BEFORE THE HONORABLE TRIBUNAL ESTABLISHED PURSUANT TO THE CHAPTER XI OF THE NORTH AMERICA TRADE AGREEMENT (NAFTA)

B-MEX AND OTHERS
(CLAIMANTS)

v.

THE UNITED MEXICAN STATES,
(RESPONDENT)

ICSID CASE No. ARB(AF)/16/3

REPLY ON JURISDICTIONAL OBJECTIONS

Counsel for the United Mexican States:
Samantha Atayde Arellano

ASSISTED BY:

Secretaría de Economía
Ximena Iturriaga
Geovanni Hernández Salvador
Blanca del Carmen Martínez Mendoza

J. Cameron Mowatt, Law Corporation
J. Cameron Mowatt
Alejandro Barragán
Yuritzi Pérez

Pillsbury Winthrop Shaw Pittman LLP
Stephan E. Becker

1st December 2017

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GLOSSARY

Mexican Enterprises	Refers to: - Juegos de Video y Entretenimiento de México, S. de R.L., de C.V. - Juegos de Video y Entretenimiento del Sureste, S. de R.L., de C.V. - Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V., - Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V., - Juegos y Video de México, S. de R.L de C.V., - Exciting Games, S. de R.L. de C.V., (also referred to as E-Games) - Operadora Pesa, S. de R.L. de C.V., - Metrojuegos, S. de R.L. de C.V., (no longer part of these proceedings) and - Merca Gaming, S. de R.L. de C.V. (no longer part of these proceedings)[1]
Additional Mexican Enterprises	Refers to the Mexican companies not mentioned in the NOI, namely: - Operadora Pesa, S. de R.L. de C.V., - Metrojuegos, S. de R.L. de C.V., (no longer part of these proceedings) and - Merca Gaming, S. de R.L. de C.V. (no longer part of these proceedings) [2]
CJCI	Refers to the *Consultoría Jurídica de Comercio Internacional* (the department of the Ministry of the Economy in charge of defending México in investor-State proceedings)
Juegos Companies	Refers to: - Juegos de Video y Entretenimiento de México, S. de R.L. de C.V. (Juegos Naucalpan);

[1] Metrojuegos, S. de R.L. de C.V and Merca Gaming, S. de R.L. de C.V. are no longer part of these proceedings, Counter-Memorial on Jurisdictional Objections, footnote 452.

[2] Metrojuegos, S. de R.L. de C.V and Merca Gaming, S. de R.L. de C.V. are no longer part of these proceedings, Counter-Memorial on Jurisdictional Objections, footnote 452.

- Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Juegos Villahermosa);
- Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. (Juegos Puebla);
- Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. (Juegos DF); and
- Juegos y Videos de México, S. de R.L. de C.V. (Juegos Cuernavaca)

Original Claimants Refers to the eight Claimants who filed the NOI dated 23 May 2014:

- B-Mex, LLC,
- B-Mex II, LLC,
- Palmas South, LLC,
- Oaxaca Investments, LLC,
- Santa Fe Mexico Investments, LLC,
- Gordon Burr,
- Erin Burr, and
- John Conley

Additional Claimants Refers to the 31 Claimants whose name do not appear in the NOI, namely:

- Deana Anthone,
- Neil Ayervais,
- Douglas Black,
- Howard Burns,
- Mark Burr,
- David Figueiredo,
- Louis Fohn,
- Deborah Lombardi,
- P. Scott Lowery,
- Thomas Malley,
- Ralph Pittman,
- Dan Rudden,
- Marjorie "Peg" Rudden,
- Robert E. Sawdon,

- Randall Taylor,
- James H. Watson, Jr.,
- B-Cabo, LLC,
- Colorado Cancun, LLC,
- Caddis Capital, LLC,
- Diamond Financial Group, Inc.,
- EMI Consulting, LLC,
- Family Vacation Spending, LLC,
- Financial Visions, Inc.,
- J. Johnson Consulting, LLC,
- J. Paul Consulting,
- Las KDL, LLC,
- Mathis Family Partners, Ltd.,
- Palmas Holdings, Inc.,
- Trude Fund II, LLC,
- Trude Fund III, LLC, and
- Victory Fund, LLC.

NOI or Original NOI	Refers to the Notice of Intent submitted on 23 May 2014.
NOI Questionnaire	Refers to the letter, sent by Ms. Martínez, then "*Directora General Adjunta de Consultoría Jurídica de Comercio Internacional B*" (Deputy General Director of International Trade B) at the Ministry of Economy, to Ms. Menaker on 24 July 2014 seeking clarification of the NOI.
RFA	Request for Arbitration dated 15 June 2016.
RICO Claim	A civil action commenced in the United States District Court for the District of Colorado by the Claimants (except for B-Cabo LLC and Colorado Cancun, LLC) against Jose Benjamin Chow del Campo, Luc Pelchat and Alfonso Rendon Abud, alleging various violations of the Federal Racketeering Influenced and Corrupt Organizations Act (RICO) and Colorado Organized Crime Control Act (COCCA), common law fraud, civil theft, and conversion in connection with alleged fraudulent deprivation of title and control of the Juegos Companies.
Amended NOI	Refers to the Amended Notice of Intent dated 2 September 2016 (received on 5 September 2016).
VCLT	Vienna Convention on the Law of Treaties

White & Case Letter	Refers to the letter dated 16 January 2013 from Ms. Menaker of White & Case.

Preamble

1. This Reply is divided into two parts. Part One deals with the Respondent's challenge to jurisdiction based on the Claimants' failure to comply with NAFTA Article's 1119 and 1121. Part Two addresses the Claimants' failure to establish standing to sue on behalf of the Mexican Enterprises. Each section has its own introduction, submissions and request for relief and adopts the same defined terms that were used in the Memorial on Jurisdictional Objections.[3]

2. The Respondent's objective in this Reply is to address what it considers to be the Claimants' principal arguments in a logical, straightforward manner. The Respondent is not to be taken to have admitted any point of argument made in the Counter-Memorial on Jurisdictional Objections that the Claimants may contend has not been directly or expressly refuted. For the purposes of the record any such argument is expressly denied.

3. The Respondent will not address the factual background included in Section III.A of the Claimants' Counter-Memorial except to the extent that it considers it relevant to issues of jurisdiction. Failure to address any specific factual allegations should not be interpreted as the Respondent's acceptance thereof. For the purposes of the record, any such allegation of fact is expressly denied.

Part One - Failure of compliance with NAFTA Articles 1119 and 1121

A. Introduction

4. The Counter-Memorial characterizes the Respondent's objections to jurisdiction as "hyper-technical" in at least eight places.[4] The Claimants make this bold assertion notwithstanding that, in more that 20 years of NAFTA Chapter Eleven arbitration, there has never been a failure to identify the intended claimants in the notice of intent as required by Article 1119, or a failure to deliver a proper written consent to arbitration as required by Article 1121. These are clearly-worded, well-known requirements that virtually every NAFTA claimant has been able to meet.

5. The failures of compliance in this case are more properly characterized as blatant, extraordinary and egregious. They were rendered irreversible by the Claimants' failure to make any timely attempt to take corrective action, despite being informed of Mexico's objections within 12 days of the delivery of the Request for Arbitration. Mexico said clearly then and has steadfastly maintained throughout that, by failing to comply with Articles 1119 and 1121, the Claimants failed to engage Mexico's consent to arbitration of this dispute and failed to validly submit their claim to arbitration.

Article 1119 – Notice of Intent to Submit a Claim to Arbitration

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[3] See Glossary.

[4] Claimants' Counter-Memorial on Jurisdictional Objections, ¶¶ 1, 4, 7, 282, 297, 324, 352, and 365.

6. The Claimants do not dispute that the text of Article 1119 describes a mandatory requirement to deliver a notice of intent containing (*inter alia*) the names and addresses of the intended claimants. Rather, they contend that the 31 Additional Claimants should be excused from that requirement because they contend that it would have been "futile" to engage in negotiations after delivery of the NOI, and because they contend that Mexico has suffered no prejudice because of this failure of compliance.

7. First and foremost, as the Respondent stated in the Memorial, (i) whether or not consultations or negotiations under Article 1118 involving the Additional Claimants would have been "futile", and (ii) whether or not there was prejudice to Mexico from being kept unaware there of the existence of the 31 Additional Claimants, are *irrelevant* considerations[5]. A NAFTA Party is *entitled* to be notified, at least 90 days prior to submission of any Chapter Eleven claim, of (*inter alia*) the name and address of every intended claimant, and nothing other than an express waiver by the affected Party relieves any intended claimant of this requirement. Either there was compliance or there was not, and no amount of excuses or real or imagined fears of retaliation can validate the attempted submission of a claim by or on behalf of a claimant that has not been properly identified in a notice of intent that complies with Article 1119.

8. Second, the Respondent will in any event demonstrate that the Claimant's contention that consultations involving the Additional Claimants would have been "futile" is dubious, given the Original Claimants' rejection of the Respondent's repeated requests for information concerning the basis of their claims which were ultimately answered in an email from their lawyer stating "I don't have any additional information to provide right now. If the client decides to pursue the claim, I will get in touch with you"[6]. It is not for the eight Original Claimants to say what the other 31 would have done or, more importantly, what steps Mexico would have taken –if only to investigate the claim and prepare its defense– if timely notice had been given by the Additional Claimants. In other words, this is not a self-judging proposition.

9. One is driven to ask rhetorically, what prevented the Additional Claimants from complying with the simple, straight forward requirements of Article 1119? They had more than 24 months from the filing of the Original NOI to file a fresh or amended notice of intent prior to filing the RFA.[7] Nothing the Respondent did or failed to do had the effect of preventing or encouraging this failure of compliance. Indeed, the opposite is true –Mexico's responsible authorities, in the person of Deputy Director Ana Carla Martinez, repeatedly requested information needed to assess the validity of the claim that went unanswered.

Article 1121 – Conditions Precedent to Submission of a Claim to Arbitration

10. The language of Article 1121 could not be more precise. It states, under the heading "conditions precedent to submission of a claim to arbitration", that the Claimant *shall* consent to

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5 Memorial on Jurisdictional Objections, ¶¶54 and 68.

6 Exhibit R-004, p. 1.

7 The NOI was delivered on 23 May 2014. The RFA was filed on 15 June 2016. If the Claimants needed to file an amended or fresh notice of intent more than 90 days beforehand in order to meet a limitation period expiring in late June, they would have had to do so by mid-March 2016, about 19 months after filing the NOI.

arbitration in accordance with the procedures set out in the NAFTA, that such consent *shall* be in writing, *shall* be delivered to the disputing Party and *shall* be included in the submission of a claim to arbitration.

11. It is axiomatic that failure to submit a written consent in these terms to the disputing Party and to include such written consent with the submission of the claim to arbitration nullifies the attempted submission. The submission in this case was *void ab initio* and could not be corrected once the claim was registered by the ICSID.

12. Mexico additionally contends that, as a result of their failure to comply with this condition precedent, the Claimants failed to engage Mexico's consent to arbitration under Article 1122. Put simply, Mexico's consent is limited to arbitration in accordance with the procedures set out in the NAFTA (which include Articles 1119 and 1121), and not according to procedures unilaterally adopted by the Claimants – namely, giving notice by only eight of the 39 claimants and the filing of individual powers of attorney that plainly are not consents to arbitration.

13. Importantly, Mexico made these very objections before registration of the claim. Instead of availing themselves of the opportunity to correct these fatal omissions, they demanded that the Secretary-General register the claim, arguing that "Respondent's Objections, at best, set forth (meritless) objections to the jurisdiction of the as-yet unconstituted arbitration tribunal. Such objections, if Mexico is to maintain them, must be resolved by the arbitral tribunal, not by the ICSID Secretariat."[8]

14. Consent is the cornerstone of any arbitration. The NAFTA Parties accorded investors of the other parties an extraordinary remedy to sue directly for losses caused by breaches of Chapter Eleven obligations. However, their agreement to allow private parties standing to submit claims against them is conditioned upon the requirements in Articles 1119 and 1121, among others. Viewed in the context of the Claimants' theory of acceptance of a State's "open offer to arbitrate", acceptance by performance depends on fulfillment of the conditions of the offer. Whether viewed as failure to comply with those conditions, or as failure to engage the disputing Party's consent, or both, the result is the same – the purported submission to arbitration was invalid.

<u>The NAFTA jurisprudence</u>

15. The Respondent's Memorial cites recent NAFTA decisions and awards, and the repeated and consistent submissions of all three NAFTA Parties that support the Respondent's submission here – that Articles 1119 and 1121 (among others) are mandatory requirements for the valid submission of a claim to arbitration. The Respondent reserved the right to respond *de novo* to the Claimants' submissions on the applicable jurisprudence, which the Respondent correctly anticipated would rely heavily on the Decision on Jurisdiction in *Ethyl Corporation v Government of Canada* and other early NAFTA decisions and awards that applied the same approach in whole or in part.

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[8] Claimant's response to Mexico's objection to registration; July 21, 2016; pp. 2 and 4.

16. *Ethyl* was the first NAFTA Chapter Eleven decision to be published. The claim was settled at an early stage. There was no final award, post award proceedings or judicial review.

17. Although *Ethyl* is distinguishable in terms of the nature and gravity of the claimant's failure of compliance, the Respondent will demonstrate that the reasoning in *Ethyl* is at best questionable on certain key issues, and the decision is entirely out-of-step with the common submissions of the NAFTA Parties that followed for the next 20 years.

The Integrity of Future NAFTA Investment Arbitration

18. It should be self-evident to the Tribunal that to excuse the failures of compliance in this case would render meaningless all of Chapter Eleven's requirements for submission of a claim to arbitration. If eight claimants can give notice of a claim on behalf of 39 who later sue, can one claimant give notice on behalf of 100 unnamed parties? Or 1000? Or if a claimant files no document even purporting to be a consent, can the claim proceed anyway on the basis that the RFA constitutes an acceptance of an open offer to arbitrate and thus, amounts to constructive consent? Or on the basis that a filed document, like a power of attorney, reflects a willingness to proceed and thus, amounts to implied consent?

19. The Claimants apparently acted intentionally by concealing the existence of the 31 Additional Claimants until the filing of the RFA, fully two years after the Original NOI was filed. And they consciously declined to take any kind of corrective action after learning the precise grounds of Mexico's objection to registration of their claim, including a quote from their own government's most recent submission under NAFTA Article 1128:

> 3. The jurisdiction of any arbitral tribunal rests upon the consent of the parties before it to arbitrate a particular dispute. Under Article 1122(1), the NAFTA Parties have offered consent to arbitrate with investors provided that certain conditions are met at the time the claim is submitted to arbitration. Compliance with Articles 1116 to 1121 is necessary to perfect the consent of a NAFTA Party to arbitrate and establish the jurisdiction of the tribunal.[9]

20. Excusing the Claimants' failure of compliance with Article 1119 or Article 1121 in the circumstances of this case would encourage future Chapter Eleven claimants to treat those provisions as mere recommendations rather than requirements, despite their plainly mandatory terms and despite the repeated, consistent submissions of the NAFTA Parties that they mean what they say.

B. Submissions

21. The Respondent relies on paragraphs 48 to 93 of the Memorial on Jurisdiction and will not repeat those submissions *verbatim* here.

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[9] Respondent's reply to Claimants' response to Mexico's objection to the registration of the claim, dated 26 July 2016, ¶ 3, citing to the United States' 1128 submissions in *KBR v. United Mexican States*.

22. NAFTA Articles 1116 and 1117 create the right of an investor of a NAFTA Party (as defined) to submit to arbitration a claim arising from a breach of a substantive obligation under Section A of Chapter Eleven that has caused the investor (or its enterprise, as the case may be) to suffer loss or damage. Both Articles 1116 and 1117 impose a three-year limitation period that runs from the date that the investor knew or should have known that the disputing investor (or its enterprise as the case may be) had suffered loss or damage as a result of the breach:

> An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage;[10] and
>
> An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.[11]

23. There are three possible events on which the Claimants could be deemed to have first acquired knowledge of the alleged breach and resulting loss or damages. The measures associated with those limitation periods are: the temporary closure of the Mexico City gaming facility on 19 June 2013; SEGOB's resolution of 28 August 2013 which revoked E-Games' permits; and the closure of the five gaming facilities on 24 April 2014.[12] The first of three possible limitation periods was about to expire just days after the RFA was filed.

24. As discussed above, the Respondent submits that the Claimants' purported submission to arbitration was void *ab initio* and cannot now be validated or otherwise retroactively revived by belated compliance with Articles 1119 and 1121. Put simply, Mexico is entitled to the juridical benefit of the passage of time that has occurred since the Claimants' insistence on registration of a defective claim in the face of Mexico's very specific objections.

25. NAFTA Article 1118 states that "[t]he disputing parties *should* first attempt to settle a claim through consultation or negotiation." Use of the verb "should" indicates that this provision is hortatory. The Respondent does not dispute the Claimants' reference Ms. Kinnear's commentary, provided the relevant passage is quoted in context:

> Article 1118 urges disputing parties to attempt to settle their differences through consultation or negotiation before initiating arbitral proceedings under Chapter 11. Several observations can be made based on the text of Article 1118. First, it is debatable whether Article 1118 imposes a mandatory obligation to consult and negotiate or simply encourages consultation and negotiation. Clearly there are no sanctions for failure to consult, and hence the provision appears to require a good faith effort at most. In practice, most disputing parties enter into some form of consultation before the notice

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10 NAFTA Article 1116 (2).

11 NAFTA Article 1117 (2).

12 Notice of Intent ¶¶ 11-12 and Request for arbitration, ¶¶ 11, 59, 70 and 117.

> of arbitration is submitted. Second, the goal of consultation is settlement of the case. While it is unusual for consultation to result in settlement of Chapter 11 cases, the consultation can have other beneficial outcomes for the disputing parties. The consultation provides an opportunity to learn more about the case of the other disputing party, to narrow the areas in dispute and to prepare for a more orderly arbitration.[13]
>
> [Emphasis added]

26. The Respondent does not rely on alleged non-compliance with Article 1118 as grounds to challenge the Tribunal's jurisdiction. Rather, it has adduced evidence of the Original Claimants' refusal to reply to requests for information concerning the claim following the issuance of the Original NOI, in order to respond to the Claimants' repeated contention in its submissions to the Secretary General that Mexico resolutely refused to engage in negotiations.

27. This subject will be addressed further below with the caveat that, whether or not either party failed to comply with Article 1118, in whole or in part, has no relevance to the question of whether the Additional Claimants were required to comply with the plainly mandatory requirements of Article 1119.

28. As discussed in detail in the Memorial[14], the use of the verb "shall" in the English version of Article 1119 (and, likewise, the use of future tense of the verb in the Spanish version) describes a mandatory requirement that every intended claimant must be named in a notice of intent to be delivered to the responding Party at least 90 days prior to the submission of his/her/its claim to arbitration. This subject will be discussed further below, observing (*inter alia*) that there are simply no grounds to excuse a claimant's failure to provide a notice of intent.

29. NAFTA Article 1120 also creates a mandatory requirement for submission of a claim by stating "*provided* that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration" under (*inter alia*) the ICSID Additional Facility Rules. It can be seen (i) that the disputing investor must wait six months from the date of the events giving rise to the claim before submitting a claim to arbitration, and (ii) that its choice of arbitration rules is limited to the three expressly described (ICSID Convention, ICSD Additional Facility and UNCITRAL) which, in turn, depend on certain conditions that are not in issue here.

30. The Claimants do not seem to contest the notion that "shall" is a mandatory term which denotes a legal requirement. Lest there be any doubt, the use of "shall" in bilateral investment treaties has been repeatedly recognized as giving rise to a legal requirement or obligation. For example, in *Wintershall v. Argentina*:

> 119. The use of the word "shall" in Article 10(2) ("[i]f any dispute in terms of the paragraph 1 above could not be settled within the term of six months ……it shall be submitted to the Courts of competent jurisdiction of the Contracting Party in whose

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[13] Exhibit CL-14, p. 1.

[14] Memorial on Jurisdictional Objections, ¶ 40 – 47.

> territory the investment was made") – is itself indicative of an "obligation" – not simply a choice or option. The word "shall" in treaty terminology means that what is provided for is legally binding. During the oral hearings, in Paris (October 14-16, 2007) the Claimant's expert Prof. Christoph Schreuer – in answer to a question by a Member of the Tribunal admitted that Article 10(2) did contain an "obligation" […] [15]

31. And in *Garanti Koza v. Turkmenistan*:

> 28. Article 8(1) provides that a claim that meets the three conditions specified in that article "shall . . . be submitted to international arbitration."35 The use of the auxiliary verb "shall" makes that statement mandatory. As the tribunal in *Wintershall v. Argentina* put it, "[t]he use of the word 'shall' […] is itself indicative of an 'obligation' – not simply a choice or option. The word 'shall' in treaty terminology means that what is provided for is legally binding.[16]

32. As discussed in detail in the Memorial, NAFTA Article 1121's title and repeated use of the verb "shall" unequivocally indicates a series of mandatory requirements that include the express need for each claimant to: (i) consent in writing to arbitration in accordance with the provisions of the NAFTA, (ii) to deliver the written consent to the disputing Party, and (iii) to include the written consent in the claimant's submission of a claim to arbitration. This subject will be discussed in further detail below, observing that there is simply no basis to allow for compliance by way of constructive consent or implied consent. Express written consent is a requirement for the valid submission of a claim to arbitration.

33. NAFTA Article 1122 provides that "[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement." The NAFTA Parties have now formally expressed the view on at least 26 occasions that their consent is not engaged under Article 1122 if the claimant fails to comply with the procedures set out in the NAFTA, namely Articles 1116 to 1121, inclusive.[17]

1. Article 1119 – Notice of Intent to Submit a Claim to Arbitration

34. The text of Article 1119 clearly and unambiguously states that every disputing investor *shall* deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, and that such notice *shall* include the name and address of the disputing investor; the name and address of any enterprise on whose behalf a claim is made; the NAFTA provisions alleged to have been breached, the issues and factual basis of the claim; and the estimated damages claimed.

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[15] RL-023. *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008; ¶119.

[16] RL-024. *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, ¶28.

[17] Exhibit R-008.

