimants were the successful bidder. In the Tribunal's view, there was nothing of any substance in this forensic exercise; and it can be ignored as completely ill-founded on the evidence adduced in these proceedings.

***(04) The Consortium and Incorporation of the Concessionaire***

- 4-41 The Consortium incorporated a Mexican legal person which was to become the Concessionaire on 6 September 1999, controlled by three groups of shareholders: Mr Henry Davis Signoret, Talsud and Gemplus. Each group was selected to contribute to the Consortium: Gemplus was a leading manufacturer of smart cards worldwide and would supply the vehicle registration cards; Talsud contributed its technical experience as having operated vehicle registries in Central and South America (including Sertracen in El Salvador); and Mr Henry Davis was chosen by the other two investors as a result of his reputation as a successful businessman in Mexico.

4-42 The share capital in the Concessionaire was divided as follows:

<i>Shareholder</i>	<i>% Ownership</i>	<i>Series</i>
Gemplus Industrial	20%	“C”
Talsud, S.A.	29%	“B”
Henry Davis Signoret	51%	“A”

(Mr Henry Davis subsequently transferred his shares to a Mexican company owned and controlled by his family, Aplicaciones Informáticas S.A. de C.V., with the Secretariat’s approval).

4-43 As already recited above, within a week of the Concessionaire’s formation, on 15 September 1999, the Secretariat and the Concessionaire executed their Concession Agreement (the “Concession Agreement” or “Title of Concession”). Neither Mr Henry Davis, nor Talsud nor the Gemplus Claimants were contracting parties to this Concession Agreement.

#### ***(05) The Concession Agreement***

4-44 The Concession Agreement set out twenty-one conditions applicable to the public service of the Registry, including the applicable legal framework (fourth condition), services to be provided (sixth condition), the level of service required (seventh condition), security (ninth condition), the Concessionaire’s rights and obligations (tenth condition) and the conditions for “termination, revocation and requisition” (seventeenth condition). Among other documents, a copy of the Consortium’s Technical Bid and its Economic Bid, along with a copy of its Business Plan, were annexed to the Concession Agreement. The Concession Agreement envisaged the registration of both used and new vehicles, like the Act; and it was never envisaged that the project would be limited to new vehicles.

4-45 *Sixth Condition:* As already indicated, the sixth condition of the Concession Agreement prescribed the services that were to be provided by the Concessionaire, including the following:

- I. Registration - Which shall consist in the incorporation of Vehicles to the Registry's control through the issuance of the Proof of Registration.*
- II. Notices of Change of Status - Which shall consist in the updating of the Information on the vehicle and the Owner's Personal Data.*
- III. Constitution and removal of Lien - Which shall consist in the registration and elimination of registration of any lien on the Vehicle.*
- IV. First Hand Sale - The Registration Service granted to Distributors.*
- V. Consultation - Which shall permit Users to consult certain information on a specific Vehicle identified by its Registration number.*
- VI. Physical Revision - Which shall enable Users or Owners to request the Concessionaire to verify Vehicle characteristics, and for the latter to issue a report on the Vehicle's status at the time of the inspection.*
- VII. Exceptional Services - The following shall be considered as Exceptional Services:*
  - a. The replacement of the Proof of Registration and, if appropriate, of the Confidential Code;*
  - b. The reactivation of a previous procedure;*
  - c. The correction of mistakes;*
  - d. The reactivation of an acknowledgement of receipt or a number of Proof of Registration that has been reported;*
  - e. The authorization of procedures based on a final judicial ruling; and*
  - f. Any other specifically contemplated by the Operation Manual.*

VIII. *Services for Registered Users - The following:-*

- a. *User's Registration - Which shall consist in the creation of a directory of Registered Users, and their permission to access the Database;*
- b. *Changes in the registration parameters - Which shall consist of the procedure to modify the data or conditions under which the Registered User was registered in the Registry;*
- c. *Report - The Concessionaire shall send a monthly account statement to the Registered Users with information on the transactions carried out before the Registry, the charges generated as a consequence thereof, and the current balance of the account;*
- d. *Receipt of payments - The Concessionaire shall put in place processes and procedures to receive periodic payments of the prices from the Registered Users; and*
- e. *Administration of the Authentication Codes.*

*[...].”*

4-46 *Tenth Condition:* The Concessionaire's rights and obligations under the Concession Agreement were set out in the tenth condition, which provided as follows:

*“The Concessionaire shall have the following rights:*

1. *To charge the price, which will be published in the Official Gazette of the Federation for the provision of the Services;*
2. *To request the Secretariat to revise the prices charged for the Services pursuant to the terms and conditions established by the General Guidelines and the Operation Manual.*
3. *In case the Registry's start-up is postponed or its structure is changed due to a decision taken by the Secretariat, the Concessionaire will be able to submit to the Secretariat's consideration an adjustment to the program of commitments established in the Operation Manual; the Secretariat shall have absolute discretion to make said adjustments, and shall respond within 30 calendar days at the latest following receipt of the Concessionaire's application;*

4. *To exploit the information of the Registry's Database in accordance with the Contract of Construction by Commission and the License Agreement entered into on this same date by the Secretariat and the Concessionaire;*
5. *In the event that the Registry's start-up is postponed, its structure is changed, or the terms and conditions under which the winner of the bid submitted its Technical and Economic Bid are directly or indirectly altered, for reasons not attributable to the Concessionaire, it may submit for the Secretariat's consideration the modification of its obligations established in this Title of Concession, or in any other provision issued by the competent authority. The Secretariat shall evaluate and, if appropriate, proceed to make the proposed modifications, seeking at all times to maintain the same correlation between the Concessionaire's rights and obligations existing at the time this Title of Concession is granted.*
6. *To participate with the Secretariat in the definition of the terms of the Coordination Agreements that it enters into with several entities of the Federal and State Public Administration, as well as of the International Treaties and inter-institutional Agreements with regard to the information exchange with other countries.*

*The Concessionaire shall have the following obligations:*

1. *To provide the Services in accordance with the applicable legal framework;*
2. *To notify immediately the Secretariat of any suspension in the provision of any of the Services;*
3. *To have, directly or indirectly, at least the required minimum infrastructure;*
4. *To grant and update the guarantees securing the fulfillment of all its obligations under the applicable legal framework.*
5. *Not to assign, encumber, transfer or in any way dispose of the concession or rights derived therefrom, except with the Secretariat's prior and written authorization;*
6. *To guarantee the security of the information contained in the Registry, in accordance with the terms and conditions established by the applicable legal frame;*

7. *To comply with the provisions of the Coordination Agreements to be entered into with several entities of the Federal and State Public Administrations; as well as of the agreements with respect to the exchange of information with entities of other countries.*
8. *To comply with the service quality levels established in this Title of Concession, the Operation Manual, and the General Guidelines;*
9. *To comply with the promotional and coordination of other sources of information requirements contemplated in the Operation Manual and the General Guidelines;*
10. *To make timeously the payment established in this Title of Concession;*
11. *To allow the Secretariat access to its facilities to oversee and verify compliance with the applicable legal framework, as well as to provide the necessary conditions that will allow it to verify and perform informatics, operations and results audits by the authorities, as well as the special ones that might be necessary;*
12. *To submit to the Secretariat's approval the modifications to its articles of incorporation and by-laws; including, without limitation, any change to its capital structure;*
13. *To obey final judicial rulings in accordance with the procedure described in the Operation Manual;*
14. *To comply with the Calendar of activities hereto attached as Exhibit "13"; and*
15. *Others that are established in the applicable legal framework."*

4-47 *Seventeenth Condition:* As indicated above, the seventeenth condition of the Concession Agreement set out the circumstances under which the Concession could be terminated or revoked by the Secretariat:

*"The Concession shall terminate, be revoked by the Secretariat or be subject to requisition by it, pursuant to the terms and conditions established in the Law.*

*If, for any reason or event of a political or social nature at the federal level, the Registry's operations start-up is prevented, the Secretariat, at the Concessionaire's request, shall take the necessary steps before the Secretariat of the Treasury and Public Credit for the prompt refund of the payment made by the Concessionaire, providing that the term does not exceed sixty (60) calendar days following the acknowledgement of said event or cause by the Secretariat with the understanding, however, that there will be no reimbursement of the expenses incurred by the Secretariat by reason of the grant of the concession the subject-matter thereof.*

*In case the Registry cannot operate at the level of certain states or municipalities for reasons not attributable to the Concessionaire, the latter shall be freed from its responsibilities in connection with said state or municipality, and therefore, from paying any conventional penalty to the Secretariat."*

- 4-48 *Nineteenth Condition:* The Nineteenth Condition, mirroring Article 17 of the Act (see above) prescribed the period of the Concession:

*"Pursuant to the provisions of Article 17 of the Act this Concession shall be in force for a term of ten (10) years, to be counted as of the date of signature of the document. The Concession may be prorogated at the Secretariat's discretion, up to for a term equal to the one originally established, provided that the Concessionaire has complied with the conditions foreseen in the Concession and requests it not later than three (3) years before its conclusion."*

The "date of signature" was 15 September 1999; and accordingly the Concession was to expire on 14 September 2009 or, if all the specified conditions were met as to compliance, notice and the exercise of the Secretariat's discretion, up to 14 September 2019.

- 4-49 *Twenty-First Condition:* The Concession Agreement contained an express jurisdiction agreement, as follows:

*"Any dispute which arises in connection with the interpretation, execution, or compliance with the provisions of the same, shall be submitted to the competent federal courts located in Mexico, Federal District."*



**(06) The Operation of the Registry**

- 4-50 **1999:** On 18 November 1999, the Secretariat appointed Analítica Consultores Asociados S.C. (“Analítica”), a Mexican consultancy, to supervise the Registry’s pre-operative stage and to advise the Secretariat whether and to what extent the Concessionaire was complying with its obligations under the Concession Agreement. (It was removed from this role by the Secretariat in early 2001).
- 4-51 **2000:** The pilot phase for the operation of the Registry began on 15 February 2000 with the registration of new and used vehicles in the states of Hidalgo and San Luis Potosí. 71 document processing centers (“CTDs”) were created in Hidalgo and 82 CTDs were created in San Luis Potosí. Over the period from 15 February 2000 to 31 May 2000, about 40,000 registration applications were submitted, approximately 6,000 of which related to new vehicles and about 34,000 relating to used vehicles.
- 4-52 On 28 April 2000, the Secretariat published in the Official Bulletin the schedule of obligations arising under the Act, in respect both of the pilot phase in the states of Hidalgo and San Luis Potosí and of the national phase for new vehicles. It was indicated that a schedule of obligations for the registration of all used vehicles in the national phase would follow within two months (i.e. June 2000).
- 4-53 On 8 June 2000, as indicated, the Secretariat published in its Official Bulletin the schedule for owners of all used vehicles to register their vehicles with the Concessionaire. The schedule imposed a deadline of 15 December 2000. This schedule further established other dates for various transactions, including the filing of notice of change in regard to a vehicle, i.e. change of vehicle information, plates, retirement, etc.
- 4-54 On 30 June 2000, an “Agreement” concerning the ceiling prices that could be charged for all notices and services provided to users of the Registry was published in the Official Bulletin, establishing the following maximum fees (amongst others):

<i>Service</i>	<i>Maximum fee (MXN \$P)</i>
Registration of First Hand Sales	\$375
Registration of Second Hand Sales	\$100
Inquiries/Confirmation of Vehicular Information	\$25

4-55 Although 100% of the fee charged for the registration of new vehicles was remitted to the Concessionaire, the Concessionaire retained only 25 pesos of the maximum 100 pesos for the registration of used vehicles in order to permit competition among CTDs on the basis of commission, which could range from no commission to 75 pesos.

***(07) Registration of New Vehicles***

4-56 The registration of new vehicles nation-wide began on 2 May 2000.

4-57 The “White Book”, published later by the Secretariat on 25 October 2000 in accordance with the National Development Plan, reported that as of that date “the infrastructure hired by Concesionaria RENAVE, S.A. de C.V. to operate the service exceeds the requirements to process the number of new vehicle transactions and to serve the vehicles that have been already registered.” According to this same source, over 250,000 new vehicles had by then been registered by the Concessionaire.

4-58 At this point, in regard to new vehicles, there was no material criticism of the Concessionaire’s conduct by reference to its obligations under the Concession Agreement, still less any criticism of the Consortium, neither by the Secretariat or its technical adviser, Analítica.

**(08) *The Registration of Used Vehicles***

- 4-59 The registration of used vehicles began nation-wide on 15 June 2000.
- 4-60 As explained in more detail below, the registration of used vehicles proved to be highly unpopular for several reasons. As a result, the number of registrations of used vehicles dropped precipitously after 21 August 2000 (following the Secretariat's suspension of the legal obligation to register used vehicles by 15 December 2000) and still further after 24 August 2000 (following news reports concerning the alleged criminal past of the Concessionaire's General Director, Mr Cavallo and his arrest in Mexico). Accordingly, in contrast with the number of new vehicles registered by October 2000 (not being equally susceptible to public opinion), less than 200,000 used vehicles had been registered by that same date.
- 4-61 In addition, there was a change of political administration at the level of the Presidency and the Federal Government. On 2 July 2000, Mr Vicente Fox Quesada (PAN) was elected to be the new President of Mexico; and under these same national elections the PRI lost power at the level of the Federal Government. The new political administration assumed power on 1 December 2000. It was perhaps inevitable that there would be at least a change of emphasis in regard to the Registry under the new PAN Federal Government (given the Registry's statutory PRI origin); and, moreover, PRI state politicians who previously had to support the PRI's initiative could now oppose it, particularly within the Federal District. (It was always and remained essential for the Secretariat to secure co-ordination agreements for the Registry with all states and other relevant state entities: see the Concession Agreement's Seventeenth Condition, cited at Paragraph 4-47 above).

**(09) The Management of the Concessionaire**

4-62 Before these events, by the beginning of July 2000, Mr Henry Davis Signoret (as chairman of the Concessionaire's Board of Directors) expressed reservations over the Concessionaire's performance of the Concession at meetings of its Board. The minutes of the Board meeting on 2 July 2000 reflect the following financial and technical concerns during this period:

*"FIRST ITEM: In relation to the first item of the Agenda, the Chairman informed those present that to this date, the Company has been financing itself solely on the basis of cash flow, and as a consequence, the Company has stopped paying some of its suppliers because the actual cash flow is not sufficient given the level of the Company's costs.*

*Consequently, the Chairman stated that it was necessary to increase the capital of the Company and proposed the Board of Directors to present to the shareholders of the Company a request to increase the capital of the Company in the amount of P\$10,000,000 (Ten Million Pesos National Currency). After an extensive discussion of this matter, the Chairman requested those present to take a resolution in this respect.*

**RESOLUTIONS**

*1. It was approved by unanimous decision of those present that the shareholders be presented with a request to increase the capital to the Company in the amount of P\$10,000,000 (Ten Million Pesos National Currency).*

*2. It was approved that if necessary, once the contribution of capital referred to above had been made, Banco Invex, S.A. will be requested to provide an additional amount of P\$10,000,000 (Ten Million Pesos National Currency) under the line of credit contracted with said financial institution.*

*SECOND ITEM: In relation to the second item on the Agenda, the Chairman informed those present that to date, the Board had not received information pertinent to the technical processes and the structure of the systems of the Company having doubts over its functioning, and consequently, he proposed that a technical audit be conducted by a company with recognized prestige, which shall review and evaluate the technical processes, the structure of the systems database, and any questions in relation to informatics, systems, administration and the technical areas of the Company.*

[...]

RESOLUTION

- '1. The conduct of a technical audit of the Company is approved.*
- 2. The company that will conduct said audit will be designated in the next few days by Mr Henry Davis Signoret, Chairman of the Board of Directors.'*

4-63 By the end of July 2000, the Chairman's criticisms had led to personal differences with Mr Taíariol of Talsud in respect of the management of the Concessionaire. Mr Taíariol was persuaded to resign as a director; and a resolution was passed at the Board meeting held on 25 July 2000 to accept Mr Taíariol's resignation as Commercial Director in these terms:

*"SIXTH ITEM: In discussion of the Sixth Item of the Agenda, the Chairman [Mr Henry Davis Signoret] commented to those present that the presence of Mr Victor Taíariol as Commercial Director of the Company was not entirely favourable for either the internal or external image of the Company, and it made the accountability and the evaluation of his performance more difficult, since Mr Taíariol is also a Principal Member of the Board of Directors. To this, Mr Taíariol tendered his resignation as Commercial Director of the Company. The Chairman requested those present to evaluate Messrs. Domenico Suave or Slim Masmoudi as possible candidates to hold the position of Commercial Director of the Company. The Chairman asked those present if they wish to make a decision in that respect, and after ample discussion, the following was unanimously agreed:*

RESOLUTION

- '1. The resignation of Mr Victor Taíariol from the position of Commercial Director of the Company is accepted with effect as of today, thanking him for his efforts during the time that he held this position.'* [...]"

4-64 Two weeks later, at the Board meeting on 8 August 2000, Mr Bilbao presented several matters of concern with regard to the Concessionaire's finances and operations, recorded in the minutes of this meeting as follows:

- "2. Mr Guillermo Bilbao made a presentation on the financial, administrative and human resources situation of the Company. The most relevant points were the following:*

- *There is an important delay in the preparation of the Financial Statements and consequently it is not possible to reconcile, completely, the income of the Company vs. the operations.*
- *There are some claims for delays in payments to the CTDs [Document Processing Centers]. It was agreed to develop an easy process to notify the CTDs of the receipt of the corresponding invoices so that both parties are aware of the date in which the 15 day period to effect payment begins to run.*
- *The total revenues of the Company to date are 67.4 Million Pesos.*
- *It is necessary to identify which operations correspond to used automobiles and which correspond to new autos because that affects the “floating” of the Company.*
- *As regards to the loan with INVEX, it was proposed to GE Capital Bank to establish bridging accounts with the banks to concentrate the revenue. In that respect, Banorte and Banamex have not responded although the other banks have.*
- *The works for the security systems for the offices of the Company are hoped to be finished in about 3 weeks.*

[...]

4-65 One week later, on 15 August 2000, another Board meeting was held in which public opposition to the Concessionaire was discussed, including the filing of “amparos” or constitutional court challenges to the Act and the Secretariat by Mexican citizens. The minutes of the meeting include the following passages:

*I. Situation of the Line of Credit issued by Banco Invex, S.A. (“INVEX”) to the Company.*

*The Chairman [Mr Davis] reported to those present on INVEX’s concerns regarding the political situation which confronts the Company at the present moment and consequently, its financial situation to face its payment obligations in relation to the Line of Credit granted by INVEX.*

*II. Guarantees granted by the shareholders of the Company under contracts with suppliers entered into by the Company.*

*The Chairman indicated that to date, there are inconsistencies in the guarantees and/or guarantors granted by the shareholders of the Company (the “Shareholders”) in favour of the same Company. In this respect, the Chairman requested the General Director [Mr Ricardo Cavallo] to prepare a list of the pending payment obligations for the Company pointing out which are guaranteed by the Shareholders and in what proportions, with the objective of evaluating the situation in detail and reorganizing the issuance of the guarantees and/or guarantors by the Shareholders in order for the three Shareholders to guarantee the total amount of said obligations in the same proportions as their participation in the shareholding capital of the Company.*

*At the same time, the Chairman stated that once the study of the pending payment obligations of the Company has been completed, they should contemplate the possibility of requesting the Shareholders to increase the capital stock of the Company in order to be able to face said obligations.*

*[...]*

*VI. Legal situation of the Company in relation to the Concession for the Operation of the Public Service of Operating the National Vehicle Registry and the Contract signed with SECOFI: position of the Company and defense of the Amparos brought against the Act and SECOFI.*

*8 Amparos have been brought, of which only in four cases does the Company appear as an affected third party. A firm of lawyers has been retained to oversee the cases against the Company, SECOFI and the law [the Act].*

*[...]*

*VIII. Plans and measure for modifying the political opposition to the project.*

- The General Director [Mr Cavallo] will be requested to request the Public Relations area to make a presentation to the Board.*
- Each Director of each area shall make a presentation of 10 minutes to the Board in each Session, starting with the next Meeting of the Board. The General Director was requested to inform the directors in this respect.*
- The General Director and Mr Bertrand Moussel will coordinate to inform the Board on the possibility of using a simpler smart card.*

- *A meeting was held with Advantage on the past 14 August 2000, at which it was agreed that Advantage would begin production to reach 5MM overlays by the end of the year. However, it was warned that it would be informed of the project's status by 15 September 2000 as to the situation of the project and the decision to continue or not with the production of the overlays."*

4-66 This was nonetheless the relative calm before the storm unleashed within the next few days, with allegations of grave criminality against Mr Cavallo and his arrest at Cancun on 24 August 2000 amidst a blaze of publicity adverse to the Concession and the Concessionaire (The Tribunal returns to these events in detail below).

4-67 Following Mr Cavallo's detention in prison in Mexico City, Mr Bilbao was appointed General Director of the Concessionaire (back-dated to 23 August 2000). This appointment was notified by letter to the Secretariat on 24 August 2000 and ratified at the next Board meeting, held on 20 September 2000.

4-68 The minutes of that Board meeting summarise the adverse events then affecting the Concessionaire, as of 20 September 2000:

*"III. Legal Actions*

*It was agreed by the Board that, with the opinion and assistance of the Legal Direction of the Company and the external lawyers, the possibility of bringing legal actions against SECOFI and/or before the competent tribunals will be evaluated in order to protect the interests of the Company and the patrimony of its shareholders.*

*[...]*

*VII. Obligations under the Title Concession [the Concession Agreement]:*

- *It was evident that in accordance with the decrees published in the Official Gazette of the Federation on 29 August 2000 and 13 September 2000, SECOFI ordered a technical intervention and subsequently an administrative intervention into the company.*



- *Those present recognized that as long as the Concession is not revoked in strict compliance with the applicable legal provisions, the Company, inasmuch as is possible and insofar as the intervention allows, will continue to comply with its obligations under the Title of Concession.”*

(The Tribunal describes these Technical and Administrative Interventions below).

4-69 Following his appointment as General Director, Mr Bilbao engaged the accountants, Deloitte & Touche, to conduct an audit of the performance of the Concessionaire’s “General Directorate” up to 25 August 2000. The results of this audit were discussed at the Board meeting held on 11 December 2000. The minutes of this meeting record the following discussion:

*“Based on the audit ordered by the Board as requested by the General Director appointed after 25 August 2000 [Mr Bilbao], which was conducted by the accounting firm of Deloitte Touche, which was discussed in this meeting, it was determined that in said administration there were important deficiencies in the execution and control of different aspects that affected the adequate and efficient operation of the company. In particular the lack of order and administrative controls and certain irregularities in the exercise of the powers of certain officers with responsibility for the management of the company were underscored. It was pointed out that the General Director [Mr Carvallo] did not timely and adequately present the information regarding the Company’s business, the financial situation of the same, nor the problems and deficiencies derived from the contracts with the principal suppliers of goods and services to the Company. It was also mentioned that, under that administration, the administrative, accounting and information systems, necessary for the adequate functioning of the Company, were not implemented, and that the General Director omitted to inform the Board of the problems that were faced in their implementation.”*

4-70 The Board therefore resolved at this meeting that the “activities of the Company shall be focused on correcting the problems faced by the operation of the same in order for it to have a working registry that will allow the provision of an adequate service to the consumers.”

4-71 In the Tribunal’s view, these internal problems within the Concessionaire’s management were not trivial; but equally, they were not seriously imperilling the Concessionaire as a future long-term business concern, as at 24 August 2000.

**(10) *Political Opposition to the Concessionaire and the Concession***

- 4-72 By mid-August 2000, as already noted, the Concessionaire faced growing political difficulties within Mexico. In particular, the public objections to the Concession made it difficult for the Federal Government to secure the necessary “co-ordination agreements” with other entities, which would allow the Concessionaire access to vehicular information collected and maintained by state and federal agencies.
- 4-73 Complaints concerning the cost of registering used vehicles and, in particular, confusion caused by the discrepancy in the commissions charged by CTDs for this service, also fuelled public criticism of the Registry. The Government of the Federal District of Mexico voiced strong opposition to the Registry and in particular its operation by a private concessionaire.
- 4-74 It is necessary to examine these several related difficulties in turn.

**(11) *The Negotiation of Co-ordination Agreements***

- 4-75 During the period running up to and following the national elections on 2 July 2000, the negotiation of co-ordination agreements with state and federal entities became increasingly difficult. In addition, technical difficulties arose because (for example) the Secretary of Security had been unable to provide relevant data relating to certain stolen vehicles to the Registry.
- 4-76 Article 3 of the Act had provided the Secretariat with the power to “enter into co-ordination agreements with the state and Federal District governments, in order to

facilitate the Registry's coverage, try to achieve its proper functioning and effect the exchange of information".

- 4-77 The Secretariat's initial strategy had been to negotiate and enter into agreements concurrently with the start-up of the Registry's operations. The Secretariat's Under-Secretary (Dr Ramos Tercero) and the Concessionaire's General Director (Mr Cavallo) with others involved in the project had travelled extensively throughout Mexico in an effort to meet with State officials and to negotiate and conclude co-ordination agreements.
- 4-78 Six coordination agreements were signed with the states of Baja California, Baja California Sur, Colima, México, Nuevo Leon and Sonora between April and August 2000. By mid-August 2000, meetings had taken place with officials from 14 other States with varying degrees of progress. The exercise remained far from complete.

### ***(12) The 2 July 2000 Federal Elections***

- 4-79 In June and early July 2000, political opposition to the Concessionaire and the Secretariat began to grow, particularly during the final weeks of the national elections. The candidate for the PRI party (the party of the incumbent President) was challenged by Mr Fox Quesada of the PAN. On 2 July 2000, Mr Fox was elected as the next President, breaking seventy or more years of PRI incumbency at the level of the Federal Government.
- 4-80 On 1 December 2000, the new PAN administration took office as the new Federal Government. President Fox appointed Mr Luis Ernesto Derbez Bautista as Secretary of the Economy (formerly SECOFI), thereby replacing Dr Herminio Blanco. These political changes were to have significant effects for the Concessionaire.

**(13) Public Perceptions of the Cost of Registering a Vehicle**

- 4-81 The cost of registering new and used vehicles had also become increasingly controversial during the summer of 2000.
- 4-82 As already described, the original fee schedule for the registration of used vehicles was designed to permit competition between CTDs in regard to commissions charged for registering used vehicles. The fees for used vehicles were, however, considered confusing by vehicle-owners; and the project became highly unpopular and perceived as a new tax on existing car-ownership, notwithstanding the large-scale publicity campaign the Concessionaire had undertaken to explain the purpose of registration and the basis for the fees charged.
- 4-83 **14.07.2000:** On 14 July 2000, Mr Henry Davis Signoret (as the Concessionaire's Chairman) wrote to Dr Ramos (at the Secretariat) concerning public protests over the cost of registering vehicles. In his letter, Mr Davis proposed that the maximum price that should be charged by CTDs be defined and published by the Secretariat to quell public confusion, as follows:

*“Pursuant to our discussion during our last meeting and pursuant to Condition Fifth of the Title of Concession of the public service of operating the National Vehicle Registry, I submit to the Secretariat’s consideration the advisability of defining the maximum price that the Document Processing Centers [CTDs] will be able to charge for the procedures contemplated in the Agreement published in the Official Gazette on 20 June 2000.*

*The foregoing, in view of the unfavourable comments caused by said fees and protests by the users and the media who believe that a charge in excess of 300% of the maximum fee charged by the Operator of the Registry is unjustified.*

*In addition and notwithstanding the publicity campaign that has been effected, there is a lot of confusion at a national level among the users of the National Vehicle Registry due to the diversity in said commissions.*

*It should be noted that this measure may generate dissatisfaction among the Document Processing Centers, and hence, a reduction in the coverage, as well as claims for compensation by users who have already paid the current fee.”*

- 4-84 **20.08.2000:** On 20 August 2000, a press article published in the national newspaper *Reforma* reported President-elect Fox as saying during a radio interview that although the National Vehicle Registry was an efficient mechanism to fight auto theft and organized crime, it was debatable “who should pay for it”. Whether so intended or not at the time, this qualified support was understood as questioning whether it was appropriate to place the Registry in the hands of a private concessionaire working for profit and not a national state agency.
- 4-85 **21.08.2000:** On 21 August 2000, the Secretariat announced a reduction in the maximum cost of registering used vehicles from 100 to 50 pesos. Owners of used vehicles who had already paid the registration charge were eligible for reimbursement at the CTD where the vehicle had been registered, up to 50% of the amount paid. The cost of registering new vehicles remained fixed at 375 pesos. (In addition, as already noted, the Secretariat postponed the deadline for registering used cars from 15 December 2000 to 1 July 2001, to which we return separately below).
- 4-86 The reduction in the registration fee for used vehicles meant, however, that CTDs could only charge a maximum commission of 25 pesos for the service, instead of 75 pesos. This led to a diminished number of CTDs available for the processing of used vehicle registrations. This in turn led to a reduction in the registration of used vehicles (caused also by the postponed deadline).
- 4-87 The Claimants complain in these proceedings that the Secretariat made its decisions “unilaterally” and caught the Concessionaire “completely unaware” [D1.44]. The Tribunal rejects this complaint. It is clear from Mr Davis’ letter that something had to be done and done quickly to calm growing public concerns; that the Concessionaire wanted something done, particularly as regards fees for registering used cars; that the Concessionaire was in communication with the Secretariat to have something done; and that all this could only be done by the Secretariat as the responsible agency of the

Federal Government, not the Concessionaire itself. (The Tribunal returns to other criticisms below).

**(14) *Specific Opposition within the Federal District***

4-88 The Government of the Federal District of Mexico, under the leadership of Mayor Rosario Robles was one of the most vocal public opponents of the Concession.

4-89 **24.08.2000:** On 24 August 2000, Mayor Robles wrote to Secretary Blanco (at the Secretariat) regarding the impact of news reports released on that day alleging the association of Mr Cavallo, the Concessionaire's General Director, with a criminal past:

*"The information published by the media in respect of Mr Ricardo Miguel Cavallo, Director of the National Vehicle Registry, has increased the concerns and preoccupations that I previously conveyed to you with respect to the legal uncertainty that can be generated for the citizens by leaving the operation of the Registry in the hands of a private party.*

*As you already know, the Permanent Commission of Congress approved on the 29<sup>th</sup> [July], an agreement by which it proposed to revise the law to eliminate the fee for registration at the National Vehicle Registry and eliminate the possibility of tendering it to private parties.*

*For that reason, I respectfully request that all the necessary measures are taken to suspend application of the Registry in the Federal District and to reimburse the citizens that have already registered, the total amount paid for this concept as a provisional measure, while we await a decision by Congress."*

On the materials adduced in these proceedings, it can be reasonably assumed that the media in Mexico City had received information on Mr Cavallo from sources close to Mayor Robles: the timing of her letter and the media reports was therefore no coincidence.

4-90 Moreover, in an interview on the Cavallo incident recorded in May 2005, Mr Ricardo Pascoe (a former member of Mayor Robles' cabinet) indicated that the Government of

the Federal District was aware of the allegations against Mr Cavallo prior to their publication in *Reforma*, but that it elected not to raise the issue with the Secretariat in order that it should be communicated to the public by the Mexican press:

*“Well, my contact with the Cavallo case came about through a long-time friend, who gave me his observation about Cavallo and sent me information about the background of this individual, who to us, at the time, was totally unknown because he appeared on the Mexican scene as a concessionaire who won a call for him to manage a National System for Vehicle Registration.*

*This, even though it is not the main topic, is for us Mexicans an important one because, at that time, a serious discussion between the Government of the National [Federal] District and the Federal Government precisely about the establishment of the vehicle registration system was occurring. And precisely what drew attention to its connection with Cavallo, it has to be said, is that, Cavallo, being Argentine and apparently owner of a concessionaire company, it had been brought to our attention that he had a criminal background and also a background in political repression in Argentina.*

*Immediately, this appeared very important to us. We received lots of information about the case, such as Cavallo’s aliases and origin in terms of military hierarchy. Additionally we learned about the businesses that he had set up in the Republic of Argentina from his participation in the repression. This, in Mexico immediately drew attention, well it drew my attention.*

*I was in Mexico, the holder of this information and I immediately discussed it with my boss at that time, [Mayor] Rosario Robles. We also discussed it once during a cabinet meeting; I submitted the information and introduced the topic. And for us, this had a double path: on the one hand, we are talking about someone who apparently had participated in the repression in Argentina, but on the other hand, we are also talking about a person representing a project with which we were not in agreement in Mexico, in terms of vehicle registration.*

*So, then, it was discussed and analyzed and I made the information available to the head of government [of the Federal District], and well, after a time of evaluating the information, we decided that we had to handle the information not through the government, but through a communication medium.”*

This is politics, in Mexico as elsewhere. It was a political attack by the Mayor of the Federal District on the Federal Government and on the Secretariat in particular. It was

hardly attractive as a form of good public administration. Yet by itself, the conduct of the Federal District's Government was not a breach by Mexico of international law or of the two BITs here at issue. (The Tribunal considers its broader implications below).

**(15) *Postponement for Used Vehicles***

4-91 **21.08.2000:** On 21 August 2000, as already noted, the Secretariat announced the postponement of the deadline for the registration of used vehicles from 15 December 2000 to 1 July 2001.

4-92 The postponement was intended by the Secretariat to allow the Secretariat additional time to conclude co-ordination agreements with the States and the Federal District, to simplify the registration procedure in order to take advantage of existing local infrastructure and the States' collection of motor taxes and, more essentially, to take some of the political heat out the situation caused by the deadline of 15 December 2000, then only four months away. This was at the time a reasonable intention, reached in good faith by the Secretariat.

**(16) *The Cavallo Incident***

4-93 It is here necessary to relate at some length the relevant details of the so-called Cavallo incident, including the criminal allegations against him, his arrest, his detention and his eventual extraditions from Mexico to Spain and from Spain to Argentina. The Tribunal re-states what is set out at the beginning of this Award: Mr Cavallo was not a named party to these proceedings; he was not legally represented before this Tribunal; he was not a witness in these proceedings; and this Tribunal has no jurisdiction to adjudicate



upon any of the criminal allegations made against him. For all of these reasons, the Tribunal does not here address the merits of any of the several criminal allegations made against him. Moreover, whilst no-one is above the law; no-one is beneath it; and in Mr Cavallo's case (where he has still not been brought to trial and his defence rests on mistaken identity), it is obvious that the legal presumption of innocence remains for him of paramount importance, as it does for this Tribunal.

**(17) Mr Cavallo's Arrest, Detention and Extraditions**

4-94 **24.08.2000:** On 24 August 2000, *Reforma*, a national Mexican newspaper, published an article on its front page entitled "Director of Renave accused of being a criminal." Mr Cavallo, as the General Director, was responsible for the Concessionaire's day-to-day operations; and he was, moreover, the public face of the Registry throughout Mexico.

4-95 The article alleged Mr Cavallo's involvement in the international crimes of genocide, terrorism, torture and murder as a military officer, as well as a personal pecuniary involvement in document forgeries, auto thefts and property thefts, committed by the Argentinean military dictatorship during the so-called "Dirty War" of 1976-1983.

4-96 The article read, in part, as follows:

*"Ricardo Miguel Cavallo, director of the National Vehicle Registry in Mexico, was identified yesterday [sic] in a photograph by five Argentinean former political prisoners as the person who tortured them in the Mechanics School of the Argentinean Navy (ESMA), during the military dictatorship between 1976 and 1983.*

*The evidence also points to businessman Ricardo Miguel Cavallo as the alleged former military man and Argentinean torturer then known as Miguel Angel Cavallo now accused in Spain of auto theft, document forgery, terrorism, and torture by Judge Baltazar Garzón.*

*Paradoxically, Cavallo is a director at Talsud, which together with the companies Aplicaciones Informáticas, S.A. [Mr Davis' company] and Gemplus Industrial, S.A. incorporated Renave [the Concessionaire], which was created by Mexican authorities to try to thwart auto theft and document forgery.*

*Although the accused denies being the person accused, an investigation by Grupo Reforma based on the testimony of former Argentinean political prisoners, an identity study performed by an expert and confidential information belie his statement ...”*

- 4-97 Later on the same day, Mr Cavallo was detained by the Attorney General’s Office at Cancun airport while attempting to leave Mexico for Argentina on a commercial flight, on a holding charge related to a possible immigration offence. He was returned that same day under guard to Mexico City, where he was held in custody.
- 4-98 **25.08.00:** On 25 August 2000, the Spanish judicial authorities, who had been investigating crimes committed against Spanish nationals in Argentina, ordered the *Juzgado Central de Instrucción Número Cinco* to request the provisional arrest for extradition purposes of “Miguel Angel Cavallo” for alleged involvement in the crimes of genocide, terrorism and torture committed during the Argentinean dictatorship.
- 4-99 That same day, the Attorney General’s Office in Mexico City received the request for provisional arrest and extradition of “Miguel Angel Cavallo” from the Spanish Government. The request was submitted to the Seventh District Court for Criminal Matters in the Federal District of Mexico, which issued a provisional arrest warrant for Mr Cavallo. Mr Cavallo was then placed in the formal custody of Interpol and held in prison in Mexico City, awaiting extradition proceedings to Spain.
- 4-100 It will be noted that Mr Cavallo was detained in Cancun before the extradition request was received by the Mexican authorities. It appears that an investigation by Interpol had begun in Mexico before the article on Mr Cavallo’s past was published in *Reforma*, in which both Spain and France were possibly involved. The evidence adduced in these proceedings leaves it unclear precisely when, why or by whom such investigations were instigated. The Respondent’s Counsel stated at the main hearing: “It is our understanding that there were former Argentine nationals who had moved to Mexico as

a result of the Dirty War and that people saw Mr Cavallo through the media and identified him as the alleged torturer ...” [D1.187]. However, it appears to the Tribunal that no conclusive evidence of Mr Cavallo’s identity as “Miguel Angel Cavallo” had been secured by the relevant Mexican authorities before the publication of the *Reforma* article on 24 August 2000; and the article itself refers to identification by torture victims only on the previous day (23 August 2000). There was evidently a difference in name.

4-101 It is unnecessary to recite here the details of the criminal allegations against Mr Cavallo. They are very grave; and they relate, in the words of the Claimants’ Counsel, to “the most serious international crimes in Argentina from the 1970s onwards” [D1.46]. It suffices here to indicate that these allegations were not limited to widespread torture and cold-blooded murder but included the forced dispossession of prisoners’ property and systematic forgeries made to facilitate thefts of property, including vehicles. Whilst the former constituted despicable international crimes, the latter appeared at the time to strike directly at the secure workings of the Registry, particularly its confidential database of vehicle registration numbers and vehicle owners’ names, addresses and other personal details. In Mexico, it was considered that such confidential details in the possession of organized criminals could greatly facilitate not only car-theft but also kidnapping, extortion and murder.

4-102 **11.01.2001:** On 11 January 2001, a Mexican district judge authorized Mr Cavallo’s extradition from Mexico to Spain.

4-103 **28.06.2003:** Following several unsuccessful appeals against his detention and order for extradition before the Mexican courts, Mr Cavallo was extradited to Spain on 28 June 2003 to face prosecution for crimes of genocide and terrorism. He was then held in a Spanish prison awaiting trial. It never took place. By diplomatic note of 5 June 2007, Spain sought Mexico’s consent to the extradition of Mr Cavallo to Argentina from Spain. This was granted by Mexico on 7 February 2008.

4-104 **31.03.2008:** Spain authorized his extradition to Argentina on 28 February 2008. The criminal proceedings against Mr Cavallo in Spain were stayed on 14 March 2008 in order to permit his extradition to Argentina. Although victims’ associations in Spain

appealed against this stay, the appeal was dismissed. Mr Cavallo was extradited to Argentina on 31 March 2008, where he was arraigned and transferred to the Marcos Paz prison in the province of Buenos Aires, to await trial.

- 4-105 Mr Cavallo continues to await trial in Argentina, in prison, for the criminal offences of aggravated illegal deprivation of liberty, torture resulting in death, robbery, extortion, “ideological forgery of public documents” (i.e. whereby a document looks authentic but its content has been modified) and criminal association. One of these charges was filed in 1999, three were filed in 2003, and one in 2004, all relate to alleged crimes committed by military officers of the Escuela Mécanica de la Armada (ESMA).
- 4-106 If Mr Cavallo’s defence of mistaken identity prevails at trial, he will not be guilty of any of the criminal charges against him; and he will have spent nine or more years in prison as an innocent man. If guilty of these particular charges, it may be thought that no sentence would be too harsh.
- 4-107 Mr Cavallo was scheduled to stand trial in Argentina in the autumn of 2009. As of the date of this Award, it is not known to the Tribunal whether Mr Cavallo’s trial has taken place.

**(18) *The Concession’s Shareholders and Mr Cavallo***

- 4-108 Mr Cavallo was (and remains) a shareholder in Talsud, holding one third of the shares in this company. He was a director of Talsud; and he was put forward as a candidate for the general directorship of the Concessionaire by Talsud. His credentials, as listed in his contemporary curriculum vitae, include training and professional experience at the “Escuela Naval Militar” and the “Armada”, respectively, in Argentina. He made no secret of his Argentinean background, his service as a naval officer and his name; and as the Concessionaire’s general director he had frequently appeared in public, being

photographed and filmed by the Mexican media many times as the public face of the Concessionaire.

4-109 Shortly following publication of the *Reforma* article on Mr Cavallo, Mexican newspapers began to report on his association with Talsud and its directors, including Mr Taíariol.

4-110 In an article published in *Reforma* on 30 August 2000, speculations were made concerning Mr Taíariol's sudden departure from Mexico following Mr Cavallo's arrest:

*“Renave partners desert Mexico*

*Representatives of the Argentinean company Talsud leave Cavallo behind. Gemplus criticizes the absence and announces a lawsuit if irregularities are confirmed.*

*The principal executives of the Argentinean company Talsud, one of the three firms that were granted control of the National Vehicle Registry (Renave), deserted Mexico and left Ricardo Miguel Cavallo, the partner facing extradition, by himself.*

*The president of Talsud, Mr Taíariol, is in San Salvador. He said he went there to “show his face” at the scandal caused by the Cavallo case with its partners in that country.*

*[...]*

*In a telephone interview from El Salvador, Taíariol commented that he did not leave Mexico to escape justice, but to be “where I am most needed”.*

*[...]*

*“Due to this situation, the problems that initiated in Mexico, I am facing consequences not only in El Salvador, but also in Argentina, and other places where we directly or indirectly operate, and hence, at every moment, I will have to be where I am most needed,” said Taíariol.*

*[...]*

*“According to Taíariol, both Davis and executives from Gemplus, which is a minority shareholder in the concessionaire, were notified of his trip to Central America.*

*The Argentinean denied any support for Cavallo, who is responsible for the scandal. "He will have to defend himself at a personal level," he insisted.*

*On the other hand, Gemplus, through its legal representative, Eduardo Salgado, said it was disappointed and felt defrauded in its association with Talsud."*

- 4-111 On the evidence adduced in these proceedings, this report was materially inaccurate as regards the reasons for the absence from Mexico of Talsud's representatives: Mr Taíariol and Mr Siegrist. In fact, following the Cavallo incident, they returned to Mexico City from El Salvador on 29 August and 7 September 2000 respectively. In any event the situation was more complicated, as appeared from evidence adduced at a late stage of these proceedings, whatever the public perception as at 30 August 2000 and, more particularly, early September 2000. By the latter date, the death of Under-Secretary Ramos Tercero had taken place. (The Tribunal addresses these evidential materials separately below.)
- 4-112 On the evidence adduced in these proceedings, the Tribunal concludes that, if Mr Cavallo were guilty of the crimes alleged against him, none of the Claimants (including Talsud) had any actual knowledge of Mr Cavallo's criminal past before August 2000. The Respondent had checked the good standing of (inter alios) Mr Cavallo with the Argentinean authorities during the bidding process and had received assurances that there was nothing adverse recorded against him. The Respondent acknowledged (rightly in the Tribunal's view) that none of the Claimants could have discovered Mr Cavallo's alleged criminal past [D1.230 & D8.1680].
- 4-113 Accordingly, for the purpose of this Award, the Tribunal finds that none of the Claimants or the Respondent knew or could have known or was otherwise at fault in not discovering the criminal past alleged against Mr Cavallo before August 2000. If he were an innocent man, it would of course have been quite impossible to do so.

**(19) Preliminary Audits of the Concession's Operations**

4-114 Immediately following the publication of the accusations against Mr Cavallo on 24 August 2000, the Secretariat ordered an audit of the Concessionaire's operations and the data centers responsible for processing information, in order to ensure the security of the Registry's database.

4-115 **24.08.2000:** Dr Ramos Tercero (as the Under-Secretary) wrote to Mr Davis (for the Concessionaire) informing him of the terms of an immediate "Verification Visit" on 24 August 2000:

*"Pursuant to article 34 subsection XXX of the Federal Public Administration Law; 16 subsections II and VIII, 50, 62, 63, 64, 65, 66, 67, 68 and 69 of the Federal Administrative Proceedings Law; 3 subsection VII of the Law of the National Vehicle Registry and ; 59 subsection III and 60 subsection II of its Regulations, a Verification Visit is issued under the following terms:*

*Allow access to the National Vehicle Registry's Computing Centre located in the facilities of Hewlett Packard, located in Prolongacion Reforma #700 in Lomas de Santa Fe, zip code 01210 in Mexico City...*

*The inspection will start at 19:00 hours on 24 August 2000 and will last as long as it takes to complete these objectives..."*

4-116 The Secretariat also requested that the Concessionaire deliver up all passwords and access codes, cancel existing passwords, deliver all files provided to the Concessionaire and delete any additional backup copies of this information.

4-117 In the Tribunal's view, this was a responsible and measured response by the Secretariat to the public concerns resulting from the allegations made against Mr Cavallo. It was suggested by the Claimants that these amounted to unlawful 'co-ordinated raids of remarkable spontaneity and speed', whilst apparently conceding that there was no cogent evidence before the Tribunal to justify such an allegation [D1.48]. The Tribunal rejects this criticism: the swiftness of the Secretariat's response was the natural

consequence of public concerns over the Cavallo incident; and it was a reasonable and necessary response in difficult circumstances.

The eventual outcome of these audits and inspection was reassuring to the Secretariat, confirming that the confidentiality of information held by the Concessionaire had not been breached from the Registry's start-up onwards, such that no-one would have been able to make improper use of the database's information. However, this did not suffice to calm public concerns within Mexico.

**(20) *The Technical Intervention***

4-118 **29.08.2000:** On 29 August 2000, facing continued pressure from public and political opposition concerning the security of information collected and managed by the Registry, the Secretariat issued a decree authorizing a 'Technical Intervention' in the management of the Registry directed at the Concessionaire.

4-119 The purpose of such a Technical Intervention was set forth in the decree, reproduced below:

*“WHEREAS*

*That the operation of the National Vehicle Registry is a public service whose purpose is the identification of vehicles manufactured, assembled, imported or circulating in the national territory, as well as providing the service of information to the public;*

*That this system of vehicle identification in all the country contributes to the legal security of the legitimate owners of vehicles and discourages the theft of the same;*

*That the current legal status of the former director of the concessionaire referenced, due to the presumption of responsibility for illegal acts imported to it, has generated uncertainty among the users of the service and the public in general with respect to the confidentiality of the information contained in the database that is necessary to provide the service;*



*That this secretariat may use the [provision] in the second paragraph of Article 25 of the Law of the National Vehicle Registry [cited earlier in this Part IV of the Award, at Paragraph 4-28 above], to intervene in the administration of the public service, in any circumstance which prevents the concessionaire from maintaining the optimal operation of the service, and due to these circumstances, it is imperative and urgent to take immediate measures, therefore I have decided to issue the following:*

*DECREE WHICH DECLARES THE INTERVENTION OF THE PUBLIC SERVICE OF THE NATIONAL REGISTRY OF VEHICLES*

*ARTICLE 1.-The Federal Government, through the Secretariat of Commerce and Industrial Development, declares the intervention of the public service of operation of the National Vehicle Registry.*

*ARTICLE 2.-The Federal Government, through the Secretariat of Commerce and Industrial Development, shall appoint a technical intervener who shall exercise the powers necessary to guarantee the integrity and confidentiality of the information contained in said registry.*

*ARTICLE 3.-Concesionaria RENAVE, S.A. de C.V. [the Concessionaire] shall grant the intervener all powers necessary for the fulfillment of its objectives, in accordance with all powers of Article 20, numeral X, of the Law of the National Vehicle Registry.*

*ARTICLE 4.-The Secretariat shall decide when this intervention shall cease, after the evaluation of the conditions which motivated it.”*

Within the Secretariat, the individual officer responsible for this decree was the Secretary, Dr Blanco, to whose testimony the Tribunal returns below. It is to be noted that this decree was not based on any “imminent peril for the national security” under the first part of Article 25 of the Act.

- 4-120 Mr Erasmo Marín Córdova was promptly appointed by the Secretariat as the technical intervener responsible for overseeing and supervising the Concessionaire's operations, beginning his work immediately. Mr Marín was not called as a witness in these proceedings; but his written reports were adduced in evidence. The Tribunal has found them objective, professional and useful.

4-121 **05.09.2000:** Mr Marin issued his first report on the confidentiality aspects of the Concessionaire on 5 September 2000. He reported the following observations to Secretary Blanco:

- *“[...] Currently, there is a place in the company Hewlett Packard where the central computers and official databases of RENAVE function. Additionally, there is an installation and equipment for disaster recovery in the Concessionaire’s building, however, due to its function and to the capacity of this equipment, the latter does not meet the need and convenience of having a “mirror” installation which should be located outside and far from HP.*

*Due to the increasing importance of this data base at the national level and due to the circumstances such as that diverse private organizations operationally intervene in the process of vehicle registration; it is necessary and convenient to design and build a mirror centre in SECOFI. The mirror centre should not be conceived as a non-operating centre, a “dark room” with a terminal that monitors the network and periodical controlled updates. The mirror centre of SECOFI should have terminals that are connected with the workflow system that allows monitoring the operation of each of the actors of the systems of the company and of the databases that are not completely linked. In this way it could be publicly confirmed that the database is secure with the redundancy and with the controlled updating in the Public Sector premises.*

- *The company Keon of Mexico, as part of a network of companies that make up the RENAVE system, has as a main duty to make the final review of the documentation submitted by the individual that requests the registration; likewise to capture the information of the owners and the vehicles; verify them internally and “scan” the copies of documents received in order to build a database that will permit the verification of the precision of the content of a database of RENAVE.*
- *During the visit of 1<sup>st</sup> September [2000] it was observed that the system’s operation of said organization was completely interrupted from 30<sup>th</sup> [August,] supposedly by failures in the Informix database; simultaneously due to that same failure and a failure in one of the two Scanners, the scanning was also interrupted. To date the system is still not working and since yesterday, the technical personnel continue to try to re-establish the operation or obtain a backup to be operated at IBM.*

*The data obtained and the facts witnessed have led us to verify on one side, the importance of this process for the company and on the other side, the great vulnerability of the same. ...”*

4-122 **11.09.2000:** On 11 September 2000, Mr Marín provided Secretary Blanco with a second written report containing the following observations, amongst others:

*“In order to confirm the assessments expressed to you and to Mr Raul Ramos during our meeting on the 5<sup>th</sup> [September], and due to the first review of the two main databases that provide the fundamental support for the functioning of the RENAVE database; we have observed that in their real actual operative conditions, they are unable to satisfy the needs of the service offered to individuals and companies who own used vehicles.*

*[...]*

*Given the conditions of the system’s operation and the situation of non-conformity expressed in the media and in the Chamber of Deputies, it is advisable to redefine the strategy to implant [sic] the system to continue only with the registration of new vehicles and federal public transport, during the time that is necessary in order to secure that the other data bases can be in conditions to provide the updated, sufficient and appropriate information to the service offered by RENAVE ...*

*Further to the letter submitted to you on the 5<sup>th</sup> of this month, the cause of the failure in the computing equipment and the backup tapes that Keon Mexico has in order to attend to RENAVE’s service, which occurred on the 30<sup>th</sup> of last month, has not been identified or corrected. Therefore, its operation has not been reestablished, as a result of which twelve days have passed without the processing of any of the registration requests.*

*[...]*

*Regarding our recommendation to establish in SECOFI, a “mirror installation” in which the database of RENAVE users is updated continuously; I inform you that the proposal by Hewlett Packard has been submitted to Ing. Luis Young which contains two options which could satisfy the needs that were raised. It is convenient for the General Directorate of RENAVE in SECOFI to carefully analyze these or other options in view of the actual circumstances, and to determine the best solution for SECOFI to have the effective control of the public database of Renave. Pursuant to article 5 of the Law, “The database remained exclusive property of the Federal Government...”; measures suggested could further guarantee the control and security of said database.”*

4-123 During the period of this technical intervention, Mr Marín also engaged Grupo Corporativo Informatico S.A. de C.V. (“GCI”) to undertake a technical evaluation of the

Concessionaire's information security systems. The GCI report was issued in early October 2000.

- 4-124 In the Tribunal's view, the appointment of a 'technical intervener' under the Act was a responsible and measured response by the Secretariat to the public concerns inevitably resulting from the grave criminal allegations made against Mr Cavallo. Eventually, it might have sufficed to assuage those concerns and restore public confidence in the Concession, leading to the registration of both used and new vehicles as originally planned, were it not for the events which soon followed.

**(21) *The Death of Under-Secretary Dr Ramos Tercero***

- 4-125 **07.09.2000:** On 7 September 2000, Dr Ramos Tercero, who had been responsible for running the project as Under-Secretary at the Secretariat (under Secretary Blanco) was found dead in a wooded area to the west of Mexico City. His death was either a murder or suicide. In either event, it was a very unexpected, sudden and brutal death.
- 4-126 Several personal documents were found after Dr Ramos' death, including a letter apparently written by him addressed to the General Director of *Reforma*. This letter, if written by the deceased, confirms the difficult situation prevailing by early September 2000 in regard the Concessionaire following Mr Cavallo's arrest. It reads, in relevant part, as follows:

*"... I am a clean man. I am an honest man. I have always been one. I have never unduly benefited from office. My life is an open book in which there is nothing to hide.*

*The bid for the concession of the National Vehicle Registry was carried out fully consistent with the law and with complete transparency. The audits that are about to be made undoubtedly will show that. I have no doubts about that. Moreover, the operation of the Concessionaire has been professional and clean and the operative difficulties that it faced can be explained by the fact that the administrative unit under my charge has been unable to provide certain necessary operation criterion rules in a timely manner.*

*We did not do so because we were overwhelmed with work. For that reason alone, there is no plot or conspiracy to make the National Vehicle Registry an instrument to perform criminal acts, there never was, on the contrary, we made a serious and professional effort to comply with our duties despite the increasingly difficult conditions, created by the media, which insisted on making us look like true criminals. ...”*

- 4-127 It is impossible here to record in full, from the evidence, the devastating and immediate effect of Dr Ramos’ death on the Secretariat, the Concessionaire and the Mexican public at large. Dr Ramos was indeed well-known and respected in Mexico (and abroad) as an honest man of great professional abilities, with a broad experience of government and international affairs. Moreover, he was not known as a person who succumbed to pressure or suffered from suicidal tendencies. He had shown no sign of distress at the meeting earlier on 6 September 2000 with Dr Blanco and the Concessionaire’s representatives.
- 4-128 Notwithstanding personal documents suggesting suicide, it was widely believed at the time that Dr Ramos had been murdered by powerful criminal interests in Mexico and that such criminals were thereby protecting their illegal activities connected to the workings of the Registry, whether the Registry was thought to impede these activities (being effective to combat organized crime) or conversely to facilitate them (being susceptible to leaks of confidential information). Conversely, if his death were suicide, questions arose as to the reason why Dr Ramos would take his own life if it were not a reason somehow connected with the Registry and the Concessionaire.
- 4-129 Accordingly, the violent death of Under-Secretary Ramos Tercero, so soon after the arrest of Mr Cavallo, greatly exacerbated public speculation and concerns over the whole project for the National Vehicle Registry.

4-130 Following Dr Ramos' death, Mr Luis Young Fonseca, Director General of the National Vehicle Registry, assumed his position as Under-Secretary within the Secretariat.

**(22)     *The Reaction of Talsud***

4-131     **23.08.2000:** Talsud first learned of the criminal allegations against Mr Cavallo late on 23 August 2000, the day before the publication of the front-page article in *Reforma*. Mr Cavallo had earlier been approached by a journalist from *Reforma*; and he in turn spoke to Mr Taíariol. At that time, Mr Taíariol was in Mexico City; and Mr Siegrist had just arrived on 22 August 2000 to attend board meetings of the Concessionaire on 23 and 24 August 2000. Mr Cavallo told them it was a case of mistaken identity and that he was proposing to return to Buenos Aires to secure further proof of his identity. At this time, the journalist's inquiries did not seem to raise an immediate concern with Talsud.

4-132     **24.08.2000:** That changed the next morning. The publication of the article in *Reforma*, Mr Cavallo's arrest and the public reaction on 24 August 2000 posed a clear threat to the future of the Concession and the Concessionaire, including Talsud as an Argentinean company and Mr Cavallo's original employer. Mr Miguel de Erice (then Talsud's lawyer in Mexico City) testified that he thought at the time that it was "the death of Renave" leading to the cancellation of the Concession [D9.2128 & 2129].

4-133     On 24 August 2000, soon after the article's publication, a meeting was held at the law offices of Noriega & Escobedo in Mexico City, starting in the morning and continuing into the afternoon. It was attended by Mr Siegrist, Mr Taíariol, Mr Juan José Borja Papini and Mr de Erice (of Noriega y Escobedo). Mr de Erice had earlier acted as the Concessionaire's legal adviser but he was now advising Talsud. He left the afternoon meeting to attend the Interpol office in Mexico City, awaiting Mr Cavallo's return from Cancun (under arrest) and instructing criminal lawyers to assist Mr Cavallo.

4-134     On 25 August 2000, after Mr Cavallo's arrest and detention in prison, a meeting was held between Mr Siegrist, Mr Taíariol, Mr Borja and Mr de Erice. On 26 August 2000

(Saturday), there was another meeting between Mr Taíariol and Mr de Erice in Mexico City. Mr Taíariol and Mr Siegrist then travelled by plane to El Salvador, as earlier planned. On 28 and 29 August 2000, Mr de Erice met Mr Taíariol in El Salvador. On 29 August, Mr de Erice and Mr Taíariol travelled from El Salvador to Mexico City. On 7 September 2000, Mr Siegrist also returned to Mexico City, with Mr Borja.

- 4-135 **06.09.2000:** A meeting took place on 6 September 2000 between Mr Davis & Mr Salgado for the Concessionaire and Dr Blanco & Dr Ramos at the offices of the Secretariat, addressing the status of the Registry and the Concessionaire. (This meeting was not attended by Mr Taíariol or Mr Siegrist). Later that night, Dr Ramos' body was found and his death announced on the radio and television.
- 4-136 **07.09.2000:** Mr Taíariol learned of Dr Ramos' death on 7 September 2000. He was very shocked and saddened. Mr Taíariol considered at the time that Dr Ramos was murdered and did not commit suicide, as he still does today [D9.2030, 2031]. He also considered that, if murdered, Dr Ramos' death was somehow linked to the Registry; and that it was therefore possible that more murders could take place [D9.2030].
- 4-137 Mr Siegrist testified that, on learning of Dr Ramos' death on 7 September 2000, he "was just totally overcome by circumstance. It was a person I knew, had dealt with, a person that Mr Salgado told me: I was with him yesterday, and he was great, he was fine, and then in the afternoon he takes his life?" [D9.2077] and "...They were very, very hard circumstances" [D9.2079].
- 4-138 Mr de Erice testified that he was "very shocked and very, very worried" on learning of Dr Ramos' death [D9.2145]. His worries concerned the personal safety of those closely involved with the Concessionaire, including Mr Taíariol and Mr Siegrist of Talsud.
- 4-139 **08.09.2000:** There were further meetings and other conversations between Mr Taíariol, Mr Siegrist and Mr de Erice during the following days. Their timing and details are not here relevant. Before returning to El Salvador on 8 September 2000, Mr Siegrist testified that he "perceived panic in Dr de Erice" [D9.2073]. In his testimony, Mr Siegrist used the phrase "mental and physical integrity" to describe the sensation of fear

felt by him at the time in Mexico [D9.2068]. Mr Siegrist decided that he would leave Mexico City for El Salvador; that it was “crazy” for him to stay in Mexico [D9.2088 & 2090]; and that he would not be returning to Mexico until circumstances changed (he returned only in February 2001). He so informed Mr Taíariol before his departure.

4-140 **11.09.2000:** Mr Taíariol met Mr de Erice during the morning of 11 September 2000, during which there was also a telephone conversation between them. There was another meeting between Mr Taíariol, Mr de Erice and a third person accompanying Mr de Erice during the afternoon. Acting on their advice, Mr Taíariol decided to leave Mexico on the next available flight to Argentina that same evening. Mr Taíariol left Mexico City by plane late on 11 September 2000, arriving in Buenos Aires on the following day. He was driven by car to the airport; but it is not clear whether he was accompanied by Mr de Erice and/or the third person.

4-141 The Tribunal does not consider that the third person attending the afternoon meeting was Mr Santiago Creel, as recalled by Mr Taíariol. (Mr Creel was then active in Mexican politics with PAN and close to President-elect Fox). The Tribunal accepts that Mr Taíariol holds an honest belief otherwise; but the Tribunal considers that his belief is probably mistaken. His present recollection is more than eight years old; he did not know Mr Creel personally at the time; he therefore did not so recognize him at the meeting (although he knew his name as a former law partner of Mr de Erice); and Mr Taíariol’s recollection, whilst indirectly supported by Mr Siegrist, does not square with other cogent evidence before this Tribunal, including the written and oral testimony of Mr de Erice. (Mr Creel was not a witness in these proceedings).

4-142 It does not matter, for the purpose of this case, who this third person actually was. The Tribunal accepts the honesty of Mr Taíariol’s testimony (albeit incorrect) as regards this third person’s identity; his mis-recollection does not impeach him as an honest witness or otherwise work to discredit him; and the Tribunal therefore rejects the submission made by the Respondent that, having “lied” as a witness in regard to this third person’s identity, an adverse inference should be drawn by the Tribunal against all of Mr Taíariol’s testimony on all other issues in these proceedings. The Claimants made it



plain that their case did not depend in any way upon the identity of this third person; and the Tribunal has placed no reliance on this third person's identity for the purpose of its decisions in this arbitration. However, this afternoon meeting is not wholly irrelevant to certain other issues addressed by the Tribunal in this Award.

- 4-143 Whoever this third person was, it is clear that with Mr de Erice, the two men strongly advised Mr Taíariol on 11 September 2000 that he should leave Mexico City urgently for his personal safety. In the words of Mr Taíariol, "they told me that somehow they had some information, and it was better for me to leave the country." [D9.2020] and "if Renave continued, there could be more death" [D9.2033]. Their advice was based on the lack of security for Mr Taíariol as a person linked to Talsud, the Concessionaire and the Registry; and it was consistent with the earlier impression received from Mr de Erice by Mr Siegrist, as relayed to Mr Taíariol.
- 4-144 As was apparent from his testimony before the Tribunal, Mr Taíariol was not a person to be easily frightened; and he described himself, in his own words, as "not an easy person to deal with" [D9.2033]. Nor did Mr Siegrist give any different impression to the Tribunal. Moreover, at about this time, Mr Cavallo's companion and their young daughter were instructed by Talsud to leave Mexico City and return to Argentina, also on advice from Mr de Erice. This companion had worked as the Concessionaire's Comptroller; and her departure was arranged by Mr de Erice, as he confirmed during his testimony [D9.2148]. In the Tribunal's view, Mr de Erice conducted himself professionally towards Talsud in these very difficult times; and his advice was both sound and reasonable.
- 4-145 In the Tribunal's view, the death of Dr Ramos had a far worse effect on the Concessionaire than even the arrest and detention of Mr Cavallo, to which it was closely linked in the minds of the public. As reports of Mr Cavallo's extradition proceedings continued in Mexico over the next 2 ½ years (until his extradition to Spain on 28 June 2003), that disturbing link was maintained in the public mind. Dr Ramos' death and the Cavallo incident were and remain important factors in this case. (The Tribunal considers the legal significance of these factors later in this Award.)

(23) *The Suspension of the Obligation to Register Used Vehicles*

4-146 *15.09.2000*: One week after Dr Ramos' death, on 15 September 2000, the Secretariat published a decree indefinitely suspending the legal obligation of owners, suppliers, and sellers to register used vehicles.

4-147 The preamble to this decree describes the purpose of the suspension as follows:

*“WHEREAS*

*That the Law of the National Vehicle Registry establishes that the Registry shall have a database, integrated with information about each vehicle provided by the authorities, manufacturers, assemblers, commercial entities, insurers, individuals or any other source;*

*That the Law of the National Vehicle Registry and its Regulation provide that the obligation to register vehicles in circulation before the National Vehicle Registry and the obligation to provide the notifications set out in the said regulations shall be completed according to the calendar that shall be published by the Secretariat of Commerce and Industrial Development for such purpose;*

*That on 28 April 2000, the Agreement, which sets out the calendar of registration and notification obligations to register before the National Registry of Vehicles by establishing dates for the compliance of the obligations derived from the Law of the National Vehicle Registry in its pilot phase for the states of Hidalgo and San Luis Potosí, as well as the calendar for the fulfillment of the obligations which derive from the same law and its regulation in its national phase in respect to new vehicles, was published in the Official Gazette of the Federation.*

*That on 8 June of the present year, the Agreement, which sets out the calendar of registration and notification obligations before the National Registry of Vehicles in its national phase, with the purpose that the individuals that are bound by the Law of the National Vehicle Registry and the Regulation submit the notifications and register vehicles in circulation which are referred to in the ordinances, was published in the Official Gazette of the Federation.*

*That in order to achieve the well-functioning and coverage of the National Registry of Vehicles, suspension of the obligation to register vehicles in circulation has been considered while the execution of coordination agreements with the federative entities is concluded so that the information contained in the vehicle lists of the federative entities and of the Federal District can be relied on and the cost to the individual can be removed;*

*That auto theft mainly affects recent vehicle models, and in order to prevent and fight this offence, it is considered imperative to give continuity to the public service of the Registry in relation to new vehicles. As provided by article two of the Agreement which sets out the calendar of obligations to register and give notice to the National Vehicle Registry, published on 28 April 2000 in the Official Gazette of the Federation, I have decided to issue the following:*

*DECREE THAT REVOKES ARTICLE ONE OF THE AGREEMENT WHICH SETS OUT THE CALENDAR OF THE OBLIGATIONS TO REGISTER AND GIVE NOTICE TO THE NATIONAL VEHICLE REGISTRY AND REVOKES THE AGREEMENT WHICH SETS OUT THE CALENDAR OF THE OBLIGATIONS TO REGISTER AND GIVE NOTICE TO THE NATIONAL VEHICLE REGISTRY IN ITS NATIONAL PHASE.”*

- 4-148 This announcement was followed on the same day by an ‘administrative intervention’ in the operation of the Registry. It was the first of two different administrative interventions ordered by the Secretariat.

**(24) The First Administrative Intervention**

- 4-149 **15.09.2000:** On 15 September 2000, the Secretariat ordered the first ‘Administrative Intervention’ directed at the Concessionaire. This intervention was justified by reference to "a situation which has generated uncertainty among the users of the service and the public in general, in relation to the confidentiality of information contained in the database of the National Vehicle Registry”.

4-150 The decree ordering the administrative intervention provided (inter alia) as follows:

*“WHEREAS*

*That with the aim of urgently confronting a situation which has generated uncertainty among the users of the service and the public in general, in relation to the confidentiality of information contained in the database of the National Vehicle Registry, the Secretariat has published a decree ordering the technical intervention of the public service of the said Registry in the Official Gazette of the Federation.*

*That it is of great importance to address the concerns generated by the functioning of the concession of the public service as to the operation of the National Vehicle Registry, which led to the cessation of the registration of used vehicles; and*

*That the foregoing lets us conclude that circumstances subsist which prevent the concessionaire from maintaining the optimal operation of the service. Therefore, the Secretariat is authorized to intervene, not only in the technical aspects in relation to the integrity and confidentiality of the Registry’s database, but also to intervene in the administration of the concessionaire, as a precautionary and necessary measure. That will enable supervision of its functioning. Due to the extraordinary circumstances which have arisen, I have decided to issue the following:*

*DECREE WHICH DECLARES THE ADMINISTRATIVE INTERVENTION OF THE PUBLIC SERVICE OF THE NATIONAL REGISTRY OF VEHICLES*

*ARTICLE 1. The Federal Government, through the Secretariat of Commerce and Industrial Development, declares the administrative intervention of the public service of operation of the National Vehicle Registry in all the national territory.*

*ARTICLE 2. The Federal Government, through the Secretariat of Commerce and Industrial Development, shall appoint an administrative intervener, as well as other persons who may be required to perform his duties.*

*The administrative intervener, with the purpose of maintaining the optimal operation of the public service:*

- I.- Shall hold the office of intervener with the authorities and powers inherent to the general director.*
- II.- Shall take administrative and operative control.*

*III.- Shall answer to the Secretary and shall inform him periodically about the development of the intervention.*

*IV.- Shall exercise the necessary authority to guarantee the integrity and confidentiality of information contained in the Registry.*

*V.- Shall take all other actions which the Secretary authorizes.*

*ARTICLE 3. Concesionaria RENAVE, S.A. de C.V. shall grant the intervener all the necessary powers for the achievement of its objectives in accordance with article 20, numeral X of the Law of the National Vehicle Registry and the provisions established in the twelfth condition, paragraph 15 of the Title of Concession.*

*ARTICLE 4. The Secretary shall decide when this intervention shall cease, after evaluating the conditions which gave rise to it.”*

Within the Secretariat, the individual officer responsible for these two decrees of 15 September 2000 was again Dr Blanco (as with the earlier decree of 29 August 2000). It is to be noted that neither of these two decrees was based on any “imminent peril for the national security” under the first part of Article 25 of the Act (cited above). It was not intended that the suspension of the legal obligation to register used vehicles should be permanent; and this administrative intervention was to be temporary: see Article 4 of the second decree above.

