IN AN ARBITRATION UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE ICISID ADDITIONAL FACILITY RULES

B-Mex, LLC and others

v.

United Mexican States

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

PARTIAL AWARD

Members of the Tribunal

Prof. Gary Born, Arbitrator
Prof. Raúl Emilio Vinuesa, Arbitrator
Dr. Gaëtan Verhoosel, President

Secretary of the Tribunal

Ms. Natalí Sequeira, ICSID

19 July 2019

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GLOSSARY

2009 Resolution	Resolution DGAJS/SCEV/0260/2009-BIS issued by SEGOB on 27 May 2009
2012 Resolution	Resolution DGJS/SCEV/1426/2012 issued by SEGOB on 16 November 2012
Additional Claimants	– Neil Ayervais – Deana Anthone – Douglas Black – Howard Burns – Mark Burr – David Figueiredo – Louis Fohn – Deborah Lombardi – P. Scott Lowery – Thomas Malley – Ralph Pittman – Daniel Rudden – Marjorie “Peg” Rudden – Robert E. Sawdon – Randall Taylor – James H. Watson, Jr. – Caddis Capital, LLC – Diamond Financial Group, Inc. – 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 – Victory Fund, LLC – B-Cabo, LLC

	– Colorado Cancún, LLC
Amended Notice	Amended Notice of Intent filed by the Claimants on 2 September 2016
Claimants	The Original Claimants and the Additional Claimants
E-Mex	Entretenimiento de Mexico, S.A. de C.V.
GATS	General Agreement on Trade in Services
Grand Odyssey	Grand Odyssey S.A. de C.V.
ICSID or the Centre	International Centre for the Settlement of Investment Disputes
Juegos Companies	– Juegos de Video y Entretenimiento de México, S. de R.L. de C.V. (***JVE Mexico***) which owned the casino at Naucalpan (***Naucalpan***) – Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (***JVE Sureste***) which owned the casino at Villahermosa (***Villahermosa***) – Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. (***JVE Centro***) which owned the casino at Puebla (***Puebla***) – Juegos y Video de México, S. de R.L de C.V. (***JyV Mexico***) which owned the casino at Cuernavaca (***Cuernavaca***) – Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. (***JVE DF***) which owned the casino at Mexico City (***Mexico City***)
Mexican Companies	– Juegos Companies – Exciting Games, S. de R.L. de C.V. (***E-Games***) – Operadora Pesa, S. de R.L. de C.V. (***Operadora Pesa***)
MIGA Convention	Convention Establishing the Multilateral Investment Guarantee Agency (MIGA)
NAFTA or Treaty	North American Free Trade Agreement
Notice	Notice of Intent submitted by the Claimants on 23 May 2014

OECD Declaration	OECD Declaration on International Investment and Multinational Enterprises
Original Claimants	– B-Mex, LLC – B-Mex II, LLC – Palmas South, LLC – Gordon G. Burr – Erin J. Burr – John Conley – Oaxaca Investments, LLC (***Oaxaca***) – Santa Fe Mexico Investments, LLC
Original Mexican Companies	– Juegos Companies – E-Games
POA	Power of Attorney
Respondent	The United Mexican States
Request	Request for Arbitration filed by the Claimants on 15 June 2016
SEGOB	Secretaría de Gobernación, a Ministry of the Government of Mexico
SPA	Share Purchase Agreement
VCLT	Vienna Convention on the Law of Treaties

I. THE PARTIES AND THEIR REPRESENTATION

1. The Request was filed by 39 Claimants. All the Claimants are U.S. nationals.[1] After the filing of the Request, one Claimant—EMI Consulting, LLC—notified the Tribunal that it withdrew from the arbitration.[2] The Claimants pursue claims both under Article 1116 of the Treaty and, on behalf of seven Mexican Companies,[3] under Article 1117 of the Treaty.

2. The Claimants are represented in these proceedings by:

Mr. David M. Orta
Mr. Daniel Salinas-Serrano
Ms. Julianne Jaquith
Mr. Kristopher Yue
Ms. Ana Paula Luna Pino
Quinn Emanuel Urquhart & Sullivan, LLP
Washington DC, USA; and

Mr. Julio Gutiérrez Morales
Ríos-Ferrer Guillén-Llarena, Treviño y Rivera S.C.
Mexico City, Mexico.

3. The Respondent is represented in these proceedings by:

Mr. Orlando Pérez Gárate
Mr. Hugo Romero Martínez
Mr. Geovanni Hernández Salvador
Ms. Blanca del Carmen Martínez Mendoza
Dirección General de Consultoría Jurídica de Comercio Internacional;

Mr. James Cameron Mowatt
Mr. Alejandro Barragán
Ms. Ximena Iturriaga
Tereposky & DeRose LLP
Ottawa, Canada; and

Mr. Stephan E. Becker
Pillsbury Winthrop Shaw Pittman LLP
Washington DC, USA.

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1 Request, ¶ 3.
2 Transcript (ENG), Hearing on Jurisdiction, Day 4, 909:12-910:2.
3 Originally there were nine. In their Counter-Memorial, the Claimants withdrew their claims on behalf of two Mexican Companies—Metrojuegos, S. de R.L. de C.V. and Merca Gaming, S. de R.L. de C.V. *See* Counter-Memorial on Jurisdictional Objections, 25 July 2017 (***Counter-Memorial***), ¶ 278, fn. 452.