35. The Claimants treat the failure of 31 disputing investors to deliver a notice of intent as a technical failure of the Claimants as a group to file a notice of intent containing all the information required by Article 1119. For example:

> 329. The link between Article 1118 and Article 1119 is important and sheds light on the procedural framework of the NAFTA dispute settlement mechanism. Article 1118 provides that "[t]he disputing parties should first attempt to settle a claim through consultation or negotiation," while Article 1119 sets out the notice of intent requirement. Importantly, as Ms. Meg Kinnear's NAFTA Commentary confirms, Article 1118 is not a mandatory requirement, as "[c]learly there are no sanctions for failure to consult, and hence the provision appears to require a good faith effort at most." Ms. Kinnear's Commentary further observes that, NAFTA Article 1119 "is stated in mandatory form ("shall"), although the article does not specify the consequences of failing to provide the necessary information in the notice of intent." If, however, the purpose of the notice of intent is to pave the way for consultation and negotiation—which is not a mandatory pre-condition to arbitration—then non-compliance with the strict letter of Article 1119 cannot operate as a bar to the tribunal's jurisdiction.[18]

36. Ms. Kinnear's book, co-authored in 2006 with Andrea Bjorklund and John Hannaford, says quite a bit more than that:

> A Overview
>
> Article 1119 requires a claimant to file a notice of intent to submit a claim to arbitration at least 90 days before the claim is submitted. Article 1119 establishes a minimum period only; it does not stipulate an end period within which an investor must file the actual claim. As can be seen from the following chart, it is not uncommon for investors to submit their claim to arbitration considerably more than 90 days after the notice of intent to claim was filed, or indeed, never to submit a claim to arbitration.
>
> […]
>
> B Form of Notice of Intent
>
> Article 1119 sets out basic information which *must* be included in a notice of intent. It is stated in mandatory form ("shall"), although the article does not specify the consequences of failing to provide the necessary information in the notice of intent. Nor does Article 1119 specify a format for notices of intent. However, on October 7, 2003, the Free Trade Commission issued a suggested format for notices of intent. While use of this format is not obligatory, following it is one way for claimants to ensure that the requirements of Article 1119 are addressed.
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> [The "Statement of the Free Trade Commission on Notices of Intent to Submit a Claim to Arbitration" is reprinted in full].[19]
>
> [Emphasis added.]

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[18] Counter-Memorial on Jurisdictional Objections, ¶ 329.

[19] Exhibit CL-15. pp. 1-4.

37. It is disingenuous of the Claimants to suggest that Kinnear *et al* somehow supports the idea that compliance with Article 1119 is not mandatory. This is not a matter of "non-compliance with the strict letter of Article 1119", it is a matter of complete non-compliance. The Respondent relies on the failure of each of the 31 Additional Claimants to deliver a notice of intent at anytime prior to purporting to submit their claims to arbitration along with the Original Claimants.

38. The following example is illustrative. The Original NOI did not include the addresses of the five Juegos Companies. The Respondent has not taken issue with that omission. A request to provide the addresses was not included in the NOI Questionnaire that Deputy Director Martinez sent to Ms. Menaker. The objection is based on the fact that the RFA contained the names of 31 parties that the Respondent had never heard of because none of them had delivered a notice of intent.

39. While there may be room to argue that a notice of intent containing minor flaws –such as a misspelled name or an incorrect postal code– is sufficiently compliant with Article 1119, that cannot be the case where an intended claimant has failed to comply altogether. The Respondent expects that minor flaws are in most cases overlooked, excused or corrected upon an information request by the disputing Party. But there is simply no basis to excuse any claimant from providing a notice of intent altogether, except for an express waiver by the disputing Party.

40. The Claimants are fixated on the idea that the sole purpose of giving notice under Article 1119 is to trigger the commencement of negotiations which they were entitled to eschew because, in the opinion of Gordon Burr, such negotiations would have been futile.

41. *First*, it bears noting that the text of Chapter Eleven nowhere states or even implies that the sole purpose of Article 1119 is to trigger or foster negotiations. As explained above, Article 1118 exhorts the disputing parties to engage in negotiation and consultation before submission of a claim to arbitration, but it does not require them to do so. Article 1119 mandates the giving of 90-days notice by each disputing investor and Article 1120 mandates a six-month waiting period running from the date of the impugned measure(s).

42. In the words of the Claimants' own government:

> Together with the notice requirement in Article 1119, the "cooling-off" requirement in Article 1120(1) affords a NAFTA Party time to identify and assess potential disputes, coordinate among relevant national and subnational officials, and consider amicable settlement or other courses of action prior to arbitration.[20]
>
> [Emphasis added]

[20] Exhibit RL-014, *Mesa Power Group LLC v Canada*, PCA Case No. 2012-17, Submission of the United States of America, 25 July 2014.

43. *Second*, it is ironic that the Claimants would argue that the Article 1119's purpose is to trigger negotiations, given that the Original Claimants refused to engage in consultations after delivery of the Original NOI.

44. A fair appraisal of the record evidence establishes the following:

- The White & Case Letter complains of various alleged actions taken under the previous administration that Ms. Menaker described as "unwarranted and ongoing Government measures".[21] Two of the three impugned measures at issue in this proceeding (*i.e.*, the revocation of the permit and the closure of the casinos) had not even occurred. Although the letter reminds the recipients that the Original Claimants have rights under the NAFTA, it does not serve as a notice of intent to pursue a Chapter Eleven remedy.
- Mexico's responsible authorities –lawyers from the *Consultoría Juridica de Comercio Internacional* (CJCI) – attended at least two meetings with representatives of the Original Claimants and officials from SEGOB within a month of two of the receipt of the White & Case Letter. The Original Claimants made no further contact with Economia until 23 May 2014 when they submitted the Original NOI.
- Mr. Gutierrez testifies that five days later, on 28 May 2014, he received a call from Mr. Vejar requesting that all future NAFTA-related communications be sent directly to him, because he was responsible for representing Mexico in NAFTA disputes.[22]
- Also, according to Mr. Gutierrez, on June 10, 2014, Mr. Vejar called a second time to inform him that he just had a meeting with Ms. Marcela González-Salas at SEGOB and to communicate that he intended to organize a meeting between E-Games, SEGOB, and Economia to discuss the case.[23]
- Mr. Gutierrez also mentions that on 11 June 2014, Messrs. Burr and Gutierrez apparently met with David Garay Maldonado from SEGOB to further discuss the closure of the casinos.[24]
- On 24 July 2014, Deputy Director Martinez sent Ms. Menaker the NOI Questionnaire with a view to assessing the validity of the allegations contained in the Original NOI.[25]

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21 Exhibit R-001, p. 1.

22 Witness statement of Mr. Julio Gutierrez, ¶ 21.

23 *Id.*, ¶ 22.

24 *Id.*, ¶ 19.

25 Exhibit R-003.

- The NOI Questionnaire inquired, *inter alia*, which investors had invested in the Juegos Companies and the size of their shareholdings, which investors had an interest in Eames and in what percentage, which of the Mexican enterprises owned the casinos, and what sort of arrangement existed between the Juegos Companies and E-Games.
- Ms. Menaker finally responded to Ms. Martinez's communication, nearly four months later, stating "I don't have any additional information to provide right now. If the client decides to pursue the claim, I will get in touch with you".[26]
- A short time earlier, CJCI received the Desistimiento – unsolicited and unexplained, but consistent with the statement that followed soon afterwards from Ms. Menaker.[27]

45. Mr. Gordon Burr now offers the following explanation for the Original Claimants' refusal to respond to the NOI Questionnaire:

> 44. The next time we heard from Mexico was on June 24, 2014, when it sent us, through White & Case, a questionnaire regarding the 2014 Notice of Intent ("Questionnaire"). We did not respond to the Questionnaire. We understood that the questions did not reflect an intention to negotiate on Mexico's part, but were instead an attempt to obtain information that we were under no obligation to provide the government and that Mexico was seeking to mount its defenses to our threatened claims. [...][28]
>
> [Emphasis added]

46. This acknowledges that the Original Claimants intentionally withheld information from Deputy Director Martinez for tactical reasons. One could ask rhetorically –how were Mexico's responsible officials going to assess the validity of the claim in order to advise their own superiors and senior officials in SEGOB whether to take corrective action? Or to consider offering monetary compensation?

47. *Third*, the Claimants' central contention that it would have been "futile" to engage in further negotiations after filing the Original NOI is a dubious proposition in both fact and law. This contention rests primarily on the testimony of Mr. Gordon Burr who evidently came to the view that it would be waste of time to pursue a solution with Mexico's responsible authorities after the Original NOI was filed.

48. One could suspect that Mr. Gordon Burr's rejection of Mexico's efforts to assess the claim was motivated more by his efforts to substitute himself and Mr. Conley with Messrs. Chow and Pelchat as the face of E-Games and the Juegos Companies which apparently had occurred or was about to occur by the time that Ms. Menaker advised '[i]f the client decides to pursue the claim, I will get in touch with you."

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[26] Exhibit R-004, p. 1.

[27] Exhibit R-005.

[28] Mr. Gordon Burr's witness statement, ¶ 44.

49. Even accepting that Mr. Gordon Burr honestly believed that it would have been "futile" to engage in consultations with Mexico's responsible authorities after delivery of the Original NOI, that could only serve as an explanation for the failure of compliance with Article 1118. It has no legal nexus to the decision of the Original Claimants to conceal the existence of the Additional Claimants, or to exempt the Additional Claimants from compliance with Article 1119.

50. There were three other reasons given in the Claimants' submissions to the Secretary General: (i) that the Additional Claimants wanted to keep their names out of the dispute in the early going for fear of harassment by organs of the Mexican State; (ii) that the Respondent always knew that there were other investors who would later be added as claimants; and (iii) that the Additional Claimants are merely minority shareholders whose inclusion makes no real difference to the overall claims.[29]

51. The Claimants seem to have abandoned the first of these contentions. They have not adduced witness testimony from any of the Additional Claimants alleging fear of harassment or anything pertaining to their understanding of what Original Claimants were doing in connection with the NAFTA claim or anything pertaining to their alleged investments in the Juegos Companies or anything pertaining to their knowledge of the transfer of shares to Grand Odyssey in or around November 2014. These matters are discussed in Part Two.

52. In support of the second contention, the Claimants cite the witness statement of Mr. Julio Gutiérrez:

> 8. In compliance with Mexico's Foreign Investment Law, the Juegos Companies and E-Games have reported the amounts of foreign (U.S.) capital subscribed in each of the companies to the Ministry of Economy (Secretaría de Economía in Spanish, or "Economía"). Additionally, in a meeting with the Ministry of the Interior (Secretaría de Gobernación in Spanish, or "SEGOB") and the Ministry of Economy in February 2013, Claimants, who were also accompanied at that meeting by their White & Case, LLP ("White & Case") attorney, Mr. Rafael Llano Oddone, explained to Mexican officials at SEGOB and Economía the corporate shareholding structure of the investments. In particular, during this meeting, we informed SEGOB and Economía of the percentage and number of shareholders that were Mexican nationals and the corresponding percentage and number that were foreign (U.S.) nationals in the Juegos Companies and E-Games. Furthermore, with regards to E-Games, we also gave SEGOB and Economía the names of all of its shareholders, as well as the names of the members of its Boards of Directors. In addition, Mr. Gordon Burr, President of the Board of Directors of the Juegos Companies and of E-Games, and Mr. John Conley, who also served on the Board of Directors of all of the companies, attended the meeting in representation of the shareholders of the Juegos Companies and E-Games.[30]

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[29] See for example: Claimants' response to Mexico's objection to registration, 21 July 2016, pp. 15, 17.

[30] Witness statement of Mr. Julio Gutierrez, ¶ 8.

53. Mr. Gutiérrez, alone testifies to the contention that Mr. Rafael Llano Oddone explained the structure of the investments, the percentages of domestic vs. foreign investment and the identities of the shareholders in E-Games.[31] Importantly, Mr. Gutierrez does not contend that the Additional Claimants were identified by name or even as a group of potential disputing investors. Mr. Gordon Burr refers to the meeting in his witness statement but does not testify that anything was said at the meeting about the corporate structure or ownership of the Juegos Companies[32]. There is no witness statement from Messrs. Llano Oddone or John Conley.

54. The White & Case Letter, received in January 2013, clearly identifies "Gordon Burr, Erin Burr, and John Conley, and U.S. companies B-Mex, LLC, B-Mex II, LLC, Palmas South, LLC, and Oaxaca Investments, LLC" as the "U.S. Investors" and states that together they:

> [...] hold an interest in five Mexican companies ("The Mexican Enterprises"): (1) Juegos de Video y Entretenimiento de México, S de RL de CV; (2) Juegos de Video y Entretenimiento del Sureste, S de RL de CV; (3) Juegos de Video y Entretenimiento del Centro S de RL de CV; (4) Juegos de Video y Entretenimiento del DF, S de RL de CV; and (5) Juegos y Videos de México, S de RL de CV.

55. It goes on to say that:

> "[t]he U.S. Investors also hold an interest in Exciting Games, S de RL de CV ("Exciting Games"), a Mexican company that manages operations and compliance with regulatory and tax obligations at the five Facilities. Exciting Games has operated and is operating each Facility pursuant to permits issued by the *Secretaría de Gobernación*".[33]

56. The White & Case Letter complains of two types of actions under the headings (1) "Arbitrary And Discriminatory Government Measures At The Facilities" (referring to alleged large-scale raids and harassment the Facilities) and (2) "Arbitrary And Discriminatory Administrative And Judicial Measures" (referring to alleged arbitrary and discriminatory administrative and judicial measures in connection with Exciting Games' permit to operate the five Facilities.) It makes no reference to the measures now complained of (revocation of E-Games permit and closure of the casinos) because those events had not yet occurred.[34]

57. The Letter goes on to say that "the U.S. Investors are mindful of the investment protections afforded under the NAFTA, including guarantees of fair and equitable treatment, national treatment, and protection from expropriation without just compensation" and that they "expressly preserve, and are prepared to pursue, any and all rights and remedies as provided under the NAFTA or other applicable legal regime" but it does not purport to serve as a notice of intent under NAFTA Article 1119.[35]

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31 Witness statement of Mr. Gutierrez, ¶ 8.

32 *Id.*, ¶ 35.

33 Exhibit R-001, p. 2.

34 *Id.*, pp. 2-3.

35 *Id.*, p. 4.

58. Importantly, the White & Case Letter nowhere states or even suggests that there are other U.S. investors involved who might also assert a Chapter Eleven claim if one were to be initiated.

59. The Original NOI was filed in May 2014, about 17 months later. It similarly describes "B-Mex, LLC, B-Mex II, LLC, Palmas South, LLC, Oaxaca Investments, LLC, Santa Fe Mexico Investments, LLC, Gordon Burr, Erin Burr, and John Conley" as the "U.S. Investors" and states that:

> Through their ownership interest in five Mexican companies (the "Mexican Enterprises"), the U.S. Investors own and/or have invested in gaming facilities in the following cities in Mexico: (1) Naucalpan, State of Mexico; (2) Villahermosa, State of Tabasco; (3) Puebla, State of Puebla; (4) Mexico City, Federal District; and (5) Cuernavaca, State of Morelos (each a "Facility," and together, the "Facilities"). In addition, the U.S. Investors are assisted in the management of their investment in the Facilities through their ownership interest in Mexican company Exciting Games, S. de R.L. de C.V. ("Exciting Games").[36]

60. The Original NOI concludes by stating "[t]he U.S. Investors reserve the right to amend this Notice and to include additional claims as may be warranted and permitted by the NAFTA".[37] It does not purport to reserve the right to include other investors as claimants. Rather, the notice refers only to unlawful actions against "the U.S. Investors" and losses suffered by the "U.S. Investors". Like the White & Case Letter, it nowhere states or even implies that there are other U.S. investors involved who might also assert a Chapter Eleven claim.

61. The Claimants nonetheless argue that Mexico's responsible authorities were aware that there were other potential claimants because "[i]n compliance with Mexico's Foreign Investment Law, the Juegos Companies, and E-Games, have reported the amounts of foreign capital subscribed in each of the companies to the Ministry of Economy".[38] This is specious. Even if such a search would have revealed the names of the 31 Additional Claimants, there would have been no reason to assume that any of them were planning to submit a claim to arbitration without first complying with Article 1119. The proper inference would be that there were other shareholders who were *not* intending to submit a claim under Chapter Eleven.

62. The Claimants additionally argue that the Original NOI was submitted by the "controlling majority shareholders"[39] and that the Additional Claimants are merely a group of minority shareholders with identical issues and claims.[40] Therefore, the argument goes, their addition as claimants in these proceedings alters nothing and should be accepted.[41]

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36 Original NOI, ¶ 5.

37 *Id.*, ¶ 18. Emphasis added by the Respondent

38 Counter-Memorial on Jurisdictional Objections, ¶ 298.

39 *Id.*, ¶ 8.

40 *Id.*, ¶¶ 8 and 285.

41 *Id.*, ¶¶ 296 and 301.

63. The Respondent submits that the Original Claimants are not the "controlling majority shareholders" and that the Additional Claimants are not merely a group of minority shareholders whose addition is inconsequential to the claim. In fact, they are crucial to establish the Claimants' alleged control of the Juegos Companies and thus their standing as a group to bring a claim on their behalf under Article 1117.

64. The reason is that control of those companies lies in the hands of the Series B shareholders and, on their own evidence, the Original Claimants do not own the majority of the Series B shares –a fact that has been omitted from the Claimants' analysis in the Counter-Memorial. The Respondent will further elaborate on this point in the section dealing with ownership and control of the Juegos Companies in Part Two of this Reply.

65. Moreover, the Claimants' argument is based on a dubious premise: that the claims of the Original Claimants are the same as those by the Additional Claimants and/or the Additional Mexican Enterprises. However, this is an unconvincing argument given the ambiguity with which the Original Claimants have described their purported investments and their conscious attempts to obscure the details of their alleged ownership and control. For evidence of the foregoing, the Tribunal needs to look no further than the RFA:

- "[...] certain of the Claimants established, had a majority interests in, and directly and indirectly controlled the operations of, another Mexican company, Exciting Games, S. de R.L. de C.V. (E-Games) [...]"[42]
- "[...] certain of the Claimants directly and indirectly controlled three other Mexican companies, namely Operadora Pesa [...]"[43]
- "[...] certain of the Claimants (i) purchased personal property in Mexico related to the Casino operations; (ii) made investments in the form of loans to the Mexican Companies; (iii) invested in the provision of resources in the development and operation of the Casinos; (iv) invested considerable time and sweat equity in managing the casino project; and, (v) executed contracts and other agreements to allow them to operate the Casinos for which they gave valuable consideration. [...]"[44]
- "[...] Certain of the Claimants also made investments, including, but not limited to, loans to Medano Beach, S. de R.L. C.V. as well as other resources including time and sweat equity to develop the B-Cabo casino Project [...]"[45]

66. As can be seen, "the Claimants" are not an homogenous group of investors each having the same interests. Some apparently invested in E-Games (the permit holder), others invested in the

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42 Request for Arbitration, ¶¶ 4, 8, 17-22.

43 *Id.*, ¶ 8.

44 *Id.*, ¶ 20.

45 *Id.*, ¶ 20.

Juegos Companies (who allegedly own the casinos), some of them presumably invested in both. Others claim to have extended loans to these companies, or contributed property, and so on.

67. Finally, there is the question of whether Mexico has suffered prejudice by the failure of 31 Additional Claimants to deliver a notice of intent under Article 1139. The Claimant seems to apply the adage "no harm, no foul" in contending that, since Mexico's officials were informed of the essential elements of the claim, it mattered not whether there were going to be eight or 39 disputing investors.

68. To engage in a debate over what Mexican officials might have done differently if properly notified of the Additional Claimants would be an entirely speculative exercise. Would further efforts to persuade the Claimants to provide information concerning the basis of their claim have resulted in cooperation from the Claimants? Perhaps not, if Mr. Gordon Burr was responsible for instructing counsel. But it would ill-behoove the Additional Claimants to take the position that concealment of their existence and intentions to join the claim made no difference because they would have supported Gordon Burr's efforts to conceal the facts and circumstances of the case.

69. Did Mexico loose an opportunity to secure documentary evidence or testimony because of this concealment? Again, it is hard to say in the face of Mr. Gordon Burr's decision to refrain from responding to the NOI Questionnaire for what he acknowledges were tactical reasons.[46] It can, however, be fairly inferred that Mexico was denied an opportunity to assess and prepare to defend the claim, as now presented by 39 Claimants having differing investment interests.

70. Certainly, the Respondent's ability to obtain information on the key issues that it has been asking for since issuance of the NOI Questionnaire (*i.e.* who owns what?) may very well have been prejudiced by the failure to name all of the Claimants in the Original NOI or in a timely amended notice of intent. For example, it is entirely possible that Mexico would have been able to secure copies of corporate records that the Claimants now say were destroyed in a fire that occurred in May 2017. The degree of prejudice suffered would not be finally known until this proceeding is well into the merits phase if such were to occur.

71. The point is that, by virtue of Article 1119's mandatory terms, Mexico was *entitled* to receive a notice of intent from each of the Additional Claimants at least 90 days prior to any one or more of them submitting a claim to arbitration. Mexico was also *entitled* to be notified of the names and addresses of the Additional Mexican Enterprises at least 90 days prior to a claim being submitted to arbitration on behalf of any one of them. No claimant is entitled to avoid the mandatory requirements for filing a claim, including the three-year limitations period.

72. As a result, Mexico is entitled to the juridical benefit arising from any failure of compliance with Article 1119. Indeed, allowing the Claimants to avoid the consequences of their failures of compliance through legal artifice would prejudice Mexico's rights as a disputing Party, including the right to rely on any limitation period that has since expired.

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[46] Witness Statement of Mr. Gordon Burr, ¶ 44.

73. There was nothing preventing the Additional Claimants and the Additional Mexican Enterprises from providing a notice of intent, singularly or together, or from joining the Original Claimants and the five Juegos Companies in a fresh notice of intent.

74. If the Claimants needed to file the RFA at least 90 days before their first limitation date (June 19, 2014) they should have filed a fresh notice of intent by mid-March 2016. In such case, they had 19 months from delivery of the Original NOI to comply with Article 1119.

75. In sum, in order to submit their claims to arbitration, the 31 Additional Claimants needed to first deliver a notice of intent under Article 1119 and wait at least 90 days. Failure to do so rendered their purported submission to arbitration void *ab initio*. They also failed to engage the Respondent's consent to arbitration "in accordance with the procedures set out in [the NAFTA]" under Article 1122. Put simply, the NAFTA Parties did not consent to arbitration with disputing investors who have not complied with the procedure for giving notice.