4-151 The administrative intervener was to be the former technical intervener, Mr Marín. He thereby assumed administrative authority over the Concessionaire’s General Director (Mr Bilbao) and reported directly to the Secretariat. Over the course of his tenure as the first administrative intervener, Mr Marín remitted several written reports to the Secretariat on the operations and financial situation of the company. Again, the Tribunal has found these reports objective, professional and useful.

4-152 **19.10.2000:** Mr Marín issued his first report as Administrative Intervener on 19 October 2000, proposing several measures to be implemented by the Concessionaire.

4-153 Among matters discussed in Mr Marín’s first report were the results of GCI’s technical review of the confidentiality of information held by the Registry and registration cards for both new and used vehicles:

*“SECURITY EVALUATION. [...]*

*The evaluation reveals a wide variety of insecure conditions in the vehicle registration service of information security operations as well as express and implied suggestions for the correction of these conditions. The analysis was centred on the three main nodes located at the premises of Hewlett Packard Mexico, Keon de México, and of Concesionaria Renave itself. It covered the equipment, applications, operating systems, databases, measures to protect the physical and logical aspects of the operations, processing, accesses, teleprocessing, information integrity, etc.*

*Within the overall scope of the study, and the different levels of impact, importance and significance that the inadequate security conditions encountered may have, which are directly related to the security levels specified in the “prospectus” and the bid terms on which this service is based, below is a summary of the most significant:*

- *“The security specification of the equipment, components, databases, and operating systems must be at least B2.” (page 124 of the prospectus). The technical evaluation verified that the B2 security level is not reached at any of the computing nodes in the concessionary’s network, not even at the main node located at HP Mexico. [...]*
- *As a corollary to the above and in accordance with your instructions to “evaluate the operation of the company to determine possible grounds for termination of the concession”, the conclusion to be drawn is that it has been demonstrated that the points mentioned constitute clear grounds for terminating the concession. Assuming the possibility that the concession might be revoked, I consider that it is essential to:*
  - *Determine and prepare all the technical, administrative, legal, and media necessary activities.*
  - *Define a new “prospectus” in which the Renave’s operating process is redesigned and resized to include only new vehicles (May 2000 and later) and changes of ownership of the same, as well as miscellaneous appropriate notices established provided for in the prospectus. ...*

*[...]*

*REGISTRATION CARDS FOR USED VEHICLES. About 200,000 applications for registration with different dates of origin are currently being processed. In accordance with regulations, within three months of the receipt of an application a registration card should be issued or an explanation given as to why a card has not been issued. Given the very few cooperation agreements with the States and the incompleteness of the information contained in the federal databases (SAT and SNSP), the resumption of the used vehicle registration service will translate into the necessity of informing the people who submitted an application the reasons why they will not receive their card, or if the cards are delivered, of the restrictions attached to them because it will not have been possible to make full checks of their conditions in the databases. The sensitive nature of this matter warrants the definition by SECOFI of an appropriate strategy in order to prevent dissatisfaction and further inconvenience. If deemed necessary, this issue should be jointly agreed beforehand with the appropriate authorities and appropriate social representatives. If the service is definitely to be discontinued, the source of the money to be refunded to the owners of the used cars shall need to be determined, as well as the cost of this refund and proceed in the short-term to publish the procedure for paying the people who have claimed refunds. The total amount involved is estimated between 8 million and 12 million pesos, and that the cooperation of the competent authorities will be necessary to authorize the deduction of this expense.*

*REGISTRATION CARDS FOR NEW VEHICLES. These applications continue to be processed normally. However, it is necessary to initiate a communication campaign focusing particularly on new car owners (May 2000 or later) to inform them and future purchasers of their obligations and benefits in terms of security by timely reporting changes in ownership and the transfer of the registration card and the scratch-off card to the new owner. The value and level of confidence associated with this solution would be derived from the RENAVE database without the necessity of resorting to the S.A.T. and S.N.S.P. databases. It will also be necessary gradually to replace the services provided by the CTDs and CTDCs since they are practically closed and do not offer the service anymore. It is advisable to redesign the current regulations given that the new circumstances do not correspond to it. Additionally, it will be necessary to define the legal status that Renave smart card might have.”*

- 4-154 It will be noted that Mr Marín here refers to the Secretariat’s instructions to him “to evaluate the operation of the company to determine possible grounds for the termination of the Concession”. Clearly, there was already an option being considered within the Secretariat to terminate the Concession Agreement, taking place before the change in

the Federal Government's political administration. The Tribunal concludes from the evidence, particularly the testimony of Dr Blanco, that this was only one of several policy options addressed by the Secretariat; and that it was not a plan, still less a decision to terminate the Concession Agreement. Indeed, it would have been surprising, given the public concerns being directed at the Concession, if the Secretariat had not considered whether or not grounds existed to terminate the Concession and enlisted the advice of Mr Marín.

4-155 **03.01.2001:** On 3 January 2001, following the replacement of Secretary Blanco by Secretary Derbez under the new political administration of President Fox, Mr Marín wrote to Secretary Derbez outlining a strategic proposal for the management of the Concessionaire's operations:

- *“The drastic fall in the number of used-vehicle registrations and the subsequent suspension of the obligation to register them caused several problems in the service contractual relationship with Keon de Mexico S.A. de C.V. As a result of this situation, registration was interrupted and information on almost 50% of the people who applied to register their used vehicles is missing. Furthermore, although it will not all be useful now, the physical file containing the copies of documents delivered by the applicants is in a sense being held “semi-hostage” in Keon because of the financial problems caused by the known events. One of the critical problems caused by this situation is that it is impossible to obtain the minimum information needed to correctly make refunds to almost 50% of those applicants.*

*Given the important public nature of this physical file, it is necessary that the Secretariat decides and orders the physical relocation of this file to the Concessionaire's premises or to another location, in accordance with its instructions. By acting on this suggestion, we would have the security required to make the refund mentioned earlier.*

- *The report dated 22 November 2000 described the severe difficulties experienced and the mistakes committed by both the Concessionaire and “GemPlus”, which impeded production of new-vehicle registration cards as of that date. As of today, although some progress has been made, not a single new registration card has yet been produced.*

*This failure is in breach of the regulation and merits an official warning from the Secretariat. [...]*”



At this time, there was apparently no suggestion that the Concession might be requisitioned, revoked or terminated by the Secretariat under the Act or the Concession Agreement itself.

- 4-156 **01.02.2001:** One month later, on 1 February 2001, Mr Marín submitted a further written report to Secretary Derbez, concluding as follows with regard to the Concessionaire's financial status: "From a financial stand point, the figures reported in the Concessionaire's financial statements show a satisfactory trend. This situation will enable the necessary adjustments to be made to its structure, procedures and operations so as to achieve the level of service and quality demanded by both the legislation and the population. In combination with the low operation volumes, this financial position will enable the internal control procedures to be strengthened."
- 4-157 Mr Marín recommended that several measures be taken in respect of the Concessionaire's financial reporting, including the following: "There is an urgent need to implement the organisational elements, procedures and controls required to ensure the suitability and quality of the services, as well as those of the information on which the financial statements are based."
- 4-158 With regard to services, Mr Marín reported the following:

*"SERVICES NOT AWARDED*

*At the express request of Mr Luis Young [of the Secretariat's Under-Secretary], the Concessionaire commenced evaluation of the degree of compliance with entry in the tax register, particularly for new vehicles. To date, talks have been held with organisations offering both finance lease and true lease arrangements. In both cases, it has been confirmed that as the vehicles are invoiced to the lessor, which therefore holds ownership, entry in the tax register is not applicable.*

*As regards the automobile finance companies and other non-specialised finance companies that also work in the automobile market, entry in the tax register is applicable. Of the total number of approximately 300 finance companies, only 11 are entered in the system. To date, of 466,000 new vehicles registered, only 135,000 have been entered in the tax register, a figure that is below the forecast result.*

*As regards this situation, four main errors are observed. 1.- An insufficient number of notifications from vehicle Distributors. 2.-Wrongful collection of the fee [...] from owners. 3.- Lack of confirmation sent to RENAVE by finance companies and 4. – Payment of the fee applicable to them.*

*The aforementioned errors mean that the legislation is not complied with and that significant financial losses are incurred by the company. It is estimated that to date approximately 3.5 million pesos have not been collected.*

#### *RECOMMENDED MEASURES*

*As a result of the aforementioned, the necessary instructions have been issued to reorganise and activate the required systems and procedures so that within the shortest possible period of time (March): 1° No new vehicle may be sold on credit without the corresponding tax being registered. 2° A review of the previous months will be undertaken to endeavour to recover and update the databases and corresponding charges.”*

4-159 Finally, Mr Marín reported continuing problems with regard to the delivery of registration documents, i.e. smart cards, recommending the following measures:

#### *“PROGRESS IN THE DELIVERY OF REGISTRATION CARDS*

*As previously mentioned, this has been one of the critical problems with the Concessionaire’s operations; the procedures that have somehow delayed delivery have been reactivated; we have established controls to keep a daily track of the production process, we have sustained conversations and established schedules to comply with the commitment of the timely delivery of cards and have made strong complaints to the provider for the significant backlog, however, to this date, we have been unable to recover and it is practically in worse condition than a month ago.*

*From a total of approximately 420,000 registration applications received in the course of this month approximately 242,000 registrations we have delivered to the provider Gemplus, of which only 12,500 have been produced and sent to the users. The situation is still serious. Adding to the situation is the fact that the provider [Gemplus] is also an important shareholder in the Concessionaire.*

*Once again we are seeing a problem of management control and this indicates the urgent need to structure the MANAGEMENT CONTROL function. The company Freysinnier y Morin has already been requested to provide a proposal with a view to institutionalizing the control of all the Concessionaire’s administrative and service processes.”*

4-160 **16.04.2001:** Mr Marín submitted a further written report on 16 April 2001, with comments on the Concessionaire’s financial status and an explanation of the strategies and measures adopted to improve the operation and future service of the Registry. Amongst those general conclusions presented in the report were the following:

*“First general conclusion. This first analysis shows that the technological infrastructure does not represent the most significant account asset although it supports the entire operation; paradoxically, since it is a financially sound operation, liquidity exceeds by far the normal requirements of its activity.*

[...]

*On the other hand it is important to draw the Second Conclusion [...] regarding the positive Treasury changes that enable current liabilities to be covered more than enough by current assets as of these dates.*

[...]

*Important changes such as cancellation of the KEON service, reduction of the AVANTEL service and termination of the Tecmarketing service lead us to a third conclusion, namely, to take the necessary action for the appropriate regrouping and relocation of the several cost items and accounts so that the operating costs may be reviewed more accurately.*

[...]

*Fourth conclusion: The imminent termination of the concession entails studying the total financial plan in order to forecast the return once all the services which are now incipient or which have not been provided are fully expedited.”*

It is to be noted that Mr Marín here refers to the “imminent termination” of the Concession. It is to be inferred that between his report of 1 February 2001 and this report of 16 April 2001, a decision was taken within the Secretariat to terminate the Concession, communicated to Mr Marín. This conclusion is confirmed by a later passage in the report of 16 April 2001 and other evidence to which the Tribunal returns below.

4-161 Mr Marín further informed the Secretariat that delays in the issuance of 340,000 registrations, in the aggregate, were “fully overcome” as of the date of his report.

4-162 However, Mr Marín also identified continuing difficulties resulting from the refusal of the Federal District and other state entities to cooperate with the Registry, noting as regards the registration of new cars (which had not been suspended under the decree of 15 September 2000):

*“Mr. Luis Young has been made aware of this matter and, in principle, it has been concluded that since there are no applicable rules clearly and specifically requiring owners of new cars to register them with RENAVE, there is no power to demand that they do so. As regards the above, I consider that our efforts in this respect will be unsuccessful since the responsibility to register is limited to the distributors or dealers that sell new cars.*

*We are concerned about the fact that the Federal District Government’s attitude of denial may be imitated by other entities in the Republic.”*

4-163 Finally, Mr Marín sought directions as to the further steps to be taken under his administrative intervention, adverting to a “warning” to him by the General Director of the National Vehicle Registry, Mr Young Fonseca:

*“It is publicly known that the population is waiting for significant changes in the service and operation of the RENAVE. Likewise the Concessionaire’s personnel is concerned about its future and that of its staff. Termination of the concession is presumed and the legal way in which the service will be continued or changed remains unknown. It is acknowledged that it is wholly unlikely that the present situation will be maintained for a long time.*

*In view of such reality and my duties I wish to tell you that I assume my obligation to support the Secretariat as regards all such matters as are deemed to be necessary and for that reason I hereby request that a hearing be held so that I may receive your guidelines and thus pave the way for the future transformation of this entity.*

*[...]*

*On Tuesday 10<sup>th</sup> of this current month [i.e. 10 April 2001] I received a warning from [the General Director of the National Vehicle Registry] [...] reading as follows:*

*'I require that in your capacity as controller of the public service of the National Vehicle Registry subordinate to this Secretariat of Finance, you limit your action to verify that Concesionaria Renave S.A. de C.V. guarantees security of the information contained in the National Vehicle Registry by observing the principles of confidentiality of the information and that you supervise Concesionaria Renave S.A. de C.V.'s management as regards the provision of the public service and inform this Secretariat of Finance of the course of supervision as established in the Agreement ....' dated September 15<sup>th</sup>, 2000.*

*I am not aware of the reason for the 'requirement' because this is not explained in the written notice in question. With all due respect and as you will understand I cannot accept such a requirement without a broad and satisfactory explanation thereon.*

*In view of the above, I request that I get a fair hearing so that I can understand the reasons for the requirement and, if pertinent, give you all the answers that may be necessary to clarify any misunderstanding regarding the difficult responsibility which has been conferred upon me.*

*You may be sure that I fully complied with the duties of my office. Likewise, I confirm to you that I remain at your disposal to tender my resignation to the office when circumstances may so require or when you may so decide."*

By the date of this report (16 April 2001), it is clear that active consideration was being given within the Secretariat as to how to terminate of the Concession Agreement in one form or another, including the dismissal of Mr Marín as the administrative intervener. As this report records, "Termination of the concession is presumed and the legal way in which the service will be continued or changed remains unknown"; but it was evidently to be linked, somehow, to the "security of the information contained in the National Vehicle Registry".

- 4-164 On the evidence adduced in these proceedings, it is equally clear that such consideration did not originate from Mr Marín but, rather, from new political figures within the Secretariat, including Secretary Derbez.
- 4-165 **04.05.2001:** On 4 May 2001, Mr Marín submitted his final report to Secretary Derbez, identifying further areas for improvement in the Concessionaire's work but stating that "the operation has been normalized".

4-166 Among those issues listed as “pending”, Mr Marín identified the following:

*“2.2.1 Agreement with the National Public Security Service, and/or otherwise agreements with the States’ Attorney’s Office regarding the exchange of information as to Vehicle Theft Notices or certification of Change of Ownership Notices. This is an essential tool in the quality and reliability RENAVE offers to users, to be supported by the timely certification of a vehicle’s ownership. Notwithstanding that in September 2000 the authorization registration [sic] in the second hand vehicle system was suspended, the natural aging of new vehicles in circulation from May 2000, requires certification of vehicle ownership in the national database, given the increasing number of changes in ownership. Without such a process in place, the RENAVE is unwarranted and lacks grounds to exist.*

*2.2.2 Agreement with the Tax Administration Service and/or otherwise, agreements with States and Municipalities to exchange information from their vehicle registries. Similarly to the previous item, the possibility of querying the system from across the whole country is beneficial and necessary for all the States as well as vehicle owners.*

*2.2.3 Reinstatement of the service of Change of Ownership Notice for New Vehicles beginning in May 2000. The incentive to reinstate this service through Distributors and Dealers and given the closure of over 2000 CTDs and CTDCs has not been fruitful. From October to present, only less than 100 Change of Ownership notices have been registered.”*

4-167 Mr Marín proposed the following strategic action, noting that “[a]ll the measures suggested are deemed feasible, although some of them are not directly dependent on the Concessionaire, and therefore it is not possible to define deadlines”:

*“4.1 Production of smart cards by Assemblers and delivery of smart cards with the vehicle of Distributors or Dealers.*

*4.2 Customization of smart cards at the Distributors and production of invoices therein to deliver them to owners with the vehicle.*

*4.3 Coordination agreements with S.A.T., S.N.S.P. and S.C.T.*

*4.4 New official incentives with States and Federal District Administrations for the acceptance and support of a National Vehicle Registry, with an electronic connection to their vehicle ‘registries’ at the state and municipal level, that renders a high quality public service to citizens overall.*

*4.5 In view of the uncertainty expressed by the public, users, and related organizations as to the future of the public service created by the National*

*Vehicle Registry Act, it is necessary to decide upon the future of the service and the Concession.*”

- 4-168 The Tribunal notes Mr Marín’s references to the current “uncertainty” over the National Vehicle Registry. It is also to be noted that Mr Marín emphasises a need by the Secretariat “to decide upon the future of the service and the Concession”. It was by now almost eight months since Secretary Blanco’s decrees of 15 September 2000 envisaging a temporary solution, limiting registration to new vehicles; the project for the National Vehicle Registry still required the registration of both new and used vehicles; the Concession remained in place, albeit limited to the registration of new vehicles; and the Secretariat was still searching for a means to terminate the Concession Agreement.
- 4-169 Shortly following Mr Marín’s report of 4 May 2001, he was replaced as the administrative intervener of the Concessionaire, thereby marking the beginning of the Secretariat’s second administrative intervention. The latter was of a quite different character. Mr Marín had not determined that there was any breach in the Registry’s security or other leakage of confidential information; he did not advise that there was any imminent peril to national security; and whilst he did identify several technical defects in the work of the Concessionaire, these were remediable and did not justify the termination of the Concession. The second intervener was instructed to pursue a different approach by the Secretariat, as the Tribunal recites below.

**(25) *The Second Administrative Intervention***

- 4-170 **18.04.2001:** On 18 April 2001, Mr Luis Pablo Monreal Loustaunau of the Secretariat prepared an internal memorandum to Secretary Derbez and others, including Dr María del Refugio González (General Director of the Secretariat’s Legal Service), concerning the first administrative intervention under Mr Marín. It was sharply critical of Mr Marín.

4-171 This memorandum read (inter alia) as follows:

*"Throughout the period of administrative intervention, 15 September 2000 to date), the intervener has been carrying out his tasks in the terms requested by this Ministry; however, given the time the intervention has lasted, I feel he has lost power and presence with the concessionaire.*

*This is detrimental to the intention of the intervention and is causing, among other things, problems in the information flow necessary for the process of valuing the concessionaire and terminating the concession. There is thus a need to take relevant steps to reinforce the process."*

Mr Monreal concluded his memorandum by proposing the appointment of a new administrative intervener. It is to be noted that the memorandum reflects a decision by the Secretariat to terminate the Concession, as at mid-April 2001. This conclusion is supported by the passages in Mr Marín's report of 16 April 2001: see above.

4-172 During this same period, i.e. between April and May 2001, Dr María del Refugio González (Dr. González) prepared an "Information Note" for Secretary Derbez "with reference to the possibility of seizing the RENAVE". Dr González was not a witness in these proceedings; but her high standing and good reputation in legal affairs was acknowledged by both sides. The fact that her legal advice was sought by the Secretariat is itself significant: it confirms that from a time in April 2001 onwards a team working at a senior level within the Federal Government was giving serious consideration to the requisition or termination of the Concession in one form or another. The content of her written advice provides further corroboration.

4-173 In her Note, Dr González made the following observations on the question posed to her for legal advice:



- “1. *In fact, Article 25 of the Law regarding RENAVE stipulates the seizure of the operations and installations centre, movable property, immovable property and equipment assigned for operating the Register, always and whenever ‘there is any imminent danger to national security, peace within the country or to the national economy’. From the perspective of the working team, none of these assumptions can be demonstrated for the time being. Moreover, one could consider the fact that the RENAVE Law does not indicate whether indemnity is appropriate; other laws which provide for seizures, in certain cases consider indemnity whilst in other cases they do not. Lastly, it is fitting to point out that in the case of RENAVE, there is no similarity either with the labour requisitions or with the bank interventions, since both have been developed in each applicable law.*
  
2. *From this perspective, it would be much closer to the law and much safer to begin work through intervention according to the terms of the intervention Agreement and leave seizure until a later stage, if this is the case. In our opinion, the intervener would be the one indicated to inform the Secretary if in the development of the tasks inherent in the intervention there are to be found elements which make it possible a) to revoke the dealership; b) to impose legal sanctions; c) to carry out the seizure.*
  
3. *It is possible that up to now intervention did not work adequately. However, this fact may have various explanations: a) the conditions in which the current intervener began; b) the personality of the intervener; c) the way in which the intervener is linked to the concessionaire and d) the uncooperative attitude of the latter. The new intervention is based on healthier grounds, whereby it seems sensible to expect positive results.*  
  
*[...]*
  
6. *It is necessary to point out that although seizure is an aspect provided for by the same law, according to the historical experience it was only resorted to in very specific cases with regard to imminent danger, which in the case of RENAVE would tend to be for national security or the economy. Seizure would be justified if the intervener were to find huge missing elements in the automobile register, misuse of information provided by individuals, handling of false documents, knowing that they were being duplicated for the benefit of third parties or some similar assumptions. If that is not so, the Ministry of the Economy would find it impossible to take any action.”*

Accordingly, this senior legal adviser was expressing, unambiguously, her opinion as to the lack of any present basis for the Requisition or Revocation of the Concession under Article 25 of the Act and, in particular, the absence of any grounds based on national security. Her advice also suggested an alternative strategy: first, the appointment of a new intervener and, subject to new and material information provided by that intervener, the possible seizure of the Concession “at a later stage”, if this is the case.

- 4-174 **07.05.2001:** On 7 May 2001, Ms María de la Esperanza Guadalupe Gómez-Mont Urueta was appointed as the new administrative intervenor, in succession to Mr Marín. Notwithstanding her political qualities and connections, she was a quite different kind of person from Mr Marín. It is clear that she acted at all times in strict accordance with the Secretariat’s instructions and objectives.
- 4-175 It is also clear on the evidence before this Tribunal that Secretary Derbez instructed Ms Gómez-Mont on her appointment to determine whether any reasons existed to revoke the Concession or otherwise adversely affect the Concessionaire. By itself, this was not necessarily an improper instruction; but, in the Tribunal’s view, it was the first step in a concerted pattern of malign conduct within the Federal Government which was to lead to the Concession’s Requisition on 25 June 2001 and its eventual Revocation on 13 December 2002. Such conduct was known to have no justifiable legal basis by the Respondent, acting by its Secretariat. Yet, a decision was reached by the Secretariat, by mid-April 2001, to ‘pull the plug’ on the Concession regardless of whether or not it was legally justified; and the manner and timing of such termination was dictated by a strategy calculated to minimise the risk of legal proceedings and the payment of compensation to the Concessionaire (including the Claimants).
- 4-176 The Tribunal records its regret that Secretary Derbez and his close colleagues at the Secretariat were not called by the Respondent as witnesses in these arbitration proceedings. It would have been helpful to the Tribunal to test the conclusions drawn from the contemporary documentation against their testimony, if different. As it is, the Tribunal can only decide these much disputed matters on the evidence adduced before it in these proceedings, as to which the contemporary documentation is conclusive.

**(26) The Requisition**

4-177 **25.06.2001:** On 25 June 2001, by decree, the Secretariat ordered the “requisition” of the Concessionaire’s operations on grounds of national security under Article 25 of the Act. No other grounds were advanced by the Secretariat at the time.

4-178 The decree ordering the Requisition provided as follows:

*“WHEREAS*

*[...]*

*That the deterioration in the operation of the public service of the National Vehicle Registry threatens national security since, as the legislator stated in the reasons for enacting the Law of the National Vehicle Registry, said Registry guarantees the protection of the rights of vehicle ownership of the Mexican people;*

*That by means of the Agreement published in the Official Gazette of the Federation on 29 August 2000, the Secretariat of Commerce and Industrial Development, now the Secretariat of the Economy, declared the technical intervention of the public service of the National Vehicle Registry, with the purpose of confronting the uncertainty generated among the users of the National Vehicle Registry and the public in general, in relation to the confidentiality of the information contained in the database necessary for the rendering of the service;*

*That the then-Secretariat of Commerce and Industrial Development, now the Secretariat of the Economy, determined the existence of circumstances preventing Concesionaria Renave, S.A. de C.V. from operating the service in an optimal fashion, which persisted, and therefore, by means of the Decree published in the Official Gazette of the Federation on 15 September 2000, declared, as a precautionary measure, the administrative intervention of the public service of the National Vehicle Registry, with the purpose of intervening not only the technical aspects related to the integrity and confidentiality of the database, but also the administration of the company;*

*That the results recently obtained during the aforementioned administrative intervention demonstrate that Concesionaria Renave, S.A. de C.V., has provided the public service of operation of the National Vehicle Registry in a deficient manner, and consequently the registry is not fully complying with its purpose, and as a consequence, not providing legal security to users of the same and not guaranteeing the confidentiality of information provided by them in relation to the vehicles, with imminent peril to national security;*

*That the deficient provision of the public service undertaken by Concesionaria Renave, S.A. de C.V., is due, amongst other things, to inadequate administration and operation practices, which, together with the lack of measures taken by the Concessionaire aimed at avoiding them may provoke deterioration of the security measures necessary to guarantee the adequate functioning of the Registry, which represents an imminent peril to national security, since it generates incongruities in the information contained in the Registry's database, and uncertainty with respect to the legal origin of the vehicles registered in it;*

*That the foregoing requires that the Federal Executive, through the Secretariat of the Economy, take immediate action to correct such practices, reorienting the operation of the public service by means of the requisition, which will allow the broadening of the controls currently available to the administrative intervention; and*

*That Article 25 of the Law of the National Vehicle Registry, grants the Secretariat of the Economy, the power to requisition the operations centre and other facilities, real estate, goods and equipment committed to the operation of the Registry, as well as to dispose of the personnel employed by the company that operates the registry, when imminent peril to national security exists, I have decided to issue the following:*

*DECREE FOR THE REQUISITION OF THE PUBLIC SERVICE OF THE OPERATION OF THE NATIONAL VEHICLE REGISTRY GRANTED IN FAVOUR OF CONCESIONARIA RENAVE, S.A. DE C.V.*

*ARTICLE FIRST.- The Federal Executive, through the Secretariat of the Economy, pursuant to Article 25 of the Law of the National Vehicle Registry, requisitions the operations centre and other facilities, real estate goods and equipment committed to the operation of the public service of the National Vehicle Registry performed by Concesionaria Renave, S.A. de C.V., due to the imminent peril to national security that its inadequate functioning represents.*

*[...]*”

- 4-179 **27.06.2001:** Two days later, on 27 June 2001, Secretary Derbez appointed Ms Gómez-Mont as the general administrator of the Requisition under this decree.
- 4-180 The factual chronology established by the Tribunal above, running from Secretary Blanco's decree of 29 August 2000 to the information note of Dr María del Refugio González and Mr Marín's final report of 4 May 2001 establishes that the Secretariat's invocation of "imminent peril to national security" was a pretence and known to be factually false to the Secretariat on 26 June 2001.
- 4-181 As to the conduct of this Requisition, it is unnecessary here to say much. In effect, the Secretariat, acting through Ms Gómez-Mont took over the running of the Concession, displacing the Concessionaire.
- 4-182 **25.04.2002:** On 25 April 2002, Mr Monreal wrote to Secretary Derbez concerning a report made by Ms Gómez-Mont two days earlier in which various deficiencies had been identified in the operations of the Concessionaire (this report was not, however, produced by the Respondent in these arbitration proceedings). In particular, Mr Monreal indicated apparent failures to comply or inconsistencies with the Act, the Concession Agreement and other applicable regulations.
- 4-183 It will be necessary later in this Award to return in detail to the Secretariat's overall conduct as regards the Requisition and its implementation from 25 June 2001 to 13 December 2002, when the Secretariat revoked the Concession. For reasons there set out, the Tribunal finds that during this period the Respondent was responsible for a pattern of conduct that can only be characterised as irrational, perverse and tainted with bad faith towards the Concessionaire.

(27) *The Revocation*

- 4-184 **13.12.2002:** On 13 December 2002, the Secretariat revoked the Concession Agreement.
- 4-185 In the decree revoking the concession, published several days later on 17 December 2002, the following reasons for the Revocation were identified by the Secretariat:

*“WHEREAS*

*[...]*

*On several occasions, Concesionaria Renave, S.A. de C.V., infringed the rules applicable to the Registro Nacional de Vehículos; therefore, pursuant to Sections 21, subsections III and 22, subsections I, V and IX of the Law of the Registro Nacional de Vehículos, on December 13, 2002, the Secretariat of Economy revoked the Concession Instrument of the public service of operation of the Registro Nacional de Vehículos, granted to Concesionaria Renave, S.A. de C.V.; such revocation was notified to Concesionaria Renave, S.A. de C.V. on December 16, 2002 and published in the Official Bulletin of the Federation on December 17, 2002;*

*One of the reasons for the revocation of the Concession Instrument of the public service of operation of the Registro Nacional de Vehículos consisted in Concesionaria Renave, S.A. de C.V.’s failure to implement the infrastructure required and the necessary systems for the public service of the operation of the Registro Nacional de Vehículos to be rendered in the manner provided for by the applicable rules; ...”*

- 4-186 It is necessary to return to these decrees as to Requisition and Revocation in detail later in this Award. It suffices to record that neither were justifiable on any factual basis in the previous work of Mr Marín, Dra del Refugio González and others, as adduced in these arbitration proceedings.
- 4-187 For reasons set out later in this Award, the Tribunal finds that, as regards the Revocation, the Respondent was responsible for further conduct that, like the earlier Requisition, can only be characterised as irrational, perverse and tainted with bad faith towards the Concessionaire.

- 4-188 As at 13 December 2002, the Concession had registered 2.2 million new vehicles. As a business concern, it could be regarded as profitable. It was still not, of course, registering used vehicles; the registration of new vehicles was therefore unduly remunerative (being intended to subsidise the costs of registering used vehicles); and it was not therefore operating as the National Vehicle Registry originally intended by the Respondent and, indeed, the Concessionaire. The Concession was effectively operating as a quite different and much more limited project, as it had since Secretary Blanco's decree of 15 September 2000.
- 4-189 As at 24 June 2001, immediately prior to the Requisition, there remained, objectively, a reasonable hope that the project, temporarily curtailed by Dr Blanco, could be restored as a National Vehicle Registry for both new and used vehicles operated by the Concessionaire - provided that the Respondent did not conduct itself unlawfully in breach of its obligations under the two BITs. There were, of course, many other difficulties facing the Concessionaire, flowing directly from the Cavallo incident and Dr Ramos' death. It is therefore necessary later in this Award to assess that objective hope: it was, in short, a 'possibility' and not a 'probability'.

**(28) *Legal Proceedings against the Federal Government***

- 4-190 Following the technical intervention initiated on 29 August 2000, the Concessionaire began several judicial and administrative proceedings in Mexico to challenge various acts and decisions of the Secretariat. None of the Claimants were parties to these proceedings; and none of their present claims under the two BITs were advanced in those proceedings by the Concessionaire.
- 4-191 On 20 September 2000, the Concessionaire initiated a review proceeding against the Technical Intervention. The Concessionaire contended that the Technical Intervention was not contemplated in any legal instrument and that the decree which authorized it established neither its scope nor its duration. The Secretariat ruled against the

Concessionaire on 8 January 2001, on the ground the Technical Intervention had been implicitly revoked by the decree ordering the First Administrative Intervention on 15 September 2000.

- 4-192 The Concessionaire also instituted an *amparo* against this First Administrative Intervention and the acts of the first intervenor (Mr Marín). On 13 December 2000, the Sixth District judge on Administrative Matters in the Federal District dismissed the case in regards to the acts of the intervenor and denied the *amparo*. The learned judge did not, in this proceeding, determine the legality of the intervention vis-à-vis the Concession Agreement. The Concessionaire filed a challenge against this ruling in April 2001.
- 4-193 On 31 August 2001, the Sixth Collegiate Tribunal on Administrative Matters of the First Circuit dismissed the challenge because the Concessionaire had not filed a copy of the Concession Agreement with the first instance judge.
- 4-194 On 30 October 2000, the Secretariat published the Rules of Operation of the Registry. The Concessionaire filed a review proceeding on 21 November 2000 concerning the adoption of the Rules of Operation, requesting a suspension of these Rules until the merits of its request regarding the Rules had been considered. The Secretariat dismissed this request for suspension on 28 November 2000.
- 4-195 The Concessionaire filed an *amparo* against the Secretariat's refusal to suspend the application of the Rules, which was denied on 18 January 2001 by the Second Judge on Administrative Matters of the Federal District.
- 4-196 On 20 February 2001, the Secretariat ruled against the Concessionaire and confirmed the Rules of Operation. On 2 May 2001, the Concessionaire filed an annulment claim before the Federal Court for Tax and Administrative Justice (the "TJFA") against the Secretariat's decision to confirm the Rules of Operation.
- 4-197 On 23 April 2003, the TJFA annulled the Rules of Operation and the Secretariat's administrative decision confirming them; and it ordered that the Concessionaire's complaint be heard.



- 4-198 The Secretariat filed an appeal from the TJFA's ruling for failure to consider the supervening event of the Revocation of the Concession Agreement (which had taken place on 13 December 2002). The TJFA's ruling was ordered set aside on 11 February 2004 by the Fourth Collegiate Tribunal on Administrative Matters of the First Circuit. The TJFA subsequently set aside its original ruling; and it suspended the annulment proceeding concerning the Rules of Operation pending the outcome of the annulment proceeding concerning the Revocation of the Concession Agreement.
- 4-199 Following several other challenges by both the Concessionaire and the Secretariat, the TJFA again annulled, on 11 February 2005, the Rules of Operation and the Secretariat's administrative decision. Following a final appeal by the Secretariat, the TJFA dismissed the case on 11 July 2005.
- 4-200 On 7 September 2001, the Concessionaire initiated an annulment proceeding before the TJFA against the Requisition of 25 June 2001, requesting the suspension of the requisition. On 3 June 2002, the request was denied by the TJFA. The Concessionaire initiated an *amparo* against this ruling, which was denied on September 2002. The Concessionaire then appealed this decision. The Concessionaire's appeal was dismissed on 26 May 2003 on the ground that the Requisition had ceased to exist as of 13 December 2002, when the Secretariat revoked the Concession Agreement. Following another round of pleadings, the TJFA confirmed the dismissal of these proceedings on 9 January 2005. The Concessionaire filed an *amparo* against this decision on August 2005 which was also denied on 9 February 2006.
- 4-201 On 7 March 2003, the Concessionaire filed an annulment proceeding against the Revocation of the Concession Agreement and requested the suspension of the order of Revocation. As of the date of this Award, it appears that this annulment proceeding remains pending before the TJFA. Accordingly, the TJFA has yet to decide on the legality of the Secretariat's Revocation of the Concession Agreement.
- 4-202 These several court proceedings in Mexico are complicated, lengthy and incomplete; and this summary omits other proceedings taken by other persons in regard to the concessionaire and the Secretariat. Save for one minor issue (to which the Tribunal

returns later below), the Tribunal considers these court proceedings to be irrelevant to the principal issues addressed in this Award. Moreover, although the Claimants complain of a denial of justice where the Mexican courts “bent over backwards” to defeat the Concessionaire’s rightful claims, the Claimants do not advance any claim for denial of justice in these proceedings [D1.56]; and accordingly the Tribunal does not here address it.

**(29) *The New National Vehicle Registry***

4-203 On 1 September 2004, the Public Register of Vehicles Act was published in the Official Gazette, repealing the 1998 Act under which the Concessionaire had operated. This new legislative framework prohibited the operation of the registry by private entities. However, Article 3 of this 2004 Act stipulated that all registrations, notices and other processes completed under the auspices of the former legislation remained fully valid and applicable. Accordingly, it appears that the Federal Government necessarily took the view that the adoption and transfer to the new registry of the Concessionaire’s registrations of new cars (in excess of two million) was administratively appropriate and posed no threat to national security, whether as an imminent peril or otherwise.

4-204 Thus, ten years after the initiative begun in 1994, Mexico was to acquire a national vehicle registry for both new and used vehicles as originally planned. The difference between the 1998 Act and this 2004 Act lay in the absence of any private concessionaire under the latter legislation. It is that essential difference and its reasons which gave rise to the present dispute between these Parties.

**(C) FURTHER FINDINGS OF FACT**

- 4-205 The Tribunal has set out above the principal chronology of factual events relevant to this Award. As already indicated, it will be necessary to return in more detail to specific aspects of this chronology later below.
- 4-206 This case, as was rightly submitted by Counsel at the main hearing, turns in substantial part on factual issues. The relevant facts relating to liability, causation and quantum, as determined by the Tribunal, are somewhat complicated and lengthy to relate, for which the Tribunal can here make no apology.

## ***PART V: ISSUE A – JURISDICTION***

### ***(01) INTRODUCTION***

- 5-1 The Respondent challenged the “competence”, or jurisdiction, of the Tribunal under Article 45 of the ICSID Arbitration (Additional Facility) Rules. The Claimants disputed such challenge.
- 5-2 The Tribunal has the power to rule on its competence in these arbitration proceedings under Article 45(1) of the Arbitration (Additional Facility) Rules. With the Parties’ consent, the Tribunal joined the Respondent’s challenge to the merits of the Parties’ dispute to be decided in this Award under Article 45(5) of the Arbitration (Additional Facility) Rules.

### ***(02) THE RESPONDENT’S CASE***

- 5-3 The Respondent raised two separate objections to the Tribunal’s jurisdiction over the Claimants’ claims pleaded in their Counter-Memorial, within the time-limit required by Article 45(2) of the Arbitration (Additional Facility) Rules.
- 5-4 *Talsud*: The first objection concerned the claims advanced by Talsud in these arbitration proceedings. Later, in its Rejoinder, the Respondent withdrew its objection concerning Talsud’s “standing” in view of the information contained in the evidential materials submitted by Talsud with the Claimants’ Reply (Rejoinder, para 128 at 40). This

information was confirmed by Counsel for Talsud on the first day of the main hearing and uncontested by the Respondent [D1.69].

5-5 *The Gemplus Claimants:* The Respondent maintained its second objection as regards the “standing” of the Gemplus Claimants: (i) Gemplus, (ii) SLP and (iii) Gemplus Industrial.

5-6 In summary, the Respondent contends that the continuous chain of ownership and nationality for their claims was broken with the legal effect, under international law and the France BIT, that each of these Gemplus Claimants lacks any standing to advance its claims; and that this Tribunal therefore lacks any jurisdiction, *ratione personae*, to decide the merits of any such claims against the Respondent in these arbitration proceedings.

5-7 *Gemplus Industrial:* The Gemplus Claimants contend that Gemplus Industrial has at all times been and remains a corporation constituted under the laws of Mexico, which merged with Gemplus Card International de Mexico SA de C.V. and Grupo Gemplus de Mexico on 31 October 2003 (the merged company remaining Gemplus Industrial); its share capital “has at all times been at least 99% owned by a French company” (Request for Arbitration, paragraph 11); and it is the legal owner of 20% of the issued share capital of the Concessionaire.

5-8 With regard to Gemplus Industrial (also described by the Respondent as “Gemplus Mexico”), the Respondent submits as follows (Counter-Memorial at 7-8):

“30. *Gemplus Mexico subscribed for 20% of the shares in Concesionaria (all of the Series “C” shares issued by the company).*

31. *Gemplus Mexico was and remains to the present day a Mexican company. At the time of the granting of the Concession it was owned by a French company, Gemplus, S.A.*

32. *It is trite law that in the absence of clear unambiguous treaty text to the contrary, a national of a State has no right to initiate an international claim against its own State.*

33. *Consistent with customary international law, Gemplus Industrial is not an “investor from the other Contracting Party” within the meaning of Article*

9, “Settlement of disputes between an investor of one Contracting Party and the other Contracting Party” of the Mexico-France Treaty.

34. Article 9 plainly distinguishes between the investor and its investment. In addition to its title, paragraph 1 states:

*This Article only applies to disputes between one Contracting Party [i.e., Mexico] and an investor of the other Contracting Party in relation to an alleged breach by the Contracting Party under this Agreement which causes loss or damage to the investor or his investment.*

35. This is further underscored by the article’s treatment of the interaction between local and international proceedings in paragraph 2. Article 9(2) states:

2. In relation to submission of a claim to arbitration:

a) *An investor of one of the Contracting Parties may not allege that the other Contracting Party has breached an obligation under this Agreement, both in arbitration proceedings in accordance with this Article and in proceedings before a competent judicial or administrative tribunal of the former Contracting Party who is party to the dispute.*

b) *Also, when a company from one of the Contracting Parties, which is a legal person owned or controlled by an investor from the other Contracting Party, alleges, during the course of proceedings before a competent judicial or administrative tribunal of the Contracting Party involved in the proceedings, that the Contracting Party has breached an obligation under this Agreement, the investor may not allege the same breach in arbitration proceedings under this Article.*

36. Article 9 does not permit a national of a State to submit an international claim against its own State.”

*[The Respondent’s emphasis; footnotes omitted]*

5-9 Gemplus: The Gemplus Claimants submit that Gemplus is a corporation organised under the laws of France; that it held (until 31 October 2003) 99% of the issued share capital of Gemplus Card International de Mexico SA de C.V., which in turn held 99% of the issued share capital of Gemplus Industrial; and that from 31 October 2003 to 27 April 2004, Gemplus held 99% of the issued share capital of Gemplus Industrial.

5-10 The Respondent contends that Gemplus (described by the Respondent as “Gemplus France” and also known as “GSA”) has no standing to bring its claims, for the following reasons (Counter-Memorial at 8-9):

“38. *Gemplus France initially had standing to advance this claim because, as a French national, it owned and controlled Gemplus Mexico [i.e. Gemplus Industrial]. However, on 22 March 2004, Gemplus France entered into a Stock Purchase Agreement to sell to a Luxembourgian company, Gemplus International S.A. (hereinafter “Gemplus Luxembourg”), all or substantially all the issued and outstanding shares of a number of its subsidiaries with effect as of 1 January 2004.*

39. *The subsidiaries listed in Exhibit A to that Stock Purchase Agreement included Gemplus Mexico, and therefore, as of 1 January 2004, the French owner of the Mexican enterprise, which originally held the 20% shareholding interest in the Concessionaire, transferred it [sic: its] shares to a Luxembourgian national.*

40. *With the transfer of the ownership of Gemplus Mexico to a Luxembourgian company, Gemplus France lost its standing to advance an international claim in respect of that enterprise’s interest in the Concessionaire.”*

*[Footnotes omitted]*

5-11 The Respondent submits that Gemplus Luxembourg (also known as “GISA”) has no standing to advance a claim under a treaty between Mexico and France for the obvious reason that it is a national of Luxembourg (not France); and, indeed, Gemplus Luxembourg is not named as a claimant party to these arbitration proceedings. It is for this reason, in the Respondent’s submission, that Gemplus Luxembourg transferred ownership of Gemplus Industrial back to its French affiliate, SLP.

5-12 *SLP*: The Gemplus Claimants contend that SLP is a corporation organised under French law; that on 27 April 2004 Gemplus transferred all its shares in Gemplus Industrial to SLP; and that, accordingly, SLP became and remains the holder of 99% of the issued share capital of Gemplus Industrial.

5-13 The Respondent contends that SLP lacks standing to bring any claim because the chain of nationality required under the France BIT was severed when Gemplus transferred ownership in Gemplus Industrial to Gemplus Luxembourg. In the Respondent’s

submission, SLP's claim is barred by the principle *nemo dat quod non habet*, i.e. no one may transfer better title than he has.

5-14 In advancing this argument, the Respondent describes the transfer of ownership in Gemplus Industrial as follows (Counter-Memorial at 9-11):

"45. *Mr Salgado [of Gemplus] testifies that:*

12. *On 27 April 2004 Gemplus transferred all its shares in Gemplus Industrial to SLP. SLP continues to be the holder of more than 99% of the share capital of Gemplus Industrial carrying voting rights and it controls Gemplus Industrial by virtue of this shareholdings. I attach charts indicating the changes in the corporate structure related to Gemplus Industrial from the date of its incorporation [A19].*
46. *The first sentence of this paragraph can easily be misinterpreted. The reference to "Gemplus" should be understood in the following manner: Gemplus Luxembourg, which five weeks previously had purchased the shares of Gemplus Mexico with effect as of 1 January 2004 gave instructions to the former owner to transfer the shares of Gemplus Mexico to SLP. By the express terms of the Share Purchase Agreement (see section II.B.2), with effect as of 1 January 2004, the "Seller hereby irrevocably sells, conveys and assigns, and Purchaser purchases and accepts, the issued and outstanding stock of the Transferred Subsidiaries", including those of Gemplus Luxembourg, which later exercised its right under section 7.1 of the Share Purchase Agreement to "designate an affiliate to whom the Seller shall transfer the Shares with respect to the applicable Transferred Subsidiary."*
47. *The charts attached to Mr Salgado's witness statement omit to indicate that, between 31 October 2003 (Mr Salgado's fourth chart) and 27 April 2004 (his fifth chart, this being the date of the designation of SLP as the holder of the shares in Gemplus Mexico), the shares of Gemplus Mexico were exclusively owned by Gemplus Luxembourg.*
48. *This was done by means of an "Acknowledgement" agreement pursuant to the Share Purchase Agreement with effect "as of April 27, 2004." In the Acknowledgement, Gemplus Luxembourg designated an affiliate transferee "for the purchase of the shares of Gemplus Industrial S.A. de C.V."*
49. *An updated confidential Memorandum of Understanding ("MOU") between Gemplus Luxembourg, Gemplus France, Gemplus Mexico, and SLP sets out the general terms governing the transfer of Gemplus Mexico*



*to SLP. This MOU is exclusively concerned with the parties' attempt to resuscitate the requisite standing to bring the international claim.*

50. *SLP, a once operating company that was inactive at the time of the Acknowledgement, was selected because of its French nationality. Paragraph 5 of the MOU states:*

5. *The parties acknowledge that SLP is within the group of companies affiliated with GISA (the "Gemplus Group") ["GISA" is the acronym for Gemplus Luxembourg] and has had significant operational activities. Those prior operations for the Gemplus Group ceased in or before the year 2003. SLP remains a suitable entity to act as a designated transferee for GISA and for the purposes of receiving and holding the Shares in connection with the Stock Purchase Agreement and this Memorandum. SLP shall not need any employees for any of the activities it may have as a designated transferee of the Shares.*

51. *Paragraph 6 then refers to the fact that the present dispute concerning the Concessionaire arose with Mexico and reflects the agreements by the parties to the MOU:*

*To the fullest extent permitted by law, GSA [Gemplus France] and Gemplus Industrial [Gemplus Mexico] retain all rights they currently have in relation to the Claims and there shall be no effect on such rights by virtue of the transfer of the Shares to SLP. SLP shall provide all assistance and take all necessary action and sign all documents, including the joining of any legal proceedings, such as any arbitration, brought in connection with the Claims ("Legal Proceedings") and act jointly and cooperate with GSA and Gemplus Industrial in connection therewith, as may be requested by GSA and Gemplus Industrial.*

52. *The purport of this clause is of no legal effect because Gemplus France and Gemplus Mexico have no right to the claims (Gemplus Mexico never had any rights in the first place, and Gemplus France lost its rights in the claims when it irrevocably conveyed ownership in Gemplus Mexico to Gemplus Luxembourg). Nor can they eliminate by means of a contract the international legal effects of the transfer of ownership of Gemplus Mexico to Gemplus Luxembourg. [...]*

53. *The MOU also contemplated that SLP might not be effective for the transactions contemplated thereunder to be fully effective and enforceable to the satisfaction of the Luxembourgian company. Accordingly, Gemplus Luxembourg retains the right to revoke the transfer and to designate a different transferee:*

10. *In the event that SLP is unable to complete actions reasonably necessary for the transactions contemplated hereunder to remain fully effective and enforceable in manner to the satisfaction of GISA, then GISA shall designate a different transferee (including, at its election, GISA itself) and the Parties will take all actions reasonably requested to effectuate the transfer of the Shares to such alternate transferee so as to have the same economic and the same effective date as of any previously made or intended transfer.*
54. *The MOU was executed under the laws of the Grand Duchy of Luxembourg and the competent courts of that State have sole and exclusive jurisdiction over any legal proceedings arising thereunder.”*

*[The Respondent’s emphasis; footnotes omitted]*

5-15 The Respondent further submits, by reference to the language of the France BIT and international law, that continuous and uninterrupted nationality was not maintained up to the submission of SLP’s claim to these arbitration proceedings (Counter-Memorial at 11-12):

- “55. *Article 9(7) of the Mexico-France BIT requires the Tribunal to resolve this dispute in accordance with the terms of the Agreement and “applicable rules and principles of international law”. Those include the rules of customary international law which continue to apply to relations between France and Mexico except to the extent that they are varied by treaty.*
56. *One such rule of customary international law is the principle of “continuous nationality”, described by Oppenheim’s as follows:*

*It may accordingly be stated as a general principle that from the time of the occurrence of the injury until the making of the award the claim must continuously and without interruption have belonged to a person or a series of persons (a) having the nationality of the state by whom it is put forward, and (b) not having the nationality of the state against whom is [sic: it is] put forward.*

57. *Brownlie cites this passage with approval. He notes that some argue that the rule does not require continuous nationality from the injury up to the date of the award (the dies ad quem). Brownlie comments:*

*The first part of the rule of continuity does not give rise to much difficulty: the relevant nationality must exist at the time of injury. The second part of the rule is variously stated in terms of*

*nationality continuing until the 'presentation of the award', or the filing of a claim before a tribunal, or the formal presentation of the diplomatic claim in the absence of submission to a tribunal. However, the majority of governments and of writers take the date of the award or judgment as the critical date.*

58. *Regardless of where the dies ad quem falls between date of presentation and date of the award, there is consensus that continuous and uninterrupted nationality must exist at a minimum until the presentation of the claim or its submission to arbitration. In this case the claim was submitted to arbitration on 10 August 2004, after ownership was transferred to Gemplus Luxembourg.*

59. *With respect to the assignment of claims, Brownlie notes:*

*If during the critical period a claim is assigned to or by a non-national of the claimant state, the claim must be denied. However, assignment does not affect the claim if the principle of continuity is observed.*

60. *Oppenheim's agrees:*

*In cases . . . of assignment, a claim will normally be allowed if the continuity of nationality is maintained and disallowed if it is not.*

61. *In this case, continuity of nationality was not maintained in the critical period. With the transfer of ownership of Gemplus Mexico, the claim passed from a French company to a Luxembourgian company and then back to another French company (and even then only conditionally). In short, to use Brownlie's terms, the continuous nationality rule is triply offended because the claim has been assigned to a non-national and by a non-national of France and it remains susceptible to being further reassigned by that non-national."*

*[The Respondent's emphasis; footnotes omitted]*

5-16 The Respondent concluded its written submissions with a lengthy passage from the NAFTA award in *The Loewen Group of Companies v. United States*. The tribunal there decided that a change in the nationality of the claimant corporation, by virtue of a corporate reorganization midway through the arbitration, was fatal to that claim as a matter of jurisdiction under Chapter 11 of NAFTA (Counter-Memorial at 13-14).

### **(03) THE GEMPLUS CLAIMANTS' CASE**

5-17 *Gemplus Industrial*: The Gemplus Claimants contend that the Respondent's submissions with regard to the standing of Gemplus Industrial to bring its claim are flawed in several material respects.

5-18 The Gemplus Claimants take issue with the Respondent's interpretation of Article 9 of the France BIT (Reply at 15-17):

"35. *To begin with, it is submitted by the Gemplus Claimants that Article 9 must be read as being subject to the definition of "Investor" in Article 1. The heading of Article 9 reads as follows:*

*'Resolution of disputes between an Investor from one of the Contracting Parties and the other Contracting Party.'*

36. *The reference to "Investor" in this heading requires reference to be made to the definition in Article 1. Article 9 must be read by reference to Article 1, which defines this word. A failure to do so would otherwise leave the term "Investor" bereft of a definition.*

37. *By Article 1(2)(b) of the BIT an "Investor" includes:*

*'any moral entity constituted in the territory of one of the Contracting States in accordance with the laws of that country and with its registered office in that country, or directly or indirectly controlled by nationals of one of the Contracting Parties, or by moral entities which have a registered office within the territory of one of the Contracting Parties and are constituted in accordance with the laws of that country. A moral entity is deemed to be controlled if the majority of its issued shares carrying voting rights is held by a national or a moral entity which has its registered office within the territory of a Contracting Party and is constituted in accordance with the laws of that Contracting Party.'*

38. *Gemplus Mexico [i.e. Gemplus Industrial] is, for the purposes of this definition, a moral entity directly or indirectly controlled by moral entities which have their registered office within the territory of one of the Contracting Parties (namely Gemplus, S.A. and/or SLP) and are constituted in accordance with the laws of that Contracting Party. It is deemed to be controlled as provided in the last sentence of that Article 9(2)(b) because the majority of its issued shares carrying voting rights is*

*held by a moral entity which has its registered office within the territory of a Contracting State (France) and is constituted in accordance with the laws of that Contracting State (France).*

39. *This provision permits the nationality of an investor to be identified by the Contracting State in which its controllers have their registered office and are constituted. Applied to a claim by a French company, the definition extends to a company constituted and with its registered office in France or to a company directly or indirectly controlled by one or more companies having their registered office in and constituted in France.”*

5-19 The Gemplus Claimants submit that there is no issue between the Parties as to the ownership and control by Gemplus of Gemplus Industrial up to 1 January 2004. Thus, the Claimants contend that, “[s]ubject to the nationality of the controller being a French company, Gemplus Mexico is a company owned or controlled by a Contracting Party other than the Respondent and is therefore an investor for the purpose of Article 1, paragraph 2(b) of the [France] BIT” (Reply at 17).

5-20 *Gemplus:* The Gemplus Claimants similarly dispute the Respondent’s allegation that Gemplus has no standing to bring its claim. The Claimants submit that the relevant issue is not whether Gemplus sold its shares under the Stock Purchase Agreement (“SPA”), but rather whether that sale affected its right to bring its present claims under the France BIT.

5-21 The Gemplus Claimants set out their submissions as follows (Reply at 19-20):

- “46. *The primary contention of the Gemplus Claimants is that Gemplus France retained its rights to the claims in this arbitration, notwithstanding the SPA. This is because Gemplus Mexico and Gemplus France entered into a Memorandum of Understanding (“MOU”), to which Gemplus Luxembourg is also a party, which contains the following provision:*

- ‘7. *The Parties acknowledge that prior to the transfer of the Shares in connection herewith, there arose a dispute with the Government of the United States of Mexico concerning Concesionaria Renave S.A. de C.V. (“Renave”). Renave was incorporated as a consequence of the granting by the Mexican government to Gemplus Industrial and its partners of the concession title to manage and operate the National Vehicle Registry of Mexico and which was subject to a series of confiscatory actions in the years 2000 through 2002, all of which have given rise to claims regarding such actions (the*

*“Claims”). To the full extent permitted by law, GSA [Gemplus France] and Gemplus Industrial [Gemplus Mexico] retain all rights they currently have in relation to the Claims and there shall be no effect on such rights by virtue of the transfer of the Shares to SLP. SLP shall provide all assistance and take all necessary action and sign all documents, including the joining of any legal proceedings, such as any arbitration, brought in connection with the Claims (“Legal Proceedings”) and act jointly and co-operate with GSA and Gemplus Industrial in connection therewith, as may be requested by GSA and Gemplus Industrial.’*

47. *It is the Claimants’ case that the impact of this provision could not be clearer: the shares were transferred by Gemplus France, but the right to bring this claim was not.*
48. *The response of the Respondent is that this clause has no legal effect for three reasons:*
- (i) Gemplus Mexico has no rights in the first place. This is wrong for the reasons given above.*
  - (ii) Gemplus France lost its rights when it transferred the shares under the SPA. Leaving aside the identity and nationality of the transferee, this assertion is self-serving: it ignores the provision on which the Gemplus Claimants rely. The SPA must be read together with the Acknowledgment and the MOU to obtain an understanding of what the parties did and intended: the shares were transferred but the rights in relation to the claims in this arbitration were expressly retained by Gemplus France, “to the fullest extent permitted by law”. No reasons are advanced by the Respondent to explain why effect should not be given to the plainly expressed intentions of the parties to the MOU; and*
  - (iii) The Gemplus companies cannot “eliminate by means of a contract the international legal effects of the transfer of ownership of Gemplus Mexico [...]”. No attempt is made to define “international legal effects” or to explain how or why these should inhibit the parties in defining what rights in addition to the shares are transferred or retained. It is accepted by the Gemplus Claimants that the transfer of shares to a non-French company would not give any rights to the transferee to make a claim under the Mexico-France BIT. But there is no reason why a French transferor should not retain the right to pursue claims which it is acknowledged by the Respondent were validly held by it up to the date of the transfer.”*

*[Footnotes omitted]*

5-22 In the alternative, contrary to their primary case, the Gemplus Claimants submit that should the Tribunal determine that Gemplus has not retained the right to pursue its claims under the France BIT, the Tribunal must necessarily find that such right is now held by SLP.

5-23 *SLP*: With regard to the Respondent's argument that the transfer of shares by Gemplus in Gemplus Industrial to Gemplus Luxembourg and then on to SLP severed the chain of nationality required under the France BIT and international law, the Gemplus Claimants contend that such a conclusion may only be reached on a "highly selective reading of the SPA and Acknowledgement". The Claimants submit that these documents instead support a different conclusion (Reply at 21-22):

*"51. ... These documents make it clear that:*

- (i) The transfer of shares under the SPA is expressly made "Subject to the Terms of this Agreement" (Clause 1.1);*
- (ii) The SPA is intended as a "framework agreement" and is subject to "Additional Agreements" as defined in Clause 7.1 (third recital);*
- (iii) The Additional Agreement provides for the designation of an affiliate to whom Gemplus France shall transfer shares in Gemplus Mexico instead of Gemplus Luxembourg;*
- (iv) Such designation was done by the Acknowledgment, whereby SLP is identified as the Transferee;*
- (v) Gemplus France as seller represents and warrants that it is the lawful owner of the shares on the Closing Date (Clause 3.5);*
- (vi) The Closing Date is "as the Parties may agree" (Clause 2.1). By the terms of the Acknowledgment, that date is 27 April 2004. This is confirmed in the MOU (Clause 12); and*
- (vii) The governing law of the SPA is that of Luxembourg."*

5-24 The Gemplus Claimants rely upon the expert opinions of Mr Kinsch and Mr José Antonio Chávez Vargas in regard to the legal effects produced by the transfer of ownership in Gemplus Industrial under the SPA, Acknowledgement and MOU under the laws of Luxembourg and Mexico respectively (Reply at 22):

“52. *The Gemplus Claimants refer to and rely on the opinion of Mr Patrick Kinsch, a member of the Luxembourg bar and Adjunct Professor of Law at the University of Luxembourg. His view is that:*

*“[...] In order to decide that property has passed to a specific party, the Arbitral Tribunal would have to find both that (i) under Luxembourg law as the law applicable to the contract, property was intended to pass, and that (ii) under Mexican law as the lex situs such steps as may be necessary to effectuate the passing of title in the shares have been taken. The property will have passed only after the requirements of both laws have been satisfied.”*

53. *Having considered the general rules of Luxembourg law on the transfer of ownership by contract of sale and the wording of the SPA, the Acknowledgment and the MOU, Professor Kinsch reaches the following conclusion:*

*“It follows from the Stock Purchase Agreement and from the Acknowledgment that the description, given in the Memorandum of Understanding and in Mr Salgado’s witness statement, of the transfer of ownership in the shares in Gemplus Industrial, as having taken place not between Gemplus and Gemplus International, but between Gemplus and SLP, is entirely in line with Mexican law. In fact, under Luxembourg law the theory of the Counter-Memorial, according to which there has been, by virtue of the signing of the Stock Purchase Agreement, an immediate passing of ownership of the shares of Gemplus to Gemplus International, is contrary to the parties’ clearly expressed intention and therefore also contrary to Luxembourg law.”*

54. *To the extent that the position under Mexican law may be relevant to this question, the Gemplus Claimants refer to and rely on the opinion of Mr José Antonio Chávez Vargas, an experienced Mexican business lawyer and partner in the Mexico City office of Thacher Proffitt & Wood, S.C. Mr Chávez, having examined the Gemplus Industrial share certificates and share register, expresses his conclusion as follows:*

*“41. The share certificates, endorsements and other means employed to implement the stock transfer, as well as the structure used for the transaction and the intention of the parties expressed in the Agreement, the Acknowledgment and MOU, all point clearly to the conclusion that the shares in Gemplus Industrial were transferred directly to and are held by SLP (with the exception of the three shares transferred to Gemplus Finance, S.A.) and that no shares in Gemplus Industrial were transferred to Gemplus International at any time.”*



*[Footnote omitted]*

5-25 The Gemplus Claimants invited the Tribunal to accept the conclusions of these independent legal experts and to conclude that the shares in Gemplus Industrial were transferred not to Gemplus Luxembourg but to SLP and that, therefore, the continuous chain of ownership and nationality of the claim has not been broken under the France BIT or international law.

#### ***(04) THE TRIBUNAL'S ANALYSIS***

5-26 *Talsud*: Given the Respondent's revised and final position as regards Talsud, it is not here necessary for the Tribunal to address the Respondent's original challenge to Talsud's claims, save to confirm and record that the Tribunal decides to assume jurisdiction over all Talsud's claims against the Respondent, having competence to do so.

5-27 *The Gemplus Claimants*: As to the Gemplus Claimants, it is convenient to consider their three respective positions in turn.

5-28 *SLP*: The expert evidence of Mr Kinsch on Luxembourg law and Mr Chávez on Mexican law was not contravened by any expert evidence or equivalent submissions by the Respondent. In any event, the Tribunal is persuaded by these experts' legal opinions as to the effect of the SPA, the MOU and related documentation, together with their express terms. As interpreted under these respective laws, as the SPA's applicable law and as the *lex situs*, the Tribunal concludes that the SPA, the MOU and related documentation transferred the shares in Gemplus Industrial (Gemplus Mexico) to SLP and not to Gemplus International (Gemplus Luxembourg). This transfer did not thereby break the 'national chain of ownership' under the France BIT, as invoked by the Respondent.

- 5-29 However, as determined below, SLP never acquired the right to bring claims against the Respondent relating to the present dispute: that right remained with Gemplus. Accordingly, SLP can have no claims against the Respondent under Article 9 of the France BIT. Whilst the Tribunal has jurisdiction to decide SLP’s pleaded claims in these arbitration proceedings, such claims must fail *in limine* on the Claimant’s primary case
- 5-30 *Gemplus Industrial*: It is common ground between the Parties that Gemplus Industrial (Gemplus Mexico) owns 20% of the shareholding in the Concessionaire, that Gemplus Industrial was and remains a legal person, constituted in Mexico in accordance with the laws of Mexico and with its registered office in Mexico. It is not disputed that at different times Gemplus and SLP, directly or indirectly, controlled Gemplus Industrial; and that both Gemplus and SLP were and remain legal persons, constituted in France in accordance with French law and with their registered offices in France.
- 5-31 On these facts, the Tribunal considers that Gemplus Industrial is an “Investor” within the definition provided by Article 1(2)(b) of the France BIT Article 1.2.b) of the France BIT (Albeit somewhat differently translated from the text cited above from the Claimants’ submissions, the BIT provided: “The term ‘investor’ means: (b) any legal person organized in the territory of one of the Contracting Parties in accordance with the laws of that Contracting Party and having its seat in the territory of that Party, or directly or indirectly controlled by nationals of one of the Contracting Parties, or by legal persons which have their seat within the territory of one of the Contracting Parties and are organized in accordance with the laws of that Contracting Party. A legal person is deemed to be controlled if the majority of its issued shares carrying voting rights is held by a national or a legal person which has its seat within the territory of a Contracting Party and is organized in accordance with the laws of that Contracting Party”).
- 5-32 However, as a Mexican legal person, Gemplus Industrial is not an investor “from the other Contracting State” in a dispute with the Respondent under Article 9(1) of the France BIT. It provides specifically: “This article applies *only* to disputes between *one* Contracting Party and investors from the *other* Contracting Party ....” [emphasis

added]. Accordingly, Gemplus Industrial cannot advance its own claims against the Respondent under Article 9 of the France BIT; and the Tribunal has no jurisdiction to decide any of its own claims pleaded in these arbitration proceedings.

- 5-33 *Gemplus*: Gemplus (Gemplus France) transferred its shares in Gemplus Industrial under the SPA and related documentation, subject to the MOU. The legal effect of the MOU, as those contracting parties manifestly intended, was such that Gemplus retained all rights to maintain its existing claims as advanced in these proceedings against the Respondent under Article 9 of the France BIT. The MOU's express qualification "to the full extent permitted by law" was met in this case under the applicable laws of Luxembourg and Mexico, as presented to the Tribunal by Mr Kinsch and Mr Chávez and not challenged by the Respondent.

#### ***(05) THE TRIBUNAL'S DECISION***

- 5-34 In conclusion, for the above reasons, the Tribunal decides to assume jurisdiction over all the claims advanced against the Respondent by Gemplus (i.e. Gemplus S.A., the First Claimant in ICSID No ARB(AF)/04/03), having competence to do so, as with all Talsud's pleaded claims in ICSID Arb (AF)/04/04; the Tribunal decides that it has no jurisdiction in regards to any claims pleaded by Gemplus Industrial (i.e. Gemplus Industrial S.A. de C.V.); and, whilst the Tribunal has jurisdiction over the claims pleaded by SLP (i.e. SLP S.A.), the latter's claims must fail *in limine* on the primary case advanced by the Gemplus Claimants themselves, including, of course, SLP itself.
- 5-35 Accordingly, from henceforth in this Award when considering the merits of the several claims brought by the Claimants against the Respondent in these arbitration proceedings, the term "Claimants" refers only to Gemplus and Talsud.

## ***PART VI: ISSUE B – LIABILITY: GENERAL APPROACH***

### ***(01) INTRODUCTION***

6-1 This case is factually and legally complicated, as already noted earlier in this Award. Although the Tribunal here seeks to separate out and decide the individual issues raised by the Claimants' substantive claims and the Respondent's substantive defences, it is helpful first to set out the general approach taken to the merits of this case, and disputed, by the Claimants and the Respondent respectively.

### ***(02) THE CLAIMANTS' CASE***

6-2 *General Approach:* The Claimants preface their substantive arguments with the following general comments (Memorial at 91-92):

“269. *First, even though the facts are related, the Claimants' approach each of these claims on the basis that it is distinct and free-standing, so that the establishment of one is in no case dependent upon the establishment of another.*

270. *Second, the Claimants recognise that the obligations in the two BITs upon which they rely are not necessarily identical in the way in which they have been drafted. The Claimants submit that it is appropriate to proceed on the basis that there is no material difference between the legal obligation*

*imposed by the two sets of provisions. Where there is such difference the Claimants will spell them out.*

271. *Third, it is appropriate to make the general factual point that Mexico failed to fulfill its obligations under the Concession Agreement and – distinctly – it failed to fulfil its obligations under the BITs. Although these two sets of failure exist in relationship to each other, the violation of the obligations under the BITs is not dependent upon finding any violation of the Concession Agreement or relevant parts of Mexican law. Having granted the Concession Agreement and permitted the Concessionaire to operate, Mexico failed, through the Secretariat or otherwise, to establish the cooperation arrangements that were essential to the effective operation of the venture, and it failed, through the Ministry of Security, to provide information required by the Concessionaire to verify data received on used vehicles. It also proceeded to take a number of measures that were intended to have – and did have – the effect of frustrating the venture and bringing it to an early conclusion. Initially, these measures constituted the arbitrary and unfair intervention in the operations of the Concessionaire and the curtailment of the shareholders’ powers of management, in particular through the Technical Intervention and the Administrative Intervention, as well as the failure to promulgate the Rules of Operation in a timely manner. Subsequently, the measures led to the Seizure of the Concessionaire, the Revocation of the Concession Agreement and the expropriation and unlawful interference with the investors’ assets, including their rights in relation to the Concession Agreement. At no time did Mexico offer due and fair compensation.*
272. *There can be no question but that each and every one of these measures is directly attributable to Mexico, acting through the Secretariat, and engages its responsibility in respect of the obligations arising under the BITs. Each and every one of the acts and omissions complained of were those of federal Mexican government ministries and authorities including, in the case of the seizure of the Registry, measures taken with the assistance of the Mexican Federal Police which took control of access to and from the Concessionaire’s premises. There is no issue in these proceedings about the responsibility of provincial or other levels of government.”*

6-3 The Tribunal notes the Claimants’ statement in Paragraph 272 (last cited above) that no issue arises from their Claims regarding the Respondent’s responsibility for “provincial or other levels of government”, e.g. thereby excluding the Respondent’s state responsibility for any acts of the Government of the Federal District of Mexico.

