

Partial Dissenting Opinion
Arbitrator Raul E. Vinuesa

I partially dissent from the Majority on its interpretation of the NAFTA text which finds for the Tribunal's jurisdiction in the present case. It is my understanding that the Tribunal lacks jurisdiction over the claims submitted by the so-called Additional Claimants and lacks jurisdiction over their claims on behalf of all the so-called Mexican Companies. I understand the Tribunal has jurisdiction over the claims submitted by the Original Claimants and over their claims submitted on behalf of the Mexican Companies JVE Mexico and E-Games.

It appears from the Parties' submissions that the so-called "Original Claimants" are those identified as Claimants in the Notice of Intent of 23 May 2014, and in the Request for Arbitration, of 15 June 2016. The so-called "Additional Claimants" are those who, despite not being identified in the Notice of Intent, were included in the Request for Arbitration. The so-called Mexican Companies, on whose behalf both the Original and the Additional Claimants claim include at the time of the Partial Award on Jurisdiction, the Juegos Companies, E-Games and Operadora Pesa.

**OBJECTIONS TO JURISDICTION REGARDING NAFTA ARTICLES 1119, 1121,
1122 (1) AND 1117**

1. I disagree with the sequence proposed by the Majority of the Tribunal to deal with what the Partial Award considers as the first two of the three preliminary issues on which the Tribunal is to decide.¹

2. I agree with dealing separately and lastly with **Issue 3** regarding the objections related to the interpretation and application of NAFTA Article 1117. Nevertheless, I understand that the objections related to Articles 1119 and 1122(1) must be addressed before the objections raised with reference to Article 1121, so as to avoid prejudging whether the Additional Claimants have legal standing.

¹ Partial Award, ¶ 41 *et seq.*

I.A. Objections regarding the breach of: a) Article 1121 by the Original Claimants and the Additional Claimants; and b) Articles 1119 and 1122(1) by the Additional Claimants

I.A.1. Scope of Article 1121 with respect to Articles 1119 and 1122(1)

3. The Majority addresses the questions defined as **Issue 1**, without addressing the Respondent’s main objection that the disputing investors and companies had to comply with the prerequisite of the Notice of Intent under NAFTA Article 1119.

4. The Majority states - at para. 41(a) of the Partial Award - that “Articles 1121(1) and 1121(2) of the Treaty require that the Claimants and the Mexican Companies, respectively, consent to ‘arbitration in accordance with the procedures set out in [the Treaty].’” However, when the Majority decided on whether Claimants had conveyed their consent under Article 1121(1), it failed to consider whether such purported consent had been given or not, in accordance “with the procedures set out in the Treaty.”²

5. The Respondent contended 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.”³

6. The Majority fails to answer, thus ignores, the objection raised by the Respondent regarding the lack of consent of all of the Claimants pursuant to Article 1121(1). The Majority focuses on answering the Respondent’s objection to the breach of the formal requirements set forth by Article 1121(3) without distinguishing between the Original Claimants and the Additional Claimants.

7. Concerning the objections to the breach of Article 1121(3) requirements, the Majority holds that all of the Claimants observed those requirements, and, therefore, there was no breach of Article 1121.

8. In this way, the Majority assumes that all of the Claimants, in their Request for Arbitration, had conveyed the consent required by Article 1121(1)⁴ without even assessing whether that consent had been given “in accordance with the procedures set out in the Treaty.”

² *Id.*, ¶¶ 46-53.

³ Reply on Jurisdictional Objections, ¶ 146.

⁴ Partial Award, ¶ 53.

9. In conclusion, without previously dealing with the Respondent's objection on whether the breach of Article 1119 affected the Additional Claimants' consent, the Majority seems to prejudge and accept as valid, without further ado, consent by all of the Claimants mentioned in the Request for Arbitration—both Original and Additional Claimants.

10. It is established that the Majority should have focused, first, on determining the Respondent's jurisdictional objections relating to Articles 1119 and 1122(1), in order to later determine whether all, some, or none of the Claimant Parties mentioned in the Request for Arbitration had standing to consent to arbitration in accordance with the procedures set out in NAFTA.

11. Concerning the objection as to whether the Claimants had conveyed their consent in the manner prescribed by Article 1121(3),⁵ I agree with the Majority's considerations expounded at paragraphs 54 to 60 of the Partial Award, but only with respect to the Original Claimants.

12. As stated below, the Additional Claimants had no standing to convey their consent under Article 1121(1) because they had breached Article 1119. Accordingly, the Respondent's consent was not triggered, with respect to the Additional Claimants, in accordance with the provisions set out in Article 1122(1).

13. In conclusion, the Original Claimants having been the only ones who had consented to submit a claim to arbitration under Article 1121, the Tribunal has jurisdiction to hear the claims submitted by the Original Claimants, but lacks jurisdiction to hear the claims submitted by the Additional Claimants. The reasons why the Tribunal lacks jurisdiction over the Additional Claimants are explained in detail below.

I.A.2. Scope of Article 1119: the notice of intent and its relation to Article 1122(1) on the consent by the Respondent Party

14. The Respondent contends the Additional Claimants' failure to comply with their obligation to notify their intent to submit a claim to arbitration precludes the Tribunal from exercising its jurisdiction. Such non-compliance also affects the Tribunal's jurisdiction because consent by the respondent Contracting Party is, under Article 1122(1), tethered to compliance with the procedures set out in the Treaty. The Respondent, thus, maintains that the claims submitted by the Additional Claimants should be dismissed since the inexistence of a Notice of Intent identifying

⁵ *Id.*, ¶¶ 54-60.

those Additional Claimants vitiates their consent. The Respondent considers its objection is focused on the Tribunal's jurisdiction. Although it disputes that it is a matter of admissibility, the Respondent argues that the claims should be dismissed even if they were considered a matter of admissibility.⁶

15. In turn, the Claimants allege that the Notice of Intent was actually submitted on behalf of the Additional Claimants as well and that the issue raised is simply a matter of admissibility. They contend that the claims should be admitted because the Notice defect does not prejudice the Respondent and does not change the course of any settlement effort.⁷

16. Therefore, the matter the Tribunal is to adjudicate relates to the definition and scope of "Jurisdiction" and "Admissibility."

17. On this particular matter, I agree with the Majority on the basic meaning of "jurisdiction" and "admissibility" as expressed in the first part of paragraph 73 of the Partial Award.

18. Conceptually, "Jurisdiction" refers to the tribunal's power to hear and adjudicate a claim, whereas "admissibility" refers to whether it is appropriate or not for the tribunal to hear that claim.

19. The arbitral tribunal's jurisdiction is founded on the parties' consensus. If the respondent State imposed conditions on its consent to arbitration, those conditions must be satisfied. Otherwise, there is no consent, and consequently, no jurisdiction. Should the tribunal determine that it lacks jurisdiction, the tribunal will not be able to decide on the admissibility of a claim over which it lacks jurisdiction.

20. Only if the tribunal determines that it has jurisdiction may the tribunal hear a prospective admissibility claim by applying the rules needed to conduct the proceedings with equity and efficiency.

21. I partially agree with what has been stated by the Majority at paragraph 72 of the Partial Award, making clear that, when the Majority asserts *in fine* that "[i]f the Tribunal has jurisdiction and declares the claims in question admissible, there is no other basis to dismiss the claims at this stage," it should have also asserted that, *should the Tribunal lack jurisdiction, the Tribunal will not be able to adjudicate matters concerning the admissibility of the claims.*

⁶ Reply, ¶¶ 74, 143 and 144.