76. The Respondent should not have to address the Additional Claimants' attempt to remedy their failure of compliance by issuance of the of the Amended NOI after registration of the claim, given the absurdity of purporting to give notice of that which has already occurred. They now say this:

> 117. On September 2, 2016, Claimants sent an amended Notice of Intent ("Amended Notice of Intent"), including the names and addresses of all Claimants that were named in the Request for Arbitration and addressing the other complaints Mexico had raised about the 2014 Notice of Intent. In that Amended Notice of Intent, Claimants once again offered to meet with Mexican government officials to attempt amicable settlement or negotiations. Once again, however, *Mexico simply ignored Claimants, opting instead to challenge ICSID' registration of the claim* and, now, the Tribunal's jurisdiction to hear it
>
> [...]
>
> 379. As a threshold matter, it is important to emphasize that the Amended Notice of Intent was not necessary, and was only delivered out of an abundance of caution and, in Claimant Gordon Burr's words, to call "Mexico's bluff." While the Claimants took this good faith step to, once again, notify Mexico of the NAFTA dispute before it now remedying all of the alleged defects in the initial 2014 notice, Mexico has continued to ignore them to this day.[47]
>
> [Emphasis added]

77. First, the Claimants need to be reminded that the Amended NOI was delivered 22 days *after* the claim was registered by the ICSID, and 79 days after the RFA was filed. It was clear that this was not a notice of intent by the Additional Claimants to initiate a fresh proceeding. On its own terms it was an "amended" notice of intent in the same proceeding that was being issued "out of an abundance of caution".

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[47] Counter-Memorial on Jurisdiction, ¶¶ 117 and 379.

78. As the Respondent promptly informed the ICSID and the Claimants that it considered the RFA to be a nullity and that the so-called Amended Notice of Intent did not in anyway satisfy the requirement of Article 1119,[48] it does not assist the Claimants for Mr. Gordon Burr to contend that the plan was to "call Mexico's bluff" by submitting the Amended NOI. There was nothing to bluff –the RFA was a nullity and the Amended NOI could not retroactively validate or revive it.

79. Faced with Mexico's objection to registration of their claims, the Additional Claimants had two potential courses of action to comply with Article 1119. First, the Claimants as a group could have asked the ICSID to suspend registration of the claim during the 57 days that registration was pending. They would then file a fresh notice of intent naming all of the disputing investors, wait 90 days and then refile the RFA. In such case, the date of submission to arbitration for the purposes of meeting limitation periods would be the date of resubmitting the RFA.

80. The second potential course of action would have been for the Additional Claimants to file their own notice of intent, wait 90 days and then file a request for arbitration in a separate proceeding –either under UNCITRAL Rules or the Additional Facility Rules– and apply later to have the two cases consolidated under NAFTA Article 1126 (Consolidation), supported by Article 1117(3):

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

81. In either case, Mexico's responsible authorities likely would have asked some of the questions posed in the NOI Questionnaire. The extent to which the Additional Claimants would have made a good faith effort to comply is a matter of speculation, but at least they would have complied with the Respondent's central objection, namely, that each of them had to be identified in an Article 1119 notice of intent delivered to Mexico's address for service at least 90 days before submitting their claim to arbitration.[49]

2. Article 1121 – Conditions Precedent to Submission of a Claim to Arbitration

82. The plain meaning of the title and text of Article 1121 clearly and unequivocally mandates fulfillment of the following requirements as a "condition precedent' for a disputing investor to submit a claim to arbitration:

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[48] Exhibit R-006, p. 2:"El Gobierno de México rechaza la posición implícita de las Demandantes en el sentido de que este documento de alguna manera satisface el requisito al que está sujeta toda parte demandante, conforme al Artículo 1119 del TLCAN, de notificar su intención de someter a arbitraje su reclamación al menos 90 días antes de presentar su solicitud de arbitraje conforme a la Sección B del Capítulo XI del TLCAN".

[49] Again, the operative date of submission to arbitration for the purposes of meeting limitation periods would have been the date that the Additional Claimants delivered their notice of arbitration to the ICSID or, if submitted under the UNCITRAL rules, to Mexico's stipulated address for delivery. See NAFTA Articles 1137 (1) and (2).

- to consent *in writing* to arbitration "in accordance with the procedures set out in [the NAFTA]",
- to deliver the written consent to the disputing Party, and
- to include the written consent in the disputing investor's submission of a claim to arbitration.

83. The Respondent has argued, and maintains here, that the filing of the RFA on behalf of the Claimants did not fulfill these requirements, nor did the delivery and filing of powers of attorney by each Claimant authorizing certain lawyers at Quinn Emmanuel to act on his/her/its behalf in this matter.

84. The Respondent has explained that the express terms of Article 1121 do not allow for constructive consent or for implied consent. It requires each disputing investor to consent expressly, in writing, to arbitration in accordance with the procedures set out in the NAFTA.

85. The Respondent has argued, and maintains here, that the express terms of Article 1121 must be fulfilled in order to engage the disputing Parties' consent under Article 1122.

86. The Respondent accordingly submits that (i) the Claimants failure to fulfill the express conditions precedent in Article 1121 rendered their purported submission to arbitration *void ab initio* and (ii) failed to engage Mexico's consent to arbitration under Article 1122.

87. The Claimants cited selected passages from Kinnear *et. al.* in attempting to argue that the purpose of Article 1119 is to initiate negotiations for settlement of the claim, which was not born out upon reading the cited passages in context. However, they have avoided any discussion of the Kinnear *et. al.* commentary on Article 1121:

> Introduction and Overview
>
> Article 1121 is entitled "Conditions Precedent to the Submission of a Claim to Arbitration." It sets forth procedural steps an investor must take in order to submit a claim to arbitration. Though other articles deal with procedural issues, Article 1121 is the only article with the words "conditions precedent" in its title. (26)
>
> 1 Investor's Consent to Arbitration
>
> Article 1121 provides the investor's consent to arbitration; while Article 1122 provides the State Party's consent to arbitration. In effect, NAFTA constitutes a standing offer by the State Parties to arbitrate, but only on the condition that the investor meet certain requirements. Article 1121(1)(a) provides that an investor bringing a claim under Article 1116 must consent to arbitration "in accordance with the procedures set out in this agreement;" the same consent is found in Article 1121(2)(a) with respect to investors bringing a claim under Article 1117. Because arbitration is based on consent, Article 1121 is an indispensable complement to Article 1122; only if both disputing parties have consented can the tribunal exercise jurisdiction. Article 1121(3) requires that the consent, and the accompanying waiver, be in writing, be delivered to the disputing Party, and be included in the submission of a claim to arbitration. Requiring that investor to deliver written consent satisfies the requirements of the ICSID, the ICSID Arbitration (Additional Facility) Rules, and the New York Convention that arbitration agreements be in writing to be enforceable. The Inter-American Convention

> requires that there be an agreement, though it does not specify that the agreement be in writing.[50]
>
> [Emphasis added]

88. The central point is that fulfillment of the requirement for giving consent stipulated in Article 1121 is a condition of the NAFTA Parties' offer to arbitrate under Article 1122 and, therefore, a limitation on the Respondent's own consent to arbitration.

89. The Claimants make two arguments in support of their contention that they have complied with Article 1121:

- that they provided their consent to arbitration in the RFA; and
- that they also separately submitted their consent to arbitration through their powers of attorney.

90. The Claimants make the following submission in support of these arguments:

> 418. Paragraph 114 of the RFA could not be clearer on this point. Paragraph 114 of the RFA very clearly provides that Claimants "accept" Mexico's offer of consent to arbitrate under NAFTA and submit their disputes to arbitration under the Additional Facility Rules of ICSID, making evident their consent to arbitrate as required by Article 1121(3):
>
> > Moreover, Article 1122(1) of the NAFTA expressly recognizes the right to refer a dispute to arbitration under different procedures, including the Additional Facility Arbitration Rules. In this regard, Mexico made a unilateral offer to submit to arbitration claims for breaches of a substantive obligation of the chapter. In addition, Article 1222(2) states that "[t]he consent given by Paragraph 1 *and the submission by a disputing investor of a claim to arbitration* shall satisfy the requirement of … the Additional Facility Rules for written consent of the parties." By this Request for Arbitration, Claimants accept Mexico's offer, and hereby submit the present dispute to arbitration under the Additional Facility Rules of ICSID.
>
> 419. Paragraph 119 of the RFA also expressly provides that "Claimants and the Mexican Companies have provided the requisite consent to arbitration under the Additional Facility and waiver in the form contemplated by Article 1121 of the NAFTA." This sentence includes a reference, at footnote 43, to the powers of attorney, attached to the RFA as Exhibit C-4. As with the powers of attorney, Respondent does not claim that Claimants' expression of their consent in the RFA was not made in writing, delivered to Mexico and included in the Claimants' submission of a claim to arbitration. Each of these requirements is met.[51]
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> [Underlying by the Claimant; italics added by the Respondent. Footnotes omitted]

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50 Exhibit RL-025, pp. 4-5.

51 Counter-Memorial, ¶¶ 418-419.

91. This submission does not withstand scrutiny. A disciplined analysis reveals that the question of whether there was compliance with Article 1121 ultimately turns on whether each power of attorney amounts to "consent to arbitration in accordance with the procedures set out in [the NAFTA]"

92. *First*, it is a "condition precedent" to the submission of a claim to arbitration that the disputing investor consent *in writing* "to arbitration in accordance with the procedures set out in [the NAFTA]" and to deliver the written consent to the disputing Party and to include the written consent to with its submission to arbitration.

93. When the Claimants say in paragraph 114 of the RFA that "[t]he consent given by [Article 1122] *and the submission by a disputing investor of a claim to arbitration* shall satisfy the requirement of [...] the Additional Facility Rules for written consent of the parties" they conflate two different consents – the consent of the disputing Party (1122) and the consent of the disputing investor (1121). The consent under discussion is the consent required by Article 1121. If there was non-compliance with the condition precedent, then there was no valid submission to arbitration.

94. This problem is in addition to other doubts, such as whether the consent and waiver required by Article 1121 can be imbedded in an RFA signed by counsel, or whether a separate document executed by the disputing investor is required. For the record, in response to the last sentence of paragraph 419 of the Counter-Memorial (quoted above), the Respondent does indeed dispute that there was an expression of the Claimants' consent in the RFA that was made in writing, delivered to Mexico and included in the Claimants' submission of a claim to arbitration.

95. *Second*, it is evident from paragraph 119 that the Claimants were relying on the powers of attorney (and waivers) as proof of compliance with Article 1121:

> 119. Fourth, and lastly, Claimants and the Mexican Companies have provided the requisite consent to arbitration under the Additional Facility and waiver in the form contemplated by Article 1121 of the NAFTA [citing to footnote 43]. Accordingly, Claimants have waived their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measures of the disputing Party that are alleged to be a breach referred to in Articles 1116 and 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.[52]

96. Footnote 43 of the RFA states: "Consent Waivers, C-4". Exhibit C-4 contains the powers of attorney (under the heading "Power of Attorney") and the waivers (under the heading "Waiver") executed by each of the Claimants. It is evident from this footnote and the accompanying exhibit, that whomever drafted the RFA was mindful of the need to include consents to arbitration executed by each claimant, but whomever provided the executed documents neglected to include an

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[52] Request for Arbitration, ¶ 119.

additional heading "Consent" followed by a sentence stating that the signatory consents to arbitration of his/her/its claim in accordance with the procedures set out in the NAFTA.[53]

97. In the Counter-Memorial, Exhibit C-4 is now described as "Claimants' Consents Waivers and Powers of Attorney", even though the exhibited documents are the same. Each consists of a single page with two headings – "Power of Attorney" and "Waiver" – each followed by a single paragraph. The operative provision in the paragraph entitled "Power of Attorney" states:

> THIS POWER OF ATTORNEY is given to David M. Orta. A. (and other named lawyers) of Quinn Emanuel Urquhart & Sullivan LLP … to take any steps required for the initiation of, and to represent [named Claimant] and act on his behalf against the United Mexican States in, arbitration proceedings under the North American Free Trade Agreement ("NAFTA"). as well as any ancillary settlement negotiations that may derive from [named Claimant's] intent to initiate arbitration proceedings against the United Mexican States.[54]

98. The Claimants now characterize to these documents as amounting to consent to "filing the arbitration":

> 427. As is evident from the plain text of the powers of attorney, each Claimant provided its unequivocal consent to arbitrate their disputes with Mexico under and pursuant to the requirements of NAFTA by instructing counsel to initiate, represent and act on their behalf in these NAFTA arbitration proceedings. Any reasonable reader would be hard-pressed to argue that, despite having retained counsel and specifically instructed them to file and prosecute a NAFTA arbitration against Mexico, the Claimants nonetheless did not effectively consent to the filing of that arbitration. Yet that is precisely what Mexico is asking this Tribunal to conclude.[55]

99. To be clear, Mexico has not argued that the Claimants "did not effectively consent to the filing of that arbitration." Clearly the Claimants authorized Quinn Emmanuel to "file the arbitration" and to that end consented to the firm doing so. That is not the point. What the Claimants did not do in the documents they signed is to declare in writing –for the benefit of the Respondent– that they "consent to arbitration in accordance with the procedures set out in [the NAFTA]".

100. The Claimants also take a stab at establishing that their consent to arbitration can be implied by the fact that they executed the powers of attorney:

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[53] Presumably the powers of attorney were intended to comply with Article 2(1) of the ICSID Additional Facility Rules: (1) Any State or any national of a State wishing to institute arbitration proceedings shall send a request to that effect in writing to the Secretariat at the seat of the Centre. It shall be drawn up in an official language of the Centre, shall be dated and *shall be signed by the requesting party or its duly authorized representative*. [Italics added.]

[54] Exhibit C-4.

[55] Counter-Memorial, ¶ 427.

> 429. Mr. Burr and his daughter, Claimant Erin Burr, met with or spoke to each Claimant to explain that the powers of attorney were intended to record their consent and authorization to file the NAFTA arbitration against Mexico, and they obtained all of Claimants' signatures.[616] Thus, Mr. Burr confirms that "[b]y signing the powers of attorney, all Claimants expressly consented to this NAFTA arbitration and authorized Quinn Emanuel to represent and act on behalf of all Claimants for all aspects of this arbitral proceeding and other related actions.[56]

101. Even if Mr. Gordon Burr's self-serving statement is assumed to be a true representation of his belief, it does not assist the Claimants. There is no indication that Mr. Gordon Burr has the authority to speak on behalf of each of the Claimants. Further, he is only saying that the Claimants "expressly consented to this NAFTA arbitration and authorized Quinn Emanuel to represent and act on behalf of all Claimants for all aspects of this arbitral proceeding and other related actions". Moreover, even if he had said that "each of the Claimants expressly consented to arbitration in accordance with the procedures set out in [the NAFTA]", that would be of no avail. By the clear terms of Article 1121, each disputing investor's consent to arbitration must be express and in writing. There is no room for implied consent, inferred consent or intended but flawed consent.

102. The Claimants place heavy reliance on the *Ethyl* decision in support of its contention that any failure of compliance with Article 1121 should treated be a question of admissibility rather than jurisdiction. The Respondent address that issue in the submissions on the NAFTA jurisprudence that follow.

103. There remains the issue of whether the powers of attorney and waivers later filed by the five Juegos Companies were validly issued. The Respondent will deal with that question in Part Two of this Reply.

3. The Jurisprudence

a. NAFTA Jurisprudence cited by the Claimant

104. In the Memorial on Jurisdiction, the Respondent observed that the Claimant's submissions responding to Mexico's objection to registration of the claim relied on several arbitral decisions and awards for the contention that the requirements under Article 1121 are merely procedural and can be cured at a later stage of the proceedings. The Respondent stated that it had responses for each of these decisions and awards, but would not elaborate upon them unless the Claimants reaffirm their reliance on them in their Counter-Memorial on Jurisdiction.

105. Predictably, the Claimants rely on *Ethyl* (1998), and the two decisions or awards that apply *Ethyl*, namely *Pope & Talbot* (2000) and *Mondev* (2002). They also rely on *Thunderbird* (2006) which purports to apply *Mondev.* The following elaborates on the reasons why these decisions and awards are incompatible with contemporary NAFTA jurisprudence and the unanimously held and repeatedly stated views of the NAFTA Parties.

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[56] *Id.*, ¶ 429.

106. Before engaging in a discussion of the jurisprudence, it bears noting that this marks the first challenge to a NAFTA tribunal's jurisdiction based on the failure of one or more disputing investors to deliver a notice or intent under Article 1119, or failure of one or more disputing investors to provide a written consent to arbitration under Article 1121. That is undoubtedly attributable to the fact that giving notice and providing a consent in the prescribed terms are well-known, easily understood requirements that virtually all other NAFTA claimants have been able to comply with.

107. This challenge to jurisdiction also differs from many of the prior decisions and awards under discussion by the immediacy and clarity of the Mexico's objection to the Claimants' failures of compliance. While an element of delay, condonation or acquiescence by the disputing Party can be seen in certain decisions and awards that have excused the disputing investor's alleged failure of compliance, that is not the case here. Mexico made its objections at the earliest possible opportunity and has steadfastly maintained them.

108. *Ethyl Corp v. Government of Canada* has been cited nine times in the Counter-Memorial[57], notwithstanding that it has been expressly disavowed and/or contradicted in at least 21 times by the NAFTA Parties in their own pleadings and submissions on questions of interpretation of the NAFTA pursuant to Article 1128.

109. The Claimants cite *Ethyl* as an example of a *technical* defect under NAFTA Article 1119 being treated as a procedural matter rather than a jurisdictional bar, and in support of the contention that "Claimant's submission of its request for arbitration perfected the Tribunal's jurisdiction" and "the question of compliance with NAFTA Article 1121's requirement to present written consents and waivers goes to admissibility, not jurisdiction" and that the proper remedy would be for the Tribunal to allow the Claimants to cure the defect.[58]

110. *Ethyl* was the first notice of intent filed (September 1996) and the first decision rendered under NAFTA Chapter 11 (June 1998).[59] The case was settled after the partial award was rendered and, therefore, it was never subject to review. However, both Canada and the U.S. have expressly disagreed with certain aspects of the award in subsequent pleadings and submissions that Mexico has endorsed (see ¶¶119 -120 below).

111. Ethyl Corporation's notice of intent was issued when the legislative measure at issue was in third reading in the House of Commons. Its notice of arbitration was filed 11 days before the legislation received Royal Assent at which point (in Canada's submission) it became a "measure" but until then was only a proposed measure. In the result, the claimant 'jumped the gun' by six months and 11 days.[60] The Claimants did not submit its Article 1121 consents and waivers until it

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57 Counter-Memorial on Jurisdictional Objections ¶¶ 339, 340, 362, 402, 440, 441, 442, 443 and 469.

58 *Id.*, ¶¶ 339, 441, 469 and 443.

59 Exhibit CL-5. *Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998.

60 *Id.*, ¶ 87.

filed its statement of claim, four and a half months after the claim was submitted to arbitration. The hearing on the jurisdiction issues was held 22 months after the claim was submitted to arbitration.[61]

112. The claim was submitted to arbitration under the UNCITRAL Rules. The decision does not reveal when Canada first raised its objections to jurisdiction or whether Canada endeavoured to block the appointment of arbitrators until the six-month cooling off period had elapsed. Canada objected to the tribunal's jurisdiction on six grounds[62], two of which are relevant here: alleged failure of compliance with Article 1120 and 1121.

113. Canada's objection based on the Claimant's failure to comply with Article 1120 was dismissed for the following reasons:

> 83. Initially, there is an issue as to whether the phrase "events giving rise to the claim" is intended to include all events (or elements) required to constitute a claim, or instead some, at least, of the events leading to crystallization of a claim. The argument is made that the object and purpose of the NAFTA, set forth in its Article 102(1)(c) and (e) to "increase substantially investment opportunities" and at the same time to "create effective procedures… for the resolution of disputes" would not be best served by a rule absolutely mandating a six-month respite following the final effectiveness of a measure until the investor may proceed to arbitration. Had the NAFTA Parties desired such rigidity, it is contended, they explicitly could have required passage of six months "since the adoption or maintenance of a measure giving rise to a claim." It nonetheless remains debatable, we are told, whether as of 14 October 1996 the status of Bill C-29 was sufficient to constitute "events giving rise to a claim."
>
> [...]
>
> 85. The Tribunal finds no need to address these arguments as to Articles 1119 and 1120 since the fact is that in any event six months and more have passed following Royal Assent to Bill C-29 and the coming into force of the MMT Act. It is not doubted that today Claimant could resubmit the very claim advanced here (subject to any scope limitations). No disposition is evident on the pan of Canada to repeal the MMT Act or

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61 *Id.*, ¶ 89.

62 On the issue of scope of Chapter 11, Canada argued:

1) No measure at the time of the NOA (i.e., the MMT act was not in effect);

2) The alleged measures do not relate to an investment or an investor;

3) Expropriation or loss outside Canada is not covered under Chapter 11.

On the requirement of Section B:

1) The Claimant failed to comply with the cooling off period in 1120;

2) The Claimant did not deliver written consent and waivers required under 1121;

3) The claimant introduced new claims in its SoC.

> amend it. Indeed, it could hardly be expected. Clearly a dismissal of the claim at this juncture would disserve, rather than serve, the object and purpose of NAFTA.[63]

114. The tribunal then made an award of costs in favor of Canada, observing that:

> 86. [...] Claimant could have avoided controversy over these issues by first awaiting Royal Assent [...] and then allowing another six months to pass i.e., until 25 October 1997, before commencing arbitration: It thus would have lost just over six months' delay in proceeding, and thus would be six months further away from a resolution of the dispute. [...]
>
> 88. Had Ethyl first awaited Royal Assent to Bill C-29, and then bided its time another six months, the Tribunal would not have been required to deal with this issue. The Tribunal deems it appropriate to decide, therefore, that Claimant shall bear the costs of the proceedings on jurisdiction insofar as these issues are involved.[64]

115. Canada's objection based on the Claimant's failure to comply with Article 1121 was dismissed for the following reason:

> 91. [...] While Article 1121's title characterizes its requirements as "Conditions Precedent," it does not say to what they are precedent. Canada's contention that they are a precondition to jurisdiction, as opposed to a prerequisite to admissibility, is not borne out by the text of Article 1121, which must govern. Article 1121(3), instead of saying "shall be included in the submission of a claim to arbitration" — in itself a broadly encompassing concept —, could have said "shall be included with the Notice of Arbitration" if the drastically preclusive effect for which Canada argues truly were intended. The Tribunal therefore concludes that jurisdiction here is not absent due to Claimant's having provided the consent and waivers necessary under Article 1121 with its Statement of Claim rather than with its Notice of Arbitration.[65]

116. The tribunal then made a further award of costs in Canada's favor:

> 92. [...] the Tribunal deems it appropriate that Claimant be responsible for the costs of the jurisdictional proceedings insofar as they have related to the issues arising in connection with Article 1121. No reason appears why the consent and waivers were not furnished with the Notice of Arbitration, which would have been the better practice. Had they been, a certain part of these proceedings would have been obviated.[66]

117. Many have been perplexed by the *Ethyl* tribunal's statement that Article 1121 needed to say, "shall be included with the Notice of Arbitration" (rather than "shall be included with the submission of claim to arbitration") if the drastically preclusive effect for which Canada argues

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63 Exhibit CL- 5. *Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998, ¶¶ 83, 85.