6-4 The Claimants contend that they have satisfied all of the requirements for bringing these arbitration proceedings. They assert that any proceedings brought before the Mexican courts have been brought by the Concessionaire, as a “juridically distinct person”, relating to alleged violations of Mexican national law and the Concession Agreement as opposed to violations of the BITs. In this regard, the Claimants submit the following (Memorial at 82-83):

*“246. Talsud has not submitted the present dispute (concerning violations of treaty obligations) against Mexico on behalf of the Concessionaire or any other Party nor has it instituted proceedings before any administrative or judicial court. Such administrative and judicial actions as have been filed in Mexican courts have been brought by the Concessionaire, a juridically distinct entity from Talsud (and the other Claimants), and they relate to disputes arising only under Mexican law and not in relation to the Argentina BIT. Talsud does not control the Concessionaire and the proceedings brought by the Concessionaire do not – and cannot – affect the international law cause of action that is the basis of Talsud’s dispute with Mexico in relation to its investment. Accordingly, neither Article 10.3 of the Argentina BIT nor Article 1.4 of the Appendix can have the effect of precluding these proceedings.*

*[...]*

*248. The Gemplus companies have not brought any action against Mexico before any administrative or judicial court and have not raised any claim alleging breach of treaty before such courts. As indicated above, the administrative and judicial actions which have been filed in Mexico concerning the Concession Agreement have been brought by the Concessionaire, a juridically distinct entity from the Claimants, and they do not give rise to or affect the treaty claims and the international law causes of action that are the subject of these claims and disputes. Moreover, the Gemplus companies do not control the Concessionaire.*

*249. As described above [...], the Concessionaire has brought several judicial actions against the Government of Mexico before various Mexican courts. At no point in any of these proceedings have the provisions of either one of the BITs been invoked by the Concessionaire, and they could not be invoked. The purpose of the judicial actions brought by the Concessionaire is fundamentally different from the purpose of these arbitration proceedings. It is the Claimants’ status as investors under the BITs that allows them to bring these arbitration proceedings, and any success they may have would bring benefits that will be limited by the terms of the BITs to them. Together, Talsud and the Gemplus companies do not control the Concessionaire.”*

6-5 *Treaty v Contract Claims*: The Claimants dispute the Respondent’s characterization of their claims in these proceedings as “an international claim [...] based on a contractual relationship between investors and the State”, contending rather that their case “is based on Mexico’s violations of various provisions of the two BITs” under international law (Reply at 100, Counter-Memorial at 16).

6-6 As regards the relationship under international law between treaty and contract claims, the Claimants cite the now well-known passage from the ICSID Annulment Ad Hoc Committee in *Compañia de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* (Memorial, para. 243 at 81):

“95. As to the relation between breach of contract and breach of treaty in the present case, it must be stressed that Articles 3 and 5 of the BIT do not relate directly to breach of a municipal contract. Rather they set an independent standard. A state may breach a treaty without breaching a contract, and vice versa, and this is certainly true of these provisions of the BIT. The point is made clear in Article 3 of the ILC Articles, which is entitled “Characterization of an act of a State as internationally wrongful”: The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

96. In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán. For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.”

*[The Claimants’ emphasis; footnotes omitted]*

6-7 However, although the Claimants contend that their claims are only treaty-based on the France and Argentina BITs, the Claimants also contend that the Tribunal should take into account the underlying factual circumstances of their claims, including the contractual relationship between the Concessionaire and Mexico (Reply at 100-01):

“237. *The relationship between treaty claims and contract claims has been addressed recently by the Tribunal in Azurix v Argentina, in a way that usefully brings together the authorities:*

‘51. *The Tribunal recalls that its decision on jurisdiction is based on the finding that the claimant had shown a prima facie claim against the respondent for breach of obligations owed by Argentina to the claimant under the BIT. In that decision, the Tribunal noted that: “The investment dispute which the claimant has put before this Tribunal invokes obligations owed by the respondent to the claimant under the BIT and it is based on a different cause of action from a claim under the Contract Documents. Even if the dispute as presented by the claimant may involve the interpretation or analysis of facts related to performance under the Concession Agreement, the Tribunal considers that, to the extent that such issues are relevant to a breach of the obligations of the respondent under the BIT, they cannot per se transform the dispute under the BIT into a contractual dispute” (Decision on Jurisdiction, para. 76).*

[...]

54. *As noted earlier, Argentina has questioned the ability of a claimant to invoke as events or facts giving rise to international responsibility the same facts that constitute a breach of contract. The Tribunal has no doubt that the same events may give rise to claims under a contract or a treaty, “even if these two claims would coincide they would remain analytically distinct, and necessarily require different enquiries.” (Ibid., para. 258.) To evoke the language of the Annulment Committee in Vivendi II, the Tribunal is faced with a claim that is not “simply reducible to so many civil or administrative law claims concerning so many individual acts alleged to violate the Concession Contract or the administrative law of Argentina”, but with a claim that “these acts taken together, or some of them, amounted to a breach” of the BIT. (Decision of Annulment Committee, para. 112) This is the nature of the claim in respect of which the Tribunal held that it had jurisdiction and which the Tribunal is obliged to consider and decide.’*



238. *The Tribunal must take into account the underlying factual circumstances, which include the contractual relationship between the Concessionaire and the Secretariat, and ascertain the extent to which the State has exercised the specific functions of a sovereign. The Claimants respectfully submit that the correct approach is that set forth by the Annulment Committee in CAA and Vivendi v Argentina:*

*'it is one thing to exercise contractual jurisdiction ... and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law, such as that reflected in [a provision of a] BIT.'*

239. *To the extent that the Claimants refer to the concession agreement they do no more than invite the Tribunal to take into account its terms for the purpose of determining whether the sovereign acts and omissions for which the Respondent is responsible – commencing with the failure to secure cooperation agreements with the federative entities and the consequent unilateral decision to extend the deadline for the registration of used cars – gives rise to violations of the two BITs. The Respondent appears to accept this in inviting the Tribunal “to have due regard to the factual background”.*

*[Footnotes omitted]*

6-8 *Deference:* The Claimants characterize the Respondent’s approach on the matter of deference owed by this Tribunal to governmental decisions of the Respondent as “misconceived”. In their submission, the only deference which might be permitted (if any) is “in relation to alternative courses of action which are justifiable under international law on the grounds that any government might have acted that way.” (Post-Hearing Brief at 6-7). In this case, however, the Claimants submit that the actions leading to the Requisition and Revocation were not measures that “a reasonable and prudent Government would have taken, and cannot justify any degree of deference.” (Post-Hearing Brief at 7).

6-9 The Claimants contend, in regard to the standard of deference articulated by the tribunal in *S.D. Myers*, that this tribunal ultimately chose not to make deference in that case; and, on the facts of the case, that it found a violation of the treaty, notwithstanding the availability of local and other remedies (Post-Hearing Brief at 8).

6-10 *Standard of Proof*: Finally, the Claimants contend that the standard of proof to which the Claimants should be held in making out their claims is set out in the two BITs and not elsewhere (Reply at 103-04):

“242. *The Respondent asserts that proving a breach of treaty carries a heavier burden of proof than proving breach of contract, and that tribunals consistently posit a high threshold for finding a denial of fair and equitable treatment. Neither assertion assists the Respondent. The standard to be applied by this Tribunal is that set forth in the BITs. The question of whether or not there has been a breach of contract – and the determination of the standard applicable under the governing Mexican law for that issue – is not a matter for this Tribunal. The standard to be applied in determining a violation of a BIT is a point to which the Claimants return below. For the purposes of identifying a general approach the determination of whether there is a high or low threshold for any particular claim is of little utility. The standard is that set forth by the two BITs in these cases, and is to be applied to the facts of each case. Belatedly, the Claimants do not seek any determination by the Tribunal that Mexico has breached its own law; the question of whether or not an unlawful act at municipal law can automatically amount to a breach of treaty is not an issue in these proceedings.*”

*[Footnotes omitted]*

### ***(03) THE RESPONDENT'S CASE***

6-11 *General Approach*: The Respondent also prefaces its written and oral submissions with several preliminary points intended to provide the Tribunal with a framework for its subsequent analysis of the relevant factual and legal issues. The Respondent contends that the claims presented by the Claimants are repetitive and, therefore, “if Mexico has a full answer to why a measure cannot give rise to an expropriation, the defence is likely to be the same or substantially the same to a claimed denial of fair and equitable treatment” (Rejoinder at 41).

6-12 The Respondent asserts that these arbitration proceedings are strictly international law proceedings under the two BITS and, therefore, that the Tribunal has no mandate over any contractual claims against the Respondent. In this regard, the Respondent submits the following (Counter-Memorial at 16-17):

“77. *The tribunal in the case of Waste Management, Inc. v. United Mexican States confirmed this in respect of the NAFTA, which contains a similarly worded governing law clause to those of the two Treaties. That Tribunal noted:*

73. *The Tribunal begins by observing that –unlike many bilateral and regional investment treaties - NAFTA Chapter 11 does not give jurisdiction in respect of breaches of investment contracts such as the Concession Agreement. Nor does it contain an “umbrella clause” committing the host State to comply with its contractual commitments. This does not mean that the Tribunal lacks jurisdiction to take note of or interpret the contract. But such jurisdiction is incidental in character, and it is always necessary for a claimant to assert as its cause of action a claim founded in one of the substantive provisions of NAFTA referred to in Articles 1116 and 1117. Furthermore, while conduct (e.g. an expropriation) may at the same time involve a breach of NAFTA standards and a breach of contract, the two categories are distinct. Even as to Article 1105, while it will be relevant to show that particular conduct of the host State contradicted agreements or understandings reached at the time of the entry of the investment, it is still necessary to prove that this conduct was a breach of the substantive standards embodied in Article 1105. Showing that it was a breach of contract is not enough.”*

*[Footnotes omitted]*

6-13 *Treaty v Contract Claims:* The Respondent contends that the Claimants’ claims, as advanced in these proceedings, are in fact “contract claims” subject to the jurisdiction of the Mexican courts and not treaty claims under the BITs at all (Counter-Memorial at 135-37). The Respondent develops this submission in its Rejoinder, where it further characterizes the Claimants’ claims as “derivative, in law and in fact” (Rejoinder, para. 137 at 42).

6-14 The Respondent contends that (Rejoinder at 44):

*“144. [c]ontrary to the [Claimants’] Reply’s assertion that the domestic legal proceedings before the Mexican courts were initiated by the majority shareholder (Mr. Davis’s group) alone, the evidence demonstrates that after the Secretariat intervened, approvals were given at both the shareholder and the Board levels to analyze the possibility of bringing legal challenges against SECOFI and to pursue such challenges.*

*145. No evidence has been adduced by the Claimants in support of the contention that the various legal proceedings were initiated by Mr. Davis alone. Nor has it been demonstrated that at any point after the various lawsuits were initiated, the Claimants exercised their powers as shareholders or as directors at any time to disavow such actions.”*

*[Footnotes omitted]*

6-15 The Respondent also submits that the majority of the acts complained of involve the exercise of a contractual right by the Secretariat (Rejoinder at 45-46):

*“148. The Reply avoids addressing the argument about the exercise of the Secretariat’s rights, and in various parts characterizes the Secretariat’s acts as “sovereign,” the implication being that the Secretariat somehow acted in a sovereign capacity external to the contract’s applicable legal framework, rather than within that legal framework.*

*149. Each of the acts complained of, with the exception of the inability to compel the execution of coordination agreements with the 32 federative entities, was: (i) expressly contemplated by the Title of Concession, (ii) by the legal framework expressly incorporated therein, or (iii) by both. It does not assist the Claimants to characterize the Secretariat’s rights of audit, inspection, intervention, termination, requisition, and revocation, to which the Claimant’s consortium agreed, as “sovereign”. With the exception of the inability to conclude coordination agreements, all of the acts complained of involved a claim of legal right by the Secretariat based on either the Title of Concession, its legal framework, or both. As the Azinian and Waste Management tribunals recognized, the form of a State entity’s repudiation of a contract affects how it is subsequently analyzed by an international tribunal. In Azinian, for example, the repudiation by the municipal council took the form of the rescission of the contract for cause, which cause was later upheld by the local courts. In the instant case the Secretariat did likewise, after reaching the conclusion (upheld by the Mexican courts) that the circumstances precluded the Concessionaire from providing the public service in an optimal fashion, the Secretariat intervened. It then informed the Concessionaire that it was considering revocation, it initiated an administrative proceeding permitting the*

*Concessionaire to make its arguments in its defence and giving it the complete file for its review, then moved to revoke the concession and submitted to the court's jurisdiction in order to respond to the Concessionaire's revocation nullity proceeding.*

150. *The Claimants' strategy appears to focus on the Secretariat's acts as if the contract's legal framework applies exclusively to the Concessionaire, but not to them, even though all their complaints are based on alleged injury to Renave and [the Claimants'] representatives managed the company at the relevant time. They thus seek to avoid the Counter-Memorial's point that when the Secretariat, as a contracting party, exercised powers reserved to it by the Title of Concession, such exercise cannot be said to have fallen outside the legitimate expectations of the company and its investors.*
151. *It is trite law that contracting parties can disagree over a party's exercise of a right held by it (or even as to the existence of the claimed right itself). In such circumstances, the other party can challenge the exercise of the claimed right by submitting the dispute to the agreed forum. In this case, the possibility that disputes over the exercise of either party's contractual rights could arise, even in the extraordinary and unforeseeable events that ultimately befell the National Vehicle Registry, was not outside the contracting parties' expectations. The fact that the exercise of such rights has been challenged (and is being contested in the proper forum, to which access has been freely obtained, and to which the Secretariat has duly submitted), is of critical importance to these international claims in this proceeding."*

*[Footnotes omitted]*

- 6-16 *Deference:* In any event, the Respondent further asserts that the Tribunal must have "due deference" to governmental decisions, drawing again in particular on the standard of deference enunciated by the tribunal in *S.D. Myers* (Counter-Memorial at 17-18):

*"When interpreting and applying the 'minimum standard' a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged facts, proceeded on the basis of misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes...."*

*[Footnotes omitted]*

6-17 In its closing submissions during the main hearing, Counsel the Respondent summarized its position on ‘deference’ as follows [D8:1805-06]:

*“The first basic principle, of course is that an international tribunal must grant a measure of deference to the governmental decision-making process, and it cannot substitute its judgment for that of the competent authorities.*

*Now, this was a point that was made in S.D. Myers against Canada at paragraph 261 of the first Partial Award, and I will just read you the key passage from that Award. The Tribunal said that a government, ‘may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others, and accepted solutions that are ultimately ineffective or counterproductive.’*

*The Tribunal goes on to say that the normal recourse in such circumstances is through, ‘internal political and legal processes, including elections.’*

*Now, this page from S.D. Myers has had some traction with subsequent tribunals. It was cited by Saluka, I think Mr. Fortier remembers this, at paragraph 284, and it was cited with approval by GAMI Investments, which is another Tribunal chaired by Mr. Paulson.”*

6-18 *Standard of Proof:* The Respondent also contends that the Claimants face a heavier burden of proof in establishing their claims for the breach of the BITs than is normally the case in proving a claim for breach of contract (Counter-Memorial at 18):

*“84. The Tribunal in the Impregilo case recently noted that when an international claim involves alleged breaches of a state contract, “[t]he threshold to establish that a breach of ... [a contract] constitutes a breach of the Treaty is a high one.” This is consistent with the conclusions reached in the Vivendi case, where the Annulment Committee concluded that, in conformity with the applicable treaty, the Claimants could pursue a treaty claim with “its associated burden of proof” (as opposed to a contract claim in the local courts) and in doing so they took the “risk of a tribunal holding that the acts complained of neither individually nor collectively rose to the level of a breach” of the BIT. The arbitral award in Waste Management is to the same effect.”*

6-19 In regard to proving a breach of the fair and equitable treatment standards under the BITs, the Respondent states that “*the Tribunal must be persuaded that the State’s*

*conduct is manifestly arbitrary or unfair,”* submitting as follows (Counter-Memorial at 18-19):

- “86. *NAFTA and other investor-State tribunals have held that “the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence.” This is reflected in the tribunals’ consistent use of qualifiers such as “clearly improper and discreditable”, “grossly unfair or unreasonable”, “grossly unfair, unjust, idiosyncratic, is discriminatory and exposes the Claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety”, and “a gross denial of justice or manifest arbitrariness falling below acceptable international standards”. International tribunals use such qualifiers because they recognize that it is not their role to second-guess the acts of States; accordingly, the high threshold for proving a violation of international law protects the autonomy and judgment of government.*
87. *Echoing its stated concern that international tribunals are not to second-guess States’ decision-making the S.D. Myers tribunal determined that a breach of the fair and equitable treatment standard would be found:*

*... only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable or arbitrary from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.”*

*[Footnotes omitted]*

- 6-20 The Respondent summarizes the arbitral ‘jurisprudence’ of successive NAFTA and ICSID tribunals in respect of the standard of proof applicable to an allegation of treaty breach as requiring something more than “mere domestic illegality” (Post-Hearing Brief at 15).

#### ***(04) THE TRIBUNAL'S ANALYSIS AND DECISION***

- 6-21 It is unnecessary here to decide upon each of the general issues raised by the Parties, save for the following five points:
- 6-22 *First*, the Tribunal addresses the Claimants' claims in this Award only as treaty claims under the respective BITs (together with international law) and not as contractual claims under the Concession Agreement or infringements of Mexican law. It can hardly do otherwise: the Claimants disavow in these proceedings any contractual claim; neither of the Claimants is a contracting party to the Concession Agreement; disputes under the Concession Agreement are expressly submitted to the jurisdiction of another consensual forum and not this Tribunal; and this Tribunal's jurisdiction in addressing the breaches of the two BITs alleged by the Claimants is limited to the terms of those BITs and international law, excluding Mexican law.
- 6-23 *Second*, the Claimants are different and distinct legal persons from the Concessionaire and its majority shareholder (Mr Davis and his company). Neither of the Claimants became a party to the several legal proceedings in the Mexican courts brought by or against the Concessionaire. As regards the legal proceedings brought by the Concessionaire, the approval of any of these Claimants was made as shareholders only and could not constitute them parties to such proceedings.
- 6-24 The Tribunal has also kept well in mind the express restriction on its competence, expressed in Article 10(6) of the Argentina BIT ("The award shall not affect the rights of any third parties under applicable local legislation") and, albeit in different terms, Article 9 of the France BIT ("Arbitral awards shall be final and binding only on the disputing parties and only in respect of the particular case").
- 6-25 *Third*, it remains a difficult question under international law, on which much ink and paper has been consumed, to what extent a claimant pleading a treaty breach in an investor-state arbitration under a BIT can rely on a contractual breach as "a fact". It is



clear that a contractual breach cannot simply be converted juridically into a treaty breach, but equally it is clearly necessary for a claimant to recite the factual basis for a treaty breach which may, in appropriate cases, include allegations of fact amounting also to a contractual breach, even if no contractual claim is pursued in the particular BIT arbitration. However, it is not clear whether a treaty breach under international law can exist against the host state when the same factual conduct is permitted by the relevant contract between the state and the investor or a third person (such as, here, the Concessionaire). In the present case, the Tribunal, whilst noting the Parties' different submissions, does not think it necessary to address this particular difficulty for the purpose of its later decisions in this Award.

6-26 *Fourth*, as to 'deference', the Tribunal accepts the Respondent's submissions to the effect that this Tribunal should not exercise "an open-ended mandate to second-guess government decision-making", in the words of the arbitration tribunal in *S.D. Myers*. Accordingly, in assessing the Respondent's conduct later in this Award, this Tribunal accords to the Respondent a generous measure of appreciation, applied without the benefit of hindsight.

6-27 *Lastly*, as to the standard of proof, the Tribunal considers the Parties' submissions to be materially similar for practical purposes, as applied in this Award. The standard for the Claimants' claims is prescribed by the wording of the respective BITs and international law; and as to the latter, the Tribunal will here pay due regard to the 'jurisprudence constante' cited by the Respondent.

**PART VII: ISSUE C – FAIR AND EQUITABLE TREATMENT**

**(01) INTRODUCTION**

7-1 In this part of the Award, the Tribunal considers the Claimants’ claim that the Respondent failed to accord to their investments ‘fair and equitable treatment’ as required by the France and Argentina BITs, by virtue of the various measures taken by the Respondent towards the Concessionaire, beginning with the extension of the deadline to register used vehicles (on 21 August 2000) and ending with the Revocation of the Concession Agreement (on 13 December 2002).

7-2 *The FET Standards:* The provisions relating to “fair and equitable treatment” in the Argentina BIT and the France BIT respectively provide as follows:

*Argentina BIT*

*“ARTICLE 3. National Treatment and Most Favoured Nation Treatment*

*1. – Each Contracting Party shall guarantee at all times the fair and equitable treatment of all investors and investments of investors of the other Contracting Party, and shall not prejudice the management, maintenance, use, enjoyment or disposition of their investments through arbitrary or discriminatory measures.*

*[...]”*

*France BIT*

*“ARTICLE 4*

*Protection and treatment of Investments*

*1. Each of the Contracting Parties undertakes to guarantee, within its territory and its maritime zone, the fair and equitable treatment, in accordance with principles of International Law, of investments made by investors from the other Contracting Party and shall guarantee that the exercise of this recognised right shall not be impeded either in law or in practice.*

*[...]”*

**(02) THE CLAIMANTS' CASE**

7-3 The Claimants submit that the fair and equitable treatment standard “has been described as a ‘flexible one which must be adapted to the circumstances of each case’” (Memorial at 105, citing *Waste Management v. United Mexican States*<sup>1</sup>). The Claimants contend that the standard “comprises a number of distinct and specific elements” (Memorial at 106-107):

“323. [...] A significant number of international arbitral tribunals, as well as distinguished commentators, have confirmed this. A survey conducted by the OECD identified the following elements expressed in the recent practice of arbitral tribunals:

- (a) *obligation of vigilance and protection;*
- (b) *due process including non-denial of justice and lack of arbitrariness;*
- (c) *transparency and respect of investor’s legitimate expectations; and*
- (d) *autonomous fairness elements.*

324. *Professor Schreuer has conducted an extensive examination of recent arbitral practice. He too concludes that the fair and equitable treatment standard covers a number of concrete principles including: transparency and the protection of the investor’s legitimate expectations; freedom from coercion or harassment; procedural propriety and due process; and good faith. The conduct of Mexico described in paragraphs [306] above violated the requirements of Article 3.1 of the Argentina BIT and Article 4.1 of the France BIT.”*

*[Footnotes omitted]*

7-4 The Claimants advance their fair and equitable treatment claims under three headings: (1) transparency and protection of the investor’s legitimate expectations; (2) due process and the absence of arbitrariness; and (3) good faith. The Claimants also plead a fourth element, as regards Talsud’s claim under the Argentina BIT, as regards the Respondent’s “arbitrary and/or discriminatory measures or to harm the management, maintenance, use, enjoyment or order of Talsud’s investment”.

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<sup>1</sup> *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award of 30 April 2004, 43 ILM 967 (2004), at para. 99.

7-5 *Expectations*: As regards the first heading, particularly the Claimants’ “legitimate expectations”, the following arguments are made (Memorial at 108):

“327. *Mexico, in the preamble to the BITs, undertook to provide “a favourable environment” for Argentina investments (Argentina BIT) and “to create favourable conditions for French investment” [sic] (France BIT).*

328. *With regard to investor’s expectations, one commentator has observed that*

*“The investor’s legitimate expectations will be based on [a] clearly perceptible legal framework and on any understandings and representations made explicitly or implicitly by the host State. A reversal of assurances by the host State which have led to legitimate expectations will violate the principle of fair and equitable treatment.”*

*And another commentator has noted that*

*“the balance of considerations having some bearing on fairness and equity as between investors and States essentially turns on ways in which State action or inaction may undermine the economic expectations, profitability and survival of individual investments ...”.*

329. *In CME v Czech Republic, the arbitral tribunal concluded that the “intentional undermining” of the Claimants’ investments constituted a breach of the obligation of fair and equitable treatment. It referred, in particular, to the “evisceration of the arrangements in reliance upon which the foreign investor was induced to invest.”*

330. *The Arbitral Tribunal in Waste Management noted that in applying the fair and equitable treatment standard, “it is relevant that the treatment is in breach of representations made by the host state which were reasonably relied on by the Claimant.”*

*[Footnotes omitted]*

7-6 The Claimants further submit that the measures taken by Mexico following the arrest of Mr Cavallo “were neither consistent nor transparent”, as follows (Memorial at 113-115):

“345. *The obligation to ensure fair and equitable treatment for investors is designed to provide a stable, legal framework within which investments may be made. This objective has been emphasised by a number of*

*international tribunals. In Metalclad v Mexico, for example, the arbitral tribunal found that Mexico had “failed to ensure a transparent and predictable framework for Metalclad’s business planning and investment; and found that the “totality of [the] circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a party acting in the expectation that it would be treated fairly and justly ...”*

346. *In Tecmed, the Arbitral Tribunal was called upon to interpret a provision in the bilateral investment treaty between Mexico and Spain that was drafted in similar terms to that of the France BIT. The Tecmed tribunal considered that the provision*

*“In light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host state to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices and directives, to be able to plan its investment and comply with such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.”*

347. *The record indicates that Mexico’s acts and omissions were motivated by extraneous political considerations rather than by any considerations relating to the performance by the Concessionaire.*
348. *The independent auditor appointed by the Secretariat to monitor and report on the Concessionaire’s compliance with its obligations, Analítica, confirmed that the Concessionaire had met all of the achievable Targets set out in Appendix 13 of the Concession Agreement by October 2000, and that it was the default of the Secretariat that prevented fulfillment of what remained. Similarly, the administrative intervener established no breach by the Concessionaire of the Concession Agreement, the 1998 Law or any other relevant regulation [C21, C22].*
349. *In these circumstances, there were no justifiable grounds for Mexico’s interference with the Claimants’ investment, for the Technical and Administrative Interventions, for the Seizure of the Registry and the replacement of the Concessionaire managers, or for the Revocation of the Concession Agreement.*

350. *Neither the 1998 Law the applicable regulations nor any other rules in connection with the Registry provided for any type of “technical intervention” such as that exercised by Mexico in August 2000. The Technical Intervention was arbitrary and unlawful because:*
- (a) Neither the 1998 Law, the applicable regulations nor any other rule in connection with the Registry provided for any type of “technical intervention”;*
  - (b) The Secretariat did not provide reasons to support its decision, in breach of basic principles of the Mexican Constitution and administrative law;*
  - (c) The 1998 Law did not allow the Secretariat to take any steps which would interfere with the Concessionaire’s activities without determining the terms and scope of the intervention (under Mexican law, public authorities only have what powers the law expressly grants to them; accordingly, acts not expressly allowed by the law are not permitted);*
  - (d) The Secretariat attempted to rely on section 25 of the 1998 Law to justify its intervention. However, the “administrative” (not technical) intervention for which Article 25 of the 1998 Law provides can only be ordered in the event of a labour strike or any other circumstance which may impede the concessionaire’s ability to render the public service in optimum conditions. The Concessionaire’s operation of the Registry was not affected in any significant way by events and continued to be provided at all times; and*
  - (e) The Secretariat sought to justify the Technical Intervention on the basis of (totally unrelated) accusations of war crimes levelled at Ricardo Cavallo. This is nonsensical. It also violated Mexico’s Constitution which prohibits authorities from imposing sanctions on one party for acts committed by another party. The Concessionaire is a variable capital stock corporation [sociedad anónima de capital variable] with its own legal status and assets; any personal acts carried out by its officers or employees as individuals, beyond the scope of their duties inside the company, can only bring about legal consequences for persons committing the acts, but not the Concessionaire. On the date that the Technical Intervention was ordered, Ricardo Cavallo had already been removed from his management duties in the company.*

*[Footnotes omitted]*

7-7 *Due Process*: As regards the second heading, *i.e.* due process and arbitrariness, the Claimants advance the following submissions (Memorial at 117-118):

“356. *One commentator has observed that “fair and equitable treatment inherently precludes arbitrary and capricious actions against investors”. As described above, Mexico interfered with the Claimants’ investment through the unlawful and arbitrary Technical and Administrative Interventions. The Interventions may properly be characterised as capricious, having regard to the fact that they were justified neither by necessity nor reason. Mexico’s actions appear to have been motivated by a desire to exploit the arrest of Ricardo Cavallo to justify harassment of the Claimants’ investment and to close the Registry. Mexico acted without warning, without good reason, arbitrarily and without due process in seizing the Registry and in subsequently revoking the Concession Agreement. It acted in the absence of evidence – from the independent auditors or from the audit conducted as part of the Administrative Intervention – that the Concessionaire had failed in any material way to fulfil its obligations under the Concession Agreement.*

357. *Arbitrariness is universally recognized as an element of unfair and inequitable treatment. For example, the Waste Management tribunal found that arbitrary conduct would infringe the fair and equitable treatment standard. In CMS v Argentina, the arbitral tribunal stated that “any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment.” In this case the Claimants’ use, enjoyment and disposal of their investment were impaired by the measures adopted by Mexico.*

358. *The Claimants’ investment was denied due process by reason of the Technical and Administrative Interventions into the Concessionaire’s operation of the Registry, together with the subsequent Seizure and Revocation. It was also denied due process and justice in respect of the unlawful issuance by the Secretariat of the Rules of Operation of the Registry. The Rules were designed by the Secretariat to provide a basis for termination of the Concession. The subsequent legal proceedings produced a result that was a violation of the fair and equitable treatment standards in both BITs.”*

*[Footnotes omitted]*

7-8 *Good Faith*: Under the third heading, *i.e.* good faith, the Claimants submit that (Memorial at 118):

“359. *[...] while bad faith itself constitutes a violation of the fair and equitable treatment standard, it is not the case that every violation of the standard*

will require bad faith on the part of the State. In *Mondev*, the tribunal confirmed that “a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith”.

360. In *Loewen*, the arbitral tribunal observed that

“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 or inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough ....”

361. In *CMS v Argentina*, the tribunal, emphasizing the need to examine whether a stable legal and business framework was provided, noted that

“this is an objective requirement unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard.

362. In the present case, numerous acts of the Mexican authorities evidence a lack of good faith, from 28 August 2000 onwards. Mexico exploited the arrest of Ricardo Cavallo to justify harassment of the Concessionaire through the Technical and Administrative Interventions, and, subsequently through the Seizure of the Registry. It used the Technical and Administrative Interventions and the Seizures, during which period the Secretariat took control of the Concessionaire’s operations, to create a case for the eventual Revocation.”

[Footnotes omitted]

7-9 *Talsud*: Finally, on the separate argument concerning the treatment of *Talsud*’s investment under the Argentina BIT, the Claimants submit the following (Memorial at 119-120):

“363. In respect of *Talsud* there exists a distinct cause of action arising under Article 3.1 of the Argentina BIT. This provides that

“Each Contracting Party shall guarantee at all times the fair and equitable treatment of all investors and investments of investors of the other Contracting Party, and shall not prejudice the management, maintenance, use, enjoyment or disposition of their investments through arbitrary or discriminatory measures.”



*The section underlined provides a separate and distinct head of claim that is available to Talsud, and that Mexico has violated.*

364. *The arbitrary nature of Mexico's acts in relation to the Claimants' investment has been described at paragraphs [146-202] above. The acts and omissions of Mexico had the effect of harming the Claimants' management, maintenance, use and enjoyment of its investment, and ultimately deprived the Claimants of the economic use and benefits of their investment.*

365. *In the ELSI case, the International Court of Justice observed that*

*“Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law ... It is wilful disregard of due process of law an act which shocks, or at least surprises, a sense of judicial propriety.”*

366. *Mexico's conduct in relation to the Claimants' investment met this standard of arbitrariness: Mexico failed to uphold and respect the legal framework applicable to the investment and its acts in relation to the investment were motivated by considerations of political expedience rather than by just cause; its acts and omissions with regard to the investment were not characterised by due process.”*

*[The Claimants' emphasis, footnotes omitted]*

7-10 *Local Remedies:* In response to the Respondent's argument on the availability of local remedies in considering a fair and equitable treatment claim, the Claimants submit (Reply at 104-05):

*“244. The Respondent asserts that the availability of local remedies is an important consideration in analyzing fair and equitable treatment claims. It relies upon the Award in Waste Management. In that case, as the tribunal will be aware, the concessionaire was a wholly owned subsidiary of the Claimant, so that the Claimant could determine whether or not to bring proceedings before the domestic courts for inter alia breach of contract or proceed to seek an international remedy. In the present case the majority shareholder has initiated proceedings in the name of the Concessionaire before the Mexican courts. The Claimants are not parties to those proceedings. It is not apparent what remedies are available to them – in their capacity as shareholders in the Concessionaire – in any proceedings before Mexican courts. What is clear is that the highlighted language in the passage of the Award in Waste Management that is relied upon by the Respondent is not pertinent to the Claimants: as minority shareholding investors who are not parties to the Concession Agreement they are not in a position to invoke a remedy for the breach of the*

*Concession Agreement before the Mexican courts. In their case the availability of local remedies is not germane. And interesting as they may be, the facts in Azinian are entirely distinguishable: the Claimants have not brought or participated in proceedings before the Mexican courts, and it is not the aim or objective of these proceedings to determine whether the decisions of the Mexican courts are or are not in violation of the BITs. The Claimants are not inviting this tribunal to review the decisions of the Mexican courts, or to act as a court of appeal. The Claimants have not claimed denial of justice in their claim concerning unfair and inequitable treatment; it is therefore curious that the Respondent should address the issue, unless of course it is seeking to direct the Claimants and the Tribunal into an issue not yet raised. Furthermore, the Respondent has not explained why judicial review proceedings brought by another party should affect the Claimants' international claims. The Respondent has not referred to any authority to support the proposition that a foreign investor who is a minority shareholder is not entitled to bring international proceedings under a BIT, and the Claimants are not aware of any such authority."*

*[Footnotes omitted]*

7-11 In their post-hearing submissions, the Claimants maintained their submission that *Waste Management* is inapposite to the facts of the present case (Post-Hearing Brief at 7-8):

- “31. *First paragraph 116 of Waste Management (No. 2) has to be read with earlier paragraphs, including paragraph 115; these make it clear that the Arbitral Tribunal considered that the threshold to be applied for a violation of the ‘fair and equitable’ standard (“wholly arbitrary”, or “grossly unfair”, actions) were not met in that case, where the most important default was limited to a “failure to pay”. The actions of the Respondent in the present case go far beyond a limited failure to make payments, a point the Respondent cannot deny, and include actions that eviscerated and then terminated the Concession on grounds that were unjustifiable and unsupported by the Respondent’s own internal legal advice (in this regard, paragraph 138 of the Award in Waste Management (No. 2) is highly pertinent: “The Tribunal has no doubt that a deliberate conspiracy - that is say, a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement - would constitute a breach of Article 1105(1)”).*
32. *Second, it is clear that the Tribunal in Waste Management (No. 2) restricted its comments on the availability of local remedies to circumstances in which a contractual violation related to monetary payments arose by reference to an alleged violation of a fair and equitable treatment standard (Article 1105 NAFTA). In such limited circumstances it is understandable that the availability of an effective local remedy to*

*address a monetary dispute could be a circumstance that a Tribunal would wish to take into account (the Tribunal was concerned that NAFTA should not become an instrument of debt collection (paragraph 116)). In the present case, the disputes concerned far more extensive actions (extending deadlines, suspending used car registrations, failing to obtain cooperation agreements, Seizure of the Concessionaire's premises, Revocation of the Concession, etc), which were expropriatory in character and effect (well beyond any violation of the FET standard), and for which effective local remedies plainly were not available (there has still been no resolution of the claims in domestic law, notwithstanding the reports of independent experts appointed by the Mexican court that are consistent with the Claimants arguments in these cases). Moreover, in Waste Management (No. 2) the Tribunal found no expropriation, stating that "[i]t is not the function of Article 1110 to compensate for failed business ventures, absent arbitrary intervention by the State amounting to a virtual taking or sterilising of the enterprise" (para. 160) [emphasis added]. The present cases are a clear example of "arbitrary intervention", falling within the standard by which the Waste Management Tribunal would plainly not have shown deference.*

33. *Third, the other authorities invoked by the Respondent provide no support for its claim to deference. Respondent relied on a standard of deference in the Partial Award in SD Myers v. Canada (13 November 2000, paragraph 261), but failed to refer to the final part of that paragraph, which states that "The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections." This case also concerned Article 1105 NAFTA, but the Respondent omitted to mention that the majority chose not to defer and, on the facts, found a violation of Article 1105, notwithstanding the availability of local remedies and other ordinary remedies. Respondent also referred to the Saluka award (Award of 17 March 2006, paragraph 284). That case also concerns 'fair and equitable treatment' (Article 3 of the BIT), and once again the Respondent omits to mention that any deference that might have been applied did not prevent the Tribunal from finding a violation because the respondent State had "created an environment impossible for the survival of" a major bank in which a foreign investment had been made (paragraph 347). These and the other authorities provide no assistance to the Respondent."*

7-12 Finally, the Claimants contended during their closing submissions at the main hearing that [D8:1931]:

*"the issue of local remedies [...] is entirely irrelevant in the case of expropriation. The argument goes entirely to the standard of fair and equitable treatment, and it has no pertinence to the issue of expropriation."*

**(03) THE RESPONDENT'S CASE**

7-13 *Expectations*: With regard to the first heading to the Claimants' fair and equitable treatment claims, the Respondent answers as follows (Rejoinder at 80-81):

*"275. The essence of the first element of the claim is set out in paragraph 277. It will be observed that the measures said to give rise to a denial of equitable treatment are substantially the same as those which are said to give rise to an expropriation.*

*a. The Claimants: "277. In sum, based on the representations made by the Respondent, and on the legal framework of the Renave Concession, the Claimants were, for example, reasonably entitled to, and did, expect that the Secretariat and/or the Mexican state would inter alia:*

*(1) execute coordination agreements with the federative entities in order to enable the establishment and operation of the national registration system, in particular in relation to used cars, and on which the Concession as a whole was predicated;"*

*Response: This has already been addressed in detail. The Claimants fully understood: (i) the voluntary nature of the coordination agreements; (ii) the risk of the investment and (iii) the potential problems that missteps, such as the ill-fated appointment of Mr. Cavallo, could pose for the project.*

*b. The Claimants: "(2) provide the Concessionaire with the information from federal agencies required to check the provenance of used motor vehicle details submitted to the Registry;"*

*Response: Although coordination agreements were not executed prior to the events of 24 August 2000, as admitted by the Concessionaire in the revocation nullity proceedings, federal agencies were taking steps to cooperate with Renave.*

*c. The Claimants: "(3) act promptly in respect of any concerns regarding, or findings of, non-compliance on the part of the*

*Concessionaire and within the framework of the mechanisms and procedures explicitly provided by the Concession contract;”*

*Response: The Secretariat exercised its legal rights after the above-mentioned events “within the framework of the mechanisms and procedures explicitly provided by the Concessionaire contract.” It communicated its concerns to the Concessionaire through written and oral means; its third party experts interviewed concessionaire personnel and examined its premises and such records as were made available to them by the Concessionaire; and it informed the Concessionaire, including through reports to its Board by the administrators and the management in requisition, of developments affecting the Registry.*

*In marked contrast, at no time did the Concessionaire inform the Secretariat of the “doubts” that its Board was having in July 2000 about the functioning of the company’s “technical processes, the structure of the systems database,” etc. and of the internal technical audit that it initiated in July 2000.*

- d. The Claimants: “(4) act only on the basis of the criteria set forth in the legal framework governing the Concession and not on the basis of extraneous political considerations and changing political circumstances, including those resulting from changes of government;*

*Response: The Secretariat’s view is that it acted on the basis of the criteria set forth in the legal framework governing the Concession and that it did not act on “extraneous political considerations and changing political circumstances, including those resulting from changes in government.” The question of whether particular measures were properly “motivated” has been answered affirmatively in the legal challenges that have been completed to date and insofar as the revocation is concerned, will be answered by the proper forum.*

- e. The Claimants: “(5) act effectively to support the Concession in the establishment and operation of the Registry in the face of political opposition that the national registration system might encounter;”*

*Response: The Secretariat did so. Eventually, for reasons not attributable to the Secretariat, the opposition to the Registry became widespread.*

- f. The Claimants: “(6) not act unilaterally and without consulting the Concessionaire in taking decisions to amend the application of the*

*Concession Agreement, in particular on matters that formed an essential component of the economic viability of the Concession, including notably the system for registering used motor vehicles and any deadlines relating thereto; and”*

*Response: The Secretariat consulted as required. At some points however, the Secretariat’s and the Concessionaire’s interests diverged. It was entirely lawful for the Secretariat to have regard to its own interests and contractual rights under the Title of Concession.*

- g. *The Claimants: “(7) not act unilaterally and without proper justification to requisition and then revoke the Concession.”*

*Response: The Secretariat exercised its legal rights to which the investors, through their company, had previously agreed. The Secretariat considered that it had more than sufficient reasons for acting and has defended its measures in the proper forum. It has never obstructed the Concessionaire’s access to justice.”*

7-14 The Respondent submits that the awards relied upon by the Claimants with regard to transparency and legitimate expectations, *i.e. CME, Occidental Petroleum, and Eureka*, are distinguishable on their facts from the present case.

7-15 *Due Process:* As to the second heading to the Claimants’ fair and equitable treatment claims, the Respondent submits that proving arbitrariness is not a simple matter, quoting the passage from the ICJ judgment in *ELSI* (United States of America v. Italy) (Counter-Memorial at 148):

*“Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law ... it is wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.”*

*[The Respondent’s emphasis]*

7-16 The Respondent submits that “[t]here is no evidence whatsoever that the Secretariat acted in willful disregard of due process or committed an act which shocks, or at least surprises, a sense of judicial propriety.” The Respondent adds that “[w]hen its acts were challenged, the Secretariat submitted to the jurisdiction of the [Mexican] courts and defended its acts. At no time did the Secretariat willfully disregard or disobey a [Mexican] court order.” (Counter-Memorial at 150).

7-17 *Good Faith*: As concerns the third heading to the Claimants' claims, the Respondent first contends that "[a]t all times it acted in good faith", putting the Claimants to the strict proof of their allegations (Counter-Memorial at 150):

*"507. [...] There were good and valid reasons for each of the Secretariat's acts. The Claimants may plainly disagree, but international law confers on States a margin of appreciation to respond to situations as they arise and Mexico's acts fall squarely within that margin. It is a universally accepted principle that good faith is presumed."*

*[Footnotes omitted]*

7-18 The Respondent also answers as follows (Rejoinder at 84-85):

*"277. As far as the third element of the fair and equitable treatment complaint, it is argued at paragraphs 293-294 [of the Claimants' Reply] that:*

*a. The Claimants: "293. For the reasons set out above, the evidence before the Tribunal does not support the Respondent's contention. The evidence does not show that there were 'good and valid reasons for each of the Secretariat's acts'. To the contrary, the evidence shows an absence of valid reasons for the actions coupled with the desire to respond to the political pressures by terminating the Concession."*

*Response: Mexico reiterates its position that it had good and valid reasons for each of the Secretariat's acts.*

*b. The Claimants: "294. The circumstances and stated purposes of the Technical and Administrative Interventions in the Concession suggest otherwise. While there had been no findings of non-compliance in respect of the Concessionaire in the period before October 2000, and the Secretariat itself had confirmed compliance, the Respondent intervened in the Concessionaire's operations at that time with a view to finding grounds for revocation. In the light of the political opposition to the Registry that had manifested itself with greater force after the national election of 2 July 2000, and the Secretariat's failure to secure the cooperation and information necessary for the Registry's effective operation in relation to used vehicles, it is difficult to escape the conclusion that the Respondent exploited the allegations regarding Mr. Cavallo to initiate the end of the Concession. This is evident from the statements of Mr. Blanco. The Respondent has put no evidence before the Tribunal to show that the arrest of Mr.*

*Cavallo, or any other factor, justified or necessitated the Technical Intervention or the measures that followed.”*

*Response: The reasons given by the Secretariat for the Technical and Administrative Interventions were later accepted by the Concessionaire itself in the revocation proceedings. The reasons were also accepted by the court in the legal challenge of the Administrative Intervention. The Secretariat had no basis prior to intervening for directly reviewing how the Concessionaire had performed its contractual obligations. It had a contractual right to determine the adequacy of Renave’s performance. Dr Blanco’s statements, read fairly and objectively, show an unwillingness to simply terminate the Concession on 15 September 2000.”*

7-19 *Local Remedies:* As regards the availability of local remedies and the Claimants’ question as to “why judicial review proceedings brought by another party should affect the Claimants’ international claims”, reproduced above, the Respondent replies as follows (Rejoinder at 49-50):

“164. *The explanation is as follows: in Robert Azinian et al v. United Mexican States, just as in the instant case, an international claim was brought by three of the four or five (the number was never conclusively established) shareholders of a Mexican company. Their company (DESONA) had been awarded a solid waste disposal concession granted by a municipality. After a dispute arose between the Concessionaire and the municipality, the latter terminated the concession. The company (not the shareholders) then sued in three levels of the local courts, losing each time. The U.S. nationals who had invested in DESONA then brought international claims under NAFTA Chapter Eleven (“Investment”). The central facts of the two cases are thus on all fours.*

165. *Mexico argued before a distinguished Tribunal (Benjamin Civiletti, Claus von Wobeser, Arbitrators; Jan Paulsson, President) that the municipality’s nullification of the concession had been upheld in legal proceedings to which the municipality and the company had duly submitted and that the tribunal had to give international legal effect to the courts’ refusal to set aside the concession’s nullification unless it was convinced that the courts had not fairly disposed of the concessionaire’s claims.*

166. *The Tribunal therefore considered the effect of DESONA’s invocation of local remedies, and concluded:*

96. *From this perspective, the problem may be put quite simply. The Ayuntamiento [the municipal council] believed it had grounds for*



*holding the Concession Contract to be invalid under Mexican law governing public service concessions. At DESONA's initiative, these grounds were tested by three levels of Mexican courts, and in each case were found to be extant. How can it be said that Mexico breached NAFTA when the Ayuntamiento of Naucalpan purported to declare the invalidity of a Concession Contract which by its terms was subject to Mexican law, and to the jurisdiction of the Mexican courts, and the courts of Mexico then agreed with the Ayuntamiento's determination? Further, the Claimants have neither contended nor proved that the Mexican legal standards for the annulment of concessions violate Mexico's Chapter Eleven obligations; nor that the Mexican law governing such annulment is expropriatory.*

97. *With the question thus framed, it becomes evident that for the Claimants to prevail it is not enough that the Arbitral Tribunal disagree with the determination of the Ayuntamiento. A governmental authority surely cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level. As the Mexican courts found that the Ayuntamiento's decision to nullify the Concession Contract was consistent with the Mexican law governing the validity of public service concessions, the question is whether the Mexican court decisions themselves breached Mexico's obligations under Chapter Eleven.*

167. *This quotation illustrates Mexico's point perfectly: for those acts of the Secretariat that were challenged by the Concessionaire and upheld by the courts in the instant case, the Secretariat cannot "be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level", to use Azinian's words."*

*[The Respondent's emphasis, footnotes omitted]*

7-20 The Respondent concludes that "it is not open to the Claimants to impugn acts of the Secretariat which have been validated by the Mexican courts"; nor "can the courts' decisions be reviewed by this Tribunal for any error in applying domestic law" (Rejoinder at 51). It follows in the Respondent's view that (Rejoinder at 51-52):

*"170. [...] the courts' treatment of the various complaints against the Secretariat's measures and the measures themselves must be accepted as lawful under the two Treaties, unless the Tribunal finds that the court committed a denial of justice. The Claimants confirm that they do not contend that any denial of justice occurred. If there is no claim against the judiciary's treatment of the Secretariat's measures, no complaint can*

*be made out against the measures themselves in this proceeding. This removes a very large portion of the Claimants' grievances from international review.*

171. *The Reply attempts to distinguish Azinian, stating:*

*And interesting as they may be, the facts in Azinian are entirely distinguishable: the Claimants have not brought or participated in proceedings before the Mexican courts, and it is not the aim of these proceedings to determine whether the decisions of the Mexican courts are or are not in violation of the BITs.*

172. *That is incorrect. Azinian is directly on point:*

- *First, like these Claimants, the Azinian Claimants themselves also had not brought or participated in proceedings before the Mexican courts.*
- *Second, like these Claimants, it was the company in which the Azinian Claimants had invested which brought the domestic legal proceedings.*
- *Finally, those Claimants, like the instant ones, sought to put the domestic court decisions aside in the international proceeding by focusing on the initial measure(s) said to be a breach of treaty, namely, the termination of the concession and urging the tribunal to ignore how the complaints against such measures were then treated by the courts. That tactic was rejected in Azinian and it should be rejected here.*

173. *Thus, with great respect the Claimants' argument is that "it is not the aim of these proceedings to determine whether the decisions of the Mexican courts are or are not in violation of the BITs," is precisely the reverse of the true proposition. On settled authority, it is the aim of these international proceedings "to determine whether the decisions of the Mexican courts are ... in violation of the BITs", if the Claimants wish to impugn the acts of the Secretariat which have been upheld by the courts. It is simply not open to the Claimants to invite this Tribunal to act as if it is a court of original jurisdiction that may proceed as if the courts have never spoken and with no need to accord a margin of appreciation to the decisions of the Secretariat or to those of the Mexican courts.*

174. *As the GAMI tribunal found, domestic remedies may operate to cure any potential international wrong. If remedies invoked by the company in which the foreign shareholder has invested make the company whole, a derivative claim by the foreign shareholder is unsustainable. In GAMI, the company in which the U.S. investor held shares (GAM) challenged an*

*expropriation decree in the local courts. The courts overturned the decree, holding that the mills must be returned to their original owner. While the international claim was being briefed, the relevant secretariat returned those mills sought by the owner (and the parties were negotiating compensation for other assets which the owner did not wish to be returned to it). The operation of local remedies, combined with the foreign Claimant's inability to establish how it suffered a loss when the enterprise in which it invested was being made whole through the return of its subsidiaries, led the international tribunal to reject the international claim in its entirety.*

175. *Likewise, as Azinian shows, the fact that the local courts reject a complaint by the company in which the foreign Claimants have invested may also show that the international claim is without merit. It is not presumed that by virtue of their right of access to international jurisdiction, foreign investors are by right entitled to compensation. All investments carry risk and investors regularly suffer losses; compensation is only granted to a party with proper standing when the State is in breach of its treaty obligations. In such circumstances, the local courts' treatment of any domestic legal claims will be critical juridical facts for the international tribunal when considering whether any treaty breach is capable of being made out."*

*[Footnotes omitted]*

7-21 In its post-hearing submissions, the Respondent maintained its position that the availability of local remedies is relevant to all the Claimants' claims (Post-Hearing Brief at 16):

- "31. *In their Closing, the Claimants contended incorrectly that the availability of local remedies is relevant only to a breach of the fair and equitable treatment standard and not to an expropriation claim. In fact, Azinian premised the expropriation claim's dismissal on the claimants' investment's resort to local remedies and the courts' validation of the municipality's nullification of the concession. Waste Management II did likewise, noting that "the normal response by an investor faced with a breach of contract by its governmental counter-party (the breach not taking the form of an exercise of governmental prerogative, such as a legislative decree) is to sue in the appropriate court to remedy the breach" and that it was "only where such access is legally or practically foreclosed that the breach could amount to a definitive denial of the right (i.e., the effective taking of the chose in action) and the protection of Article 1110 be called into play."*
32. *There was no taking of the chose in action in the instant case (c.f. the Renave court actions) and no sovereign act was taken external to the*

*contract and applicable legal framework seeking to both negate the contract and deny judicial relief. Waste Management's focus on determining whether the State had acted in such a way as to "negate the rights concerned without any remedy" was applied to a non-contractual expropriation claim in EnCana Corporation v. Ecuador. Azinian's treatment of the impact of "judicial validation of government acts" on an expropriation claim was applied in Feldman in likewise dismissing an expropriation claim, the tribunal finding that the Azinian standard could not be met: "Given as noted earlier that Mexican courts and administrative procedures at all relevant times have been open to the Claimants... there appears to have been no denial of due process or denial of justice there as would rise to the level of a violation of international law."*

*[Footnotes omitted]*

#### **(04) THE TRIBUNAL'S ANALYSIS**

7-22 It is necessary first to address more specifically certain aspects of the factual chronology set out in Part IV above.

##### **(A) Alleged Financial and Technical Deficiencies**

7-23 The Parties dispute strongly the existence of any financial and technical deficiencies in the operation of the Concession by the Concessionaire in mid-2000, as well as the effect of any such deficiencies. The Claimants submit that the Concessionaire complied with its technical, security and financial obligations under the Concession, pointing to the positive results of the audit and technical intervention, Dr Blanco's testimony as to the security of information in the database and the absence of any complaints following Analítica's review regarding the Concessionaire's contractual compliance with the Concession Agreement [D8:1729]. The Respondent, on the other hand, points to 23

alleged deficiencies – security, operations and financial - identified by Ms Gómez-Mont and her team during the Requisition (amongst other evidence of deficiencies), contending that the existence of these deficiencies provided a legitimate basis for the Revocation of the Concession by the Respondent [D8:1792-1803].

7-24 The written and oral testimony mirrored this dispute. Extensive testimony was adduced at the main hearing from Mr Siegrist [D2:387-442, D3:530-559]; Mr Taíariol [D3:655]; Ms Barrera [D4:748, 764]; Mr Rojas [D4: 820-856]; Dr Blanco [D5:988, 1092]; and Ms Gómez-Mont [D6:1201, 1214, 1306, 1325]. The entirety of Mr. Rojas' testimony is dedicated to the issue of the Concessionaire's technical performance and the issue of compliance with the terms of the Concession Agreement [D4:813-856].

7-25 The Tribunal reiterates what it has recorded earlier in this Award: It does not seek to address any question as to whether the Concessionaire or the Respondent complied with the terms of the Concession Agreement, whether it be the former's technical or financial performance or the latter's timely procurement of co-ordination agreements with federal, state and other agencies. However, the Tribunal does conclude that there is no cogent factual evidence adduced in these arbitration proceedings which supports the Respondent's allegation, at any time, to the effect that the Concessionaire's conduct resulted in an imminent peril to Mexico's national security.

**(B) *The Used Cars Decree***

7-26 The Parties dispute the significance of the Secretariat's decision of 21 August 2000 to postpone the deadline for the registration of used vehicles from 15 December 2000 to 1 July 2001 (see Part IV (15) above).

7-27 The Claimants characterise this act as the first in a series of acts and omissions by the Respondent which collectively and individually give rise to breach of the respective BITs [D8: 1691].

7-28 The Respondent, in contrast, defends the Secretariat's decision to postpone the date for registering used vehicles as a necessary measure taken to address growing public opposition to the cost of registering used vehicles and to ensure adequate time to pursue the negotiation of co-ordination agreements [D1: 178].

7-29 Mr Siegrist testified to the significance of the postponement for the Concessionaire as follows [D2: 450-452]:

*“Q. This is a discussion of the announcement on the 21st of August [2000], where the Secretariat postponed the deadline for registration of used vehicles by six months. Do you recall that? August 21, it was not 27. August 21st.*

*I said 21, but--yes, it was the 21 of August.*

*A. Yes.*

*Q. And I just want to direct you to a sentence about midway through the paragraph, sir. You say that the Concessionaire's business model was founded on the premise that it would be compulsory for all vehicle users to register their vehicles within a relatively short period of time. Do you see that?*

*A. Yes, that is correct. That was the requirement of the list of bidding conditions. Yes, it was a brief period of time, a short period of time to register the fleet of used cars, and that was a big challenge for this project.*

*Q. But you didn't mean to suggest in that sentence that all used vehicles in circulation in Mexico would have been registered by the middle of December 2000, did you?*

*A. No. There was an expectation that a large percentage - and this was in the Business Plan - was going to be registered during the first year, but there was something else. I mean, it was - more registrations were going to take place during the second year because we, of course, have extensions of deadlines, and in our experience these things happen.*

*But in light of these conditions, there was an expectation, because the legal framework and the technical framework was there, that a large number of used cars would be registered during the first year of operations.”*

7-30 The Tribunal does not consider that the Secretariat's postponement of the obligation to register used vehicles from 15 December 2000 to 1 July 2001 constitutes any breach of either BIT.

7-31 Dr Blanco testified compellingly to the Secretariat's good sense in coming to the decision to postpone the deadline for the registration of used vehicles [D5: 1017-1020]:

*"Q. So, on the 21st of August 2000, in the attempt to head off the growing opposition on the issue of cost, you announce a 50 percent cut in cost, the postponement of the deadline for registering used vehicles from December 15 to July the 15th, 2001.*

*Now, in relation to the part of your sentence where you say, "the postponement of the deadlines for registering used vehicles," what did you expect the implications of that announcement to be?*

*A. On the dates?*

*Q. On the pushing back the date for registration of used cars from December to July.*

*A. Well, you know the--I'm sure you're very well aware of the term "lame duck." In a sense, we had few months left, and one of the things that may have been happening was that they were going to sign, the governors were going to sign with this government that is going out as of November the 30th. So, we thought that maybe to give us more time during those months and give some time to the new administration also, to finalize a new administration, strong in the sense of just entering, to finalize those agreements that we could not finalize with the state governments, we thought that was something that we better do instead of leaving the problem to the new administration, and the new administration will be in the 1st of December. They will have from the 1st of December to the 15th of December. They will find out that some states had not actually have signed.*

*So, we thought that giving more time was a good way to be able to have our administration and potentially the new administration being able to finalize the agreements with if not all, many more states.*

*Q. Doesn't it possibly have the opposite effect of making it the new administration's problem?*

*A. We don't consider - that was not the intention at all, but also the intention was quite on the contrary to leave room for the new administration instead of leaving them a problem of doing something in 15 days.*

*And you know, actually, what we saw is that it was--that was perceived as something natural, and you have some ideal dates, and moving the dates six months was not seen as something of a major or a damaging move from the part of our government. So, I thought it was perceived as an adjustment of the dates, not more than that.”*

7-32 The Tribunal accepts Dr Blanco’s testimony. His decision was, in the Tribunal’s view, a reasonable and measured step on the part of the Secretariat, taken in good faith, in view of the difficulties it faced at the time in negotiating co-ordination agreements and contending with growing political controversy over the impending deadline for registering used vehicles.

**(C) The Technical Intervention**

7-33 The Technical Intervention into the Concessionaire’s operations was ordered by the Secretariat on 29 August 2000, days after the press reports on Mr Cavallo (see Part IV (20) above and subsection (D) below).

7-34 This was, in the Claimants’ view, totally unjustified and an arbitrary interference with the Concessionaire’s operations [D8: 1731-32]. The Respondent defends this intervention as necessary and justified in view of the potential implications of the Cavallo incident on the Concession and increasing public concerns over the security of information stored in the Concession’s database [D1:193-94].

7-35 Mr Salgado testified that the requirements for decreeing a technical intervention under the Concession Agreement were never fulfilled [D2:270]. In closing argument, the Claimants also summarized the state of the Concession at the time of the Technical Intervention and the results of the Technical Intervention, as follows [D8:1728-1729]:

*“On the 24th, with remarkable speed, audits were carried out, with a view to protecting the security of the database and the information held by the company, but no infringements were found. Five days later, on the 29th of August 2000, the Technical Intervention was carried out. Mr. Erasmo Marín was appointed, a technical man with apparently impeccable*



*credentials, and no one has questioned his integrity or his qualifications to carry out the task.*

*In the Technical Intervention he identified no deficiencies or failings in the technical security issues. Mr. Blanco was asked: "Are you aware that there was ever a breach of [...] security or confidential information during your time - that, I assume, goes all the way up to December 2000" - and his answer at page 989, line 13 was, "Not a breach of security, no."*

*By that date, the Concessionaire had complied with its contractual obligations in relation to security, in relation to financial contributions, in relation to other matters. There is no contemporaneous evidence from that period showing that there were any concerns or questions about factual or technical matters. The famous White Book raises no issues. The report of Analítica, who were the consultants to the Secretariat, raise no contractual issues."*

7-36 Whilst Dr Blanco testified on behalf of the Respondent that Mr Marín, the technical intervener, had reported no misuse at that time of the Concession's database, he explained the purpose of the intervention as meeting the public alarm at the accusations against Mr Cavallo, in the following terms [D5: 1085]:

*"A. We did not terminate the Concession. We were only managing the Renave.*

*As I said before, this was one of our last resources to keep the Concession alive. We did not decide to take the Concession away. We decided to intervene in a managerial fashion precisely to keep it alive.*

*Even if the new vehicles registration was proceeding accordingly, the fact that the sequence of events of the arrest of Cavallo and the death of Mr. Ramos, will make also the buyers of new vehicles have an extremely serious doubt about the security of giving their data to a databases which may be controlled by a criminal organization."*

7-37 In the immediate aftermath of the news concerning Mr Cavallo's alleged criminal past and his arrest in Mexico, the Technical Intervention appears to have been a rational response by the Secretariat, taken in good faith, to address public outcry and concern over the security of personal information maintained in the Concession's database. Moreover, Dr Blanco's motive was manifestly to 'keep the Concession alive', by interposing the Secretariat between the Concessionaire and its Mexican critics. As such, the Tribunal does not consider this act to constitute any breach of either BIT.

**(D) *The Cavallo Incident***

- 7-38 In the Parties' respective submissions, the Claimants minimize the importance of the Cavallo incident. The Claimants stress that while there was a dip in the registration of used vehicles in August 2000, this dip is likely to be attributable to the Secretariat's postponement of the deadline to register used vehicles and not the Cavallo incident itself, observing that the registration of new vehicles increased in September 2000 [D1:45-46]. The Respondent, on the other hand, characterises the Cavallo incident as a threshold event [D1:138]. The Respondent observes that there was a public outcry in response to the allegations against Mr Cavallo and an immediate expression of opposition to the Concession by many state and other institutions, making the negotiation of co-ordination agreements "extremely difficult" [D1:188-89].
- 7-39 In its written pleadings, the Respondent also alleges a contributory fault against the Claimants based on Article 39 of the ILC's draft Articles on State Responsibility and on the fact that Talsud was responsible for Mr Cavallo's appointment as the Concessionaire's General Director, claiming that "whatever prospects it [the Concession] had for its public acceptance and viability were destroyed by the Cavallo scandal." (Rejoinder, para. 247). This was reiterated in closing argument, when the Respondent focused on the shareholder response to Mr Cavallo's disclosure to them on 23 August 2000 and submitted that any award of damages should be reduced for contributory fault as a result [D8:1924-27]. The Claimants refute contributory fault, pointing out that it was accepted that no one knew prior to August 2000 of Mr. Cavallo's alleged past and that even Mr. Blanco testified that a background check on the shareholders, including Mr Cavallo, prior to granting the Concession did not produce any negative information, concluding as follows: "If Talsud is responsible for it, then the Government of Mexico has, in a sense, ratified that action and carried out its own due diligence, which, curiously, in light of the evidence that has now appeared before

this Tribunal, they did not identify.” [D8:1945-46]. The Tribunal returns to these submissions separately in Part XI of this Award.

7-40 From all the evidence, as already noted above, the Tribunal concludes that Mr Cavallo’s arrest was a highly significant event for the Concession, damaging public confidence in the Concession and increasing the difficulty in negotiating co-ordination agreements, but that it was not necessarily, by itself, a crippling event leading inevitably to the end of the Concession.

7-41 Mr Salgado testified as follows on cross-examination with regard to the impact of the Cavallo incident on the Concessionaire [D2:331-332]:

*“Q. I would like to look into the accusations on August 24th and the following days regarding the past of Mr. Cavallo. Do you remember the accusations?”*

*A. Yes, I do remember the accusations, but I thought this was about the investment of Gemplus and Talsud in the company and about the treaty. What are the accusations of Mr. Cavallo's past [have] to do with investment.*

*Q. I understand, but I would like to review with you the accusations against Mr. Cavallo. Do you remember that he was accused of homicide?”*

*A. I remember, yes.*

*Q. Torture?”*

*A. Those were the accusations.*

*Q. Of taking the assets of the prisoners during the dictatorship and taking control of the cars of the prisoners?”*

*A. Those were the accusations, yes. To this date, I understand that Mr. Cavallo hasn't been trialed. He is still awaiting for a trial. Nothing has been proven yet, and those were accusations for a time during the dictatorship period in Argentina.*

*Q. Was there any discussions within the Board since the accusations could risk the whole project?”*

*A. They had, of course, a devastating effect on the image of Concesionaira Renave. Those accusations, yes. But we were always - we always thought that it didn't matter if the sexual orientation, the gender, the past of any*

*general manager, if he was doing a good job at the company, why would that make it a problem. He was a diligent and responsible General Manager. He always performed correct. He never conducted anything without integrity, so we thought that that had to be taken into account.*

*Unfortunately, Mr. Cavallo's past damaged the company, but his past and his work in the company never mixed."*

7-42 Ms Barrera also testified on cross-examination that the Concessionaire's suppliers and creditors did not immediately express any concern following the *Reforma* publication on 24 August 2000, but rather approached the Concessionaire only after the First Administrative Intervention of 15 September 2000 [D4:761-763]:

*"Q. When did you first become aware of the allegations against Ricardo Cavallo?*

*A. Not until the day he was arrested. Until that time, I didn't know anything.*

*Q. And you were shocked, I take it, as many others were?*

*A. Of course. Concerned.*

*Q. And there was an indication in your statement that when this news broke, creditors and suppliers started to call Renave to ask questions of what was going on?*

*A. That is correct.*

*Q. And they were worried about being paid, I presume?*

*A. Concerned mainly about what was going to happen. The question they asked is, "What's going to happen?" We told them that, in effect, the question of used cars was suspended, and that that would lead to changes or would entail changes in the supply amounts originally provided for, but that each and every one of the commitments would be abided by the company and, indeed, it did carry them out.*

*We sat down with a person from the automobiles, the supply of kits of - the paperwork for the used papers or used cars, rather. In some cases, we cancelled some part. In other cases, the deliveries that were originally set were deferred.*

*Q. I just want to be a little more precise about timing. So, when the news of Mr. Cavallo's arrest was publicized, that's when you began to receive inquiries from suppliers and your creditors; correct?*

A. *No. When we began to get these questions most was after the intervention, the Administrative Intervention, which was 15 September 2000. Things happened so quickly, the events in succession, the arrest of Mr. Cavallo, the Technical Intervention, the death of the Deputy Secretary, the Administrative Intervention, all of that happened in the course of approximately 20 days. But the calls from the suppliers and when we sat down with them, well, that was after the Administrative Intervention."*

7-43 Dr Blanco testified as follows with regard to the impact of the Cavallo incident [D5:1036-1038]:

*"Q. If you could turn over the page to Tab 5. It's an article of the 29th of August 2000, and there is just one little section I would like you to have a look at. At the bottom, it says, about Mr. Cavallo, Sobre el Señor Cavallo: "There is not an accusation of theft or document falsifications. The accusations made by the Spanish judge refer to genocide, terrorism, and torture," he clarified. But that apparently is a quotation attributed to you. To the best of your recollection, is that an accurate quotation?"*

A. *What I can recall, it was a very costly affirmation on my part. I recall the leftist newspaper saying, "He is only a murderer - Blanco". So, I recall that there was a question raised, and I said, "Look, the accusations by the judge, not by anybody else, but the judge is only accusing him of this."*

Q. *What's the distinction between - well, what was the significance of the distinction for you between being accused of vehicle theft or document falsifications on the one hand and genocide, terrorism, and torture on the other hand?*

A. *I was trying to explain to this person that trying to dispel the hypothesis that maybe the databases had been somehow misused by Mr. Cavallo since he was somebody that was accused of being a thief and a forger of documents, so I was trying to dispel the hypothesis that not only did we have strong standards, maybe not the standards that were committed by the Concessionaire, but good standards, and that not only that, but it was not in a sense - a specialty of Mr. Cavallo was not to do that.*

Q. *Was that response an instinctual response, or was it in a sense part of an effort to respond to the crisis?*

A. *Well, you know, through all this ordeal, we kept committed to the Registry. We kept committed to the need of the Registry, and we kept committed to the whole scheme of being a Concessionaire. We were committed to that. We believe that was the right way to do it, and we wanted to do everything possible for that to continue. And, in that sense, trying to mitigate the*

*storm that was happening, the public storm that was happening was one of my roles.*

*So, anything we tried--that we did was try to diminish the public uproar against the Renave so as to maintain the Renave as a feasible entity.*

*Q. So just to help on my understanding, are you saying that the effort was to shift it to genocide and away from car theft as a way of protecting the Renave Concession?*

*A. Yes, that's what I said."*

7-44 The Tribunal accepts this testimony.

7-45 Immediately following publication of the *Reforma* article on Mr Cavallo on 24 August 2000, the Secretariat ordered the emergency audit of the Concessionaire's operations, the outcome of which confirmed that the confidentiality of information had not been breached (see Part IV (19) above). However, still facing intense pressure from the public and political opposition concerning the security of personal information collected and managed by the Concessionaire, the Secretariat ordered the Technical Intervention on 29 August 2000, overseen by Mr Marín (see Part IV (20) above).

7-46 One week later, on 7 September 2000, Dr Ramos Tercero was found dead under tragic and mysterious circumstances (see Part IV (21) above). Coupled with the Cavallo incident, this was a crippling event for the Concession threatening its future.