⁷ Counter-Memorial on Jurisdictional Objections, 8 January 2018, ¶¶ 280, 282, 283 and 284.

22. Likewise, the Majority avers that “[it] will first examine whether the defect in the Notice precludes the Tribunal’s jurisdiction over the Additional Claimants. Should it find that it does not, it will then examine whether the claims should nonetheless be dismissed as *inadmissible*;⁸ it should have also asserted that, *should the Tribunal find it lacks jurisdiction, it will not be able to examine the admissibility of the claims in any way whatsoever*.

23. The Tribunal must decide on the Respondent’s jurisdictional objection as a matter of consent. The dispute between the parties refers to whether the consent conveyed by the Respondent under Article 1122(1) was tethered to compliance with Article 1119.

24. I fully agree with the Majority on the fact that the matter thus raised must be solved through interpretation of NAFTA Articles 1119 and 1122 in accordance with the interpretation principles codified in Article 31 *et seq.* of the Vienna Convention on the Law of Treaties (hereinafter “VCLT”). Nevertheless, I dissent from the Majority’s conclusion that Article 1119 does not condition the Respondent’s consent to arbitration in Article 1122(1) and that the Additional Claimants’ failure to issue a notice of intent therefore does not deprive the Tribunal of jurisdiction over them.⁹ The reasons for this dissent are set forth in the following Sections.

LA.2.a. The content and scope of the Notice of Intent of 23 May 2014

25. It is an undisputed fact that the Notice of Intent of 23 May 2014 states that “[t]his Notice is submitted by the U.S. Investors”¹⁰ and subsequently identifies only eight investors.¹¹

26. These eight investors are those identified in these proceedings as the Original Claimants. Nowhere in the text of the Notice is there any reference to any other investor(s) that may potentially be considered as disputing investors.

27. The “U.S. Investors” reservation at paragraph 18 of the Notice is exclusively restricted to the right to amend it for purposes of including additional claims as may be warranted and permitted by NAFTA. Evidently, the reservation’s text does not permit extension to potential investors not identified in the aforementioned Notice.

⁸ Partial Award, ¶ 75.

⁹ *Id.*, ¶ 19.

¹⁰ C-34-001, Section I. 1. *Identification of the Disputing Investors*, page 1.

¹¹ *Id.*; Section I. 5, page 5. “Through their ownership interest in five Mexican companies (the “Mexican Enterprises”) the U.S. Investors own and/or have invested in gaming facilities.... In addition, the U.S. Investors... are assisted through their ownership interest in Mexican company Exciting Games...”

28. The Majority understands that the lack of identification of other disputing investors in the Notice of Intent is the “only defect”¹² or an “omission”.¹³ I disagree with this assertion since this lack of identification implies the non-existence of (an)other disputing investor(s) and, consequently, results in non-compliance with a prerequisite mandatory to trigger arbitration under NAFTA.

29. The Majority holds that it “remains unclear” what led to the omission of the Additional Claimants in the Notice’s text.¹⁴ The Majority makes reference to the fact that the Claimants’ evidence at the Hearing was that they had relied on the advice of their specialized arbitration counsel. The Majority also mentions that there was a suggestion that the omission was insignificant because the Original Claimants were the controlling shareholders.

30. None of these allegations create any degree of credibility. The law firm that advised the Original Claimants at the time of submitting their Notice—having extensive experience in the subject—cannot be presumed, without any evidence, to be the creator of a potential professional negligence. Furthermore, if failure to identify the Additional Claimants were insignificant, there would be no reasonable legal basis for attempting to include them after completion of the term set for the Notice.

31. I share the Majority’s opinion that what the Tribunal must determine is whether the aforementioned “omission” leads to the consequences alleged by the Respondent. However, I dissent from the Majority when it holds that “it is irrelevant why the information was omitted.”¹⁵ It is apparent that the reasons why the Additional Claimants are absent from the Notice are relevant not only to determine good faith in their actions, but also to evidence the grounds that would enable the Tribunal to eventually hear potential admissibility claims.

32. The first question the Tribunal must consider is whether the Notice of Intent constituted an obligation necessary to determine its jurisdiction.

I.A.2.b. Interpretation of Article 1119 under International Law

33. The General Rule of Interpretation contained in Article 31.1 of the VCLT provides that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given

¹² Partial Award, ¶ 67.

¹³ *Id.*, ¶ 68

¹⁴ *Id.*

¹⁵ *Id.*, ¶ 69.

to the terms of the treaty in their context and in the light of its object and purpose.”

34. Any good faith interpretation of a treaty rule starts with the analysis of the ordinary meaning to be given to the terms thereof. Against this background, it is relevant to interpret the ordinary meaning given to the term “shall deliver [...] [a] notice” and to its Spanish equivalent “*notificara*.”

35. The ordinary meaning of “shall deliver [...] [a] notice” (“*notificara*” in Spanish) expresses a “requirement” or “mandate” that has a clearly defined meaning in the context of Article 1119. Therefore, the term “shall deliver [...] [a] notice” (“*notificara*” in Spanish) expresses the imposition of an enforceable obligation.

36. NAFTA Article 1119 requires the existence of a “disputing investor,” who “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 ...” In this way, it imposes on the disputing investor the obligation to notify its intention to submit its claim to arbitration requiring that any such notice be written and at least 90 days before the claim is submitted.

37. The notice of intent shall specify: “a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise; b) the provisions of this Agreement alleged to have been breached and any other relevant provisions; c) the issues and the factual basis for the claim; and d) the relief sought and the approximate amount of damages claimed.”

38. It arises from the NAFTA text itself that the notice of intent to submit a claim to arbitration is an enforceable requirement. This condition stems from the ordinary meaning of the term “shall deliver [...] [a] notice” (“*notificara*” in Spanish) used by the Contracting Parties. The term “shall deliver [...] [a] notice” undoubtedly conveys the existence of an obligation that must be complied with by anyone who wishes to be considered a “disputing investor.” That very same “disputing investor” will be the one who is able to submit a claim to arbitration under Article 1121.

39. Furthermore, if a disputing investor has delivered to the disputing party a written notice of intent, but the information that should have been included therein is deficient or contains excusable errors, the tribunal may, in light of the case-specific circumstances, analyze the admissibility of that notice once the deficiencies or excusable errors have been cured.

40. In order for this Tribunal to exercise its discretion for the purpose of curing deficiencies in the information contained in the notice of intent, it must have first inexorably

determined that it had jurisdiction. Such jurisdiction depends on the requirements imposed by the Contracting Parties in the NAFTA.

41. Case law is categorical in the sense that the term “shall” denotes an obligation or mandate that must be inexorably complied with. In Article 1119, that obligation implies the identification of all the claimants and their respective claims.

42. In *Philip Morris*, the tribunal, concerning the exhaustion of local remedies as a step prior to arbitration, held as follows: “The sequence of steps to be followed by the Claimants under Articles 10(1) and (2) before resorting to international arbitration is of importance for the purpose of this analysis. Each such step is clearly indicated as part of a binding sequence, as evidenced by the word “shall” before each step as follows...”¹⁶ It added that “[t]he ordinary meaning of the terms used for the two steps (i) and (ii), which are preliminary to the institution of international arbitration, is clearly indicative of the binding character of each step in the sequence. That is apparent from the use of the term “shall” which is unmistakably mandatory and from the obvious intention of Switzerland and Uruguay that these procedures be complied with, not ignored.”¹⁷

43. The International Court of Justice (hereinafter “ICJ”) as well as the Permanent Court of International Justice (hereinafter “PCIJ”) have specified the legal nature of the procedural conditions and prerequisites imposed on the parties in order to exercise their jurisdiction based on what was agreed upon in the international instruments enabling their jurisdiction. The ICJ asserted that, “[t]o the extent that the procedural requirements of [a dispute resolution clause] may be conditions, they must be conditions precedent to the seisin of the Court even when the term is not qualified by a temporal element.”¹⁸

44. Furthermore, the ICJ clearly determined that the limits to its jurisdiction were conditioned by the Contracting Parties’ consent. In this sense, it asserted the following: “...The jurisdiction [of the Court] is based on the consent of the parties and is confined to the extent accepted by them... When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon.