64 *Id.*, ¶¶ 86-88.

65 *Id.*, ¶ 91.

66 *Id.*, ¶ 92

truly were intended". This statement fails to account for the express terms of Article 1137 (1), under the heading "*Time when a Claim is Submitted to Arbitration*":

> A claim is submitted to arbitration under this Section when [...] (c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party.

118. The Respondent accordingly submits, with all due respect to the esteemed members of the *Ethyl* tribunal, that its finding in paragraph 91 is patently incorrect. The Respondent also submits that the tribunal's decision not to enforce the six-month waiting period in paragraphs 84-85 was wrong to the extent that it infers that Article 1120 is not a mandatory requirement, as indicated by the plain meaning of the text:

> *provided that* six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under [...] (c) the UNCITRAL Arbitration Rules.

119. Canada later observed in *Mondev* that *Ethyl* was wrongly decided:

> It is clear that fulfillment of the conditions precedent is a mandatory obligation. [Fn 5] A Party's consent to arbitrate is premised on adherence to the procedural requirements of NAFTA.
>
> [Fn 5]: In *Ethyl Corporation v. Canada* (Tab 4) the Tribunal categorised obligations under NAFTA Chapter Eleven Section B as either jurisdictional provisions or procedural rules. The Tribunal indicated that the failure to satisfy the former would restrict the authority of the Tribunal to act on the merits of the dispute. Conversely, the failure to meet procedural rules would only result in delay. It is submitted that all of the conditions precedent and procedural requirements specified in NAFTA Chapter Eleven B fall into the former category. The decision in *Ethyl*, supra was wrongly decided insofar as it conflicts with this interpretation of these procedural requirements and hence ignores the plain language and context of Articles 1121 and 1122. See Ethyl, supra note 4, at paras. 58-61. An interpretation consistent with the requirements of Chapter Eleven Section B is found in *Waste Management Inc. v. United Mexican States*, infra note 14.[67]

120. The United States made submissions to the same effect in *Methanex*:

> [Fn 74] […] First, to the extent that the *Ethyl* tribunal determined that a jurisdictional defect could be unilaterally waived by the tribunal without the consent of the respondent NAFTA Party, the United States respectfully disagrees with that determination. The United States submits that it is not within the Tribunal's discretion to waive the fulfillment of any jurisdictional prerequisite set forth in Chapter Eleven.[68]

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[67] Exhibit RL-026; Canada's 1128 Submission in *Mondev International LTD v. United States of America*; 6 July 2001.

[68] Exhibit RL-027 - *Methanex v. United States*, UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America, 13 November 2000.

121. Before turning to describe the shift away from *Ethyl* in subsequent NAFTA jurisprudence, it bears noting that the reasoning in *Ethyl* does not ultimately assist the Claimants in this case because their failures of compliance –even if considered a question of admissibility rather than jurisdiction– were never corrected:

> 58. It is important to distinguish between jurisdictional provisions, i.e., the limits set to the authority of this Tribunal to act at all on the merits of the dispute, and procedural rules that must be satisfied by Claimant, but the failure to satisfy which results not in an absence of jurisdiction ab initio, but rather in a possible delay of proceedings, followed ultimately, should such non-compliance persist, by dismissal of the claim. Canada argues that all of its objections fall into the first category, whereas Ethyl is of the view that such objections as may have been valid at one point fall into the second category and have since been obviated.[69]

122. It can be seen that, even if the failure of the Additional Claimants to comply with Article 1119 and/or the failure of all of the Claimants and the Mexican Enterprises to comply with Article 1121 is characterized as an impediment to admissibility rather than a bar to the Tribunal's jurisdiction, the Claimants' insistence on proceeding with registration of the claim and the establishment of the Tribunal amounts to persistent non-compliance and calls for dismissal of the claim.

123. It also bears noting that the facts and circumstances of this case differ from those under consideration in *Ethyl* in the following material respects:

- The Claimants declined to engage in consultations with Mexico's responsible authorities following delivery of the Original NOI, apparently for tactical reasons;
- The Claimants knowing withheld disclosing the existence of the 31 Additional Claimants despite apparently intending that they would be included as claimants in the proceeding;
- The Claimants were promptly notified of Mexico's objection to registration of the claim for failure to comply with Articles 1119 and 1121;
- The Claimants resolutely pressed ahead despite being informed of the precise grounds for Mexico's objection, including the fact that Mexico's consent under Article 1122 had not been engaged because the Claimants had not complied with the procedures set out in the NAFTA, as observed in their own government's submission under NAFTA Article 1128:

> 3. The jurisdiction of any arbitral tribunal rests upon the consent of the parties before it to arbitrate a particular dispute. Under Article 1122(1), the NAFTA Parties have offered consent to arbitrate with investors provided that certain conditions are met at the time the claim is submitted to arbitration. Compliance with Articles 1116 to 1121 is necessary to perfect the consent of a NAFTA Party to arbitrate and establish the jurisdiction of the tribunal.[70]

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[69] Exhibit CL- 5. *Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998.

[70] Respondent's reply to Claimants' response to Mexico's objection to the registration of the claim, dated 26 July 2016, ¶ 3, citing to the United States' 1128 submissions in *KBR v. United Mexican States*.

- The Claimants will not be in a position to simply refile and carry on with the arbitration if it is dismissed on this challenge to jurisdiction, as the three potentially applicable limitation periods have expired;
- This Tribunal will have the benefit of the contemporary NAFTA jurisprudence and nearly twenty years of submissions by the NAFTA Parties, all clearly stating that compliance with Articles 1119 and 1121 (among others) is necessary to engage a disputing Party's consent to arbitration under Article 1122.

124. *Ethyl* was cited with apparent approval in two other early NAFTA decisions and awards that the Claimants rely on: *Pope & Talbot* (2000)[71] and *Mondev* (2002). They also rely on *Thunderbird* (2006) which applies *Mondev.*[72] It bears noting, however, that in both cases citing *Ethyl* the tribunal found that the claimants had complied with the requirements set out in the NAFTA:

- In *Pope & Talbot* the issue was whether the claim based on the so-called Super Fee was a new claim that was not previously notified to the respondent or, rather, an extension of a previously asserted claim. The tribunal observed: "it is patent that the Investor was challenging the implementation of the SLA [Softwood Lumber Agreement] as it affected its rights under Chapter 11 of NAFTA and that, as the Regime changed from year to year, those effects might also change", and held: "[f]or these reasons, the Tribunal concludes that the Investor's contentions regarding the super fee are not a 'new' claim, but relate instead to a new element that has recently been grafted onto the overall Regime."[73] In other words, the tribunal ruled that the claimants had in fact complied with the requirement of providing notice.
- In *Mondev*, the claimant timely filed a notice of intent, however, this notice did not include the address of one of its subsidiaries (Lafayette Place Associates (LPA)) and was not clear as to whether Mondev intended to make a claim on behalf of LPA under Article 1117. In the end the tribunal found "no evidence of material non-disclosure or prejudice and Article 1121 was complied with" and went on to hold that "[i]n the event, the matter does not have to be decided, since the case can be resolved on the basis of the Claimant's standing under Article 1116".[74]

125. The *Thunderbird* award (January 2006) dismissed a claim arising from SEGOB's closure of "skill game" parlours for violation of the *Ley de Juegos y Sorteos*. The *Thunderbird* tribunal decided two issues that the Claimants contend are germane to this case*:*

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[71] Exhibit CL-19, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award Concerning the Motion by Government of Canada Respecting the Claim Based Upon Imposition of the "Super Fee" August 2000, ¶ 26.

[72] Exhibit CL-17, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 44.

[73] Exhibit CL-19 *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award Concerning the Motion by Government of Canada Respecting the Claim Based Upon Imposition of the "Super Fee" y August 2000 ¶¶ 24 and 25.

[74] Exhibit CL-17; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002, ¶ 86.

- whether the late filing of consents and waivers by three of four Mexican enterprises (with the claimant's particularized statement of claim) invalidated the claims on behalf of those enterprises; and
- whether "*de facto"* control of the same three enterprises by the claimant was sufficient to establish its standing to sue on behalf of those enterprises under Article 1117.

126. The following addresses the first issue. The second issue is addressed in Part Two.

127. Mexico disagrees with the Tribunal's statement that "the requirement to include the waivers in the submission of the claim is purely formal, and that a failure to meet such requirement cannot suffice to invalidate the submission of a claim if the so-called failure is remedied at a later stage of the proceedings". This statement – made in 2006 without the benefit of Article 1128 submission on this issue- would be aberrant if made today in light of consistent stream of contrary decisions and awards that have since been rendered.

128. That said, it can be seen that the *Thunderbird* tribunal may have bee influenced by the fact that Mexico apparently did not object to the absence of consents and waivers when the notice of arbitration was filed under the UNCITRAL Rules and, as noted in the decision, the omission had been remedied at the time the objection was made in Mexico's Statement of Defence/Counter-Memorial. Accordingly, it could be said there was an element of acquiescence by the respondent in that case.

129. Despite its reference to *Ethyl*, *Mondev* held as follows:

> 44. It may be that a distinction is to be drawn between compliance with the conditions set out in Article 1121, which are specifically stated to be "conditions precedent" to submission of a claim to arbitration, and other procedures referred to in Chapter 11. Unless the condition is waived by the other Party, non-compliance with a condition precedent would seem to invalidate the submission, whereas a minor or technical failure to comply with some other condition set out in Chapter 11 might not have that effect, provided at any rate that the failure was promptly remedied. Chapter 11 should not be construed in an excessively technical way, so as to require the commencement of multiple proceedings in order to reach a dispute which is in substance within its scope.[75]
>
> [Emphasis added, footnotes omitted]

130. The Claimants also rely on the *ADF* tribunal's statement that "[w]e see no logical necessity for interpreting the "procedures set out in the [NAFTA]" as delimiting the detailed boundaries of the consent given by either the disputing Party or the disputing investor". This is plainly at odds with the repeated submissions of the NAFTA Parties, as demonstrated in Exhibit R-008.

131. *Methanex* (2002) marked a turn way from *Ethyl* and was at odds with *ADF* which succeeded it by five months;

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[75] *Id.*

In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.[76]

[Emphasis added, footnotes omitted]

132. The decision in *Canfor* (2006) held as follows:

171. The above decisions make clear four points that a Chapter Eleven tribunal needs to address if and to the extent that a respondent State Party raises an objection to jurisdiction under the NAFTA:

- First, a mere assertion by a claimant that a tribunal has jurisdiction does not in and of itself establish jurisdiction. It is the tribunal that must decide whether the requirements for jurisdiction are met.
- Second, in making that determination, the tribunal is required to interpret and apply the jurisdictional provisions, including procedural provisions of the NAFTA relating thereto, i.e., whether the requirements of Article 1101 are met; whether a claim has been brought by a claimant investor in accordance with Article 1116 or 1117; and whether all pre-conditions and formalities under Articles 1118-1121 are satisfied.
- Third, the facts as alleged by a claimant must be accepted as true pro tempore for purposes of determining jurisdiction.
- Fourth, the tribunal must determine whether the facts as alleged by the claimant, if eventually proven, are prima facie capable of constituting a violation of the relevant substantive obligations of the respondent State Party under the NAFTA.[77]

[Emphasis added]

133. And in *Merrill & Ring* (2008):

28. In the specific context of NAFTA, as argued by the Claimant, both *Ethyl* (cit., paras. 85, 95) and *Mondev* (cit., para. 44) have followed the first approach - considering that minor technical failures to comply with such requirements can be corrected for the sake of efficiency and the avoidance of multiple proceedings to decide a dispute which is, in substance, within the scope of Chapter 11. The *Methanex* tribunal, however, as the Respondent pointed out, was of the view that consent to arbitration under NAFTA requires a claimant to satisfy not only Articles 1101 and 1116 or 1117, but also that "all

[76] Exhibit RL-007, *Methanex Corporation v. United States of America*, Partial Award, 7 August 2002, ¶ 120.

[77] Exhibit RL-009, *Canfor Corporation v. United States of America*, UNCITRAL, Decision of Preliminary Question, 6 June 2006, ¶ 171.

pre-conditions and formalities required under Articles 1118-1121 are satisfied" (cit., para. 120). Only then will the consent to arbitration under Article 1122 be perfected.

29. The Tribunal has no doubt about the importance of the safeguards noted and finds that they cannot be regarded as merely procedural niceties. They perform a substantial function which, if not complied with, would deprive the Respondent of the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim announced. This would be hardly compatible with the requirements of good faith under international law and might even have an adverse effect on the right of the Respondent to a proper defence.[78]

134. And in *Cargill* (2009):

¶ 160. A claimant must also provide preliminary notice pursuant to Article 1119 and satisfy the conditions precedent via consent and, where appropriate, waiver, under Article 1121. Consent of the respondent must be established pursuant to Article 1122.

[...]

¶ 183. The Tribunal must finally consider any challenges to the presence of consent by either of the Parties. Consent by the investor pursuant to Article 1121 is not disputed. Respondent, however, has challenged one element of the claim procedurally with respect to the import permit measure. As noted above, Respondent asserts that it was not validly notified pursuant to Article 1119. Because Claimant's capacity to initiate arbitration under Article 1122 is limited to claims "to arbitration in accordance with the procedures set out in this Agreement," the question is then whether Claimant has failed to comply with a procedural requirement with respect to the import permit measure and if so, whether this negates consent by Respondent in respect of such a claim.[79]

[Emphasis added]

135. And in *Detroit River Bridge* (2015):

A. PRELIMINARY CONSIDERATIONS.

NAFTA Article 1121, entitled "Conditions Precedent to Submission of a Claim to Arbitration" stipulates the conditions that a claimant must meet in order to submit a claim under NAFTA Chapter Eleven. A claimant's failure to meet these conditions renders the NAFTA Party's consent to arbitrate without effect.

[…]

Accordingly, the Tribunal does not have jurisdiction in this case, because of DIBC's failure to comply with NAFTA Article 1121.[80]

[Emphasis added]

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[78] Exhibit RL-008, *Merrill and Ring Forestry L.P. v. Government of Canada*, UNCITRAL, ICSID Administered, Decision on a Motion to Add a New Party, 31 January 2008, ¶¶ 28-29.

[79] Exhibit RL-016, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶¶ 160 and 183.

[80] Exhibit RL-015, *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Award on Jurisdiction, 2 April 2015, ¶¶ 291, 337.

136. And in *Bilcon* (2015):

> V. THE JURISDICTION OF THE TRIBUNAL
>
> 228. In international arbitration, it is for the applicant to establish that a tribunal has jurisdiction to hear and decide a matter. A Chapter Eleven tribunal only has authority to the extent that is provided by Chapter Eleven itself.
>
> 229. In Chapter Eleven, the NAFTA Parties, in the interest of ensuring "a predictable commercial framework for business planning and investment" established protections for investors. They also enabled investors to bring a host state directly to arbitration for a legally binding decision. These remedial mechanisms mean that investors possessing the nationality of another NAFTA Party do not have to depend on their home state to espouse their grievances, as would be the case in general international law. Instead, investors can proceed directly to arbitration on their own. General international law also provides that a state is not automatically subject to the jurisdiction of international adjudicatory bodies to decide in a legally binding way on complaints concerning its treatment of a foreign investor, but must give its consent to that means of dispute resolution. The heightened protection given to investors from other NAFTA Parties under Chapter Eleven of the Agreement must be interpreted and applied in a manner that respects the limits that the NAFTA Parties put in place as integral aspects of their consent, in Chapter Eleven, to an overall enhancement of their exposure to remedial actions by investors. The Parties to NAFTA chose to go as far, but only as far, as they stipulate in Chapter Eleven towards enhancing the international legal rights of investors.[81]
>
> [Emphasis added.]

137. The Claimants' attempt to distinguish these decisions and awards is unavailing. Although they involve different alleged failures of compliance and in some cases the disputing investor was found to have sufficiently complied with the requirement at issue they all clearly support the Respondent's central point –that compliance with Articles 1119 and 1121 is required for the valid submission of a claim to arbitration and necessary to engage the disputing Party's consent to arbitration under Chapter Eleven.

138. The recognition of the mandatory nature of the requirements for a disputing investor to validly submit a claim to arbitration –and the fact that compliance with such requirements is necessary to establish the consent of the disputing Party– has undoubtedly been influenced by the consistent and repeated submissions of the NAFTA Parties in their own disputes and in their submissions on questions of interpretation of the NAFTA pursuant to Article 1128.

139. The Respondent has accumulated at least 26 'post *Ethyl*' examples which are detailed in Exhibit R-008. They include submissions in: *Waste Management v. Mexico I* (1999); *Pope & Talbot* (2000); *Methanex* (2000-2001); *Mondev* (2001); *ADF* (2001); *Bayview* (2006); *Merril & Ring* (2008); *Mesa Power* (2012); *KBR* (2014); and *Resolute Forest Products* (2017).

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[81] Exhibit RL-010, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada* (UNCITRAL), Award on Jurisdiction and Liability, 17 March 2015, ¶¶ 228- 229.

140. The Respondent accordingly submits that the applicable decisions and awards cited above have now achieved the status of *jurisprudence constante* to the effect that "all pre-conditions and formalities under Articles 1118-1121" must be satisfied by the disputing investor in order to establish a disputing Party's consent under Article 1122.

141. Moreover, it could by now be said that the consistent and repeated submissions of the NAFTA Parties amount to a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" under VCLT Article 31(3).

142. In sum, the quantity and consistency of the jurisprudence and of the NAFTA Parties' submissions overwhelmingly refutes the Claimants' contention that their failures of compliance with Articles 1119 and 1121 can be excused or overlooked, and that such failures go admissibility of the claim rather than jurisdiction of the Tribunal.

143. Finally, even if the Claimants failures of compliance with Articles 1119 and/or 1121 were to be considered matters of admissibility rather than jurisdiction, the fact that the operative faults were not promptly corrected leaves the Claimants in the same position –their claims must be dismissed.

144. If considered a matter of admissibility, for failure to comply with Article 1119, the claims by the Additional Investors and claims on behalf the Additional Mexican Enterprises were inadmissible when the RFA was submitted to the ICSID, when the claim was registered and when the Tribunal was constituted, and they remain inadmissible now.

145. Similarly, for failure to comply with Article 1121, all of the claims of the Claimants individually and on behalf of the Mexican Enterprises were inadmissible when the RFA was submitted to the ICSID, when the claim was registered and when the Tribunal was constituted, and they remain inadmissible now.

146. The Respondent submits that the Claimants failed to engage the consent of the United Mexican States under NAFTA Article 1122 by their failures of compliance with Articles 1119 and 1121. There being no consent to arbitration by either disputing party, this Tribunal lacks competence to decide this claim on its merits.

b. Criticisms of NAFTA jurisprudence cited by the Respondent

147. The Claimants take issue with the jurisprudence cited by the Respondent in the Memorial. This section addresses those criticisms.

148. With respect to *Methanex*, the Claimants contend that the tribunal did not consider the scope and effect of non-compliance with the technical requirements in Article 1119.[82] However, the fact that the tribunal dismissed the claims because, in its determination, they fell outside the scope and coverage of the NAFTA Chapter Eleven does not mean that the passage quoted by the Respondent in the Memorial should not be considered. The Tribunal specifically identified compliance with

[82] Counter-Memorial on Jurisdictional Objections, ¶ 353.

the requirements in Articles 1116-1121 as necessary elements for consent to be established under Article 1122:

> In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.[83]

149. The Claimants also criticize Mexico for not citing and/or relying on the final award in *Methanex*. They claim that the *Methanex* tribunal omitted from its discussion the objection to the introduction of new measure submitted by the United States based on (*inter alia*) non-compliance with Article 1119. According to the Claimants this is evidence that the tribunal "implicitly rejected that the failure to provide a notice of an additional measure was not [sic] a relevant factor in its analysis."[84] With all due respect, this is a *non-sequitur*.

150. In relation to the introduction of the additional measure, the *Methanex* tribunal determined:

> 19. The Tribunal decides that, insofar as Methanex is relying on the amended § 2262.6(c) as *evidence* of California's intent to harm methanol producers, Methanex should be allowed to amend its Second Amended Statement of Claim to that limited effect [...]
>
> 20. However, for the reasons which follow, insofar as Methanex is relying on the amended § 2262.6(c) as an *additional* "measure" under Article 1101 NAFTA, the Tribunal decides that Methanex cannot advance the proposed amendment to its case in these arbitration proceedings.[85]

151. The Tribunal went on to explain that the amended § 2262.6(c) was never pleaded as an additional measure and that any such plea would require an additional amendment to the claimant's Second Amended Statement of Claim, which was not permissible under the applicable arbitration rules.[86] In other words, a finding regarding the claimants alleged non-compliance with Article 1119 was unnecessary. This, Mexico submits, more likely explains the absence of any discussion related to the U.S. objection based on non-compliance with Article 1119 in the final award.

152. Next, the Claimants attempt to distinguish *Merrill & Ring* by arguing that "the claimant submitted the motion to add a new party *after* the tribunal had already been constituted, and *after* both claimant and respondent had made substantive submissions in the proceeding"[87] whereas, in

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83 Exhibit RL-007, *Methanex Corporation v. United States of America*, Partial Award, 7 August 2002, ¶ 120.

84 Counter-Memorial on Jurisdictional Objections, ¶ 354.

85 Exhibit CL-027, *Methanex Corporation v. United States of America*, Final Award, 3 August 2005, Part II – Chapter F, ¶¶ 19-20.

86 *Id*., ¶ 21 *et seq*.

87 Counter-Memorial on Jurisdictional Objections, ¶ 355.

this case, "all Claimants and Enterprises were identified in the Request for Arbitration". This is beside the point.