### **(E) *The Death of Dr Ramos***

7-47 The Parties agree that the death of Dr Ramos adversely affected the Concession and the Concessionaire. In closing argument, the Claimants submitted that whilst the Secretariat's attitude towards the Concessionaire changed following Dr Ramos' death, the Revocation of the Concession was still not inevitable, pointing to Dr Blanco's testimony to the effect that Revocation was not on his mind following this tragic event

[D8:1734]. The Respondent contended in closing argument that the damage done to the Concession by the Cavallo incident was much exacerbated by Dr Ramos' death, making the conduct of the Concession extraordinarily difficult for both the Secretariat and the Concessionaire [D8:1859-60].

7-48 Mr Salgado testified as follows on cross-examination as to the impact of Dr Ramos' death [D2: 348-49]:

*“Q. The next day [7 September 2000] the body of Mr. Ramos Tercero was discovered; right?”*

*A. That's correct.*

*Q. And his death was a major event for the Renave project; is that not right?”*

*A. That's right. He was the one that conceived the project, and he was actually responsible for it before the Secretariat.*

*Q. What was the impact of the lamentable death of Deputy Secretary Raúl Ramos Tercero in the media?”*

*A. In the media, well, there were a lot of newspaper clips, a lot of reports. I do remember that one of the experts that spoke on TV at some point or in the news, in the radio news, I don't remember, said that it had been impossible for Mr. Ramos Tercero to commit suicide because he had so many deep cuts in his wrists that would have made it impossible for him to cut one wrist and then without tendons cut the other wrist. And then the jugular and the femoral vein as well, so that looked very impossible for a suicide, it seemed. I remember that.”*

7-49 Mr Siegrist testified [D3: 586]: “The Cavallo affair was one thing, and then the death of Mr. Ramos Tercero was something that took this to a higher level.”

7-50 Mr Taíariol testified as follows on cross-examination [D3: 683-685]:

*“Q. Now, going back to the 24<sup>th</sup> [August 2000] in that meeting of the Board, there was a concern on the part of the members of the Board on the impact on Renave's public image?”*

*A. Obviously. How could it be otherwise? We don't live in a bubble. It's obvious that we were concerned. Beyond the fact that - well, beyond what I said that I think that or thought that it was a crisis that was building up. In any event, the arrest of a person who is the Director General of the*

*company, a person who, moreover, in some cases, was respected and by us, and in terms of the start-up of the Renave, of course, we were all concerned. We were very concerned.*

*Q. And this major concern, did that include the possibility that the Renave project might not continue?*

*A. No, I don't think so. At that time - I'm giving you my opinion - it's strictly a personal opinion--I don't think so because, actually, the alternative of continuing with the project was perfectly within reach. I think that most of the structure was prepared to provide the service, and that that could be done well. I think that from the standpoint of continuity of the project, the death of Ramos Tercero was much more important than the arrest of Ricardo Cavallo.*

*Q. You obviously knew Mr. Raúl Ramos Tercero very well; is that not right?*

*A. Yes.*

*Q. And the Concessionaire was in constant contact with him?*

*A. There was fluid contact.*

*Q. And no doubt the news of Raúl Ramos Tercero's death was devastating for the Concessionaire, for the Renave project?*

*A. Yes.*

*I was much more impacted personally. Raúl Ramos Tercero was not a person who had a suicidal syndrome or anything of the sort. He was the father of four children. He was a servant, a believer, an integral person. So, the truth is that first, it was very painful for me personally; and, second, from that moment, no doubt it was going to be very difficult to go forward because I think that part of the heart of Renave was Raúl Ramos Tercero.*

*Q. So, then, it was very difficult for the Renave project to continue forward? Is that what you're saying?*

*A. Yes. Not only that, but after Ramos Tercero, there was one other on the list. Perhaps I was on the list. Who would know?"*

7-51 Dr Blanco testified as follows [D5:1077-1080, 1081-1082]:

*" ... Now, the events of the 24th [August 2000] obviously had a significant impact. If we could go now to paragraph 25 of your statement, do please take a moment to refresh your memory and have a quick look at it. And*



*this, of course, you are referring to the period not only after the 24th, but also after the death of Ramos Tercero; I appreciate that.*

*You say: "It was simply untenable for the Registry to continue under the control of the Concessionaire," and you did what you could to support the Concessionaire, but you faced almost universal condemnation. Now, it seems that on the 6th of September 2000, you attended a meeting with the various persons at the Concessionaire, and that is referred to in paragraph 24. The question I have for you is: At what point did you conclude that it was simply untenable? Was that before or after Ramos Tercero's death on the 7th of September?*

- A. *Well, on the 6th of September, we reviewed together with Mr. Davis and some other representatives of the corporation Renave the state of affairs, and we tried - at that point in time, kept our communication open with the Concessionaire to talk about difficulties, but most importantly it was a meeting where it was said, well, things should get better sometime in the future. And in that sense, it was - at the end I considered it a positive meeting. Things were difficult, but let's wait to see how things develop. That changed very fast with the death of Mr. Ramos. It was, as it appeared in the newspapers and again another storm of articles, his death was related to the Cavallo affair. Somehow people related to Cavallo have killed Mr. Ramos. That was sort of the line. So, obviously, they were trying to hide something terrible that had happened with the Registry, with the database. That was the line that you could read in the newspapers, listen in the radio and watch on the TV.*

*At that point in time, our concern again was how can we keep Renave alive. The opposition was terrible at that point in time. The public opinion when you multiplied the effect of Cavallo, a vehicle thief and a forger of documents, with what was seen at that point in time a crime, a murder because of Renave. Things got really impossible to handle in the sense of having a viable institution being at that point in time managed by the Concessionaire. So, we said, okay, let's give it one more chance. Instead of taking the Concession away, let's keep the Concession, let's take the administration and hope for the better. Hope for this storm to calm down in the months to come, in the next administration, or, if it was possible, before, for the administration of Renave to be given back to the Concessionaire.*

*So, to answer your question in point, it was the death of Mr. Ramos, the role that he played in Renave, and the hypotheses there were out in public opinion that his death was related to Mr. Cavallo, specifically that they were trying to silence him on something terrible that had happened to the Registry. That made us as a measure to save Renave and to give another chance to the shareholders of Renave, that made us decide to take the*

*administration, but still give it another chance for the shareholders of Renave to keep the ownership of Renave.*

*Q. But your view on that changed after the 7<sup>th</sup> of September?*

*A. Yes.*

*[...]*

*Q. What precisely was it about the death of Ramos Tercero that caused you to recognize that the Concession was dead?*

*A. I wouldn't - I didn't think the Concession was dead. I was doing my last effort to keep it alive. Instead of taking the Concession away, we decided to manage the Concession, keeping the ownership in the actual shareholders.*

*I may sound a little repetitive, but at that point I was convinced that we were trying to fight against the idea that a thief and a forger of documents had somehow penetrated the registry. We were fighting against that. And in the meeting on the 6th of September, the conclusion is things looked terrible, but not real terrible. Things will improve. Maybe the Cavallo storm will start dying down. When Undersecretary Ramos dies, and his death is directly related by the press as an act of a criminal organization trying to silence the person, the connection between the criminal organization and the Registry, that was the point in time when I said there was no way the owners, the shareholders of Renave can keep on managing Renave. Unless we manage, this institution will absolutely die because nobody will register.*

*Q. Did you form that view because of the identity of the shareholders or the way in which the Concession was functioning?*

*A. I formed that view because the sequence of events, Mr. Cavallo and Mr. Ramos and the connection and the public opinion that came out specifically is that the property of thousands of Mexicans—actually millions of Mexicans--was in danger because their data had been communicated to a delictive to a criminal organization. That was in the air. That was public opinion. Everybody was feeling that, and that's a moment in which I thought that the best chance to keep Renave alive and to keep it as a concession was for us to take the administration.”*

7-52 The Tribunal accepts this testimony, confirmed by the contemporary reaction of Talsud (see Part IV (22) above). The Tribunal notes, particularly, Dr Blanco’s benevolent motives towards the Concession in September 2000, namely ‘how to keep Renave alive’ until the public storm had calmed down.

7-53 The Tribunal concludes that the combination of these two events, the Cavallo incident and Dr Ramos' death, would have destroyed all public confidence in the Concession permanently - but for the Secretariat's conduct between 24 August and 15 September 2000 in deciding to front the Concessionaire and thereby to shield it from adverse public opinion.

**(F) *The First Administrative Intervention***

7-54 One week following Dr Ramos's death, on 15 September 2000, the Secretariat suspended the obligation to register used vehicles and initiated the First Administrative Intervention (see Part IV (23) and (24) above). The Claimants contend that these acts were arbitrary and a breach of both BITs; whereas the Respondent takes the position that this act was a lawful exercise of its rights under the Concession Agreement.

7-55 Several witnesses testified on behalf of both the Claimants and the Respondent in respect of the motivation for and the results of the First Administrative Intervention. In the Tribunal's view, the best testimony as to motive came from Dr Blanco. As already cited in part E above, Dr Blanco testified on cross-examination that the Secretariat's intention was to preserve the Concession, not to terminate it [D5: 1085-1088]:

*“Q. But by the 13th or 14th of September, when the Administrative Intervention came into being, revocation of the Concession was clearly in your mind, was it not?”*

*A. Revocation of the Concession was not in my mind.*

*Q. Can I take you to Tab 13 of the bundle 1E. At the bottom of page 128 is the announcement, you said: "Revocation of the Concession was not in my mind."*

*A. May I -*

*Q. Of course.*

A. *It was not in my mind as an action that I was willing to take during the administration of President Zedillo. Obviously, we have considered that in the sense of what are the options, but whenever we came and we had another alternative that was not the revocation of the Concession, history shows that we took - we took the other option. That was always an option, but it was an option that we decided not to take.*

Q. *Was it an option you were hoping that another administration might take?*

A. *No, not at all. Not at all. My hope was that the next administration would be under better weather than we were at the time, and that things will come down, and that the discussion will be more done under objective conditions instead of the - how could - -a lack of English words, but under the very, very stormy and convoluted times that we were living at the end in these months when - after those terrible events of Mr. Cavallo and Mr. Ramos, it was, indeed, the best way to describe it is as a perfect storm ...*

Q. *... Thirteenth, 14th of September, would it be fair to say that you were looking for reasons to terminate the Concession?*

A. *I was not looking - I was looking for ways to continue with the Concession. I thought that the effort that we did through so many years, since 1996, if my mind doesn't fail, from 1996 to year 2000, we invested a lot of resources in studies, a lot of resources in lobbying, a lot of resources and a life of one of my most dear colleagues in the process. The last thing that I wanted is to accept is that this initiative was a failure. I wanted to keep it alive, and it was not that I wanted to pass it to the new administration. I just wanted to keep it alive because I thought there was the right institution, and that it was on the wrong circumstances; that given time and better conditions, the institution should survive, not only survive, but give the Mexicans the type of assurances on the property that they deserve and they would decrease the robbery of vehicles."*

7-56 As to the results of the First Administrative Intervention, in the Tribunal's view, the most reliable evidence comes from the contemporary written reports of Mr Marín, the administrative intervener (who was not called as a witness by the Respondent in these arbitration proceedings).

7-57 It is not disputed by the Parties that Mr Marín was a "technical man" with respectable credentials whose integrity in carrying out the tasks put to him by the Secretariat is unquestioned [D8:1729]. It is clear on the basis of Mr Marín's reports that several problems troubled the operation of the Concession, none which appear to have been fatal to its ability to function for its intended purpose. Indeed, for new vehicles, the

National Vehicle Registry was a relative success, notwithstanding the non-registration of used vehicles.

- 7-58 By February 2001, Mr Marín had reported to Dr Blanco's successor, Secretary Derbez, that the Concessionaire's financial statements "showed a satisfactory trend" and expressed the opinion that this situation would enable "the necessary adjustments to be made to its structure, procedures and operations so as to achieve the level of service and quality demanded by both the legislation and the population."
- 7-59 In other words, whilst the Concessionaire was not yet free of difficulties in February 2001, it was at least on the mend, or so it seemed until Mr Marín was replaced as administrative intervener with Ms Gómez-Mont on 7 May 2001. As already recited above in Part IV (25), Mr Marín's removal followed shortly after a report prepared by Mr Luis Pablo Monreal Loustanau on 18 April 2001 for Secretary Derbez sharply criticized Mr Marín for having "lost power and presence with the concessionaire", which was viewed by Mr Monreal as "detrimental to the intention of the intervention".
- 7-60 The Tribunal decides that the Secretariat's First Administrative Intervention was a measured and reasonable response to the very real and serious public concerns raised Mr Cavallo's arrest and Dr Ramos' death; that it was intended by Dr Blanco to save the Concession and to be temporary until such time as the 'storm' had abated; and that its conduct by Mr Marín, from September 2000 to April 2001 was not intended to harm the Concession or the Concessionaire. In short, the Tribunal finds that the Respondent's conduct up to 18 April 2001 does not amount to any breach of either BIT.

**(G) *The Second Administrative Intervention***

7-61 As already noted above, the Claimants' primary submission is that their loss commenced on 21 August 2000, with the postponement of the obligation to register used vehicles and that the Second Administrative Intervention of 7 May 2001 was only one of several intermediate acts amounting to a breach of the two BITs. On the Tribunal's decisions so far as regards the FET standards under the two BITs, that submission fails as regards any act by the Respondent preceding the Second Administrative Intervention.

7-62 As regards the Second Administrative Intervention, the Claimants specifically reject the testimony of Ms Gómez-Mont, the intervener, to the effect that this intervention was justified [D8:1690-91]. The Respondent submits that, with regard to the Second Administrative Intervention, its actions were reasonable in the circumstances, have been upheld by Mexico's domestic courts and cannot therefore amount to any breach of the BITs [D8:1791, 1830].

7-63 The testimony on the Second Administrative Intervention was largely provided by Ms Gómez-Mont [D6:1172-1345] and Mr González [D6:1347-1375].

7-64 Ms Gómez-Mont testified as follows, on cross-examination, with regard to her instructions from the Secretariat as intervener [D6:1194-95, 1211-1214]:

*“Q. Let's look at what happened in April and May of 2001. Your appointment takes place, does it not, on the 7th of May 2001?”*

*A. That is correct.*

*Q. In the period between your leaving FONALES [sic] and being appointed to take up the position at Renave, did you begin to get briefed and to be involved in informational aspects of what the issues were facing Renave?”*

*A. The meeting that--at the meeting that I had with the Secretariat.*

*When I sat down with Mr. Derbez, his instructions were very clear, very concise and direct. He told me we need to maintain the operation, and we need to make a diagnosis. Those were the only directions I received. He didn't tell me anything else. This is a person who was a professional. This is a person who knew we had to get our job accomplished; therefore, I did not receive any further instructions.*

*Q. You said that he gave clear and very brief instructions. Did you talk at that first meeting about a Requisa of the Concession?*

*A. No, once again, I repeat, he told me you need to maintain the operation and perform a diagnostic.*

*Q. Did he talk at all about possible revocation of the Concession?*

*A. No, he did not.*

*Q. So, at what point did the issue of a Requisa first come up?*

*A. As I told you before, I was the Administrative Manager. I was the Intervenor of the Concessionaire. My duties were to maintain the operations and to diagnose the situation. That's what I had to do. [...]*

*Q. Well, it's just that I'm a little surprised by the answer that you have given me because it contradicts what you wrote in your written statement, and I wonder whether you can explain to us which of your two statements is correct. If I can take you to paragraph four of your statement, you say, and I will read out, "Upon being named Intervenor, Secretary Derbez called me to a meeting in which he commented that the concept of the Registry should be strengthened, and he instructed me to perform a general evaluation of the Registry that would permit the Secretariat to determine if there were bases to revoke the Concession.*

*A. Yes.*

*Q. So, you have just contradicted your own Witness Statement. Which is the correct answer?*

*A. Let me explain once again. We have to undertake an assessment so that the decisions provided for by the law can be made. The law might speak of sanctions, fines, seizure, requisition, revocation, et cetera. We have to show and provide the basis, the assessment so that the areas with the authority could make the decisions to come up with a solution. I'm not saying yes or no. I'm saying that we have to undertake the assessments so that the law would tell us what the solution to the problem or non-problem would be. At that time we still hadn't come up with the assessment.*

*Q. Well, it strikes me that--*

- A. *Excuse me. In the same, it says that there could be a seizure or Requisa, which is another power under Mexican law.*
- Q. *I understand you're not saying yes or no, but you have also said yes and no, and I'm slightly confused. Either he did talk about revocation or he didn't talk about revocation. It's like pregnancy, you are or you are not. It's a yes-or-no answer. Which are of your numerous answers, yes, no, or neither yes or no is correct?*
- A. *Let me answer in the same way that would allow the Secretariat to determine whether there were any bases for revoking the Concession, imposing sanctions, or proceeding with the Seizure of the company. These are legal concepts that are in our laws, that are in the Concession Agreement, in terms of reference, regulations, and so forth. You see them there. So, it would be to enable the Secretariat, if you will, to take action. Paragraph four, last four lines. It's not saying go forward with the revocation, the sanctions, and so forth. Those were not my authorities. I had to carry out the assessment. All right?*
- Q. *But I'm still slightly confused as to whether or not you got instructions to consider whether or not there was a ground for revocation. Could you just give a yes-or-no answer to that question?*
- A. *Based on the facts that one might come up with, it was any of those three might have been options, any of the three. Seizure, sanction, revocation, any of them, depending on what I would find. The facts - the facts in Mexico speak.*
- Q. *The only fact I'm looking for is whether or not you and Mr. Derbez talked about revocation at that meeting. It's a very simple yes-or-no answer.*
- A. *Mr. Derbez reminded me that the regulations in Renave gave him the authority to adopt any of those three measures. We are talking about the law and regulations that we have.*
- Q. *So, you did talk about revocation?*
- A. *No, he didn't tell me that I had to go in to undertake an assessment so that that assessment would tell us what was going to happen. I wasn't in the legal area of the Secretariat who were the ones who had to make those decisions, not me. I had to undertake my assessment and present facts. I don't know if -*
- Q. *I feel I have asked the question enough times I don't feel I'm going to make any more progress, so let's move on to the next issue."*



7-65 Mr González testified as follows, on cross-examination, with regard to the operation of the Second Administrative Intervention [D6:1354-55]:

*“Q. Could you look upon the first page, page 129 in the Spanish, 137 in the English, Article 2, the second line says, “The Administrative Intervenor, with the purpose of maintaining the optimal operation of the public service,” and then item one, “shall hold the Office of the Intervenor with the authorities and powers inherent to the General Director.” Do you see that?*

*A. Yes, I see it.*

*Q. And these are the powers that Mrs. Gómez Mont inherited from Erasmo Marín; is that not correct?*

*A. According to the document, that is right.*

*Q. Thank you. We have finished with this document for the time being. So, while you say in your statement that in practical terms, Mr. Bilbao was responsible for the day-to-day operations, legally the Intervenor had the powers of the General Director; is that not correct?*

*A. Legally, that is right.”*

7-66 The Second Administrative Intervention commenced on 7 May 2001 and ended on 25 June 2001, with the Requisition. It will be recalled that prior to or around the appointment of Ms Gómez-Mont, Dr. González prepared a note for Secretary Derbez concerning the feasibility of seizing and/or revoking the Concession: see Part IV (25) above.

7-67 The Tribunal determines that the Secretariat’s Second Administrative Intervention was markedly different in purpose and content from the First Administrative Intervention. Whilst the latter was motivated by a desire to “keep [the Concession] alive” [D5:1088], the former’s motivation was quite the opposite. Under the new regime of Secretary Derbez, it is clear that the groundwork was being prepared to revoke the Concession. This culminated in the Requisition of the Concession on 25 June 2001 and its eventual Revocation over a year later, on 13 December 2002, both of which were directed at terminating any hope that the Concession might be revived and its activities restored to registering both new and used vehicles, as Dr Blanco had intended in August-September 2000.

**(H) *The Requisition and Revocation***

- 7-68 The Claimants summarised their case in their closing submissions at the main hearing to the effect that the Respondent had deliberately set in motion a series of unlawful events which led “inexorably” to the Revocation of the Concession on 13 December 2002 [D8:1691]. The Claimants submitted that, as the heart of the evidence which emerged during the main hearing, “it is the events of June 2001 that become absolutely essential because what has now become clear is that there really was no substantive basis at all for Mexico to seize the Registry in June 2001”, i.e. the Requisition of 25 June 2001 [D8:1692]
- 7-69 The Respondent strongly refutes this characterization of the several events leading to the Requisition of 25 June 2001 and the Revocation of 13 December 2002. The Respondent submits that the Secretariat faced “extraordinary circumstances and sought to address them properly” [D8: 1791]. The Respondent justifies the Requisition and Revocation on the basis of the deficiencies identified by Ms Gómez-Mont, as the intervener, in the operation of the Concession by the Concessionaire [D8: 1792].
- 7-70 Factually, the Tribunal does not consider that Ms Gómez-Mont’s “23 deficiencies” played any material part in the Secretariat’s decisions regarding the Requisition and Revocation. It is clear from the evidence adduced in these proceedings that these decisions in June 2001 and December 2002 bore a quite different stamp from those taken by the Secretariat in August and September 2000; that the later decisions inaccurately invoked imminent peril to national security in stark contrast to the earlier decisions (which had not done so) in not dissimilar circumstances; and that the difference between these respective decisions, as taken by the old and new Secretariats, evidences a clear intention by the new Secretariat to terminate the Concession and Concession Agreement without due regard to the Claimants’ legal rights under the two BITs.

**(05) THE TRIBUNAL'S DECISION**

- 7-71 It is now appropriate to decide the legal issues in regard to the Claimants' FET Claims on the facts found by the Tribunal in Parts IV and VII (04) above.
- 7-72 The Tribunal decides to apply the primary wording of the FET standards in the two BITs, interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties, namely "fair and equitable treatment". The Tribunal accepts the Claimants' submissions that this phrase in both BITs includes the exercise of good faith or the absence of manifest irrationality, arbitrariness or perversity by the Respondent.
- 7-73 Given that the Tribunal here addresses only the Claimants' rights arising from the two BITs under international law, the Tribunal is not concerned with the different legal rights of the Concessionaire under the Concession Agreement and Mexican law, which were the exclusive subject-matter of the decisions of the Mexican courts invoked by the Respondent. Hence, the Tribunal rejects the Respondent's arguments based on "local remedies".
- 7-74 It is not necessary, on the facts of this case, to consider more fully the legal scope of these FET standards; and, for reasons which appear below, it is also unnecessary to consider the separate legal argument of Talsud based on the second limb of Article 3(1) of the Argentina BIT, relating to the Respondent's obligation to "not prejudice" the management etc of their investments through arbitrary or discriminatory measures.
- 7-75 Applied to the facts found by the Tribunal, the Tribunal does not consider that the Claimants established any FET claim for breach of Article 3 of the Argentina BIT or Article 4 of the France BIT based on events prior to 25 June 2001, i.e. before the Secretariat ordered the Requisition. Whilst the Secretariat, internally, had already developed its malign motives towards the Concession with the Second Administrative Intervention of 7 May 2001, these had not crystallised sufficiently into overt unlawful

conduct towards the Claimants under the two BITs before the Requisition. (This decision includes Talsud's separate argument based on the second limb of Article 3(1) of the Argentina BIT).

7-76 The Tribunal considers, conversely, that the Claimants established their FET claims with both the Requisition of 25 June 2001 and the Revocation of 13 December 2002. On the facts found in this Award, the Tribunal can only characterise the Respondent's conduct from 25 June 2001 onwards to 13 December 2002 as manifestly irrational, arbitrary and perverse, being also conducted in bad faith towards the Claimants and their rights as investors under the two BITs.

7-77 The interim period of almost 18 months from 25 June 2001 to 13 December 2002 is perhaps not directly relevant to the Tribunal's decisions in this Award, notwithstanding that it comprised composite acts consequential upon the Secretariat's decisions in regard to the Requisition and the Revocation. These acts certainly do not mitigate or extinguish the unlawfulness of either act under the BITs; and, indeed, the prolongation and increasing seriousness of the Respondent's conduct only confirms such unlawfulness from the outset, namely the Requisition of 25 June 2001.

7-78 For the purposes of establishing the date of the first FET breach of both BITs by the Respondent, as a completed act, the Tribunal determines that breach as occurring on 25 June 2001 with the Secretariat's decree ordering the Requisition.

**PART VIII: ISSUE D – EXPROPRIATION**

**(01) INTRODUCTION**

- 8-1 In this part of the Award the Tribunal considers the Claimants’ claims that the various measures adopted by the Respondent, beginning with the Secretariat’s extension of the deadline to register used vehicles on 21 August 2000 and culminating in the Revocation of the Concession Agreement on 13 December 2002, amounted to unlawful expropriation (direct and indirect) or were equivalent to such expropriation, in violation of the two BITs.
- 8-2 The expropriation provisions of the Argentina BIT and the France BIT respectively provide as follows:

*Argentina BIT*

*“ARTICLE 5.  
Expropriation and Indemnification*

*1. – Neither of the Contracting Parties may nationalise or expropriate, either directly or indirectly, an investment made by an investor from the other Contracting Party in its territory or adopt any measures equivalent to the expropriation or nationalisation of this investment, except:*  
*a) for reasons of public utility;*  
*b) on a non-discriminatory basis;*  
*c) in accordance with the principle of legality; and*

*France BIT*

*“ARTICLE 5  
Expropriation and Indemnification*

*1. Neither Contracting Party shall take any direct or indirect measures to expropriate or nationalise, or any other measure which has the equivalent effect, an investment made by an investor within its territory or its maritime zone, except:*  
*(i) for reasons of public utility;*  
*(ii) on the condition that these measures are not discriminatory;*  
*(iii) in accordance with the required legal procedure;*

*d) with compensation, pursuant to paragraphs (2) and (4) below.*

*2. – The compensation shall be equivalent to the market value of the expropriated investment immediately before the expropriating measure was implemented ("date of expropriation") or before the expropriating measure was made public. The valuation criteria shall include current value, declared tax value of tangible property, and other criteria appropriate to determine market value.*

*3. – Compensation shall be paid without delay, in full and be freely transferable.*

*4. – The amount paid shall be no less than the equivalent amount which would have been paid as compensation on the date of expropriation in a freely-convertible currency on the international financial market, that currency having been converted to the standard market quotation on the date of valuation, plus interest corresponding to a reasonable commercial rate for that currency until the date of payment."*

*(iv) on payment of compensation in accordance with the provisions of paragraphs 2 and 3 of this Article.*

*2. Compensation shall be paid without delay, in full and be freely transferable.*

*3. The compensation shall equate to the fair market value or, where this is not available, to the actual value of the expropriated or nationalised investment immediately before the expropriation or nationalisation was carried out and shall not take account of any changes in the value which arise as a result of the expropriation becoming known prior to it taking place. Criteria to be considered for the evaluation are the current value, the asset value including the declared tax value of tangible property and any other criteria which, in the circumstances, are appropriate to determine the fair market value. The compensation, its amount and its mode of payment shall be fixed no later than the date of the expropriation. The compensation will be subject to interest calculated at the applicable market rate until the date of payment."*

## **(02) THE CLAIMANTS' CASE**

8-3 The Claimants submit that "the measures adopted by Mexico in the period prior to the Revocation amounted to indirect expropriation and/or measures tantamount to expropriation, and that, at the time of the Revocation, a direct expropriation occurred" (Memorial at 94). These measures are identified by the Claimants as follows (Reply, para. 246 at 106):

- *“the unilateral decision of 21 August 2000 to extend the deadline for registration of used vehicles as a result of the Secretariat’s failure to secure cooperation agreement [sic] with the federative entities used car registrations by the Respondent;*
- *the decision to proceed to the Technical Intervention on 28 August 2000;*
- *the decision to proceed to an Administrative Interventions [sic] of 14 September 2000 and, thereafter the failure to secure any further cooperation agreements with the federative entities;*
- *the seizure of the Registry on 25 June 2001; and*
- *the revocation of the concession on 13 December 2002.”*

8-4 The Claimants submit in connection with the expropriation provisions in the two BITs that (Memorial at 97):

*“290. It is notable that Article 5.1 is broadly drafted to encompass “any measure having a similar [sic: equivalent] effect” to nationalization or expropriation. The Claimants submit that the acts and omissions of the Mexican government authorities in relation to the Claimants’ investment prior to and culminating in the revocation of the Concession Agreement, constituted measures having a similar effect to expropriation. The acts and omissions comprising measures having similar effect to expropriation in this case included each of the acts set out at paragraph [271] above, as well as those acts taken cumulatively.*

*291. Each of these sovereign acts of Mexican government authorities had the effect of depriving the Claimants of the use and enjoyment of their investment, by rendering the Concessionaire’s effective operation of the Registry impossible. Taken together the acts initially constituted an indirect and/or creeping expropriation of the Claimants’ investment and then a direct expropriation following the Revocation in December 2002. Interference with the Claimants’ investment began shortly after the commencement of the Concession Agreement, and increased to the point that the Claimants were deprived of the totality of their control, economic use and enjoyment of their investment. The measures taken by Mexico did not fulfill the requirements of Article 5.1 of the two BITs, and accordingly violated these provisions.”*

8-5 The Claimants refer to several awards<sup>1</sup> dealing with the definition of “indirect expropriation”, highlighting in particular the Iran-U.S. Claims Tribunal’s discussion in *Starrett Housing v. Iran* and *Tippetts v. Iran* (Memorial at 98-99):

“294. *One of the most widely-cited descriptions of indirect expropriation is that of the Iran-US Claims Tribunal in Starrett Housing v Iran, which observed that*

*“it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.”*

295. *It is notable that in the Starrett case, Iran had appointed a temporary manager of the enterprise in question, Shah Goli. The Tribunal observed that*

*“the succinct language of [the decree] makes it clear that the appointment of Mr Erfan as a temporary manager in accordance with its provisions deprived the shareholders of their right to manage Shah Goli. As a result of these measures the Claimants could no longer exercise their rights to manage Shah Goli and were deprived of their possibilities of effective use and control of it.”*

296. *The Tribunal acknowledged that “assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law”. However, in the circumstances of the case, the Tribunal found that the investor no longer had the right to manage the project, and concluded that Iran had interfered with the Claimants’ property rights to an extent that rendered them so useless that they must be deemed to have been taken.*

297. *Similarly, in Tippetts v. Iran, the Iran-US Claims Tribunal found a taking of property where a temporary manager was imposed, holding that:*

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<sup>1</sup> The Claimants also cited the following legal authorities: *Tippetts v. Iran*, Award, 22 June 1984, 6 *Iran-US CTR* 219, at 225; *Metalclad Corporation v. United States of Mexico* (ICSID Case No. ARB(AF)/97/1), Award, 30 August 2000, at para. 103; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6), Award of 12 April 2002, para. 107; *Antoine Goetz et consorts c. République du Burundi* (ICSID Case No. ARB/95/3), Award of 10 February 1999, at para. 68; *Antoine Biloune v. Ghana*, UNCITRAL, Award on Jurisdiction and Liability of 27 October 1989, 5 *ILR* 189, at para 209; *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1), Award of 17 February 2000, 5 *ICSID Reports*. 153, para. 6.



*“A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where the legal title to the property is not affected.”*

298. *The parallels with the present case, in which Mexico interfered with the Concessionaire’s operation of the Registry, seized the Registry and ousted the Concessionaire’s personnel from management of the Registry, are clear.”*

*[Footnotes omitted]*

8-6 On the basis of these authorities, the Claimants contend that (Memorial at 102):

“306. *[b]y any standard, the measures taken by the Mexican government authorities in respect of the Registry and the Concessionaire had the effect of depriving the Claimants of the use and benefit of their investment in the Concessionaire, and constituted measures having similar effect to expropriation. Mexico’s acts and omissions rendered the effective operation of the Registry impossible, notwithstanding the Concessionaire’s full implementation of its commitments under the Concession Agreement. In particular:*

- (a) The Concessionaire was denied its right to operate and manage the Registry by the Technical and Administrative Interventions, which were not justified in law (under the Concession Agreement, the Law or relevant regulation) or on the facts.*
- (b) The Concessionaire was denied its right to operate and manage the Registry by virtue of the Seizure of the Registry in June 2001, which resulted in the replacement of the Concessionaire managers with government appointees and the denial of the Concessionaire’s access to and any control over the Registry including through the cancellation of passwords, the denial of access to offices and computers, the cancellation of existing bank authorizations, and the revocation of powers of attorney.*
- (c) The Concessionaire was deprived of its rights under the Concession Agreement by the Revocation of the Concession Agreement by Mexico.*
- (d) The operation and management of the Registry pursuant to the Concession Agreement was the Concessionaire’s only business (LECG/Horwath letter para. [3]). The Revocation put the Concessionaire out of business.*

- (e) *The profitability and scale of the Concessionaire’s business, as reflected in the projections made in the Business Plan submitted as part of the bidding process, depended entirely upon an income stream derived from registration fees (LECH/Horwath Letter para. [24]).*
- (f) *The measures taken by the Secretariat at first reduced and impeded the Concessionaire’s business and ultimately frustrated its business operations entirely when the Concession Agreement was revoked. The current value of the Concessionaire is insignificant (LECG/Horwath Letter paras. [12-14]).*
- (g) *The market value of the shares held in the Concessionaire by the Claimants was dependant on the Concessionaire’s ability to generate income from registration fees. [...]*”

*[Footnotes omitted]*

8-7 The Claimants respond as follows to the Respondent’s refutation of the legal authorities invoked in support of their expropriation claim (Reply at 110-11):

“256. *First, it is beyond argument that an expropriation, or acts tantamount to expropriation, can occur in the context of a contractual relationship: see Eureka v Poland; Southern Pacific Properties (Middle East) Ltd. v. Egypt; and CME v Czech Republic. Moreover, as indicated above, the Claimants’ claim is made under the BITs in respect of their investment in Renave. The Claimants’ Memorial set out the reasons why the acts and omissions of the Respondent in this case constituted not only violations of contractual obligations vis-à-vis Renave, but also, and independently, violations of obligations owed to the Claimants in respect of their investment in Renave under the French and Argentina BITs. As the Tribunal in Azurix v Argentina Republic observed, it is established that:*

*“[w]hether one or series [sic] of such [contractual] breaches can be considered to be measures tantamount to expropriation will depend on whether the State or its instrumentality has breached the contract in the exercise of its sovereign authority, or as party to the contract.*

257. *Second, in the present case, as the Claimants have demonstrated in paragraphs 58 to 228, it is quite clear that in its conduct towards the Renave Concession – and in particular from 21 August 2000 – the Respondent acted not as a party to the contract but outside the contract and in the exercise of its sovereign authority. The decisions to suspend the registration of used cars, to intervene in and ultimately to terminate the Concession were based on political, not contractual, consideration. Each*

*of these acts were sovereign acts, not contractual acts. That this is the case is clear from the account of events in paragraphs 58 to 228, including the statements of President-elect Fox and Mr Blanco.*

258. *The Respondent's assertions that it acted at all times as a party to the Concession Agreement are undermined by the fact that it did not take the steps envisaged in the Concession to address any of the alleged breaches of the Concession by Renave, none of which had been identified before 21 August 2000. As described in paragraphs 194 to 202, for example, the Concession Agreement contains procedures and penalties for any violations of confidentiality requirements of the Concession. The Respondent never sought to invoke these penalty provisions. Nor did it consult with the Concessionaire with regard to any need to review or modify the operating regulations of the Concession, as foreseen in the Concession, in the light of any identified operational deficiencies. Instead, on the basis, inter alia, of alleged but unspecified security concerns, it intervened directly in the running of the Concession, and it did so explicitly with a view to seeking grounds for revocation, as Mr Blanco made clear. It seized the Registry, and finally revoked the Concession. These were sovereign acts, not contractual acts."*

*[Footnotes omitted]*

- 8-8 In respect of the Respondent's refutation of cases not involving the exercise of contractual rights by a state co-contracting party, the Claimants respond that (Reply at 114):

"263. [...] [t]he Claimants did not assert that the Starrett Housing and Tippetts cases involved contractual relationships between the claimants in those cases and the government of Iran. However, like the present case, they did involve unjustified interference with the operation of an investor's business [sic], seizure of property and the replacement of the investor's personnel. Like the claimants in the Starrett Housing and Tippetts cases, Renave lost the right to manage and operate its business."

- 8-9 The Claimants submit in their Reply that, whilst the Respondent disputes that an expropriation occurred on the facts, it does not challenge the legal principle under international law that "the consequences of regulatory governmental action on a foreign-owned shareholding in a Mexican investment can constitute an act of expropriation" (Reply at 107).

- 8-10 The Claimants further submit that the Respondent's actions were unlawful because they could not be justified on grounds of public interest or public utility, nor were they

accompanied by the payment of adequate compensation, both requirements of Article (1)(d) and Article 5(1)(iv) of the Argentina and France BITs respectively (Reply at 108).

8-11 In regard to the Respondent's argument that the acts constituting expropriation were lawful because they were taken pursuant to legal rights under the Concession Agreement and Mexican law to respond to a situation that was not of the Respondent's making, the Claimants respond as follows (Reply at 108-09):

*“253. The Respondent's argument is misconceived in fact and law. It is misconceived in fact because the series of acts for which the Respondent bears responsibility commenced on 21 August 2000 and occurred prior to the arrest of Mr Cavallo, which was simply a useful pretext for terminating the Concession and in no way undermined the viability of the project. The decision to extend the deadline for the registration of used cars was taken by the State in the context of a wave of public and political opposition to Renave. It is an act that is directly attributable to the Respondent. To claim that the act was “not attributable to the State” is unarguable. Further, the facts clearly establish that the Respondent publicly articulated its desire to find a reason to terminate the concession as early as September 2000: the words of Secretary of State Blanco are unambiguous on this point. At every stage thereafter the State was seeking reasons to terminate without finding them. This is especially clear from the internal legal advice sent by Dra. Maria del Refugio Gonzalez to Dr. Derbez in the second half of 2001.*

*254. The facts establish that the Secretariat has not observed any ground giving rise to material concerns at any point prior to 21 August 2000 and that it had still not found any grounds a year or so later when Dra. Gonzalez wrote to Dr. Derbez. Neither the Concession Agreement nor Mexican law allows the state to go on fishing expeditions looking for grounds to terminate a lawful concession. In her statement Maria Jimena Valverde Valdes, the Head of the Judicial Matters Unit of the Secretary of the Economy, refers to Article 25 of the Renave Law in support of the claim that the act of requisition was justified on grounds of national security. Yet no new facts had emerged between 21 August 2000 and 27 June 2001 to support a claim that the State faced a situation of “imminent danger to national security”, and Dr Gonzalez's letter indicated that the working group had not found any such facts. On the basis of the evidence before the Tribunal the State acted for political reasons and without regard for the rights and interests of Renave and its shareholders when, on 21 August 2000, it extended the deadline for registration of used cars. The Respondent has put no evidence before the Tribunal that could justify*

*its decision to proceed to the Technical Intervention on 28 August 2000 or to the Administrative Intervention on 14 September 2000. In particular, it has not explained why the arrest of Mr Cavallo could not have been managed with less draconian measures within the scheme envisaged by the Concession Agreement. It has not provided any explanation as to the failure to provide public reassurances, as Mr Blanco had promised, or why the State thereafter gave up on its efforts to secure cooperation agreements with the federative entities. In the circumstances the Claimants submit that it is self-evidence that the actions taken by the State were not for a public purpose and were not lawful.”*

*[Footnotes omitted]*

8-12 In any event, the Claimants assert that the Respondent’s acts were unjustified and disproportionate and therefore expropriatory, in breach of the two BITs (Reply at 115-116):

*“267. Even if it were true, which the Claimants deny, that there were problems with the management and/or financing of the Concession and/or with the level of security provided in respect of vehicle registration data, the Respondent’s premature and escalating interference in the Registry’s operations, from the Technical Intervention in August 2000, to the revocation of the Concession in December 2002, were disproportionate and extra-contractual responses. The Respondent has been at pains to point out, and the Claimants dispute, that the steps it took were within its contractual rights under the Concession. But at no point does the Respondent explain why none of the less draconian measures explicitly envisaged in the Concession were taken.*

*268. The far-reaching and disproportionate nature of the Respondent’s measures supports that Claimants’ submission that they were expropriatory in nature. The Tribunal in Tecmed, considering the exercise of regulatory powers by the respondent state, observed that, it would consider:*

*‘In order to determine if they are to be characterised as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality.’*

*It is noted that:*

*‘There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and*

*the aim sought to be realised by any expropriatory measure. To value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the actions of the state and whether such deprivation was compensated or not.'*

269. *The Respondent's conduct in the present case was not proportionate to any operational or implementation difficulties that the Concession may have been facing as a result of matters that were within the responsibility and control of the Concessionaire. The Secretariat never appears to have considered any option except revocation from at least mid September 2000."*

8-13 With regard to the Respondent's obligation to pay adequate compensation, the Claimants contend that the language of the expropriation provisions in the two BITs serve a "dual function" (Memorial at 104):

*"312. [...] First, they establish that a failure to provide compensation in accordance with the standard defined will render any act of expropriation unlawful by reference to the BIT. Second, they give rise to a distinct and enforceable legal obligation that establishes the standard of compensation that is to be paid when an act of expropriate has occurred.*

*313. In the present proceedings, Mexico authorised the Concessionaire to make payments to each of the Claimants as shareholders, by way of dividends, return of capital and reimbursement for start up costs. However, these payments barely cover the Claimants' actual capital contributions and contributions to the start-up costs. The payments are not "equivalent to the market value of the expropriated investment immediately before the expropriating measures was implemented" (Argentina BIT, Art 5.2) [sic] and they do not "equate to the fair market value" (France BIT, Art. 5.2). (LECG/Horwath Letter paras. [16-17])."*

*[Footnotes omitted]*

8-14 The Claimants conclude that the Respondent's "failure to pay compensation to the Claimants in accordance with the fair market value before the expropriation occurred thereby renders the expropriation unlawful by reference to the BITs" (Memorial at 104).

**(03) THE RESPONDENT'S CASE**

- 8-15 The Respondent contends that the legal materials invoked by the Claimants to advance their expropriation claims are inapposite: these are based on different grants of jurisdiction and applicable laws. The Respondent submits that the Claimants' reliance upon awards of the Iran-US Claims Tribunal, including *Starrett Housing* and *Tippetts*, is misplaced because those decisions are "inextricably bound up in the Iranian revolution, visceral anti-American sentiment and widespread attempts to interfere with or disposes U.S. nationals of their investment in commercial interests there" (Counter-Memorial at 144).
- 8-16 The Respondent further distinguishes the awards in *Southern Pacific Properties v. Egypt*, *Wena Hotels v. Egypt*, and *Eureko B.V. v. Republic of Poland* from the present case, submitting that "[a]ll three cases address the state's exercise of legislative authority external to the contract, its intervening by taking some extra-legal action as in *ELSI*, or otherwise acting in such a way as to negate the rights concerned without any remedy" (Counter-Memorial at 146).
- 8-17 The Respondent denies that any expropriation claim can be made out on the facts of the present case, responding to each act or omission alleged by the Claimants to give rise to an expropriation as follows (Rejoinder at 71-73):

"[...]"

- a. *Claimants: 'In its Memorial (sic) the Claimants set out the basis for their claim that the acts and omissions of the Respondent amounted to an expropriation of the Claimants' investment in Renave, or alternatively measures that amounted to or were similar in effect to an expropriation. As a result of measures taken by the Respondent, acting in a sovereign capacity, the Claimants were deprived of the use and benefit of their investment in the Concessionaire, Renave. These measures included:*
- *the unilateral decision of 21 August 2000 to extend the deadline for registration of used vehicles as a result of the Secretariat's failure to secure cooperation agreement with the federal entities used car registrations by the Respondent;*

*Response: This (i) was never the subject of contemporaneous complaint; (ii) was a bona fide and reasonable decision taken in light of the public opposition and the Secretariat's desire to defuse it by reducing the cost of registration; (iii) reflected the difficulty of persuading recalcitrant state governments of the desirability of concluding coordination agreements; and (iv) was accepted as such by the Concessionaire in the revocation nullity proceedings. In short, it was not an 'interference' at all and cannot be considered to be part of a series of measures giving rise to an expropriation.*

- b. *Claimants: '- the decision to proceed to a Technical Intervention on 28 August 2000;'*

*Response: This (i) was initially accepted as legitimate by the Concessionaire's Legal Director at the time; (ii) in any event, was necessitated by the crisis engulfing the Registry; (iii) was less intrusive than the power to administratively intervene explicitly recognized by the Title of Concession; (iv) was justified by the Secretariat having regard to the events of 24 August 2000 [i.e. the Cavallo Incident]; (v) was the subject of an administrative proceeding before the Secretariat which was then overtaken by the Administrative Intervention which followed it 14 days after the technical intervention.*

- c. *Claimants: '- the decision to proceed to an Administrative Interventions [sic] of 14 September 2000 and, thereafter, the failure to secure any further cooperation agreements with the federative entities';*

*Response: The Administrative Intervention was: (i) expressly motivated by the events of 24 August - 7 September 2000 [i.e. the Cavallo Incident and Dr Ramos' death]; (ii) expressly contemplated by the Concession's legal framework; (iii) accepted as fully justified and properly motivated by the court in the Concessionaire's subsequent amparo against the Secretariat; and (iv) was thereafter accepted by the Concessionaire in its own account of the facts in the revocation nullity proceeding as being motivated by the 'enormous uncertainty' generated by the relevant events.*

*As for the failure to secure any further cooperation agreements with the federative entities this was: (i) is [sic] attributable to the collapse in confidence in the Registry occasioned by the events of 24 August - 7 September 2000; (ii) attributable to the disinterest of the states to respond to SECOFI's attempts to restart such negotiations; and (iii) in any event, reflected the voluntary nature of such agreements and the Secretariat's inability to compel their execution, a fact that the investors in Renave were well aware of at the time of the making of their investment, (iv) and, in any event, the failure to execute coordination agreements cannot, under any objective standard, be considered an expropriation.*



d. Claimants: ‘ - the seizure of the Registry on 25 June 2001’;

*Response: It was a requisition, not a ‘seizure’. In this regard: (i) the Secretariat’s right to requisition the Registry was expressly contemplated by the Concession’s legal framework (Article 25 of the Renave Law); (ii) the Secretariat’s decision to requisition the Registry was reasoned and in writing; (iii) the courts subsequently refused the Concessionaire’s request for an injunction against the seizure citing as the basis of their decision the grounds of public order and national security; (iv) during the period of requisition, and without interference from the requisition administration, the shareholders of Renave resolved to reduce their variable capital in the company by 63.8 million pesos and paid themselves a dividend; and (v) further judicial proceedings in relation to the requisition were ultimately overtaken by the Title of Concession’s revocation.*

e. Claimants: ‘ - the revocation of the concession on 13 December 2002.’

*Response: The revocation: (i) was a power contemplated in the Title of Concession; (ii) was the subject of an administrative proceeding before the Secretariat; (iii) in which the Secretariat gave the Concessionaire notice of the proceeding and an opportunity to make written submissions to it; (iv) the Secretariat provided lengthy written reasons for its decision to revoke the Concession; (v) when the company was returned to the shareholders, it received a cash balance of some 140 million pesos which, combined with the above-mentioned return of variable capital and dividend, more than made the investors whole; (vi) when the Concessionaire submitted its revocation nullity claim to the proper forum in March 2003, the Secretariat duly submitted to the jurisdiction of the courts and defended its position; and (vii) Mexico has stated that it will comply with any final decision of the courts if it is adverse to the Secretariat.*

8-18 The Respondent further submits as follows (Rejoinder at 73-74):

*“251. There is ample authority that where a state instrumentality has contracted with an investment of a foreign investor, the tribunal must look at the terms of the contract in order to determine whether the State is acting as co-contractant. While the Reply attempts to distinguish Waste Management’s relevance to the facts of this case, no attempt is made to respond to the same point being made in Salini and SGS about extra-legal actions taken outside of a contractual relationship that terminate or vary previously agreed contractual rights. Here the Secretariat indubitably possessed contractual rights of audit, inspection, intervention, termination, requisition, and revocation. The exercise of such rights cannot at the same time be considered the termination or variance of Renave’s contractual rights by means not contemplated by the contract. In this case there are no unilateral acts, outside the*

*contemplation of the contracting parties, which purport to vary the contract's terms."*

*[Footnotes omitted]*

8-19 The Respondent contends that it "is simply untenable to try to equate a State's exercising a right of requisition or revocation to which the investor agreed in contract, which exercise is then submitted to the proper forum under the contract, with State action that expropriates contractual rights of an investor" (Rejoinder at 74). The Respondent relies upon *Azurix Corp. v. Argentina* in making this point (*ibid.*):

"254. [...] *The point is made in Azurix, a case cited repeatedly in the Reply, where that tribunal observed when discussing expropriation:*

*Whether or not a series of such [contractual] breaches can be considered to be measures tantamount to expropriation will depend on whether the State or its instrumentality has breached the contract in the exercise of its sovereign authority, or as party to the contract.*

255. *Bearing in mind the Counter-Memorial's distinction between those cases involving a State's breach of contract and this case, which involves the exercise of a State's contractual rights, Azurix supports Mexico's point: international tribunals approach the acts of a State entity by focusing on whether the acts complained of can be seen to fall within the terms of the contract or whether there is an exercise of the State's sovereign power external to, or unconnected with the contract and not contemplated by its terms. As the Azurix tribunal noted in the sentence immediately preceding the quotation cited by the Claimants at paragraph 256 of the Reply:*

*The Tribunal agrees that contractual breaches by a State party or one of its instrumentalities would not normally constitute expropriation.*

256. *If this is the case for contractual breaches by the State party or one of its instrumentalities, it is perforce much stronger where the complaint is directed at the exercise of the State's contractual rights"*

*[The Respondent's emphasis; footnotes omitted]*

8-20 On this analysis, the Respondent concludes that "even if this Tribunal were not to share the Secretariat's view of the circumstances which led it to exercise its legal rights, on settled authority, the resort to local remedies in and of itself disposes of the Claimants'

grievances, unless they contend that the courts denied justice to the Concessionaire” (Rejoinder at 75).

**(04) THE TRIBUNAL’S ANALYSIS**

- 8-21 The Claimants submit that the “heart” of this case is expropriation [D8:1767], concluding that a violation of the expropriation provisions in the two BITs is so “self-evident”, that the main question before the Tribunal is only how much the Claimants are entitled to receive by way of compensation from the Respondent [D1:84, D8:1697]. As already noted, the Claimants claim that the first act of unlawful expropriation occurred on 21 August 2000 with the Secretariat’s postponement of the obligation to register used vehicles, being the relevant date for the purpose of determining a completed breach of the two treaties by the Respondent.
- 8-22 The Respondent concludes that each of the Secretariat’s acts was justified from 21 August 2000 to 13 December 2002, strenuously denying that any unlawful expropriation can be made out on the facts of the present case.
- 8-23 Given the Tribunal’s earlier decisions in Part VII of this Award in regard to the Respondent’s violations of the FET standards in the two BITs, it serves no purpose here to analyse in detail the Parties’ respective legal submissions on expropriation. The Tribunal applies the legal submissions made by the Claimant, to the general effect that an indirect expropriation occurs if the state deliberately deprives the investor of the ability to use its investment in any meaningful way and a direct expropriation occurs if the state deliberately takes that investment away from the investor.
- 8-24 In short, on the facts found by the Tribunal earlier in this Award and applying Article 5 of the two BITs, the Tribunal considers that the Claimants have not established their case as regards the period from 21 August 2000 up to (but not including) the Requisition of 25 June 2001. Conversely, the Tribunal considers that the Claimants have

established their case on indirect expropriation with the Requisition on 25 June 2001 and direct expropriation with the Revocation on 13 December 2002.

- 8-25 The Tribunal concludes that these expropriations were unlawful under the BITs and international law, given the facts found by the Tribunal and the further fact that the Respondent did not meet the condition required by Article 5 of both treaties regarding the payment of adequate compensation. As will appear later from Part XIV of this Award, the Tribunal does not consider that the Claimants' receipt of dividends, return of capital and reimbursement of start-costs amounted to adequate compensation required by Article 5 of the two BITs.
- 8-26 In reaching these conclusions, the Tribunal has paid no regard to the Claimants' allegations that the Secretariat violated the terms of the Concession Agreement or Mexican law. As the Tribunal has already noted several times above in this Award, this Tribunal is not concerned with the legal rights of the Secretariat and the Concessionaire under the Concession Agreement or Mexican law.

**(05) THE TRIBUNAL'S DECISION**

- 8-27 The Tribunal decides, on the facts found above by the Tribunal in Parts IV and VII of this Award, that the Claimants' investments were unlawfully expropriated by the Respondent, indirectly with the Requisition on 25 June 2001 and directly with the Revocation on 13 December 2002, in violation of Article 5 (1) of the Argentina BIT and Article 5 (1) of the France BIT respectively.
- 8-28 For the purpose of establishing the date of the first breach of both BITs as regards unlawful expropriation by the Respondent, as a completed act, the Tribunal determines that breach as occurring on 25 June 2001 with the Secretariat's decree ordering the Requisition.

***PART IX: ISSUE E – PROTECTION AND SECURITY***

***(01) INTRODUCTION***

- 9-1 In this part of the Award the Tribunal considers the Claimants’ claims that the Respondent failed to accord to their investments “full legal protection” and “full and complete protection and security” in accordance with the requirements of Article 3(2) of the Argentina BIT and Article 4(3) of the France BIT respectively.
- 9-2 The provisions relating to ‘protection’ in the Argentina BIT and the France BIT respectively provide as follows:

*Argentina BIT*

*“ARTICLE 3. National Treatment and Most Favoured Nation Treatment*

*[...]*

*2.- Each Contracting Party, after admitting in its territory investments from investors of the other Contracting Party, shall provide full legal protection to those investors and their investments and shall grant them a treatment no less favourable than that granted to investors and investments of its own investors or investors from third States.*

*[...]”*

*France BIT*

*“ARTICLE 4 Protection and Treatment of Investments*

*[...]*

*3. Investments made by investors of one Contracting Party within the territory or the maritime zone of the other Contracting Party shall benefit from full and complete protection and security within the territory and maritime zone.*

*[...]”*

(02) THE CLAIMANTS' CASE

9-3 The Claimants submit that the scope of these provisions extends beyond protection from physical violence and threats and “incorporate[s] a broader requirement to protect the position of investors and their investments”, referring to certain legal materials in support of their position, including the following (Memorial at 121-23):

“370. *In CME v Czech Republic, the arbitral tribunal found that the obligation in the relevant BIT to provide full security and protection had been violated certain [sic] acts of a government regulatory authority. It stated that:*

*‘The Media Council’s actions in 1996 and its actions and inactions in 1999 were targeted to remove the security and legal protection of the Claimants’ investment in the Czech Republic. . . . The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor’s investment withdrawn or devalued. This is not the case. The Respondent is therefore in breach of this obligation.’*

371. *In Goetz v Burundi, the arbitral tribunal found that the withdrawal of a free zone certificate by the State could constitute a measure having similar effect to depriving investors of or restricting their use of property, since it had forced the claimants to halt their activities and deprived them of the benefit which they could have expected from their investment. The tribunal observed that:*

*‘under the terms of Article 4 of the Treaty a measure depriving of or restricting property or a measure having similar effect is legal under international law once certain conditions are fulfilled. It is only when one of these conditions is found not to be satisfied that the host State can be regarded as having contravened its international obligations under the Treaty and, more especially, having breached its obligation, set out in Article 3, to ensure the ‘constant security . . . and protection of investors from the other party.’*

372. *The Goetz tribunal observed that if Burundi failed to provide the indemnity required under the BIT:*

*“The international responsibility of the Burundian State would therefore be triggered both for the violation of the obligation . . . to abstain from taking any measure having a similar effect to a measure depriving of or restricting property and for violation of the obligation, set out in Article 3, to assure Belgian investments on its territory ‘constant security and ... protection’.”*

*The Goetz tribunal concluded that in order to adhere to its international duties under the relevant BIT, Burundi had either to give an effective and adequate indemnity in order to render the revocation lawful under the relevant BIT provision, or, if it preferred, terminate the decision to withdraw the free zone certificate. There was no suggestion in Goetz v Burundi of any violence or threat of violence against the claimants’ investment.*

373. *The case of Rankin v Iran before the Iran-US Claims Tribunal also supports the view that the obligation to provide full and complete protection and safety is not limited to protection from physical violence. In that case, the Tribunal held that anti-American statements attributable to Iran “were inconsistent with the requirements of the Treaty of Amity and customary international law to accord protection and security to foreigners and their property.’*

*[...]*

375. *And in Occidental v Ecuador, the Arbitral Tribunal recognised that a violation of the fair and equitable treatment standard of the relevant BIT also gave rise to a breach of the obligation of full protection and security in the same provision of the BIT:*

*“a treatment that is not fair and equitable automatically entails absence of full protection and security of the investment”.*”

*[The Claimants’ emphasis; footnotes omitted.]*

- 9-4 The Claimants add in their Reply that this legal approach was confirmed by the award in *Azurix v. Argentina Republic*, as follows:

*“[Full protection and security] is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor’s point of view ... when the terms “protection and security” are qualified by “full” and no other adjective or explanation, they extending [sic] their ordinary meaning, the content of this standard beyond physical security.”*

9-5 The Claimants submit that, against this legal background, “the acts and omissions of Mexico [...] undermined the stability of the investment environment in which they had to operate and frustrated their legitimate expectations” thereby giving rise to an independent violation of the Respondent’s obligations to accord full and complete protection and safety under Article 4(3) of the France BIT and under Article 3(2) of the Argentina BIT (Memorial at 123).

9-6 The Claimants conclude in connection with this claim as follows (Reply at 129):

*“299. Nothing in the French or Argentina BITs explicitly limits the full protection and security standard to the level of police protection required under customary international law. In the present case, the Respondent’s unjustified interference with the operation of the Concession by Renave – commencing with the unilateral extension of the deadline for the registration of used vehicles through to the revocation of the Concession – undermined the stability of the environment in which the Concession operated, frustrated the Claimants’ legitimate expectations, and thereby violated the standards of protection guaranteed to investors under Article 4.3 of the French BIT and Article 3.2 of the Argentina BIT.”*

*[Footnotes omitted.]*

### **(03) THE RESPONDENT’S CASE**

9-7 The Respondent submits that arguments relating to ‘protection and security’ must not be compared with those concerning FET standards under the BITs (Counter-Memorial at 151-152):

*“510. The concepts of full protection and security refer to the State’s obligation to afford protection to the person or property of a foreign national in situations of threatened harm by third persons such as civil conflict or some other disturbance. Tribunals have held that States are bound to a due diligence standard in the circumstances. An example of the kind of*



*circumstances that have been considered to attract State responsibility due to its failure to accord full protection and security is found in Asian Agricultural Products Limited v. Republic of Sri Lanka. In that case, the Claimant's shrimp farm was located in an area of Sri Lanka that had come under the control of Tamil insurgents. During a counter insurgency operation conducted by government security forces, the farm was destroyed and its manager and staff members were killed. It was unclear whether the damage was caused by government forces or rebels. The majority of the tribunal found that the security forces could have taken precautionary measures even though they suspected that some of the farm employees were affiliated with the insurgents and for that reason found the Respondent liable for failing to provide full protection and security.*

511. *The Tribunal rejected that the claimant's argument that full protection and security must be read broadly:*

46. *The Tribunal is of the opinion that the claimant's construction of Article 2(2) as explained herein-above cannot be justified under any of the canons of interpretation previously stated (supra, Section 40).*

47. *In conformity with Rule (B), the words "shall enjoy full protection and security" have to be construed according to the "common use which custom has affixed" to them, their "usus loquendi", "natural and obvious sense", and "fair meaning."*

*In fact, similar expressions, or even stronger wordings like the "most constant protection", were utilized since last century in a number of bilateral treaties concluded to encourage the flow of international economic exchanges and to provide the citizens and national companies established on the territory of the other Contracting Party with adequate treatment for them as well as to their property ("Traité d'Amitié, de Commerce et Navigation", concluded between France and Mexico on November 27, 1886-cf. A Ch. Kiss Répertoire de la Pratique Française ..., op.cit., Tome III, 1965 Section 1002, p. 637; The Treaty concluded in 1861 between Italy and Venezuela, the interpretation of which became the central issue on the Sambiaggio case adjudicated in 1903 by the Italy/Venezuela Mixed Claims Commission-U.N. Reports International Arbitral Awards, vol. X, p. 512 ss.)*

48. *The arbitral Tribunal is not aware of any case in which the obligation assumed by the host State to provide the nationals of the other Contracting State with "full protection and security" was construed as absolute obligation [sic] which guarantees that no damages will be suffered, in the sense that any violation thereof*

*creates automatically a “strict liability” on behalf of the host State.*

512. *The tribunal then referred to ELSI, where among the claims presented to the Chamber was one where the United States complained that the unlawful occupation of the manufacturing plant at issue by striking workers had been permitted by Italy had permitted [sic] contrary to its obligation to provide full protection and security commented:*

*In its Judgment of July 20, 1989, the ICJ Chamber clearly stated that:*

*The reference in Article V to the provision of “constant protection and security” cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed (C.I.J., Recueil, 1989, Section 109, p. 65).*

*Consequently, both the oldest reported arbitral precedent and the latest ICJ ruling confirms that the language imposing on the host State an obligation to provide “protection and security” or “full protection and security by international law” (the other expression included in the same Article V) could not be construed according to the natural and ordinary sense of the words as creating a “strict liability”. The rule remains that:*

*The state into which an alien has entered ... is not an insurer or a guarantor of his security ... It does not, and could hardly be asked to, accept an absolute responsibility for all injuries to foreigners (Alwyn V. Freeman, Responsibility of states for Unlawful Acts of Their Armed Forces, Sijthoff, Leiden, 1957, p. 14.)*

*This conclusion, arrived at more than three decades ago, still reflects in the Tribunal’s opinion – the present state of International Law Investment Standards as reflected in “the worldwide BIT network”... ”*

*[Footnotes omitted.]*

- 9-8 The Respondent concludes that this allegation of breach of the BITs by the Claimants is merely “a make-weight” and duplicative argument advanced in relation to their cases on Expropriation and the FET standards (Rejoinder at 86).

**(04) THE TRIBUNAL'S ANALYSIS**

- 9-9 The Tribunal considers that the two BIT provisions relating to the Respondent's obligation to provide 'protection' are materially similar for the purposes of the present case, despite their different wording and different scope (the Argentina BIT referring to investors and investments; and the France BIT referring to investments only).
- 9-10 Such 'protection' provisions, in the form of the wording here under consideration, do not generally impose strict liability on a host state under international law; and the mere fact of other unlawful conduct in the form of expropriation or inequitable and unfair treatment by the host state is not, without more, to be treated as a breach of these provisions.
- 9-11 The Tribunal also considers that these BIT provisions are directed at different kinds of unlawful treatment from that proscribed by other provisions of the two BITs, particularly those regarding FET and Expropriation. The latter involve the investor and the host state, whereas the 'protection' provisions also involve the host state protecting the investment from a third party.
- 9-12 In the Tribunal's determination, this was never a case about a failure by the Respondent (including the Secretariat) to afford physical or other like protection to the Claimants. Moreover, the harm alleged by the Claimants is attributed to the Respondent itself and not to any third party; and the existence of the many legal proceedings involving the Concession and the Concessionaire, recorded in Part IV (28) above, demonstrate that it was also never a case about a failure by the Respondent to afford, indirectly, legal protection to the Claimants or their investments under Mexican law within the Mexican legal system. It is clear that the Concessionaire was itself entitled to resort and did resort to domestic legal remedies in the Respondent's state courts; and the Claimants have advanced no pleaded case in these arbitration proceedings for denial of justice.

9-13 In conclusion, on the facts found earlier in this Award, the Tribunal decides that the Respondent has not breached Article 3(2) of the Argentine BIT (“full legal protection”) or Article 4(3) of the France BIT (“full and complete protection and security”).

**(05) THE TRIBUNAL’S DECISION**

9-14 Accordingly, for the reasons set out above, the Tribunal decides that the Claimants have not established any breach of the two BIT’s ‘protection’ provisions; and these claims are therefore dismissed by the Tribunal. (In any event, these claims, even if any were successful, would add nothing to the Tribunal’s overall decisions on liability, causation and quantum in this Award).

**PART X: ISSUE F – NLF/MFN TREATMENT**

**(01) INTRODUCTION**

- 10-1 In this part of the Award, the Tribunal considers the Claimants’ submissions that the Respondent is precluded from relying on the ‘national security’ proviso in Article 2(5) of the Argentina BIT in regard to Talsud’s claims as a result of the ‘most favoured nation treatment’ provision in Article 3(2) of that BIT and the terms of the France BIT (which contain no ‘national security’ proviso).
- 10-2 The provisions relating to ‘no less favourable’ treatment and to ‘most favoured nation’ treatment in the Argentina BIT and the France BIT (“NLF/MFN”) provide, respectively, as follows:

*Argentina BIT*

*“ARTICLE 3. National Treatment and Most Favoured Nation Treatment*

*[...]*

*2.- Each Contracting Party, after admitting in its territory investments from investors of the other Contracting Party, shall provide full legal protection to those investors and their investments and shall grant them a treatment no less favorable than that granted to investors and investments of its own investors or investors from third States. [...]*”

*France BIT*

*“ARTICLE 4 Protection and treatment of Investments*

*[...]*

*2. Each of the Contracting Parties shall grant, within its territory and its maritime zone, to investors of the other Contracting Party a treatment no less favourable than it would grant its own investors or treatment granted to investors of the most favoured Nation, if the latter is more favourable, with regard to their investments and the operation, administration, maintenance, use, enjoyment or disposition of such investments. [...]*”

10-3 Article 2(5) of the Argentina BIT further provides as follows:

*“ARTICLE 2 Scope of Application*

*[...]*

*5. - This Agreement shall not apply to:*

*[...]*

*b) measures adopted by a Contracting Party for reasons of national security or public order.”*

## **(02) THE CLAIMANTS’ CASE**

10-4 The Claimants’ position is first pleaded as follows (Memorial at 125):

*“380. These provisions provide benefits to each of the Claimants. For example, Article 3.2 [of the Argentina BIT] operates to ensure that Talsud is entitled to the standard of treatment provided in the Argentina BIT to the full extent that that BIT does not incorporate a national security exception. Thus, Mexico is precluded from relying on Article 2.5 of the Argentina BIT to avoid the applicability of the Argentina BIT to Talsud’s investment and to that company’s rights to invoke that BIT in these proceedings.*

*381. Arbitral tribunals have confirmed that investors may rely on most favoured nation (MFN) provisions in a BIT to claim more favorable treatment, where such treatment is provided under another BIT to which the host state is a party. For example, in Maffezini v Italy [sic], the claimant sought to rely upon an MFN provision in the Argentina-Spain BIT to avoid a requirement in that BIT to allow a period of eighteen months for disputes to be settled by domestic courts prior to having recourse to arbitration under the BIT. The claimant alleged that Spain had entered into other BITs that required no such prior reference to domestic courts, and claimed the more favourable treatment provided in those BITs. The Tribunal found that*

*“if a third-party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause as they are fully compatible with the ejusdem generis principle.”*

*In the context of applying MFN treatment to the dispute settlement provisions (as opposed to the substantive standards) of a BIT, the Maffezini Tribunal identified certain limits arising from public policy considerations. However, the Claimants submit that no such considerations limit the application of MFN requirement in these proceedings.*

*[Footnotes omitted]*

10-5 In their Reply, the Claimants further submit that (Reply at 129-130):

- “300. [...] in any event, it is not open to the Respondent to seek to invoke that provision [Article 2(5) of the Argentina BIT] against Talsud in the present proceedings. There is no national security provision in the France BIT and hence Talsud is entitled, by virtue of the MFN provision in Article 3.2 of the Argentina BIT, to claim the more favourable treatment available to investors under the France BIT.
301. The Respondent’s answer to these submissions is not clear. It states that “[n]ational security issues in the sense of the 1998 Law arose in relation to the failure to adequately protect the security of citizens’ personal information [...]”. However, the Respondent does not address the Claimants’ arguments on this issue in any detail, and for present purposes it is the Claimants’ understanding that the Respondent is not seeking to invoke Article 2.5 of the Argentina BIT in respect of Talsud’s claim. The Claimants reserve the right to make further submissions on this issue should the Respondent raise it at a later stage of these proceedings, however. At this stage the Claimants would simply note that the Respondent’s invocation of a national security argument has always been unsustainable, and that it is all the more so following the report of Mexican court-appointed expert [sic] which addresses not national security but the security of Renave’s data handling systems. In his opinion Ing. Vasquez states that “the level of security implemented [by the Concessionaire] corresponds to level B2”, and he determines that no changes were made during to the level of security [sic] during or after the technical or administrative interventions. He concludes:

*“the level of security established by the Concessionary during the technical and administrative interventions was adequate for the type of information and services being provided.”*

302. *Notwithstanding that it does not advance any legal arguments based on Article 2.5 of the Argentina BIT, the Respondent argues that the MFN clause could not override a national security provision in a BIT. The Claimants disagree. The Respondent's suggestion that the public policy nature of a national security provision precludes the application to it of the MFN clause is undermined by the absence of such a provision from the French BIT. The Claimants again reserve their rights to make further submissions on this point should the Respondent seek to raise it at a later stage."*

*[Footnotes omitted]*

### **(03) THE RESPONDENT'S CASE**

10-6 The Respondent submits principally that the MFN clause in the Argentina BIT cannot override the public policy invocation of 'national security' in relation to the Concessionaire (Counter-Memorial at 171):

*"581. The Claimants have advanced arguments based on an anticipated invocation of the national security exception contained in the Argentina-Mexico Treaty. National security issues in the sense of the 1998 Law arose in relation to the failure to adequately protect the security of the citizens' personal information (this was noted in the requisition Acuerdo of 25 June 2000 and has been subsequently confirmed by Mexican courts) and the Concessionaire's security lapses have already been addressed both in the facts (including in the witness statement of Lic. María Jimena Valverde Valdez).*

*582. Mexico's response to the Claimants' submissions on the national security clause is twofold. First, Mexico disagrees with the submission to the effect that an MFN clause can override this provision of the Treaty. This clause is a provision of a public policy nature which cannot be overridden by an MFN clause. The Claimants acknowledge that limits on the MFN clauses exist by virtue of public policy considerations (there are other reasons as well). Mexico plainly disagrees with the contention that a national security exception does not fall into the category of public policy and therefore an MFN clause cannot override it. Second, Mexico's response to the Claimants' contention that the threshold to be met for the invocation of the national security exception is "extremely high" is that each*



*exception depends upon its own wording; some are plainly self-judging and others are plainly not, while still others fall somewhere between the two. For present purposes, it is unnecessary to address the Claimants' contentions in further detail."*

*[Footnotes omitted]*

**(04) THE TRIBUNAL'S ANALYSIS**

- 10-7 The Tribunal observes that the submissions advanced by the Claimants under the Argentina BIT were, in fact, as was acknowledged by the Claimants themselves, anticipatory of a defence which was ultimately never advanced by the Respondent in these arbitration proceedings.
- 10-8 As Article 2(5) of the Argentina BIT has not been invoked by the Respondent, this Issue F remains entirely moot. It is therefore unnecessary for the Tribunal to decide it in these arbitration proceedings.