II. THE PROCEEDING

4. On 23 May 2014, the Claimants submitted the Notice. The Notice, in a section titled "Identification of the Disputing Investors", identified the eight Original Claimants and the six Original Mexican Companies. It set out the factual basis of the claim, identified the provisions of the Treaty that were alleged to have been breached, and specified the relief requested.

5. On 15 June 2016, the Claimants filed the Request with the Centre. On 23 June 2016, the Centre acknowledged receipt of the Request.

6. On 27 June 2016, the Respondent objected to the registration of the Request, claiming, *inter alia*, the (i) failure by the 31 Additional Claimants to provide a notice of intent at least 90 days prior to the submission to arbitration as required by NAFTA Article 1119 and Article 1122; (ii) failure by the Claimants to identify in the Notice three of the then nine Mexican Companies on whose behalf they intended to pursue a claim under Article 1117; and (iii) failure by the Claimants and the Mexican Companies to consent to arbitration as required by Article 1121.

7. On 6 July 2016, the Centre sent a questionnaire to the Claimants requesting, *inter alia*, (i) copies of the written waivers issued by each of the Mexican Companies; (ii) copies of each of the Mexican Companies' written consent to arbitration; and (iii) an explanation as to how each Claimant and each Mexican Company meets the requirements of Article 1119.

8. On 21 July 2016, the Claimants submitted a written response to the Centre's questionnaire and to the Respondent's objections of 27 June 2016. Attached to the written response were POAs and waivers by four of the then nine Mexican Companies. The Claimants argued that "consents and waivers" from the five Juegos Companies were not required because the Respondent had deprived the Claimants of control of the Juegos Companies, and therefore the exception in NAFTA Article 1121(4) applied.

9. On 26 July 2016, the Respondent responded to the Claimants' letter of 21 July 2016.

10. On 2 August 2016, the Centre informed the Claimants that it could not approve access to the Additional Facility or register the Request unless the consents of the Juegos Companies were provided as required by Article 1121(2)(a) NAFTA. ICSID asked

the Claimants to respond by 5 August 2016 and inform the Centre of whether they wished to: (i) suspend the approval and registration of the claim until the Request had been supplemented with the necessary consents, or (ii) withdraw the claims made on behalf of the Juegos Companies under Article 1117 of the Treaty.

11. On 5 August 2016, the Claimants responded to the Centre, attaching the POAs and waivers by the Juegos Companies.

12. On 11 August 2016, ICSID registered the Request pursuant to Article 4 of the ICSID Arbitration (Additional Facility) Rules.

13. On 2 September 2016, the Claimants sent the Amended Notice to the Respondent.

14. By letter of 9 September 2016, the Claimants appointed Professor Gary Born, a U.S. national, as arbitrator. Professor Born accepted his appointment on 14 September 2016.

15. By letter of 26 September 2016, the Respondent appointed Professor Raúl Vinuesa, an Argentine national, as arbitrator. Professor Vinuesa accepted his appointment on 4 October 2016.

16. On 31 October 2016, the Claimants wrote to the Centre to request that the Secretary-General of ICSID appoint the presiding arbitrator pursuant to Article 1124 of the Treaty, as the parties had been unable to reach agreement on the designation of the presiding arbitrator.

17. By letter of 13 January 2017, the Secretary-General of ICSID appointed Dr. Gaëtan Verhoosel, a Belgian national, as the presiding arbitrator. Dr. Verhoosel accepted his appointment on 13 February 2017.

18. On 14 February 2017, the Centre notified the parties that the Tribunal had been constituted pursuant to ICSID Arbitration (Additional Facility) Rules.

19. On 28 March 2017, the Tribunal held its first session by telephone conference. The parties agreed to bifurcate the proceeding, with a first phase limited to the preliminary objections raised by the Respondent. On 4 April 2017, the Tribunal issued Procedural Order No. 1, which included a procedural timetable reflecting the parties' agreement.

20. On 30 May 2017, the Respondent filed its Memorial on Jurisdictional Objections. On 25 July 2017, the Claimants filed their Counter-Memorial on Jurisdictional Objections. On 1 December 2017, the Respondent filed its Reply on Jurisdictional Objections. On 8 January 2018, the Claimants filed their Rejoinder on Jurisdictional Objections. Attached to the Claimants' Rejoinder were 43 additional Witness Statements.

21. On 22 March 2018, new evidence was tendered by the Claimants with leave of the Tribunal. On 25 April 2018, the Respondent filed its Rebuttal Submission in Response to New Evidence, responding to the new evidence exhibited with the Claimants' Rejoinder and the new evidence tendered by the Claimants on 22 March 2018.

22. From 21 May 2018 to 25 May 2018, the Tribunal held a hearing on jurisdiction in Washington DC. Present at the hearing were, for the Tribunal: Dr. Gaëtan Verhoosel, Professor Gary Born, Professor Raúl Vinuesa, and Ms. Natalí Sequeira, Secretary to the Tribunal. For the Claimants: Mr. David Orta, Mr. Daniel Salinas, Ms. Julianne Jaquith, Mr. Kristopher Yue, Ms. Ana Paula Luna Pino, Ms. Dominique Lambert, Mr. Milton Segarra (all from Quinn Emanuel Urquhart & Sullivan, LLP, Washington DC, USA), and Mr. Julio Gutiérrez Morales (from Ríos-Ferrer Guillén-Llarena, Treviño y Rivera S.C., Mexico City, Mexico). For the Respondent: Ms. Samantha Atayde Arellano, Ms. Ximena Iturriaga, Mr. Geovanni Hernández Salvador, Ms. Blanca del Carmen Martínez Mendoza (all from Dirección General de Consultoría Jurídica de Comercio Internacional), Mr. James Cameron Mowatt, Mr. Alejandro Barragán, Ms. Jennifer Radford, Mr. Greg Tereposky, Ms. Yuri Perez (all from Tereposky & DeRose LLP, Ottawa, Canada), and Mr. Stephan E. Becker (from Pillsbury Winthrop Shaw Pittman LLP, Washington DC, USA).