153. The tribunal in *Merrill & Ring* grounded its decision on the claimant's non-compliance with the requirements established in the NAFTA. It specifically stated that "even if" Merrill & Ring's and Georgia Basin's claims were similar, compliance with NAFTA requirements would still be necessary, hence the delay and the serious procedural prejudice:

> 30. Thus, even if it were to be concluded that Merrill & Ring's and Georgia Basin's claims are similar, the compliance with the above mentioned safeguards would still need to be satisfied. This would take a number of months. If these proceedings were to be delayed by waiting for such compliance there would indeed be a serious procedural prejudice. At that point consolidation would not serve the efficient resolution of the claims as the present proceedings will be much advanced.[88]

154. Regarding *Canfor*, the Claimants complains that Mexico cites *obiter dicta*. The question before the tribunal was whether NAFTA Article 1901(3) bars a tribunal from considering claims with respect to antidumping and countervailing duties under Chapter Eleven, which is "a far cry from whether technical aspects of procedural provisions must be strictly and mandatorily complied with".[89]

155. *First*, the tribunal's observations regarding compliance with the pre-conditions and formalities under Articles 1118-1121 were not *obiter dicta*. They were made while explaining the four elements that a tribunal needs to address when evaluating an objection raised by a state Party. It is in this context that it observed:

> Second, in making that determination [i.e., whether the requirements for jurisdiction are met], the tribunal is required to interpret and apply the jurisdictional provisions, including procedural provisions of the NAFTA relating thereto, i.e., whether the requirements of Article 1101 are met; whether a claim has been brought by a claimant investor in accordance with Article 1116 or 1117; and whether all pre-conditions and formalities under Articles 1118-1121 are satisfied.[90]
>
> [Emphasis added]

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88 Exhibit RL-008, Douglas, Zachary; *The International Law of Investment Claims,* Cambridge University Press (2009) ¶ 30.

89 Counter-Memorial on Jurisdictional Objections, ¶ 356

90 Exhibit RL-009, *Canfor Corporation v. United States of America, Tembec Inc. et. al. v. United States of America and Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Decision of Preliminary Question, 6 June 2006, ¶ 171.

156. The fact that the issue in *Canfor* was not failure to comply with Article 1119 or Article 1121, does not diminish in any way the significance of the tribunal's finding regarding the necessity to comply with all pre-conditions formalities in order to establish the tribunal's jurisdiction.[91]

157. With respect to *Bilcon,* the Respondent has similar observations. The fact that the tribunal "had no occasion to consider whether technical non-compliance with Chapter Eleven procedures deprives it of jurisdiction" and the fact that "there simply was no discussion at all about Article 1119"[92] is beside the point. The fact that the interpretation of Article 1119 was not an issue decided by the tribunal does not invalidate the statement whereby the tribunal recognized that the protection given under Chapter Eleven must be interpreted and applied in a manner that respects the limits that the NAFTA Parties put in place as integral aspects of their consent.[93]

158. The Claimants also contend that the *Mesa Power* award does not support Mexico's interpretation of Article 1119.[94] Three observations can be made at the outset: (i) Mexico did *not* rely on the *Mesa Power* award, but rather on the non-disputing Party submissions made by the U.S. in that case; (ii) *Mesa Power* was not concerned with non-compliance with Article 1119 or 1121, and (iii) the question before that tribunal was of a different nature.

159. The issue in *Mesa Power* was whether the claimant had complied with the 6-month cooling-off period provided for in Article 1120, the interpretation of which depended on "the significance of the words 'events giving rise to the claim' in Article 1120(1)". The claimant argued that Article 1120(1) did not require that *all* events giving rise to the claim occurred six months before the notice of arbitration.[95] Canada argued that the ordinary meaning of this phrase entails that every event which gives rise to a claim must have occurred at least six months prior to the submission of that claim to arbitration.

160. The Tribunal sided with the claimant, noting:

> 299. The Tribunal agrees with the Claimant on this issue. If the Respondent's argument were followed, every new event related to a claim would require a claimant to wait for a new six months period before starting arbitration. This would apply however secondary or ancillary the new event may be. If events relating to the same claim kept occurring, a claimant would effectively be precluded from ever initiating an arbitration. This interpretation would effectively deprive Article 1116(1) (that entitles investors to

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91 Counter-Memorial on Jurisdictional Objections, ¶ 356.

92 *Id.*, ¶ 357.

93 Memorial on Jurisdiction, ¶ 59 and Exhibit RL-010, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015, ¶¶ 228- 229.

94 Counter-Memorial on Jurisdictional Objections, ¶ 360.

95 Exhibit RL-013, *Mesa Power Group LLC v Canada,* PCA Case No. 2012-17, Award, 24 March 2016, ¶ 280.

> submit a claim to arbitration) of *effet utile*, an outcome that is contrary to treaty interpretation rules.[96]

161. The Tribunal went on to hold:

> 301. For these reasons, the Tribunal considers that the six-month requirement in Article 1120(1) must be deemed met if sufficient events giving rise to a claim exist six months prior to the submission of the dispute to arbitration. If additional events occur within the six-month period which are part of the claim brought to arbitration, they can be regarded as not affecting the Tribunal's jurisdiction over that claim. This is all the more the case where the additional events are foreseeable, as was the case in Ethyl. The Respondent appears to agree with this position, albeit in a different context."[97]
>
> [Emphasis added]

162. The *Mesa Power* tribunal did not dismiss Canada's objection on the grounds that Article 1120 was procedural in nature. It dismissed it because it held, as a finding of fact, that the requirements of Article 1120(1) had been complied with.[98] Importantly, as duly noted by the Claimants in their Counter-Memorial, the tribunal "dispensed with determining whether these requirements go to consent and are thus jurisdictional …".[99]

163. Therefore, the Respondent submits, the *Mesa* award is of no assistance to this Tribunal. The Article 1128 submissions by the United States and Mexico in that case, however, are relevant and should not be ignored just because the tribunal decided the issue on the basis of factual considerations.

164. Regarding *KBR*, the Claimants complain that Mexico cites the submissions of the other two NAFTA Parties but does not provide a copy of the award.[100] Furthermore, the Claimants argue that very likely the tribunal declined jurisdiction due to the investor's substantive, material non-compliance with the waiver requirement and not because of a technical defect in the notice of intent.[101] Finally, the Claimants argue that there is no reason to believe that the *KBR* tribunal dealt with arguments regarding technical, non-compliance with Article 1119.[102]

165. The Claimants speculations and assumptions on the findings of the tribunal in *KBR* are meaningless. To this date, there is no public version of the award. The Respondent has made a good faith attempt to obtain the award. Counsel for Mexico again wrote KBR's lawyers at King &

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96 *Id.*, ¶ 299.

97 *Id.*, ¶ 301.

98 *Id.*, ¶ 318.

99 Counter-Memorial on Jurisdictional Objections, ¶ 360

100 *Id.*, ¶ 364.

101 *Id*.

102 *Id*.

Spalding in an attempt to obtain KBR's consent for the publication of the award.[103] KBR again rejected Mexico's request to release the award.[104]

166. Mexico would happily rely on the award in KBR if it could, however, for the purposes of this proceeding it relies only on the Article 1128 Submissions of Canada and the United States support Mexico's contention that the common understanding of the NAFTA Parties is that consent to arbitration under Article 1122 is conditioned to compliance with the requirements and procedures set out in Chapter Eleven.

c. Non-NAFTA jurisprudence

167. The Claimants also cite a non-NAFTA case, *Biwater Gauff v. Tanzania*, in support of the proposition that outside the NAFTA context tribunals "consistently have exercised jurisdiction despite complete, substantive (as opposed to technical) non-compliance with the notice of intent or other notice-type provisions under BITs".[105]

168. In *Biwater*, Tanzania objected to the tribunal's jurisdiction because the claimant failed to comply with the six-month cooling off period required by the Tanzania-United Kingdom BIT.[106] According to the Claimants, the tribunal rejected Tanzania's objection despite the fact that *Biwater* filed its request for arbitration before the cooling-off period had elapsed.[107]

169. Mexico questions the value of non-NAFTA jurisprudence for general propositions like the one advanced by the Claimants. NAFTA has specific wording and set of requirements that makes non-NAFTA jurisprudence of limited assistance to the Tribunal without any further analysis.

170. Importantly, the Tanzania-UK BIT under which the *Biwater* case was brought, does not have a provision equivalent to Article 1119, requiring an intended claimant to file a notice of intent containing specific information.[108] It is also clear that the decision in *Biwater* was predicated on the specific language of the Tanzania-UK BIT:

> 344. In the Arbitral Tribunal's view, such consequences [preventing the prosecution of a claim, and forcing the claimant to do nothing until six months have elapsed, even where further negotiations are obviously futile, or settlement obviously impossible for any reason and forcing the claimant to recommence an arbitration started too soon, even

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103 Exhibit R-009.

104 Exhibit R-010.

105 Counter-Memorial on Jurisdictional Objections, ¶ 344.

106 Exhibit CL-022, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 341.

107 Counter-Memorial on Jurisdictional Objections, ¶ 344.

108 Article 8.3. of the Tanzania-UK BIT establishes: "If any such dispute should arise and agreement cannot be reached within six months between the parties to this dispute through pursuit of local remedies or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre […]".

> if the six-month period has elapsed by the time the tribunal considers the matter] would not have been contemplated in the framing of Article 8(3), and nothing in the text of this provision requires such, as a matter of treaty interpretation.[109]

171. It is also worth noting that other non-NAFTA tribunals have adopted a different approach. In the CAFTA case, *Railroad Development Company v. Guatemala*, the tribunal had to decide whether a waiver submitted by the Claimant on behalf on its "investment enterprise" was defective. In its counter memorial, the respondent argued that failure to comply with the requirements set forth in CAFTA Article 10.18 (which is the *equivalent* of NAFTA Article 1121) constituted a jurisdictional impediment.[110]

172. The tribunal held that it had no jurisdiction to hear the case without an agreement of the parties to grant the claimant an opportunity to remedy a deficient waiver:

> [...] The Respondent even requested the Tribunal to issue an order to permit the Claimant to remedy the defective waiver. But it is also clear from subsequent submissions, confirmed during the hearing, that the Respondent retracted this concession and there is no basis on which the Tribunal could hold that it was precluded from doing so. This being a matter pertaining to the consent of the Respondent to this arbitration, the Tribunal has no jurisdiction without the agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver. It is for the Respondent and not the Tribunal to waive a deficiency under Article 10.18 or to allow a defective waiver to be remedied, as the United States did in Methanex.[111]

4. The Integrity of Future NAFTA Investment Arbitration

173. The decision sought by the Claimants has serious systemic implications for future dispute settlement proceedings under NAFTA Chapter Eleven.

174. If the Tribunal were to accept that a claimant named in a notice of intent can decide for itself that further "negotiations" would be "futile" and thereby be entitled to include additional claimants in its request for arbitration, dispute settlement under NAFTA will suffer a manifest lack of predictability that will harm the interests of the NAFTA Parties and future disputing investors alike.

175. This theory –equivalent to "notice not required if negotiations are deemed to be futile"– is dangerous and completely contrary to the ordinary meaning of the text of Article 1119.

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[109] Exhibit CL-022, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award,24 July 2008, ¶ 344.

[110] Exhibit RL-028. *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Respondent Reply on Jurisdiction, 11 August 2008, ¶ 42.

[111] Exhibit RL-029. *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction, 17 November 2008, ¶ 61.

176. As observed in the introduction to this pleading, the Claimants' position, if accepted, would enable a single disputing investor to give notice of intent and later include any number of claimants in the submission to arbitration.

177. It could even be argued that a disputing investor could give notice of intent, engage in unsuccessful negotiations and then immediately submit a claim to arbitration without waiting for 90 days to expire. Why wait the full 90 days if further negotiations are doomed to fail?

178. Article 1119 is not solely intended to give a disputing investor an opportunity to negotiate a settlement. It also accords the disputing Party an opportunity, through "consultations", to investigate and assess the claim in order to decide whether to recommending remedial action, to consider recommending financial compensation and/or to secure evidence needed for the preparation of its defense.

179. Contrary to the Claimants "refusal to negotiate" mantra in this case, Mexico's responsible authorities attempted in good faith to obtain information reasonably needed to assess the various allegations contained in the Original NOI, including the pervasive and continuing question of 'who owns what?'

180. The Tribunal would do a serious disservice to the orderly conduct of Chapter Eleven dispute settlement if it were to revive platitudes applied 20 years ago in *Ethyl* in order to excuse the Additional Claimant's blatant failure of compliance with Article 1119.

181. The same can be said of the Claimants' effort to excuse their failure of compliance with Article 1121, which boils down to a question of whether the powers of attorney that they presented can qualify as express consent to arbitration in accordance with the procedures set out in the NAFTA. The Claimants effectively contend that the powers of attorney should qualify as they imply the consent of each claimant. Mexico simply seeks adherence to a clear legal requirement under the treaty that express written consent be given by each claimant.

182. Again, the Tribunal would do a disservice to orderly, predictable Chapter Eleven dispute settlement if it were to resort to some legal artifice –such as inferred consent sufficing for express consent– to relieve the Claimants of their obvious failure of compliance with Article 1121.

183. Finally, there is the unanswered question of 'how did this happen?' There is no explanation from Mr. Gordon Burr why the Additional Claimants did not file their own notice of intend or join the Original claimants in a fresh notice of intent. One can only speculate as to whether: (i) it was too late to make this obviously necessary correction when Mr. Gordon Burr engaged Quinn Emmanuel, or (ii) he and/or counsel thought there would be a tactical advantage to keeping existence of the Additional Claimants a surprise for the Respondent upon receiving the RFA, which it was. In either case, this problem rests squarely at the feet of the Claimants.

184. Similarly, there is no explanation why the RFA clearly contemplates the filing of "consents waivers" but instead includes as exhibits powers of attorney and waivers. Was this done intentionally or was there miscommunication between the RFA drafters and those responsible for drafting the documents for signature by the Claimants?

185. It is, however, certain that the Claimants were promptly advised of Mexico's position on their failure to submit proper written consents but obstinately refused to take corrective action, insisting instead that acceptance of Mexico's open offer to arbitrate operated as consent and additionally, or perhaps alternatively, that the powers of attorney sufficed as written consent. This is also a problem that lies at the feet of the Claimants.

C. Request for Relief

186. The Respondent respectfully requests the Tribunal to make the following declarations:

- A declaration that the Tribunal lacks jurisdiction to decide the claims of the Additional Claimants for the failure of each of them to deliver a notice of intent as required by NAFTA Article 1119.
- A declaration that the Tribunal lacks jurisdiction to decide the claims of the Additional Mexican Enterprises for the failure of the Claimants to name any of them in a notice of intent as required by NAFTA Article 1119:
- A declaration that the Tribunal lacks jurisdiction to decide the claims of any of the Claimants for failure to deliver and file a consent to arbitration in the terms and manner required by NAFTA Article 1121;

187. And to make the following orders, as appropriate:

- An order dismissing the claims of all the Additional Claimants, namely:
    - Deana Anthone,
    - Neil Ayervais,
    - Douglas Black,
    - Howard Burns,
    - Mark Burr,
    - David Figueiredo,
    - Louis Fohn,
    - Deborah Lombardi,
    - P. Scott Lowery,
    - Thomas Malley,
    - Ralph Pittman,
    - Dan Rudden,
    - Marjorie "Peg" Rudden,
    - Robert E. Sawdon,
    - Randall Taylor,
    - James H. Watson, Jr.,

- B-Cabo, LLC,
- Colorado Cancun, LLC,
- Caddis Capital, LLC,
- Diamond Financial Group, Inc.,
- EMI Consulting, LLC,
- Family Vacation Spending, LLC,
- Financial Visions, Inc.,
- J. Johnson Consulting, LLC,
- J. Paul Consulting,
- Las KDL, LLC,
- Mathis Family Partners, Ltd.,
- Palmas Holdings, Inc.,
- Trude Fund II, LLC,
- Trude Fund III, LLC, and
- Victory Fund, LLC.

- An order dismissing the claims of the Additional Mexican Enterprises, namely:
  - Operadora Pesa, S. de R.L. de C.V.,
  - Metrojuegos, S. de R.L. de C.V., (no longer part of these proceedings) and
  - Merca Gaming, S. de R.L. de C.V.(no longer part of these proceedings)
- An order dismissing the claims of all the Claimants, namely:
  - B-Mex, LLC,
  - B-Mex II, LLC
  - Palmas South, LLC,
  - Oaxaca Investments, LLC,
  - Santa Fe Mexico Investments, LLC,
  - Gordon Burr,
  - Erin Burr, and
  - John Conley
  - Deana Anthone,
  - Neil Ayervais,
  - Douglas Black,
  - Howard Burns,

- Mark Burr,
- David Figueiredo,
- Louis Fohn,
- Deborah Lombardi,
- P. Scott Lowery,
- Thomas Malley,
- Ralph Pittman,
- Dan Rudden,
- Marjorie “Peg” Rudden,
- Robert E. Sawdon,
- Randall Taylor,
- James H. Watson, Jr.,
- B-Cabo, LLC,
- Colorado Cancun, LLC,
- Caddis Capital, LLC,
- Diamond Financial Group, Inc.,
- EMI Consulting, LLC,
- Family Vacation Spending, LLC,
- Financial Visions, Inc.,
- J. Johnson Consulting, LLC,
- J. Paul Consulting,
- Las KDL, LLC,
- Mathis Family Partners, Ltd.,
- Palmas Holdings, Inc.,
- Trude Fund II, LLC,
- Trude Fund III, LLC, and
- Victory Fund, LLC.

- An order dismissing the claims made on behalf of all of the Mexican Enterprises, namely:
  - Juegos de Video y Entretenimiento de México, S. de R.L., de C.V.,
  - Juegos de Video y Entretenimiento del Sureste, S. de R.L., de C.V.,
  - Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V.,
  - Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V.,

- Juegos y Video de México, S. de R.L. de C.V.,
- Exciting Games, S. de R.L. de C.V.,
- Operadora Pesa, S. de R.L. de C.V.
- Metrojuegos, S. de R.L. de C.V. (no longer part of these proceedings) and
- Merca Gaming, S. de R.L. de C.V. (no longer part of these proceedings)[112]

- An order requiring the Claimants to jointly and severally indemnify the Respondent for the costs of the arbitration and its costs of legal representation, including reasonable travel expenses of all attending legal counsel and witnesses.

[112] Metrojuegos, S. de R.L. de C.V. and Merca Gaming, S.de R.L. de C.V. are no longer part of these proceedings, Counter-Memorial on Jurisdictional Objections, footnote 452.

Part Two - Failure to establish standing

A. Introduction

188. Section B of Chapter Eleven permits international claims to be made in certain defined circumstances. Consistent with long-standing rules of customary international law, it does not allow a company of a Party to submit an international claim against its own State. Article 1117(4) states in this regard that: "An investment may not make a claim under this Section".

189. Article 1117(1) permits a derivative claim to be brought in the name of an enterprise that is a "juridical person" of the respondent State in certain defined circumstances. First, the investor must own or control the enterprise directly or indirectly. Second, both the investor and the enterprise must consent to the NAFTA arbitration and waive their right to pursue claims for damages before other tribunals or dispute settlement mechanisms.

190. The derivative nature of the claim is maintained throughout the arbitration and is reflected in any relief that might be awarded by a tribunal: Article 1135(2) requires that, in the event of a successful claim brought under Article 1117, the award must provide that restitution of property be "made to the enterprise", an award of damages and interest must be "paid to the enterprise", and the award "shall provide that it is without prejudice to any right that any person may have in the relief under applicable law".

191. The provisions governing claims made under Article 1117 recognize the fact that in all three NAFTA Parties (and universally) ownership or control gives the owner or controlling shareholder very broad powers over it. It gives it the authority to modify or liquidate the enterprise, to appoint officers and directors, modify its governing bylaws and thereby control the policy and management affairs of the corporation. NAFTA allows for the investor of one Party that holds the ownership or control of a company from another Party to file a claim on its behalf.

192. A mere shareholder does not have such a right. A shareholder has the right to be notified of assembly meetings, to vote according to the shares it owns, the right of participation with respect to profit earned according to its shares, and to participate in the distribution of any profit obtained by the company. However, a minor shareholder is not allowed to act in representation of a company, and only has the rights conferred by the company bylaws or by domestic law.

193. Similarly, NAFTA does not grant rights of this kind to shareholders that do not demonstrate the ownership or control of the company. Such shareholders can only file a claim for alleged violations of the provisions in Section A that directly affect their rights *qua* shareholders.

194. As will be demonstrated below, the Claimants have failed to establish that they directly or indirectly own or control the Mexican Enterprises and, therefore, that they have standing to bring claims on their behalf under Article 1117. At most the Claimants hold a non-controlling stake on those companies and, therefore, can only submit a claim on their own behalf for alleged treaty violations as shareholders.

B. Ownership and control

195. The general rule of interpretation embodied in Article 31 of the VCLT states that "a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[113] The context for the purpose of interpretation includes the text of the treaty, including its preamble and annexes. The VCLT also prescribes that "a special meaning shall be given to a term if it is established that the parties so intended".

196. Article 1117 provides in the relevant part as follows:

> **Article 1117: Claim by an Investor of Party on Behalf of an Enterprise**
>
> 1. An investor of a Party, on behalf of an Enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit a claim to arbitration under this Section a claim that the other Party has breached an obligation under: [...] [Emphasis added]
>
> – o –
>
> **Artículo 1117. Reclamación del inversionista de una Parte, en representación de una empresa**
>
> 1. El inversionista de una Parte, en representación de una empresa de otra Parte que sea una persona moral propiedad del inversionista o que esté bajo su control directo o indirecto, podrá someter a arbitraje, de conformidad con esta sección, una reclamación en el sentido de que la otra Parte ha violado una obligación establecida en: [...] [Énfasis propio]

197. The terms "ownership" and "control" are not defined in the NAFTA. For that reason, the analysis must begin with the ordinary meaning of the terms.

198. The Merriam-Webster Dictionary defines "ownership" as:

> Definition of ownership
>
> 1 : the state, relation, or fact of being an owner
>
> 2 : a group or organization of owners[114]

199. The *Diccionario de la lengua española*, defines "propiedad" as:

> 1. f. Derecho o facultad de poseer alguien algo y poder disponer de ello dentro de los límites legales.[115]
>
> 1. f. Right or faculty of someone to possess something and the ability to dispose of it within the legal limits. [Translated by the Respondent]

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113 VCLT, Article 31.

114 Merriam-Webster Dictionary. https://www.merriam-webster.com/dictionary/ownership?src=search-dict-box .

115 Diccionario de la lengua española. http://dle.rae.es/?id=UNs0WGg

200. The Respondent submits that "ownership" in the context of Article 1117 means full ownership or virtually full ownership of the company. A shareholder -or group of shareholders- with a majority stake in a company, even if that stake is significant, does *not* own the company. Article 1117 does not state that an investor may bring a claim on behalf of a company it *partially* or *substantially* owns.

201. For cases involving less than full ownership, Article 1117 requires the investor to establish that he/she/it has direct or indirect "control" of the enterprise in order to bring a claim on its behalf.