**(05) THE TRIBUNAL'S DECISION**

- 10-9 As the 'national security' provision in Article 2(5) of the Argentina BIT was never invoked by the Respondent as a defence to Talsud's claim, no decision in respect of the Claimants' submissions is required of the Tribunal, save to dismiss them as otiose in these arbitration proceedings.
- 10-10 In so dismissing the Claimant's submissions, the Tribunal wishes to make it explicitly clear that it is not here making any decision on the other merits or demerits of the Parties' respective submissions as regards this Issue F.

**PART XI: ISSUE G - CAUSATION AND FAULT**

**(01) INTRODUCTION**

- 11.1. In this part of the Award, the Tribunal considers issues of causation and fault, on the basis that the Claimants have established (i) a breach of the FET standards in both BITs comprising of both the Requisition on 25 June 2001 and the Revocation on 13 December 2002; and (ii) a breach of the expropriation provisions in both BITs comprising also of both the Requisition and the Revocation.
- 11.2. The provisions relating to causation in the Argentina BIT and the France BIT respectively provide as follows:

*Argentina BIT*

*“Article 10. Dispute Settlement between an Investor and the Contracting Party which has received the Investment*

*[...]*

*6.- The arbitration award shall be limited to determining whether a Contracting Party has breached this Agreement, whether this breach has caused a loss to the investor and, if so:-*

*a) fix the amount of compensatory indemnification for the damage suffered;*

*b) restitution of property or, if that is not possible, the corresponding compensatory indemnification ...”*

*France BIT*

*“Article 9*

*Resolution of Disputes between an Investor of one of the Contracting Parties and the other Contracting Party*

*1. This Article only applies to disputes between one Contracting Party and an investor of the other Contracting Party in relation to an alleged breach by the Contracting Party under this Agreement which causes loss or damage to the investor or his investment ...”.*

**(02) THE CLAIMANTS' CASE**

- 11.3. The Claimants submit that they have suffered loss as a result of the Respondent's actions, identifying in particular "acts of expropriation", the failure to provide fair and equitable treatment, and the failure to provide full protection and security (Memorial, para. 382 at 126). In this regard, the Claimants submit that the Respondent is solely responsible for their loss.
- 11.4. The Claimants reject the proposition that they contributed to their losses and the corollary notion that any compensation awarded should accordingly be reduced or entirely extinguished, on the ground that Mr Cavallo was a senior employee of the Concessionaire.
- 11.5. The *MTD* award<sup>1</sup> cited by the Respondent in support of this proposition is distinguished by the Claimants (Quan. Rep. 40-41):

*"90. The present situation is entirely different. The Claimants were not negligent or unwise when they appointed Mr Cavallo. Mr Taiariol and Mr Siegrist have already dealt with these allegations in their witness statements. The Respondent has introduced no evidence in the merits phase to support the proposition that the Claimants knew or could have known the background events in issue. Mr Cavallo had successfully managed Talsud projects in Mendoza and Godoy Cruz. In recognition of his efforts he became a Director of Talsud in 1995. His technical training and practical experience with concessions similar to Renave made him the obvious choice to manage Renave. His curriculum vitae was accordingly submitted to Mexico as part of the bid process in 1999. The Renave shareholders were not aware of the alleged criminal activity of Mr Cavallo in the late 1970s or early 1980s and were no better placed than Mexico to make enquiries about his past life in military service in Argentina. This is not a case of someone being introduced who did not have the requisite skills and qualifications. The accusations made against Mr Cavallo are wholly extraordinary and so far at the extreme of the*

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<sup>1</sup> *MTD Equity Sdn, Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award of 25 May 2004.

*unexpected that it is unreasonable to lay blame for the fact that they did not come to light at an earlier stage.*

91. *In addition, the events surrounding the arrest of Mr Cavallo in August 2000 should have no bearing on the Claimants' loss. The project could have continued to operate successfully and profitably and in respect of new vehicles did so until December 2002, long after the events in question. Used vehicle operations were postponed on 21 August 2000, before the arrest of Mr Cavallo. It is the Respondent's actions only that caused the Claimants' loss.*
92. *The Respondent is therefore solely responsible for the loss caused to the Claimants and cannot invoke any contributory negligence."*

*[Footnotes omitted]*

### **(03) THE RESPONDENT'S CASE**

- 11.6. The Respondent contends that Article 39 of the ILC draft Articles on State Responsibility "should preclude any recovery" in this case because the Claimants contributed to any injury suffered (Rejoinder at 70-71):

*"245. The recent annulment committee decision in MTD Equity Sdn. Bhd and MTD Chile S.A. v. Republic of Chile ("MTD") upheld that tribunal's use of the principle of contributory fault. The committee noted that the ILC's Articles of Responsibility of States for Internationally Wrongful Acts stated at Article 39:*

*Contribution to the injury*

*In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.*

246. *The Committee noted that although Article 39 falls within the part of the ILC Articles on diplomatic protection, "[t]here is no reason [not] to apply the same principle of contribution to claims for breach of treaty brought by individuals."*

247. *In Mexico's respectful submission, the evidence, viewed objectively, points to a single event - entirely of Talsud's own making - namely, the appointment of Mr. Cavallo, which had the effect of undermining the entire project. Mexico does not dispute that the project faced other difficulties, however, whatever prospects it had for its public acceptance and viability were destroyed by the Cavallo scandal. Applying Article 39, this should preclude any recovery. It was the event that initiated the entire chain of events that damaged the Registry, the Concessionaire and the Secretariat."*

*[Footnotes Omitted]*

11.7. The Respondent's position in its quantum submissions appears less categorical. The Respondent submits that any award of damages should be reduced by half to account for the Claimants' contributory fault (Quan. CM at 30):

*"114. Mexico's Rejoinder noted the MTD annulment committee's embrace of that tribunal's use of the rule of contributory fault. It is Mexico's position that were there to be any award of damages, such award should be further discounted by at least 50% on the basis of contributory fault. The venture, which was facing serious problems before 24 August 2000, faced insurmountable problems thereafter.*

*115. Those problems stemmed from Talsud's appointment of Mr. Cavallo to the highest managerial position in Renave. Gemplus, Henry Davis Signoret and Talsud agreed to give Talsud the right to appoint the General Director. Mr. Cavallo was Talsud's choice, not Mexico's, and Talsud and its co-venturer Gemplus must bear the consequences."*

#### **(04) THE TRIBUNAL'S ANALYSIS**

11.8. It is clear under international law that compensation for violation of a BIT will only be due from a respondent state if there is a sufficient causal link between the treaty breach by that state and the loss sustained by the claimant; and here the two BITs expressly refer to 'causation': see above.

11.9. As to causation generally, it is here, as elsewhere in this Award, useful to refer the ILC's draft Articles on Responsibility of States for Internationally Wrongful Acts. Article 31 of the ILC's draft Articles states that a responsible state is obliged to make full reparation for the injury "caused by the intentionally wrongful act of a State".

11.10. The ILC's Commentary on Article 31<sup>2</sup> states:

*"(10) ... Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses 'attributable [to the wrongful act] as a proximate cause', or to damage which is 'too indirect, remote, and uncertain to be appraised', or to 'any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of' the wrongful act. This causality in fact is a necessary but not a sufficient condition of reparation. There is a further element, associated with the exclusion of injury that is too 'remote' or 'consequential' to be the subject of reparation. In some cases, the criterion of 'directness' may be used, in others 'foreseeability' or 'proximity'. But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule. In other words, the requirement of a causal link is not necessarily the same in relation to every beach of an international obligation. In international as in national law, the question of remoteness of damage 'is not a part of the law which can be satisfactorily solved by search for a single verbal formula'. The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase."*

*[Footnote omitted]*

11.11. In the Tribunal's view, these general principles as to causation are not materially in issue on the facts of the present case. As determined by the Tribunal, on the facts found by the Tribunal earlier in this Award, the particular question here is whether the claims for compensation advanced by the Claimants, or more particularly Talsud, should, as a matter of causation or analogous principle, be extinguished or partially reduced because the Claimants associated themselves with and appointed Mr Cavallo as the

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<sup>2</sup> J. Crawford, *The International Law Commission's Articles on State Responsibility* (CUP, 2002), p.204.

Concessionaire's General Director, as the material factor which triggered or substantially contributed to the Claimants' injuries.

11.12. Article 39 of the ILC's Articles on State Responsibility precludes full or any recovery, where, through the wilful or negligent act or omission of the claimant state or person, that state or person has contributed to the injury for which reparation is sought from the respondent state. The ILC's Commentary on Article 39 refers to like concepts in national laws referred to as "contributory negligence", "comparative fault", "*faute de la victime*" etc. The common feature of all these national legal concepts is, of course, a fault by the claimant which has caused or contributed to the injury which is the subject-matter of the claim; and such a fault is synonymous with a form of culpability and *not* any act or omission falling short of such culpability.

11.13. This interpretation of Article 39 is confirmed by the ILC Commentary. It states, in Paragraph 39(5):

*"Not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights ...". "It follows that something which is not wilful, negligent or otherwise culpable falls outwith the principle expressed in Article 39."*<sup>3</sup>

11.14. The Tribunal determines that none of the Claimants knew or could reasonably have known of Mr Cavallo's past (assuming even, for present purposes, that his past is as was alleged by the Respondent). It was certainly not known at the material time by the Respondent itself, which (as a state) had privileged access to the Government of Argentina and, having made an appropriate inquiry to Argentina before granting the Concession to the Concessionaire, received an anodyne response as to Mr Cavallo's antecedents. If that little was achieved by the Respondent as a state receiving assistance from a state, how much less could have become known by the Claimants. Indeed, it was accepted by Counsel for the Respondent on the first day, and again on the final day, of the main hearing that the Claimants did not and could not have known of the criminal

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<sup>3</sup> *Ibid*, p. 241.

allegations made against Mr Cavallo [D1:230 and D8:1680]. In short, there is no culpability attaching to the Claimants.

- 11.15. In the Tribunal's view, these facts suffice to demonstrate the absence of any fault by any of the Claimants; and, without such fault, this defence advanced by the Respondent must fail in its entirety on the facts of the present case.

**(05) THE TRIBUNAL'S DECISION**

- 11.16. Accordingly, the Tribunal determines that the Respondent caused the losses suffered by the Claimants as assessed later in this Award, without any reduction for "contributory negligence" or other fault, as alleged by the Respondent.



**PART XII: ISSUE H – COMPENSATION: GENERAL APPROACH**

**(01) INTRODUCTION**

- 12-1 In this part of the Award, the Tribunal considers the general legal principles applicable to an award of compensation under the two BITs and international law, as approached by the Claimants and the Respondent respectively.
- 12-2 The Argentina BIT and the France BIT provide as follows as regards “Expropriation and Indemnification”:

***“Argentina BIT  
Article 5***

*5.1. – Neither of the Contracting Parties may nationalize or expropriate, either directly or indirectly, an investment of an investor of the other Contracting Party in its territory or adopt any measures equivalent to the expropriation or nationalization of that investment, except:*

- a) for reasons of public utility;*
- b) on a non-discriminatory basis;*
- c) in accordance with due process; and*
- d) with indemnification, pursuant to paragraphs (2) through (4).*

*2. – The indemnification shall be equivalent to the market value of the expropriated investment immediately before the expropriatory measure was*

***“France BIT  
Article 5***

*5.1. Neither Contracting Party shall nationalize or expropriate directly or indirectly, or take any other measure of equivalent effect, with respect to an investment of the other Contracting Party in its territory or its maritime zone, except:*

- (i) for reasons of public interest;*
- (ii) provided that such measures are non-discriminatory;*
- (iii) in accordance with due process;*
- (iv) on payment of indemnification in accordance with the provisions of paragraphs 2 and 3 of this Article.*

*2. Indemnification shall be paid without delay, shall be freely transferable and*

*implemented. The valuation criteria shall include current value, declared tax value of tangible goods, and other criteria that are appropriate to determine market value.*

*3. – Indemnification shall be paid without delay, fully realizable and freely transferable.*

*4. – The amount paid shall be no less than the equivalent amount which would have been paid as indemnification on the date of expropriation in a freely-convertible currency on the international financial market, that currency having been converted to the standard market quotation on the date of valuation, plus interest corresponding to a reasonable commercial rate for that currency until the date of payment.”*

*fully realizable.*

*3. The indemnification shall be equivalent to the fair market value or, in the absence of such value, to the actual value of the expropriated or nationalized investment immediately before the expropriation or nationalization was carried out and shall not reflect any changes in the value which arise as a result of the expropriation becoming known prior to the date of expropriation. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property and any other criteria which, in the circumstances, are appropriate to determine fair market value. The aforementioned indemnification, its amount and its mode of payment shall be fixed no later than the date of deprivation. Indemnification will be subject to interest calculated at the applicable market rate until the date of payment.”*

- 12-3 These measures of indemnification relate, under both BITs, to lawful expropriation and do not expressly address compensation for unlawful expropriation by the Respondent, as decided by the Tribunal above in Part VIII of this Award. Neither BIT provides expressly for any separate measure of compensation in respect of breach of the BITs’ FET standards, as decided by the Tribunal in Part VII above. (The Tribunal returns to these features later below).

**(02) THE CLAIMANTS' CASE**

- 12-4 The Claimants submit that the market value measure of compensation in Article 5 of both BITs is consistent with the standard expressed in most other treaties and under customary international law, especially the decisions in *Chorzów Factory*<sup>1</sup> (Quan. Mem. at 11).
- 12-5 In *Chorzów Factory*, the Permanent Court of International Justice expressed the general principle of compensation as reparation as follows: “Reparation must, as 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.”
- 12-6 According to the Claimants, the general principle in *Chorzów Factory* has been recently followed in *Compañía de Aguas del Aconquija & Vivendi v. Argentina*<sup>2</sup> (Quan. Rep. at 5, para. 9):

*“There can be no doubt about the vitality of [the Chorzów Factory] statement of the damages standard under customary international law, which has been affirmed and applied by numerous international tribunals as well as the PCIJ’s successor, the International Court of Justice. It is also clear that such a standard permits, if the facts so require, a higher rate of recovery than prescribed in [the BIT] for lawful expropriations.”*

- 12-7 The Claimants contend that this standard, which includes (in their submission) the potential to recover lost profits, is now codified in the ILC’s draft Articles on State Responsibility (Quan. Rep. at 5; Quan. Mem. at 11-12):

*“11. As provided in Article 31(1) of the International Law Commissions’ Draft Articles on State Compensation [sic], the responsible state “is under an obligation to make full reparation for the injury caused by the internationally wrongful act.” Full reparation includes “an obligation to compensate for the damages caused thereby; insofar as such damage is not made good by restitution.” In a case such as this, where the value of a business is reflected largely in its income stream (here backed up by a legal obligation for all vehicles to be registered), this is particularly*

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<sup>1</sup> *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1927 PCIJ, Series A, No 9 (Jurisdiction); 1928 PCIJ, Series A, No 17 (Merits) [hereinafter *Chorzów Factory*].

<sup>2</sup> *Compañía de Aguas de Aconquija S.A. and Vivendi Universal S.A. v. Republic of Argentina* (ICSID Case No. ARB/97/3), Award of 25 July 2007, para. 8.2.5.

*relevant. Lost profits are to be awarded because reparation would otherwise not “wipe out all the consequences of the illegal act.” [...]*

“31. *Likewise, under Article 36 (Compensation) of the International Law Commission’s Guideline on the Responsibility of States for Internationally Wrongful Acts:*

“1. *The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.*

2. *The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”*

32. *These principles lead to a two fold obligation: first, the obligation to restore the property in question or, if this is not possible, to pay compensation corresponding to its value. Second, there is an obligation to pay damages for any additional losses sustained as a consequence of the taking.”*

12-8 The Claimants refer the Tribunal to Mr Brower’s concurring opinion in the Iran-U.S. Claims Tribunal case of *Amoco International Finance* (amongst other legal materials) as to the scope of compensation under this standard (Quan. Mem. at 15-16, para. 39):

*“[...] Chorzów Factory presents a simple scheme: If an expropriation is lawful, the deprived party is to be awarded damages equal to “the value of the undertaking” which it has lost, including any potential future profits, as of the date of taking; in the case of an unlawful taking, however, either the injured party is to be actually restored to enjoyment of his property, or, should this be impossible or impractical, he is to be awarded damages equal to the greater of (i) the value of the undertaking at the date of loss (again including lost profits), judged on the basis of information available as of that date, and (ii) its value (likewise including lost profits) as shown by its probable performance subsequent to the date of loss and prior to the date of the award, based on actual post-taking experience, plus (in either alternative) any consequential damages. Apart from the fact that this is what Chorzów Factory says, it is the only set of principles that will guarantee just compensation to all expropriated parties.*

*[...]*

*The substantive text of the judgment in Chorzów Factory is consonant with the conclusion that the “value of the undertaking” includes its potential for earning profits. The Court thus described such value as including ‘the*

*cessation of the working and the loss of profits which have accrued’; [...] and as embracing ‘the worth of the enterprise as a whole’ or ‘the total value of the undertaking’ including ‘profit’.”*

*[Footnotes omitted]*

12-9 The Claimants further refer to the recent ICSID awards in *LG&E v. Argentina* and *Enron v. Argentina* (Quan. Rep. at 36-37):

- “76. [...] In *LG&E* the Tribunal concluded that “the appropriate standard for reparation under international law is “full” reparation as set out by the Permanent Court of International Justice in the *Chorzów Factory* case and as codified in Article 31 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (the Draft Articles or DARS).” It concluded that the tribunal had to assess the “‘actual loss’ suffered by the investor ‘as a result’ of Argentina’s conduct”, or the “compensation [...] that Claimants would have received but for Argentina’s breaches [less those dividends] that were actually received by Claimants.”
77. The *Enron* Tribunal reached a similar conclusion when assessing the standard of compensation for breach of the obligations to accord the investor the fair and equitable treatment as guaranteed by Article II(2)(a) of the Argentina-USA BIT and to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) of the Argentina-USA BIT. The tribunal ruled that “the appropriate standard of reparation under international law is compensation for the losses suffered by the affected party, as was established by the Permanent Court of International Justice in the *Chorzów Case*.” It concluded that “the appropriate approach in the instant case is that of compensation for the difference in the ‘fair market value’ of the investment resulting from the treaty breaches.” As to the distinction between the standard for expropriation and the standard for other breaches, the Tribunal stated that:

*“On occasions, the line separating indirect expropriation from the breach of fair and equitable treatment can be rather thin and in those circumstances the standard of compensation can also be similar on one or the other side of the line. Given the cumulative nature of the breaches that have resulted in a finding of liability, the Tribunal believes that in this case it is appropriate to apply the fair market value to the determination of compensation.”*

78. The Tribunal went on to say that:

*“The Tribunal is not persuaded by the use of book value or unjust enrichment in this case because these methodologies do not*

*provide an adequate tool for estimating the market value of TGS's stake. The book value of TGS stake [sic] is by definition valid for accounting purposes but, as noted by LECG, fails to incorporate the expected performance of the firm in the future. The unjust enrichment method does not provide a value of the company; it computes damages by looking at the extent of unfair enrichment by the Government. The estimation of the unfair enrichment would then be determined on the basis of the price paid for the license or the wealth transferred to the entity benefiting from the enrichment.*

*[...]*

*In view of the fact that TGS is a "going concern", the Tribunal believes that its fair market value should include the measure of its future prospects.*

*Since DCF reflects the companies' capacity to generate positive returns in the future, it appears as the appropriate method to value a "going concern" such as TGS. Moreover, there is convincing evidence that DCF is a sound tool used internationally to value companies, albeit that it is to be used with caution as it can give rise to speculation. It has also been constantly used by tribunals in establishing fair market value of assets to determine compensation of breaches of international law."*

*[Footnotes omitted]*

12-10 The Claimants submit that whilst lost profits are not a necessary element in determining the market value of shares, they are commonly provided for as an element of compensation in other contractual contexts, including the UN Convention on Contracts for the International Sale of Goods and the UNIDROIT Principles (Quan. Rep. at 6):

"13. [...] Article 14 states: "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach." This is reflected in the UNIDROIT principles, which state at article 7.4.2. that:

*'The aggrieved party is entitled to full compensation for harm suffered as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of costs or harm.'*

*[The Claimants' emphasis]*

12-11 The Claimants submit that, where an asset is not publicly traded and there is no open market for the asset, its value must be established by reference to its “likely value in a hypothetical market”. Relying primarily upon the Iran-U.S. Claims Tribunal’s decision in *Starrett Housing Corp. v. The Islamic Republic of Iran*, the Claimants contend that “the market value of an untraded asset is” the “*price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat.*”<sup>3</sup>

12-12 The Claimants contend that the World Bank has endorsed this approach in the *Guidelines on the Treatment of Foreign Direct Investment* which define “market value” as (Quan. Mem. at 17):

*“an amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case.”*<sup>4</sup>

12-13 The Claimants rely upon the World Bank’s Guideline IV.4 for the proposition that “the discounted cash flow method is the best method to establish the market value of a business such as Renave” (Quan. Mem. at 19, para. 50):

*“[w]ithout implying the exclusive validity of a single standard for the fairness by which compensation is to be determined and as an illustration of the reasonable determination by a State of the market value of the investment under Section 5 above, such determination will be deemed reasonable if conducted as follows:*

*(i) for a going concern with a proven record of profitability, on the basis of the discounted cash flow value”*

12-14 The Claimants contend that the ‘Income Approach’ method, which relies on a DCF model, is the most appropriate method to value their investments in the Concessionaire (Quan. Rep. at 3):

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<sup>3</sup> *Starrett Housing Corp. v. The Islamic Republic of Iran*, 16 Iran-U.S. C.T.R. 112, Final Award No. 314-24-1, 14 August 1987, para. 274 [hereinafter *Starrett Housing*].

<sup>4</sup> World Bank Group, *Guidelines on the Treatment of Foreign Direct Investment*, Guideline IV.5.

“4. *In this case - as in many others with which the ICSID system has dealt - a significant value of the business at the stage at which the unlawful interference occurred was its future income stream. Recent ICSID and other awards have accepted the principle that in such circumstances the DCF approach is the one that is to be adopted, unless there are compelling reasons for not doing so. The operative presumption is that DCF provides the best and fairest means of assessing the value of the rights or the property that have been subject to internationally unlawful acts. That is why it is used so often. In the present case there is no reason why that operative presumption should be displaced. The award of the Concession that established a national monopoly was promoted by the state and backed by legislation. As part of the Concession, vehicle registration was a mandatory obligation so that the revenue projections adopted in the Business Plan can be regarded as reliable and realistic. The LECG/Horwath report makes clear that developments in Mexico’s vehicle market since 1999 (when the Business Plan was formulated) show that the projections in the Business Plan were conservative. There are several years of established, verifiable data on which to base and then test DCF assumptions. There is little that is speculative about the operation of Renave over a period of several years. This is particularly true for new vehicle registrations.*”

12-15 The Claimants contend that international tribunals have frequently made use of this approach<sup>5</sup> (Quan. Rep. at 8-9):

“17. *[...] The CMS tribunal had “no hesitation in endorsing” the DCF method as the most appropriate method in that case, further adding that “DCF techniques have been universally adopted, including by numerous arbitral tribunals, as an appropriate method for valuing business assets.” The tribunal accepted that while the DCF method necessarily requires some degree of estimation, such estimates need not be “arbitrary or analogous to a shot in the dark; with the appropriate methodology and the use of reasonable alternative sets of hypotheses, it is possible to arrive at figures which represent a range of values which can be rationally justified [...].”*

18. *In ADC v. Hungary, the tribunal stated that “like many tribunals in cases such as the present one, the Tribunal prefer [sic] to apply the DCF*

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<sup>5</sup> In their Quantum Memorial, the Claimants cite the following arbitral awards: *Starrett Housing Corp. v. The Government of the Islamic Republic of Iran*, 16 Iran-U.S. C.T.R. 112, Final Award No. 314-24-1, 14 August 1987, paras. 32 and 279; *Phillips Petroleum Company Iran v. The Islamic Republic of Iran*, 21 Iran-U.S. C.T.R. 79, Partial Award No. 425-39-2, 29 June 1989, p. 123; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No. ARB/03/16), Award of 2 October 2006, paras. 501-502; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL (The Netherlands/Czech Republic BIT), Award of 13 September 2001; *CMS Gas Transmission Company v. Argentina* (ICSID Case No. ARB/01/8), Award of 12 May 2005; and *S.D. Myers, Inc. v. Canada*, UNCITRAL (NAFTA), Second Partial Award of 21 October 2002 (referring to lost income streams).



*method.” The tribunal further noted that the expert valuer was “fully justified” in adopting the DCF method.*

19. *The advantages of the DCF method have long been recognised. For example, the AMCO tribunal noted that “the DCF method has been used in appropriate international awards (e.g. Starrett and Phillips).” It considered that “the DCF method is at once a flexible tool, that allows for an application of factors and elements judged as relevant. At the same time, it allows for the application of these judgmental elements to be articulated.”*

20. *McLachlan, Shore and Weiniger have looked at the practice of international tribunals and concluded as follows:*

*“Notwithstanding its difficulties, the DCF method is almost universally used and accepted by both the business and the academic community in valuing income-producing assets. The value of an income-producing capital asset can only be ascertained by valuing the cash the asset is expected to generate in the future. The DCF method is thus appropriate because it is designed to calculate the value on one specific date of cash flows that are to be received at different times.”*

*[Footnotes omitted]*

12-16 Thus, in the Claimants’ submission, this approach is the “only fair and proper way to value” their loss in the present case (Quan. Rep. at 17-18):

“42. *The LECG/Horwath approach is correct for a second reason: international tribunals have used the DCF method where, as in the present case, it is possible on the basis of verifiable data to predict the income that would be generated by the investment. Tribunals have only resorted to other techniques when it was not possible to use DCF because the methodology was based on speculative assumptions or there was a history of lack of profitability. As summarised by authors McLachlan, Shore and Weiniger:*

*“Compensation under this [DCF] is not appropriate for speculative or indeterminate damage, or for alleged profits which cannot legitimately accrue under the laws and regulations of the host country.”*

43. *In this case, there are clear reasons why the Tribunal can validly make use of the DCF method:*

- (i) *the damage is not speculative, and the facts and assumptions on which LECG/Horwath rely are sufficiently certain to make such an approach appropriate; and*
- (ii) *the alternative valuation methods put forward by PRA (which LECG/Horwath considered and rejected) do not allow Renave's key asset, namely its predictable income stream under the terms of the Concession Agreement, to be taken into account, as referred to in more detail below."*

*[Footnotes omitted]*

12-17 The Claimants contend that the 'jurisprudence' relied upon by the Respondent in fact supports their arguments that the DCF method is appropriate to value their investments in the Concessionaire, submitting that those legal materials may be divided into two categories: "(i) either the investment's profitability was not evidenced and the DCF method could therefore not be applied with sufficient certainty, or (ii) the tribunal endorsed and used the DCF method to assess compensation, but altered (and reduced) the Claimant's calculations" (Quan. Rep. at 30).

12-18 The Claimants submit that in refuting the applicability of the DCF method (Quan. Rep at 10-11):

- “24. [...] Respondent draws a wholly artificial and untenable distinction between the track record as at the valuation date, as referred to above, and the actual track record based on established facts. The Respondent's approach is self-contradictory. The Respondent is happy to refer in the Counter Memorial to new vehicle registrations which continued long enough to permit Renave to generate funds to pay as dividends to its investors, but it does not wish to refer to the same facts for the purposes of valuing the investment. There is no dispute between the parties that about 2.2 million new vehicles were registered by Renave from inception up to the Revocation of the Concession in December 2002. The Respondent cannot say – and it does not say – that there was no track record. Rather, it argues that the Tribunal should not look at how the investment actually performed after the Respondent's initial and unlawful act of interference in August 2000. The Respondent seeks, in effect, to rely on its own wrongdoing to minimise the compensation that is due.
- 25. *The Claimants submit that the Respondent's approach is ill-conceived and should be rejected. There has been a widespread acceptance of lost gain or loss of profit as a legitimate element for measuring the amount of compensation that is due. The approach is supported by the terms of the*

*two BITs, which allow reference to be made to all appropriate criteria in assessing compensation. In this case, it is accepted by all the parties that there was no open market for the shares in Renave. As stated in the Claimants' First Memorial on Quantum, the Claimants' experts proceed on the basis that there was no existing business comparable to Renave and there had been no arm's-length transaction from which they derived an estimate of Renave's value. The parties are driven to the fiction of a hypothetical buyer and seller by the terms of the BITs which equate compensation with the market value of the investment. It does not follow that the Tribunal should ignore what would otherwise be material, accessible and verifiable information about the prospects for future profit. The Respondent's approach is unrealistic and unfair and undermines the intention of the drafters of the BITs and the Claimants' legitimate expectations as to how they would be interpreted and applied.*

26. *The artificiality of a valuation which ignores actual facts is recognised both in the Respondent's Counter Memorial and the PRA Report. The Counter Memorial refers to the "real world of commerce" and speculates about the likelihood of "earn out" payments being made in a real transaction. According to PRA, "a proper DCF valuation" would also address factors such as the aftermath of the Cavallo arrest. However, at the same time, the PRA Report seeks to limit various aspects of its analysis to pre-valuation date data. Yet it fails to support the proposition that reference to actual facts, including post-valuation data information, is "not permitted" in terms of applicable principles of valuation theory or practice."*

*[Footnotes omitted]*

12-19 The Claimants next assert that "[t]here is nothing out of the ordinary" in the approach they have adopted in valuing their investments, particularly as regards the use of data coming into existence after the relevant valuation date (Quan Rep. at 12):

- "30. *[...] In CMS, for instance, the Tribunal valued the investment as at 17 August 2000. Nevertheless, the Tribunal considered all relevant facts up to the date of the award when assessing the value of the investment. The CMS Tribunal notably took into account the actual GDP of Argentina:*

*"The Tribunal has concluded that it is reasonable to assume that sales revenues would have decreased by 5% in each of 2002 and 2003 and by 1% in 2004. This would reflect the delayed impact of the decline of the Argentina GDP in 2001 (-4.4%) and 2002 (-10.9%), somewhat mitigated by the maintenance of the non-pesofication of export revenues which continued in addition to be adjusted to the PPI. On the other hand, in 2003 and 2004, the Argentine GDP rose significantly, by 8.8% and 7.8% respectively.*

*It would be normal that that turnaround would manifest itself in an increase in the industrial and residential demand for gas. Moreover, there would have been, by the end of 2004, an excess capacity of some 19% (6% original surplus capacity existing in 2001 plus 13% additional capacity created by the reduced demand between 2002-2004). The Tribunal is of the view that gradual increase in demand over the following years would have taken place until full capacity would have been achieved in TGN's pipelines. The Tribunal has therefore forecasted an increase in sales of 3% in 2011. This would allow for the full recuperation of the excess capacity in the gas transportation system of TGN. Thereafter, the sales would only increase by 1.5% each year under the PPI formula."*

*The tribunal awarded US\$133.2 million to the Claimant based on a discount rate of 14.5%.*

31. *Likewise, in CME v. Czech Republic the Tribunal took into account relevant post valuation date facts. Although the valuation date was 5 August 1999, facts such as reports on advertising forecasts released in September 1999 and 2001 and a media report dated July 2001 were taken into account. The Tribunal also took into account the significant fact that the Czech Republic renewed the television channel's broadcasting licence:*

*"The parties disputed the possibility that the Nova 12 years' broadcasting license rendered to CET 21 in 1993 would not be renewed at January 31, 2005. Rothschild for this alternative suggested an implied enterprise value for CNTS as of August 5, 1999 at the amount of USD 114 million. The Tribunal cannot accept this argument.*

- *CET 21's broadcasting license was meanwhile extended by the media Council on January 22, 2002 by another ten years until 2017 (CET 21 being purportedly under control of Dr. Zelezny). [...]"*

32. *All relevant facts were also taken into account by the tribunals in SD Myers and ADC v. Hungary."*

*[Footnotes omitted]*

12-20 The Claimants also submit that, in order to determine the amount of compensation in this case, the Tribunal should exclude the effects of the taking itself and all acts related to the taking which had an adverse impact on the value of the investments on the date of the valuation, contending as follows (Quan. Mem. at 20-21):

- “54. Both BITs envisage this as they provide for compensation valued immediately before the first expropriatory acts or threat thereof. In addition, the Mexico-France BIT specifically states that “compensation [...] shall not take account of any changes in the value which arise as a result of the expropriation becoming known prior to it taking place.”
55. This guiding principle of international law was applied by the tribunal in *Norwegian Shipowners’ Claims*, which refused to value compensation based on an artificial reduction of the value of the ships resulting from governmental action.
56. This point has since been confirmed by numerous international tribunals. For example, the Iran-US Claims Tribunal in *Shahin Shaine Ebrahimi v. The Government of the Islamic Republic of Iran*, holding that “a government cannot justify non-payment (or inadequate payment) for valuable property on the ground that prospective buyers would have been lacking because of the expropriation itself or the threat thereof.” Likewise, in *James M. Saghi v. The Islamic Republic of Iran*, it held that “any diminution of value caused by the deprivation of property itself should be disregarded.”
57. In *Starrett Housing Corporation v. The Government of the Islamic Republic of Iran*, the Tribunal noted that the effects of measures falling within the category of acts of taking or threats of taking must be excluded under international law in determining compensation for expropriated property.
58. Similarly, the Tribunal in *American International Group, Inc. v. The Islamic Republic of Iran* held that it is “necessary to exclude the effects of actions taken by the nationalizing State in relation to the enterprise which actions may have depressed its value.”
59. This view is shared by ICSID tribunals. As stated in *Azurix*: “in assessing fair market value, a tribunal would establish that value in a hypothetical context where the State would not have resorted to such manoeuvres but would have fully respected the provisions of the treaty and the contract concerned.”

[Footnotes omitted]

12-21 The Claimants contend that the relevant date from which to calculate compensation is “the date immediately preceding the actions or omissions that rendered the expropriation

irreversible”, identifying other decisions of ICSID tribunals<sup>6</sup> which have endorsed this approach (Quan. Mem. at 21-22):

“63. *This approach had [sic] been widely endorsed by arbitral practice. In the words of the Azurix tribunal:*

*“[i]n a case of direct expropriation, the moment when expropriation has occurred can usually be established without difficulty. In the case where indirect or “creeping” expropriation has taken place or, as the Santa Elena tribunal put it, “the date on which the governmental ‘interference’ has deprived the owner of his rights or has made those rights practically useless”, it will be much more difficult for the tribunal to establish the exact time of the expropriation. The difficulty is no less severe, unless the decision is based on a single act creating liability, when the Tribunal concludes that an investor has not received fair and equitable treatment or that it has been subjected to arbitrary treatment or that the host State has not provided the investor the full protection and security guarantee by the BIT. The Iran-U.S. Claims Tribunal, in one of its awards, decided that “where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of property”, the date of the expropriation is “the day when the interference has ripened into a more or less irreversible deprivation of the property rather than on the beginning date of the events”. It has been sometimes argued that applying this formula would lead to an inequitable situation where the investment’s value would be assessed at the time when the cumulative actions of the State would have led to a dramatic devaluation of the investment. However, such a view does not take into account that, in assessing fair market value, a tribunal would establish that value in a hypothetical context where the State would not have resorted to such manoeuvres but would have fully respected the provisions of the treaty and the contract concerned.”*

12-22 In the Claimants’ submission, the latest appropriate date of valuation is 20 August 2000, the day preceding the Secretariat’s decision of 21 August 2000 to postpone the registration of used vehicles (Quan. Mem. at 23-25):

“66. *Mexico’s actions and omissions had an adverse affect on the Concession as early as July 2000. The Claimants and the Respondent agree that there*

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<sup>6</sup> The Claimants also cite the following arbitral awards in support of this point: *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1), Final Award of 17 February 2000, 15 ICSID Review-FILJ (2000), 169 at para. 76; and *Metalclad Corp. v. The United Mexican States* (ICSID Case No. ARB (AF)/97/1), Award of 30 August 2000, 16 ICSID Review-FILJ (2001), 168.

*was significant and growing political pressure against the private management and operation of the motor vehicle registry, including from the Mayor of Mexico City and from Governors of at least 17 States. Furthermore, on 2 July 2000 Vicente Fox was elected President of Mexico after his party had opposed the private operation of the motor vehicle registry.*

67. *It is the Claimants' submission that Mexico's successive interferences ripened into an irreversible expropriation on 21 August 2000. On this date the Secretariat announced Mexico's unilateral decision to extend the deadline for the registration of used vehicles, thereby irreversibly setting in motion the sequence of events that led to the expropriation of the Claimants' investment. The Respondent does not contest the unilateral nature of this decision in its Rejoinder. [...]*

68. *The effects of this decision are substantiated by the Respondent's evidence. The Freyssinier Report states that:*

*"Revenues were 60% lower than expected, mainly due to the events described in the background section of this report, which resulted in that only new cars and part of the expected number of used cars could be registered during the period of operation."*

69. *In sum, this sovereign and unilateral decision had serious, immediate and irreversible effects on Renave. It was the first act in a chain of events, followed within a week by the Technical Intervention (28 August 2000), the two Administrative Interventions, the Seizure, and, finally, the Revocation. On 21 August 2000 the Secretariat made public the decision that rendered expropriation irreversible."*

12-23 At the Tribunal's request, the Claimants also assessed the value of their investments in the Concessionaire as at two other potential valuation dates, described in greater detail below in Part XIII of this Award.

12-24 However, the Claimants' general approach remains unchanged, whatever the valuation date. In the Claimants' submission, even taking a valuation date as late as December 2002, the project remained highly profitable (Claimants' Post-Hearing Br. at 16-17):

*" 66. It can be taken from the evidence that later valuation dates would give time to resolve the internal difficulties identified in the evidence of PRA and relied on as further reasons why the LECG evaluation is unacceptable. These were referred to on the cross-examination of Mr Tormo as "red flags" (D4.887-875). The evidence of Mrs Barrera was to the effect that it would have been possible to resolve any apparent*

*accounting irregularities (D4.798-800). Moreover, the evidence of Mr. Ri3n, when asked if he would have advised the board of Renave on 20 August 2000 to sell the shares in the company, was that he would have advised them to “fix” their problems and then sell (D7.1568, 3-17). The inference to be drawn from this evidence is that, given time, the internal problems could be fixed.*

67. *The undisputed evidence of LECG (LECG letter dated October 9, 2005, paragraph 37) is that the total number of new vehicles registered as of June 27 2001 was 795,000. Total new vehicle registrations as of December 1 2002 was 2,229,384 (Ibid paragraph 38). It is submitted that the existence of this record on either of the two dates is plainly sufficient for the purposes of the application of the DCF method. Thus the adoption of either date makes it unnecessary to consider whether ex-post information may be considered.*

[...]

70. *On either date, a comparison of actual new vehicle registrations with Business Plan projections and actual derived revenues with projected revenues shows that the actual numbers exceeded the projected numbers by a considerable margin.*
71. *Any concern that LECG might not have taken fully into account the risks facing the investment in calculating lost profit damages (LECG September 12, 2007, paragraph 43) has no relevance if either of the two later dates are taken. This is because the evidence shows that by the earliest of the two dates the new vehicle operations had been fully operational for a period of about two years and the “storm” of August/September 2000 had blown over. Mr. Ri3n acknowledged this (D7:1582, 17-20).”*

12-25 Finally, the Claimants submit that the standard of compensation applicable to their expropriation claims under the two BITs applies equally to their claims relating to the Respondent’s breach of the FET standards in the BITs, quoting the following passage from Professor Lowenfeld’s 2003 monograph *International Economic Law* (Quan. Mem. at 12):

*“It is worth noting that the BITs set out the criteria for compensation only in respect to expropriation or measures tantamount to expropriation. No comparable criteria are set out in any of the treaties for breach of the obligation to accord national treatment, most-favoured-nation treatment, full protection and security, or fair and equitable treatment. Arbitral tribunals that have found a violation of one or more of these provisions have in effect borrowed from the provisions and precedents concerned with expropriations.”*



12-26 In the Claimants' submission, this case "echoes that of *Vivendi*", in which the tribunal determined that the level of damages flowing from different treaty breaches was equivalent (Quan. Rep. at 38, para. 79):

*"Of course, the level of damages necessary to compensate for a breach of the fair and equitable standard could be difference [sic] from a case where the same government expropriates the foreign investment. This difference will generally turn on whether the investment has been merely impaired or destroyed. Here, however, we are not faced with a need to so differentiate, given our earlier finding that the same state measures infringed both relevant Articles of the BIT and that these measures emasculated the Concession Agreement, rendering it valueless. Put differently, the breaches of Articles 3 and 5 caused more or less equivalent harm."*

12-27 The Claimants point to other decisions in which arbitration tribunals have awarded damages for breach of treaty obligations other than expropriation, under the *Chorzów Factory* standard (Quan. Mem. at 12-13):

*"35. International arbitral tribunals have awarded damages for breaches of the fair and equitable treatment standard by reference to the Chorzów Factory principle. For instance, the tribunal in Maffezini v. Spain awarded the investor compensatory damages because acts attributable to the Kingdom of Spain amounted to a breach by Spain of its obligation to protect the investment as provided for in the Argentina-Spain BIT. An instrumentality of the Spanish government had transferred to itself from Maffezini's account a so called "loan" for 30 million Spanish pesetas. The tribunal found that this transaction was performed with so little transparency that it violated the treaty's fair and equitable treatment provision. Relying on the Chorzów Factory principle, it awarded full compensatory damages to wipe out the effects of Spain's breach of the treaty's fair and equitable treatment provision.*

*36. Likewise, the tribunal in CMS v. Argentina explicitly relied on the Chorzów Factory principle to determine the standard of compensation applicable to a breach of the fair and equitable treatment standard. The tribunal summarized its findings as follows:*

*"[t]he loss suffered by the claimant is the general standard commonly used in international law in respect of injury to property, including often capital value, loss of profits and expenses. The methods to provide compensation, a number of which the parties have discussed, are not unknown in international law. Depending on the circumstances, various methods have been*

*used by tribunals to determine the compensation which should be paid out but the general concept upon which commercial valuation of assets is based is that of 'fair market value'.*

*The Tribunal specifically ruled that it was*

*“persuaded that the cumulative nature of the breaches discussed here is best dealt with by resorting to the standard of fair market value. While this standard figures prominently in respect of expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses.”*

37. *In MTD v. Chile, the ICSID tribunal also had to determine the standard of compensation applicable to breaches of the fair and equitable treatment [sic]. The tribunal accepted Claimants' proposal to apply the standard of compensation formulated in Chorzów by the PCIJ. That award has recently been considered by a distinguished ad hoc Annulment Committee, which did not annul any part of the Award.*

38. *The Azurix tribunal faced an identical question. The relevant sections of the tribunal's reasoning merit reproducing in full:*

*“[...]*

424. *In the present case, the Tribunal is of the view that a compensation based on the fair market value of the Concession would be appropriate, particularly since the Province has taken it over. Fair market value has been defined as: “the price expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.”*

*[Footnotes omitted]*

**(03) THE RESPONDENT'S CASE**

12-28 The Respondent observes that there is no material difference between the applicable BITs as regards the standard of compensation for expropriation. Furthermore, it is not disputed by the Respondent that this standard reflects the *Chorzów Factory* standard (Quan. Rej. at para. 35).

12-29 However, the Respondent contests the Claimants' assertion that the standard of compensation in *Chorzów Factory* entitles the Claimants to recovery the compensation prescribed in the relevant BITs plus loss of profits, relying upon NAFTA decisions<sup>7</sup> (Quan. Rej. at para. 43-46):

“43. [...] *The Respondent disagrees with this purported application of the full reparation principle, as extended in obiter in Vivendi, at least in any case where the BIT at issue prescribes fair market value or its equivalent as the standard of compensation.*

44. *First, as a matter of treaty interpretation, it has been recognized by NAFTA tribunals applying a standard of compensation similar to the BITs at issue here, that damages payable for a violation of NAFTA Article 1110 should be equivalent to the stipulated standard of compensation (i.e., fair market value immediately before the expropriation took place, assessed in the manner prescribed). This follows as a logical consequence of breaching Article 1110: the direct or indirect expropriation of an investment of an investor of another Party without prompt payment of compensation based on the fair market value of the investment gives rise to a claim for payment of damages equal to what should have been paid, plus interest.*

45. *Second, whenever the prescribed standard of compensation is fair market value or its equivalent, the Chorzów Factory requirement of full reparation will be met. The BITs at issue here, like NAFTA Article 1110, provide for market value immediately prior to the date of expropriation and eliminate the prospect of a reduction in value by reason of the expropriation's becoming known earlier. The fair market value of the investment – based on the traditional test of what a willing buyer would pay a willing seller when both parties are properly informed of the relevant facts – would amount to full compensation if paid promptly at the*

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<sup>7</sup> In particular, the Respondent cites the arbitral awards in *Metalclad* at para. 118 and *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award of 16 December 2002, para. 194.

*time of expropriation. There is no retrospective reduction in value or increase in value for after-occurring events, such as unforeseen changes – positive or negative – in relevant markets or economic conditions. Simply put, a claimant gets what its investment was worth at the time it was expropriated and an award of interest compensates it for any delay in the receipt of such payment.*

46. *When and to what extent future profits may be to [sic: be] taken into account is a separate question. The BITs at issue here do not stipulate DCF or any other form of future profits analysis as a valuation criterion to be taken into account in assessing fair market value. The Respondent has acknowledged that DCF may be an appropriate criterion to be taken into account in a proper case, but the jurisprudence consistently points to the requirement for a suitable performance record, including one of profitability, before that can be done. As discussed more fully below, the record of new car registration which the Claimants urge the Tribunal to consider as a track record of profitability did not exist on the date for expropriation and provides no guidance as to the profitability of the Registry's operation as originally envisaged (i.e. as a new and used vehicle registry). Indeed, the new vehicle registration only came into being because the Secretariat "fronted" the Registry after the Cavallo scandal resulted in the collapse of public confidence in the Registry.*"

*[Footnotes omitted]*

12-30 As regards the appropriate valuation method, the Respondent submits that neither BIT requires that a particular valuation method be applied to calculate the market value of an investment. The Respondent submits that, in the circumstances of this case, the 'asset value' and 'declared tax' value methods "should be preferred over the DCF method", which the Respondent describes as "*wholly speculative and impermissible, due to Renave's absence of a proven track record of profitable operations at the date of valuation*" (Quan. CM at 5, para. 23).

12-31 The Respondent thus "disagrees with the Claimants' contention that 'the DCF approach is the one that is to be adopted, unless there are compelling reasons for not doing so'" [emphasis in original]. The Respondent further explains its case as follows (Quan. Rej. at paras. 40-41):

- "40. [...] *The authorities do not posit such an "operative assumption" in favour of DCF; rather, as stated by the International Law Commission, the general rule is the opposite. As Mexico noted in the quotation from the*

*commentary on the ILC's Articles on State Responsibility (cited at paragraph 34 of the Counter-Memorial):*

*... difficulties can arise in the application of the DCF method to establish capital value in the compensation context. The method analyses a wide range of inherently speculative elements, some of which have a significant impact on the outcome (e.g. discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks). This has led tribunals to adopt a cautious approach to the use of the method. Hence although income-based methods have been accepted in principle, there has been a decided preference for asset-based methods.*

41. *The Reply on Quantum cites a recent text by McLachlan, Shore and Weiniger, International Investment Arbitration: Substantive Principles, which discusses the usefulness of the DCF methodology. However, immediately after discussing the methodology's attributes, the authors acknowledge that a number of tribunals have refused to apply it:*

*Recently, a number of tribunals have refused to award DCF-based compensation to enterprises lacking a proven track record of profitability ... These awards do not represent any dissatisfaction with DCF methodology as a whole and are consistent with the World Bank Guidelines, which limit DCF awards to going concerns with a proven track record of profitability.*

42. *This is indeed the case. The Guidelines do require that for DCF to be employed, the investment must be a "going concern with a proven track record of profitability." The Guidelines go on to state that "for an enterprise which, not being a proven going concern, demonstrates lack of profitability," compensation shall be "on the basis of the liquidation value."*

*[The Respondent's emphasis]*

- 12-32 The Respondent highlights the difficulties associated with exclusive reliance on the DCF method, as articulated by the majority of the Iran-U.S. Claims Tribunal in *Amoco International Finance* (Quan. CM at 6-7):

- "25. *This Tribunal will be well aware of the problems associated with relying exclusively on the DCF method. The Iran-U.S. Claims Tribunal observed in Amoco International Finance Corp. (a case on which the Claimants place reliance) that:*

238. *As a projection into the future, any cash flow projection has an element of speculation associated with it, as recognized by the*

*Claimant. For this reason it is disputable whether a tribunal can use it at all for the valuation of compensation. One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damages can be awarded. This holds true for the existence of the damage and its effect as well.*

26. *It is worth noting that Judge Brower's opinion in Amoco, cited by the Claimants expressly indicates that he concurred only to form the majority necessary to an award [sic] by the tribunal. His opinion on valuation, on which the Claimants' Memorial relies, was the dissenting opinion, a fact not noted by the Claimants.*
27. *In Amoco, the tribunal held:*
228. *As used by the Claimant in the present Case, however, the DCF method goes even further: it amounts to a complete departure from, and a reversal of, the approach traditionally adopted in international practice, notably, by international tribunals. Under the traditional approach, in case of expropriation of an enterprise the compensation to be paid is calculated according to the net value of the transferred – that is, expropriated – assets. As we have seen this can extend to physical properties, movable and immovable, as well as to intangibles, including profitability in the case of an ongoing enterprise: the “going concern” value. To this element of *damnum emergens*, a complementary one is added where the expropriation is unlawful: the value of the revenues that the owner earned if the expropriation had not occurred, i.e. *lucrum cessans*.*
229. *The Claimant's calculation completely leaves aside the net value of the expropriated assets: this value has no place whatsoever in the Claimant's reasoning. Exit *damnum emergens*. The Claimant's method is instead a projection into the future to assess the amount of the revenues which would be earned by the undertaking, year after year, up to eighteen years later in this Case. These forecasted revenues are actualized at the time by way of a discounting calculation, and capitalized as the measure of the compensation to be paid, as well as the alleged market value of the enterprise. With such a method, *lucrum cessans* becomes the sole element of compensation...*
231. *In the case of a going concern, as the AMINOIL tribunal aptly put it, the value of the enterprise as a whole is higher than the sum of the discrete elements which constitute it ... but it remains related to these elements. With the DCF method, as used in this case, the alleged value of the undertaking has no relation whatsoever to the*

*value of these elements – and therefore to the investment made in order to create the concern and to maintain its profitability. The replacement value, that is, the investment necessary to create a similar undertaking, is no more taken into consideration. The capitalization of the future earnings will probably amount to a much higher figure, which could lead to unjust enrichment for the beneficiary of such compensation, since he could, hypothetically, establish a similar enterprise with comparable earnings, spending only a portion of the compensation received, and earn additional revenues with the remaining part. If the enterprise were less profitable, the claimant would probably refer to another method, as the claimant did in the Chorzów Factory case. It is one thing to recognize, as this Tribunal and many other international tribunals before it have done, that the profitability of a going concern is one of the elements to be considered in the valuation of such a concern; it is another thing to substitute a capitalization of hypothetical future earnings for all other elements of valuation.”*

*[The Respondent’s emphasis; footnotes omitted]*

12-33 The Respondent observes that although the *Amoco* tribunal was not ultimately called upon to determine the damages in that case (due to settlement of the claim between the parties), the Iran-U.S. Claims Tribunal has expressed similar reservations over the use of DCF valuations in other decisions<sup>8</sup> (Quan. CM at 7-8):

“28. *Amoco* was subsequently settled, so one cannot gauge what the tribunal would have determined was the investment’s value and then compare it to that claimant’s proposed DCF value. What can be seen, however, is that the Iran-U.S. Claims Tribunal was rightly wary of DCF valuations. For example:

- *In American International Group, the tribunal rejected the claimant’s DCF valuations ranging from US\$74 million to US\$147 million and awarded it US\$10 million in damages.*
- *In Phelps Dodge, the tribunal refused to employ a DCF valuation for a shareholding interest in a manufacturing company on the ground it had not become a going concern “so that such elements of value as future profits and goodwill could be confidently valued” and “any conclusions on these matters would be highly*

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<sup>8</sup> In its Rejoinder, the Respondent refers to the following Iran-U.S. Claims Tribunal awards: *Phillips Petroleum Co. v. Iran*, 21 Iran-U.S. C.T.R. 79 at para. 79, Partial Award No. 425-39-2, 29 June 1989; *American International Corp. v. Iran*, 4 Iran-U.S. C.T.R. 96 at 106, Award No. 93-2-3, 19 December 1983; *INA Corp. v. Iran*, 8 Iran-U.S. C.T.R. 373 at 380, Award No. 184-161-1, 13 August 1985; *James M. Saghi et al v. Iran*, 29 Iran-U.S.C.T.R. 20 at para. 79, Award No. 544-298-2, 22 January 1993.

*speculative.” It therefore concluded that Phelps Dodge’s capital invested in the company was “equal to its investment.”*

- *In Starrett Housing, the tribunal approved its own expert’s use of a DCF analysis to value the claimant’s ownership rights in a joint venture for the construction of a housing project, but reduced the award from the expert’s figure of 377 million rials to only 27 million rials, approximately 7% of the value reached by the expert.”*

*[Footnotes omitted]*

12-34 According to the Respondent, this arbitral caution against exclusive reliance on the DCF method is to be found in other arbitral decisions (Quan. CM at 8-10):

“30. *For example, the Metalclad tribunal agreed with previous awards that a period of two to three years of profitable operations is required before a discounted cash flow valuation could be considered reliable:*

119. *Normally, the fair market value of a going concern which has a history of profitable operation may be based on an estimate of future profits subject to a discounted cash flow analysis. Benvenuti and Bonfant Srl v. The Government of the People’s Republic of Congo, 1 ICSID Reports 330; 21 I.L.M. 758; AGIP v. The Government of the People’s Republic of Congo, 1 ICSID Report 306.*

120. *However, where the enterprise has not operated for a sufficiently long time to establish a performance record, or where it has failed to make a profit, future profits cannot be used to determine the going concern or fair market value. In Sola Tiles, Inc. v. Iran (1987) Iran-U.S.C.T.R. 224, 240-42; I.L.R. 460, 480-81, the Iran-U.S. Claims Tribunal pointed to the importance in relation to a company’s value of “its business reputation and the relationship it has established with its suppliers and customers”. Similarly, in Asian Agricultural Products v. Sri Lanka (4 ICSID Reports 246 (1990) at 292) another Tribunal observed, in dealing with the comparable problem of the assessment of the value of goodwill, that its ascertainment “requires the prior presence on the market for at least two or three years, which is the minimum period needed to establish continuing business connections”.*



31. *Likewise, in Southern Pacific Properties, the ICC tribunal rejected the claimants' DCF valuation on the same basis and on other factors also relevant to the instant case:*

65. *We feel unable to accept the claimants' estimate of the value of the investment as at May 1978 for a variety of reasons, some of which may be summarized as follows:*

- (1) *We believe the risk factor is much higher than has been assumed in the projections. We consider that if the projected figures of income and expenditure were to be adopted they would carry a much higher discount rate. The uncertainties were very considerable. The project was a unique one in a very sensitive area from an environmental and political point of view. This involved risks against which even the Egyptian Government could not give full guarantees. They were bound to lead and did lead to differences between the parties to the Joint Venture.*
- (2) *By the date of the cancellation, the political and economic climate has a number of new elements unfavourable to the venture's prospects. This is one of the reasons why we feel only very limited weight should be given to the transactions in the shares of SPP(ME) which took place between eighteen months and two years previously.*
- (3) *There was a considerable risk in a change in the tax status of the venture after the initial five year period.*
- (4) *By the date of the cancellation the great majority of the work had still to be done.*
- (5) *The calculation put forward by the claimants produces a disparity between the amount of the investment made by the claimants and its supposed value at the material date.*
- (6) *There is still the possibility, although we suspect it is a remote one, that there will be some recovery from the proceedings now involving the ETDC.*

*For these and other reasons we are of the opinion that an approach to the quantification of damages by means of a discounted cash flow calculation should in this particular case be rejected. We consider it more appropriate to take the amount of the claimants' actual investment and add to that an incremental factor representing the increase in the value of the investment over its actual cost...*

32. *The ICSID tribunal likewise held in Southern Pacific Properties [i.e. the ICSID arbitration, following the ICC arbitration] that a DCF valuation was inappropriate:*

188. *In the Tribunal's view, the DCF method is not appropriate for determining the fair compensation in this case because the project was not in existence for a sufficient period of time to generate the data necessary for a meaningful DCF calculation... The project was in its infancy and there is very little history on which to base projected revenues.*

189. *In these circumstances, the application of the DCF method would, in the Tribunal's view, result in awarding "possible but contingent and undeterminable damage, which, in accordance with the jurisprudence of arbitral tribunals, cannot be taken into account". (Chorzów Factory case, Series A, No. 17, 1928, at p. 51). As the tribunal in the Amoco case observed:*

*One of the best settled rules on international responsibility of States is that no reparation for speculative or uncertain damages can be awarded.*

33. *More recently, in Wena Hotels Limited v. Arab Republic of Egypt, the tribunal rejected the DCF valuation approach in favour of awarding the claimant the return of the capital it had actually invested in its hotel project:*

124. *Like the Metalclad and SPP disputes, here, there is [an] insufficiently "solid base on which to found any profit ... or for predicting growth or expansion of the investment made" by Wena. Wena had operated the Luxor hotel for less than eighteen months, and had not completed its renovations on the Nile hotel, before they were seized on April 1, 1991. In addition, there is some question whether Wena had sufficient finances to fund its renovation and operation of the hotels. Finally, the Tribunal is disinclined to grant Wena's request for lost profits and lost opportunities given the large disparity between the requested amounts (GB£ 45.7 million) and the Wena's stated investment in the two hotels (US\$8,819,466.93)."*

*[Respondent's emphasis; footnotes omitted]*

12-35 The Respondent also relies upon the ILC Commentary to Article 36 of the ILC's Draft Articles on State Responsibility, highlighting language critical of the DCF method (Quan. CM at 10):

“34. *The International Law Commission cited the judgments of the Iran-U.S. Claims Tribunal in support of its commentary on Article 36 of the Articles of State Responsibility, where the DCF method is criticized and where it points out that it is the “decided preference” (emphasis added) in the cases to use asset-based methods for valuing expropriated investments:*

(26) *Since 1945, valuation techniques have been developed to factor in different elements of risk and probability. The discounted cash flow (DCF) method has gained some favour, especially in the context of calculations involving income over a limited duration, as in the case of wasting assets. Although developed as a tool for assessing commercial value, it can also be useful in the context of calculating value for compensation purposes. But difficulties can arise in the application of the DCF method to establish capital value in the compensation context. The method analyses a wide range of inherently speculative elements, some of which have significant impact on the outcome (e.g. discounts rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks.) This has led tribunals to adopt a cautious approach to the use of the method. Hence although income-based methods have been accepted in principle, there has been a decided preference for asset-based methods. A particular concern is the risk of double counting which arises from the relationship between the capital value of an enterprise and its contractually based profits.”*

*[Respondent’s emphasis; footnotes omitted]*

12-36 In addition to this arbitral jurisprudence and doctrine, the Respondent contends that the DCF method has consistently been rejected in NAFTA arbitrations to which Mexico has been a party, citing the awards in *Metalclad*, *Feldman* and *Tecmed*. Taking *Tecmed* to illustrate its general proposition, the Respondent contends as follows (Quan. CM at 11-12):

“36. *Apropos [sic] to the instant case is the fact that the Tecmed tribunal agreed with Mexico on two salient points: first, it agreed that the claimant’s DCF valuation of US\$52 million was completely out of proportion with its actual investment in the investment (US\$4 million) and second, applying Metalclad and other authorities, it agreed that the claimant’s track record with the investment was insufficiently long enough to employ a DCF valuation:*

186. *The Arbitral Tribunal has noted both the remarkable disparity between the estimates of the two expert witnesses ... and also the considerable differences in the amount paid under the tender offer*

*for assets related to the Landfill – US\$4,028,788 – and the relief sought by the Claimant, amounting to US\$52,000,000, likely to be inconsistent with the legitimate and genuine estimates on return on Claimant’s investment at the time of making the investment. The non-relevance of the brief history of operation of the Landfill by Cytrar – a little more than two years – and the difficulties in obtaining objective data allowing for application of the discounted cash flow method on the basis of estimates for a protracted future, not less than 15 years, together with the fact that such future cash flow also depends upon investments to be made – building of seven additional cells – in the long term, lead the Arbitral Tribunal to disregard such methodology to determine the relief to be awarded to the Claimant.*

37. *As shall be developed in greater detail, the factors cited in Tecmed for refusing to use a DCF valuation are even more pronounced in the instant case: (i) the amount invested is proportionately smaller compared to the DCF valuation proposed by the Claimants’ experts; (ii) Renave had an even briefer period of operations (only five weeks operating at the national level as compared to 2 years in Tecmed); and (iii) obtaining objective data for applying the DCF method is even more problematic in the instant case than it was in Tecmed.”*

*[Footnotes omitted]*

12-37 The Respondent concludes that the DCF method should be rejected by this Tribunal because there is no proven track record of the Concessionaire’s profitable operations at the date of valuation in this case, whatever it may be (Quan. CM at 12-13):

- “38. *As in Metalclad, Tecmed, Southern Pacific Properties, Wena and other cases, the evidence in the instant case demonstrates the absence of a proven track record of profitable operations on the date of valuation:*

- *At the Claimant’s date of valuation, 20 August 2000, Renave was not profitable. According to its income statement for July 2000, the Concessionaire had a net loss of more than \$4.1 million pesos and had accumulated losses for \$15.2 million pesos during the year. By the end of August, the Concessionaire had an accumulated net loss of \$37.2 million pesos (or \$44 million, depending on which financial statements are used).*
- *At the date of valuation Renave had been operating at the national level for only 5 weeks and for new vehicles for only 3 months. The Concessionaire had existed for less than a year and most of that time was taken up with start-up activities. This period of*

*operations is far less than what the authorities require to be able to apply a DCF valuation.*

- *Renave itself had little understanding of its financial situation at the time, other than recognizing that it could not operate on the basis of existing cash flows and that it required additional capitalization. At the date of valuation, it was unable to identify which revenues were being received from new vehicle registrations and which were from used vehicle registrations (a rather serious problem for a motor vehicle registry). This points up [sic: to] an obvious problem with projecting unknown or uncertain results forward.*
- *There was considerable uncertainty surrounding key aspects of the project, for example, regarding the voluntary participation of the states which was required to implement the Registry fully, regarding the viability of the planned fee structure which would affect the Concessionaire's profitability, concerning the operation of the database which was at the core of the endeavour, and so on.*
- *The project was not evolving as originally intended: there were significant departures from the Business Plan concerning the project's financing and the way it operated (in terms of outsourcing key functions to third parties)."*

*[Footnotes omitted]*

12-38 The Respondent concludes that all the relevant facts, as of 20 August 2000 (being the Claimants' primary date for valuation), disprove any track record of profitable operations by the Concessionaire (Quan. Rej. at paras. 52-53):

- "52. [...] (i) *Renave was in its infancy with only 5 weeks of operations at the national level; (ii) its performance record was one of un-profitability; (iii) its prospects were looking poor, so much so that its Board decided to postpone the contractually required publicity campaign and contemplated seeking the Secretariat's consent to avoid its contractual obligation to conduct a market study; (iv) it had manifold internal operating problems, as evidenced in its own documents; and (v) as agreed by the disputing parties, the Secretariat was encouraging considerable difficulties in negotiating voluntary coordination agreements with the federative entities.*
53. *Moreover, four days after the Claimants' selected date of valuation, this already troubled project was plunged into a crisis that:*
- *Provoked the widespread, non-partisan and legitimate concern of legislators;*

- *Caused 80% of Mexican citizens polled, according to the Reforma opinion poll of 30 August 2000, to be opposed to the Registry and its operation by a private concessionaire;*
- *Led the Secretariat to intervene in the Concessionaire (which intervention was later upheld by the courts and was entirely reasonable at international law);*
- *Which intervention reduced the Registry's coverage, initially temporarily (and in the end for the remainder of the Registry's existence), from being a comprehensive new and used motor vehicle registry to being a new vehicle registry alone; and*
- *Justified the exercise of a number of the Secretariat's rights under the Title of Concession and applicable legal framework."*

12-39 As for each of the alternative potential valuation dates identified by the Tribunal, June 2001 and December 2002, the Respondent contends that the Claimants' DCF approach to valuation, and in particular the separate registration of new and used vehicles, remains wholly inappropriate to measure any compensation on the facts of this case (Respondent's Post-Hearing Br. at 21-22):

- "45. ... first, the allegations against Cavallo and ensuing events would have been fatal to the concessionaire had the government not stepped in and, second, it was never agreed - expressly or by implication - that by reason of the scandal the concessionaire would be entitled to carry on business indefinitely as a new car registry operated essentially under government auspices and control.
46. The Claimants have no basis to contend, as they do in their Reply on Quantum, that they could or should be awarded DCF value of the concession operating solely as a new car registry. The Secretariat would have been entirely justified, at any point in time, to demand that the concessionaire comply in all material respects with the Title of Concession - including the provision of a full used vehicle registry. Conspicuously absent from the Claimants' case was any evidence that concessionaire was ready, willing or able to resume its obligations under the Title of Concession entirely autonomously of the Secretariat. There was no confession and avoidance statement, no engagement of public relations experts, no public relations campaign, and, above all, no plan of any kind to re-establish public confidence in Renave. Instead, the Renave shareholders were content to have the Secretariat operate a new car registry and to be paid dividends on earnings that would not have been earned had they had been left to fend for themselves after 24 August 2000.
47. It is obvious that the Concessionaire could not have succeeded in persuading used car owners to register their vehicles without a fundamental change to the

*constitution and management of Renave calculated to restore public confidence. Moreover, it cannot be presumed, as the Claimants contend, that the registration of new cars would automatically occur despite the lost confidence in Renave*

48. *It can be fairly assumed that the Mexican Automobile Dealers Association (AMDA) would have resisted efforts to force its members to comply with the registration requirement if customers were concerned that personal data would be mishandled or misused. Even on a purely practical level there would have been problems, as indicated in the testimony of Ms. Barrera who said that even when the Secretariat operated the registry, verification of the new car registration requirement and remittances required counting inventory at each dealership, an undertaking complicated by the fact that dealers frequently trade or transfer vehicles in order to meet customer needs.*
49. *The requirement to operate a used vehicle registry was never waived or removed from the Title of Concession. Thus, the Claimants bore the burden of convincing the Tribunal that Renave was ready, willing and able to perform its obligations in full, rather than being content to sit back and collect dividends while an incomplete registry was operated under the government's auspices. In Mexico's submission, they did not do so and there can be no claim for deprivation of any purported right to continue operating a registry only for new vehicles.*
50. *Any award based on a projection of future profits following the suspension of the obligation to register new vehicles would be entirely speculative. If the Secretariat had demanded compliance with the operation of the registry as originally conceived and contractually agreed, would the concessionaire have been capable of fulfilling its obligations? Or if the Tribunal were to find that in June 2001 or December 2002 the Secretariat was obliged to withdraw and give the concessionaire an opportunity to autonomously operate a substantially scaled-back registry for new cars for the balance of the term of the concession, can it be confidentially said that Renave actually would have succeeded in achieving the profits projected by Mr. Tormo?"*

*[Footnotes omitted]*

12-40 The Respondent submits that, consistent with *Chorzów Factory*, the results of one valuation method must be tested against the results of other methods "in order to avoid speculative or undue awards of damages" (Quan. CM at 14):

- “41. *As long ago as the Chorzów Factory Case, the Permanent Court of International Justice underscored the desirability of comparing one method of valuation against the others. In discussing the various questions which it posed to the court-appointed valuation expert, the Court noted:*

*...the Court considers it preferable to endeavour to ascertain the value to be estimated by several methods, in order to permit of a comparison and if necessary of completing the results of the one by those of the others. The Court, therefore, reserves every right to review the valuations referred to in the different formulae; basing itself on the results of the said valuations and of facts and documents submitted to it, it will then proceed to determine the sum to be awarded to the German government, in conformity with the legal principles set out above.”*

*[The Respondent’s emphasis]*

12-41 Finally, the Respondent rejects the Claimants’ assertion that all treaty breaches under the BITs are equivalent to expropriation for the purpose of determining the measure of compensation for those breaches, quoting from the NAFTA tribunal’s award in *S.D. Myers* (Quan. CM at 29, para. 111):

“306. *SDMI [the claimant] suggested in its Memorial that Chapter 11 tribunals are likely to find that the standard set out in Article 1110(2) [the NAFTA’s expropriation provision] applies also to breaches of the other Articles of chapter 11. The Tribunal doubts that Article 1110(2) supplies the appropriate standard when a Party has breached one of the other provisions of Chapter 11...*

309 *By not identifying any particular methodology for the assessment of compensation in cases not involving expropriation, the Tribunal considers that the drafters of the NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case, taking into account the principles of both international law and the provisions of the NAFTA. In some non-expropriation cases a tribunal might think it appropriate to adopt the “fair market value” standard; in other cases it might not. In this case the Tribunal considers that the application of the fair market value standard is not a logical, appropriate or practicable measure of the compensation to be awarded.”*

*[Respondent’s emphasis; footnote omitted]*



**(04) THE TRIBUNAL'S ANALYSIS AND DECISION**

- 12-42 *General Approach:* The Tribunal, for reasons which are self-evident from this Award, has found the issues of compensation both complicated and difficult to resolve on the particular facts of this case, including the starkly different evidence from their quantum expert witnesses, Mr Charles Tormo of LECG/Horwath for the Claimants and Mr Pablo Ríon of Pablo Ríon & Associates (PRA) for the Respondent. It is appropriate to decide first the Tribunal's general approach on the quantum issues in this part of the Award, to be followed by detailed consideration in the following parts of the Award.
- 12-43 *Relevant Date:* Both under international law and (directly or by analogy) Article 5 of the two BITs, the relevant date for assessing compensation is 24 June 2001, being the day preceding the unlawful Requisition of 25 June 2001. As to the relevant legal principles, the Tribunal accepts the Claimants' submission, summarised above, to such effect: see the cited passages from the awards in *Santa Elena*, *Metalclad* and *Azurix*. As to the application of such principles to the facts of this case, the Tribunal has decided earlier in this Award, in Parts VIII and IX above, that the Requisition of 25 June 2001 was the first completed breach by the Respondent under both BITs, as regards both the FET standards and unlawful expropriation.
- 12-44 It is immaterial that the Requisition was also the first of continuing unlawful acts by the Respondent leading to the Revocation on 13 December 2002: Article 15 of the ILC's Articles on State Responsibility, entitled "Breach consisting of a composite act", provides as follows: "(1) The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act. (2) In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation." The ILC Commentary to Article 15 states that the breach of an international obligation is dated from the first act in a series of acts which together form the wrongful act. In

particular, the ILC Commentary provides that Article 15(2): “[...] deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but at that point the act should be regarded as having occurred over the whole period from the commission of the first action or omission. If this were not so, the effectiveness of the prohibited would thereby be undermined.”<sup>9</sup>

12-45 Accordingly, the Tribunal determines the relevant date for the assessment of compensation as 24 June 2001; and it rejects the Claimants’ case as to any earlier date for the assessment of compensation and the Respondent’s case as to any later date.