¹⁶ *Philip Morris Brands SÀRL et al v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, ¶ 139.

¹⁷ *Id.*, 1140.

¹⁸ *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* ICJ Reports, Preliminary Objections - Judgment of 1 April 2011, ¶ 130.

The Court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application ...”¹⁹

45. The Majority, ignoring the ordinary meaning of the term “shall deliver [...] [a] notice” of Article 1119, is of the opinion that such Article “... is entirely silent on the consequences of a failure to include all the required information in the notice of intent. Article 1119 does not in terms refer to Article 1122(1); does not provide that satisfaction of the requirements of Article 1119 is a condition precedent to a NAFTA Party’s consent; and does not state that failure to satisfy those requirements will vitiate a NAFTA Party’s consent.”²⁰

46. The Majority holds, in turn, that “[t]he text of Article 1119 alone therefore does not compel the conclusion that a failure to include all the required information in the notice of intent vitiates a NAFTA Party’s consent under Article 1122(1).”²¹ I disagree with all those assertions.

47. On this particular issue, the scope and consequences of the obligations imposed by Article 1119 and by Article 1122(1) must be complemented (as subsequently stated) in good faith, in their context, and in the light of their object and purpose.

48. I also disagree with the Majority’s purported inferences whereby Article 1122(1) also does not in terms refer back to either Article 1119 or to the Notice of Intent.²² Once again, I restate my understanding of the necessary interpretation of the text of both articles “in their context and in the light of [their] object and purpose.”

49. Conversely, the question, as raised by the Respondent is not the failure to “include all the required information,” but the breach of the treaty obligation by the Additional Claimants to submit a Notice of Intent identifying them as disputing investors.²³ Actually, the question is not a simple omission of certain Claimants’ names in a certain notice submission, but, more precisely, the lack of compliance with a requirement to which any potential investor is bound, within a peremptory term.

¹⁹ *Case Concerning Armed Activities on the Territory of The Congo (New Application: 2002) (Democratic Republic of The Congo v. Rwanda)* ICJ Reports, Judgment of 3 February 2006; ¶ 88.

²⁰ Partial Award, ¶ 81.

²¹ *Id.*

²² *Id.*, ¶ 82.

²³ See Reply on Jurisdictional Objections, 1 December 2017, ¶ 107.

I.A.2.c. Interpretation of Article 1122(1) under International Law

50. I disagree with the Majority on its purported interpretation of the expression “in accordance with the procedures set out in this Agreement” contained in Article 1122(1).

51. Such expression makes reference to each Party “consent[ing] to the submission of a claim to arbitration” and imposes that condition thereon. A good-faith reading of such text “in accordance with the ordinary meaning to be given to the terms of the treaty” does not allow us to depart from that expression in order to suggest that the duty to act in accordance with the procedures set out in this Agreement only refers to either “submitting a claim” or “arbitration.” Through a simple reading, the expression “consents to the submission of a claim to arbitration” may only be interpreted as a consistent and compact, *i.e.*, clearly monolithic, expression. Consequently, I believe that all of the assertions by the Majority on whether the expression “in accordance with the procedures set out in this Agreement” only modifies the term “arbitration” are nothing but groundless speculations.

52. The Majority’s interpretation concerning the scope of Article 1122(1) text terms is still speculative, despite presuming that such interpretation was accepted by both parties to the dispute. As stated below, the conclusion reached by the Majority at paragraph 90 of the Partial Award is unsupported by case law and unanimously rejected by the NAFTA Contracting Parties.

53. Therefore, I differ on how the Majority prejudices whether “The procedures’ with which the ‘arbitration’ must accord include the requirements of Article 1119.”²⁴ Of course, I differ on the direct consequence of such prejudgment: when stating that “[t]he natural and ordinary meaning of ‘arbitration’ is therefore the procedures commenced by, and to be followed upon, the submission of a claim,” the Majority fails to stick to the literal text it purports to interpret, which undoubtedly refers not only to “arbitration,” but also to “consents to the submission of a claim to arbitration.”²⁵

54. Clearly, the submission of a notice of intent neither commences an arbitration nor compels a disputing investor to commence an arbitration. The direct consequence of fulfilling the duty imposed in Article 1119 is to trigger recourse to an arbitral tribunal. In this regard, within the framework of the procedural steps defined in Chapter XI of the NAFTA, the Notice of Intent is a

²⁴ Partial Award, title (A)(2)V. c.(ii)(b).

²⁵ *Id.*, f 97.

jurisdictional prerequisite that triggers recourse to arbitration, should the disputing investor so decide and once all jurisdictional requirements have been met.

55. When stating that nothing in those provisions can condition the “validity” of the submission of a claim to arbitration on satisfaction of Article 1119,²⁶ it thus fails to acknowledge that the text of that Article does not claim to be merely declarative, let alone that its content is non-binding for the Parties. Once again, the Majority avoids making reference to the *effet utile* to be attributed to any rule subject to an interpretation process in accordance with the rules of international law.

56. The Majority contends that the procedures mentioned in Article 1122(1) “most naturally”²⁷ refer to the procedures for the conduct of the arbitration set out in Articles 1223-1336. The expression “most naturally” seems to be the only reason stated by the Majority to assert that “[t]he NAFTA Parties did not consent in Article 1122 to just any generic arbitral process; they agreed to the specific arbitral process as organised and regulated by Articles 1123-1136.”²⁸

57. The fact that Articles 1123-1236 follow Article 1122 is not a serious ground to support its assertion.²⁹ Nor is the Majority assisted by the fact that the Contracting Parties have made no reference in the text of Article 1122(1) to an alleged and exclusive relationship with the “procedures” set forth in Articles 1223-1236.

58. I disagree with the Majority on the purported scope of the terms used in Articles 1116-1121 so as to conclude that the drafters of the Treaty intentionally deprived the agreement set out in Article 1119 of legal consequences. The Majority’s catchphrase that “[t]hat choice [of the terms used] by the Treaty’s drafters cannot be ignored”³⁰ contradicts the context in which the terms of a treaty are to be interpreted.

59. In turn, paragraphs (1) and (2) of Article 1121 provide that a disputing investor may submit a claim under Article 1116 or 1117 to arbitration only if the investor consents to arbitration in accordance with the procedures set out in this Agreement. The temporal sequence of the steps that the disputing investor must take pursuant to Articles 1116-1121 forms the context within which

²⁶ *Id.*, ¶ 99.

²⁷ *Id.*, ¶ 106.

²⁸ *Id.*

²⁹ *Id.*, ¶ 102.

³⁰ *Id.*, ¶¶ 108, 109, 110.

the terms of Article 1119 are to be construed.