23. At the hearing, the following witnesses or experts were examined:

Mr. Neil Ayervais
Mr. Gordon Burr
Ms. Erin Burr
Mr. Julio Gutiérrez Morales
Mr. José Ramón Moreno
Mr. John Conley

Mr. Benjamín Chow
Mr. René Irra Ibarra
Ms. Ana Carla Martínez Gamba
Mr. Moisés Opatowski
Mr. Luc Pelchat
Mr. José Luis Segura Cárdenas
Mr. Rodrigo Zamora

24. On 17 August 2018, both parties submitted their Post-Hearing Briefs.

25. On 1 October 2018, both parties submitted their statements of costs in relation to this phase.

26. On 23 November 2018, the Tribunal invited the parties and the Non-Disputing Parties, if they so wished, to file submissions addressing the question of whether there are any relevant rules of international law applicable in the relations between the NAFTA Parties within the meaning of Article 31(3)(c) of the VCLT of which the Tribunal should take account in interpreting "own[] or control[]" in Article 1117 of the Treaty. All such responsive submissions were received by 21 December 2018.

27. In the course of the proceeding, the Tribunal issued seven procedural orders, addressing a variety of procedural issues and incidents and presenting questions to the parties for their post-hearing briefs. All procedural orders are available on the ICSID website and therefore need not be summarized here.

III. FACTUAL BACKGROUND

28. The Tribunal sets out below a very brief summary of the factual background insofar as relevant to this preliminary phase. This summary reflects only what has been alleged by the Claimants, and not any findings of fact by the Tribunal. The Tribunal need not, and does not, make any factual findings in this Award other than to the extent indicated in Part V below, "The Tribunal's Findings and Conclusions". Therefore, since it would be fastidious to insert "allegedly" before each alleged fact in the summary below, it is to be understood as being expressly qualified as such *in toto*.

A. THE EXISTING CASINO BUSINESS

29. The Mexican Companies were involved in the operation of casino businesses.[4] From 1 April 2008 to 27 May 2009, the casinos were operated under a casino operation permit held by E-Mex, a Mexican company.[5] On 27 May 2009, SEGOB issued a resolution granting E-Games permission to operate the casinos under the same permit but autonomously from E-Mex, based on the doctrine of "acquired rights" (the ***2009 Resolution***).[6]

30. On 16 November 2012, SEGOB issued a resolution granting E-Games an independent casino operation permit with its distinct permit number (the ***2012 Resolution***).[7] This meant that E-Games was no longer operating under E-Mex's permit, whether autonomously or otherwise. The permit was to remain valid until 2030 and the Claimants would have the right to operate up to fourteen gaming establishments (7 remote gambling centres and 7 lottery number rooms), or up to 7 dual-function gaming establishments.[8]

31. The Mexican Companies performed the following functions in the business:

    a. Each of the five Juegos Companies owned a casino and related assets.[9]

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4 Counter-Memorial, ¶ 178.
5 Request, ¶ 27.
6 SEGOB Resolution No. DGAJS/SCEV/0260/2009-BIS, 27 May 2009, **C-11**. *See also* Request, ¶ 37.
7 SEGOB Resolution No. DGJS/SCEV/1426/2012, 16 November 2012, **C-16**.
8 SEGOB Resolution No. DGJS/SCEV/1426/2012, 16 November 2012, p. 5, **C-16**; Request, ¶ 46.
9 Counter-Memorial, ¶ 178.

b. From 16 November 2012, E-Games held the casino operation permit and operated the five dual-function casinos.[10] E-Games also leased casino machines from each of the Juegos Companies.[11]

c. Operadora Pesa provided management and administrative services (such as coordinating with food and beverage vendors) for the five casinos through a services agreement between Operadora Pesa and E-Games.[12]

32. Each of the Claimants, with the exception of B-Cabo, LLC and Colorado Cancúun LLC, are shareholders in at least one of the Juegos Companies.[13] Two of the Original Claimants—John Conley and Oaxaca—also are shareholders in E-Games.[14]

33. Further, some of the Claimants provided loans to the Juegos Companies:

a. Palmas South, LLC provided a loan to JVE Sureste, with US$ 130,000 of the principal outstanding, and a loan to JVE Centro, with US$ 400,000 of the principal outstanding.[15]

b. Gordon Burr made a loan to JVE DF, with US$ 110,000 of the principal outstanding.[16]

c. After the casinos were shut down in April 2014, some of the Claimants also made unspecified loans to B-Mex, LLC, which in turn invested the funds to finance upkeep obligations of the various Mexican Companies.[17]

B. THE LOS CABOS AND CANCÚN PROJECTS

34. The Claimants were also in the process of developing two other casino ventures in Mexico, in Los Cabos and Cancún. These casinos were to be the two remaining dual-function casinos that E-Games was allowed to operate under its casino operation

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[10] Counter-Memorial, ¶¶ 57, 178; Tr. (ENG), Day 2, 424:14-18.