12-46 *Shares Valueless*: The Claimants’ shares in the Concessionaire are currently worthless and have been so, effectively, from 31 December 2002. (The Concessionaire still had a cash balance on 31 December 2002; but this value has since disappeared, as was inevitable).

12-47 *Lost Capital*: As already noted, the Claimants received back from the Concessionaire in April and December 2002, authorised by the Respondent, certain amounts intended to compensate them for their lost capital in the Concessionaire, together with dividends and other expenses. The Tribunal considers separately below, in Part XIV of this Award, the question whether these amounts were sufficient to compensate the Claimants for lost capital and their legal effect generally on the Claimants’ claims.

12-48 *Lost Profits*: It is clear from the Claimants’ submissions, summarised above, that their claims for compensation derive otherwise, entirely, from the allegedly lost income stream to be received by the Concessionaire from the Concession Agreement during the remaining period of the Concession after the relevant date and, as a result of that alleged loss, the Concessionaire’s lost profits ultimately impacting the Claimants’ investments in the Concessionaire as shareholders. It is the Claimants’ claim derived indirectly from these allegedly lost future profits by the Concessionaire which raises several distinct

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<sup>9</sup> Crawford, ILC’s Articles on State Responsibility (CUP, 2002), pp.143-144.

issues. These are considered by the Tribunal separately in more detail below, in Part XIII of this Award.

12-49 *Duration*: The period of the Concession Agreement was ten years, commencing on 15 September 1999 and expiring on 14 September 2009: see Paragraph 4-48 of Part IV above. There was a possible extension thereafter of not more than ten more years, subject (inter alia) to the discretion of the Secretariat. Whilst the exercise of that discretion was not unfettered under Mexican law, the Tribunal considers that the Claimants' claim for this second period of ten years is far too contingent, uncertain and unproven, lacking any sufficient factual basis for the assessment of compensation under the two BITs. At the relevant date, the Concessionaire had no legal right to any extension of the Concession's original ten-year term; and as the Concessionaire's minority shareholders, the Claimants' rights as investors under the BITs were still more nebulous and speculative. Accordingly, the Tribunal proceeds on the basis that the Concession Agreement would not have continued beyond 14 September 2009, i.e. 8.25 years after the Requisition of 25 June 2001; and the Tribunal rejects the Claimants' claims based upon any period thereafter.

12-50 *Investments*: The Claimants' claims for compensation derive only from their status as investors with investments in the form of their respective minority shareholdings in the Concessionaire, as distinct from any claim by the Concessionaire itself. Perhaps inevitably, the Parties' submissions occasionally elided this important distinction, effectively treating the valuation of the Concessionaire's future profits (if any) as the relevant exercise for the assessment of compensation due to the Claimants. The exercise required of this Tribunal is, in contrast, the valuation of the Claimants' lost investments in the form of their shares in the Concessionaire and not, as such, the lost profits incurred by the Concessionaire under the Concession Agreement. The latter are not, of course, irrelevant; but they are not directly relevant as if the Claimants' claims were made by the Concessionaire itself.

12-51 *Chorzów Factory*: As to the general approach to the assessment of compensation, the Tribunal accepts the general guidance provided by the well-known passage in the PCIJ's decision in *Chorzów Factory* 1928 PCIJ, Series A, No 17 (Merits), 47, as invoked by

both the Claimants and the Respondent in these arbitration proceedings (summarised above):

*“The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. 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.”<sup>10</sup>*

The Tribunal is likewise guided by Article 31 of the ILC’s draft Articles of State Responsibility, being declaratory of international law.

12-52 *FET & Expropriation*: The Tribunal accepts the Claimants’ submissions, as summarised above, that this is an appropriate case in which the Tribunal should be guided by the same measure for breach of the FET standards in the two BITs, as for unlawful expropriation under the BITs: see the *Enron* award and *Chorzów Factory*. Accordingly, the Tribunal does not hereafter distinguish between compensation for unlawful expropriation and compensation for breach of the FET standards.

12-53 *Article 5 of the BITs*: The Tribunal returns to its earlier acknowledgement (at the beginning of this Part XII of the Award) that the provisions on compensation in Article 5 of the two BITs expressly address lawful expropriation, but that these provisions do not address expressly either unlawful expropriation in breach of Article 5(1) of the BITs or breach of the FET standards in Articles 3 and 4 of the BITs. Nonetheless, under international law, the measures of compensation in the two BITs (which are materially similar for present purposes) provide a useful guide to the measure of compensation for unlawful expropriation and for breach of the FET standards under these BITs. The Tribunal accepts the Claimants’ submissions to such effect, as summarised above: see Professor Lowenfeld’s *International Economic Law*.

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<sup>10</sup> *Chorzów Factory* 1928 PCIJ, Series A, No 17 (Merits), p. 47.

- 12-54 *Market Value/Fair Market Value*: The Tribunal notes that the issues under Article 5 of the two BITs relate to the effect of the several phrases (i) “market value” of the investment as the measure of indemnification, to include “current value, declared tax value of tangible goods, and other criteria that are appropriate to determine market value” (the Argentina BIT); and (ii) “fair market value or, in the absence of such value, ... the actual value of the ... investment”, to include “going concern value, asset value including the declared tax value of tangible property and any other criteria, which in the circumstances, are appropriate to determine fair market value” (the France BIT). These terms are considered by the Tribunal separately in more detail below, in Part XIII of this Award.
- 12-55 *DCF*: Neither BIT here refers expressly to the DCF approach to valuation forming the Claimants’ primary case on quantum, which is so strongly disputed by the Respondent. It is necessary to consider at some length the extent to which the DCF method is appropriate, on the facts found by the Tribunal in this case, also in the next Part XIII of this Award.
- 12-56 *Burden of Proof*: Under international law and the BITs, the Claimants bear the overall burden of proving the loss founding their claims for compensation. If that loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent. Again, it is necessary to consider this general principle in more detail in the next Part XIII of this Award.
- 12-57 *Arbitral Discretion*: As indicated above, the Tribunal has experienced considerable difficulties in deciding certain quantum issues in these arbitration proceedings. It is not the Tribunal’s function, as an arbitration tribunal, to make a simplistic binary choice between the very different cases advanced by the two sides. Moreover, given these issues’ dependence on multiple findings of fact by the Tribunal, it would not even be possible to do so in the present case, even if this Tribunal were willing to do so (which it is not). Ultimately, the Tribunal must exercise its own arbitral discretion in assessing compensation by reference to the applicable legal principles and the particular facts, as determined by the Tribunal. In *Chorzów Factory*, the PCIJ noted its mandate to decide

the issue of compensation in its own discretion based on the various valuations presented for its consideration:

*“The Court does not fail to appreciate the difficulties presented by these two questions, difficulties which are however inherent in the special case under consideration, and closely connected with the time that elapsed between the dispossession and the demand for compensation, and with the transformations of the factory and the progress made in the industry with which the factory is concerned. In view of these difficulties, the Court considers it preferable to endeavour to ascertain the value to be estimated by several methods, in order to permit of a comparison and if necessary of completing the results of the one by those of the others. The Court, therefore, reserves every right to review the valuations referred to in the different formulae; basing itself on the results of the said valuations and of facts and documents submitted to it, it will then proceed to determine the sum to be awarded to the German Government, in conformity with the legal principles set out above.”<sup>11</sup>*

The Respondent invoked this passage to contend that the Tribunal, in the present case, should consider the results of several valuation methods in determining the appropriate sum of compensation due to the Claimants.

12-58 A similar approach was adopted in several awards of the Iran-U.S. Claims Tribunal. In *Starrett Housing Corporation v. The Government of the Islamic Republic of Iran*<sup>12</sup>, otherwise much invoked by the Claimants, the arbitration tribunal noted, as to assessment of compensation, that “[i]t is generally recognized that international tribunals have a wide margin of appreciation to make reasonable approximations in such circumstances.”<sup>13</sup> Specifically, the tribunal decided: “These matters are not capable of precise quantification because they depend on the exercise of judgmental factors that are better expressed in approximations or ranges. In these circumstances, the Tribunal must make an overall determination of a global amount, taking account of the nature of the forecasts involved and the various interrelationships between them. This is, indeed, what reasonable businessmen typically do when finally determining the price they are willing to pay in a complex transaction. Therefore, the Tribunal again steps into the shoes of the

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<sup>11</sup> *Ibid.*, pp. 53-54.

<sup>12</sup> *Starrett Housing*, Final Award No. 314-24-1, 14 August 1987.

<sup>13</sup> *Ibid.*, para. 339.

hypothetical reasonable businessman, and will consider what he would have done, faced with inevitable uncertainties yet wanting to conclude a purchase.”<sup>14</sup>

12-59 The Tribunal is guided by this same approach in the present case.

12-60 *No Double Recovery*: Lastly, the Tribunal here records the express acknowledgment made by the Claimants in their post-hearing submissions, as to the absence of any risk of double recovery, directly and indirectly, between amounts recoverable by the Claimants in these arbitration proceedings and amounts recoverable by the Concessionaire in any separate legal proceedings in Mexico (Claimants’ Post-Hearing brief, paras. 18-25):

" *Double recovery*’

*18. The Claimants’ claims against the Respondent under the BITs are jurisdictionally distinct and wholly separate from any claim for compensation which the Concessionaire may decide to pursue against the Mexican Federal Government in due course. Nevertheless, the Claimants appreciate the concern that, in practical terms, they may be seen as recovering compensation for the same acts through separate sets of proceedings. For the reasons set out below, the Claimants consider that this is unlikely.*

*19. We are advised by Lic. Graham [the Claimants’ legal adviser in Mexico] that, although the Federal Government Pecuniary Responsibility Act does not expressly require the Administrative Court to take into consideration any award issued by an international investment arbitral tribunal requiring the Mexican Federal Government to pay damages ("Award"), the Mexican regime on liability relies on the universal principle that compensation must be limited to damages actually suffered (Federal Civil Code, Book Four, Title One, Chapter V and Title Four, Chapter 1; Federal Civil Code, Articles 1910, 1915, 2108, 2109).*

*20. Lic. Graham has advised that if a claim is brought under the Act, the Mexican government would have the right to invoke the above principle to abate any amount previously paid as a result of the arbitral award.*

*21. Lic. Graham has further advised that if the Concessionaire files a claim for damages the Administrative Court would take any Award into consideration, failing which it would be breaching the terms of the BITs, which state that an Award is final and binding on the State party in an arbitration.*

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<sup>14</sup> *Ibid.*, para. 338.

22. *In sum, Lic. Graham's conclusion is that should the Concessionaire prove any damages before the Administrative Court, Talsud and Gemplus would not be entitled to collect the amounts granted to Conrena [the Concessionaire]. The only shareholder to be compensated would be Aplicaciones Informáticas S.A. de C.V ("Aplicaciones Informáticas").*

23. *Separately, Lic. Zambrano [the Claimants' legal adviser in Mexico] has also advised that the Administrative Court would take into account any damages awarded by this Tribunal. Lic. Zambrano has stated that the Administrative Court would award compensation in proportion to the shareholding held by Aplicaciones Informáticas to avoid any double recovery.*

24. *In view of these opinions, it appears that there is very little (if any) risk of the Claimants making a "double recovery", as the Administrative Court will take into account any Award when determining the quantum of any judgment.*

25. *In order to address any residual concern that the Tribunal might have concerning double recovery, the Claimants are prepared to enter into a legally binding assignment to Mexico of any and all pecuniary benefits, up to the value of any award in damages made in this arbitration, which they may derive as shareholders in the Concessionaire by way of dividends, distributions or otherwise from the final outcome of the Nullity Claim and any consequent claim for damages before the Administrative Court."*

12-61 The Tribunal has taken note of the offer made by the Claimants to the Respondent in the last-cited paragraph above, which (so it understands) remains available for acceptance as at the date of this Award and, doubtless, thereafter.



## ***PART XIII: ISSUE I – COMPENSATION: LOST FUTURE PROFITS***

### ***(01) INTRODUCTION***

13-1 In this part of the Award, the Tribunal considers the various methods proposed by the Parties to calculate the appropriate amount of compensation under the respective BITs in regard to the Claimants' claims based on the Concessionaire's lost future profits, including the Claimants' use of the DCF method and the Respondent's use of Non-DCF methods.

### ***(02) THE CONCESSION'S CLASSIFICATION***

13-2 The Concessionaire's Concession is characterized by the Claimants as a highly valuable investment, and by the Respondent as significantly less valuable, if not actually worthless. Although the Tribunal has decided earlier in this Award that the relevant valuation date is 24 June 2001, it is necessary to consider the Parties' cases relating to periods before and after this date.

**A. The Claimants' Case**

13-3 The Claimants characterise the Concession for the purpose of the Tribunal's quantum analysis as follows (Quan. Rep. at 1-2, para. 3):

- (i) *as at 20 August 2000, Renave had legal rights under a renewable 10-year Concession Agreement with the Secretariat granted on 15 September 1999 (and published in the Official Journal of the Federation on 11 May 2000), to manage the registration of all used and new vehicles for the life of the Concession;*
- (ii) *in accordance with the terms of that Concession the Respondent had introduced special legislation to make the registration of all vehicles compulsory and granted to Renave in law the right to charge a fee for each registration;*
- (iii) *the Respondent had recognised and endorsed the validity of the income stream projections in Renave's Business Plan which formed a part of the Concession Agreement;*
- (iv) *the Business Plan under (endorsed by the Respondent) [sic] anticipated gross earnings from registration fees amounting to approximately MXN\$4.6 billion and pre-tax profits of MXN\$1.8 billion during the first 10-year period of the Concession;*
- (v) *the Concession gave rise to a legitimate expectation that significant additional revenue could be expected from the second 10-year period of the Concession;*
- (vi) *the Claimants therefore made their investments on the basis of projections of income and earnings which were formally accepted by the Mexican State and which gave rise to legitimate expectations as to future income;*
- (vii) *as at 20 August 2000, Renave was an established, income-producing business which had successfully completed the execution phase of the Concession by establishing a Registry;*
- (viii) *after 20 August 2000, the Registry operated for more than two years, giving rise to a record of revenue earnings as to which there is no scope for speculation;*
- (ix) *in 2001 and 2002 more than 95% of all new vehicles in Mexico were registered with Renave and the assumption of 99% made by*

*LECG/Horwath for the remainder of the Concession period has not been challenged by the Respondent's expert;*

- (x) in the 28 month period after 20 August 2000, the level of such performance, for new vehicles, exceeded the projections for registrations that had been set out in the Business Plan, making it clear that (i) those projections were conservative and (ii) the Claimants' legitimate expectations would have been met but for the Respondent's unlawful actions and inactions; and*
- (xi) The "Asociación Mexicana de Distribuidores de Automotores" (AMDA) has published historical figures for the number of new vehicles sold in Mexico for the period from 2000 to 2006. These figures are not disputed by the Respondent or its experts."*

*[Footnotes omitted]*

13-4 The Claimants' set forth their submissions on the value of their investment as follows (Quan. Mem. at 2):

- "2. In brief summary, the Claimants' case on quantum is that Renave would have been highly profitable over the ten year life of the concession. This is clear from the projections that were incorporated into the Concession Agreement and from the track record for registration of new vehicles in the period up to December 2002. The value of the Claimants' investment, namely their shares in Renave, would have reflected that. The result of the interventions and other actions by the Respondent for which it incurs liability, including the revocation of the concession, is that Renave, and therefore the Claimants' investment, has been rendered worthless. The Respondent has permitted Renave to make modest distributions to its shareholders in 2002. However, these amounts do not amount to adequate compensation in accordance with the requirements of the Mexico-Argentina and Mexico-France bilateral investment treaties ("the BITS") and the applicable rules of law.*
- 3. The relevant principles governing compensation for the serious effects of treaty violations and breaches of international law alleged by the Claimants are set out below, in respect of expropriation and all other breaches of the BITS. From these principles it is clear that the Tribunal is required to assess the value of the concession as a whole, including any potential future profits based on the probable performance of Renave over the life of the concession (and any renewals). The Claimants as shareholders in Renave are entitled to claim a proportionate part of the value of the enterprise or the total value of the undertaking including profit. This valuation must be made at a point in time immediately before the alleged wrongful acts of the Respondent began to impair the value of*

*the concession rights. It is also established that any negative effect on valuation that may have been caused by the intervention of the Respondent, or any earlier acts that are inconsistent with its treaty obligations, must be excluded from the valuation.”*

13-5 The Claimants calculate the total value of their lost investments as MXP \$340,230,868, excluding the value of any subsequent concession renewals, interest and costs (Quan. Mem. at 3).

### ***B. The Respondent’s Case***

13-6 The Respondent, on the other hand, characterises the Concession for valuation purposes as follows (Quan. Rej. at para. 7):

- *“At the date of valuation, the Claimants had invested only P\$28.37 million (approximately US\$3.2 million), notwithstanding the Business Plan’s projection of a total investment of P\$337 million (approximately US\$35 million) during 2000, 56% of which would be financed through shareholder capital contributions. They made, as the Claimants, admit, “something less than 100%” of the capital investment contemplated in the Business Plan. To be accurate, it was something very substantially less than 100%.*
- *Renave had an accumulated net loss of P\$37.2 million (or P\$44 million depending upon which financial statement is used) at the end of August 2000.*
- *The Concessionaire’s investment strategy was to sub-contract the main components of the Registry, for example, a data scanning center, and it had the database hosted by Hewlett Packard. By the end of August 2000, it had only P\$25 million worth of fixed assets, against a planned P\$300 million worth of fixed assets contemplated by the Business Plan for the end of the first year.*
- *A subsequent study revealed that there was very little infrastructure that would be transferred to the Secretariat were the contract to be terminated.*
- *The company’s net assets around the date of valuation were P\$44.7 million and by the end of August 2000 had decreased to P\$22.6 million.*

- *For a project (now) characterized as “low risk”, the Concessionaire paid only P\$11.3 million (US\$1.17 million at the then-prevailing exchange rate) for the concession rights and agreed thereafter to make annual payments of only P\$9,000,000 (US\$959,000 for year one) and P\$8,000,000 (US\$870,000 annually for the next eight years). Using LECG/Horwath’s proposed 15% discount rate, the present value of those payments (had they all been made) amounted to only P\$58.2 million. As PRA points out in their second report, the Claimants’ P\$754.7 million valuation represents a return of 1,197% on what the Concessionaire was prepared to pay for that “most precious asset”, as the Reply characterizes it.*
- *The Claimants received back what they invested in the company. (They quibble about whether they were made completely whole, but the evidence is that they essentially got back the capital that they invested in Renave.)”*

*[Footnotes omitted]*

13-7 The Respondent contends as follows with regard to the approach to valuing the Claimants’ investments (Quan. CM at 30):

- “117. There is a final factor that would have to be taken into consideration by the Tribunal. It is Mexico’s position that with the events of 24 August-7 September 2000 the entire project came undone. There was a collapse of public confidence and the Secretariat was obliged to step in.*
- 118. Since the valuation exercise propounded by the Claimants involves hypothetical scenarios and assumptions, the Tribunal might well ponder one more: what would have happened to Renave and its investors had the Mexican Government washed its hands of the Cavallo scandal on 24 August 2000 and instead of intervening in various ways in an effort to try to restore public confidence, had simply required the concessionaire to resolve it on its own?*
- 119. In Mexico’s view, the Registry would have collapsed in a matter of days due to widespread refusal to register vehicles with a Concessionaire associated in the public mind with Ricardo Cavallo. The value of the Concessionaire in such circumstances would have been zero.*
- 120. The only reason why the Claimants were able to essentially recoup their investments is that while the Secretariat investigated the Concessionaire’s performance and evaluated its position, the new vehicle registration continued long enough to permit Renave to generate enough monies to enable the company to pay out its investors. That process was not saddled with the loss-making used vehicles registration process. This would not have been possible without the Secretariat’s intervention.”*

*[Footnotes omitted]*

13-8 The Respondent calculates that the total value of the Claimants' claims, at most, is in the range of MXP \$2,553,129 to \$3,590,360 on the basis of its proposed Expected Returns Approach, excluding the value of any subsequent concession renewals, interest and costs, and discounted by at least 50 % on the basis of contributory fault (Quan. CM at 28).

**(03) THE DCF METHOD**

**A. The Claimants' Case**

13-9 The Claimants' expert, LECG/Horwath, calculated the value of the Claimants' respective investments on two alternative DCF models.

13-10 *First DCF Model:* The first model assumes that the Concessionaire would have continued to operate normally in accordance with the terms of the Concession Agreement with respect to both new and used vehicles. This model is summarized as follows (Quan. Mem. at 26-27):

*“74. First, LECG/Horwath calculated the value of the business on the assumption that Renave would have continued to operate normally in accordance with the terms of the Concession Agreement in relation to both new and used vehicles. This calculation is summarised at Schedule 1 to the LECG/Horwath Report. LECG/Horwath proceeded as follows:*

*(i) Almost all new vehicles would have been registered (this was compulsory, and LECG/Horwath have assumed a rate of 99%). For each vehicle, a registration fee would have been paid. This occurred in practice until December 2002, and LECG/Horwath were therefore able to use the actual figures for registration of new vehicles for that period. For the period from December 2002 to December 2006, LECG/Horwath used figures provided by AMDA specifying the number of new vehicles which would have been*

*registered. Finally, LECG/Horwath have assumed that the market for new vehicles will grow, for the period 2007-2010, at the same rate as it grew during the period 2000-2006.*

- (ii) Under this first model, all owners of used vehicles would also have remained subject to the obligation to register their vehicles. Again, for each registration, a fee would have been paid. LECG/Horwath have proceeded on the basis that the registrations would have taken place in accordance with the figures in the Business Plan, which were based on the information provided by the Respondent (as to the number of vehicles in Mexico at the time the concession was granted) and agreed by the Respondent as part of the Concession Agreement. They consider this to be an accurate, but conservative, estimate of what would have occurred.*
  - (iii) Finally, once a vehicle was registered, fees would have been paid for subsequent transactions (such as change of owner) in accordance with the Business Plan. LECG/Horwath refer to these registrations as “other categories”. Again, LECG/Horwath proceeded on the basis of the figures in the Business Plan. They consider that these figures represent the best estimate (although conservative) of the rate at which the other categories of registration would have occurred and the income this would have generated. This is extremely conservative, because LECG/Horwath did not consider the additional transactions that would have occurred as a result of the much faster than anticipated growth (as between the Business Plan and what happened in reality) in Mexico’s new vehicle market.*
  - (iv) LECG/Horwath then deducted from the income the expenses attributable to each aspect of Renave’s business. Where this was available, they relied on actual data. In the absence of such data, they relied on the figures in the Business Plan and figures provided by Maria Elena Barrera, Director of Finance and Administration of Renave.*
  - (v) LECG/Horwath applied tax at the applicable rate for each year then made adjustments/deductions for depreciation/amortization.*
- 75. Finally, LECG/Horwath applied a discount rate of 15% to reflect the time value of money and risks for Renave as at 20 August 2000. In summary, they adopted an additive model in which the return on an asset is estimated as the sum of a risk-free rate and one or more risk premia. In reaching the final figure of 15%, they took into account the following factors:*

- (i) *the risk-free rate of return based on 10-year constant maturity U.S. treasuries (since any risky investment should return at least as much as the riskless asset);*
- (ii) *the U.S. long-horizon equity risk premium for the period 1926 to 2000 (to reflect the additional return an investor requires for investing in equities as opposed to riskless assets);*
- (iii) *an industry/firm specific risk premium; and*
- (iv) *a country risk premium factor of 333 basis points at August 21, 2000, to capture the difference between rates of return on government bonds in Mexico as opposed to the U.S. and to factor the additional premium required by investors on that date for Mexican investments.”*

*[Footnotes omitted]*

13-11 *Second DCF Model:* The second model assumes that, as actually occurred, the obligation on owners of used vehicles to register those vehicles was suspended in August/September 2000. This calculation “*follows the same logic as the calculation for used and new cars, but does not take into account the income derived from the registration of used cars and other categories. It also makes adjustments to deduct expenses related solely to the part of Renave’s business engaged with the registration of used cars*” (Quan. Mem. at 28).

13-12 In response to the Respondent’s criticism of the use of the DCF method, the Claimants reply as follows (Quan. Rep. at 9-11):

“22. *The Respondent’s critique of LECG’s valuation is largely based on the proposition that the Claimants’ valuation is based upon the hypothetical notion of the price which a willing buy[er] would pay to a willing seller and that it is not permissible to rely on data that was not available at the date of valuation. The approach is designed to introduce a very significant qualification to the factual basis that may be relied upon to value the shares in Renave. The Respondent seeks to limit the number of years of Renave’s operations that can be considered in order then to argue that there is no established practice on which to assess income and profitability. This is the central strategy of the Respondent’s Counter-Memorial on Quantum: the Respondent’s primary contention is that Renave’s lack of a “track record” of profitable operations at the time of valuation precludes the use of the DCF valuation. The Respondent seeks*



*to construct an argument that the investment was too speculative. The approach is misconceived.*

23. *It is this proposition that underpins a substantial part of the PRA report. Thus, for example:-*

- (a) *In commenting on the limitations of the DCF methodology, PRA asserts that Renave has no reliable historical performance record or “track record” as of the valuation date. That assertion cannot be made in relation to Renave’s historical performance as a whole, a performance that was based on the assumptions that underpinned the Business Plan and the arrangements put in to place by the Claimants;*
- (b) *PRA asserts that, as of the valuation date, virtually no historical data is available to validate future cash-flow projections;*
- (c) *PRA asserts that a due diligence investigation performed by a hypothetical willing buyer could only be performed based on the information available as of the valuation date; and*
- (d) *PRA asserts that the hypothetical willing buyer would not have been able to take into account the information included in the LECG/Horwath model, such as the number of new vehicle registrations reported by AMDA during 2007 and Renave’s audited financial statements for 2000 or 2001.*

24. *In making this argument the Respondent draws a wholly artificial and untenable distinction between the track record as at the valuation date, as referred to above, and the actual track record based on established facts. The Respondent’s approach is self-contradictory. The Respondent is happy to refer in the Counter Memorial to new vehicle registrations which continued long enough to permit Renave to generate funds to pay as dividends to its investors, but it does not wish to refer to the same facts for the purposes of valuing the investment. There is no dispute between the parties that about 2.2 million new vehicles were registered by Renave from inception up to the Revocation of the Concession in December 2002. The Respondent cannot say - and it does not say - that there was no track record. Rather, it argues that the Tribunal should not look at how the investment actually performed after the Respondent’s initial and unlawful act of interference in August 2000. The Respondent seeks, in effect, to rely on its own wrong-doing to minimise the compensation that is due.*

25. *The Claimants submit that the Respondent’s approach is ill-conceived and should be rejected. There has been a widespread acceptance of lost gain or loss of profit as a legitimate element for measuring the amount of compensation that is due. The approach is supported by the terms of the*

*two BITs, which allow reference to be made to all appropriate criteria in assessing compensation. In this case, it is accepted by all the parties that there was no open market for the shares in Renave. As stated in the Claimants' First Memorial on Quantum, the Claimants' experts proceed on the basis that there was no existing business comparable to Renave and there had been no arm's length transaction from which they derived an estimate of Renave's value. The parties are driven to the fiction of a hypothetical buyer and seller by the terms of the BITs which equate compensation with the market value of the investment. It does not follow that the Tribunal should ignore what would otherwise be material, accessible and verifiable information about the prospects for future profit. The Respondent's approach is unrealistic and unfair and undermines the intention of the drafters of the BITs and the Claimants' legitimate expectations as to how they would be interpreted and applied."*

*[Footnotes omitted]*

13-13 The Claimants identify additional reasons why the DCF methods ought to apply in this case, including substantial consensus on valuation data. The Claimants submit that LECG/Horwath have relied upon projections in the Business Plan, "which were agreed between the parties and enshrined in the Concession Agreement." The Claimants also note that an approved business plan is an acceptable part of a DCF valuation and "reinforces the likelihood of the damages suffered by the Claimants" (Quan. Rep., para. 40 at 16).

13-14 It is further submitted by the Claimants that the DCF method is the only "fair and proper way" to value the Claimants' loss. In this respect, the Claimants submit that (Quan. Rep. at 17-18):

"42. [...] international tribunals have used the DCF method where, as in the present case, it is possible on the basis of verifiable data to predict the income that would be generated by the investment. Tribunals have only resorted to other techniques when it was not possible to use DCF because the methodology was based on speculative assumptions or there was a history of lack of profitability...

43. *In this case, there are clear reasons why the Tribunal can validly make use of the DCF method:*

(i) *the damage is not speculative, and the facts and assumptions on which LECG/Horwath rely are sufficiently certain to make such an approach appropriate; and*

- (ii) *the alternative valuation methods put forward by PRA (which LECG/Horwath considered and rejected) do not allow Renave's key asset, namely its predictable income stream under the terms of the Concession Agreement, to be taken into account, as referred to in more detail below"*

*[Footnotes omitted]*

13-15 The Claimants' expert, LECG/Horwath, also responded to PRA's criticisms of its DCF approach, in preference for the Concessionaire's 'book value', as follows (LECG Second Expert Report at 10):

"15. ... [t]he crucial issue in the valuation of Renave's shares is the income stream flowing from operating the Registry as a going concern. The most important asset in the valuation of Renave's shares is the intangible right to the concession, to operate the Registry, and to receive the financial benefits from the investment. These financial benefits exist during the initial ten-year terms and any subsequent renewal of the concession and do not accrue to any tangible asset. Consequently, the income stream is the central consideration in valuing the shares in Renave. By focusing only on the book value of tangible assets and cash contributions, the PRA Report ignores the principal source of value."

13-16 The Claimants and LECG/Horwath undertook an additional valuation of the Claimants' investment as of 26 June 2001 and 12 December 2002 using the same model as relied on in their previous damages submissions resulting in the following calculations (Claimants' Post-Hearing Br. at 17-20):

*Summary of Claimants' Damages (New & Used Vehicles) as of Various Dates*

*(Present value basis in MXN \$)*

<i>As of June 26, 2001</i>	<i>Talsud</i>	<i>Gemplus</i>
Market Value of Shares in Renave / Loss of Profits Suffered by Claimants	\$247,690,740	\$170,821,200
<i>Less:</i>		
Shareholder Distributions Received	(19,068,651)	(12,882,908)
Value of Renave (Conrena) Shares	(795,317)	(548,495)
	\$227,826,772	\$157,389,797
<i>Add:</i>		
Pre-award interest on the value of shares / lost profits from June 26, 2001 to February 29, 2008:	\$186,953,523	\$128,933,464
Daily interest from March 1, 2008	\$85,794	\$59,169

The values of shares / lost profits of a subsequent renewal of the concession based on June 26, 2001 valuation date:	\$262,541,690	\$183,132,200
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As of December 12, 2002	Talsud	Gemplus
Market Value of Shares in Renave/Loss of Profits Suffered by Claimants	\$269,093,320	\$185,581,600
<i>Less:</i>		
Shareholder Distributions Received	(23,371,741)	(15,790,085)
Value of Renave (Conrena) Shares	(940,088)	(648,336)
	\$244,781,491	\$169,143,179
<i>Add:</i>		
Pre-award interest on the value of shares / lost profits from December 12, 2002 to February 29, 2008	\$134,957,417	\$93,074,081
Daily interest from March 1, 2008	\$79,756	\$55,004
The value of shares/lost profits of a subsequent renewal of the concession based on December 12, 2002 valuation date:	\$262,595,290	\$181,100,200

[...]

73. *These calculations have been adjusted to take account of the concession made by the Claimants concerning PTU tax and as advised to the Respondent's counsel during the hearing by e-mail dated 23 February 2008.*
74. *The above is a summary of the values derived by LECG from the Claimants' investment, which equates to the value of their shares in Renave. This is measured as the value of the business of Renave using the DCF approach, taking into account actual and projected revenues from fees from three income streams, as applicable, these being from (a) from the initial registration from new and used vehicles, (b) subsequent transfers of ownership and (c) other transactions for which fees are payable."*

13-17 As regards PTU, during the main hearing, the Claimants conceded that a correction should be made to their DCF model concerning PTU (which has to do with the profit sharing plan for the Concessionaire's employees) [D7:1645]. On the final day of the main hearing, the Claimants submitted a revised schedule, adjusting the manner in

which PTU was reflected in their damages model. The Respondent confirmed in its closing submissions at the hearing that it did not oppose the Claimants' correction, reiterating that its main objection was to the Claimants' use of the DCF model generally [D8:1903]. The PTU adjustment was taken into account by the Claimants in their post-hearing submissions and reflected in the alternative damages calculations presented by the Claimants for the Tribunal's alternative valuation dates, i.e. June 2001 and December 2002 [Post-Hearing Br. at para. 73].

- 13-18 Finally, the Claimants request that all compensation awarded to them be denominated in US dollars, using an exchange rate as of the date of the Award (Claimants' Post-Hearing Br., para. 76 at 20).

**B. The Respondent's Case**

- 13-19 The Respondent expresses the following reservations as to the application of any DCF model, characterising it as a legal fiction inapplicable to the present case (Quan. CM at 17):

- “56. *The First Memorial on Quantum cites a passage from an award of the Iran-U.S. Claims Tribunal on the market value of an untraded asset. In Starrett Housing, the tribunal noted that the price is that which a willing buyer will pay to a willing seller in circumstances in which each had good information and each desired to maximize his financial gain.*
57. *The test assumes that the arm's length would-be purchaser would have access to the key financial and operational documents generated by the company and its management in order to determine whether to proceed with the purchase and at what price. The would-be purchaser would have access to the company's financial statements, its bank records, management's discussion of its prospects, etc. In other words, the hypothetical purchaser is presumed to know what the Concessionaire's senior management knew about the financial status of the company, its performance under the Title of Concession and its prospects.*
58. *These are important points which warrant emphasizing: the test is a legal fiction that assumes that on the valuation date, the purchaser is well and*

*fully appraised of all relevant information about the proposed purchase and can therefore make an informed decision. The test also assumes that while the seller will want to maximize the sales price, the purchaser will focus on the principle features of the proposed transaction that would result in a reduction of the sales price.”*

13-20 The Respondent then proceeds to identify what any fictional would-be purchaser would know following a review of the Concessionaire’s internal corporate information, as of 20 August 2000, claiming that these facts alone would have raised serious questions about the “wisdom” of purchasing the Concessionaire (Quan. CM at 18-20, para. 61):

- *“First, the purchaser would be aware that the Claimants themselves had characterized the project as being of “high risk” from the outset. This in itself calls for a large discount in the price a potential buyer would be willing to pay, especially considering that some of those risks had materialized as of 20 August 2000.*
- *Second, the purchaser would discover that only 6 weeks before 20 August 2000, the Board had authorized the retention of the Electronic Data Systems (EDS) to conduct the technical audit of Renave’s database and operating systems due to “doubts” about their performance. Since this was the Concessionaire’s key asset and on whose secure and proper operation the longevity of the Title of Concession depended, if the seller was having its doubts about the database’s operation, concerns would perforce be raised in the would-be purchaser’s mind about what would have to be done to make the database properly operational.*
- *Third, the purchaser would find that the company itself did not have an accurate understanding of its own financial and operational prospects. The Board minutes reveal that although repeatedly promised to the Board, over the course of the summer of 2000, Renave’s Financial Directorship was unable to prepare a detailed presentation on the company’s performance for the Board’s review. A would-be purchaser would have doubts about buying a company which lacked an accurate understanding of its own operations. The purchaser would be unable to run its own DCF valuation on the “actual numbers” due to the absence of the necessary data, and therefore could not test Renave’s actual performance against its Business Plan projections.*
- *Fourth, the purchaser would be aware of the changes in the company’s management and administration in July-August 2000: Mr. Taiariol resigned as Commercial Director and Mr Alec Davis was appointed as the Board member to oversee the company’s financial and administrative functions due to Board concerns about Mr. Cavallo’s performance. In short, the Talsud representatives, who were represented in the bid as the*

*individuals with substantial prior experience in the motor vehicle registry business, were being shunted aside by the majority shareholder.*

- *Fifth, the would-be purchaser would be aware of the extent to which the company had sub-contracted key functions to third parties and the correspondingly modest investment in physical assets made by the shareholders. It would note that the existing shareholders had hitherto sought (unsuccessfully) to finance its operations from existing cash flows. These facts would raise doubts about the would-be sellers' confidence in their investment and their willingness to put their own capital at risk. The would-be purchaser could reasonably conclude that if the shareholders (including Henry Davis Signoret) had only been prepared to put some US\$6.6 million at risk, they could not have had a substantial expectation to be paid some US\$82 million.*
- *Sixth, and related to the foregoing point, it is common ground between parties that the investors made a much smaller capital investment than that contemplated by the Title of Concession's Program of Investment. The would-be purchaser would also take note of that underperformance. This would raise questions of whether the Concessionaire was in breach of any of its contractual commitments to the Secretariat.*

*The under-commitment of capital could be a breach of the Title of Concession. It would be exemplary of a more general contingency that any purchaser would factor into the deal: given that this was a grant of a monopoly to provide a public service and was subject to extensive governmental involvement through the Title of Concession and its legal framework, there would always be a risk that at some point the Secretariat could form the view that it was appropriate to exercise its legal rights under the contract. No seller could warrant that the 10 year term was a certainty because it could not warrant that the Secretariat would never form the view that the concessionaire was in breach of the Title of Concession.*

- *Seventh, Renave's relationships with its principle suppliers which provided the major components of the data collection and hosting (i.e., collection of registration applications, data scanning, and data base hosting) were unsettled. In fact, it was unable to finalize the contracts for the purchase of the smart cards from its own shareholder Gemplus.*
- *Eighth, and related to the company's subcontracting strategy, the purchaser would note the very high indebtedness, which heightened the project's risk. The debt to equity ratio in July was 1.97. The same ratio by the end of August was 5.3 (i.e., debt was 5.3 times greater than the shareholder's equity).*

- *Ninth, given that the Concession was predicated on a nation-wide system of documentary processing centers and, as recognized in Mr. Davis' letter of 14 July 2000 to Dr. Ramos, the cost of registration had already raised questions about the system's viability, the purchaser would question how registration data would be collected if the CTD system were to be less robust than originally contemplated or even non-existent, and whether that would entail higher costs to it if it had to find a new means of collecting used vehicle registrations nation-wide.*
- *Tenth, a would-be purchaser would be aware of the bank's concerns about the company's prospects and of the majority shareholder's concerns about the investors' exposure to claims on various guarantees given to suppliers and others.*
- *Eleventh, a prospective buyer would be acquiring a minority of interest in the company. Normally, the purchase of a minority interest commands a discount.*
- *Finally, a potential buyer would examine the need to make additional capital contributions to the company and factor this into its offer. The available financial information indicates that the Concessionaire had a significant working capital deficit which called for either increased debt or additional capital contributions (which were in fact made towards the end of 2000)."*

*[Footnotes omitted]*

13-21 The Respondent also contends that the external environment in which the Concessionaire was operating would introduce commercial uncertainty into the fictional would-be buyer's calculation of the purchase price (Quan. CM at 21).

13-22 Based on all these factors, the Respondent submits that a fully informed arm's length purchaser contemplating the purchase of a 49% stake in the Concessionaire would demand "a very high discount". The Respondent submits that, in such circumstances, the DCF model fails to capture any fictional purchase and sale agreement for the Concessionaire (Quan. CM at 21-22):

*"69. A DCF valuation is simplistic in that assumes [sic] a fully consummated, irrevocable agreement with no ability to vary or terminate the deal if the business did not unfold as predicted. In this respect, it is very much a fiction.*



70. *Much more likely in the real world of commerce, the purchaser faced with the facts as outlined above would agree to pay a small sum as an up-front payment and then make progress or “earn out” payments if certain contractually stipulated targets were met. In PRA’s view, this would be a far more likely way of proceeding.*
71. *The value of such a contract from the purchaser’s perspective is that the seller would shoulder the burden of the risk. Given the facts reviewed above, it is Mexico’s position that a would-be purchaser, if it was willing to commit any capital at all to the project, would be most unwilling to make a substantial up-front payment. Rather, it would make a small payment and then promise to pay milestone payments, if the milestones were met.”*

*[Footnotes omitted]*

13-23 In view of the material events, *i.e.* beginning with the Cavallo incident onwards, the Respondent submits that any fictional purchaser would likely also have demanded the rescission of the purchase and sale agreement on or after any relevant date for valuation purposes (Quan. CM at 23).

13-24 In its Rejoinder, the Respondent identifies what, in its view, represents a significant shift in the approach taken by the Claimants’ experts, to address what the fictional purchaser and seller could have known at the relevant time (Quan. Rej. at paras. 36-37):

“36. *[...] In this first report, they undertook to “give our opinion on the market value, as of August 20, 2000, of the Claimants’ shares in the company ....” Mexico responded that if market value is being established, the focus must be on what the purchaser and seller could have known at the time. In their second report, the Claimants’ experts shift to providing a “calculation of the lost profits to the Claimants (as distinct from the market value of the shares in Renave held by the Claimants) as of August 20, 2000” and to give an opinion on “the market value of the Claimants shares as of December 12, 2002.”*

37. *This shift, it is submitted, is intended to allow the experts to move [...] explicitly to a lost profits analysis and to thereby invoke the sources which permit the use of ex post information. Having done so, they then contend that their lost profits calculation is equivalent to a market value analysis (even though they themselves characterized it as being distinct from one).”*

*[Respondent’s emphasis; footnotes omitted]*

13-25 In addition to its general objection to any reliance on the DCF model to value the Claimants' investments, the Respondent takes issue with certain aspects of LECG/Horwath's analysis, which it claims increase the estimated value of the Concessionaire by approximately MXP\$673 million (Quan. CM at 24). In particular, the Respondent challenges five aspects of LECG/Horwath's analysis: (1) "unverified assumptions"; (2) "information not available to a hypothetical willing buyer"; (3) the discount rate; (4) taxes; and (5) the discounting period.

13-26 The Respondent contends that LECG/Horwath's analysis contains several assumptions that cannot be corroborated but all of which tend to overstate the value of the Concessionaire (Quan. CM at 24):

*"84. [...] For example, LECG/Horwath assumes the per unit cost of registering used and new vehicles to be \$4.46 pesos and \$53.52 pesos respectively.*

*85. These figures are said to be based on an estimate prepared by Ms. Maria Elena Barrera, however, Ms. Barrera has not offered any testimony in this phase of the proceedings; her analysis is not included as an exhibit to either the First Memorial on Quantum or to the LECG/Horwath report; the documents on which she relied to arrive at such estimates have not been identified or produced, and therefore, this important part of LECG/Horwath analysis is not supported by any evidence.*

*86. In order to test the reasonableness of said assumptions, PRA compared the Net Income Before Taxes as projected by LECG/Horwath against Renave's original projections and found that they are between 1.6 and 3.1 higher than the original projections. PRA concludes, based on the limited information available on this issue, that the cost estimates used by the Claimants' expert appears to be biased in favour of overstating the value of Renave."*

13-27 The Respondent also contends that LECG/Horwath has used information that could not have been available to a hypothetical willing buyer, thereby transgressing the Claimants' own definition of market value (Quan. CM at 25):

*"88. As explained in Section B.5.2 of the PRA report, LECG/Horwath relies on information from Renave's audited financial statements for 2000-2002 to determine revenues and costs related to new car registrations, AMDA's statistics on car sales for 2002-2006 to determine Renave's revenues from new car registrations, and project car sales forward using observed growth rates from those years.*

89. *It also uses other information, such as the actual corporate tax rate for 2001-2007, notwithstanding that this information could not have been known in the summer of 2000 and therefore could not have been incorporated into the willing buyer's assessment of value.*
90. *To illustrate this point: the hypothetical willing buyer would have likely taken Renave's original expectations regarding new car registrations as a basis to evaluate Renave's revenue potential. However, he would not have based the price he was willing to pay on the expectation that car sales would increase between 82% and 102% beyond Renave's original projections. Likewise, he would not have expected the corporate tax rate to fall from 35% to 33% and factor this into the price."*

*[Footnotes omitted]*

13-28 The Respondent also challenges the discount rate used by LECG/Horwath to assess the value of Claimants' shares in the Concessionaire, contending that the rates exceed two benchmarks of reasonable discount rates, *i.e.* the risk-free interest rate in Mexico (CETES) and the interest rate charged on the Concessionaire's long-term debt with INVEX (Quan. CM at 25):

- "92. *Given the fact that Renave, as an investment, carried considerably more risk than a government-backed certificate, such as CETES, it stands [to] reason that an investor would demand a higher return from Renave than it would from CETES. Hence, the discount rate used in a DCF valuation of Renave, which represents the rate of return acquired by the investor, should be higher than the CETES rate, not 2 points below that rate as LECG/Horwath suggests.*
93. *The second reference point offered by PRA is the interest rate charged on Renave's long-term debt with INVEX. Since creditors have a preferential claim over the company's assets in case of a liquidation, they face a lower risk than the shareholders. For that reason, creditors are willing to lend funds at a lower rate than that demanded by the shareholders in the same company. It logically follows that the discount rate in this case (*i.e.*, the cost of equity) should be higher than the interest rate charged by INVEX.*
94. *In its credit agreement with Renave executed in March 2000 (before the external operating problems arose), INVEX charged between 23% and 26%. Yet the discount used in the Claimants' DCF analysis is only 15%. According to PRA, an investor would necessarily demand a higher return to compensate for the additional risk borne vis-à-vis the creditor INVEX.*
95. *In regard to the Build-Up Method (the method employed by LECG/Horwath to determine the discount rate) PRA points out that,*

*although it is commonly used to determine discount rates, it can be easily manipulated and could lead to unrealistic results. As an example PRA states that if Renave was alternatively classified under “Computer Programming, Data Processing, and Other Computer Services” (instead of as a “Consumer Credit Reporting Agencies, Mercantile Reporting Agencies and Adjustments and Collections Agencies” (as LECG/Horwath does) instead of arriving at a 15% discount rate, the Build-Up Method would yield a 24.5% discount rate.”*

*[Footnotes omitted]*

- 13-29 The Respondent concludes that a proper discount rate would fall between 26%, *i.e.*, the interest rate paid on the Concessionaire’s long-term debt, and 31%, *i.e.*, the low end of the rate of return “usually required by venture capitalists when investing in start-up companies” (Quan. CM at 26).
- 13-30 The Respondent claims the following two errors were made by LECG/Horwath in relation to the PTU (*i.e.*, worker participation in RENAVE’s profits) and corporate taxes (Quan. CM at 26-27):
- “99. *PRA indicates in their report that LECG/Horwath incorrectly treated the carry-forward loss as a positive cash flow (a negative tax) for the year 2000, thereby having the effect of increasing the cash flow in that year, and thereby increasing the estimated value of Renave. PRA points out that the carry-forward loss does not reduce the cash outflow in the year it is generated (as if the tax authorities reimbursed companies for the losses they incur), rather it reduces payable taxes (thus enhancing the cash flow) in future years when the company generates profits, and therefore has to pay taxes.*
100. *Furthermore, PRA states that LECG/Horwath incorrectly added up the [PTU] (10%) and the corporate tax (35%) to calculate the carry-forward. PRA explains that the PTU is due only if the company reports profits. There is no carry-forward provision for PTU and therefore the company cannot reduce its tax liability in future years by carrying-forward losses from previous years.”*
- 13-31 The Claimants later took into account these corrections in relation to PTU in calculating their claims: see above.

13-32 The Respondent concludes that LECG/Horwath has overstated the value of the Concessionaire by approximately MXP\$27 million by discounting cash flows six months in advance of the date on which, according to the Respondent's expert PRA, they would normally be discounted (Quan. CM at 27).

13-33 As regards the Claimants' "different damages assessments", the Respondent claims these all present "significant shortcomings" (Quan. Rej. at para 90):

- *"The discount rate used by LECG/Horwath (15%) is too low, is inconsistent with the prevailing market conditions at the time, and is based on an unjustified assumption regarding Renave's industry-specific risk. In PRA's opinion the appropriate discount rate would fall between 26% and 31%.*
- *LECG/Horwath's cost projections are unreliable. They are based on Ms. Barrera's estimates which not only cannot be verified, since no supporting documentation was provided, but they also are inconsistent with the audited financial statements for 2001 and 2002 (that LECG/Horwath themselves use in their analysis).*
- *LECG/Horwath did not take into account the fixed costs associated with used vehicle registrations. The cost estimates submitted with Ms. Barrera's second witness statement suggest the fixed costs were P\$26.2 million. However, LECG/Horwath calculated the total costs of used vehicle registration by multiplying the variable cost (P\$53.52) by the number of expected registrations. This omission adds P\$146.2 million to the estimated value of Renave.*
- *LECG/Horwath discounts cash flows as if they were received in the middle of the year. This would be equivalent to assuming that the shareholders would receive 86 dividend payments during the year, and has the effect of adding P\$57 million to the estimated value of Renave.*
- *LECG/Horwath's inflation adjustment is incorrect. It was anticipated that fees would be adjusted each year for yearly inflation minus 2 points. LECG/Horwath adjust for inflation (without any reduction), thus overstating Renave's revenues by P\$387 million."*

*[Footnotes omitted]*

13-34 The Respondent concludes with the following submission in its Rejoinder on Quantum (Quan. Rej., paras. 22, 55 and 92-93):

“22. *Without having to register used vehicles for P\$25 (against a cost of a least P\$53), and receiving P\$375 for a new vehicle registration (against a cost of P\$39, according to the Claimants’ evidence), the economics of the operation changed. That is what the intervener was noting when he addressed the “result of the several measures applied to the operation” and the “partial view”. As discussed further below, Mexico’s point is that the Registry that existed on 20 August 2000 differed fundamentally from 15 September 2000 until December 2002.*

[...]

55. *In the period 24 August to 15 September 2000, the Registry was thus transformed from being a comprehensive new and used motor vehicle registry with the prospect of being gradually implemented at the state level through coordination agreements (once the cost of registration issued was resolved with the states), to being solely a new vehicle registry as the Secretariat responded to the crisis of public confidence in Renave and the widespread public, state and legislative opposition thereto. The Tribunal can easily conclude on the record evidence that without Secretariat intervention and were Renave left to make out its own defence, the project would have collapsed, in which case no post-intervention revenues would have been generated, and the Claimants would not have recovered their capital contributions.*

[...]

92. *In summary, a damages claim cannot ignore the circumstances surrounding an investment. In the instant case the project faced a number of risks as of the date of valuation which had nothing to do with the acts of Renave’s counterparty, the Secretariat. The project faced adverse conditions: the public considered a fee charged for used vehicle registration to be excessive: the public was reticent to provide personal information; a number of state governments stated in July-August 2000 that they would not participate in the project as then conceived; and the Federal District (DF) government vehemently opposed the private concessioning of the Registry (and later seized upon the Cavallo scandal as proof of the rightness of its earlier opposition). These externalities shaped and threatened the project’s prospects. They were all independent of the acts of the Secretariat which, up to and including the date of valuation, was striving to implement the project and to address those externalities.*

93. *The Secretariat’s interventions commencing on 24 August 2000 did not occur in a vacuum. What was proving to be difficult to implement became impossible. Without Secretariat intervention, the project would have collapsed in September 2000.”*

13-35 Finally, the Respondent contends that, if selected, the DCF method must, at a minimum, be checked against the results of other valuation methods (Quan. CM at 14):

- “42. *The evidence is that around the time of the Claimants’ chosen valuation date, Renave’s net asset value (i.e., shareholders equity) was \$44,718,656.19 pesos (or \$15,927,772.58 pesos, depending on which financial statements are used). By the end of August, the Concessionaire’s net asset value was reduced to P\$22,656,466.57 pesos (about half of what it was in July 2000).*
43. *As combined 49% shareholders, the Claimants’ share of the Concessionaire’s net asset value would be \$21,912,141.53 pesos, or roughly US\$2.4 million. This stands in stark contrast with the US\$40 million dollars that, according to LECG/Horwath, the Claimants’ 49% share in Renave was worth (without considering renewals) as of 20 August 2000. LECG/Horwath’s value assessment also stands in stark contrast with the P\$30 million (US\$3.2 million dollars) they invested in the project as of that date.*
44. *LECG/Horwath’s calculation yields a value that is over 17 times the net asset value of the company in July and over 46 times its net asset value by the end of August 2000. It is also more than 12 times the Claimants’ actual investment in the company. The Tecmed claimant’s DCF calculation was also 12 times the actual investment and, as has been seen, that created too great a disparity in that tribunal’s view.*
45. *According to the company’s tax returns for 1999 and 2000, the declared tax value of tangible assets was P\$38,845,434 and P\$142,976,895 pesos, respectively.”*

*[Footnotes omitted]*

**(04) NON-DCF METHODS**

**A. The Claimants' Case**

13-36 In its preliminary engagement letter, LECG/Horwath described the Concessionaire's market value, as of 31 December 2004, as follows, based on its 'book value' (LECG October 7 Letter paras. 12-14):

- “12. Renave currently has 10,000 shares of common stock issued and outstanding comprised of 5,100 shares of Series A, 2,900 shares of Series B, and 2,000 shares of Series C common stock, with a nominal par value per share of MXN \$ 1,000. Talsud holds 2,900 shares of Series B common with a nominal par value of MXN \$ 1,000. Gemplus holds 2,000 shares of Series C common with a nominal par value of MXN \$ 1,000. These represent respectively 29% and 20% of the issued and outstanding share capital of Renave.*
- 13. We have analyzed the accounts of Renave for the year ended December 31, 2004, the last period for which the Claimants have been provided financial statements. A summary of these accounts appears in Schedules 3 and 3a. Based on our understanding that the concession to operate Registry [sic] has been revoked and there being no other business undertaken by Renave, we believe that the book values reflected in the accounts of Renave are an accurate measure of the current market value of the shares in Renave. Renave is not a going concern and the appropriate premise of value is liquidation value, this being the net amount that can be realized if the business is terminated and the assets are sold piecemeal. For the year ended December 31, 2004, Renave reported a net loss of MXN \$ 5,143, 528. As of December 31, 2004, the net book value (assets minus liabilities) of Renave is MXN \$ 12,363,193.*
- 14. Based on the net book value of Renave and the Claimants' respective ownership percentages, as of December 31, 2004, the market value of Talsud's shares is MXN \$ 3,585,326 and the market value of Gemplus' shares is MXN \$ 2,472,639. Applying the current rate of exchange of USD = MXN \$ 10.8, the market value of Talsud's shares is USD \$ 331,975 and the market value of Gemplus' shares is USD \$ 228,948. Assuming that the current pattern of expenses continues and that the capitalization of Renave remains the same, Renave will eventually become insolvent and no value will be realized from the liquidation of its assets.”*



*[Footnotes omitted]*

13-37 LECG/Horwath was instructed at this initial stage to estimate only a present day value of the shareholders' interest in the Concessionaire, *i.e.* on 31 December 2004.

13-38 The Claimants made the following submissions in their Memorial on Quantum rejecting several methodologies, including the 'Market Approach' and the 'Asset Approach', in favour of the DCF 'Income Approach' (Quan. Mem. at 17-19):

“42. *Where there exists an active market for the expropriated asset, its market value is the asset's actual value on that market. Where, as in the present case, an asset is not publicly traded and there is no open market for it, its value typically falls to be established by reference to its likely value on a hypothetical market.*

43. *According to the Iran United States Claims Tribunal's decision in Starrett Housing Corp. v. The Islamic Republic of Iran, the market value of an untraded asset is:-*

*“the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat.”*

44. *This approach has been widely endorsed by international arbitral tribunals that have awarded damages for breach of investment treaties.*

45. *The Iran-United States Claims Tribunal has repeatedly relied on an assets' likely value in a hypothetical market. So have ICSID tribunals. Moreover, in its 1992 Guidelines on the Treatment of Foreign Direct Investment, the World Bank also endorsed that approach, defining market value as:-*

*“an amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case.”*

46. *LECG/Horwath considered the various valuation methods potentially available to establish this amount. They considered three methods: the*

*Market or Comparable Approach, the Asset or Cost Approach, and the Income Approach.*

47. *LECG/Horwath deemed the Market Approach unsuitable to value Renave as there is no existing business comparable to Renave and there has been no arm's length transaction from which to derive an estimate of Renave's value.*
48. *LECG/Horwath excluded the Asset Approach as it would not take into account the full earning potential of Renave and would therefore not reflect accurately the price that a willing buyer and a willing seller would have agreed.*
49. *It is therefore LECG/Horwath's conclusion that the Income Approach, which relies on a discounted cash flow method model, is the most appropriate and accurate method to value the Claimants' investment. This approach is particularly appropriate to the valuation of a business such as Renave where the market value of the investment would have been dependent on its ability to generate return to its owners. Furthermore, LECG/Horwath had access to reliable data to carry out such a valuation. Precise data was available for the operating period of the Registry. A Business Plan had been submitted with the bid documents, approved by Mexico and incorporated into the Concession Agreement. Audited historical financial statements of Renave for the years ended 31 December 2000 and 2001 were available. Detailed statistics regarding the number of new motor vehicles put in circulation each year in Mexico are kept and made available by AMDA, the leading Mexican trade association providing data on vehicles sales in Mexico. The Income Approach is therefore the only appropriate and reliable method to value the Claimants' investment."*

*[Footnotes omitted]*

13-39 These submissions are supported by LECG/Horwath's first expert report. In its review of the Concessionaire's financial history, LECG/Horwath noted as follows (LECG First Quantum Report at 6-7):

- “14. *Audited accounts were prepared for Renave by KPMG for the initial period September 6, 1999 to December 31, 1999 and by Deloitte & Touche for the years ended December 31, 2000 and 2001. We were also provided drafts of Deloitte & Touche audit reports with accompanying financial statements for the years ended December 31, 2002, 2003, and 2004.*
15. *For the initial period September 6, 1999 to December 31, 1999 and for the years ended December 31, 2000, 2001, 2002, 2003 and 2004, Renave*

*reported gross revenues of MXN \$ 0, \$ 199,952,900, \$ 327,099,242, \$ 358,849,805, \$ 4,905,407 and \$ 949,737 respectively. For the same periods, Renave reported net income (losses) before taxes of MXN \$ (13,262,390), \$ (68,057,263), \$ 123,517,148, \$ 131,733,983, \$ (25,782,235), and \$ (5,143,528), respectively. A summary of Renave's financial statements is set out in Schedule 13 and 13a. It can be seen that gross revenues and net income for the period after December 31, 2002 were relatively insignificant, reflecting the termination of the concession."*

*[Footnotes omitted]*

13-40 In the Claimants' reply on quantum, the Claimants submitted the following with regard to alternative valuation methodologies (Quan. Rep. at 3-5):

- "5. Together with its Counter Memorial on Quantum the Respondent submitted a report from Pablo Ri3n y Asociados, S.A. de C.V. ("PRA"). This purports to criticise the LECG/Horwath valuation on which the Claimants have relied. The Claimants have instructed LECG/Horwath to respond to the PRA Report. A copy of this response dated 12 September 2007 ("LECG/Horwath 2") is annexed at Annex 2. In sum, LECG/Horwath have maintained their original valuations and the methodology they adopted to make their calculations, and have provided additional support for their conclusions. Specifically, they address each of the reasons advanced by PRA for seeking to ignore post-valuation date data and for adopting an "assets-based" rather than an "income-based" approach to the valuation of the Claimants' investments. LECG/Horwath have carefully considered the PRA Report and provided a complete refutation of PRA's purported arguments. They have also provided further reasons for confirming their opinion that there is nothing in relation to the facts of this case that make it inappropriate or unnecessary to employ the established DCF methodology.*
- 6. The Respondent contends that the Claimants have received sufficient compensation for expropriation and, or in the alternative, compensation for breach of the other rights and protections which they enjoyed under the two BITs. To put it another way, by reference to the wording of the BITs, the Respondent argues that the Claimants have received the market value of the expropriated investment, disregarding any changes in value caused by the Respondent's conduct underlying the claim. The Respondent contends – and the Claimants accept – that for this limited purpose there is no material difference between the different expressions of market value in the two BITs. However, the parties are in sharp disagreement as to whether the compensation standard stipulated for expropriation applies also to breaches of the other obligations alleged by the Claimants, a point to which this Reply returns in due course.*

7. *A considerable body of jurisprudence exists on the valuation of investments for purposes of investment treaty arbitrations. Before turning to the case-law and other sources of relevant law it is instructive to begin by noting the wording of the BITs, which is of prime importance in this regard since they reflect the intention of the drafters of the BITs. Both set out the valuation criteria that are to be applied for the purposes of compensation. They do so in terms that are strikingly similar. The Argentina BIT provides that the valuation criteria “shall include current value, declared tax value of tangible property, and other criteria appropriate to determine market value.” The France BIT provides that the criteria to be considered “are the current value, the asset value including the declared tax value of tangible property and any other criteria which, in the circumstances, are appropriate to determine the fair market value.”*
8. *These provisions set out the criteria that are to be taken into account for the purposes of valuation. Any qualifications are set out in these provisions, and it is inappropriate for the Respondent to add to these. Significantly, the provisions do not preclude account being taken of profits (whether past, present or future) in assessing value. The words “other criteria appropriate” (Argentina BIT) and “any other criteria” (France BIT) indicate the intention of the drafters to allow future profits to be taken into account where established international practice and relevant authorities so direct.*
9. *All the parties to these proceedings agree that the Claimants are entitled to the market value of their lost investment. They also agree that the founding principles for compensation were laid down in the Chorzów Factory case. The international standard regarding compensation has been set out by the Claimants in their Memorial on Quantum at paragraphs 22 to 70. As recently confirmed by the tribunal in Vivendi:*

*“There can be no doubt about the vitality of [the Chorzów Factory] statement of the damages standard under customary international law, which has been affirmed and applied by numerous international tribunals as well as the PCIJ’s successor, the International Court Justice. It is also clear that such a standard permits, if the facts so require, a higher rate of recovery than prescribed in [the BIT] for lawful expropriations.”*
10. *It is only the application of these principles to the facts of this particular case that is in controversy. The Claimants’ case is that full compensation includes lost profits. In Chorzow Factory, the PCIJ specifically instructed its valuation expert “to determine the monetary value, both of the object which should have been restored in kind and of the additional damage, on the basis of the estimated value of the undertaking including stock as at the moment of taking possession by the Polish Government, together with*

*any probable profit that would have accrued to the undertaking between the date of taking possession and that of the expert opinion.”*

*[Footnotes omitted]*

13-41 The Claimants therefore reject the Respondent’s reliance upon the ‘Asset’ or ‘Cost’ approaches and the ‘Declared Tax Value’ approach primarily because, in their submission, they “fail to value Renave’s most precious asset, its licence to operate the Registry” (Quan. Rep. at 18-19):

“45. *LECG/Horwath conclude that none of the asset/tax figures found in the PRA Report are to be treated as “valuations,” and reports that they are neither useful nor appropriate because:*

- (i) The asset/tax figures are improperly presented by the PRA Report as valuation results. They are based on the erroneous assumption that the value of Renave’s business can be measured on the basis of the book value of the assets as set out in Renave’s account balances. Renave was undoubtedly a going concern as at 20 August 2000. Such value as it would have to its shareholders and any potential buyers would inevitably be determined by reference to its capacity to generate income. Its business value can only be measured in a useful way by reference to a methodology that takes into account its income, actual and future. On this basis the market value has to be assessed by using the DCF income approach.*
- (ii) The asset/tax figures are only numerical data points drawn from the balance sheet and the tax filings of Renave and do not amount to, and cannot be presented as, figures that may be said to constitute a “value.” They were not obtained by carrying out the due diligence exercise necessary to conduct an asset based valuation. Moreover the asset and tax figures are not capable of being two independent sums for the purposes of any valuation exercise as the underlying source for each is the same: Renave’s asset account balances.*
- (iii) These figures do not – and cannot – reflect the market value of Renave because the majority of the value of Renave’s business came not from tangible assets but from intangible assets, including most significantly the value of the Concession rights. Renave’s business was based on the operation of the Registry during the terms of the renewable ten-year Concession. The key tangible assets, including the Registry’s database, were owned by the Respondent. For this reason the PRA Report ignores the central*

*issue, since it fails to take any account of the most valuable part of Renave's assets.*

- (iv) *Further, the asset/tax figures proposed by PRA fail to take any account of the fair market value of liabilities as would be required in a proper asset based valuation under generally accepted valuation principles. The PRA figures also fail to adjust the book value of the individual assets to fair market value (or to make adjustments to account for the valuation data being different from the date of the source data PRA use), and for this reason alone are meaningless."*

*[Footnotes omitted]*

13-42 In its 12 September 2007 report, LECG/Horwath offered the following criticisms of PRA's proposed alternatives approaches to valuation in support of the Claimants' Quantum Reply (LECG Second Quantum Report at 6-9):

*"... The asset and tax figures cited in the PRA Report are based on book values only and are not instructive*

5. *The first two figures under the terms "Asset or Cost Approach" and "Declared Tax Value" are erroneous for several reasons. First, both figures are improperly presented as valuation results. Both are based on the same flawed assumption that the value of Renave's business can be meaningfully measured based on only the book value of assets as reflected in Renave's account balances. In our opinion, these figures are not useful or indicative of the value of Renave's operating business. As a going concern on the valuation date of August 20, 2000, Renave's business value can only be meaningfully measured under an income approach. Renave's owners did not seek asset value in the concession but rather the income generating capacity of the business. As a going concern, the market value of the investment was largely dependent on the investment's ability to generate returns to its owners. Value would be dependent almost exclusively on income in the case of the Renave's concession. As of the valuation date, Renave had functioned as a going concern for a sufficient period to enable us properly to evaluate certain aspects of its future performance in terms of earnings and expenditure. In our view, as explained below, the most appropriate approach to use to value the Claimants' shares in Renave as a going concern is the Discounted Cash Flow income approach ("DCF Method").*
6. *It is conceptually incorrect to automatically conclude that the value of Renave's business is equal to its accounting/tax book value without the use of generally accepted valuation procedures and rigorous financial analysis to support this conclusion. These affirmative opinions regarding*

*value contained in the PRA Report under the terms “Asset or Cost Approach” or “Declared Tax Value” are only readings of book balances of Renave and fail to provide a fair measure of value. Neither of the two figures are appropriate or useful in establishing an objective value for the shares of Renave as of August 20, 2000 as a going concern. They are merely numerical data points from the balance sheet and tax filings of Renave and they do not rise to the level of valuation analysis. The figures should also not be misinterpreted as representing two independent valuation data points as their source is the same (Renave’s asset account balances).*

7. *Asset account balances are comprised of historical acquisition costs with reductions as appropriate for depreciation based on assumed conventions. Assets include cash, receivables, fixed assets, and capitalized costs. A value obtained from reading of a book or tax balance sheet is hardly indicative of the fair value of Renave’s shares as a going concern and would be more indicative of a liquidation value or floor value under distress.*
8. *The majority of the value of Renave’s business did not come from its tangible assets but rather from intangibles including the value of the concession rights. The PRA Report does not value the intangibles and ignores the core values of the business represented by its rights under the Concession and the profit to be derived from future revenues.*
9. *Renave’s business was based on operating the Registry during the term/s of the concession. Key assets including the Registry’s database were owned by Mexico. The value of Renave was not in the assets or in appreciation or depreciation thereof, but rather, in the income stream generated during the concession.*
10. *The calculation presented under the term “Expected Returns Approach” is not relevant to valuation analysis:*
11. *The PRA Report asserts a third affirmative opinion of value under the hearing “Expected Returns Approach”. This is an irrelevant calculation. Although the term “expected returns” is commonly used in finance and economics, there is no such “approach” in valuation theory and this is not a generally accepted valuation method. The calculation is based on the future value, as of August 20, 2000, of four cash contributions made by each of the Claimants into Renave’s capital account on September 1999, December 1999, February 2000, and July 2000, using a future value interest factor based on a rate of 26% - 31%. It is conceptually incorrect to assume that the value of Renave’s business can be measured based on the sum of certain equity contributions made by its shareholders plus some rate of return. In our view, this calculation is not instructive in valuing Renave’s assets.*

12. *The logic of this calculation is flawed and the results provide no useful information in valuing Renave's shares as a going concern. The PRA Report provides no financial analysis or explanation as to how the cash contributions made by the Claimant's are the determinants of business value. The actual market value of an investment over time is not typically determined by the level of cash (or debt assumed) by an investor.*

*The PRA Report comparisons are not instructive:*

13. *The comparisons using the aforementioned asset, tax and contribution figures presented in the PRA are not valid. This would include comparing these figures to each other or to results obtained under valid valuation approaches. Since the asset and tax figures are from the same source, they offer no corroboration value. Also given that the "expected return" calculation is not related to a legitimate valuation concept and the results are irrelevant and arbitrary under this perspective, comparing this figure to the asset and tax figures offers no corroboration value either. We also note that the PRA Report subjectively compares these figures to a substantially deflated modification of our valuation results after certain erroneous adjustments. This arbitrary comparison also offers no legitimate corroboration. In our opinion, the following conclusions in the PRA Report should not be relied upon:*

*"As can be quickly recognized, the values obtained by the Asset or Cost Approach are significantly lower than the value concluded by the LECG Report, but they are very much in line with the values yielded by the revised LECG Report's model and methodology when the revised assumptions are used."*

*"Again, the values obtained by the Declared Tax Value approach are significantly lower than the value concluded by the LECG Report, and are more in line with the values yielded by the revised LECG Report's model and methodology when the revised assumptions are used."*

*"In contrast, the values we obtained from the expected returns approach are very much in line with the values yielded by the revised LECG Report's model and methodology when the revised assumptions are used, as discussed in the previous sections."*

*We also do not recognise the usefulness of the PRA Report's commentary that the value estimated in our report differs substantially by various multiples from actual capital contributions made by the shareholders of Renave and from the book value of Renave. This is not uncommon. Business values commonly exceed these measures."*

*[Footnotes omitted]*



13-43 Although the Claimants presented several alternative quantum calculations in their Quantum Reply, these too were based on the DCF method (Quan. Rep. at 41-42):

- “94. *The first [...] is a valuation based upon the projections in the Business Plan. This calculates the market value of the Claimants’ shares only as MXN\$501,180,000. The value attributable to the Talsud shareholdings of 29% of the shares is MXN\$145,342,200 and the value attributable to the Gemplus shareholding of 20% of the shares is MXN\$100,236,050.*
95. *The second alternative is the calculation of the Claimants’ lost profit damages as of 20 August 2000 (as distinct from a calculation of the market value of the shares in Renave held by the Claimants). This calculation, which is made for both new and used vehicles together and for new vehicles alone, produces results which are the same as the original calculation of the market values of the shares.*
96. *The third alternative [...] is a valuation of the shares as of 12 December 2002 on the basis that the business of Renave was limited to the registration of new vehicles. The intention here is to provide a value based upon the actual experience of Renave which continued to register new vehicles up to about 12 December 2002 when the Concession was revoked.*
97. *On the basis of this last alternative, the market value of the shares in Renave in respect of Talsud is given as MXN\$149,405,100 and for Gemplus is given as MXN\$103,038,000. A valuation is also provided for the terminal value of the Concession as of 12 December 2002 in order to quantify the value of a subsequent renewal, again as limited to new vehicles.”*

*[Footnotes omitted]*

13-44 In their closing submissions during the main hearing, the Claimants maintained that the alternative approaches proposed by the Respondent should be rejected (D8: 1776-1777):

*“A quick word about the alternative approaches espoused by the Respondent’s expert, PRA. There were three. The first is the asset cost approach; second is the tax return approach; third is the expected returns [one]. Well, the first and the second should be rejected. Mr. Ri3n admits that they do not allow - they would not allow you to take into account the projected revenues, and that’s at page 1533, line 10.*

*And the third of the alternative [sic], the expected returns approach, should also be rejected because there is no such approach in valuation theory on the evidence - on our evidence, I should say - and no reasons why cash contributions - cash contributions alone are determinants of*

*business value have been put forward. In that respect, I refer you to the second report of LECCG.”*

13-45 Finally, in their post-hearing submissions, the Claimants’ similarly maintained their primary approach to valuation, *i.e.* the DCF method, criticising as follows the Respondent’s proposed alternative methods (Claimants’ Post-Hearing Br. at 13-14):

“53. *The Claimants explained why the DCF method is applicable in their closing submissions (D8.1773,19-1776,20) and make further reference to Sempra (above at para 50). The reasons why the alternative asset cost approach, tax return approach and expected returns approach are inapplicable were also addressed (D8.1776,21-177,14). Of particular importance in this context is the track record of new car registrations.*

54. *On that point, it was submitted by Counsel for the Respondent that it cannot be assumed that the Registry would have survived but for the intervention of the State, and that had it not been for the intervention, the Registry “would have died on its feet” (D8.1921,11). It was also a constant refrain of the evidence of Mr Ri3n given in cross-examination that the performance of the Registry following the intervention is not a guide to loss of profit because the project was no longer autonomous (see e.g. D7.1531,4-15 and D7.582,20 to 1529, 1-3).*

55. *These arguments were not supported by any evidence. They are unsubstantiated assertions in respect of which the comments of Mr Ri3n add nothing. He was not informed about operational matters and it was not his purpose or function or expertise to explore these (D7.1561, 8-9).*

56. *It is a striking feature of this argument that it was not even pleaded in the memorial on liability, and that it only emerged for the first time in the Respondent’s counter-memorial on damages (paragraph 117) (and was further elaborated in the Rejoinder on damages (paragraphs 46, 55, 57 and 93)). It was not addressed in any of the statements of the Respondent’s factual witnesses, and was notably absent from the statement of Mrs. Gomez-Mont. Nor was the argument put to the Claimants’ witnesses during the hearing. No analysis of the record of new car registrations was conducted by PRA and the fact that the Registry continued to operate for new vehicles until the Revocation of the Concession was entirely ignored in the Respondent’s pleadings on liability.*

57. *It is not now open to the Respondent – at this late stage in the proceedings – to advance a case based on an entirely untested and unsupported factual assertion, namely that the Registry would have collapsed had the intervention not occurred, and that the registration record should be ignored as somehow artificial or unrepresentative for the purposes of assessing damages. Not only is this unsupported by evidence, but it*

*contradicts the evidence of two of the Respondent's witnesses who acknowledged that the process for registering new cars was almost automatic (see Mr Gallardo at D7.1432-1433 and Mr González at D6.1366, 22-1367, 17) and backed up by a clear legal obligation of manufacturers and dealers to provide the necessary information to the Concessionaire (Mr Gallardo at D7.1423, 6-15 and D7.1430, 6-9 re new vehicles and D7.1427, 3-22 re used vehicles). The argument also flies in the face of the uncontroverted fact that during the thirty-two months of the operations of the Registry nearly all (between 97% and 99%) of all new vehicles on the roads of Mexico were registered by Renave."*

**B. The Respondent's Case**

13-46 Relying upon its expert PRA's, analysis, the Respondent rejects the Claimants' DCF method and proposes three alternative valuation methods: (1) the 'Asset or Cost Approach'; (2) the 'Declared Tax Value Approach'; and (3) the 'Expected Returns Approach'.