202. As noted by a well-respected scholar and arbitrator in the subject of investment claims, the question of whether an investor of another Party exercises control over an enterprise of a Party is largely a question of domestic law:

> This discussion of the relationship between an individual or legal entity (the claimant) and its investment (property or assets) reveals that the question of control is a question of law. It would be meaningless for a claimant to assert that it is the *de facto* owner of the land that constitutes its investments or has some other form of *de facto* control in respect thereof. Either the claimant has a power to control that property that is recognized by the *lex situs* or it does not.[116]

203. Mexico submits that the term "control" in Article 1117 means legal corporate control of a company. In line with the plain meaning of the term "control", it is a reference to the investor's power to govern the management and policies of the entity, that is, to decide on substantive matters, such as: the appointment and removal of the company's directors and officers; the approval and amendment of the company's bylaws; the transfer of shares or admission of new partners; and the dissolution of the company. As will be explained below, in the case of all Mexican Enterprises, these powers reside in the *asamblea de socios* (shareholders assembly).

204. All of the Mexican Enterprises are *sociedades de responsabilidad limitada* (limited liability partnerships) and as such are regulated by the *Ley General de Sociedades Mercantiles* (General Law of Mercantile Companies or LGSM).[117] The highest authority of a limited liability partnership is the *asamblea de socios* (shareholders assembly) which makes its decisions by majority vote, unless the bylaws provide otherwise:

> Article 77.- The General Shareholder's Meeting is the supreme organ of the Society. The resolutions of the General Shareholder's Meeting will be taken by the majority of the votes that represent at least half of the social capital, unless the social contract demands a higher majority. Except as otherwise specified, if this majority is not obtained in the first meeting, the shareholders will be called for a second time, and the

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[116] Exhibit RL-030, Douglas, Zachary; *The International Law of Investment Claims*; Cambridge University Press, 2009, ¶ 558.

[117] Limited liability companies have *socios* who have a stake in the company called *parte social*. For practical reasons and to be consistent with the Claimants' submissions, the Respondent will refer to *socios* as "shareholders" and their respective "*partes sociales*" as "shares" or "shareholding" although the terms are not equivalent.

> decisions will be taken by the majority of votes, notwithstanding the proxied proportion of the social capital.[118] [Translated by the Respondent]

205. Article 78 of the LGSM endows the *asamblea* with vast powers over the company, including: the approval, modification or rejection of the company's financials statements; distribution of profits; appointment and removal the company's directors (*Consejo de Gerentes)*; appointment of a supervisory council (*Consejo de Vigilancia*); matters concerning the division and amortization of shares; amendments to the company's bylaws; transfer or shares or admission of new partners; and the dissolution of the company.[119] In other words, he who controls the *asamblea de socios* controls the company.

206. The Claimants rely on *Thunderbird* for the proposition that "in assessing control for NAFTA standing purposes, tribunals look to management authority, contribution of expertise, and initial capitalization efforts as important factors."[120]

207. The Respondent observes that the *Thunderbird* tribunal made its determination on the basis of the record as a whole. Consideration of "initial capitalization efforts" and "contribution of expertise" for the purposes of establishing control was likely deemed important in that case because the companies at issue were in the very early stages of operation. In fact, many of them never opened for business.

208. In any case, Mexico strongly disagrees, for example, that "initial capitalization efforts" or "contribution of expertise" carries any weight for the purposes establishing control. These factors may be evidence that a person or entity founded a business or that certain person or entity was instrumental in establishing the business. However, it does not necessarily follow that he/she/it exercises control over it. What matters for the purposes of standing is whether a claimant bringing a claim on behalf of an enterprise had ownership or control at all material times.

209. Mexico also disputes that "management authority" alone gives an investor standing to bring a claim on behalf of the enterprise under Article 1117. This is especially true when that managerial authority can be limited, conditioned or even revoked at any time by a hierarchically superior body, such as the *asamblea de socios*, as in the instant case.

210. In any event, the *Thunderbird* tribunal did not hold that management authority, contribution of expertise and initial capitalization efforts were "important factors" in establishing control. The

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118 LGSM, Article 77. The original text in Spanish reads:

"Artículo 77.- La asamblea de los socios es el órgano supremo de la sociedad. Sus resoluciones se tomarán por mayoría de votos de los socios que representen, por lo menos, la mitad del capital social, a no ser que el contrato social exija una mayoría más elevada. Salvo estipulación en contrario, si esta cifra no se obtiene en la primera reunión, los socios serán convocados por segunda vez, tomándose las decisiones por mayoría de votos, cualquiera que sea la porción del capital representado."

119 LGSM, Article 78.

120 Claimants' Counter-Memorial on Jurisdictional Objections, ¶ 163.

question in that case was "whether 'control' must be established in the legal sense, or whether *de facto* control can suffice for the purposes of Chapter Eleven of the NAFTA." The tribunal held that "a showing of effective or '*de facto*' control is, in the Tribunal's view, sufficient for the purposes of Article 1117 of the NAFTA".[121]

211. Mexico disagrees with this aspect of the award. The concept of *de facto* control is subjective and thus, injects uncertainty and ambiguity where none should exist. As noted earlier in this submission, "[e]ither the claimant has a power to control that property that is recognized by the *lex situs* or it does not." Opening the interpretation of "control" to other subjective factors, such as the ability to exercise substantial influence over the management and operation of the investment, would only lead to questionable and/or inconsistent outcomes.

212. The Thunderbird tribunal's approach raises the potential for inconsistency, as explained by Professor Douglas:

> 570. 'Legal control' and '*de facto* control' are juxtaposed in this statement [¶ 106 of the Award[122]] and the inference is that either would suffice. That gives rise to the possibility that an entity exercising *de jure* control over an investment and an entity purporting to exercise *de facto* control in respect of the same could both seek remedies in investment treaty arbitration for the same prejudice to the same investment. Perhaps the tribunal in *Thunderbird* meant to carve out a very limited exception to the requirement of legal control, as would follow from its insistence upon a standard of proof in criminal proceedings – 'beyond a reasonable doubt'. Nevertheless, the tribunal's application of this standard to the evidence, whilst exhaustive and transparent, does raise concerns about the application of a subjective test that might, in future cases, simply be tailored to affirm jurisdiction.[123] [Emphasis added]

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[121] Exhibit CL-7, ¶¶ 105-106. The Thunderbird tribunal appears to have relied on an "Understanding" with respect to Article 1(6) of the Energy Charter Treaty which was cited in support of the finding at issue:

"For greater clarity, as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after such an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's (a) financial interest, including equity interest, in the Investment; (b) ability to exercise substantial influence over the management and operation of the Investment; and (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body. [...]"

[122] Paragraph 106 of the *Thunderbird* Award states:

"The Tribunal does not follow Mexico's proposition that Article 1117 of the NAFTA requires a showing of legal control. The term "control" is not defined in the NAFTA. Interpreted in accordance with its ordinary meaning, control can be exercised in various manners. Therefore, a showing of effective or "*de facto*" control is, in the Tribunal's view, sufficient for the purposes of Article 1117 of the NAFTA3. In the absence of legal control however, the Tribunal is of the opinion that de facto control must be established beyond any reasonable doubt."

[123] Exhibit RL-030. Douglas, Zachary; *The International Law of Investment Claims,* Cambridge University Press (2009), p. 307.

213. But even if this Tribunal were to adopt the standard of *de facto* control used in *Thunderbird*, it bears noting that the tribunal in that case observed that "*in the absence of legal control however, the Tribunal is of the opinion that de facto control must be established beyond a reasonable doubt*."[124] As will be explained in subsequent sections, the Claimants have not met their burden of proving beyond a reasonable doubt their purported *de facto* control over the Mexican Enterprises.

1. Ownership of the Mexican Enterprises

a. Alleged ownership of the Juegos Companies

214. The Claimants have provided very limited, incomplete and inconsistent documentary evidence of their shareholding in the Mexican Enterprises. They did not submit a copy of the shareholder's registry book (required by law and the bylaws), or a copy of the book of capital variations (required by the bylaws), or copies of their respective share certificates, or evidence of the acquisition of the shares (such as wire transfers or receipts), or a complete set of *asambleas* recording all the changes in shareholding interests.

215. There is no testimony or documentary evidence of any kind from any of the Additional Claimants, the very parties that allegedly make up the voting control of the Juegos companies. Surely, in the absence of corporate records that are alleged to have been lost in a fire,[125] and the failure to produce copies of such records from secondary sources such as lawyers and accountants, the best evidence of each investor's shareholding, including the identity of the company invested in, the date of acquisition and disposal (if any), the class of shares acquired and the amount paid would be a witness statement from each investor, with supporting documentation, such as lawyers' or notaries' reporting letters, copies of share certificates, cancelled cheques and/or receipts, and dividend statements.

216. The Claimants rely instead on the witness statement of Ms. Erin Burr, in particular Annex C which contains a series of charts that purport to show the Claimants' shareholdings in the Juegos Companies as of 19 June 2013 (the date in which the Mexico City casino was temporarily closed). These charts are said to be based (*inter alia*) on Exhibits C-89 to C-93[126] which, according to Ms. Burr, are "the last *asambleas* where changes in shareholding capital were recognized".[127]

217. The Respondent submits that regardless of what standard of proof is deemed to apply to the issue of ownership, the Claimants have failed to meet their burden. *First*, the scant evidence provided by the Claimants does not prove that they owned the Mexican Enterprises at all material times. *Second*, the charts in Ms. Burr's witness statement are inconsistent with the evidence on the

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[124] Exhibit CL-07, *International Thunderbird Gaming Corp. v. The United Mexican States*, UNCITRAL, Award, 26 January 2006, ¶ 106.

[125] Claimant's Response to the Tribunal's Decision on Respondent's Request for Documents, 31 October 2017, p. 2.

[126] In its reply to request 7, the Claimants stated "[...] Ms. Erin Burr prepared Annex C from the data contained in Exhibits C-89 – C-93 and an internal corporate worksheet kept contemporaneously in the regular course of business for the Juegos Companies. [...] "

[127] Witness Statement of Ms. Erin Burr, ¶ 72. The term "*asambleas*" refers to the general shareholders meeting.

record. *Third*, even if the evidence were to be considered sufficient and accurate, it clearly shows that the Claimants did not have full ownership of the Mexican Enterprises.

218. With regard to the first point, the Respondent maintains that the minutes of the *asambleas* on which Ms. Burr relied for the preparation of Annex C (*i.e.*, Exhibits C-89 to C-93) are not proof of the Claimants' shareholding in the Mexican Enterprises at all material times. They are, at best, evidence of the Claimants' shareholdings as of the date of the respective *asamblea* (*i.e.*, between February 2006 and September 2008). Subsequent transfers could have occurred and most likely did occur.

219. The evidence on the record shows, for example, that on 29 August 2014[128]: (i) the Board of Managers of all the Juegos Companies was restructured –Messrs. Burr, Conley, among others,[129] were replaced by Messrs. Chow and Pelchat; (ii) the new Board approved Grand Odyssey as a *Socio Calificado*; and (iii) the *Asamblea* de Socios, with the exception of Juegos Naucalpan, approved the transfer of the Claimants' shares to Grand Odyssey:

> Ninth.- Gordon Gay Burr Jr., Antonio Moreno Quijano, John Edward Conley y Alfredo Moreno Quijano are removed from the Board of Directors.
>
> Tenth.- A1 Series Shareholders unanimously appointed Alfonso Abud as Board of Director's member.
>
> Eleventh.- A2 Series Shareholders unanimously appointed Jose Adolfo Ramirez Lucio as a Board of Director's member.
>
> Twelfth.- Series B Series Shareholders unanimously appointed Jose Bejamin Chow del Campo, Luc Pelchat y Antonio Navarro Bernal as members of the Board of Directors.[130]
>
> [Translated by the Respondent]

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[128] The minutes of the *asamblea* were notarized on 10 September 2014.

[129] The list of names varies from one entity to another. However, Messrs. Burr and Conley were removed from the board of all the Juegos companies. Antonio Moreno Quijano, Dan Rudden, Alfredo Moreno Quijano, Antonio Goicochea, and Eduardo Gómez were also removed.

[130] Exhibit C-36, Minutes of the *Asamblea* held on 29 August 2014 of Juegos Villahermosa, p.11. Equivalent resolutions can be found in the minutes of the *Asambleas* of the other Juegos Companies held on the same date. See Exhibits C-37, p.11, C-38, p. 10, C-39, p. 10, and C-40, p. 11. The original text in Spanish reads:

"Novena: Se remueve a Gordon Gay Burr Jr., Antonio Moreno Quijano, John Edward Conley y Alfredo Moreno Quijano como miembros del Consejo de Gerentes de la Sociedad.

Decima: Los socios de la Seria "A1" nombraron por unanimidad como gerente a Alfonso Abud.

Decima Primera: Los socios de la Serie "A2" nombraron por unanimidad como Gerente a Jose Adolfo Ramírez Lucio.

Decima Segunda: Los socios de la Serie "B", nombraron por unanimidad como Gerentes a Jose Benjamín Chow del Campo, Luc Pelchat y Antonio Navarro Bernal."

220. The authorization for the transfer of the shares to Grand Odyssey was subsequently confirmed at the 7 November 2014 *asambleas*[131] and recorded in the corresponding minutes:

> Resolutions
>
> First.- The transmission of shares from Mathew Roberts, Neil Ayervais; Doug Black, Howard Bursn, Erin Burr, Gordon Burr, Mark Burr, Caddis Capital LLC, John Edward Conley; Cordplease Private Foundation, David Figueiredo, Las KDL. LLC; Oaxaca Investments LLc, Jay Rhodes, Dan Rudden, Santa Fe Mexico investments LLC; Michael Tanner; Randal Taylor; James H. Watson Jr y Mathis Family Partners, Ltd. to the company Grand Oddyssey Casino, SA de CV is approved by unanimous vote.
>
> As a consequence of the above, the notifications and registrations referred in Section THIRTEENTH of Juegos de Video y Entretenimiento del Sureste S de RL de CV Bylaws shall be made in due time.[132]
>
> [Translated by the Respondent]

221. The Respondent is aware that the Claimants dispute the legal validity of the transfer of the shares that took place on 7 November 2014 minutes. However, the only evidence they have provided to contest what the minutes record is the testimony of Mr. Luc Pelchat: an individual the Claimants themselves have accused of fraud, extortion and racketeering, among other offenses, and whose testimony was secured only after the Claimants reached a settlement agreement and agreed to discontinue the lawsuit filed against him (the RICO claim).[133]

222. On this point, the Respondent would further observe that the transfer of the shares was further confirmed in an email dated 2 June 2015 from Neil Ayervais to (presumably) Mr. Benjamin Chow. Notably, the email acknowledges that the transfer "occurred in November" and does not claim that it was done illegally or was otherwise irregular:

> Benjamin, as I'm sure you agree, we need to move quickly on the new deal. Our sense of urgency is magnified by learning about some events in Mexico that increase our concerns. After we learned about the sales of the vehicles about which we expressed displeasure last week, we discovered that your attorney, Adolfo, had filed a request with SEGOB to remove the seals from the casinos for the purpose of removing gaming machines and other assets. Of course, we were even more alarmed at that news, despite

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131 The minutes of the *asambleas* were notarized on 10 November 2014.

132 Exhibit R-011, Minutes of the Asamblea held on 7 November 2014 (10 November 2014) of Juegos Villahermosa; p. 2. Equivalent resolutions can be found in the minutes of the *Asambleas* of the other Juegos Companies held on the same date. See Exhibits R-012, p. 2, R-013, p. 2, and R-014, p. 2. The original text in Spanish reads:

"Primera.- Se aprueba por unanimidad la transmisión de las partes sociales de: Mathew Roberts, Neil Ayervais; Doug Black, Howard Bursn, Erin Burr, Gordon Burr, Mark Burr, Caddis Capital LLC, John Edward Conley; Cord please Private Foundation, David Figueiredo, Las KDL. LLC; Oaxaca Investments LLC, Jay Rhodes, Dan Rudden, Santa Fe Mexico investments LLC; Michael Tanner; Randal Taylor; James H. Watson Jr y Mathis Family Partners, Ltd. A favor de la empresa Grand Odyssey Casino, S.A. de C.V.

Como consecuencia de los anterior, en su momento realícense las notificaciones y registros a los que hace referencia el artículo Décimo tercero de los Estatutos de Juegos de Video y Entretenimiento del Sureste S. de R.L. de C.V."

133 Counter-Memorial, ¶ 98 and Exhibit R-002.

> the fact that SEGOB had denied the request. We hate to have to reiterate that no assets can be removed or sold.
>
> The news that the landlord in Cuernavaca had filed an action to evict the casino is also a great concern.
>
> Here is what we need you to accomplish immediately:
>
> 1. Finalize the letter of intent.
>
> 2. Call for an assemblea to approve the new deal, reverse the stock transfers that occurred in November, approve the financials, change the board of directors until the new deal is completed and deal with the Beiruti situation. Julio is preparing the assemblea documents.
>
> 3. Provide us in writing with the status of the Cuernavaca lease and the Beiruti debt.
>
> We are ready, willing and able to move quickly and provide whatever assistance is necessary. Please confirm your agreement with these matters and get the redraft of the LOI to us.[134]
>
> [Emphasis added]

223. With regard to the second point –i.e., the reliability of the shareholding charts in Annex C of Ms. Burr's witness statement– the Respondent's analysis of Exhibits C-89 to C-93 has uncovered a series of inconsistencies that put into question Ms. Burr's charts' evidentiary value. For example:

- Five of the Additional Claimants –Trude Fund II, LLC, Trude Fund III, LLC, J. Johnson Consulting, LLC, Deana Anthone and Robert E. Swadon– appear in Ms. Burr's chart for Juegos Villahermosa, but do not appear in the list of shareholders in Exhibit C-90 (*i.e.*, the last *asamblea* of Juegos Villahermosa recording changes in the company's shareholdings, according to Ms. Burr);
- Three of the Additional Claimants –Caddis Capital, LLC, Diamond Financial Group, Inc. and Thomas Malley– appear in Ms. Burr's chart for Juegos Morelos (Cuernavaca), but do not appear in the list of shareholders in Exhibit C-92 (*i.e.*, the last *asamblea* of Juegos Cuernavaca recording changes in the company's shareholdings, according to Ms. Burr);
- According to Ms. Burr, Caddis Capital LLC is a shareholder in Juegos D.F. and Juegos Puebla, however, it does not appear in the list of shareholders in Exhibits C-93 and C-91 (*i.e.*, the last *asambleas* of Juegos DF and Puebla recording changes in the company's shareholdings, according to Ms. Burr);
- Also, according to Ms. Burr, Mr. Randal Taylor owns 1,000 Class A1 shares and 1,000 Class B shares in Juegos Cuernavaca, however, according to Exhibit C-92 he only owns 500 Class B shares and no Class A1 shares.

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134 Exhibit R-015, p. 1.

224. It bears noting here that, the Juegos Companies' bylaws provided for a unique process for the transfer of shares. First, if the transfer involved a new shareholder, he/she/it had to be approved beforehand as a qualified shareholder (*socio calificado*) by the majority of the Board of Managers:

> FOURTEENTH. The transmission of shares will be subject to the purchaser being approved as a "qualified shareholder" through a resolution taken by the majority of the members of the Board of Managers.[135]
>
> [Translated by the Respondent]

225. Second, any transfer of shares had to be approved by the majority of the Board of Managers (C*onsejo de Gerentes*) and by the *Asamblea de Socios* with a majority vote of the Class B shares, and be recorded in the Shareholders Registry:

> THIRTEEN. The Shareholders may transmit, convey, sell, encumber or otherwise dispose of their shares in accordance with this article, provided that it has previous authorization of the majority of the members of the Board of Managers, as well as the authorization of the Asamblea de Socios with the majority vote of the of series B shares.
>
> [...]
>
> Any acquisition of shares by third parties in contravention of the requirements contained in this Article will not be recognized by the company.
>
> [...]
>
> The partnership [*sociedad*] will only recognize as shareholders those individuals or corporations registered in the Shareholders Registry [*Libro de Registro de Socios*]. The shareholders' addresses and shareholding will also be registered in this Registry. Likewise, any transfer of shares done pursuant to this chapter will be recorded in this Registry. [...] [Emphasis added][136]

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[135] Exhibit C-90, Bylaws of Juegos Villahermosa, p. 16. The original text in Spanish is "DECIMO CUARTO. - La transmisión de partes sociales estará condicionada a que el adquiriente sea considerado "socio calificado" por la resolución de la mayoría de los integrantes del Consejo de Gerentes." Similar provisions can be found in Exhibits C-89, p. 14; C-91, p. 11; C-92, p. 11; C-93, p. 10.

[136] Exhibit C-90, Bylaws of Juegos Villahermosa, pp..15. The original text in Spanish reads as follows:

"DECIMO TERCERO. - Los socios podrán transmitir, ceder, vender, gravar o disponer en cualquier otra forma de sus partes sociales atendiendo a lo estipulado en este numeral y siempre con la autorización previa de la mayoría de los miembros del Consejo de Gerentes, o en su caso del Gerente Único, y por acuerdo tomado en la Asamblea de Socios con la mayoría de votos de los socios de la Seria B.

[...]

Cualquier adquisición de partes sociales de la Sociedad por terceras personas en contravención a las disposiciones contenidas en el presente Artículo, no será reconocida en la Sociedad.

[...]

La Sociedad solo reconocerá como socios a aquellas personas físicas o morales registradas en su Libro de Registro de Socios. Los domicilios y participaciones de los socios también serán registrados en dicho Libro. Asimismo, deberá reflejarse en este Libro cualquier transferencia de partes sociales que sea realizada conforme al presente capitulo."

Similar provisions can be found in Exhibits C-89, p.13; C-91, p. 11; C-92, p.11; C-93, p.10.

[Translated by the Respondent]

226. There is simply no evidence that these necessary steps were taken in the case of the shares allegedly held by the individuals that appear in the charts in Annex C, but not on the corresponding shareholder lists recorded in the minutes of the *asambleas* in exhibits C-89 to C-93.

227. A similar problem exists in the case of the alleged share acquisition by Louis Fohn and Victory Fund LLC.

> 266. All U.S. claimant shareholders made their investments in the Juegos Companies by purchasing their shares before June 2013. They were owners of their shares on the date they filed the RFA and remain so today. Although two Claimants—Louis Fohn and Victory Fund, LLC—formally acquired their shares in JVE Sureste on January 1, 2014, both of them had already made their investments by purchasing their shares prior to June 2013. In particular, Louis Fohn paid Claimant Daniel Rudden in March 2013 to purchase 0.4 units of Class B shares of JVE Sureste, and Victory Fund, LLC paid an American national in December 2012 for 0.5 units of Class B shares of the same company. [...]