60. It is thus surprising that it strikes the Majority as “more natural” to read the consent requirement in Article 1121(1) as being prospective “in nature,” pertaining to a process that lies ahead.³¹

61. Even though one of the objectives of Article 1119 is to allow the parties to settle a claim through consultation or negotiation, it is neither the only nor the primary one. The Notice of Intent also enables the Respondent to understand the complexity of the alleged dispute as well as to organize its defense within a reasonable time period. The NAFTA Contracting Parties have recognized and assured the different purposes contained in Article 1119.³²

62. This has been confirmed by case law. In this sense, the failure to comply with the requirements and formalities under Articles 1118-1121 has been deemed 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 defense.³³

63. The Majority states that, for the Respondent, “a claimant who fails to include certain information in a notice of intent”³⁴ (emphasis added) would forfeit the right to Treaty arbitration. Yet a claimant who has delivered a Notice but fails altogether to pursue a settlement effort would retain that right undiminished. The Majority concludes that, if failing to pursue settlement discussions does not bar access to arbitration, then at least bald logic suggests that neither should a failure to comply with a step designed to facilitate such settlement discussions.³⁵

64. The Majority’s narrative ignores the fact that the Notice is not intended to facilitate settlement discussions only. Moreover, when the Majority refers to “a claimant who fails to include certain information in a notice,”³⁶ the Majority cannot, by bald logic, be referring to a claimant “unidentified in the Notice” (as it occurs with the Additional Claimants in this case.) In this regard, according to the Majority’s narrative, “a claimant who fails to include certain information” would

³¹ *Id.*, ¶ 111.

³² See the Contracting Parties’ positions in *Waste Management* (2009); *Pope & Talbot* (2002); *Methanex* (2000-2001); *Mondev* (2001); *ADF* (2001); *Bayview* (2006); *Merrill Ring* (2008); *Mesa Power* (2012); *KBR* (2014); *Resolute Forest Products* (2017), see Exhibit R-008.

³³ *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL, ICSID Administered Case, Decision on Motion to Add a New Party, 31 January 2008, ¶¶ 28 and 29.

³⁴ Partial Award, ¶ 113.

³⁵ *Id.*

³⁶ *Id.*

necessarily be the one who submitted the Notice and would necessarily be identified. The claimant who submitted a Notice may not cure the breaches and negligence attributable to the unidentified investor. It is just as simple, and as complex, as that.

65. NAFTA's objective regarding the creation of effective procedures for the resolution of disputes (Article 102) is supplemented by Article 1115, which proclaims that establishing "a mechanism" for the settlement of investment disputes is the Purpose of Section B.

66. Such mechanism is defined by each article of that Section of the NAFTA. Therefore, "the procedures set out in this Agreement" under Articles 1121 and 1122 are necessarily included in the "mechanism" established for Section B on the Settlement of Disputes between a Party and an Investor of Another Party in its entirety.

67. Consequently, one cannot ignore the fact that Article 1119 is an integral part of the mechanism for the settlement of investment disputes which, pursuant to Article 1115, assures "both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal." (Emphasis added).

68. Every legal proceeding assumes the existence of rules that condition the parties' behavior on a series of enforceable obligations. There is no legal proceeding absent a mandatory set of applicable rules. The general rule under Article 31.1 of the VCLT requires that the terms of a treaty be interpreted in accordance with their ordinary meaning.

69. The Notice of Intent under Article 1119 is a duty that conditions not only the possibility that a disputing investor consents to submit a claim to arbitration, but also the other disputing Party's consent to submit a claim to arbitration. The context in which the duty to deliver a Notice under Article 1119 is stated, relates to the prerequisites agreed-upon by the Contracting Parties in order to consent to submit a claim to arbitration. Such literal reading obviously takes into account its object and purpose, which is no other than to assure "due process before an impartial tribunal."

70. Article 1115 then assures due process within the mechanism for the settlement of disputes established in Section B on the "Settlement of Disputes between a Party and an Investor of Another Party."

71. It strikes the Majority as a difficult proposition that the objectives of Article 1115 could be furthered by barring access to arbitration on the basis that the names of certain investors

were omitted from the notice of intent.³⁷

72. The instant case is not merely about “omitted names.” It is about the failure to satisfy a treaty prerequisite to be met by any disputing investor who may intend, at a given opportunity, accept the Respondent’s consent to arbitration.

73. The legality of the due process inexorably entails the existence of a regulatory framework comprising both rights and obligations. The primary objective of Article 1115 may not be distorted so as to justify a failure to observe the basic rules of the legality of due process.

74. Therefore, the Respondent’s consent pursuant to Article 1122(1) is contingent on the satisfaction of the prerequisite under Article 1119 concerning the necessary identification of any potential claimant as a “disputing investor” in the Notice of Intent.

75. In sum, on the basis of an interpretation in accordance with the ordinary meaning of the text of Articles 1119 and 1122(1), in their context and in the light of the NAFTA’s object and purpose, the Tribunal lacks jurisdiction over the Additional Claimants or their claims. Only the disputing investors identified in this case, such as the Original Claimants, may submit their claims to arbitration under Chapter XI of the NAFTA.

76. As explained below, the foregoing conclusions are supported by NAFTA arbitration case law, as well as the positions adopted by all the NAFTA Contracting Parties in the exercise of their rights established in Article 1128.

I.A.3. Relevance of other tribunals’ decisions

77. I agree with the criterion whereby every tribunal is the judge of its own competence. Every tribunal must determine its jurisdiction regardless of other tribunals’ decisions. This Tribunal is not bound to decide in accordance with other tribunals’ decisions. Every award or judgment creates law for the parties only. However, the iteration of certain interpretation rules on a given text under analysis may help another tribunal understand the meaning of the rule to be applied thereby.³⁸ In connection with the issues raised in this case, NAFTA arbitral decisions evidence a clear trend towards requiring that the disputing investor be identified as such in a notice of intent.

78. Apart from NAFTA decisions, the case law of other tribunals cited by the Majority

³⁷ A/, ¶ 117.

³⁸ Tribunals are not bound by previous decisions of NAFTA or other international tribunals (*See Chemtura*, ¶102). At the same time, due regard should be paid to earlier decisions on comparable issues, but subject of course to the specifics of each case (*See Chemtura*, ¶109; *see ADF*, ¶136).

is absolutely irrelevant in that it concerns rules and facts different from those to be taken into consideration by this Tribunal.

79. By way of example, the tribunal's findings in *Philip Morris* do not apply to the case at hand. The tribunal held that "[t]he domestic litigation requirement had not been satisfied at the time this arbitration was instituted...Nonetheless, even if the requirement were regarded as jurisdictional, the Tribunal concludes that it could be, and was, satisfied by actions occurring after the date the arbitration was instituted..."³⁹

80. Clearly, in the instant case, the requirement whereby a disputing investor must notify the respondent Party at least 90 days prior to the formal submission of the claim may not be satisfied "by actions occurring after the date the arbitration was instituted." The duty to deliver the notice of intent to submit the claim to arbitration is a requirement that must be inexorably satisfied prior to submitting the claim and, thus, may not be "satisfied by actions occurring after the date the arbitration was instituted."

81. Moreover, the tribunal in *Philip Morris* errs in contending that "[i]n the *Mavrommatis* case the Permanent Court of International Justice had found that jurisdictional requirements which were not satisfied at the time of instituting legal proceedings could be met subsequently..."⁴⁰

82. Contrary to the determinations by the *Philip Morris* tribunal, the PCIJ maintained that it had jurisdiction based on Article 26 of the Mandate for Palestine. At no time did the Court describe as a jurisdictional requirement, the ratification of Protocol XII at the time when Greece submitted its claim.⁴¹

83. In turn, the NAFTA decisions which mention the rules to be applied by this Tribunal become relevant when it comes to understand the meaning and scope according to which those very rules have been interpreted and applied before.