[11] Counter-Memorial, ¶ 246. The Claimants have produced the Machine Lease Agreements between each of the Juegos Companies and E-Games, *see* **C-52** to **C-56**.

[12] Counter-Memorial, ¶ 178; Contract of Services between Operadora Pesa, S. de R.L. de C.V. and Exciting Games, S. de R.L. de C.V., 10 December 2008, **C-126**.

[13] Counter-Memorial, ¶ 209.

[14] Counter-Memorial, ¶ 240.

[15] Counter-Memorial, ¶ 269.

[16] Counter-Memorial, ¶ 269.

[17] Counter-Memorial, ¶ 269; Erin Burr First Witness Statement dated 25 July 2017 (***E. Burr First WS***), ¶ 88, **CWS-2**.

permit.[18] Two Claimants—B-Cabo, LLC and Colorado Cancún, LLC—were set up in connection with this plan.[19] These two Claimants are only asserting claims on their own behalf under Article 1116.[20]

35. B-Mex II, LLC invested US$ 2.5 million to obtain licenses for the operation of gaming machines in 2006, some of which were intended to be used in the Los Cabos and Cancún projects.[21]

36. Colorado Cancún, LLC invested US$ 250,000 in entering into an option to purchase a gaming license from B-Mex II, LLC.[22]

37. B-Cabo, LLC invested US$ 600,000 through loans to Medano Beach, S. de R.L. de C.V., a Mexican company, for the purchase of property for the B-Cabo hotel and casino.[23] B-Cabo, LLC was also in the process of acquiring a gaming license from B-Mex II, LLC when E-Games's casino permit was revoked by the Respondent.[24]

C. ALLEGED WRONGFUL CONDUCT BY THE RESPONDENT

38. On 30 December 2011, E-Mex filed a constitutional challenge—known as an *amparo* proceeding—against SEGOB, challenging, *inter alia*, the 2009 Resolution.[25] On 30 January 2013, the *amparo* judge ruled that the 2009 Resolution was unconstitutional and ordered its rescission.[26] This ruling was affirmed by the appellate court on 10 July 2013.[27] On 19 July 2013, SEGOB complied with the judgment and rescinded the 2009 Resolution.[28]

39. The Claimants claim that the Respondent breached Articles 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment), 1105 (Minimum Standard of

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18 Counter-Memorial, ¶¶ 271-272.
19 Counter-Memorial, ¶¶ 272-273; E. Burr First WS, ¶ 52, **CWS-2**.
20 Counter Memorial, ¶ 167, fn. 272.
21 Counter-Memorial, ¶ 274; E. Burr First WS, ¶ 52, **CWS-2**.
22 Counter-Memorial, ¶ 275; Right of First Refusal Agreement between Colorado Cancún, LLC and B-Mex II, LLC, 27 April 2011, **C-88**.
23 Counter-Memorial, ¶ 276; Investment/Loan Agreement between B-Cabo, LLC and Medano Beach Hotel, 5 April 2013, **C-65**,
24 Counter-Memorial, ¶ 276.
25 Request, ¶ 51.
26 Request, ¶ 52; Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal*, 30 January 2013, **C-18**.
27 Request, ¶ 53; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa*, 10 July 2013, **C-20**.
28 Request, ¶ 54.

Treatment) and 1110 (Expropriation and Compensation) of the Treaty by taking the following measures against the Mexican Companies:[29]

a. On 19 June 2013, the Respondent temporarily and illegally closed the Mexico City casino.[30]

b. On 22 August 2013, the *amparo* judge improperly re-opened proceedings upon E-Mex's request.[31] On 26 August 2013, the judge issued another judgment ordering SEGOB to rescind all resolutions based on or derived from the 2009 Resolution, and not just the 2009 Resolution.[32]

c. On 28 August 2013, SEGOB, apparently in compliance with the *amparo* judge's order of 26 August 2013, rescinded several resolutions, including the 2012 Resolution.[33] On 14 October 2013, however, the *amparo* judge ruled that SEGOB had exceeded the enforcement of the 26 August 2013 *amparo* order in revoking the 2012 Resolution.[34]

d. After making this ruling on 14 October 2013, however, the *amparo* judge chose not to issue an order confirming that the 2012 Resolution should not have been rescinded.[35] Instead, the judge sent the matter to the appellate court to decide whether to sanction SEGOB for exceeding its authority.[36]

e. On 19 February 2014, the appellate court, instead of deciding the issue of whether to sanction SEGOB, instead reinterpreted the *amparo* judge's decision. The appellate court determined that SEGOB had not exceeded its powers when rescinding the 2012 Resolution.[37] The Claimants claim that this decision was "politically motivated and influenced".[38] On remand, on 10 March 2014, the

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29 Request, Part V.
30 Notice, ¶ 11; Request, ¶ 11.
31 Request, ¶¶ 56-58.
32 Request, ¶ 58; Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa*, 26 August 2013, **C-23**.
33 Request, ¶ 59.
34 Request, ¶ 64; Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa*, 14 October 2013, **C-24**.
35 Request, ¶ 65.
36 Request, ¶ 65.
37 Request, ¶ 67.
38 Request, ¶ 67.