13-47 In its Counter-Memorial on Quantum, the Respondent made the following submissions on these alternative methods (Quan. CM at 4-5):

*"14. The Claimants' experts [LECG/Horwath] discard the market value method because in the instant case the asset was not publicly traded and there was no open market for it.*

*15. Mexico agrees with this view.*

*16. The Claimants' experts also summarily dismiss the asset or cost method. The memorial notes that:*

*LECG/Horwath excluded the Asset Approach as it would not take into account the full earning potential of Renave and would therefore not reflect accurately the price that a willing buyer and a willing seller would have agreed.*

*17. Mexico does not agree with this.*

18. *The asset approach is: (i) a recognized method of valuation under both treaties; (ii) is the preferred approach in international law; and (iii) according to the arbitral authorities, when a tribunal is concerned with a start-up company in its early stages of operation.*
19. *The Claimants' experts say nothing about the declared tax value of Renave's tangible assets. In response to Mexico's request for disclosure of documents pertaining to quantum, the Claimants initially asserted that Renave's tax returns "have no specific relevance to the valuation of the Concession and are therefore immaterial to the outcome of the quantum proceedings."*
20. *Mexico does not agree with this assertion either. It is plainly in error.*
21. *The declared tax value of the investment's tangible assets is a valuation criterion stipulated by both treaties and thus the tax returns are plainly relevant. After Mexico objected to the Claimants' refusal to produce such documents, the Claimants reversed their position and agreed to provide the company's tax returns for the years 1999-2002 inclusive.*
22. *Mexico says that the declared tax value criterion should also be applied by the Tribunal. Said criterion is contemplated by both treaties and the arbitral authorities consider it to be useful method for valuing start-up companies such as Renave.*
23. *Both the asset value and the declared value methods should be preferred over the DCF method, which is both wholly speculative and impermissible, due to Renave's absence of a proven track record of profitable operations at the date valuation. On settled public international law jurisprudence repeatedly reaffirmed in the investor-State arbitration context, the DCF method cannot be employed on the facts of this case.*
24. *Even if a DCF valuation could be employed (which is denied), once again, on settled principle, it must be checked against the asset or cost method and the declared tax value of tangible assets criterion; the three methods of valuation are not mutually exclusive of each other and differences between the results must be explicable."*

*[Footnotes omitted]*

13-48 *Asset Value Approach:* With regard to the 'Asset Value Approach', the Respondent submits the following (Quan. CM at 27-28):

*"104. PRA considers it appropriate to use the Asset or Cost Approach (which is expressly contemplated in both treaties) because it eliminates much of the speculative aspects of the valuation, which are directly related to different views or expectations about the future prospects of Renave. In this sense,*

*the Asset or Cost Approach is a “neutral approach that takes into consideration only objective information as of the date of valuation (namely the actual value, or cost of the assets) and is not subject to subjective interpretations about what the future of a company might look like.”*

105. *Based on the unaudited financial states as of 31 July 2000, Talsud’s and Gemplus’s stake in the net asset value of Renave on the aforementioned date was \$19,355,642 pesos and 13,348,718 pesos respectively.*
106. *PRA also calculated the declared tax value of tangible assets as per Renave’s tax returns for 1999 and 2000 (i.e., since there are no monthly tax returns). According to this approach, Talsud’s equity participation would range between \$11.26 and \$41.46 million pesos and Gemplus’s equity between \$7.76 and \$28.59 million pesos.”*

*[Footnotes omitted]*

13-49 PRA further explains its reliance on the ‘Asset Value Approach’ as follows, in response to LECG/Horwath’s expert opinions to the contrary (First PRA Report at 37-38):

*“162. The LECG Report considers that the Market or Comparable Approach is not useful in the case of Renave, as there are no similar or comparable businesses to Renave, and whose can be used to infer the value of Renave. We agree with the LECG Report on this view.*

*[...]*

164. *The third option, the Asset or Cost Approach, is dismissed by the LECG Report because it is “not reflective of the full earning power and cash-generated power of Renave’s total business enterprise”. Although this is true, the Asset or Cost Approach is a neutral approach that takes into consideration only objective information as of the date of valuation (namely the actual value, or cost, of the assets), and is not subject to the subjective interpretations about what the future of a company might look like.*

165. *In the case of Renave, this becomes very relevant, because as can be seen from the analysis presented in the LECG Report, and the analysis contained herein, there can be very substantial differences in views about the future prospects of a business, especially when there is little track record to support future projections. While the LECG Report projects a strong, growing and stable business, our view is that given the internal operational and external conditions that prevailed around the Valuation Date, such a strong and stable growth was unlikely.*

166. *Furthermore, the Asset of [sic] Cost Approach is a recognized method of valuation under many bilateral treaties, including the Mexico-Argentina treaty and the Mexico-France treaty (as confirmed to us by legal counsel to Mexico). As such, it is necessary to at least perform a valuation under this approach, and have its result serve as an additional reference of value.*
167. *As of July 31, 2000, according to the internal financial statements of Renave which were presented to the Board of Directors, the total value of the assets of Renave was \$66,743,592 pesos.*
168. *Since there are no financial statements available as of the Valuation Date, the only verifiable financial statements available as of such date would have been the July 31, 2000 ones.*
169. *Considering the Claimants' equity stake in Renave, 29% of the net asset value of Renave would have corresponded to Talsud, and 20% would have corresponded to Gemplus, or about \$19.4 million pesos and \$13.3 million pesos, respectively.*

Table 8

Total asset value of Renave as of July 31, 2000

Value		
<i>(Monetary values in MXP)</i>		
Total Asset Value of Renave as of July 31, 2000	\$66,743,592	[A]
<u>Talsud</u>		
Equity participation	29.00%	[B]
Corresponding Asset Value	\$19,355,642	[C] = [A]*[B]
<u>Gemplus</u>		
Equity participation	20.00%	[D]
Corresponding Asset Value	\$13,348,718	[E] = [A]*[D]

[A] Source: Exhibit PRA-12, pp.1

170. *As can be quickly recognized, the values obtained by the Asset or Cost Approach are significantly lower than the value concluded by the LECG Report, but they are very much in line with the values yielded by the revised LECG Report’s model and methodology when the revised assumptions are used.”*

[Footnotes omitted]

13-50 The Respondent reiterated its position as regards the merits of its approach, on the basis of PRA’s analysis, in its Quantum Rejoinder (Quan. Rej. at para. 88):

“88. *As for the use of the Asset Approach to determine de [sic] value of the Claimants’ shares, PRA explains that it is a valid approach when, as in this case, there is a high degree of uncertainty surrounding the prospects of a company/project or when cash flows cannot be reasonably forecasted due to the lack of a track record of profitable operations. As for the date of valuation, Renave had just begun operations, had internal operational difficulties, was not profitable, could not produce reliable financial information, and the project was already facing significant opposition. Under these circumstances, in PRA’s opinion, the Asset Approach should be preferred over a DCF analysis. At the very least, it should be used to test the reasonableness of the results under such approach. (And when that is done, the DCF valuation is seen as greatly inflated.)”*

[Footnotes omitted]

13-51 In its second expert report, PRA expressed the following opinion with regard to LECG's criticism that this approach does not take into account future cash flows (Second PRA Report at 8-9):

- “21. *LECG is correct in stating that this approach does not take into account future cash flows, and its criticism would be valid if there were no doubts regarding Renave's future profitability and its continuity as a going concern during the term of the Concession. We do not believe these conditions are present.*
22. *The Asset or Cost Approach is an appropriate methodology when there is a lot of uncertainty regarding the viability of a company. We believe that, as of the Valuation Date, and based on the information available at that time, it would have been very difficult to determine whether Renave would be profitable in the future and opine with any certainty on its prospects as a going concern given its short existence, its internal problems and the significant potential and social opposition the project was facing.*
23. *As of 20 August 2000, Renave had been operating on a nationwide basis for approximately 2 months, it had never generated any profits and had accumulated losses of approximately \$44 million pesos (since January 2000), as demonstrated by the August 2000 financial statements, which were reviewed by Renave's Board of Directors.*
24. *As for the Valuation Date, Renave's managers were unable to reconcile bank revenues with its operation, that is, they could not match the deposits it received with the vehicles that had been registered. In fact, in its presentation to the Board of Directors on 27 June 2000, Renave's management reported that only \$1,223,869 pesos from its \$20, 129, 106 pesos bank account balance had been identified, which corresponded to “stationary and kits”. The origin of the remaining \$18,905,252 pesos, that is 94% of the bank account's balance, was unknown.*
25. *Even more concerning was the fact that Renave's accounting division recorded revenues from registrations (from both used [and] new vehicles) for an amount of \$7,977,149 pesos, although it ignored whether those transactions were actually paid.*

*“we have an accounting record of the client, number and type of operation from new car registrations for \$7,048,222 and used car registrations for \$927,927; we do not know if these transactions have been paid or the date of payment (if it is the case).”*

*[Emphasis added]*



26. *LECG considers these matters to be insignificant and as normal business situations. We do not consider them normal much less insignificant, and believe that a hypothetical purchaser on the Date of Valuation would share this view. We believe it is fundamental that a company be able to determine whether or not it has been paid for the services it has provided and explain where its revenues come from. But Renave could not do so, at least not as of the Valuation Date.*
27. *If we take into account all these factors, it becomes clear that there was no certainty whatsoever about Renave’s profitability (Renave was not profitable up to that moment), its financial and operational record was no longer enough to project future cash flows with a minimum degree of reliability and, given the clear opposition to the project and the evident financial and operational disorder, there was at least a reasonable doubt about its viability as a going concern. That, in our opinion, justifies a valuation under the asset approach.”*

*[Footnotes omitted]*

13-52 In respect of LECG’s criticism that the Asset Approach fails to capture the value of the Concessionaire’s most important asset (the Concession Agreement), PRA replied as follows (Second PRA Report at 10-11):

- “30. *The LECG Reply argues that most of Renave’s value did not come from its tangible assets but from its Title of Concession, which is an intangible asset. If the concession was a low-risk business, as LECG assumes, and was low-risk because its revenues were somehow guaranteed by the obligation to register vehicles, we would expect the price paid for the concession rights to have some relationship with its value. For that reason, we thought it would be illustrative to compare what the Concessionaire would have had to pay for those rights to the value that LECG now ascribes to them.*
31. *According to the Title of Concession, Renave had to make an initial payment of \$11.3 million pesos upon receiving the Title of Concession, an additional payment of \$9 million pesos (adjusted for inflation) 12 months hence, and make subsequent annual payments of \$8 million pesos (also adjusted for inflation) during the remaining term.*
32. *In order to facilitate the comparison, we have calculated the present value as of 20 August 2000 of the payments the concessionaire would have had to make using the 15% discount rate that LECG uses in its report. The result is a total amount of \$58.2 million pesos. This would be the price that Renave would have had to pay for the intangible from which, according to LECG, the concessionaire derived most of its value.*

Table 1

*Value of Renave's Title of Concession*

*Over the 10-year Concession Term*

	<i>Nominal Amount</i>	<i>Discount Factor</i>	<i>Present Value As of 20 Aug 2000</i>
	<i>[A]</i>	<i>[E]</i>	<i>[F] = [D]*[E]</i>
<i>Initial Payment</i>	\$ 11,300,000		
<i>Annual Payment</i>			
<i>Year 1</i>	\$ 9,000,000	0.9901	\$ 9,699,453
<i>Year 2</i>	\$ 8,000,000	0.8610	\$ 7,920,061
<i>Year 3</i>	\$ 8,000,000	0.7487	\$ 7,183,476
<i>Year 4</i>	\$ 8,000,000	0.6510	\$ 6,456,905
<i>Year 5</i>	\$ 8,000,000	0.5659	\$ 5,841,616
<i>Year 6</i>	\$ 8,000,000	0.4921	\$ 5,217,837
<i>Year 7</i>	\$ 8,000,000	0.4279	\$ 4,677,253
<i>Year 8</i>	\$ 8,000,000	0.3721	\$ 4,179,988
<i>Year 9</i>	\$ 8,000,000	0.3234	\$ 3,711,000
<i>Year 10</i>	\$ 8,000,000	0.2812	\$ 3,294,452
<b>Total</b>	\$ 92,300,000		\$ 58,182,043

*[A] Source: Exhibit PRA-21*

*[B] Source: Appendix A*

33. *Naturally, Renave expected a return on this investment, that is, it expected to obtain profits in excess of the price it paid for the rights to exploit the concession. However, what LECG suggests would be equivalent to assuming that Renave's shareholders acquired rights with a value close to \$754.7 million pesos in just \$58.2 million pesos, which would imply a 92.3% discount over their "real" value.*
34. *It goes without saying that this kind of discount is only observed in real life when there is a high degree of risk associated with the project. A discount of this magnitude in a low risk project would be equivalent to a wealth transfer from the government to a private company, not a market transaction. LECG assumes low risk for the project in one hand, and a great discount in the intangible's value on the other, which translates into a very high return for the shareholders (1,197% on their investment).*

35. *To be clear, we are not submitting this exercise as an alternative valuation criteria but only as a reference point to test the reasonableness of LECG's conclusion on value.*"

*[Footnotes omitted]*

13-53 *Declared Tax Value Approach:* As an alternative to the Asset Approach, the Respondent submits that the Tribunal should apply the Declared Tax Value Approach. On the basis of the Concessionaire's 1999 and 2000 tax returns and measured as of 20 August 2000, the Respondent estimates that the value of Talsud's equity participation would range between MXN 11.26 and 41.46 million and the value of Gemplus' equity participation would range from MXN 7.76 to 28.59 million (Quan. CM, para. 106 at 28).

13-54 With regard to the 'Declared Tax Value Approach', PRA expresses the following opinion (First PRA Report at 38-39):

"171. *Although not mentioned in the LECG Report, the Declared Tax Value of Tangible Assets Approach is also a recognized method of valuation under the Mexico-Argentina treaty and the Mexico-France treaty (as confirmed to us by legal counsel to Mexico).*

172. *In its annual tax return for the year 1999, Renave declared a total asset value of \$38,845,434, and in its annual tax return for the year 2000, Renave declared a total asset value of \$142,976,895.*

173. *As no monthly tax returns of Renave are available for the year 2000, as of the Valuation Date, the only available income tax return would have been the 1999 annual income tax return.*

174. *Considering the Claimants' equity stake in Renave, 29% of the declared total asset value of Renave, as declared in the 1999 and 2000 annual income tax returns, would have corresponded to Talsud, and 20% would have corresponded to Gemplus, or between \$11.3 million pesos and \$41.5 million pesos for Talsud, and between \$7.8 million pesos and \$28.6 million pesos for Gemplus.*

*Table 9*

*Declared Tax Value of Tangible Assets of Renave,*

*As reported in the 1999 and 2000 annual income tax returns*

**1999**

**2000**

**(Monetary values in MXP)**

Declared Tax Value of Tangible Assets of Renave \$38,845,434 \$142,976,895 [A]

Talsud

Equity participation	29.00%	29.00%	[B]	
Corresponding Asset Value	\$11,265,176	\$41,463,300	[C]	=
			[A]*[B]	

Gemplus

Equity participation	20.00%	20.00%	[D]	
Corresponding Asset Value	\$7,769,087	\$28,595,379	[E]	=
			[A]*[D]	

[A] Source: Exhibit PRA-13, pp.6 for 1999, and Exhibit PRA-14, pp. 5 for 2000

175. Again, the values obtained by the Declared Tax Value approach are significantly lower than the value concluded by the LECG report, and are more in line with the values yielded by the revised LECG Report’s model and methodology when the revised assumptions are used.”

13-55 *Expected Returns Approach:* In the further alternative, the Respondent submits that recourse should be had to the ‘Expected Returns Approach’ (Quan. CM at 28):

“107. PRA also applied the Expected Returns Approach. Under this approach, the value of the Claimants’ shares in Renave are determined by applying an appropriate rate of return to the Claimants’ capital contributions.

108. PRA estimates that given the risk associated with the project, the investors would have sought a rate of return between 26 and 31%. By applying these rates to the capital contributions made by the shareholders as of 20 August 2000, PRA concludes that the value of Talsud’s shares would lie between \$20.0 and \$20.6 million pesos and the value of Gemplus’s shares would be between \$13.8 and \$14.24 million pesos.”

[Footnotes omitted]

13-56 PRA explains the basis for this approach as follows (First PRA Report at 39-42):

“176. Although not explicitly recognized by either the Mexico-Argentina treaty, nor the Mexico-France treaty (as a note, neither is the DCF methodology), we consider that a third alternative to establish the

minimum value that the Claimants could have hoped their investment in Renave to be worth, as of the Valuation Date, is the expected returns approach.

177. Under this approach, the general concept is to calculate what the value of the Claimants' shares in Renave should have been, as of the Valuation Date, so that the Claimants would have realized an adequate and expected return on their investments, had they sold their shares as of the Valuation Date.
178. To start with this analysis, we first need to establish a proper discount rate at which the capital investments made by the Claimants in Renave are to be discounted to bring to present value as of the Valuation Date.
179. The LECG Report considered a 15% discount rate as appropriate. We, however, considered that this discount rate was not suitable as it did not properly reflect the expected returns an equity investor in Renave might have, given the contemporaneous available investment alternatives and the risk profile of Renave, and considered that a discount rate of between 26% and 31% was more appropriate (note that by choosing a higher discount rate than the LECG Report, we will arrive at a higher present value, thus we are being more optimistic).
180. The next step is to calculate the present value, as of the Valuation Date, or August 20, 2000, of the actual capital investments made by the Claimants in Renave on or before the Valuation Date. As can be seen, at present value, Talsud's investment was worth between \$20.0 million pesos and \$20.6 million pesos, while Gemplus' investment was worth between \$13.8 million pesos and \$14.2 million pesos.

Table 10

*Present value of the capital investments in Renave made by the Claimants*

	Talsud	Gemplus	
<i>(Monetary values in MXP)</i>			
<u>Capital Contributions</u>			
September 1999	\$10,081,000	\$6,982,000	[A]
December 1999	\$2,073,000	\$1,400,000	[B]
February 2000	\$1,740,000	\$1,200,000	[C]
July 2000	\$2,900,000	\$2,000,000	[D]
Total	\$16,794,000	\$11,582,000	[E] = sum [A] to [D]

Using a 26% discount rate

Present Value Factor for September 1999	1.25125	1.25125	[F]
Present Value Factor for December 1999	1.18120	1.18120	[G]
Present Value Factor for February 2000	1.13572	1.13572	[H]
Present Value Factor for July 2000	1.03217	1.03217	[I]
Present Value as of 8/20/2000	\$20,031,955	\$13,817,132	[J] = [A]*[F] + [B]*[G] ...

Using a 31% discount rate

Present Value Factor for September 1999	1.29938	1.29938	[K]
Present Value Factor for December 1999	1.21479	1.21479	[L]
Present Value Factor for February 2000	1.16032	1.16032	[M]
Present Value Factor for July 2000	1.03768	1.03768	[N]
Present Value as of 8/20/2000	\$20,645,572	\$14,240,745	[O] = [A]*[K] + [B]*[L]...

[A] to [D] Source: LECG Report, Schedule 11; [F] to [I] calculated using a discount rate of 26%; [K] to [N] calculated using a discount rate of 31%.

181. For perspective, using the LECG Report's 15% discount rate, the present value of the Claimants' investment would have been lower, at \$18.7 million pesos for Talsud, and \$12.9 million for Gemplus.
182. This means that, if Talsud and Gemplus had received \$20.6 million pesos, and \$14.2 million pesos, respectively, on the Valuation Date, they would have earned a 31% return on their invested capital, which is a very reasonable return, and certainly a higher return than 15% return that the LECG Report considered as adequate.
183. When comparing these values against the values of \$218.9 million pesos for Talsud and \$150.9 million pesos for Gemplus that were concluded by the LECG Report, it becomes evident that the LECG Report's values are significantly overstated.
184. If, on the Valuation Date, Talsud and Gemplus would have actually received the amounts calculated by the LECG Report in exchange for their

*shares in Renave, the Claimants would have earned an annualized return of more than 1932% on their investment. This would have been quite a remarkable feat, considering the Claimants had only owned shares of Renave for less than 1 year. Needless to say, such returns are extremely rare, if not non-existent, in the real world.*

185. *In contrast, the values we obtain from the expected returns approach are very much in line with the values yielded by the revised LECG Report's model and methodology when revised assumptions are used, as discussed in the previous sections.*
186. *It is important to mention that this methodology does not take into account the potential earning beyond the Valuation Date that the shareholders in Renave could have hoped for. However, as in the case of the Asset or Cost approach, it is a neutral approach that is not subject to the subjective interpretations about what the future of Renave might have looked like, which, as we have seen, can vary substantially.*
187. *This methodology simply calculates what the value of the shares of Renave should have been, as of the Valuation Date, in order for its shareholders to have received a reasonable return on their invested capital up to that point in time. The methodology does not speculate about the possible future performance of Renave.*
188. *Furthermore, it is feasible that the shareholders of Renave, given the opposition they faced around the Valuation Date, would have been motivated to sell their shares (thus eliminating all of their potential risk in their invested capital), and receiving a reasonable return of between 26% and 31% on their capital investments. In less than one year, Talsud, for example, would have earned about \$3.9 million pesos on a total investment of \$16.8 million pesos. In the context of LECG Report's definition of market value, these conditions would have very likely created a "willing seller".*
189. *Now, having calculated the present value of the Claimants' capital investments in Renave, it is only proper to discount from these amounts the present value of the cash distributions that were actually received by the Claimants from their investment in Renave. These returns were previously calculated in section B.6 (Table 6).*
190. *At present value, as of the Valuation Date, the actual cash distributions received by the Claimants were of \$18.0 million pesos for Talsud, and \$12.1 million pesos for Gemplus.*
191. *Deducting these actual cash distributions the Claimants received from Renave, from the present value of the Claimants' investments in Renave, the result is that, as of the Valuation Date, Talsud would just have*

required between \$2.1 million pesos and \$2.7 million pesos of additional money to achieve its expected returns, and Gemplus would just have required between \$1.7 million and \$2.1 million pesos of additional money to achieve its expected returns (expected returns of between 26% and 31% per annum).

192. Following the LECG report’s methodology of deducting both the present value of the distributions received by the Claimants and also the current value of the shares Renave, we obtain a final number of between \$1.4 million pesos and \$2.0 million pesos for Talsud, and of between \$1.2 million pesos and \$1.6 million pesos for Gemplus.

Table 11

Calculation of present value of Claimants’ investment in Renave less present value of cash distributions and current value of Renave’s shares

	Low Scenario <sup>1</sup>		High Scenario <sup>2</sup>		
	Talsud	Gemplus	Talsud	Gemplus	
<i>(Amounts in MXP)</i>					
Present value of Claimants’ investments in Renave <sup>3</sup>	\$20,031,955	\$13,817,132	\$20,645,572	\$14,240,745	[A]
<u>Less</u>					
Shareholder Distributions Received	\$17,965,174	\$12,137,381	\$17,965,174	\$12,137,381	[B]
Current Value of Renave Shares	\$706,299	\$487,103	\$706,299	\$487,103	[C]
Total	\$1,360,481	\$1,192,648	\$1,974,099	\$1,616,261	[D] = [A] – [B] – [C]

<sup>1</sup> Using a 26% discount rate

<sup>2</sup> Using a 31% discount rate

<sup>3</sup> As of the Valuation Date

[A] Source: Table 10; [B] Source: Table 6; [C] Source: LECG Report, pp. 18, paragraph 63”

[Footnotes omitted]



13-57 The Respondent relies upon PRA's second report to expand on the appropriateness of this approach (Quan. Rej. at para. 89):

"89. *With regard to the Expected Returns Approach, PRA points out that, although it is not a conventional valuation exercise, it does offer another yardstick against which the Claimants' damages claim can be tested. This approach is used to calculate the price at which the shares in Renave would have had to be sold on 20 August 2000 in order to ensure that the investors received their investment back plus a reasonable return (between 26% and 31% in only 9 months). That reasonable return stands in stark contrast to the 1,932% return implicit in LECG/Horwath's estimate of the fair market value of the shares and is inconsistent with the return associated with a low risk investment (which LECG/Horwath claims Renave was)."*

13-58 PRA responded to LECG's criticisms on its Expected Returns Approach (Second PRA Report at 14-16):

"51. *In the PRA Report, we presented an alternate approach that could serve as an additional reference point to establish the reasonable range for the "fair market value" of Renave's shares as of 20 August 2000.*

52. *To be clear, we confirm that the purpose of this calculation is not to determine Renave's value from the contributions made by its shareholders. What we want to ascertain is the amount that the shareholders needed to receive for their shares on the Date of Valuation in order to obtain a reasonable market return.*

53. *LECG considers this calculation irrelevant because it is not a generally accepted valuation methodology. Although we agree that the approach presented in the PRA Report is not a methodology typically used in the business valuation discipline (and nowhere in the PRA Report we say it is), it does offer a reference point that allows us to test the calculations presented in the LECG report.*

54. *Ibbotson Associates, one of the information sources used by LECG to calculate its discount rate, explains that the discount rate used to determine the present value of future cash flows is equivalent to the rate of return that the investors expect to obtain from its investment.*

*The cost of capital (sometimes called the expected or required rate of return or the discount rate) can be viewed from three different perspectives. On the asset side of a firm's balance sheet, it is the rate that should be used to discount to a present value the future expected cash flows. On the liability side, it is the economic cost to*

*the firm of attracting and retaining capital in a competitive environment, in which investors (capital providers) carefully analyze and compare all return generating opportunities. On the investor's side, it is the return one expects and requires from an investment in a firm's debt or equity. While each of these perspectives might view the cost of capital differently, they are all dealing with the same number.*" [Emphasis added]

55. *According to the values suggested by LECG, if Renave's shareholders had chosen to sell their shares on the Date of Valuation they would have obtained an annualized return of more than 1,932% on their investment in a company with only two months of operations, in a period of less than nine months. In our opinion, this scenario is simply not realistic, specially considering that LECG itself believes that the appropriate discount rate for Renave's cash flows (which is equivalent to the return expected by Renave investors, as Ibbotson Associates points out) should be only 15%.*
56. *The LECG Reply criticizes our approach by arguing that this is not a generally recognized methodology, but at no time does it offer an explanation as to why the 1,932% return for Renave shareholders is more appropriate than a market return of between 26% and 31% as we suggested in the PRA Report; specially if we take into account that LECG considers Renave to be a low-risk company.*
57. *We believe that notwithstanding LECG's attempt to discredit this approach simply because it is not an orthodox valuation methodology, it is a helpful tool to evaluate the reasonableness of the valuations presented in the LECG report, specially in view of the very few valuation alternatives available in this case due to the scarcity and low quality of the available information."*

*[Footnotes omitted: emphasis in original.]*

- 13-59 PRA concludes, on the basis of varying values obtained through different valuation methodologies, that a realistic range of the Concessionaire's value as of 20 August 2000 is between MXN 12.6 million and MXN 71.2 million; or, even if using LECG/Horwath DCF method (as adjusted by PRA), to no more than MXN 137.9 million. Applying Talsud's and Gemplus' respective percentage shareholdings in the Concessionaire, PRA estimate a valuation between MXN zero to MXN 21,325,213 for Talsud and between MXN zero and MXN 14,959,438 for Gemplus.
- 13-60 In its conclusions at the main hearing, Counsel for the Respondent submitted with regard to its proposed alternative quantum approaches, as follows (D8:1923-1924):

*“I’m told that I’m about to run out of time, so I’m going to say two things quickly. We have postulated three alternatives. One is the your money back equals fair market value alternative, which was the choice in both Metalclad and in the Tecmed case and in a number of other cases which we have cited in our pleadings as an alternative to fair market value based on some future profits projection where that wasn’t appropriate.*

*We postulated a second possibility.*

*We postulated another alternative, which is your money back plus reasonable rate [sic] of return. That reasonable rate of return is given in the PRA Report in a range of 26 percent to 31 percent, which was the discount rate used for his [sic] comparative DCF calculation.*

*The figures are in the report, but if you use a 26 percent rate of return, Talsud would get an extra 2.1 million pesos, which would rise to 2,7 million pesos and 31 percent rate of return. Gemplus would get an extra 1.7 million pesos for a 26 percent rate of return, and 2.1 million pesos at a 31 percent rate of return.”*

13-61 In its post-hearing submissions, the Respondent concluded its case on quantum with these comments (Respondent’s Post-Hearing Br. at 18-20):

- “36. *Mexico responded to the claim for damages as presented by the Claimants - first, on the basis that the valuation dated was 20 August 2000 (the day before the 21 August 2000 announcement) and later on the basis that the valuation date was 11 December 2002 (the day before the concession was cancelled). The Claimant has not adduced evidence of the fair market value of Renave immediately prior to 27 June 2001 (the date of the requisition) and Mexico has not responded to such a claim.*
37. *Mexico’s position is that, whether the alleged date of breach is taken as August 20, 2000, 26 June 2001 or 11 December 2002, it would be inappropriate on the facts of this case to use a DCF valuation model to assess damages. In August 2000, Renave was a ‘start up’ that lacked a sufficient track record of profitability as required by settled jurisprudence. Likewise, it has no track record of profitability autonomously from the Secretariat at any time after the Cavallo scandal. Rather, its operations were fronted by the government at all times after the appointment of the first administrative intervener in mid-September 2000.*
38. *As explained in response to Question 7, there is a serious question as to whether Renave was ready, willing and able to independently operate a new and used car registry (or even a new car registry alone) following the evisceration of its credibility on 24 August 2000. Accordingly, any projection as to what profits Renave would have earned had control of the*

*concession been returned to the shareholders would be entirely speculative.*

39. *Mexico submits that the fair market value of Renave as at any of the proposed valuation dates should be assessed by reference to the amount invested, as was done in Metalclad, Tecmed and Wena Hotels. As explained in the pleadings, both Claimants were permitted to recover substantially all that they invested by withdrawing dividends and their variable capital equal to or exceeding their paid up capital.*
40. *Alternatively, fair market value (as well as damages for alleged breach of the fair and equitable treatment obligation) could be assessed by allowing the Claimants a reasonable return on the amount they invested, described in the PRA reports as the “Expected Returns Approach”. PRA calculated the following range of damages based on the 20 August 2000 valuation date used by the Claimants, recorded in Table 11 of the PRA’s first report:*
- a) using a 26% annual rate of return, Talsud would be entitled to the further sum of 1,360,461 pesos and Gemplus would be entitled to 1,192,648 pesos; and*
  - b) using a 31% annual rate of return, Talsud would recover an additional 1,974,009 pesos and Gemplus would receive 1,616,261 pesos.*
41. *These amounts would be modestly higher if a 27 June 2001 or 12 December 2002 valuation date is used as both of the Claimants had by then made additional capital contributions (Gemplus in December 2000 and Talsud in June 2001). PRA has provided the following new calculations using the same methodology:*

<i>Valuation Date</i>	<i>Talsud 26%</i>	<i>Gemplus 26%</i>	<i>Talsud 31%</i>	<i>Gemplus 31%</i>
	<i>Pesos</i>			
<i>27-Jun-02 [sic]</i>	<i>8,196,026</i>	<i>5,844,212</i>	<i>9,531,826</i>	<i>7,019,145</i>
<i>12-Dec-02</i>	<i>7,924,107</i>	<i>6,084,111</i>	<i>10,601,074</i>	<i>7,819,532</i>

*[Footnotes omitted]*

**(05) THE TRIBUNAL'S ANALYSIS**

- 13-62 First, on the basis of the facts found by the Tribunal earlier in this Award, it is appropriate for the Tribunal to summarise below the more significant factors relevant to its analysis below.
- 13-63 *The National Vehicle Registry*: The national project for registering vehicles in Mexico, both historically and as originally envisaged by the Respondent (including the Secretariat) and the Concessionaire (including the Claimants), comprised the registration of *both* used and new vehicles. It was not envisaged that such registration could be limited permanently to new vehicles. Otherwise, the project could never achieve its purpose as a national vehicle registry for all vehicles in Mexico. As found by the Tribunal earlier in this Award, the Secretariat's suspension of the obligation to register used vehicles on 15 September 2000 was intended to be temporary, not permanent.
- 13-64 *Profitability*: The Concession was intended by the Respondent (including the Secretariat) and the Concessionaire (including the Claimants) to be a profitable investment for the Concessionaire. Although the project never achieved the level of profitability contemplated in the Concessionaire's Business Plan, it still retained a reasonable opportunity to make significant future profits until the Respondent's unlawful conduct on 25 June 2001, with the Requisition. The registration of new vehicles was eventually a profitable activity for the Concessionaire. However, as already indicated above, the registration of new vehicles only was not the project envisaged by the Concessionaire and the Respondent; and it was also intended that receipts for registering new vehicles would be used by the Concessionaire to off-set its higher costs of registering used vehicles. Hence, any profitability based only upon income from registering new vehicles is not a true measure of the Concessionaire's profitability, as its business was originally envisaged under the Concession Agreement.
- 13-65 *Risks*: The Concessionaire was the direct beneficiary of a state monopoly, granted by the Secretariat in the form of the Concession Agreement, to provide a new nation-wide

public service, within a federal state, to millions of Mexican citizens. It was thus always a high risk project for the Concessionaire, subject not only to commercial factors confronting a new business but subject also to the co-operation of Mexican states and continuing support from Mexican public opinion. These risks were compensated by the prospect of significant profits from the Concession. The two, high risks and significant profits, are necessarily intertwined in this case.

13-66 *No Market*: The Tribunal accepts that there was no open, public, active or other available market for the Claimants' shares in the Concessionaire, as at the relevant date for their valuation (24 June 2001). The Tribunal also accepts that there was no comparable business to the Concessionaire's Concession (as a business), at this relevant date, which could provide any reliable guide to the market value of the Claimants' shares.

13-67 *Capital*: As at the valuation date (24 June 2001), the value of the Claimants' shares in the Concessionaire was not materially affected by the relatively low level of contributions towards capital and related expenditure made by the Concessionaire's shareholders (including the Claimants). There was to be, inevitably, a significant disparity between the shareholders' contributions and the Concessionaire's profits, given the high degree of risk associated with the Concession and the correlative prospect of significant profitability.

13-68 *Intangible Asset*: As at the valuation date (24 June 2001), the value of the Claimants' shares in the Concessionaire was not materially affected by the Concessionaire's assets or declared tax values but derived, indirectly, from its income stream reasonably anticipated from the Concession Agreement, as an intangible asset. (The Tribunal considers separately below the level of such anticipation and its associated uncertainties).

13-69 *No Complete Business*: The Concession was operative, as regards the registration of new and used vehicles under the Concession Agreement, for no more than five weeks in July-August 2000. After a period of uncertainty, the Concessionaire was limited to the registration of new vehicles on 15 September 2000, albeit with the possibility of being restored to full-life with the renewed registration of used vehicles. Effectively, the Concessionaire's business survived thereafter in a form of suspended half-life from 15 September 2000 to 24 June 2001, limited to the registration of new vehicles. That half-

life was not the business concern originally envisaged by the Respondent (including the Secretariat) and the Concessionaire (including the Claimants) under the Concession Agreement.

13-70 *No Going Concern*: As at the relevant date for valuation (24 June 2001), the Concessionaire was not operating as a going concern in the form envisaged at the time of the Concession Agreement, because (i) the registration of used vehicles had been suspended from 15 September 2000 and (ii) the Concessionaire was not operating as an independent concern given the Secretariat's First and Second Administrative Interventions of 15 September 2000 and 18 April 2001. Moreover, as a business, the Concessionaire had barely progressed beyond start-up operations by 15 September 2000, at which time it began its suspended half-life until 24 June 2001. The Concessionaire had therefore no significant or reliable track-record as a business, or 'going concern' by 24 June 2001, as that business was originally conceived under the Concession Agreement.

13-71 Based on these factors, the Tribunal next addresses the use of the Claimants' DCF method and the Respondent's non-DCF methods to value the Claimants' shares.

13-72 *DCF Method*: The Tribunal does not consider the DCF method to be an appropriate methodology to apply on the facts of the present case; and it rejects the Claimants' case on the use of the DCF method. The Tribunal accepts the Respondent's submissions to the effect that the status of the Concessionaire as a business, during the period from August/September 2000 up to the relevant valuation date of 24 June 2001, was far too uncertain and incomplete to provide any sufficient factual basis for the DCF method. Moreover, the Claimants' use of the DCF method, with its expert (LECG), produces figures for the Concessionaire's future lost profits which are manifestly too high on the facts found by the Tribunal.

13-73 *Non-DCF Methods*: Equally, the Tribunal rejects the Non-DCF methods advanced by the Respondent. Neither the Asset Approach nor the Declared Tax Value Approach take any account of the Concessionaire's most valuable intangible asset as at 24 June 2001, namely its future income stream reasonably anticipated from the Concession Agreement under its remaining ten-year term. As a result, the Respondents' use of these Non-DCF

methods, with its expert (PRA), produce figures for the valuation of the Claimants' shares which are manifestly too low. As regards the Respondent's Expected Returns Approach, the Tribunal accepts the Claimants' objection that it is wrong in principle to base such returns on the relatively small contributions made by the Claimants as the Concessionaire's minority shareholders. The Tribunal does not consider that the value of the Claimants' shares, on the facts of this case, bore any material relationship to the Concessionaire's future returns (or profits): this was to be a lucrative investment for the Claimants, albeit subject to high risks. Moreover, this third approach by the Respondent also produces figures which are manifestly too low.

13-74 *Underlying Data:* At the main hearing, the Respondent's expert witness, Mr. Rión of PRA, whilst disagreeing with the use of the DCF method, did not dispute the accuracy of much of the underlying data used by LECG/Horwath. This material consensus between the Parties' quantum experts was summarized in the Claimants' post-hearing submissions, as follows [at paras. 39-40]:

*“In cross-examination, Mr Rión conceded the accuracy of the background information and assumptions used by LECG, the financial history and Business Plan, the existence of a track record and even the status of Renave as a going concern as at 20 August 2000. (D7.1469, 14 to 1470,2; 1473,9; 1475,1 to 1476,3; 1477,8 to 1478,4; other references in D7.1478, further references in D7.1479; 1480; 1481; 1485; 1488; 1493; 1494; 1495; 1502; 1504,5-9; 1512, 16-21 (track record) and D.7,1513,1-1515,6 (going concern)). In light of these concessions, all the basic data relied on by LECG for the purposes of proposing an income approach for the question of valuation using the discounted cash flow (DCF) method, have been validated by the Respondent's expert. They must be taken as admitted.”*

The Tribunal, whilst not accepting the Claimants' characterisation of Mr. Rión's independent testimony as a formal admission by the Respondent, nonetheless accepts, for the purpose of its analysis, that much of LECG's underlying data can be treated as accurate, short of its application in the form of any DCF method.

13-75 *The Tribunal's Approach:* Having rejected the Parties' respective primary cases, as to their respective DCF and Non-DCF methods, it is necessary for the Tribunal to steer an appropriate middle course, between Scylla and Charybdis, given the Tribunal's firm



view that the Claimants' shares in the Concessionaire must be valued by reference (inter alia) to the Concessionaire's reasonably anticipated loss of future profits assessed as at 24 June 2001, i.e. a modified form of the income-based approach using much of the LECG/Horwath underlying data, albeit not using its DCF method.

- 13-76 In applying this approach to the facts of this case, as found by the Tribunal, difficulties immediately arise from the significant uncertainties associated with that income stream for the remaining 8.25 years of the Concession Agreement, as at 24 June 2001. Collectively, those uncertainties made it improbable (but not impossible) that the Concessionaire's business would be fully restored and that, as a result, it would make significant profits within the Concession's remaining period, assuming the Respondent's compliance with its obligations towards the Claimants under the BITs. Or, if expressed as a percentage, it was significantly more than 50% probable that the Concessionaire would fail and significantly less than 50% possible that it would succeed. With these evidential difficulties, it is necessary to return to first principles applicable to this case.
- 13-77 *The Two Arbitration Agreements:* It will be recalled, from Part I (03) of this Award, that the relevant arbitration agreements are contained in Article 10 of the Argentina BIT and Article 9 of the France BIT respectively, as the source of this Tribunal's arbitral jurisdiction. Article 10(6) of the Argentina BIT specifies the scope of any arbitration award under this treaty: it requires a determination by this Tribunal whether a breach of the treaty "has caused a loss to the investor" and, if so, the fixing of "the amount of compensatory indemnification for the damage suffered" by the aggrieved party, together with "any applicable interest"; and it prohibits any order "for payment of punitive damages." Similarly, Article 9(8) of the France BIT provides for an award by this Tribunal to include "monetary indemnification including interest ...", excluding any order to a Contracting Party "to pay punitive damages".
- 13-78 These provisions of the two BITs, especially Article 10(6)(a) and Article 9(8)(b), are the necessary starting-points in considering the potential scope of any award in these

arbitration proceedings in respect of compensation for breach of the BITs by the Respondent, as already found by the Tribunal earlier in this Award.

13-79 *ILC*: These provisions are materially consistent with the International Law Commission' Articles on Responsibility of States for Internationally Wrongful Acts. These provide, as here relevant, regarding reparation under international law:

*“Article 31- Reparation*

1. *The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*
2. *Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State. [...]*

*Article 34 - Forms of Reparation*

*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. [...]*

*Article 36 - Compensation*

1. *The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.*
2. *The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”*

13-80 In the present case, restitution is not claimed by the Claimants; nor (if it were) would it be appropriate or even possible. The Tribunal is here concerned only with reparation in the form of compensation, as described in Article 36 of the ILC's Articles. It is for the Claimants, as claimants alleging an entitlement to such compensation, to establish the amount of that compensation: the principle *actori incumbit probatio* is “*the broad basic rule to the allocation of the burden of proof in international procedure*”<sup>1</sup>. This burden does not rest on a respondent, at least not initially.

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<sup>1</sup> M. Kazazi, *Burden of Proof and Related Issues* (Kluwer, 1996), at pp. 116, 221 & 369.

13-81 As to that compensation, Article 36 contains two express requirements, (i) that the damage be “financially assessable”, i.e. capable of being evaluated in money, and that it be “established”, i.e. such that the remedy be commensurate with the injured party’s proven loss and thus make it whole in accordance with the general principle expressed in *The Chorzów Factory Case* as regards compensation for an illegal act (cited above in Part XII of this Award). The Tribunal considers that this approach coincides with the requirements of the two BITs, albeit expressed in slightly different wording. Under the Argentine BIT, the compensation is expressed in the form of an indemnity for damage suffered; and the France BIT likewise refers to an indemnity for loss or damage, both necessarily to be made in money.

13-82 It is next necessary to consider the quality of evidential proof required of a claimant to establish a claim, directly or indirectly, based on lost future profits under international law. As explained in the ILC’s Commentary on Article 36(2):

*“... lost profits have not been as commonly awarded in practice as compensation for accrued losses. Tribunals have been reluctant to provide compensation for claims with inherently speculative elements. When compared with tangible assets, profits (and intangible assets which are income-based) are relatively vulnerable to commercial, political and other risks, and increasingly so the further into the future projections are made. In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable ...”<sup>2</sup>*

*[Footnote omitted]*

13-83 In this ILC Commentary (with certain materials there cited), there is an emphasis on ‘certainty’ to be established evidentially by a claimant in all cases; but it is clear from other legal materials there cited that the concept of certainty is both relative and reasonable in its application, to be adjusted to the circumstances of the particular case. It suffices to cite two illustrative arbitral decisions, starting with *Sapphire* (cited in the ILC Commentary on Article 36).

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<sup>2</sup> Crawford, *The International Law Commission’s Articles on State Responsibility* (CUP, 2002), at para. 27, p. 228.

- 13-84 *Sapphire*: The arbitrator in *Sapphire International Petroleum, Ltd. v. National Iranian Oil Company*<sup>3</sup> (M. Pierre Cavin) awarded compensation of US \$2 million for loss of opportunity although the injured party could not establish actual loss of future profits: “... in such cases the existence of damage is uncertain, case law has looked at the position at the time when the opportunity was lost and has accepted that this opportunity itself has a value whose loss gives rise to compensation”<sup>4</sup>. In that case, the arbitrator also decided: “It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behaviour of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage.”<sup>5</sup>
- 13-85 The Tribunal has noted that the arbitrator, in this case, fixed the amount of compensation by reference to his powers “*ex aequo et bono*”. It is undisputed that this Tribunal does not have power to decide any issue *ex aequo et bono* in these arbitration proceedings: there is no express agreement by the Parties conferring any such power on this Tribunal under Article 54(2) of the ICSID (Additional Facility) Arbitration Rules; nor does this Tribunal assert or seek to exercise any such powers in this Award. Nonetheless, as explained further below, it does not appear that this decision is necessarily limited to a tribunal’s exercise of such special powers *ex aequo et bono*.
- 13-86 *SPP*: The arbitration tribunal in *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*<sup>6</sup> (Dr. Mohamed Admin El Mahdi; Mr. Robert Pietrowski; and Mr Eduardo Jimenez de Arachaga, President) awarded compensation for the claimant’s loss of the opportunity of making a commercial success of the project in the sum of US\$ 3 million, although declining to award compensation by reference to any DCF methodologies because the project was in its infancy with an insufficient history on which to base projected revenues into the future. The tribunal decided that it was incontestable on the evidential record that the claimants’ investment had a value that exceeded their out-of-pocket expenses. The tribunal acknowledged that determining the

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<sup>3</sup> *Sapphire International Petroleum, Ltd. v. National Iranian Oil Company*, 35 ILR 136 (1963).

<sup>4</sup> *Ibid* at p. 188.

<sup>5</sup> *Ibid* at pp. 187-88.

<sup>6</sup> *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award, of 20 May 1992.

“opportunity of making a commercial success of the project” necessarily involved an element of subjectivism and, consequently some uncertainty; however, it stated that “it is well settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred”<sup>7</sup>; and the tribunal proceeded to calculate such compensation, as follows:

- “216. *In determining the amount by which the value of the Claimants’ investment in ETDC exceeded their out-of-pocket expenses, the Tribunal will take as a starting point the lot sales actually made during the short life of the project and the revenues to be imputed to those sales. As the Tribunal has already observed, the evidence show that during the period February 1977 to May 1978, ETDC’s actual sales of villa and multi-family sites amounted to US \$10,211,000. The lots involved - 383 villa sites and 3 multi-family sites represented only 6 percent of the villa sites and less than 1 percent of the multi-family sites with respect to which ETDC held rights. It is clear, therefore, that the remaining lots were a potential source of very substantial revenues.*
217. *The Tribunal will next consider what it took in the way of expenditures by the Claimants to generate the revenues imputed to the lot sales. The difference between these expenditures and the portion of imputed revenues corresponding to SPP(ME)’s shareholding in ETDC is, in the Tribunal’s view, the minimum measure of the value to be ascribed to the opportunity to make a commercial success of the project.*
218. *It is not disputed that SPP(ME) made capital contributions to ETDC of US \$1,310,000, and the Tribunal has already determined that the Claimants’ development costs were US \$1,719,000. In addition, loans totalling US \$2,058,000 were made to ETDC, but these loans will be disregarded for present purposes because they were intended to be reimbursed - for the most part with interest at commercial rates. The portion of the revenues imputed to the lot sales corresponding to SPP(ME)’s shareholding in ETDC was 60 percent of US \$10,211,000, or US \$6,127,000. Thus, the portion of the sales revenues corresponding to SPP (ME)’s shareholding in ETDC would have exceeded the Claimants’ non-reimbursable out-of-pocket expenses by US \$3,098,000. In these circumstances, the Tribunal is of the view that the value of which the Claimants have called the “opportunity of making a commercial success of the project” was not less than US \$3,098,000. Stated differently, the value of the Claimants’ investment in May of 1978 when the project was cancelled exceeded their out-of-pocket expenses by at least US \$3,098,000.”*

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<sup>7</sup> *Ibid.* at para. 215.

13-87 In a recent work, Ripinsky & Williams' *Damages in International Investment Law* (2008), these general principles as to loss of opportunity, or "loss of a chance", were summarised as follows:

*"Where a tribunal cannot accept a claim for lost profits as not sufficiently certain, it may choose to award, instead, a compensation for the loss of business (commercial) opportunity, or for the loss of a chance. This head of damage appears to be a sub-species of lost profits, which is resorted to when the available data does not allow making a more precise calculation of lost profits. The concept of the loss of opportunity, or the loss of a chance, is recognised in a number of national legal systems, as well as in the UNIDROIT Principles of International Commercial Contracts. The latter provide in Article 7.4.3(2) that '[c]ompensation may be due for the loss of a chance in proportion to the probability of its occurrence'. It is suggested that a chance of making a profit is an asset with a value of its own, and that compensation for the loss of a chance is an alternative to the award of lost profits proper in cases where the claimant has failed to prove the amount of the alleged loss of profit with the required degree of certainty, but where the tribunal was satisfied that the loss in fact occurred. Loss of a chance can thus be used as a tool allowing the injured party to receive some form of compensation for the loss of a chance to make a profit. In theory, the loss of a chance is assessed by reference to the degree of probability of the chance turning out in the plaintiff's favour, although in practice the amount awarded on this account is often discretionary."*<sup>8</sup>

*[Footnotes omitted]*

13-88 It may be noted that Article 7.4.3(1) of the UNIDROIT Principles<sup>9</sup> requires a "reasonable degree of certainty" for establishing compensation for future harm, thereby further confirming that the requirement for certainty in proving a claimant's claim for compensation is relative and not incompatible with an award of compensation for loss of opportunity, nor is the latter necessarily linked to an arbitrator's power to decide *ex aequo et bono*<sup>10</sup>. Indeed, the concept of damages for the loss of a chance (opportunity) is recognised in many national systems of law; it is there also compatible with legal

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<sup>8</sup> S. Ripinsky and K. Williams, *Damages in International Investment Law* (BIICL, 2008) at p. 291.

<sup>9</sup> The Tribunal notes the UNIDROIT Principles for the general proposition that lost profit is an accepted and well-established component in assessing compensation [Cl. Quan. Rep., para. 13]: see Part XII above.

<sup>10</sup> UNIDROIT Principles: Article 7.4.3 (Certainty of Harm) provides: "(1) Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty. (2) Compensation may be due for the loss of a chance in proportion to the probability of its occurrence. (3) Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court."

requirements to prove damages with a degree of certainty (including certainty on a balance of probabilities); and it does not depend upon the tribunal or court acting *ex aequo et bono*.

13-89 For example, English law has long recognised damages for the loss of a chance in both contract and tort, ever since the decision of the Court of Appeal in *Chaplin v Hicks* (1911)<sup>11</sup> where the plaintiff was wrongly deprived of an opportunity, in breach of contract, to win a beauty competition leading to employment as an actress. The jury could not award her damages on the basis that she would have won the competition because she was only one of 50 competitors from which only 12 winners could be chosen; but she was nonetheless awarded substantial damages (£100, now equivalent to about £8,000). On the defendant’s unsuccessful appeal, the Court of Appeal emphasised that it remained legally possible to quantify the plaintiff’s damages, on a balance of probabilities under English law, even though her claim remained subject to future contingencies making that exercise “not only difficult but incapable of being carried out with certainty or precision”; and the Court rejected the notion “with emphasis” that, because such precision was not possible, then no damages could be ordered at all. Other common law jurisdictions have adopted a broadly similar approach to English law; and, as a general approach albeit expressed in different terms, the concept is not foreign to the laws of Mexico and Canada.

13-90 It would be possible to illustrate these general principles from several other national legal systems (both common law and civilian); but it is unnecessary to do so here because, first, such principles are broadly re-stated in the UNIDROIT Principles; and, second, the Tribunal is in no doubt that similar principles form part of international law, as expressed in the ILC Articles. Moreover, the law applicable in this case is not English, Mexican, Canadian or any other national law.

13-91 Applying international law to the present case, the Tribunal is influenced by two related factors. First, the Tribunal rejects any argument that because the quantification of loss or damage in the form of lost future profits is uncertain or difficult, that the Claimants

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<sup>11</sup> *Chaplin v Hicks* [1911] 2 KB 786; see also McGregor, *Damages* (18<sup>th</sup> ed; 2009), pp. 342ff.

should be treated in this case as having failed to prove an essential element of their claims in respect of lost future profits, with the result that their claims for compensation should be dismissed. The Tribunal considers that this approach is not required by the terms of either BIT or international law; and that it would also produce a harsh and unfair result in this case. The Tribunal emphasises that it is here addressing contingent future events and not actual past events; it is seeking to determine not what did or did not happen as past facts but what could have happened in the future. This exercise necessarily involves the Tribunal in assessing whether such future events would have occurred and in quantifying that assessment in money terms, as compensation. It is not always possible for a claimant to prove that a future event could or could not happen with certainty; and a tribunal can only evaluate the chances of such a future event happening. That is not therefore an exercise in certainty, as such; but it is, in the circumstances, an exercise in “sufficient certainty”, as indicated by the ILC’s Commentary cited above.

- 13-92 Second, the Tribunal is mindful of the fact that the Claimant’s evidential difficulties in proving their claim for loss of future profits are directly caused by the breaches of the BITs by the Respondent responsible for such loss. If there had been no such breaches, the Concessionaire would have had an opportunity to restore the project, as originally envisaged; and it could then have been seen, as actual facts, whether and, if so, to what extent the restored project would have been profitable for the Concessionaire and, indirectly, the Claimants. The Tribunal considers that, as a general legal principle, when a respondent has committed a legal wrong causing loss to a claimant (as found by a tribunal), the respondent is not entitled to invoke the burden of proof as to the amount of compensation for such loss to the extent that it would compound the respondent’s wrongs and unfairly defeat the claimant’s claim for compensation - as was indicated in the *Sapphire* award regarding the “behaviour of the author of the damage” (see above). At this point, confronted by evidential difficulties created by the respondent’s own wrongs, the tribunal considers that the claimant’s burden of proof may be satisfied to the tribunal’s satisfaction, subject to the respondent itself proving otherwise.



- 13-93 *The BITs:* With this approach, it is helpful to return to the wording of Article 5 of the two BITs. In the Argentina BIT, these provisions require the equivalent of the “market value” of Talsud’s shares in the Concessionaire to be assessed, broadly defined to include “other criteria that are appropriate to determine” such value; and in the France BIT, these provisions require the equivalent of the “fair market value, or in the absence of such value, [of] actual value” of Gemplus’ shares in the Concessionaire to be assessed, likewise broadly defined to include “any other criteria which, in the circumstances, are appropriate to determine fair market value”. As a guide, the Tribunal is content to apply this wording to its chosen valuation method, operating with the Parties’ two extreme positions.
- 13-94 Accordingly, with this valuation method, the Tribunal next addresses, on the facts of this case, the Concessionaire’s chances of future profits and seeks to quantify the resulting compensation for the Claimants’ claims derived, indirectly, from those lost profits in order to value the Claimants’ shares as at the relevant valuation date. This method necessarily points to an answer lying between the Parties’ extreme positions; but the issue addressed by the Parties and the Tribunal remains juridically the same, namely: how to value in money terms the Claimants’ shares in the Concessionaire.

**(06)            *COMPENSATION FOR LOST OPPORTUNITY***

- 13-95 As already indicated, the factual issue is how to assess, in money terms, the Concessionaire’s lost opportunity (or chance) to make future profits for the remainder of the Concession Agreement’s period of 8.25 years as at 24 June 2002 (recognising that the Concession’s legal existence continued until the Requisition on 13 December 2002).
- 13-96 As found by the Tribunal, the project was by then already severely damaged from earlier events for which the Respondent bears no liability under the BITs; and it remained subject to several commercial, legal and political risks. Moreover, it was the Respondent’s own efforts in September 2000 that kept the project even half alive (as

regards new vehicles) and not destroyed completely by the twin calamities of August/September 2000, namely the Cavallo incident and the death of Dr Ramos. But for Dr Blanco's efforts at the time (at the Secretariat), the Concessionaire would have failed in or soon after September 2000. Moreover this half-life project, by 24 June 2001, was far from the project originally envisaged with its business dependent on the registration of both new and used vehicles.

- 13-97 This lost chance was clearly not 100%; nor was it manifestly 0%. In other words, even if the Respondent had committed no breach of the BITs on and after 25 June 2001, the several problems with the Concessionaire, the Concession Agreement, the Mexican states, the *amparos* and, particularly, Mexican vehicle-owners and the Mexican public generally, would have made it very difficult for the Concessionaire (with the Secretariat) to restore the whole project. On the other hand, Mexico still needed a comprehensive national vehicle registry in June 2001, perhaps more than ever before; and that national registry was to occur much later in 2004. In June 2001, the Concessionaire, but for the Respondent's unlawful conduct, remained the logical candidate to operate that registry, with at least a possibility (as Dr Blanco had intended in September 2000) to re-new its activities for both used and new vehicles with the support of the Respondent, acting lawfully under the two BITs.
- 13-98 In the Tribunal's view, there was therefore as at 24 June 2001 no certainty or realistic expectation of this project's profitability as originally envisaged, but there was nonetheless a reasonable opportunity. That opportunity, however small, has a monetary value for the purpose of Article 36 of the ILA Articles and the indemnities for compensation provided by the two BITs.
- 13-99 It remains extremely difficult for the Tribunal to assess the value of this lost opportunity in money terms. First, the commercial, legal, political and other risks confronting the Concessionaire were considerable and are not susceptible to any useful analysis expressed in percentages. Moreover, the Claimants' claims for compensation are necessarily based only indirectly on the Concessionaire's future performance. Yet, the hypothetical willing seller of the Claimants' shares and their hypothetical willing buyer,

as business people, would have been able to strike a price for such shares. It is a fact that business people can agree a price notwithstanding expert accountants respectively advising them that only a higher or lower price is appropriate. Second, the fact that this exercise is difficult is due directly to the Respondent's breaches of the two BITs which have made it almost impossible for the Claimants to show how the Concessionaire could or would have made use of that lost opportunity. As already decided by the Tribunal above, it would be wrong in principle to deprive or diminish the Claimants of the monetary value of that lost opportunity on lack of evidential grounds when that lack of evidence is directly attributable to the Respondent's own wrongs. This is not therefore a case where the burden of proof lay exclusively on the Claimants: and, in the Tribunal's view, it was also for the Respondent to prove the contrary. It did not do so.

13-100 Having in mind all the legal principles and other factors above, taking the hypothetically willing buyer and willing seller materially informed as to their intended transaction on 24 June 2001, the Tribunal determines in the exercise of its arbitral discretion that the price agreed by these hypothetical parties for the Claimants' shares in the Concessionaire would have been (in total) the sum of MXN 130,000,000 or US\$ 14,340,872 (at the then prevailing rate of exchange: MXN 9.065 = US\$1). The Tribunal prefers to express this price in US\$ for reasons explained later in Part XVI of this Award.

**(07) THE TRIBUNAL'S DECISION**

13-101 As regards the Claimants' claims for compensation for the lost value of their respective shares in the Concessionaire as at 24 June 2001, whether advanced as the Respondent's liability for unlawful expropriation or breach of the FET standards in the two BITs or both, the Tribunal decides the Claimants' loss to be proven in these arbitration proceedings in the total amount of US \$ 14,340,872, *i.e.* US\$ 5,853,417 for Gemplus (as

to its 20% shareholding in the Concessionaire) and US\$ 8,487,455 for Talsud (as to its 29% shareholding in the Concessionaire).

## **PART XIV: ISSUE J – COMPENSATION: PAST PAYMENTS**

### **(01) INTRODUCTION**

14-1 The Tribunal here considers the effect of the Claimants' receipt of certain amounts from the Concessionaire in April and December 2002, to which reference was made earlier in Part XII of this Award (Paragraph 12-44). It is again necessary first to summarise the Parties' submissions in regard to these "distributions".