84. In this context, in *Methanex*, the tribunal ruled that, in order to establish consent to

³⁹ *Philip Morris Brands SÀRL et al v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, ¶ 144.

⁴⁰ *Id.*, ¶ 145.

⁴¹ ^MIt must in the first place be remembered that at the time when the opposing views of the two governments took definitive shape (April 1924) and at the time when proceedings were instituted, the Mandate for Palestine was in force. The Court is of the opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment. In the present case, this interpretation appears to be indicated by the terms of Article 26 itself where it is laid down that 'any dispute whatsoever... which may arise' shall be submitted to the Court..." *Mavrommatis*, p. 35.

arbitration, it is sufficient to show that Chapter XI applies in the first place, that a claim has been brought by an investor in accordance with Articles 1116 and 1117, and that all pre-conditions and formalities required under Articles 1118 -1121 are satisfied.⁴²

85. In *Canfor*, the tribunal asserted that arbitral tribunals hearing objections to jurisdiction under Chapter XI shall ensure that all conditions and formalities under Articles 1118-1121 have been satisfied.⁴³

86. In *Merrill & Ring*, the tribunal, in accordance with *Methanex* and as opposed to *Ethyl*⁴⁴ and *Mondev*,⁴⁵ held that consent to NAFTA arbitration requires that the Claimant not only meet the requirements laid down in Articles 1101, 1116 and 1117, but also satisfy all of the prerequisites and formalities under Articles 1118-1121.⁴⁶

87. In *Cargill*, the tribunal ruled that a claimant must also provide preliminary notice pursuant to Article 1119 and satisfy the conditions precedent via consent.⁴⁷

88. In *Bilcon*, the tribunal found that the protection given to investors must be interpreted and applied in a manner that respects the limits that the Contracting Parties put in place as integral

⁴² “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 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 NAFTA Party’s consent to arbitration is established.” *Methanex Corporation v. United States of America*; Partial Award, 7 August 2002, ¶ 120.

⁴³ “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 NAFTA: [...] – 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;” *Canfor Corporation v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006, ¶ 171.

⁴⁴ *Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998.

⁴⁵ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002.

⁴⁶ “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 grievance 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.” *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL, ICSID Administered Case, Decision on Motion to Add a New Party, 31 January 2008, ¶¶ 28 and 29.

⁴⁷ “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.” *Cargill, Incorporated v. United States of America*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 160.

aspects of their consent.⁴⁸

89. As opposed to the foregoing case law, the Majority finds support in the decisions adopted in *Chemtura* and *ADF*. Still, neither of these decisions makes reference to the failure to identify a claimant in the notice of intent. Thus, they exert no impact on the trend set by NAFTA arbitration tribunals.

90. The tribunal in *ADF*, under the special circumstances of the case, proceeds to interpret the text of Article 1119 (b) within the narrow framework of its own discretion in order to make the information requirements for the notice of intent more flexible. The tribunal starts out from the *sine qua non* condition that the notice of intent identify the disputing investor.⁴⁹ Therefore, the identification of the investor in the notice of intent is undisputed.

91. The tribunal in *Chemtura* only refers to the “form and content of a notice of intent,” thus starts out from the basic assumption that a notice of intent has been submitted by a clearly identified disputing investor. Under each case-specific circumstance a tribunal may deem the conditions met by the disputing investor in the notice of intent as admissible if satisfied following submission of such notice. The tribunal in *Chemtura*, when citing the *ADF* award, reaffirmed the need for a notice of intent to exist as an implied condition to cure any defects in the content or form

⁴⁸ “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 [...] 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 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;” *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.

⁴⁹ *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, ¶135: “Turning back to Article 1119(b), we observe that the notice of intention to submit to arbitration should specify not only ‘the provisions of [NAFTA] alleged to have been breached’ but also ‘*any other relevant procedures [of NAFTA].*’ Which provisions of NAFTA may be regarded as also ‘relevant’ would depend on, among other things, what arguments are *subsequently* developed to sustain the legal claims made. We find it difficult to conclude that failure on the part of the investor to set out an exhaustive list of ‘other relevant provisions’ in its Notice of Intention to Submit a Claim to Arbitration must result in the loss of jurisdiction to consider and rely upon any unlisted but pertinent NAFTA provision in the process of resolving the dispute,” *ADF Group Inc. v. United States of America*, Case No. ARB(AF)00/1, Award, 9 January 2003, ¶ 134; “It is also instructive to note that the notice to be given by claimant “wishing to institute arbitration proceedings” under ICSID Arbitration (Additional Facility) Rules is required merely to “contain information concerning the issue in dispute and an indication of the amount involved, if any.” (Article 3[1] [d], ICSID Arbitration (Additional Facility Rules) The generality and flexibility of this requirement do not suggest that failure to be absolutely precise and complete in setting out that “information” must necessarily result in diminution of jurisdiction on the part of the Tribunal...”

thereof.⁵⁰

92. In conclusion, there must be a notice of intent evidencing the very existence of a claimant investor. This is an essential requirement so as to identify not only the claimant, but also the alleged dispute itself. The mere existence of a timely notice presumes jurisdiction of a NAFTA tribunal. Only errors or defects in the information contained in a notice may be cured following submission thereof. This is the substance of decisions allowing defects or errors in a notice of intent to be cured. Both *Chemtura* and *ADF* tribunals decide on the admissibility of defects or errors in the notice of intent delivered by a claimant investor. In no way do they purport to allow defects in the content of a nonexistent notice to be cured with regard to an investor it has failed to identify. The existence of a notice of intent by the investor is vital for the Tribunal to have jurisdiction.

93. Throughout this proceeding, no case in which access to arbitration was given to an investor who had not been identified in a notice of intent has been cited. The cases cited by the Majority so as to prove the absence of a *jurisprudence constante* (*ADF* and *Chemtura*) actually confirm that, in both cases, all claimants had submitted their respective notices of intent. For jurisdiction to exist, every claimant must be identified by means of a notice of intent. Under the specific circumstances of each case, involuntary errors or remediable defects in the Notice are subject to the discretion of the Tribunal, in the equitable and efficient conduct of the proceeding, provided that the conditions necessary to establish the Respondent's consent have been satisfied.⁵¹

94. In view of the categorical assertion in NAFTA decisions on the scope and binding effects of Article 1119, the Majority may not dispute the relevance of such acknowledgment, in order to justify its violation by the Additional Claimants.⁵² In the same vein, the failure to follow the procedures set out in Article 1122(1) do not evince the Respondent's consent with regard to those Claimants.

I.A.4. Scope of the NAFTA Parties' interpretations under Article 1128

95. Pursuant to Article 1128, NAFTA Contracting Parties may make submissions to a tribunal on a question of interpretation of that Treaty. It is apparent that, contrary to the

⁵⁰ *Chemtura Corporation v. Government of Canada*, Ad Hoc NAFTA Arbitration under UNCITRAL Rules, Award, 2 August 2010, ¶ 102.

⁵¹ Reply on Jurisdictional Objections, 1 December 2017, ¶ 107.

⁵² Partial Award, ¶ 119c.

interpretations by the Free Trade Commission, the Contracting Parties' interpretations contained in the submissions made to a tribunal are not mandatory therefor. Neither does it arise from Article 1128 that those interpretations are of a recommendatory nature. Nevertheless, those interpretations will help a tribunal confirm or not the meaning the Parties gave, or sought to give, to the rules subject to interpretation.