228. There is no evidence that Mr. Fohn and/or Victory Fund LLC were approved as *socios calificados*, that the Board and the *Asamblea* approved the transfer of shares or that the transfer was registered in the Shareholders Registry. That transfer of shares was never formalized in accordance with the company's bylaws.

229. With regard to the third point –*i.e.*, that the Claimants have failed to establish that they had full ownership of the Juegos Companies– the Claimants' own evidence shows they did not own any of the Juegos Companies at any material time. As can be seen from the following table based on Annex C of Ms. Burr's witness statement, the Original Claimants allegedly had a shareholding between 41.1% and 82.3%. With the Additional Claimants, the percentage increases to a range between 56% to 82.30%:

Entity	Shareholding %	
	Original Claimants	All Claimants
Juegos Companies		
Villahermosa	41.10	56.00
Cuernavaca	51.90	73.00
Mexico City	52.60	68.20
Puebla	54.10	69.20
Naucalpan	82.30	82.30

Note: Includes all types of shares.

230. In sum, even if one were to assume that: (i) the *asambleas* in exhibits C-89 to C-93 are proof of the Claimants current shareholding (*quod non*), (ii) that the transfer of their shares never took place or was illegal, and (iii) that the evidence provided in Ms. Burr's witness statement was accurate and reliable (*quod non*), the Claimants have failed to establish that they own the Juegos Companies.

231. Mexico reiterates that holding a majority stake in a company is not equivalent to owning the company. Thus, the question is whether that purported majority shareholding gives the Claimants control over the Juegos Companies. That question will be addressed in the section dealing with the issue of control of the Mexican Enterprises further ahead in this pleading.

b. Alleged ownership of E-Games

232. The Claimants falsely claim that they created E-Games in 2006.[137] E-Games' articles of incorporation reveal that it was established on 22 February 2006 by two Mexican nationals: Messrs. Alfredo Moreno Quijano and his brother, Antonio Moreno Quijano, each holding a 50% stake in the company.[138] Initially, there was no participation by any of the named Claimants.

233. It was not until the *asamblea* 9 July 2009 (notarized on 6 October 2009) –more than three years after the company was established– that 2 of the 39 Claimants invested in E-Games. The minutes of the *asamblea* held on that date record that Messrs. Antonio and Alfredo Moreno sold most of their participation in E-Games to Oaxaca Investments (one of the Claimants), Mr. Tomás Ruiz (a Mexican National who is not a party in these proceedings) and Mr. John Conley (also a Claimant). Each of the new partners acquired a 28.33% interest in the company and Mr. Alfredo Moreno retained the remaining 15%.[139]

234. Ownership of the company evolved over the years, as demonstrated by the table below. According to the latest information available to the Respondent, as of 13 July 2013, Oaxaca Investments and John Conley each holds a 33.33% stake in the company, and Messrs. José Ramón Moreno Quijano and Jorge Armando Guerrero Ortiz each holds a 16.67% interest:

	22-Feb-06	06-Oct-09	06-Jul-11	12-Aug-11	02-Mar-12	07-Oct-13
Alfredo Moreno Quijano	50%	15.00%	28.33%	56.67%	28.33%	
Antonio Moreno Quijano	50%					
José Ramón Moreno Quijano					14.17%	16.67%
Jorge Armando Guerrero Ortiz					14.17%	16.67%
Oaxaca Investments		**28.33%**	**28.33%**	**28.33%**	**28.33%**	**33.32%**
John Conley		**28.34%**	**15.00%**	**15.00%**	**15.00%**	**33.34%**
Tomás Fernando Ruíz Ramírez		28.33%	28.33%			
Total	100%	100.00%	100.00%	100.00%	100.00%	100.00%

[140]

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[137] Claimants' Counter-Memorial on Jurisdictional Objections, ¶ 29 "Claimants also created Exciting Games, S. de R.L. de C.V. ("E-Games") in 2006, a Mexican company that eventually became the operator and permit holder of the Casinos."

[138] Exhibit C-63, pp. 1-4. The original name of the Company was Juegos de Video y Entretenimiento de Morelos S. de R.L. de C.V., but it was changed to Exciting Games S. de R.L. de C.V. on 6 October 2006.

[139] Exhibit C-63, p. 6.

[140] Exhibit C-63.

235. The previous recount demonstrates that the Claimants assertion that "[a]t all relevant times, Mr. Burr and other U.S. investors held majority ownership over E-Games, which also included voting control over the most critical decisions of the company"[141] is false. The Claimants, and more precisely, Oaxaca Investments and John Conley, do not "own" and have never owned E-Games. In fact, these two claimants only held a minority position in the company (43.33%) in early 2013 when the White & Case letter was delivered to Economia[142] and, importantly, when the first measure giving rise to this claim occurred (the temporary closure of the Mexico City casino on 19 June 2013).

236. The Respondent will further elaborate on this point in the section addressing control of Mexican Enterprises below.

c. Operadora Pesa

237. The Claimants falsely claim that "*Mr. Burr, Ms. Burr, and Mr. Conley also formed Operadora Pesa, S. de R.L. de C.V. ("Operadora Pesa") in 2008*".[143] The articles of incorporation submitted by the Claimants as Exhibit C-109 show that the enterprise was incorporated by Messrs. Moisés Optawski and José Miguel Ramírez Rodríguez, neither of whom are claimants in these proceedings.

238. Operadora Pesa does not appear to have any foreign investment whatsoever.[144] There is no record of the company in the Foreign Investment Registry of the Ministry of the Economy and the bylaws preclude participation of foreign investment. Indeed, pursuant to Article Fifth:

> ARTICLE FIFTH.- No foreign physical or moral person may have any shareholding [participación social] or own shares in the company. This shall be understood as the company's agreement or express pact that the company will not admit, directly or indirectly, as partners or shareholders any foreign investors or companies without a "Foreign Exclusion Clause", or recognize rights as partners or shareholders to the same investors and companies.[145]
>
> [Translated by the Respondent]

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141 Claimants' Counter-Memorial on Jurisdictional Objections, ¶ 41.

142 The letter from White & Case was the first contact of the Original Claimants with the Ministry of the Economy. In the letter, counsel for the U.S. investors warned of the possibility of filing a notice of intent on behalf its clients if their demands were not met, see Exhibit R-001.

143 Claimants' Counter-Memorial on Jurisdictional Objections, ¶ 42.

144 Exhibit R-016.

145 Exhibit C-109, p. 3. The original text in Spanish reads as follows: "ARTÍCULO QUINTO: Ninguna persona extranjera, física o moral, podrá tener participación social alguna o ser propietaria de acciones de la sociedad. Entendiéndose por esto el convenio o pacto expreso, que la sociedad no admitirá directa ni indirectamente como socios o accionistas a inversionistas extranjeros o sociedades sin "Cláusula de Exclusión de Extranjeros", ni tampoco reconocerán en abosluto, derecho de socios o accionistas a los mismos inversionistas y sociedades."

239. The same *acta* with the articles of incorporation shows that Mr. Opatowski was appointed "Sole Manager" ("*Gerente Único*") of the company and Mr. Ramírez was designated Operadora Pesa's legal representative (*apoderado legal*).[146] Yet, Mr. Gordon Burr's witness statement suggests that the company was established by the Claimants and states that he was the "ultimate decision maker" in the company.

> 32. Operadora Pesa, S. de R.L. de C.V., which I mentioned above, is a Mexican company that we founded in 2008 on advice of our legal and financial advisors to provide management and administrative services for the five Casinos. Operadora Pesa's principal role was to hire vendors that would provide goods and services to support our gaming operations and to coordinate with vendors on behalf of the Casinos so as to benefit from volume and other discounts. In my role as the key manager for the B-Mex Companies, the Juegos Companies and E-Games, I was the ultimate decision maker for Operadora Pesa and the services it provided to the Juegos Companies, E-Games and the Casinos. As an example, I would decide which vendors we would hire, which contracts we would sign with vendors, what their terms would be, etc.[147]
>
> [Emphasis added, footnotes omitted]

240. The Claimants appear to be taking the position that, notwithstanding the fact that they have no interest in Operadora Pesa, they have standing to bring a claim on its behalf because Mr. Gordon Burr purportedly "controls" it through a management agreement. This is disingenuous.

241. As noted earlier, it is a fundamental tenet of treaty interpretation that "a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose*". That context, in the case of Article 1117, is Chapter Eleven of the NAFTA.

242. Chapter Eleven is concerned with "Investment". Article 1101, which defines the scope and coverage of Chapter Eleven, states that it applies to "measures adopted or maintained by a Party relating to: (a) *investors of another Party* and (b) *investments of investors of another Party* in the territory of the Party". Chapter Eleven does not apply to measures related to individuals that are not *investors of another Party* or to enterprises that are not *investments of investors of another Party*.

243. Operadora Pesa is not an *investment of an investor of another Party* and Mr. Gordon Burr is not an investor of another Party when it comes to Operadora Pesa. It follows that Chapter Eleven does not apply to measures relating to Operadora Pesa, regardless of whether Mr. Gordon Burr is the "ultimate decision maker" (*quod non*).

244. Mexico further submits that "control", within the meaning of Article 1117, refers to a "quality of the ownership interest"[148] that an investor of another Party has on an enterprise of a

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146 Exhibit C-107, pp. 7-8.

147 Witness statement of Mr. Gordon Burr, ¶ 32.

148 Paraphrasing *Aguas del Tunari, S.A., v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005.

Party. In other words, "control" arises from the interest that an investor from another Party holds in an enterprise of the Party (*i.e.*, the investment); it is a consequence thereof.

245. Thus, the relevant question for the purposes of determining standing under Article 1117 is whether the interest held by an investor of another Party gives him/her/it control over the enterprise of a Party. Article 1117 was never intended, for example, to allow an American CEO of a Mexican company (with no stake therein) to bring a claim on behalf of the company against its own state.

246. To the Respondent's knowledge no claimant in a NAFTA proceeding has ever sought to bring a claim on behalf of an enterprise in which it has no interest whatsoever by arguing that it has management control over it. However, there is one non-NAFTA case that provides support to Mexico's position: *Aguas del Tunari v. Bolivia*.

247. The issue in that case was whether the claimant, Aguas del Tunari, a company organized under the laws of Bolivia, was "controlled directly or indirectly" by IWT B.V or IWH B.V, two companies organized under the laws of the Netherlands (the claim was brought under the Netherlands-Bolivia BIT):

> 242. As to the context in which the phrase "controlled directly or indirectly" is found, the Tribunal notes that Article 1 in defining the concept of "national" not only defines the scope of persons and entities that are to be regarded as the beneficiaries of the substantive rights of the BIT but also defines those persons and entities to whom the offer of arbitration is directed and who thus are potential claimants. Given the context of defining the scope of eligible claimants, the word "controlled" is not intended as an alternative to ownership since control without an ownership interest would define a group of entities not necessarily possessing an interest which could be the subject of a claim. In this sense, "controlled" indicates a quality of the ownership interest.[149]
>
> [Emphasis added]

248. Mexico respectfully submits that the same reasoning applies to the interpretation of Article 1117. Control in Article 1117 was not intended as an alternative to ownership, but rather to give investors of another Party standing to bring a claim on behalf of a company that they do not fully own, but nevertheless is under their direct or indirect control by reason of their investment therein.

2. Control of the Mexican Enterprises

a. The Claimants did not control the Juegos Companies at all material times

249. The Claimants allege to have control of the Juegos Companies through: (i) their shareholding, (ii) their ability to appoint the majority of the members of the Board of Managers, and (iii) the appointment of Messrs. Burr, Conley and Ayervais to the Board of Managers, and (iv) their management authority over the companies through Mr. Gordon Burr's Employment Agreement with VGS.

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[149] Exhibit RL-031. *Aguas del Tunari, S.A., v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶ 242.

250. As noted earlier in this pleading the highest authority in a limited liability partnership is the *asamblea de socios*, which takes its decision by majority vote, unless the bylaws provide otherwise. In the case of the Juegos Companies, the bylaws provide otherwise.

251. The Juegos Companies have different types of shareholders. Most of them recognize three different types of shares: Series A1, A2 and B shares. Series A shares have a preferential treatment in regard to the company's profits, but limited voting rights:

> SIXTH.- The social capital will be variable. The minimum amount of fixed capital will be three thousand Mexican pesos. The variable portion of the company's capital will be unlimited. The company's capital will be represented by shares [*partes sociales*] divided in three series: "A1", "A2" and "B", which grant different corporate and patrimonial rights to their holders pursuant to the bylaws.
>
> The "A1" and "A2" Series will represent the shares with a higher proportional value per share with privileged economic rights for the return of profit sharing. However, it will have limited voting rights.
>
> The B Series will have preference over the A Series whenever there is a return of profits.[150]
>
> [Translated by the Respondent]

252. Decisions requiring the vote of Series A1 and A2 shares are limited to: (i) the dissolution of the company, (ii) the sale of all or substantially all the property of the company; (iii) commencement of bankruptcy proceedings (*i.e., concurso mercantil*); (iv) exclusion of a shareholder pursuant to article Thirty Six; and (v) the reduction of the company's capital.[151]

253. While most decisions require a simple majority vote of the Series B shares, certain decisions, such as the assumption of debt in excess of US $500,000 and securing debt with the company's property, require a 75% vote. Modification of the company's bylaws, in turn, requires a 75% vote of both Series A1 and A2 and majority of votes of Series B shares.[152]

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[150] Exhibit C-90, p. 13. The original text in Spanish reads as follows:

"SEXTO.- El capital social será variable. El capital mínimo fijo será la cantidad de cincuenta mil pesos. La parte variable del capital social será ilimitada. El capital social estará representada por partes sociales, las cuales estarán divididas en dos Series: "A1", "A2" y "B", que otorgan distintos derechos corporativos y patrimoniales a cada una de acuerdo a lo previsto en los estatutos.".

La serie "A1" y "A2" representaran las partes sociales con mayor prima proporcional por parte social con derechos economicos privilegiados para la recuperacion via distribucion de utilidades, pero tendra voto limitado.

La Serie B tendra prelacion respecto de las utilidades subordinadas al cobro o restitucion de la prima de las partes sociales de la serie "A1" y "A2".

The bylaws of the other Juegos Companies contain similar provisions. See, exhibits C-89, p.12; C-91, p.9; C-92 pp. 8-9; C-93 pp. 8-9.

[151] See exhibits C-89, p. 16; C-90, p. 17; C-91, p.12; C-92, p.12; C93, p. 12.

[152] Exhibit C-89, p.16, C-90, p. 17.

254. The direction and administration of the companies is in the hands of a Board of Managers (*Consejo de Gerentes*), which may have 3 or 5 members. In the case of a 3-member Board, Series A shareholders would have the right to appoint 1 member, and the Series B shareholders the remaining two. In the case of a 5-member board, Series A1 shareholders would appoint 1 member, Series A2 shareholders would appoint another member, and Series B shareholders the remaining 3. In all cases, the appointments were made by majority vote of the respective series.

> TWENTY FOURTH.- The direction and administration of the company will be in the hands of a Board of Managers. The Board of Managers will be integrated by five managers as per the decision of the *Asamblea de Socios*; one of the managers will be designated by majority of votes of A1 Series, another manager will be designated by majority of votes of A2 Series, and three managers will be designated by the majority of votes of B Series. The appointed managers may be shareholders in the company or not.
>
> The Board of Managers shall appoint a President by majority vote of its members.
>
> [...]
>
> Managers will be appointed for each fiscal year, but they shall remain in their positions until new managers are appointed and assume their new positions. Managers may be re-elected notwithstanding the amount of time they have held their positions. [153]
>
> [Translated by the Respondent]

255. In view of the fact that: (i) the majority of the substantive decisions of the company were in the hands of the Series B shares, and (ii) Series B shareholders had the power to appoint the majority of the member of the Board of Managers, the Respondent submits that in order to demonstrate "control" of the Juegos Companies, the Claimants would need to demonstrate that they held a majority of the Series B shares at all relevant times.

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[153] Exhibit C-36, pp.3-4. Bylaws of Juegos Villahermosa. The original text in Spanish reads as follows:

"VIGESIMO CUARTO.- La dirección y administración de la Sociedad estará a cargo de un consejo de Gerentes. El consejo de gerentes estará compuesto por por cinco gerentes según sea determinado por la Asamblea de Socios: uno de ellos será nombrado por el voto de la mayoría de las partes sociales Serie "A1", uno será nombrado por el voto de la mayoría de las partes sociales Serie "A2" y tres serán nombrados por el voto de la mayoría de las partes sociales Serie "B". Los gerentes elegidos podrán ser o no socios de la Sociedad.

El Consejo de Gerentes deberá elegir a un Presidente, por la mayoría de votos de sus miembros.

[...]

Los Gerentes serán elegidos para cada ejercicio social, pero deberán permanecer en sus cargos hasta que sus sucesores sean electos y toman posesión de su cargo. Los Gerentes podrán ser relegidos independientemente del tiempo que lleven en su encargo."

In this respect, all other Bylaws of the Juegos companies are similar to the Juegos Sureste. See Exhibits C-37. pp. 3-4; C-38, pp. 3-4, C-39, pp. 3-4; C-40, pp. 3-4.

256. This is where the issue of standing and the other two objections raised by the Respondent intersect, as it is clear that the Original Claimants, with one exception, do *not* have a majority of the Series B shares. The following table, based on Annex C of Ms. Erin Burr's witness statement[154], illustrates this point:

	Series B Shares (% of total)		
	Original Claimants	Additional Claimants	Total Claimants
Naucalpan	100.00	-	100.00
Villahermosa	28.33	22.38	50.71
Puebla	42.53	22.52	65.05
Cuernavaca	40.65	26.00	66.64
Mexico City	34.89	23.54	58.44

257. This does not take into account the inconsistencies detected by the Respondent (see ¶ 223) which would further reduce the Claimants' share in all the Casinos except for Naucalpan.

258. This, in Mexico's respectful submission, explains why the Claimants desperately seek to incorporate the Additional Claimants in this case, despite the fact that they did not provide a notice of intent as required under Article 1119. With the exception of Juegos Naucalpan, the Original Claimants simply cannot claim to have control of the Juegos Companies and, therefore, cannot bring a claim on their behalf. It also contradicts the Claimants' statement that the "notice [of intent] was submitted by the *controlling, majority* shareholders [...]".[155] In fact, it was submitted by a group of non-controlling shareholders (*i.e.,* the Original Claimants) with no standing to bring a claim on behalf of the Juegos Companies (with the exception of Juegos Naucalpan).

Board Control

259. The Claimants also contend that they exercise control over the Juegos Companies on account of the fact that some of them were members of the Board of Managers. The Respondent does not dispute that Messrs. Burr and Conley (and in one case Mr. Rudden) were members of the Board at one time, however, they all stepped down before the claim was submitted to arbitration.

260. Indeed, according to the minutes of the *Asambleas* of 29 August 2014 (notarized on 10 September 2014), all U.S. investors were removed from the board on that date. Whatever form of control the Claimants allege to have had as a result of their participation in the Board of Managers of the Juegos Companies was lost on that date.

– – – – – – – – – – – – – – – – – – RESOLUTIONS: – – – – – – – – – – – – – – – – – –

[154] The Respondent disputes that Annex C is an accurate representation of the Claimants shareholding in the Juegos Companies.

[155] Claimants' Counter-Memorial on Jurisdictional Objections, ¶ 8. Emphasis added.

> **Ninth**.- "Gordon Gay Burr Jr. Agustin Joseba Goicochea Chavarri, John Edward Conley, José Ramón Moreno Quijano y Alfredo Moreno Quijano are removed as members of the Board of Mangers of the company."
>
> [...]
>
> **Twelfth**.- "The series B shareholders unanimously/by majority appointed [Messrs.] José Benjamin Chow del Campo, Luc Pelchat y Antonio Navarro Bernal as Managers."[156]
>
> [Translated by the Respondent]

261. But, perhaps the most compelling evidence that the Claimants lost "control" of the Juegos Companies comes from the Claimants themselves. When Mexico objected to the registration of the claim, the Claimants explained that they were unable to provide consents and waivers for the Juegos Companies on account of their loss of "board control", and claimed to be working diligently to regain it. The argument then was that the loss of control was caused by the Respondent and thus should not be held against them:

> Additionally, the Centre has requested copies of the waivers issued by the Mexican Companies in accordance with Article 1121 of the NAFTA, and Mexico has objected to Claimants' access to the Additional Facility and to the registration of the RFA on the basis that the requisite consents and waivers were not provided for these companies.[...] As explained below, through its actions and omissions, including the illegal closure of the Mexican casinos operated by Claimants and the refusal to allow them to reopen and continue operating, Mexico has obstructed Claimants' ability to obtain the waivers from the remaining Mexican Companies, which were the Mexican enterprises that operated the casino businesses at issue in the RFA. Claimants are working diligently to regain board control of these enterprises so that they may provide the consents and waivers specified in Article 1121, but their non-submission should not be held against Claimants since this is directly attributable to the illegal measures implemented by Respondent, which placed Claimants in the position of having to mitigate their losses.
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> [...]

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[156] Exhibit C-36, p. 11, The original text in Spanish reads:

> **Novena.**- "Se remueve a Gordon Gay Burr Jr., Agustín Joseba Goicochea Chavarri y John Edward Conley, José Ramón Moreno Quijano y Alfredo Moreno Quijano, como miembros del Consejo de Gerentes de la Sociedad."
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> [...]
>
> **Décima Segunda**: "Los socios de la Serie "B", nombraron por unanimidad/mayoría como Gerentes a: José Benjamin Chow del Campo, Luc Pelchat y Antonio Navarro Bernal."

The other Shareholder meetings of the Juegos Companies have similar resolutions. See Exhibits C-37 p.11; C-38 pp. 10-11; C-39 pp.10; C-40 p. 11.

> The above notwithstanding, Claimants will continue in their efforts to regain board control of the Juegos Companies and will provide the waivers for the Juegos Companies once it has done so. [...] [157] [Emphasis added]

262. To the Respondent's knowledge, the Claimants have never recovered control of the Board of the Juegos Companies. In fact, when the Claimants eventually filed the purported consents and waivers for the Juegos Companies they filed two sets: the first was signed by Mr. Luc Pelchat (an individual who is not a claimant in these proceedings) and the second by Mr. Gordon Burr as "President of the Board" despite the fact that he no longer held that position.[158] Their inability to reappoint Mr. Gordon Burr *et al* to the board before submitting the claim to arbitration (and to this date) speaks volumes about their purported "control" over the Juegos Companies.

Employment Agreement with VGS

263. As noted in the section dealing with Operadora Pesa, the Respondent submits that "control" within the meaning of Article 1117 refers to legal control arising from the Claimants' interest in the companies. It cannot be interpreted as simple managerial control which may or may not be in the hands of an investor of another Party and can be modified, limited or revoked by the *Asamblea de Socios* and/or the Board of Managers at any time.