### **(02) THE CLAIMANTS' CASE**

14-2 The Claimants address the issue of distributions effected to the Concessionaire's shareholders (including the Claimants) during the Second Administrative Intervention, as follows (Memorial at 72):

*"218. Despite the traumatic history of the Concessionaire's operations and the manifest intention of the Government of Mexico to frustrate the operation of the Mexico Concession and terminate the Concession Agreement, some profits were realised and distributions made. In 2002 the Secretariat authorised payments by the Concessionaire to the shareholders including the Claimants by way of dividends, return of capital and reimbursement for start up costs. These payments, summarised in LECG/Horwath Letter (paragraphs [16-17]), exceeded the shareholders' contributions by a modest margin. The Claimants have therefore addressed at this stage the question whether by any conceivable measure these distributions can be considered to be compensation for the loss of profit which would have been realised but for the actions taken by the Secretariat."*

*[Emphasis added]*

14-3 The Claimants' expert, LECG/Horwath, note of the distributions to the Claimants in their first letter dated 7 October 2005, as follows (LECG Letter, at 6):

- “16. *A total sum of MXN \$ 23,506,699 was received by Talsud by way of dividends and return of capital. Gemplus received a total sum of MXN \$ 15,881,206 by way of dividends and return of capital. Dividends were paid in December 2002. The return of capital was made in December 2002. A summary of these payments is presented in Schedule 5 attached. Applying the current rate of exchange of USD \$ 1 = MXN \$ 10.8, the aggregate value of distributions received by Talsud is USD \$ 2,176,546 and the aggregate value of distributions received by Gemplus is USD \$ 1,470,482.*
17. *In April 2002, a payment was made to the shareholders of Renave as a reimbursement for start-up costs previously incurred by the shareholders. Talsud was reimbursed MXN \$ 7,250,000 and Gemplus was reimbursed MXN \$ 5,000,000.*
18. *All distributions appear to have been made to shareholders proportionate to their respective share holdings.”*

14-4 In their second letter dated 9 October 2006, LECG/Horwath further address this issue (LECG October 9 Letter at 13):

- “34. *We have been referred to paragraph 401 of the Counter-Memorial and to paragraph 26 of the witness statement of Mr. Guillermo Gonzalez concerning return of capital and other payments to the Renave shareholders. We have verified that as of December 16, 2002, before certain distributions, Renave had reported net cash and investments of MXN \$143,827,480. We have also verified the data set out in the table appearing in paragraph 400 of the Counter-Memorial to payment source documents with respect to Talsud and Gemplus. A total sum of MXN \$23,506,699 was received by Talsud by way of dividends and return of capital. Gemplus received a total sum of MXN \$15,881,206 by way of dividends and return of capital. Dividends were paid in December 2002. The return of capital was made in December 2002.”*

*[Footnotes omitted]*

14-5 In their Memorial on Quantum, the Claimants contend that whilst the amount of distributions paid by the Respondent is not in dispute, the Parties dispute the effect of these payments on the assessment of the Claimants' losses (Quan. Mem. at 6-7):

- “15. *Capital contributions were made by the Claimants throughout the active life of the concession. LECG/Horwath record two capital contributions in September 1999 and further contributions in December 1999, February 2000, July 2000, December 2000 and June 2001. Talsud contributed a total sum of MXN\$21,406,000 and Gemplus contributed a total of MXN\$14,495,000. These contributions were made on the expectation that there would be significant return on the investment.*
16. *The Respondents’ Counter Memorial makes reference to the return of capital and other payments to the shareholders of Renave. This is common ground between the Parties except for minor differences on the value of reimbursement to Talsud and Gemplus of certain start-up costs. There is also agreement on the amount of distributions paid by way of dividends and return of capital. In cash terms, Talsud received a total sum of MXN\$23,506,699 (against a total contribution of MXN\$21,406,000) and Gemplus received a total distribution of MXN\$15,881,206 (against a total contribution of MXN\$14,495,000). Both distributions were made in December 2002.*
17. *The return of capital and other payments to the shareholders occurred at various stages in 2002, after the date of the Seizure which was declared by decree on 27 June 2001. In her first witness statement, Ma. Elena Barrera Sanchez [sic], who was employed as Administration and Finance Manager of Renave until the date of the Seizure, says the following:-*
- “[w]ith the Seizure, the authorisation to sign cheques that the company and its representatives had granted me was cancelled. However, as from 27 June 2001 onwards, new signatories were arranged for the bank accounts and I was included among them. I could not take any decision of any kind without the prior approval of my immediate superior, Guillermo Gonzalez Lozano.”*
18. *It is unclear whether the Respondent advances an argument that the distributions received by the shareholders in 2002 represent sufficient compensation of the Seizure, for prior interventions or for the subsequent Revocation of the concession. Certainly, the distributions were never accepted as such and for the reasons advanced below it is the Claimants’ case that the distributions were very far from being adequate compensation for the loss in the value of their investment caused by the actions of the Secretariat.*
19. *These payments fall far short of the value of the Claimants’ contributions in cash and kind, and provide no return at all on the investment that has been made, or anything by way of compensation for loss of future profits. The evidence in the LECG/Horwath Report is that, after taking into account the period of time that elapsed between the contributions made and distributions received by the Claimants, inflation during this period*

*and other economic factors, the value of the Claimants' contributions at the time they were made exceeds the value of the distributions at the time they were received so that in terms of value both the Claimants received less than they invested. From a financial perspective, the Claimants made a loss on their investment."*

*[Footnotes omitted]*

14-6 LECG/Horwath further describe the distributions to the Claimants in their first expert report as follows (LECG First Expert Report at 17-18):

- "60. A total sum of MXN \$ 23,506,699 was received by Talsud by way of dividends and return of capital. Gemplus received a total sum of MXN \$ 15,881,206 by way of dividends and return of capital. Dividends were paid in December 2002. The return of capital was made in December 2002. On a present value basis, as of August 20, 2000, the value of Talsud's distributions is MXN \$ 16,934,344 and the value of Gemplus' distributions is MXN \$ 11,440,956. A Summary of these payments is presented in Schedule 12 attached.*
- 61. In April 2002, a payment was made to the shareholders of Renave as a reimbursement for start-up costs previously incurred by the shareholders. Talsud was reimbursed MXN \$ 7,250,000 and Gemplus was reimbursed MXN \$ 5,000,000.*
- 62. All distributions appear to have been made to shareholders proportionate to their respective share holdings."*

14-7 The amounts estimated by LECG/Horwath above were derived from its calculation of cash distributions set out in Schedule 12 to its first expert report, which provided as follows:



*Schedule 12*  
*Summary of Cash Distributions [MXN]*

<i>Description</i>	<i>Talsud</i>	<i>Gemplus</i>
<i>Dividends paid in December 2002</i>	<i>5,000,699</i>	<i>3,386,206</i>
<i>Return of Capital in December 2002</i>	<i>18,506,000</i>	<i>12,495,000</i>
	<u><i>23,506,699</i></u>	<u><i>15,881,206</i></u>
<i>Times: Present Value Factor for December 4, 2002</i>	<i>0.72607</i>	<i>0.72607</i>
<i>Times: Present Value Factor for December 30, 2002</i>	<i>0.71887</i>	<i>0.71887</i>
<i>Present Value as of 8/20/2000</i>	<u><i>16,934,344</i></u>	<u><i>11,440,956</i></u>

- 14-8 In their post-hearing submissions, the Claimants provided values for the distributions as of 26 June 2001 and 12 December 2002, the dates of the Requisition and the Revocation:

*Value of Distributions to Claimants*  
*[MXN]*

	<i>Talsud</i>	<i>Gemplus</i>
<i>As of June 26, 2001</i>	<i>19,068,651</i>	<i>12,882,908</i>
<i>As of December 12, 2002</i>	<i>23,371,741</i>	<i>15,790,085</i>

**(03) THE RESPONDENT'S CASE**

- 14-9 The Respondent's case on the distributions to the Claimants was pleaded as follows (Counter-Memorial at 119-120):

*“399. On 12 November 2002, Mr. Salvador Fonseca sent two letters to Professor Gomez Mont informing her: i) that on 8 November 2002 the Concessionaire’s shareholders held an extraordinary meeting in which they decided to reduce the variable portion of the company’s capital by 63.8 million pesos, and ii) that on 3 October 2002 the Concessionaire’s*

shareholders held an ordinary shareholders meeting, in which they decided to pay out a dividend of 233.61 pesos per share.

400. *The payments would be made in accordance with each shareholders' stake in the company, that is, 51% to Aplicaciones Informáticas, S.A. de C.V., 29% to Talsud, S.A. and 20% to Gemplus Industrial, S.A. de C.V., as shown in the following table:*

<i>Shareholder</i>	<i>Dividend</i>	<i>Capital Reimbursement</i>	<i>Total [MXN]</i>
<i>Henry Davis</i>	<i>8,856,932.03</i>	<i>32,813,000.00</i>	<i>41,669,932.03</i>
<i>Talsud</i>	<i>5,000,698.63</i>	<i>18,506,000.00</i>	<i>23,506,698.63</i>
<i>Gemplus</i>	<i>3,386,206.05</i>	<i>12,495,000.00</i>	<i>15,881,206.05</i>
<i>Subtotal</i>	<i>17,243,836.71</i>	<i>63,814,000.00</i>	<i>81,057,836.71</i>
<i>Taxes (ISR)</i>	<i>6,882,253.09</i>	<i>1,336,595.62</i>	<i>8,218,848.71</i>
<i>Total</i>	<i>24,126,089.80</i>	<i>65,150,595.62</i>	<i>89,276,685.42</i>

401. *According to the testimony of Mr. Guillermo González, the shareholders also received payments for technical consultation fees (Aplicaciones Informáticas received 14.7 million pesos, Gemplus Industrial 5.6 million pesos and Talsud received 961,896 US dollars); they received the company [sic] with a balance of 140 million in cash and investments (a part of which was apparently used to pay out the 63 million pesos reimbursement of capital) and received additional monies through the liquidation of assets.”*

*[Footnotes omitted]*

- 14-10 In its Rejoinder on the Merits, the Respondent submits that the Claimants were, in effect, made whole by these distributions (Rejoinder at 40-41):

*“D. The Claimants recovered a sum larger than the capital they had invested in the Concessionaire*

*113. Mexico’s fourth point is that it is an admitted fact that the Concessionaire’s shareholders received a return on their capital invested, a dividend, and payment for their services rendered in the start-up phase of the project. This is not a case where the investor-claimant has suffered a complete or even partial loss of its investment. These investors were more than made whole.*

1. *They Received a Return of Capital, a Dividend, and Payment for Services Rendered*

114. *The evidence shows that while the company was in requisition:*

- *The shareholders withdrew their variable capital (US\$6.2 million), which left them with their fixed capital, which on Renave's date of incorporation, was worth approximately US\$290,000.00 (for Talsud) and US\$200,000.00 (for Gemplus).*
- *The shareholders also authorized the Concessionaire to declare a dividend. This more than covered their fixed capital commitments.*
- *Finally, when they received the company back at the end of the revocation proceeding, the shareholders received a significant cash balance.*

115. *Thus, by exercising their powers to control the company's finances while it was in requisition, the shareholders more than made themselves whole in respect of the capital that they put at risk. They nevertheless now seek damages for loss of future profits which they contend the Concessionaire "stood to make" but for the Secretariat's measures in response to the events of August-September 2000.*

116. *In Mexico's submission, it is anomalous, to say the least, that having gotten back more than they actually invested, the Claimants still contend that they have suffered an expropriation of their investments."*

*[Footnotes omitted]*

14-11 In its Counter-Memorial on Quantum, the Respondent further contends that no further amount is required to compensate the Claimants (Quan. CM at 15-16):

"48. *It is common ground that while Renave was in requisition, the shareholders used their control to effect three forms of cash transfers to themselves: (i) a payment for services rendered in starting up the company; (ii) a dividend; and (iii) a return of all variable capital.*

49. *The First Memorial on Quantum notes that Talsud received a total sum of P\$23,506,699 (against a total contribution of P\$21,406,000) and Gemplus received a total of P\$15,881,206 (against a total contribution of P\$14,495,000). Thus, in nominal terms, without taking into consideration the time value of the monies invested, the Claimants received a slightly greater amount than they originally invested. If inflation is taken into account, that is, if the amounts are expressed in terms of pesos with the*

*purchasing power of August 2000, the Claimants received \$20,600,813.62, pesos and \$13,917,979.93 pesos. The difference with respect to their capital contributions in both cases is slightly greater than one million pesos.*

50. *The First Memorial on Quantum asserts that these payments fall far short of the Claimants' contributions in cash and kind, since they provide no return at all on the investment that has been made, or anything by way of compensation for loss of future profits. On a present value basis as of the valuation date, the difference between the transfers received by Renave's shareholders and the monies invested in the project as of 20 August 2000 is between P\$1.7 and P\$2.1 million in the case of Gemplus and between P\$2.1 and P\$2.7 million in the case of Talsud.*
51. *In addition to essentially making the investors whole, the return of variable capital raises additional complications for the Claimants' use of a DCF valuation for a simple but fundamental reason: DCF calculations are predicated upon the investor's putting a sum of capital at risk in the belief that the present value of future income streams generated by that capital will be greater than the capital itself (i.e., the investment has a positive Net Present Value) and that larger streams might not be generated by placing that capital in another investment (i.e., it is the best option available to the investor). The future income stream is inextricably linked to the capital invested. This means that once the variable capital was withdrawn from the company, the income stream that could flow from it ended. It was no longer committed to generating future income streams from this company. No DCF calculation can validly include it because without that capital investment the investors would not be entitled to any cash flow from Renave.*
52. *LECG/Horwath treated the variable capital withdrawal in the following way: (i) they ran the DCF calculation as if the capital in fact remained committed to Renave for the entire 10 year period; and (ii) they then subtracted the amount that had been withdrawn in 2002 from the resulting valuation. In other words, the capital is treated as committed for roughly 8 years after it was withdrawn and then subtracted from the inflated figure. Yet since the time of its withdrawal in 2002, that capital has been put to other uses by both Claimants."*

*[Footnotes omitted]*

14-12 The Respondent's case is supported by PRA's first expert report, in which the following observations are made by the Respondent's expert (PRA First Expert Report at 32-33):

*"141. Now, as per the LECG Report's own methodology, once it arrives at its DCF valuation result for 100% of the shares of Renave, it goes on to*

calculate the implicit value for Talsud and Gemplus, who had a 29% and 20% equity participation in Renave. It then subtracts from this value the cash distributions that Talsud and Gemplus actually received after the Valuation Date, and also subtracts the current value of Renave's shares.

142. The LECG Report discounted the received cash distributions by the same discount rate used in its model, namely 15%. However, since these [sic] is no uncertainty (or risk) about these cash flows (i.e. it is a reality that they were actually disbursed to Talsud and Gemplus), the appropriate discount rate is the risk-free rate. As discussed, the Mexican risk-free rate is the CETEs rate. For the period between the Valuation date and December of 2002 (which is when Talsud and Gemplus received their dividend [December 4, 2002] and the return of capital [December 31, 2002]), the average 364-day CETEs rate was 12.14%.
143. If we apply the 12.14% risk-free rate to the LECG Report's calculation of the present value of the distributions actually received by Talsud and Gemplus, we obtain a value of \$18.0 million pesos for Talsud, and of \$12.1 million pesos for Gemplus.

Table 6  
Present Value calculation of cash distributions to Talsud and Gemplus  
Using the risk-free rate

	Talsud	Gemplus	
<i>(Amounts in MXP) [MXN]</i>			
Dividends paid on December 4, 2002	5,000,699	3,386,206	[A]
Return of Capital in December 30, 2002	18,506,000	12,495,000	[B]
	23,506,699	15,881,206	[C]=[A]+[B]
Present Value Factor for December 4, 2002	0.76918	0.76918	[E]
Present Value Factor for December 30, 2002	0.76293	0.76293	[F]F
Present Value as of 8/20/2000	17,965,174	12,137,381	[G] = [A]*[E]+[B]*[F]

144. Following the LECG Report's methodology for deducting the present value of the cash distributions received by the Claimants, as well as the current value of their shares in Renave, from the value obtained from the LECG Report's DCF model (using the revised assumptions), we obtain a value of between [MXN] 21.3 million pesos and [MXN] 5.1 million pesos

*for Talsud, and of between [MXN] 15.0 million pesos and [MXN] 3.8 million pesos for Gemplus.”*

*[Footnotes omitted]*

- 14-13 Although the Respondent provided alternative figures for damages in its post-hearing submissions, the Respondent did not provide a like break-down of distribution payments to the Claimants.

**(04) THE TRIBUNAL'S ANALYSIS**

- 14-14 As to the facts, it is necessary to distinguish between the three different payments made to the Claimants: (i) the reimbursement of past expenses; (ii) dividends and (iii) the return of capital.
- 14-15 *Expenses:* As to the reimbursement of expenses paid by the Concessionaire, as authorised by the Respondent during the First Administrative Intervention, Gemplus received MXN 5,000,000 and Talsud received MXN 7,250,000 in April 2002. These expenses had been incurred by Gemplus and Talsud for the Concessionaire during the start-up of the project; and their reimbursement was made to the Claimants effectively as creditors of the Concessionaire. Moreover, these expenses had been incurred for the Concessionaire long before the relevant valuation date, 24 June 2001 and even before the First Administrative Intervention. Accordingly, the Tribunal considers that these payments were made under a separate transaction and independently of the Claimants' status as the Concessionaire's shareholders and of the value of the Claimants' shares in the Concessionaire as at the valuation date.
- 14-16 *Dividends:* As to the dividends paid by the Concessionaire, as authorised by the Respondent during the Requisition, Gemplus received MXN 3,386,206.05 and Talsud received MXN 5,000,698.63 on 4 December 2002. The minutes of the Concessionaire's extraordinary shareholders' meeting of 8 November 2002 approved the payment of these

dividends for the year ending 31 December 2001 [R-178]. These amounts were to be paid in November 2002, but they were not actually paid to the Claimants until 4 December 2002. Accordingly, the Tribunal considers that these payments were made to the Claimants as the Concessionaire's shareholders; but that half of these payments relate to the period preceding the relevant valuation date, 24 June 2001: i.e. MXN 1,693,103 for Gemplus and MXN 2,500,349 for Talsud.

- 14-17 *Capital:* As to the return of variable capital in the Concessionaire, as authorised by the Respondent, Gemplus received MXN 12,495,000 and Talsud received MXN 18,506,000 on 30 December 2002 after the Revocation. Accordingly, the Tribunal considers that these payments were made to the Claimants as the Concessionaire's shareholders.
- 14-18 The Tribunal has determined above, in Part XIII of this Award (subject to this Part XIV), that the Claimants are entitled to compensation as at 24 June 2001 in the amount of US\$ 5,178,022 for Gemplus and US\$ 7,508,133 for Talsud, as the value of their shares in the Concessionaire based on Concessionaire's lost chance of future profits. The legal question arises whether any of the three distributions fall to be deducted from these amounts of compensation; and it is again appropriate to address each in turn.
- 14-19 *Capital:* In order to allow the Concessionaire an opportunity to earn those future profits, the Tribunal considers that the Claimants would have had to maintain their variable capital in the Concessionaire. Without such capital, provided by all the Concessionaire's shareholders, the Concessionaire's opportunity to make these profits would have been substantially diminished, if not actually extinguished. Nor does the Tribunal think it reasonable to assume that the Claimants could have withdrawn their own variable capital, leaving the majority shareholder to continue as to 51% of such capital. This approach is consistent with the Claimants' methodology which likewise deducted these returns of capital from their claims for compensation (albeit subject to certain interest and exchange calculations, within the context of their DCF method). The Tribunal notes

that such an approach is not limited to the use of DCF methods but extends to other methods for assessing *lucrum cessans*, so as to avoid double counting<sup>1</sup>.

- 14-20 Moreover, the Tribunal's valuation of the Claimants' shares assumes a hypothetical sale on 24 June 2001: see Paragraphs 13-100 & 13-101 of Part XIII above. That sales' hypothetical price assumes the full value of the Claimants' shares; and it must therefore follow that a later return of capital to the Concessionaire's shareholders would have benefited the new notional purchaser and not the old notional seller, such as the Claimants.
- 14-21 Accordingly, the Tribunal decides that the Claimants' distributions as to return of capital on 30 December 2002, in the sums of MXN 12,495,000 for Gemplus and MXN 18,506,000 for Talsud must be deducted from these two amounts of compensation assessed as at 24 June 2001, subject to adjustment for currency exchange rates and interest.
- 14-22 *Dividends:* The position as regards the dividend is, in part, materially similar. Given the valuation date of 24 June 2001, it must follow that the part of these dividend relating to the period after the hypothetical sale of 24 June 2001 to 31 December 2001 would have benefited the new notional buyer and not the old notional seller, such as the Claimants (in contrast to the part relating to the period before 24 June 2001 which would benefit the seller).
- 14-23 Accordingly, the Tribunal decides that the Claimants' distributions as to dividends in December 2002, in the sums of MXN 1,693,103 for Gemplus and MXN 2,500, 349 for Talsud must be deducted from these two amounts of compensation assessed as at 24 June 2001, subject to adjustment for currency exchange rates and interest.
- 14-24 *Expenses:* The position regarding the reimbursement of expenses is materially different. The Tribunal considers that none of these distributions should be deducted from the two amounts of compensation. These payments were not received by the Claimants as

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<sup>1</sup> See Ripinsky & Williams, *Damages in International Investment Law*, (BICCL, 2008) at p. 296 and Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer, 2008), at pp. 198-201.



shareholders but arose from a separate transaction; and that transaction pre-dated the valuation date of 24 June 2001.

14-25 With the following schedule, the Tribunal summarises of the Claimants' respective positions in regard to the relevant distributions to be deducted from the amounts of compensation, converted from MXN to US\$ as at the dates of payment to the Claimants<sup>2</sup>:

*Relevant Distributions to Claimants*  
(MXN / US\$)

Distributions	Talsud		Gemplus	
	(MXN)	(US\$)	(MXN)	(US\$)
Return of Capital (30 December 2002)	18,506,000	1,784,141	12,495,000	1,204,628
Dividends (50%) (4 December 2002)	2,500,349	244,593	1,693,103	165,625
Total	21,006,349	2,028,734	14,188,103	1,370,253

**(05) THE TRIBUNAL'S DECISION**

14-26 For the reasons set out above, the Tribunal decides that, as at 30 December 2002, Gemplus had received the equivalent of US\$ 1,370,253 and Talsud the equivalent of US\$ 2,028,734, as dividends and return of capital, to be deducted from the compensation assessed, as at 24 June 2001, in the amounts of US\$ 5,178,022 for Gemplus and US\$ 7,508,133 for Talsud - subject to adjustments for interest as later considered in Part XVI of this Award in regard to Issue K.

<sup>2</sup> i.e. US1 = MXN 10.2225 for 4 December 2002 and MXN 10.3725 for 30 December 2002: see U.S. Federal Reserve Statistical Release, H10 Foreign Exchange Rates (weekly), Historical Rates for Mexico, available at [http://www.federalreserve.gov/releases/H10/hist/dat00\\_mx.htm](http://www.federalreserve.gov/releases/H10/hist/dat00_mx.htm).

## ***PART XV: CONCLUSION AND SUMMARY***

- 15.1. ***Introduction:*** The Tribunal here summarises its decisions in this Award so far, as regards Issues A-J (subject to interest, currency and costs), by reference also to the Parties' respective claims for relief set out above in Part I(06) of this Award.
- 15.2. ***Issue A - Jurisdiction:*** As determined in Part V of this Award, the Tribunal decides to assume jurisdiction over all the claims pleaded against the Respondent in these arbitration proceedings by Gemplus (Gemplus S.A.), having competence to do so (as with all Talsud's pleaded claims); the Tribunal decides that it has no jurisdiction in regards to the claims pleaded by Gemplus Industrial (Gemplus Industrial S.A. de C.V.); and, whilst the Tribunal has jurisdiction over the claims pleaded by SLP (SLP S.A.), the latter's claims must fail *in limine* on the primary case advanced by the Gemplus Claimants themselves (including SLP). Accordingly, in addressing the merits of Claimants' substantive claims in this Award, the reference to "the Claimants" should be understood as referring only to Gemplus and Talsud.
- 15.3. To this extent only, the Tribunal grants the relief claimed by the Claimants set out in Paragraphs 1-52(A)(1) and 1-52(B)(1) of this Award and dismisses the relief claimed by the Respondent set out in Paragraph 1-53 of this Award.
- 15.4. ***Issue B - Liability General Approach:*** As determined (inter alia) in Part VI of this Award, the Tribunal addresses the Claimants' claims in this Award only as treaty claims under the respective Argentina and France BITs (together with international law) and not as contractual claims under the Concession Agreement or infringements of Mexican law; and the Tribunal treats the Claimants as different and distinct legal persons from both the Concessionaire and its majority shareholder.
- 15.5. ***Issue C - FET:*** As determined in Part VII of this Award, the Tribunal does not consider that the Claimants established any claim for breach of the fair and equitable standards (FET) in Article 3 of the Argentina BIT or Article 4 of the France BIT based on events prior to 25 June 2001 when the Respondent's Secretariat ordered the

Requisition. The Tribunal decides, conversely, that the Claimants established their FET claims in regard to both the Requisition of 25 June 2001 and the Revocation of 13 December 2002, with the interim period comprising composite acts consequential upon the Secretariat's decisions in regard to the Requisition and Revocation. For the purpose of establishing the first date of the FET breaches of both BITs by the Respondent, whether as a completed act or as the first of series of composite acts, the Tribunal decides that date as 25 June 2001.

- 15.6. To this extent only, the Tribunal grants the relief claimed by the Claimants set out in Paragraphs 1-50(i)(1) and 1-51 of this Award.
- 15.7. ***Issue D - Expropriation:*** As determined in Part VIII of this Award, the Tribunal decides that the Claimants' investments were unlawfully expropriated by the Respondent, indirectly with the Requisition on 25 June 2001 and directly with the Revocation on 13 December 2002, both in violation of Article 5 (1) of the Argentina BIT and Article 5 (1) of the France BIT, with the interim period comprising composite acts consequential upon the Secretariat's decisions in regard to the Requisition and Revocation. For the purpose of establishing the first date of the breaches of both BITs as regards unlawful expropriation by the Respondent, whether as a completed act or as the first of a series of composite acts, the Tribunal decides that date as 25 June 2001.
- 15.8. To this extent only, the Tribunal grants the relief claimed by the Claimants set out in Paragraphs 1-50(i)(4)&(5) and 1-51 of this Award.
- 15.9. ***Issue E – 'Protection and Security':*** As determined in Part IX of this Award, the Tribunal decides that the Claimants have not established any breach of the 'protection' provisions in Article 4 of the France BIT and Article 3 of the Argentina BIT; and these claims are therefore dismissed by the Tribunal.
- 15.10. To this extent, the Tribunal rejects the relief claimed by the Claimants set out in Paragraph 1-50(i)(3) and 1-51 of this Award.
- 15.11. ***Issue F – NLF/MFN "National Security":*** As determined in Part X of this Award, the Tribunal decides that, as the 'national security' provision in Article 2(5) of the Argentina BIT (NLF/MFN) was never invoked by the Respondent as a defence to Talsud's claim (or any other claim by any of the Claimants), no decision in respect

of the Claimants' submissions is required of the Tribunal, save to dismiss them as otiose in these arbitration proceedings.

- 15.12. To this extent only, the Tribunal rejects the relief claimed by the Claimants set out in Paragraphs 1-50(i)(2) and 1-51 of this Award.
- 15.13. **Issue G – Causation and Fault:** As determined in Part XI of this Award, the Tribunal decides that the Respondent's unlawful conduct under the France and Argentina BITs caused loss to the Claimants, to which neither of these Claimants materially contributed for the purpose of extinguishing or reducing the Respondent's liability to pay compensation to these Claimants.
- 15.14. **Issue H – Compensation General Approach:** As determined (inter alia) in Part XII of this Award, the Tribunal decides that the Claimants' claims for compensation derive only from their status as investors with investments in the form of their respective minority shareholdings in the Concessionaire, as distinct from any claim by the Concessionaire itself (or its majority shareholder); that the Claimants' shares in the Concessionaire are currently worthless and have been so, effectively, from 31 December 2002; that both under international law and (directly or by analogy) Article 5 of the France and Argentina BITs, the relevant date for assessing compensation due to the Claimants is 24 June 2001 (being the day preceding the unlawful Requisition of 25 June 2001); and that the period of the Concession Agreement is to be treated as not extending beyond 14 September 2009, i.e. 8.25 years after the Requisition of 25 June 2001.
- 15.15. **Issue I – Compensation Lost Future Profits:** As determined in Part XIII of this Award in regard to the Claimants' claims for compensation for the lost value of their respective shares in the Concessionaire as at 24 June 2001 (whether advanced as the Respondent's liability for unlawful expropriation or for breach of the FET standards in the France and Argentina BITs or both), the Tribunal decides the Claimants' loss to be proven in these arbitration proceedings in the total amount of US\$ 14,340,872 , i.e. US\$ 5,853,417 for Gemplus (as to its 20% shareholding in the Concessionaire) and US\$ 8,487,455 for Talsud (as to its 29% shareholding in the Concessionaire) – subject to Issues J and K.

- 15.16. **Issue J – Compensation Past Payments:** As determined in Part XIV of this Award, the Tribunal decides that, as at 30 December 2002, Gemplus had received the equivalent of US\$ 1,370,253 and Talsud had received the equivalent of US\$ 2,028,734 as dividends and return of capital, to be deducted from the compensation assessed as at 24 June 2001 (in the amounts of US\$ 5,853,417 for Gemplus and US\$ 8,487,455 for Talsud), thereby producing the lower figures of US\$ 4,483,164 for Gemplus and US\$ 6,458,721 for Talsud as compensation due by the Respondent - subject to Issue K below.
- 15.17. To this extent only, the Tribunal grants the relief claimed by the Claimants set out in Paragraphs 1-50(ii), 1-5, 1-52(A)(2) and 1-52(B)(2) of this Award and dismisses the relief claimed by the Respondent set out in Paragraph 1-53 of this Award.
- 15.18. **Issues K & L:** The Tribunal considers Issues K and L, as to Currency & Interest and Legal & Arbitration Costs respectively, in Parts XVI and XVII of this Award below.

***PART XVI: ISSUE K – CURRENCY AND INTEREST***

***(01) INTRODUCTION***

16-1 In this part of the Award, the Tribunal considers the appropriate currency and interest to apply to the sums calculated as compensation for the Respondent's breach of the two BITs in regard to the FET standards and unlawful expropriation, as decided by the Tribunal in Parts XII, XIII, XIV and XV of this Award.

16-2 Neither BIT provides expressly for the specific currency or interest applicable in the case of a breach of the FET standards or unlawful expropriation, in contrast to compensation for lawful expropriation under Article 5 of the two BITs.

16-3 Article 5(4) of the Argentina BIT provides as to lawful expropriation, in relevant part, as follows:

*“4. The amount paid shall be no less than the equivalent amount which would have been paid as indemnification on the date of expropriation in a freely-convertible currency on the international financial market, that currency having been converted to the standard market quotation on the date of valuation, plus interest corresponding to a reasonable commercial rate for that currency until the date of payment.”*

*[Emphasis added]*

16-4 Article 5(3) of the France BIT provides likewise, in relevant part, as follows:

*“3. The indemnification shall be equivalent to the fair market value or, in the absence of such value, to the actual value of the expropriated or nationalized investment immediately before the expropriation or nationalization was carried out and shall not reflect any changes in the value which arise as a result of the expropriation becoming known prior to the date of expropriation. Valuation criteria shall include going*

*concern value, asset value including the declared tax value of tangible property and any other criteria which, in the circumstances, are appropriate to determine fair market value. The aforementioned indemnification, its amount and its mode of payment shall be fixed no later than the date of deprivation. Indemnification will be subject to interest calculated at the applicable market rate until the date of payment.”*

*[Emphasis added]*

- 16-5 As to appropriate currency for lawful expropriation, it will be noted that the Argentina BIT expressly refers to an amount “in a freely-convertible currency on the international financial market, that currency having been converted to the standard market quotation on the date of valuation ...”. In contrast, the France BIT has no express provision regarding the currency in which such compensation is payable by the Respondent for breach of the BIT, save for the broad reference to “any other criteria.”
- 16-6 As to appropriate interest for lawful expropriation, it will be noted that both BITs provide expressly for interest. The Argentina BIT provides for pre-award and post-award interest from the date of valuation “corresponding to a reasonable commercial rate for that currency.” The France BIT likewise provides for pre-award and post-award interest from the date of valuation “calculated at the applicable market rate”

## **(02) THE CLAIMANTS’ CASE**

- 16-7 As to currency, as already noted above, the Claimants seek an order for compensation calculated in Mexican currency as at the date of valuation but converted for payment by the Respondent into the currency of the United States of America, using an exchange rate as of the date of the Award (Claimants’ Post-Hearing Br., para 70 at 20).
- 16-8 As to interest, the Claimants submit that the BITs respectively require interest at a “reasonable commercial rate for that currency” (Argentina BIT, Art. 5.4) and at the “applicable market rate” (France BIT, Art. 5.3). It is the Claimants’ contention that these provisions both express the standard prescribed by international law for the

calculation of interest, citing the following passage from Brower and Sharpe, *Awards of Compound Interest in International Arbitration* (Quan. Mem. at 82):

“*[i]nternational arbitral tribunals consistently award interest to prevailing parties as compensation for the temporary withholding of their money. The Iran-United States Claims Tribunal has noted that ‘it is customary for arbitral tribunals to award interest as part of an award for damages’, even in ‘the absence of any express reference to interest in the compromis’. Indeed, arbitral tribunals’ inherent authority to award interest is so well recognized, and is of such fundamental importance, that the right to interest has become part of the lex mercatoria.*”

16-9 Although the BITs are silent as to whether interest should be compounded or not, the Claimants contend that current arbitral practice supports the compounding of interest (Quan. Mem. at 29-31):

“85. *The current practice of international arbitral tribunals demonstrates that compounding interest is a commercially reasonable practice and is appropriate in this case. According to Mann, “compound interest may be and, in the absence of special circumstances, should be awarded to the claimant as damages by international tribunals.”*

[...]

87. *Professor Gotanda, a recognised expert on the subject of damages and compensation in international arbitration, agrees:*

*‘[i]n the modern world of international commerce, almost all financing and investment vehicles involve compound, as opposed to simple, interest. [...] By awarding compound interest, therefore, the model avoids leaving the claimant in a much worse position than it would have been in had the money owed been timely paid.’*

88. *ICSID tribunals have awarded compound interest in recent expropriation cases. In Wena v. Egypt the Tribunal found that compound interest “is generally appropriate in most modern commercial arbitrations,” adding:*

*‘[I]ike the distinguished panel in the recently-issued Metalclad decision, this Tribunal also has determined that compounded interest will best ‘restore the Claimant to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place.’*

89. *The Annulment Committee in the Wena case confirmed the Tribunal’s determination of the interest award. In doing so, the former stated that*



*international law and ICSID practice offered a variety of alternatives that include the compounding of interests. The Annulment Committee considered such a determination of interest compatible with the standard of compensation required by international law:*

*'compensation must be, first, 'prompt, adequate and effective' and, second, 'compensation shall amount to the market value of the investment expropriated immediately before the expropriation itself. Although not referring to interest, the provision must be read as including a determination of interest that is compatible with those two principles. In particular, the compensation must not be eroded by the passage of time or by the diminution in the market value. The award of interest that reflects such international business practices meets these two objectives.*

*The option the Tribunal took was in the view of this Committee within the Tribunal's power. International law and ICSID practice, unlike the Egyptian Civil Code, offer a variety of alternatives that are compatible with those objectives. These alternatives include the compounding of interest in some cases. Whether among the many alternatives are variable under such practice the Tribunal chose the most appropriate in the circumstances of the case is not for this Committee to say as such matter belongs to the merits of the decision [...]*

90. *In Compañía del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica, the tribunal also found it appropriate to award interest, compounded annually:*

*'In particular, where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.'*

91. *Other ICSID tribunals have also awarded compound interest; as have tribunals in NAFTA cases and other investment disputes."*

*[Footnotes omitted]*

16-10 The Claimants submit that this approach is consistent with the determination of their expert, LECG/Horwath of the most appropriate rate of interest in this case - the rate of return that would have been available to the Claimants but for their investment in the Concessionaire, that is the CETES (Certificados de la Tesoría de la Federación) 364 day Mexican government bond rate, compounded annually, at the lowest yielding rate in their calculations (LECG First Expert Report, paras. 66-67 at 18-19; Claimants' Post-Hearing Br., para. 87 at 23).

16-11 LECG/Horwath calculated the interest on the Claimants' alleged losses from the Claimants' alleged date of valuation, i.e. 20 August 2000 (LECG First Expert Report, Sched. 15), as follows:

Schedule 15

CONCESIONARIA RENAVE, S.A. DE C.V.

Pre-Award Interest Compounded Annually

August 20, 2000 to February 29, 2008

(Amounts Reflected in Mexican Currency or "MXN")

Beginning Date	End Date	Days	Pre-Award Interest Rate	Principal Value	Pre-Award Interest	Cumulative Pre-Award Interest
8/20/2000	8/8/2001	354	16.95%	\$ 754,693,000	\$ 124,065,326	\$ 124,065,326
8/9/2001	8/7/2002	364	11.44%	878,758,326	100,254,528	224,319,854
8/8/2002	8/6/2003	364	8.56%	979,012,854	83,573,902	301,893,756
8/7/2003	8/4/2004	364	6.61%	1,062,586,756	69,853,176	377,746,932
8/5/2004	8/3/2005	364	8.55%	1,132,439,932	96,558,344	474,305,276
8/4/2005	8/2/2006	364	9.60%	1,228,998,276	117,660,591	581,965,867
8/3/2006	8/1/2007	364	7.54%	1,346,658,867	101,259,892	693,225,759
8/2/2007	2/29/2008	212	7.54%	1,447,918,759	63,236,863	756,462,622
					\$ 756,462,622	

		Daily Interest
Pre-Award Interest – 100% Interest (Rounded)	\$ 756,462,622	\$ 298,287
Pre-Award Interest – 29% Interest – Talsud	\$ 219,374,160	\$ 86,503
Pre-Award Interest – 20% Interest - Gemplus	\$ 151,292,524	\$ 59,657

Source: CETEs published interest rates from Banco de México for 364-day bonds from August 2000 to August 2006.  
(<http://www.banxico.org.mx/polmoneinflacion/estadisticas/tasasInteres/tasasInteres.html>)

\*Rates are based on date of placement for bond issue in italics.

\*Rates for 8/2/2007 to 2/29/2008 were assumed to be 7.54%.

**(03) THE RESPONDENT'S CASE**

16-12 As to currency, the Respondent submits that, because the Claimants expected to earn Mexican pesos through their investment in the Concessionaire and the damages calculations have been calculated in pesos, the Award should also be denominated in pesos (Respondent's Post-Hearing Br., para. 53 at 23).

16-13 As to interest, assuming a principal sum expressed in Mexican pesos, the Respondent submits that interest should be calculated according to the Mexican CETES rates. However, the Respondent submits that the 28 day rate is "a much more commonly used economic indicator than the 364 day rate proposed by the Claimants", thereby satisfying the requirement for interest at the "applicable market rate" in the Mexico-France BIT and for a "reasonable commercial rate" in the Argentina BIT (Respondent's Post-Hearing Br., para. 54 at 23-24).

16-14 The Respondent objects to compound interest in this case, for the following reasons (Respondent's Post-Hearing Br. at 24):

*"55. Mexico disagrees with the Claimants' contention that compound interest should be awarded. While there are examples in the jurisprudence of awards of compound interest, there are also numerous examples of awards of simple interest. There is no hard and fast rule.*

*56. There is no reason to benefit the Claimants with an award of compound interest where: (i) the conduct of the Claimants (or a person for whom they are responsible) is the underlying cause of the events giving rise to the claim; (ii) there was no effort made by the Claimants to cure the effects of the problem; (iii) it is virtually certain the Claimants' business venture would have collapsed had the government not appointed an administrative intervener; (iv) they were paid dividends and a return of all variable capital which compensated them, in whole or substantial part, for the amounts they invested. Presumably since its repayment, that variable*

*capital has been put to other uses by each Claimant; it is certainly no longer invested and at risk in Renave.”*

*[Footnotes omitted]*

- 16-15 The Respondent submits that, in the event of any compensation ordered by the Tribunal, simple interest at the 28 day CETES rate should be awarded as from the valuation date (Respondent’s Post-Hearing Br., para 57 at 24).

**(04) THE TRIBUNAL’S ANALYSIS**

- 16-16 *General Approach.* As already decided earlier in Part XII of this Award, the Tribunal is guided generally by the provisions of the two BITs on compensation for lawful expropriation, as regards the consequences of the Respondent’s breach of the BITs in regard to the FET standards and unlawful expropriation. For the same reasons, the Tribunal here decides to be guided generally (inter alia) by the provisions of the BITs as regards appropriate currency and interest.
- 16-17 *Currency:* As regards appropriate currency, as cited above, Article 5.4 of the Argentina BIT provides for payment in a freely-convertible currency assessed as at the date of valuation; and Article 5.3 of the France BIT provides for the Tribunal to fix the mode of payment “no later than the date of deprivation”. There is here no mandate requiring the Tribunal to assess the compensation in Mexican currency as at the date of valuation and to convert that amount into US\$ in the Award, using an exchange rate as at the date of that Award necessarily long after the date of valuation. There is also no reason to do so on the facts of this case. Accordingly, the Tribunal rejects the Claimants’ primary case on currency.
- 16-18 The Tribunal prefers the approach suggested by the two BITs, namely to convert the amount of compensation from Mexican currency to US\$ at the date of the Tribunal’s valuation, namely 24 June 2001. Given that the Claimants were foreign investors and that Mexican currency is historically subject to fluctuation, it would be reasonable to

assume that the Claimants, if fully compensated by the Respondent on 24 June 2001, would have required payment in US\$ or, if not paid in US\$ but in Mexican currency, that the Claimants would have immediately converted such compensation from Mexican currency into a reserve currency; and, in all the circumstances of this case, that currency would have been the currency of the United States of America for both Talsud and (at least initially) Gemplus.

- 16-19 Accordingly, in these arbitration proceedings, the Tribunal has decided to express its order for compensation in US currency, converted from Mexican currency as at 24 June 2001 at the exchange rate then prevailing commercially; namely: MXN 9.065 = US\$1.
- 16-20 *Principal sums:* The principal sums of compensation ordered by the Tribunal for payment by the Respondent to the Claimants under this Award are thus: (i) Gemplus: US\$ 4,483,164 (i.e. US\$ 5,853,417 less relevant deductions of US\$ 1,370,253) and (ii) Talsud: US\$ 6,458,721 (i.e. US\$ 8,487,455 less relevant deductions of US\$ 2,028,734).
- 16-21 *Interest:* As to starting-date and end-date for interest on the principal sums, the Tribunal decides that the former shall be 24 June 2001 and the latter the date of full payment by the Respondent under this Award.
- 16-22 It is however necessary to adjust for the Claimants' receipts of capital and 50% dividend in December 2002. Accordingly, the Tribunal decides that interest shall run on the greater sums of US\$ 5,853,417 for Gemplus and of US\$ 8,487,455 for Talsud from 24 June 2001 to 30 December 2002 (i.e. without deducting these receipts), a period of almost 18 months.
- 16-23 Both BITS refer to appropriate rates of interest in similar terms, as a reasonable commercial rate "for that currency" in the Argentina BIT and "applicable" market rate in the France BIT. The Tribunal considers it generally inappropriate, if not in this case also fundamentally wrong in principle, to apply any interest rate derived from one currency to a quite different currency, such as the Mexican and US currencies. Accordingly, the Tribunal decides not to apply either of the CETES rates advanced by the Parties to sums expressed in US\$.

- 16-24 The Tribunal decides that, for these US currency amounts owed by a friendly sovereign state to investors subject to the protection of two other friendly sovereign states, the appropriate base rate is the one-month US Treasury Bills annualised rate, as published by the US Federal Reserve Bank<sup>1</sup>. That rate was 3.49% in June 2001, falling to 1.19% in December 2002, rising to 4.96% in August 2006 and currently falling to less than 1%. Given the different financial status and rating for the two countries, it is necessary to adjust this base rate upwards to reflect an appropriate rate of interest for a US\$ debt owing by the Respondent, which the Tribunal fixes as an average uplift of 2% for the period from June 2001 to full payment under this award.
- 16-25 Conscious that this exercise is mathematically inexact and cannot fully replicate in fact an essentially hypothetical situation, the Tribunal fixes (i) a rate of interest of 4% (i.e. 2% plus 2%) for the period from 24 June 2001 to 30 December 2002; (ii) a rate of interest of 4.25% (i.e. 2.25% plus 2%) from 31 December 2002 to 31 December 2009; and (iii) a rate of interest of 2% from 1 January 2010 to full payment by the Respondent under this Award.
- 16-26 The Parties have expressed diverging views on whether this is an appropriate case for the application of compound, as opposed to simple, interest. As noted above, the BITS contain no express provision on compound interest. However the reference to “commercial” and “market” in Article 5 of these BITS both point to the permissible application of reasonable compound rates, given that it is the universal practice of banks and other loan providers in the world market to provide monies at a cost amounting to or equivalent to compound rates of interest and not simple interest. In addition, it is clear from the legal materials cited by the Claimants (summarised above, to which several more could be added) that the current practice of international tribunals (including ICSID) is to award compound and not simple interest. In the Tribunal’s opinion, there is now a form of ‘jurisprudence *constante*’ where the presumption has shifted from the position a decade or so ago with the result it would now be more appropriate to order compound interest, unless shown to be inappropriate in favour of

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<sup>1</sup> For the one-month US Treasury Bills annualised rates from June 2001 to date published by the US Federal Reserve Bank, see: [www.federalreserve.gov/releases/h15/data/Monthly/H15\\_TB\\_M3.txt](http://www.federalreserve.gov/releases/h15/data/Monthly/H15_TB_M3.txt)

simple interest, rather than vice-versa. As to rest-periods, the Tribunal is content to accept the Claimants' submission that these should be yearly rests.

16-27 Accordingly, in the light of the Tribunal's decisions as to interest, the relevant arithmetical exercise for interest can be summarised as follows:

*(A) First Period 24.06.2001 – 30.12.2002: Almost 18 months*

4% compounded (yearly rests) applied to (i) US\$ 5,853,417 (Gemplus) and (ii) US\$ 8,487,455 (Talsud):

US\$ 351,205 (Gemplus)

US\$ 514,340 (Talsud)

*(B) Second Period 31.12.2002 – 31.12.2009: 7 years*

4.25% compounded (yearly rests) applied to (i) US\$ 4,483,164 (Gemplus) and (ii) US\$ 6,458,721 (Talsud):

US\$ 1,516,384 (Gemplus)

US\$ 2,184,567 (Talsud)

*(C) Third Period 01.01.2010 – Full Payment*

2% compounded (yearly rests) applied to (i) US\$ 4,483,164 (Gemplus) and (ii) US\$ 6,458,721(Talsud):

This calculation will be readily made by the Parties but cannot, of course, be here made by the Tribunal.

***(05) THE TRIBUNAL'S DECISION***

16-28 For the reasons set out above, the Tribunal decides to order in this Award compensation expressed in the currency of the United States of America converted from Mexican currency as at 24 June 2001 (being the relevant date for assessing compensation) and to award compound interest on such compensation (with yearly rests) from 24 June 2001 until full payment by the Respondent to the Claimants.

16-29 In accordance with the rates of interest and principal sums calculated above, the Tribunal decides that compound interest accrues from 24 June 2001 to 31 December 2009 as follows:

US\$ 1,867,589 (Gemplus) (i.e. 351,205 + 1,516,384)

US\$ 2,698,907 (Talsud) (i.e. 514,340 + 2,184,567)

Interest on the principal sums of (i) US\$ 4,483,164 (Gemplus) and (ii) US\$ 6,458,721 (Talsud) shall carry compound interest at 2% (with annual rests) from 1 January 2010 until full payment by the Respondent to the Claimants under this Award.



**PART XVII: ISSUE L – LEGAL AND ARBITRATION COSTS**

**(01) INTRODUCTION**

17-1 The Tribunal’s power to award costs in these arbitration proceeding derives from Article 58 of the ICSID Arbitration (Additional Facility) Rules, which provides as follows:

*“Article 58*

*Cost of Proceeding*

- (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 costs 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.”*

17-2 Upon the conclusion of the main hearing in these proceedings on 27 February 2008, the Tribunal ordered the Parties to provide written submissions on costs. The date for providing costs submissions was subsequently extended by the Tribunal at the supplemental hearing on 28 May 2008, resulting in the Parties’ “June Submissions on Costs”. The Tribunal further invited the Parties to provide supplemental submissions on costs, among other matters, by its letters dated 1 and 7 October 2008, resulting in the Parties’ “October Submissions on Costs”.

**(02) THE CLAIMANTS' CASE**

17-3 The Claimants submit that, in principle, the losing party should pay the reasonable costs incurred by the successful party, including lawyers' and other professionals' fees and arbitration expenses and disbursements. The Claimants further submit that tribunals will also consider whether the losing party's case was presented in an efficient and professional manner. The Claimants rely on several ICSID and *ad hoc* arbitral awards in support of these propositions (Claimants' June Submission on Costs, paras. 4-15).

17-4 Among those cases discussed, the Claimants rely on the tribunal's award in *Azinian*, stating as follows (Claimants' June Submission on Costs, para. 12):

*"12. The first NAFTA tribunal to issue a final award, Azinian, stated the principle that "[i]n ordinary circumstances it is common in international arbitral proceedings that a losing claimant is ordered to bear the costs of the arbitration, as well as to contribute to the prevailing respondent's reasonable costs of representation. This practice serves the dual function of reparation and dissuasion." In that case, however, the tribunal concluded that in the special circumstances of the Azinian case the parties should bear their own costs. The Azinian tribunal set out the basic principles which it considered a NAFTA tribunal should consider in deciding the issue of costs. These were (i) the novelty of NAFTA as a dispute resolution mechanism (this was a particularly relevant factor in the Azinian case, as it was the first time a NAFTA tribunal issued an [] award and thus considered the issue of costs); (ii) whether the claimants presented its case in an efficient and professional manner; (iii) whether the respondent may be said to some extent to have invited litigation; and (iv) whether the persons most accountable for the claimant's wrongful behavior would be the least likely to be affected by an award on costs."*

17-5 Applying the *Azinian* criteria, which the Claimants contend are the "strictest articulated by any investment arbitration tribunal", the Claimants submit that they are entitled to their costs if successful in these proceedings, setting forth their reasoning as follows (Claimant' June Submission on Costs, paras. 16-22):

*"16. [...] As to the first point (novelty), the ICSID Additional Facility was created in 1978 and is certainly not novel. As to the fourth point (responsible party not bearing the costs), the illegal measures taken by*

*Mexico were the responsibility of Secofi, the predecessor to the Secretariat of Economy which represents Mexico in this arbitration. The responsible party would therefore directly bear the costs of this arbitration. It is further submitted, that the second (whether the respondent presented its case efficiently and professionally) and third (respondent invited litigation) factors support an award on costs in favour of the Claimants for the following reasons.*

17. *On the assumption that they are successful on the merits of their claims, the Tribunal will have found that the Claimants' treaty rights were breached by Mexico. The extreme rigour with which the claims made in this arbitration have been opposed by the Respondent will have been apparent to the Tribunal. This left the claimants with little choice but to bring these proceedings. Pursuant to the third Azinian factor, the Claimants are therefore entitled to their reasonable costs.*
18. *The Claimants further submit that they are entitled to their reasonable costs because the Respondent presented its case inefficiently. Not only were lengthy arguments made on jurisdiction, which were eventually abandoned, but an additional hearing had to be held in Washington, DC to discuss a point that had no bearing on the case. The Claimants submit that they should recover their costs of addressing the Respondent's flawed jurisdiction challenge and of the hearing on 28 May 2008 in any event. This is set out in detail below in Part IV, but the Claimants further rely on this to support their submission that they should recover their costs if they are successful on the merits.*
19. *The Tribunal should also take account of the fact that the Respondent raised every argument available to defend the claims including some which were implausible. [...]*
20. *The Respondent submitted a considerable amount of documents together with their pleadings. A total of 457 electronic documents were submitted by the Respondent, including dozens of press articles, some of dubious relevance to the claim, and the DVD of a documentary on Ricardo Cavallo. Many of these documents were not even referred to in the pleadings or evidence. The Tribunal will recall the Respondent's theatrical distribution of Exhibit R-144 on the 6<sup>th</sup> day of the hearing, although it had been referred to in pleadings or witnesses statement presented by the Respondent. This compares to approximately 235 electronic documents submitted by the Claimants.*
21. *Significant costs thus had to be expanded [sic] by the Claimants to respond to the Respondent's arguments. These were reasonable expenses. As stated by the ADC Tribunal, itself quoting Sylvania Technical Sys. Inc. v. Iran:*

*A test of reasonableness is not, however, an invitation to mere subjectivity. Objective tests of reasonableness of lawyers' fees are well-known. Such tests typically assign weight primarily to the time spent and complexity of the case. In modern practice, the amount of time required to be spent is often a gauge of the extent of the complexity involved. Where the Tribunal is presented with copies of bills for services or other appropriate evidence, indicating the time spent, the hourly billing rate, and a general description of the professional services rendered, its task need be neither onerous nor mysterious. The range of typical hourly billing rates is generally known and, as evidence before the Tribunal in various cases including this one indicates, it does not greatly differ between the United States and countries of Western Europe, where both claimants and respondents before the Tribunal typically hire their outside counsel. Just how much time any lawyer reasonably needs to accomplish a task can be measured by the number of issues involved in a case and the amount of evidence requiring analysis and presentation. While legal fees are not to be calculated on the basis of the pounds of paper involved, the Tribunal by the end of a case is able to have a fair idea, on the basis of the submissions made by both sides, of the approximate extent of the effort that was reasonably required.*

*Nor should the Tribunal neglect to consider the reality that legal bills are usually first submitted to businessmen. The pragmatic fact that a businessman has agreed to pay a bill, not knowing whether or not the Tribunal would reimburse the expenses, is a strong indication that the amount billed was considered reasonable by a reasonable man spending his own money, or the money of the corporation he services. That is a classic test of reasonableness."*

22. *The reasonableness of the Claimants' costs is further illustrated by the size of its legal team compared to that of the Respondent. Whereas four lawyers appeared on behalf of the two Claimants, Mexico was represented by four legal teams and 15 lawyers. The Claimants' legal team at Baker & McKenzie comprised David Fraser with an average hourly billing rate of £450, associate Edward Poulton with an average hourly billing rate of £320 and consultant Alexis Martinez with an average hourly rate of £130."*

*[Footnotes omitted]*

- 17-6 In sum, the Claimants claim a total of US\$ 5,362,973.22 (US\$ 2,314,031.74 on account of Gemplus and US\$ 3,048,941.48 on account of Talsud) (Claimants' June Submissions on Costs, para. 24; and Claimants' October Submissions on Costs, at 1).

17-7 The Claimants further argue that, in any event of the cause, the Respondent should bear “the unjustified costs” they incurred in order to address the Respondent’s jurisdictional arguments and to attend the supplemental 28 May 2008 hearing.

17-8 As regards costs associated with defence of the jurisdictional arguments, the Claimants submit that the Respondent’s prosecution of these arguments was unreasonable, identifying their costs associated with the defence of these arguments in the amount of US\$ 160,443.11 (US\$ 139,904.72 on account of Gemplus and US\$ 20,538.39 on account of Talsud) (Claimants’ June Submissions on Costs, paras. 26-28).

17-9 As regards the supplemental hearing of 28 May 2008, the Claimants submit as follows (Claimants’ June Submission on Costs, para. 29):

*“29. In addition, the Respondent produced a declaration from Miguel de Erice on the penultimate day of the first hearing contradicting a minor factual statement made by Victor Taiariol. Even though the Claimants made clear that they placed no reliance on that point, the insistence by the Respondent that this should be admitted in evidence (and the unavailability of Mr. de Erice to travel to Washington to give oral evidence during the three days that remained for the scheduled hearing in February) made it necessary to convene a new hearing in Washington, DC at a later stage to confront the witnesses. This was an indulgence granted to the Respondent. This hearing took place on 28 May 2008 and proved inconclusive. No issue relevant to the outcome of the dispute was addressed during the extra hearing day and the Respondent should pay all costs incurred by the Claimants in preparing for and attending the hearing.”*

*[Footnotes omitted]*

17-10 On this basis, the Claimants claim their full costs associated with the supplemental hearing, identifying those costs as totaling US\$ 274,687.53 (US\$ 129,990.67 on account of Gemplus and US\$ 144,696.86 on account of Talsud).

**(03) THE RESPONDENT'S CASE**

- 17-11 In its June Submissions on Costs, the Respondent claimed total costs in the amount of US\$2,319,841.70, which comprise the costs of external legal counsel, expert fees and disbursements, witness expenses, administrative expenses and other expenses incurred in relation to attendance of the hearing (Respondent's June Submissions on Costs, at 1).
- 17-12 In its supplemental submissions on Costs, the Respondent provided a revised statement of its actual costs incurred in these proceedings, totaling US\$ 2,553,437.68 (Respondent's October Submissions on Costs, at 2).
- 17-13 The Respondent subsequently provided substantive costs submissions in response to the Claimants' arguments in support of a costs award. As a general matter, the Respondent submits that the Claimants' submissions are premised upon the assumption that the measures taken by Mexico were unlawful, as follows (Respondent's October Submissions on Costs, at 1):
- “The Respondent obviously has a very different view of its response to various events (particularly its attempt to forge consensus in support of an affordable motor vehicle registry for used vehicles during July-August 2000 and its responses to the train of events occasioned by the Cavallo affair). There is a distinct lack of any recognition by the Claimants of their contribution to the crisis and to the collapse of public confidence in the entire project.”*
- 17-14 The Respondent next contends that its defence of the claims brought against it was conducted responsibly, rejecting the Claimant's suggestion that it defended those claims “with extreme rigour” in the event that this characterization is “intended to suggest that it did anything other than defend its legal interests vigorously, as it is entitled to do” (Respondent's October Submissions on Costs, at 1).
- 17-15 In respect of the Claimants' submissions on the Respondent's jurisdictional objections, the Respondent contends as follows (Respondent's October Submissions on Costs, at 1):

*“With respect to the jurisdictional objection mounted against Gemplus, a careful review of the Gemplus re-organization raises serious questions about the continuous nationality issue. Reserving in Gemplus Luxembourg, a non-beneficiary of the France-Mexico treaty, the right to re-assign possession of the claim parked in SLP, S.A., is objectionable, as is the attempt by Gemplus Mexico to launch an international claim against its own State (in the absence of text in the bilateral treaty akin to Article 25(2)(b) of the ICSID Convention). Neither objection is, with respect, complex or convoluted, and both go to the crucial issue of standing to bring an international claim.*

*Mexico pressed the objections as far as it could. It will be recalled that the Tribunal accepted the Claimants’ invocation of privilege and declined to order them to produce further documents pertaining to the Gemplus re-organization. Therefore Mexico could not develop the objection any further. Contrary to the Claimants’ Submission (at paragraph 18), the objections were not “eventually abandoned,” but rather are maintained.*

*With respect to the jurisdictional challenge against Talsud, that objection was withdrawn in Mexico’s Rejoinder (at paragraph 128) after additional evidence was filed in the Reply.”*

*[Footnotes omitted]*

- 17-16 The Respondent further objects to the Claimants’ characterization of its presentation of its case as inefficient, submitting in particular with regard to the supplemental hearing as follows (Respondent’s October Submissions on Costs, at 2):

*“As for the holding of the 28 May 2008 hearing, which the Claimants describe hopefully as having “no bearing on the case” (at paragraph 18) and Mr. Taiariol’s testimony on his departure from Mexico as “a minor factual statement” (at paragraph 29), the decision to schedule the hearing was the Tribunal’s after reading Mr. de Erice’s letter denouncing Mr. Taiariol’s testimony and entering it into the record. The Respondent does not view the Tribunal’s treatment of Mr. Taiariol’s testimony as an “indulgence,” nor does it share the Claimants’ view (at paragraph 29) that the hearing proved “inconsequential.”*

*It is recalled that the President made it clear to the Claimants that they were advised to provide documentary evidence in support of any reply testimony that they might file in response to Mr. de Erice (although such documentary evidence as was later provided did not support Mr. Taiariol’s account of the alleged Taiariol-de Erice-Creel meeting and subsequent escorted visit to the airport and his own story kept changing).*

*The Claimants seem to imply that the President and 66% shareholder of a claimant was free to give false testimony that was later denied by the claimant's former lawyer and unsupported by Talsud's other representative, Mr. Siegrist, so long as (in their view) it was not material to their case. The Respondent has a very different view. If this is what claimants are free to do in investment arbitrations, the system will be short-lived indeed. Moreover, had his story not been denounced by Talsud's former counsel, the Respondent believes that the Claimants would not have been so quick to distance themselves from his testimony on this point when Mexico applied to adduce the de Erice letter and it would have played a prominent role in their closing arguments. For those reasons, the Respondent disagrees that its arguments made in the light of Mr. Taiariol's testimony and behaviour were in any way implausible."*

- 17-17 With regard to the relative size of the counsel teams on each side, the Respondent submits that this factor is irrelevant, contending that the issue is rather the size of the overall bills from counsel. In this respect, the Respondent submits that the billing rates for the Claimants' counsel are excessive and the relative efficiencies of counsel are demonstrated by the size of the fee accounts (Respondent's October Submissions on Costs, at 2).
- 17-18 The Respondent further defended the volume of documents filed by the Respondent in these proceedings, including the DVD, submitting that it was "crucial that the Tribunal, two members of which likely had never heard of the Renave project and the events of August-September 2000 before this case, had as full an understanding of the circumstances surrounding the Secretariat's actions as possible" (Respondent's October Submissions on Costs, at 3).
- 17-19 In summary, the Respondent submits that whilst the Tribunal may decide this is not a case in which a successful claimant ought to be subject to a costs award, costs should, at a minimum, be awarded in the Respondent's favour in respect of the expenses occasioned by Mr. Taiariol's testimony (Respondent's October Submissions on Costs, at 3).



#### **(04) THE TRIBUNAL'S ANALYSIS**

- 17-20 *General Approach.* The Tribunal observes that the Claimants have prevailed overall on jurisdiction, liability, causation and (to a lesser extent) quantum, leading to an Award by this Tribunal for significant amounts to be paid by the Respondent to the Claimants (i.e. Gemplus and Talsud). In short, whilst falling short of their pleaded claims, the Claimants' case has broadly prevailed in these proceedings; and the Respondent's case has not prevailed.
- 17-21 Article 58(1) of the ICSID Arbitration (Additional Facility) Rules confers a broad discretion on the Tribunal, as to legal and arbitration costs. Moreover, following the general principle expressed in *Chorzow Factory*, that "reparation must, as far as possible, wipe out all the consequences of the illegal act", it is the Tribunal's view that compensation should include a claimant's reasonable costs, both reasonably incurred and reasonable in amount, in successfully and necessarily asserting its disputed legal rights in arbitration proceedings against an unsuccessful respondent.
- 17-22 This general approach is consistent with the recent practice of other arbitral tribunals in investment treaty arbitrations (including ICSID), which take as their starting-point the general principle that the successful party should have its reasonable costs paid by the unsuccessful party, in accordance with the general position in other forms of transnational commercial arbitration.<sup>1</sup> The Tribunal considers the analysis of the so-called "loser pays principle" in the award *International Thunderbird Gaming Corp. v. Mexico* to be particularly apposite to the present case:

*"It is also debated whether "the loser pays" (or "costs follow the event") rule should be applied in international investment arbitration. It is indeed true that in many cases, notwithstanding the fact that the investor is not the prevailing party, the investor is not condemned to pay the costs of the*

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<sup>1</sup> See e.g. *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No. ARB/03/16), Award of 2 October 2006, paras. 531-534.

*government. The Tribunal fails to grasp the rationale of this view, except in the case of an investor with limited financial resources where considerations of access to justice may play a role. Barring that, it appears to the Tribunal that the same rules should apply to international investment arbitration as apply in other international arbitration proceedings.”<sup>2</sup>*

17-23 *Other Factors:* As regards any special factors arising from the facts of this case, the Tribunal dismisses the Claimants’ criticisms of the Respondent. The latter conducted itself in these proceedings with propriety and professionalism; and it is no criticism for the Tribunal here to confirm that the Respondent’s counsel defended the Respondent’s interests vigorously; indeed that should be understood as a compliment in this case. The Tribunal likewise rejects any criticism of the Respondent for asserting and then abandoning its jurisdictional challenge to Talsud’s claims: it was a legitimate challenge on perceived facts when first raised; and when the full facts emerged, the challenge was promptly dropped by the Respondent. The Tribunal also rejects the Claimants’ criticisms of the Respondent in regard to the supplemental hearing. The Tribunal found that further factual evidence more than useful, albeit not for the primary purpose invoked by the Respondent. Conversely, the Tribunal accepts that the Gemplus Claimants were reasonable in introducing two additional parties in support of their alternative case on jurisdiction. Indeed, the addition of these two parties was not responsible for any significant additional costs by either side.

17-24 In short, this was never an easy, simple or straightforward case; and the Tribunal records its appreciation to both sides for the responsible conduct and presentation of their respective cases. Accordingly, in the absence of any special factors, one way or the other, the Tribunal decides to apply the general principle that the Claimants, as the successful party, should recover their costs from the Respondent, as the unsuccessful party.

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<sup>2</sup> *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL (NAFTA), Award of 26 January 2006, at para. 214. This arbitration tribunal applied the four factors identified by the *Azinian* tribunal, deciding that the relatively successful respondent was entitled to recover from the relatively unsuccessful claimant an appropriate portion of its costs of legal representation and assistance.

- 17-25 *Amount of Costs.* As noted above, the Claimants claim costs in the total sum of US\$ 5,362,973.22. This amount significantly exceeds the Respondent's claim for costs, being less than 45% of the Claimants' costs; but the Tribunal does not consider the latter excessive for this case. It is well-known that legal costs incurred by respondent-state parties are usually much lower than costs incurred by claimant-private parties, partly because a claimant bears a greater burden in presenting and proving its case, partly because a state's billing practices with its legal representatives are different and partly, as here, where there is more than one claimant bringing claims under more than one treaty. The Tribunal also here bears much in mind the point made in the *ADC* and *Sylvania* awards (cited above), as to the "pragmatic fact" that the Claimants' legal bills had first to be presented to and paid by the Claimants at a time when the Claimants could not know whether or not the Tribunal would reimburse the Claimants.
- 17-26 In this case, the Tribunal sees no good reason to second-guess, with the advantage of hindsight, the Claimants' amount of costs; and it concludes that their claimed costs for these proceedings were both reasonably incurred and reasonable in amount rounded down to US\$ 2.3 million for Gemplus and US\$ 3 million for Talsud (making US\$ 5.3 million in all). The Tribunal adds an amount of US\$ 75,000 for each Claimant corresponding to their respective shares of the last advance requested by the Centre in January 2010, which had not been included in the Parties' Submissions on Costs of 2008.

#### ***(05) THE TRIBUNAL'S DECISION***

- 17-27 For the reasons set out above, the Tribunal awards the Claimants their costs in the total amount of US\$ 5,450,000, namely (i) US\$ 2.375 million for Gemplus and (ii) US\$ 3.075 million for Talsud.

***PART XVIII: OPERATIVE PART***

- 18-1 For the reasons set out above, by reference to the relief claimed by the Parties in these arbitration proceedings, the Tribunal awards as follows:
- 18-2 The Tribunal dismisses the Respondent's jurisdictional challenge against Gemplus S.A.; and the Tribunal declares that it has jurisdiction to decide on their merits all claims advanced by Gemplus S.A. and Talsud S.A. as Claimants against the Respondent in these arbitration proceedings under the France and Argentina Bilateral Investment Treaties respectively;
- 18-3 The Respondent has breached the fair and equitable treatment standards respectively applicable towards Gemplus S.A. and Talsud S.A. and their investments under the France and Argentina Bilateral Investment Treaties;
- 18-4 The Respondent has unlawfully expropriated the investments of Gemplus S.A. and Talsud S.A. in breach of the France and Argentina Bilateral Investment Treaties respectively;
- 18-5 The Respondent is liable to pay compensation for the losses caused by its said breaches of the Bilateral Investment Treaties in the principal sums of US\$ 4,483,164 (Four Million Four Hundred and Eighty-Three Thousand One Hundred and Sixty-Four United States Dollars) to Gemplus S.A. and US\$ 6,458,721 (Six Million Four Hundred and Fifty Eight Thousand Seven Hundred and Twenty-One United States Dollars) to Talsud S.A., both sums being assessed as at 24 June 2001 and converted from Mexican currency to the currency of the United States of America at the appropriate exchange rate then prevailing;

- 18-6 The Respondent is liable to pay compound interest on such compensation from 24 June 2001 to 31 December 2009 (with yearly rests) in the total sums of US\$ 1,867,589 (One Million Eight Hundred and Sixty Seven Thousand Five Hundred and Eighty Nine United States Dollars) to Gemplus S.A and US\$ 2,698,907 (Two Million Six Hundred and Ninety Eight Thousand Nine Hundred and Seven United States Dollars) to Talsud S.A.;
- 18-7 The Respondent is liable to pay compound interest on the said principal sums of US\$ 4,483,164 (Four Million Four Hundred and Eighty-Three Thousand One Hundred and Sixty-Four United States Dollars) and US\$ 6,458,721 (Six Million Four Hundred and Fifty Eight Thousand Seven Hundred and Twenty-One United States Dollars) from 1 January 2010 at 2% per annum (with annual rests) until full payment of such sums under this Award to Gemplus S.A. and Talsud S.A. respectively;
- 18-8 The Respondent is liable to pay to Gemplus S.A. and Talsud S.A. their costs of these arbitration proceedings in the sums of US\$ 2,375,000 (Two Million Three Hundred and Seventy-Five Thousand United States Dollars) and US\$ 3,075,000 (Three Million and Seventy-Five Thousand United States Dollars) respectively.
- 18-9 The Respondent shall bear all other costs of these arbitration proceedings in full, without recourse to any of the Claimants;
- 18-10 The Respondent shall pay forthwith to Gemplus S.A. and Talsud S.A. respectively all amounts which it is declared liable hereunder to pay; and
- 18-11 Save as aforesaid, all other claims by all Claimants and the Respondent made in these arbitration proceedings are hereby dismissed.

*L. Yves Fortier CC, QC*

*[SIGNED]*

*Date: 18 May/10*

*Eduardo Magallón Gómez*

*[SIGNED]*

*Date: 20/mayo/2010*

*V.V. Veeder QC*

*[SIGNED]*

*Date: 17.V.2010*