96. The Tribunal cannot ignore the submissions made by the Contracting Parties, especially when they reassert and unanimously confirm a recurrent trend to understand that the prerequisites set out in Articles 1119, 1121 and 1122(1) are enforceable and condition the Claimants' consent as well as the Respondent Party's consent.⁵³

97. The Contracting State Parties, in their recurring interpretative submissions on these same articles, have remained silent on the effects of the waivers the Respondent States may accept regarding compliance with mere formal requirements or remediable errors which, despite being mandatory, would be liable to be excused.

98. On this particular issue, it is worth highlighting that the Respondent referred to the possibility that minor errors and defects in the information the Notice of Intent was supposed to contain could be regarded as not affecting a Tribunal's jurisdiction.⁵⁴ However, this condonation does not extend to the lack of identification of the "disputing investor" who failed to submit a Notice of Intent and who could not establish the existence of a dispute with the Respondent State either.

99. In conclusion, I understand that the positions assumed by the Contracting Parties in the exercise of their rights under Article 1128 do not impose, but simply confirm, the interpretations of Articles 1119, 1121 and 1122 that support and substantiate this dissenting opinion.

100. For all the reasons stated above, I consider that:

- The Tribunal lacks jurisdiction over the claims by the Additional Claimants.

⁵³Submission of the Government of Canada pursuant to NAFTA Article 1128, February 28, 2018: "... Articles 1116 to 1121 mandate that a claimant satisfy several requirements in order to perfect the consent of a NAFTA Party to arbitrate an investment..." ¶ II. 3; Submission of the United States of America pursuant to Article 1128, August 17, 2018: "... the United States has long maintained, that the "procedures set out in this Agreement", required to engage the NAFTA Parties' consent and form the agreement to arbitrate necessarily include Articles 1116-1121. All three NAFTA Parties agree that their consent to the submission of any claim to arbitration is conditioned upon de satisfaction of the relevant procedural requirements. Their common, concordant, and consistent views form a subsequent practice "that shall be taken into account," ¶ 16.

⁵⁴ "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;" Reply on Jurisdictional Objections, 1 December 2017, ¶ 107.

- The Tribunal, lacking jurisdiction over the Additional Claimants, is precluded from hearing any admissibility claim by those Additional Claimants.

I.B. Jurisdictional objection regarding the Claimants’ claims on behalf of the Mexican Companies under Articles 1117, 1119, 1121 and 1122(1).

101. The Respondent challenges the existence of its consent pursuant to Article 1122(1); the validity of the Mexican Companies’ consent pursuant to Article 1121; and the Mexican Companies’ ownership or control by the Claimants pursuant to Article 1117.

I.B.1. The Respondent’s consent under Article 1122(1)

102. As regards the objection related to the Respondent’s lack of consent pursuant to Article 1122(1), I disagree with the Majority due to the fact that, as stated above, failure to comply with the conditions imposed by that Article precludes the Tribunal from exercising its jurisdiction over the claims by the so-called Additional Claimants. The rationale and conclusions set out in **Section I.A.** extend, *mutatis mutandis*, to any Mexican company not identified in the Notice of Intent.

I.B.2. The Mexican Companies’ consent under Article 1121

I.B.2.a. The Juegos Companies’ consent

103. The Respondent challenges the consent conveyed by the Juegos Companies pursuant to Article 1117(2) and (3).

104. Article 1121, on the Conditions Precedent to Submission of a Claim to Arbitration, in its sub-article 2, states that “[a] disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise: (a) consent to arbitration in accordance with the procedures set out in this Agreement; and (b) waive their right to initiate or continue [...] any proceedings with respect to the measure [adopted by] the disputing Party...;” in its sub-article 3, it states that “[a] consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.”

105. All the Juegos Companies that had been identified in the Notice of Intent, which, in turn, were identified in the Request for Arbitration, proved compliance with the conditions set out by Articles 1119 and 1122(1). Therefore, these companies were enabled to give their consent pursuant to Article 1117(2).

106. The seven-week delay in the consent provision by the Juegos Companies, through the powers of attorney the Original Claimants had vested in their counsel, could be cured by the Tribunal in the exercise of its discretion in the efficient administration of the proceedings and respecting procedural equity between the Parties.

107. The Respondent acknowledged in its Reply the Tribunal's ability to cure minor deficiencies in the proceedings;⁵⁵ therefore, the Tribunal may and must consider valid the consent conveyed by the Juegos Companies identified in the Notice of Intent.

108. The Tribunal's acceptance of the belated consents by the Juegos Companies cannot be extended to the consents by the Additional Claimants that failed to comply with the prerequisite of Article 1119. In this sense, Article 1121(1)(a) y (2)(a)) requires that both the investor and the enterprise "consent to arbitration in accordance with the procedures set out in this Agreement," *inter alia*, the prerequisites of Article 1119.

109. An enterprise's consent, in compliance with Article 1121(2), does not prejudice the ownership or the direct or indirect control the disputing investor of a Party seeks to have over an enterprise of the other Party for the purposes of Article 1117(1).

110. Accordingly, the Respondent's objection regarding the lack of consent by the Juegos Companies, that was duly identified in the Notice of Intent, is dismissed. Consequently, as in the case of the Original Claimants, it is established that the Juegos Companies, identified in the Notice of Intent, complied with the provisions set out by Article 1121(2) and (3). The aforementioned consent does not prejudice the ownership or control the Original Claimants had, at the relevant critical dates, over those enterprises—and on whose behalf the Original Claimants claimed.

I.B.2.b. The withdrawal by E-Games.

111. The Respondent alleges that E-Games lacks standing to submit a claim to arbitration, because its withdrawal from the Notice of Intent, by letter dated 24 October 2014, affected the right thereof to consent to arbitration.

112. I agree with the Majority on the assertion that E-Games is not a party to these proceedings. E-Games could have never withdrawn from the Notice of Intent because the Notice of Intent was not submitted by E-Games, but by the Original Claimants. Neither could it have desisted

⁵⁵ Reply, ¶ 107.

from the remedy provided for in Article 1117 because such remedy had not been pursued as of the submission date of the alleged withdrawal.

113. I disagree with the Majority's conclusion that, in any case, were the *desistimiento* to give rise to a defect under Article 1119, the Tribunal would dispose of that defect as it did in respect of the Additional Claimants.⁵⁶

114. In conclusion, I consider that the Tribunal has jurisdiction over the claims by the Original Claimants on behalf of E-Games, on the grounds that it was duly identified in the Notice of Intent and that, in compliance with Articles 1119 and 1122(1), it was authorized to convey its consent pursuant to Article 1121(2) and (3). Once again, an enterprise's consent, in compliance with Article 1121(2), does not prejudice the ownership or the direct or indirect control the disputing investor of a Party seeks to have over an enterprise of the other Party for the purposes of Article 1117(1).

I.B.2.c. The consent by Operadora Pesa

115. It is a fact that Operadora Pesa was not identified in the Notice of Intent. Accordingly, the conditions set out by Articles 1119 and 1122(1) were not complied with. Therefore, Operadora Pesa is not authorized to give its consent pursuant to Article 1117(2).