amparo judge complied with the appellate court's ruling.[39] According to the Claimants, E-Games was deprived of its due process rights during the course of these judicial proceedings described in Paragraphs 39b to 39e.[40]

f. On 23 April 2014, E-Games filed a writ to the Mexican Supreme Court—known as a *recurso de inconformidad*—attacking the appellate court's ruling of 19 February 2014, and the *amparo* judge's compliance on 10 March 2014.[41]

g. On 3 September 2014, the Supreme Court dismissed the appeal on procedural grounds and remanded the case to the same appellate court that had made the 19 February 2014 decision that was being appealed.[42] This meant that the appellate court was reviewing its own decision, and the Claimants allege that they were thus "effectively and practically denied an appeal".[43] On 29 January 2015, the appellate court upheld its own prior decision that affirmed SEGOB's rescission of, *inter alia*, the 2012 Resolution.[44]

h. The Claimants allege that the Mexican Government may have unlawfully intervened in these Supreme Court and appellate court proceedings by threatening certain judges.[45]

i. The Claimants further allege that a Mexican company, Producciones Móviles, S.A. de C.V., was allowed to continue operating its casinos despite obtaining its casino permit under circumstances that were materially identical to how E-Games obtained its independent casino permit under the 2012 Resolution.[46]

j. On 24 April 2014, the day after E-Games had filed its *recurso de inconformidad*, SEGOB, aided by the federal police, closed down all of the Claimants' casinos. The federal police entered the casinos while armed, blocked all entrances and

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39 Request, ¶ 68.
40 Request, ¶¶ 62, 65, 68.
41 Request, ¶ 69.
42 Request, ¶ 73; Order of the *Suprema Corte de Justicia de la Nación*, 3 September 2014, **C-26**.
43 Request, ¶ 73.
44 Request, ¶ 75.
45 Request, ¶¶ 72, 74.
46 Request, ¶ 77.

exits, and confined employees to the offices.[47] SEGOB also refused to provide a copy of the closure order.[48]

k. After the casinos' closure on 24 April 2014, SEGOB blocked any attempts by the Claimants to mitigate their losses. On three occasions around mid-2014, the Claimants approached SEGOB about the possibility of working with a partner to re-open the casinos. SEGOB objected on each occasion.[49] On one occasion, SEGOB informed one of the Claimants' prospective partners, Grand Odyssey, that the casinos could not be reopened "if the 'gringos' remained involved".[50]

l. On 4 April 2014, E-Games made an application to obtain a new independent casino operation permit. On 15 August 2014, SEGOB denied the request, according to the Claimants on purely technical grounds and without affording E-Games the opportunity to correct the errors.[51] SEGOB, during this time, granted casino operation permits to mostly Mexican companies.[52]

m. In September 2012, the Mexican tax authorities commenced a tax audit in relation to E-Games's 2009 operations.[53] After a change of government on 1 December 2012, the authorities on 28 February 2014 issued a resolution finding that E-Games had not complied with its reporting obligations and ordering it to pay more than 170 million Mexican Pesos in back taxes.[54] The Claimants claim that this was improper as they had always filed E-Games's taxes in the same manner, and a separate audit had found its 2011 filings to be compliant with tax legislation.[55]

n. Mexican prosecutors also brought criminal charges against E-Games's representatives. These charges were based on E-Games's illegal operation of the

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47 Notice, ¶¶ 12-13; Request, ¶ 70.
48 Notice, ¶¶ 12-13; Request, ¶ 70.
49 Request, ¶¶ 81-83.
50 Request, ¶ 83.
51 Request, ¶ 86; SEGOB Resolution No. DGJS/2738/2014, 5 August 2014, **C-27**; SEGOB Resolution No. DGJS/2739/2014, 15 August 2014, **C-28**; SEGOB Resolution No. DGJS/2740/2014, 15 August 2014, **C-29**; SEGOB Resolution No. DGJS/2741/2014, 15 August 2014, **C-30**; SEGOB Resolution No. DGJS/2742/2014, 15 August 2014, **C-31**; SEGOB Resolution No. DGJS/2743/2014, 15 August 2014, **C-32**; SEGOB Resolution No. DGJS/2744/2014, 15 August 2014, **C-33**.
52 Request, ¶ 99.
53 Request, ¶ 91.
54 Request, ¶ 91.
55 Request, ¶¶ 90-91.

casinos between 26 August 2013 (when the *amparo* judge issued an order to rescind all resolutions derived from the 2009 Resolution), until 24 April 2014 (when the Respondent closed the casinos).[56]

56 Request, ¶ 92.

IV. THE PARTIES' SUBMISSIONS

40. The Tribunal has carefully reviewed all of the parties' submissions in this arbitration. Those submissions are available on the ICSID website at https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB(AF)/16/3. Therefore, rather than attempting to produce summaries of those pleadings, which would almost certainly fail to do justice to them, the Tribunal hereby incorporates the parties' submissions in their entirety by reference into this section of the Award.