264. In any event, the Respondent observes that there are two components of the VGS arrangement. The first was a series of Management Agreements between B-Mex, B-Mex II and Palmas South LLC and VGS (the Management Agreements). The second was an Employment Agreement between VGS and Mr. Gordon Burr.

265. The Claimants contend that the Board of Managers of the Juegos Companies "adopted" the Employment Agreement through a series of consents in lieu. There is no evidence that any of the Juegos Companies adopted the Management Agreements between the three B-Mex Companies and VGS and therefore, they are not germane to the issue of control of the Mexican Enterprises.

266. VGS is described in the Counter-Memorial as a "contractor that would employ and pay the management team in charge of the Casino operations and the Claimants' investments in the B-Mex Companies and the Juegos Companies".[159] That management team was allegedly led by Mr. Gordon Burr.

267. The Claimants contend that "[t]he VGS Employment Agreement formalized Mr. Gordon Burr's role as President of the B-Mex Companies *as well as President of the Boards of Directors of the Juegos Companies* (as explained further below), but also as an employee of VGS".[160] The

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157 Claimants' response to Mexico's Objection dated 21 July 2016, pp. 8-9.

158 Annex A to Claimant's Rejoinder to Mexico's Objection to Registration, dated 5 August 2016.

159 Counter-Memorial on Jurisdictional Objections, ¶ 33.

160 *Id.*, ¶ 34.

claim is specious because, pursuant to the bylaws of the Juegos Companies, the President of the Board was to be appointed by majority vote of its members:

> Twenty Fourth.- [...] The Board of Mangers shall elect a President by majority vote of its members. [...][161]
>
> [Translated by the Respondent]

268. The Employment Agreement formalizes Mr. Gordon Burr's role as an employee of VGS, and nothing else. His role as an employee of VGS did not give the Claimants additional control over the casino business. In fact, pursuant to Section 2.2 of the agreement:

> In the performance of [his] duties, Executive shall report directly to the Board and shall be subject to the direction of the Board and to such limits upon Executive's authority as the Board may from time to time impose.[162] [Emphasis added]

269. Management control of the Juegos Companies has always been in the hands of the Board of Managers and, as noted earlier, Mr. Gordon Burr was removed from the Board on 29 August 2014.

Transfer of shares

270. Last but not least is the matter of the transfer of the shares. As noted earlier, the *asambleas* of 29 August 2014 (notarized on 10 September 2014) and 7 November 2014 (notarized on 10 November 2014) record not only the new conformation of the Board of Managers, but also the transfer of the Claimants' shares in the Juegos Companies (with the exception of Juegos Naucalpan) to Grand Odyssey. The transfer of shares was confirmed in an email dated 2 June 2015 from Neil Ayervais to Mr. Benjamin Chow.[163]

271. The Claimants contend that the transfer of shares never occurred, however, they have not submitted compelling evidence to support this fact. The only evidence to support their claim is the testimony of Mr. Luc Pelchat. They have not submitted copies of minutes of *asambleas* reversing the transaction, copies of the Shareholders Registry showing that their ownership of the shares has been restored, or copies of the Capital Variations Book or any other form of contemporaneous documentary evidence. All of these documents would have been prepared *after* the closure of the Casinos and, therefore, none could have been destroyed in the Naucalpan facility fire that occurred in May 2017.

Bloc voting

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[161] Exhibit C-36, p. 4. The text in Spanish reads as follows: Vigésimo Cuarto […] "El consejo de gerentes deberá elegir un president por la mayoría de los votos de sus miembros" […].

[162] Exhibit C-45, p. 2.

[163] Exhibit R-015.

272. The question, put simply, is whether a group of shareholders that collectively own more than 50% of the voting stock in a corporate entity can be said to "control" the company under NAFTA Article 1117.

273. The simple fact that a group of shareholders could vote their shares in a collaborative manner does not suffice. There must be a legal instrument – such as a shareholders' agreement, voting trust or enduring voting proxy that requires the shareholders to exercise their powers in general meeting a certain way, or that irrevocably transfers such powers to a particular individual, in connection with the main elements of control of the company, namely, to appoint the a majority of directors, and to take decisions otherwise requiring a shareholders' resolution.

274. The fact that a certain group of investors might as a practical matter consistently vote their shares in particular manner does not mean that they are obliged to do so, or even that the likely will in the future. Would the Claimants that are Series B shareholders have voted together in sufficient numbers to establish a majority on all shareholder matters going forward? That is not possible to predict absent a shareholders' agreement, voting trust or similar legal instrument.

b. The Claimants do not control E-Games

275. E-Games, like the Juegos Companies, is a *sociedad de responsabilidad limitada* and therefore, its highest authority is the *Asamblea de Socios*. However, as the Claimants point out in their Counter-Memorial, E-Games' bylaws require a 70% vote to adopt resolutions.[164]

276. In view of the foregoing, to demonstrate control of the company requires the Claimants to show that they held 70% of the voting shares at all material times. John Conley and Oaxaca Investments (the only two Claimants that held an interest in E-Games) only had 66.66% of the shares and consequently, were unable to pass resolutions without the vote of the other shareholders. In other words, they do not own a controlling stake in the company.

277. The Claimants attempt to overcome this problem by claiming that "Mr. Alfredo Moreno Quijano could not freely vote his stock" and that "the Controlling Disputing Investors also always had and controlled the vote of Mr. José Ramón Moreno Quijano".[165] This bold assertion is based on the purported existence of an option agreement between Messrs. Conley and Alfredo Moreno and the claim that Mr. Jose Ramón Moreno always "*bloc voted*" with the U.S. investors.

278. Regarding the alleged option agreement, the Respondent observes that the Claimants have been unable to provide a signed copy of the instrument and neither Mr. Conley nor Mr. Moreno have submitted witness statements confirming the existence of the agreement and its terms. But even assuming for the sake of argument that the unsigned draft was in fact executed on those terms, the fact is that the agreement did not give Mr. Conley the ability to "control" Mr. Moreno's vote. It simply gave him the right to acquire the shares prior to the shares being voted:

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164 Claimants' Counter-Memorial on Jurisdictional Objections, ¶ 243 (which in turn refers the reader to Exhibit C-63, pp. 19-20).

165 *Id.* , ¶¶ 240-241.

> Optioner *desires* to grant, and Optionee *desires to accept*, an option, pursuant the terms of the Agreement, ownership interests equal to a 13.34% ownership interest of the Company. In addition, *the parties desire* that the Option Interests not be voted bt Optionor on any matter to be votes on by the Company's owners at a meeting or by consent, without Optionee being notified of the vote and confirming to Optionor that Optionee does *not desire to exercise the option*, in whole or in part, prior to such vote."[166]
>
> [Emphasis added]

279. In any event, whether or not Mr. Conley had the option agreement makes no difference at all for the purposes of determining control, because at the time he only held 15% of E-Games shares and Mr. Gordon Burr an additional 28.34%. Thus, even if the agreement gave him control over an additional 13.34% (*quod non*) the U.S. investors would still fall short of the 70% needed to pass resolutions.

280. As for the alleged "bloc voting" of Mr. José Ramón Moreno, the Respondent will simply observe that past behaviour is not tantamount to a shareholders agreement giving Oaxaca Investments and Mr. Conley control over Mr. Moreno's shares. The fact that Mr. Moreno voted with the U.S. investors in the past does not in any way guarantee that he would do so in the future.

281. As noted earlier, the simple fact that a group of shareholders could vote their shares in a collaborative manner does not suffice. There must be a legal instrument – such as a shareholders' agreement, voting trust or enduring voting proxy that requires the shareholders to exercise their powers in general meeting a certain way, or that irrevocably transfers such powers to a particular individual, in connection with the main elements of control of the company.

282. On a final note on this point, even assuming *arguendo* that their combined 66.66% gave Oaxaca Investments and Mr. Conley control over E-Games (*quod non*), that majority stake was not held by them "at all material times". According to the Claimants' own account of the facts:

> After October 7, 2013, Alfredo transferred all stock to the other owners (as he ceased being a shareholder), and the ownership was John Conley (33.34%), Oaxaca Investments (33.32%), Jose Ramon Moreno Quijano (16.67%) and Jorge Armando Guerrero Ortiz (16.67%), which is as it remains today. [167]

283. At least two of the measures that give rise to this claim occurred before 7 October 2013, namely: (i) the temporary closure of the Mexico City casino on 19 June 2013 and (ii) the cancellation of the permit on 28 August 2013. The Respondent submits that ownership and control of a company on behalf of which a claim is being submitted to arbitration must exist *inter alia* at the time of the breach. The *Gallo* case, is a good example:

> Art. 1117 of the NAFTA authorises '[a]n investor of a Party, on behalf of an enterprise of another Party, that is a juridical person that the investor owns or controls directly or indirectly' to submit a dispute to arbitration. And Art. 1101(1) limits the scope of

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166 Exhibit C-8, p. 1

167 Witness Statement of Mr. Gordon Burr, ¶ 19.

> Chapter 11 protection 'to measures adopted or maintained' by Canada that relate to 'investors of another Party' and 'investments of investors of another Party'. Accordingly, for Chapter 11 of the NAFTA to apply to a measure relating to an investment, that investment must be owned or controlled by an investor of another party, and ownership or control must exist at the time the measure which allegedly violates the Treaty is adopted or maintained. In a claim under Art. 1117 the investor must prove that he owned or controlled directly or indirectly the 'juridical person' holding the investment, at the critical time.[168] [Emphasis added]

284. The Respondent would add that any intended claimant would also need to prove ownership and control on the date of submission to arbitration and maintain such ownership and control until the issuance of a final award.

285. Lastly, the Claimants contend that they controlled E-Games through the company's Board of Managers.[169] Mr. Gordon Burr affirms in his witness statement that he was E-Games' CEO; that he exercised all management control over the entity; and that he served as President of the Board of Managers. However, the evidence on the record does not support Mr. Gordon Burr's contention[170], for example:

- The Expense Reimbursement Agreements dated 1 November 2009 between E-Games and B-Mex, LLC, B-Mex II, LLC and Palmas South, LLC (Exhibits C-60, C-61 and C-62, respectively) were all executed by Mr. Alfredo Moreno Quijano as Director General of E-Games.[171]
- The contract of services between Operadora Pesa and E-Games of 10 December 2008, was also executed by Mr. Alfredo Moreno on behalf of E-Games in his capacity as legal representative (*apoderado legal*).[172]
- The five Machine Lease Agreements between E-Games and each of the Juegos Companies dated 9 December 2009 were signed by Mr. Alfredo Moreno on behalf of E-Games.[173]
- The Consent to Action in Lieu of Meeting of 7 June 2011, shows that Tomas Ruiz Gonzalez was appointed President of the Board of Managers and its Chief

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168 Exhibit RL-032. *Vito G. Gallo v. Government of Canada*, PCA Case No. 55798, Award (Redacted), 15 September 2011, ¶ 325.

169 Counter-Memorial on Jurisdictional Objections, ¶ 238.

170 Witness Statement of Mr. Gordon Burr, ¶ 17.

171 See Exhibit C-60, p. 7, C-61, p. 7 and C-62, p. 7. None of the agreements are signed.

172 See Exhibit C-126, p.2

173 See Exhibits C-52, C-53, C-54, C-55 and C-56.

Executive Officer until his resignation, termination as provided in the bylaws or until the next election.[174]

- The minutes of the *Sesion del Consejo de Gerentes* of 6 March 2013 was executed by Antonio Moreno Quijano as President of the Board[175] and José Ramón Moreno Quijano was ratified as Director General of the Company.[176]

286. Mr. Gordon Burr states in his witness statement that John Conley, Yamir Mendoza and himself were members of the Board, however, Exhibit C-63 shows that on 12 September 2007 (17 September 2007), Alfredo Moreno Quijano, Antonio Moreno Quijano and David Guillen Llarena were appointed Members of the Board. They appear to have retained their positions until their resignation on 6 July 2013. On that same date, Gordon Burr, John Edward Conley and Alberto Yamir Mendoza Ordoñez were appointed President of the Board, *Consejero* and *Consejero independiente*, respectively. In sum, there is no evidence that Gordon Burr was a member of the board of managers prior to July 2013.

C. Inadequacy of the Claimants' evidence

287. In the Memorial on Jurisdiction the Respondent quoted the following passage from *Emmis International Holding v. Hungary* in support of its argument that the Claimants had to prove their standing as investors of a party in the jurisdiction phase:

> 171. The Tribunal must [decide the question of whether the Claimants owned an investment capable of expropriation] finally at the jurisdictional stage on the balance of probabilities. The Claimants bear the burden of proof. If the Claimants' burden of proving ownership of the claim is not met, the Respondent has no burden to establish the validity of its jurisdictional defences. As the tribunal held in *Saipem v Bangladesh*:
>
> > "In accordance with accepted international practice (and generally also with national practice), a party bears the burden of proving the facts it asserts. For instance, an ICSID tribunal held that the Claimant had to satisfy the burden of proof required at the jurisdictional phase and make a *prima facie* showing of Treaty breaches".
>
> 172. This passage touches upon two types of jurisdictional proof. The first relates to questions of fact that must be definitively determined at the jurisdictional stage. The second involves questions of fact that go to the merits, which the Tribunal must ordinarily not prejudge, unless they are plainly without foundation. This latter question necessarily involves assessing whether the alleged conduct of the Respondent is capable of constituting a breach of the substantive protections of the investment treaty so as to fall within the jurisdiction of the Tribunal *ratione materiae* but this has to be determined on a *prima facie* basis only.
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> 173. In the context of the present case, the Claimants bear the burden of proving that they owned an investment capable of expropriation. This task lies fully within the ambit

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174 Exhibit C-64, p. 3.

175 Exhibit C-111, p. 12.

176 *Id.*, p. 11-12.

> of the jurisdictional phase. This burden is to be contrasted with the need to establish on a *prima facie* basis at the jurisdictional phase that the Respondent breached the treaty. This question is based on whether the alleged unlawful conduct giving rise to the treaty breach—if it can be established in the merits phase—is capable of falling within the treaty provisions invoked.

288. With respect to the Claimant's claims on their own behalf under Article 1116 the Respondent submitted that, at a minimum, the Claimants must state precisely and prove with evidence:

- The assets that each of them purportedly acquired individually – whether in the form of shares in particular enterprises, or the making of loans, or the contribution of movable or immovable property or capital;
- the date(s) that such assets or rights purportedly were acquired and the date they were disposed of or lost; in the case of shares, the number and class of shares purportedly acquired and any special rights associated with such shares;
- in the case of loans, the amount purportedly loaned, the identity of the borrower and the terms of the loans, including their original maturity and expiry date; and
- particulars of any other contribution purportedly amounting to an alleged investment; any agreement or arrangement purportedly entitling any of the Claimants to share in the income or profits of the Mexican Enterprises and/or the Casinos.[177]

289. With respect to the claims under Article 1117, the Respondent submitted that, at a minimum, the Claimants must state precisely and prove with evidence the following:

- The identity of the Claimant or group of Claimants that is alleged to have standing to assert a claim for each one of the Mexican Enterprises;
- the number of shares that each such Claimant holds in each of the Mexican Enterprises, the percentage such shares represent in the total issued shares in that class, and the voting rights associated with that class of shares;
- the dates that all such shares were acquired and disposed of or lost;
- the precise manner in which the Claimants claim to exercise direct or indirect control of each of the Mexican Enterprises; and the terms of any shareholders' agreement, voting proxy or any other instrument that purports to convey any shareholder's right to any of the other Claimants, or any third party.[178]

290. The evidence filed with the Counter-Memorial falls short of establishing, as a fact, any of the points stipulated above with respect to the claims of the disputing investors on their own behalf, or the claims asserted on behalf of the Mexican Enterprises. It also bears noting here that no evidence was adduced to support the contention that any one or more of the Claimants had an

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177 Memorial on Jurisdiction, ¶ 113.

178 *Id.*, ¶ 118.

ownership interest in the remaining Additional Mexican Enterprises. It is thus assumed that any claims on behalf of those enterprises have been quietly abandoned.

291. As explained in detail above, the evidence adduced in support of the principal question of 'who owns what' rests almost exclusively on the testimony of Erin Burr which in turn its based on *actas de asamblea* of the Juegos Companies issued in 2006, 2007 and 2008. A review of these documents and documents later produced shows numerous inconsistencies with the names listed on Ms. Erin Burr's spreadsheet (see ¶ 223 above).

292. Moreover, this sparse evidence says nothing of the Claimants' shareholdings as at the dates of alleged breach; whether they were in fact shareholders in any of the Mexican Enterprises when the claim was submitted to arbitration; and whether they are in fact shareholders today.

293. Finally, this sparse evidence does not purport to deal with the type of shares purportedly acquired and any special rights associated with such shares; the manner in which the Claimants exercised direct or indirect control of each of the Mexican Enterprises; whether they were legally committed to vote their shares in any particular way; whether they in fact voted their shares as a block; and whether or not they approved the transfer of their shares to Grand Odyssey.

294. Surprisingly, none of the Additional Claimants (or Mr. Conley) have provided any testimony pertaining to their investments in the Mexican Enterprises, or pertaining to any of the related issues, including the question of whether they were legally committed to vote their shares in any particular manner and whether they agreed to the transfer of their shares to Grand Odyssey.

295. Surely, the best evidence to establish any of these matters as a fact, short of submitting a copy of the shareholder's registry, would be in the form of witness statements from individual claimants, testifying to the date and amount invested, the number and class of shares acquired, any voting commitments and practices and the apparent sale or transfer of their shares to Grand Odyssey. Such evidence should be supported by copies of original documents, such as cancelled cheques or receipts, share certificates, reporting letters from lawyers or notaries, statements of account from the investment manager, correspondence containing directions concerning voting at shareholder meetings and the proposal to transfer shares to Grand Odyssey.

296. Ms. Burr's testimony is at most *prima facie* evidence that *some* of the Claimants held shares in one or more of the Mexican Enterprise some years before the events giving rise to the claim. The Claimants must do more than submit *prima facie* evidence to establish standing as under Articles 1116 and 1117. They must adduce *sufficient* evidence to convince the tribunal of the truth of the facts alleged. The investment treaty jurisprudence consistently refers to the seminal work of Bin Cheng on this point first referenced in *Asian Agricultural Products. v. Sri Lanka*[179]:

297. In *Tokios Tokeles v. Ukraine*:

> 121. Moreover, the burden of demonstrating the impact of the state action indisputably rests on the Claimant. The principle of onus *probandi actori incumbit* – that a claimant

[179] Exhibit RL-033, *Asian Agricultural Products, Ltd. v Republic of Sri Lanka,* ICSID Case No. ARB/87/3, Award, 27 June 1990, ¶ 56.

> bears the burden of proving its claims – is widely recognized in practice before international tribunals. The significance of this burden was stated effectively by the tribunal *in Asian Agricultural Products, Ltd. v. Sri Lanka* (ARB/87/3), which noted that:
>
> [a] Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.[180] [Footnotes omitted]

298. In Marion *Unlgaube v Costa Rica*:

> 34. The degree or standard of proof is not as precisely defined. Whichever party bears the burden of proof on a particular issue and presents supporting evidence "must also convince the Tribunal of [its] truth, lest it be disregarded for want, or insufficiency, of proof." The degree to which evidence must be proven can generally be summarized as a "balance of probability," "reasonable degree of probability" or a preponderance of the evidence. Because no single precise standard has been articulated, tribunals ultimately exercise discretion in this area.[181] [Footnotes omitted]

299. And in *Ampal-American v. Egypt*:

> 219. The Tribunal now turns to determine whether Mr. Fischer has satisfied his jurisdictional burden. On this point, it is important to keep in mind that the burden of proof is not necessarily satisfied by simply producing evidence. As Professor Bin Cheng has neatly stated: "a party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency of proof." [182] [Footnotes omitted]

300. The Claimants have the sole means of proving their claims. This is not an evidentiary question that the Respondent has the means to disprove. In such circumstances, a claimant cannot simply put in the barest conceivable evidence and then claim to have met the burden of proof.

301. The Respondent submits that, in the face of the Claimants' failure to provide direct evidence themselves, preferring to rely instead on the sparse indirect evidence of Ms. Burr – itself incomplete and in part contradicted by contemporaneous documents – the Tribunal should hold that "want or insufficiency of proof" requires it to decide the Claimants have failed to establish standing under Article 1116 or Article 1117.

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[180] Exhibit RL-034; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007. ¶ 121 and footnote 117 citing *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, 6 ICSID Rev.-FILJ 526, 549 (1991) at paragraph 56 (quoting Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 329-31 (1953)).

[181] Exhibit RL-035, *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012, ¶34 and Footnote 5: See Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award (27 June 1990), ¶ 56 (citing Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 329-331 (1987))

[182] Exhibit RL-036, *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, ¶219 and Footnote 166: 1 February 2016 Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, 1953, p. 329.

302. The Respondent further submits that the time and place to adduce direct testimony and documentary evidence from the Claimants themselves was in the Counter-Memorial. The Respondent will object to the inclusion of such evidence in the Rejoinder on the grounds that the Respondent will be denied the opportunity to seek production of documents, and to make submissions, in connection with such evidence.

D. Conclusions and Request for Relief

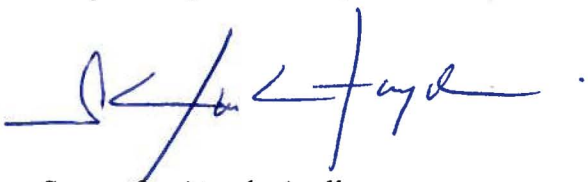
303. The Respondent submits that the Claimants' alleged standing to submit claims to arbitration on their own behalf under Article 1116 is unproven, as is the alleged standing of any of them to submit a claim to arbitration on behalf of any of the Mexican Enterprises.

304. The Respondent accordingly requests the Tribunal to issue an order dismissing the claims of all of the Claimants under Article 1116 and Article 1117 and to further order that the Claimants jointly and severally indemnify the Respondent for the costs of the arbitration and its costs of legal representation, including reasonable travel expenses of all attending legal counsel and witnesses.

305. In the even the event that the Tribunal is disposed to allow the Claimants to adduce further evidence in support of their alleged standing to submit claims under Article 1116 and/or Article 1117, the Respondent requests the Tribunal defer deciding the issue until the Respondent has had an opportunity to properly respond to such evidence, including through a further request for production of documents and the opportunity to cross-examine each of the Claimant's on whose behalf such evidence is tendered.

December 1st, 2017

Respectfully submitted,



Samantha Atayde Arellano

Counsel for the United Mexican States