I.C. The Claimants' ownership or control over the Mexican Companies

I.C.1. Value of the evidence produced

116. I agree with the Majority that the Claimants are the ones that should prove whether they owned or controlled the Mexican Companies both at the time of the alleged breach of the Treaty and at the time of the submission of the Request for Arbitration.⁵⁷

117. I agree with the Majority that the Claimants did not manage to transfer their shares in the Juegos Companies to a third party (Grand Odissey)⁵⁸ in November 2014.

118. In light of the apparent recurrent negligence and constant irregularities in the Mexican Companies' management; along with the failure to comply with their by-laws and, thus,

⁵⁶ Partial Award, ¶ 264.

⁵⁷ *Id.*, ¶¶ 147-148.

⁵⁸ *A.*, ¶¶ 166-167.

with Mexican law; and in light of the inefficiency proven in the production of the evidence necessary to support their arguments, I disagree with the Majority's findings that all of these situations attributable to the Claimants are only relevant to the allocation of the costs of the proceedings.⁵⁹

119. I also disagree with the Majority's view that the constant flaws and irregularities of the Claimants in the production of evidence of their shares in the Juegos Companies may satisfy the minimum probative demands the Tribunal should make.⁶⁰

120. Against this background, the notarized minutes of the 2006 and 2018 Shareholders' Meetings (*asambleas*) may satisfy the Tribunal's demands for evidence of the shareholding in the Juegos Companies as of those dates only. Nevertheless, the Tribunal must decide what shares the Claimants held at the date of the first alleged breach (June 2013) and at the date of submission of the Request for Arbitration (June 2016).

121. The Claimants allege that their 2014 Shareholding Worksheet details exactly what the Claimants position as shareholders was from June 2013 to date. They justify the discrepancies between the notarized minutes of the 2006-2008 Shareholders' Meetings and the 2014 Shareholding Worksheet in the fact that certain share transfers prior to 2014 were not duly approved by the Shareholders' Meeting at the time, as required by the by-laws of the Juegos Companies.

122. The Claimants contend that, under Mexican law, share transfers are valid and effective as from execution thereof, irrespective of the approval by the Shareholders' Meeting. Should approval from the shareholders' meeting had been necessary, in any case, the 2018 Shareholders' Meeting granted retroactive effect thereto.

123. For the Respondent, Mexican Law provides that share transfers have direct effects *inter partes* but such effects are nonexistent vis-à-vis the company until they are approved by the shareholders' meeting beforehand. Therefore, they produce no effect whatsoever regarding the recognition of the shareholder and exercise of his/her rights at the company. The transfers which have not been approved by the shareholders' meeting are nonexistent. Therefore, the 2018 Shareholders' Meetings have no retroactive effects.

124. I disagree with the Majority regarding the limited practical relevance attributed to the positions assumed by the legal experts on Mexican law,⁶¹ which applies to the matters of fact and

⁵⁹ *Id.*, ¶¶ 171-172.

⁶⁰ *Id.* ¶¶ 173 *et seq.*

⁶¹ *Id.*, ¶ 181.

of law alleged by the Parties. The Tribunal cannot fail to acknowledge that it lacks ‘expertise’ in the respondent Party’s domestic law. The debate between the experts evinces that both of them recognize that there are two legal acts: on the one hand, the share transfer between parties, which only produces legal effects as between them; and, on the other hand, the Shareholder Meeting’s approval, which produces legal effects *vis-à-vis* the company.⁶² Without the Shareholder Meeting’s prior approval of a share transfer, that transfer does not exist *vis-à-vis* the company or third parties.⁶³ Contrary to the Majority’s assertion,⁶⁴ there is no evidence on record of alleged rights attached to such unauthorized transfers, but those rights are only exercised through those who still own them.⁶⁵

125. It is apparent that the result of the debate does not support the Majority. In lieu thereof, it contends, first, that, under Mexican law, the shareholders who were transferred the shares have owned them since the date of their transfer; and, second, that, as a matter of fact, the transferee shareholders have been able to exercise the rights attached to those shares since the date of their transfer.⁶⁶ In my opinion, the Majority cites no provision under Mexican law in support of its conclusion, simply because it cannot find any. The Majority attempts to ignore the legal effects that the bylaws attribute to the Shareholder Meeting’s prior approval of any share transfer. What is more, in fact, such lack of authorization is a nonexistent legal act under Mexican law.

126. Under Mexican law, Section 2224 of the Federal Civil Code provides that “a legal act, nonexistent due to lack of consent or a material component, will not produce any legal effect. It may not be rendered valid by way of confirmation or prescription; its nonexistence can be invoked by any interested party.” [Free Translation.] Accordingly, under Mexican Law, the lack of timely approval of a transfer does not constitute grounds for finding a *nullidad relativa* (relative nullity) that may be cured as a matter of fact, as the Majority contends, or retroactively, as Claimants maintained when interpreting the effects of the Minutes of the Shareholder Meetings held in January

⁶² Transcript (Spanish version), Hearing on Jurisdiction, Day 5, Statement by Respondent’s Expert Rene Irra Ibarra, page 921 *et seq*; Statement by Claimants’ Expert Rodrigo Zamora Etcharre, 1061: 6-22; 1062: 1-5; 1087: 10-22; 1088: 1-2, 1091; 16-22; 1092: 1-5.

⁶³ *Conf.* Article Thirteen, common to the By-laws of the Juegos Companies states as follows: “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.”

⁶⁴ Partial Award, ¶ 183.

⁶⁵ Transcript (Spanish version), Hearing on Jurisdiction, Day 5, Statement by Claimants’ Expert Rodrigo Zamora Etcharre, 1091: 16-22; 1092: 1-5.

⁶⁶ Partial Award, ¶ 185.

2018. Therefore, under Mexican law, the share transfer without prior authorization by the shareholders' meeting is a nonexistent act vis-à-vis the company that cannot be amended or perfected by any act whatsoever.

127. Consequently, the Majority does not ground its assertions in applicable law, altering in turn the legal effects Mexican law attributes to nonexistent acts.

128. Moreover, the Majority holds that if the Tribunal gave no probative value to the *de facto* share ownership and found that the Claimants' share ownership between June 2013 and June 2016 was instead as recorded in the 2006-2008 *asambleas*, the Claimants would have still owned more than 50% of the shares –the relevant threshold for proving the legal capacity to control the Juegos Companies under Article 1117.⁶⁷

129. The Majority fails to distinguish the shareholding percentages between the Original Claimants and the Additional Claimants, as at the critical date of the first alleged breach of NAFTA as well as at the critical date of the Request for Arbitration.

130. Despite not taking into account that the share transfers prior to 2004 were not previously approved by the Shareholders' Meetings, the Majority is not able to prove the Original Claimants' legal capacity to control, as of the critical date of the Request for Arbitration.

131. Concerning JVE Mexico, the Majority only relies on 2006, 2013, 2014 and 2018 data; for JVE Sureste, it only relies on 2007, 2009, 2013, 2014 and 2018 data; for JVE Centro, it only relies on , 2008, 2013, 2014 and 2018 data; for J y V, it only relies on 2008, 2012, 2013, 2014 and 2018 data; and for JVE DF, it only relies on 2008, 2012, 2013, 2014 and 2018 data.⁶⁸ Consequently, the Majority does not have sufficient evidence to establish that, as of the date on which the Request for Arbitration was filed, the Original Claimants controlled the Juegos Companies.

132. However, the Tribunal does have information provided by the Claimants on their version of the Original Claimants' and the Additional Claimants' shareholdings.

133. In this context, the Tribunal requested the parties to identify the share percentages of each of the Mexican Companies; distinguishing between Original Claimant shareholders, Additional Claimant shareholders, and other shareholders.