V. THE TRIBUNAL'S FINDINGS AND CONCLUSIONS

41. In this first phase the Tribunal shall decide the following three preliminary issues (the ***Issues***):

a. **<u>Issue 1</u>**: 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]". Article 1121(3) requires the Claimants and the Mexican Companies to give that consent "in writing"; to "deliver[] [it] to the disputing Party"; and to "include[] [it] in the submission of a claim to arbitration". The Respondent's case is that the Claimants' acceptance in the Request of the Respondent's arbitration offer in Article 1122 of the Treaty and the POAs granted by the Claimants and the Mexican Companies to their counsel are incapable of satisfying these requirements; and that this deprives the Tribunal of jurisdiction.[57]

b. **<u>Issue 2</u>**: Article 1119 provides that a "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 …". Article 1122(1) of the Treaty provides that the Respondent consents to the submission of a claim to "arbitration in accordance with the procedures set out in [the Treaty]". The Respondent submits that "[i]n 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".[58]

c. **<u>Issue 3</u>**: Article 1117 of the Treaty provides that an investor may submit a claim to arbitration on behalf of an enterprise of another Party that the investor owns or controls directly or indirectly. The Respondent's case is that at the relevant times the Claimants did not own or control directly or indirectly the Mexican

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57 Reply on Jurisdictional Objections, 1 December 2017 (***Reply***), ¶ 83.

58 Reply, ¶ 75.

Companies on whose behalf they have submitted a claim.[59] Closely intertwined with this objection is the Respondent's objection that the Claimants have failed to prove that they owned any particular number and type of shares in the Mexican Companies at the relevant times.[60]

42. The Tribunal will first address the first two of these Issues insofar as they apply to the claims under Article 1116 on behalf of *the Claimants*. The Tribunal will next address each of these Issues insofar as they apply to the claims under Article 1117 on behalf of *the Mexican Companies*.

A. THE CLAIMANTS' CLAIMS UNDER ARTICLE 1116

1. Article 1121: consent by the Claimants

43. In addressing this objection, the Tribunal starts by noting that Article 1121 is not a monolith. Instead, it contains three paragraphs, two of which are relevant for current purposes:

a. Paragraph (1) provides that "a disputing investor may submit a claim … to arbitration only if" the investor consents to "arbitration in accordance with the procedures set out in this Agreement" and waives the right to pursue other proceedings relating to the same measures.

b. Paragraph (3) provides that such consent and waiver shall "be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration".

44. The Tribunal discerns in paragraphs (1) and (3) of Article 1121 two distinct sets of requirements. They are not to be conflated; each must be given meaning.

a. On the one hand, paragraph (1) sets out two substantive *conditions precedent* that an investor must satisfy before it can pursue a claim in arbitration: consent and waiver. It is clear from the terms of the provision ("may submit a claim … only if") that a NAFTA Party cannot be compelled to arbitrate where those conditions are not met.

[59] Reply, ¶ 194.
[60] Reply, ¶ 217.

b. On the other hand, paragraph (3) sets out *the manner in which* satisfaction of those two conditions precedent—consent and waiver—is to be *conveyed* to the Respondent.

45. Paragraphs (1) and (3) thus elicit separate enquiries, and the Tribunal will pursue each in turn.

a. Article 1121(1): have the Claimants given consent?

46. Arbitration being a creature of consent, lack of consent equates lack of jurisdiction. Where any Claimant has in fact not consented to arbitrate with the Respondent as required by Article 1121(1), the Tribunal has no jurisdiction in respect of that Claimant. The Tribunal must determine whether, as the Respondent submits, that is the case here.

47. In paragraph 114 of the Request, the Claimants referred to the Respondent's offer to arbitrate in Article 1122 of the Treaty and stated that "[b]y this Request for Arbitration, Claimants accept Mexico's offer, and hereby submit the present dispute to arbitration under the Additional Facility Rules of ICSID".[61] This acceptance was given in a document reviewed and agreed to by the Claimants,[62] and signed by the Claimants' counsel pursuant to POAs by the Claimants authorizing counsel to "take any steps required for the initiation of, and to represent [Claimants] and act on [their] behalf against the United Mexican States in, arbitration proceedings under the [Treaty]".[63]

48. The Respondent submits on the basis of this record that the Claimants have not consented. According to the Respondent, the POAs "[a]t most … suggests that the Claimants would have been willing to consent to arbitration if asked …";[64] and the Claimants' consent as conveyed in paragraph 114 of the Request was only "implied or constructive".[65]

49. The Tribunal disagrees. Leaving aside the counterintuitive nature of the Respondent's position—that the Claimants would have spent millions of dollars on an arbitration to

[61] Request, ¶ 114.
[62] Tr. (ENG), Day 2, 448:21-449:4, 450:18-451:10 (G. Burr); 482:15-484:4 (E. Burr).
[63] Counter-Memorial, ¶ 12; Claimants' Waivers and Powers of Attorney, 19 May 2016 – 1 June 2016, **C-4**.
[64] Respondent's Post-Hearing Brief, 17 August 2018 (***Respondent's PHB***), ¶ 15.
[65] Respondent's PHB, ¶¶ 21, 24.

which they did not consent—the record permits no other conclusion than that the Claimants did in fact consent:

a. The Claimants, who have all confirmed in testimony that they did consent,[66] conveyed that consent in paragraph 114 of the Request when expressly accepting the Respondent's offer in Article 1122. Nothing in that paragraph needs to be implied or construed to enable the conclusion that the Claimants did consent.

b. It is true that the Claimants provided their consent through counsel. That is also irrelevant. Where, as here, there is no suggestion that Quinn Emanuel was not duly authorized or that it acted *ultra vires* in issuing the Request conveying the Claimants' consent, there is no question that all statements in the Request are attributable to and bind the principals of Quinn Emanuel—the Claimants. Nothing in the Treaty precludes investors from acting through duly authorized legal counsel.

50. While the Respondent elsewhere concedes that "[c]learly the Claimants authorized Quinn Emmanuel to 'file the arbitration' and to that end consented to the firm doing so", the Respondent suggests "[t]hat is not the point".[67] The point, according to the Respondent, is "[w]hat the Claimants did not do in the [POAs] they signed": "to declare in writing—for the benefit of the Respondent—that they 'consent to arbitration in accordance with the procedures set out in [the Treaty]'".[68] The argument, therefore,

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[66] Each Claimant has submitted evidence stating in these terms, or in materially identical terms: "I understand that Mexico alleges that I have not provided my consent to the submission of my claims in this arbitration in accordance with the ICSID Additional Facility Rules. This is simply not true; my consent has been unequivocal at all times. I at all times have expressly consented to the filing of the Request for Arbitration on my behalf, to the execution of the powers of attorney in favor of Quinn Emanuel through which I intended to consent and in fact expressly consented to arbitration in accordance with the procedures set out in the NAFTA, as well as the ICSID Additional Facility Rules. I hereby affirm, once again, that I have consented, and continue to consent, to arbitration in accordance with the procedures set out in the NAFTA, in compliance with NAFTA Article 1121". *See* Further 32 Claimants' Witness Statements dated 8 January 2018 (***Further 32 Claimants' WS***), Part III, **CWS-16** to **CWS-47**; B-Cabo, LLC Witness Statement dated 8 January 2018 (***B-Cabo WS***), Part II, **CWS-48**; Colorado Cancun, LLC Witness Statement dated 8 January 2018 (***Colorado Cancun WS***), Part II, **CWS-49**; Gordon Burr First Witness Statement dated 25 July 2017 (***G. Burr First WS***), ¶ 69, **CWS-1**; Erin Burr Second Witness Statement dated 8 January 2018 (***E. Burr Second WS***), Part V, **CWS-8**; Neil Ayervais Witness Statement dated 8 January 2017 (***Ayervais WS***), Part III, **CWS-12**; John Conley Witness Statement dated 8 January 2017 (***Conley WS***), Part IV, **CWS-13**. *See also* Tr. (ENG), Day 2: 487:13-489:1 (E. Burr).

[67] Reply, ¶ 99.

[68] Reply, ¶ 99.

is that a verbatim recitation by the Claimants of the phrase "arbitration in accordance with the procedures set out in" the Treaty is required to satisfy Article 1121(1).[69]

51. The Tribunal disagrees. The Request refers to the Respondent's offer in Article 1122 and states that the Claimants "accept Mexico's offer" as set forth in that provision. As further discussed below, Article 1122 in terms already expressly confines the Respondent's offer to "arbitration in accordance with the procedures set out in this Agreement". Accordingly, the only offer to which the Claimants could give their consent in paragraph 114 of the Request was necessarily and already limited to "arbitration in accordance with the procedures set out in this Agreement". A verbatim recitation of that phrase in the Request or in the POAs would not have added anything: the limitation on consent introduced by that phrase is hard-wired into the Respondent's offer. The Claimants could not accept an offer not made in Article 1122.

52. The Tribunal is not aware of any arbitral authority requiring any particular formulation for giving consent under Article 1121(1). None of the decisions cited by the Respondent, including *Methanex*, *Canfor*, *Merrill and Ring*, *Cargill*, *Detroit International Bridge*, *Bilcon*, *Resolute Forest,* and *Mercer*, suggests that a claimant can only validly give consent under Article 1121(1) by verbatim reciting Article 1122 or using any other particular phraseology.[70]

53. In sum, the Claimants did give consent as required by Article 1121(1). The only question is whether that consent was conveyed in the manner prescribed by Article 1121(3). The Tribunal turns to this next.

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69 Respondent's PHB, ¶ 26.

70 *See, e.g.*, Reply, ¶¶ 131-136 and Respondent's PHB, ¶¶ 44-45, citing *Methanex Corporation v. United States of America,* UNCITRAL, Partial Award, 7 August 2002 (***Methanex***), **CL-26**; *Canfor Corporation v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006 (***Canfor***), **CL-29**; *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 (***Merrill and Ring***), **CL-28**; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (***Cargill***), **RL-016**; *Detroit International Bridge Company v. Government of Canada*, UNCITRAL, PCA Case No. 2012-25, Award on Jurisdiction, 2 April 2015 (***Detroit International Bridge***), **CL-3**; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 (***Bilcon***), **RL-010**; *Resolute Forest Products Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 (***Resolute Forest***), **RL-037**; *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018 (***Mercer***), **RL-038**.

b. Have the Claimants conveyed their consent in the manner prescribed by Article 1121(3)?

54. Article 1121(3) required the Claimants to give their consent "in writing", to "deliver[] [it] to" the Respondent, and to "include[] [it] in the submission of a claim to arbitration".

55. The Respondent submits that the Claimants' acceptance of the Respondent's offer in paragraph 114 of the Request, filed on their behalf by Quinn Emanuel, failed to satisfy the three requirements of Article 1121(3).[71]

56. It is true that the Claimants did not issue to the Respondent a separate letter affirming their consent to arbitration. That is also irrelevant: nothing in Article 1121(3) required them to do so. All it required was that the consent be (i) "in writing", (ii) "delivered to" the Respondent, and (iii) "included in the submission of a claim to arbitration".

57. That was done here. To wit, the Request (i) *is* a written document; (ii) *was* delivered to the Respondent; and (iii) *was* included in the submission of the claim to arbitration (which pursuant to Article 1137 of the Treaty occurs when the Request was received by the Secretary-General of ICSID).