⁶⁷ *Id.*, ¶ 186.

⁶⁸ *Id.*, Tables at ¶¶ 174, 189, 191, 192, 193 and 194.

134. As required by the Tribunal, the Claimants supplied in the tables and charts included in their Post-Hearing Brief relevant information that evinces their acknowledgment that the Original Claimants lacked the shares necessary to control each of the Mexican companies, with the exception of JVE Mexico.⁶⁹

135. In view of the defects in the production of evidence and the inconsistencies of the evidence produced by the Claimants, I disagree with the Majority's position that mere inferences may make up for the burden, absence, or inconsistencies of proof.

I.C.2. Claimants' ownership and control of the Mexican Companies

136. Article 1117 on the Claim by an Investor of a Party on Behalf of an Enterprise provides: "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 to arbitration under this Section a claim that the other Party has breached an obligation..."

137. The parties disagree on the requirements imposed by Article 1117 whereby the investor must "own[]" or "control[] [the enterprise] directly or indirectly." The parties' differences raise a question about the scope and the effects of that rule. This question must be resolved through international law rules on interpretation.

138. I agree with the Majority that the term "ownership" in the text and context of Article 1117 means holding all the shares in a company. Since the Claimants have failed to demonstrate that they owned the Juegos Companies, E-Games or Operadora Pesa at the critical dates established by the NAFTA, they may not claim to be the owners for the purposes of Article 1117.

139. The ordinary meaning of the term "control" implies the exercise of power, decisive influence or discretionary management over something. Control means to have and exercise an exclusive power to the exclusion of any other power or influence. Article 1117 draws a distinction between direct or indirect control only. The categories of "legal control" and "*de facto* control" are not provided for therein, and thus were not intended by the NAFTA Contracting Parties.

140. Still, the distinction between "legal control" and "*de facto* control" has been used by both disputing parties and some arbitral tribunals. Such distinction may help, and has indeed helped, to characterize the different forms of control that a Party's investor may exercise over the other

⁶⁹ Claimants' Post-Hearing Brief, 17 August 2018, Annex 1.

Party's enterprise. Nevertheless, such distinction may not alter the very substance of the term "control" in the ordinary meaning to be given thereto as the manifestation and exercise of an exclusive power to the exclusion of any other power or control.⁷⁰

141. Article 1117 only refers to "control." That control may be exercised either by the one who is entitled thereto under the bylaws and actually exercises it or else by the one who actually exercises such control.

142. In *Thunderbird*, the tribunal held that the owner or legally controlling party has the ultimate right to determine key decisions. However, if in practice a person exercises that position, there is a genuine link yielding the control to that person.⁷¹

143. Hence, it contended that the term "control" interpreted in accordance with its ordinary meaning can be exercised in various manners, and, therefore, a showing of effective or "*de facto*" control is, in the tribunal's view, sufficient for the purposes of Article 1117 of the NAFTA.⁷² In this regard, although within the framework of non-NAFTA cases, the notion that any "control" must be effective is also confirmed by decisions rendered by ICSID tribunals.⁷³

144. In conclusion, the term "control" may be classified as legal control or *de facto* control, but this characterization does not alter the content and scope of the term "control," *i.e.*, the exercise of exclusive power in the management of an enterprise to the exclusion of any other power. Control must be contextualized in time. Only the investor exercising "effective control" at any given time may resort to arbitration pursuant to Article 1117(1).

I.C.2.a. The Original Claimants' control over the Juegos Companies

145. The Original Claimants were unable to provide sufficient evidence that, at the

⁷⁰ "Ownership and legal control may assure that the owner or legally controlling party has the ultimate right to determine key decisions. However, if in practice a person exercises that position... one can conceive the existence of a genuine link yielding the control of the enterprise to that person;" *International Thunderbird Gaming Corporation v. United Mexican States*, Award, 26 November 2006, ¶ 108.

⁷¹ *Id.*, ¶ 108.

⁷² *Id.* ¶ 106: "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 NAFTA. Interpreted in accordance with the 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 NAFTA."

⁷³ *Ioan Micula, v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, ¶¶ 119, 115; *Bernard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 127.

relevant dates (June 2013 and June 2016), they jointly owned most Class B shares in the Juegos Companies, with the exception of JVE Mexico.⁷⁴

146. When filing the Request for Arbitration to ICSID, the Original Claimants were also unable to show that they had effective or *de facto* control over the Juegos Companies, not only due to the lack of sufficient evidence, but also in view of the text of Claimants' letter dated 21 July 2016 in which, in response to a letter from the Centre, they admitted that, "because Claimants do not have board control of the Juegos Companies, they [we]re not at [that] moment in a position to provide the requested affirmation."⁷⁵

147. In conclusion, the Original Claimants neither owned nor exercised effective control over the Juegos Companies at the dates relevant to determining the Tribunal's jurisdiction under Article 1117(2).

I.C.2.b. The Original Claimants' control over E-Games

148. It was established that the Original Claimants did not hold the shares necessary to control E-Games, neither at the time of alleged breaches nor upon the filing of the Request for Arbitration.⁷⁶ It was also demonstrated that the Original Claimants exercised effective control over E-Games at the relevant dates.⁷⁷

149. In conclusion, the Original Claimants did not own, but did prove to have exercised effective control, over the Juegos Companies on the dates relevant to determining the Tribunal's jurisdiction under Article 1117(2).

I.C.2.c. The Original Claimants' control over Operadora Pesa

150. It is a proven fact that the Original Claimants were not investors in Operadora Pesa at the dates relevant to determining the Tribunal's jurisdiction under Article 1117(2).⁷⁸

⁷⁴ Claimants' Post-Hearing Brief, 17 August 2018, Annex 1.

⁷⁵ Claimants' letter to ICSID dated 21 July 2016, p. 13. [Arbitrator's Translation]

⁷⁶ Partial Award, ¶236.

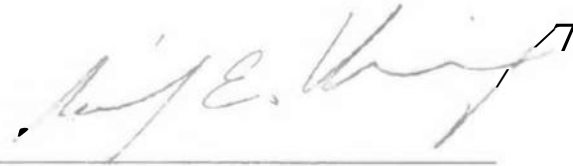
⁷⁷ *Id.*, ¶¶ 237 *et seq.* Conf. Claimants' Post-Hearing Brief, 17 August 2018, Annex 2.

⁷⁸ Claimants' Post-Hearing Brief, 17 August 2018, Annex 3.

CONCLUSION

151. In view of the foregoing considerations, I partially dissent from the Majority's Decision. Therefore, in my opinion:

- The Tribunal should have granted the Respondent's Jurisdictional Objection based on Article 1121 of the Treaty with respect to the Additional Claimants and Operadora Pesa;
- The Tribunal should have granted the Respondent's Jurisdictional Objection based on Articles 1119 and 1122(1) of the Treaty with respect to the Additional Claimants and Operadora Pesa;
- The Tribunal should have granted the Respondent's Jurisdictional Objection based on Article 1117 of the Treaty with respect to Operadora Pesa and the Juegos Companies, with the exception of JVE Mexico;
- Consequently, the Tribunal has jurisdiction over the claims submitted by the Original Claimants on their own behalf under Article 1116 of the Treaty and on behalf of JVE Mexico and E-Games under Article 1117 of the Treaty.
- The costs of the proceeding should be equally borne by the Parties, and each Party should bear the costs and expenses incurred thereby in the context of the proceeding.



Prof. Raul Emilio Vinuesa
Arbitrator

Da*: 6 JULY 2019