58. The text of Article 1121(3) imposes no other requirements. Its context also militates against implying any. Under Article 1122(2), "the requirement of … the Additional Facility Rules for *written consent* of the parties" is satisfied by "[t]he consent given by [Article 1122(1)] and the submission by a disputing investor of a claim to arbitration". It would have been surprising if a claimant then could not satisfy Article 1121(3) by doing exactly that.

59. The cases cited by the Respondent also do not suggest otherwise. None of them have imposed additional requirements as to the manner of conveying consent beyond those already contained in Article 1121(3).[72]

60. In any event, even if the Respondent's interpretation of Article 1121(3) were right, that would not then have affected the Tribunal's jurisdiction. While there can be no

[71] Respondent's PHB, ¶¶ 13-14.

[72] *See, e.g.*, Reply, ¶¶ 131-136 and Respondent's PHB, ¶¶ 44-45, citing *Methanex*, **CL-26**; *Canfor*, **CL-29**; *Merrill and Ring*, **CL-28**; *Cargill*, **RL-016**; *Detroit International Bridge*, **CL-3**; *Bilcon*, **RL-010**, *Resolute Forest*, **RL-037** and *Mercer*, **RL-038**.

jurisdiction absent the Claimants' consent (both as a matter of first principles and pursuant to the express terms of Article 1121(1)), the requirements of Article 1121(3) as to the manner in which that consent is to be conveyed to the Respondent do not bear on the Tribunal's jurisdiction. Rather, failure to meet those requirements may affect the claim's admissibility and can be cured.[73]

2. Articles 1122(1) and 1119(a): the Notice and the Respondent's consent

61. Article 1119 requires that, at least 90 days prior to commencing arbitration, the investor submit a notice of intent specifying: "(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 NAFTA] alleged to have been breached …; (c) the issues and the factual basis for the claim; and (d) the relief sought and the approximate amount of damages claimed."

62. Article 1122(1) provides that the Respondent consents to "the submission of a claim to arbitration in accordance with the procedures set out in this Agreement".

63. The Respondent contends that (i) the failure by the Additional Claimants "to [submit a notice of intent] rendered their purported submission to arbitration void ab initio" and (ii) "[t]hey also failed to engage the Respondent's consent to arbitration 'in accordance with the procedures set out in [the NAFTA]' under Article 1122".[74]

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73 *See, e.g.*, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 January 2006 (***International Thunderbird***), ¶ 117 ("The Tribunal considers indeed 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"). When other tribunals have referred to the conditions precedent of Article 1121 as bearing on their jurisdiction, the Tribunal does not read those decisions as referring to the form requirements of *Article 1121(3)*. See the cases cited at Memorial on Jurisdictional Objections, 30 May 2017 (***Memorial***), ¶¶ 82-83; Reply, ¶¶ 131-136; Respondent's PHB, ¶¶ 17-19. As stated above, the Tribunal agrees with those tribunals insofar as they identified the conditions precedent of *Article 1121(1)* as bearing on their jurisdiction.

74 Reply, ¶ 75.

a. The undisputed defect in the Notice

64. The Notice submitted on 23 May 2014 alleged that there had been breaches of Articles 1102, 1103, 1105 and 1110 of the Treaty;[75] set out the factual background to the claims;[76] and estimated the damages relief sought "in the range of US$ 100 million".[77]

65. In a section titled "Identification of the Disputing Investors", it provided the names and addresses of eight investors (who are now eight of the 38 Claimants) and the names of six Mexican companies[78] (who are now six of the seven Mexican Companies).[79] The Notice, however, did not provide the names and addresses of the remaining 31 Additional Claimants or of Operadora Pesa.[80]

66. It is not in dispute that, if the Claimants' contentions as regards their shareholding in the Mexican Companies are found to be correct, the aggregate shareholding held by the Additional Claimants in each of the Juegos Companies and E-Games was at all times smaller than the aggregate shareholding held by the Original Claimants, yet by no means insignificant.

67. It is also common ground that the only defect in the Notice relates to this failure to identify the Additional Claimants and Operadora Pesa as required under Article 1119(a). The Respondent has not complained about the summary of facts, the identification of the Treaty provisions allegedly breached, or the estimate of damages set out in the Notice.

68. It remains unclear what led to the omission of the Additional Claimants and Operadora Pesa from the Notice. The Claimants' evidence at the hearing was that they relied on the advice of their specialised arbitration counsel (at that time a different firm from their counsel of record in this arbitration).[81] There was a suggestion that the omission

75 Notice, Part III.
76 Notice, Part II.
77 Notice, Part IV.
78 The Respondent has stated that it does not "take[] issue" with the omission of the addresses of the six Mexican companies mentioned in the NOI. Reply, ¶ 38.
79 Notice, Part I.
80 Notice, Part I. *See also* Tr. (ENG), Day 2, 375:5-15 (G. Burr).
81 Tr. (ENG), Day 2, 353:13-354:5, 376:3-376:8 (G. Burr).

was insignificant because the Original Claimants allegedly were the controlling shareholders whereas the Additional Claimants were all "passive investors".[82]

69. The Tribunal need not resolve this here. For purposes of interpreting Articles 1119 and 1122, it is irrelevant why the information was omitted. All the Tribunal must determine is whether that omission has the consequences as argued by the Respondent.

b. A matter of jurisdiction or admissibility

70. The Respondent's case is that the claims by the Additional Claimants should be dismissed because their omission from the notice vitiates its consent ("They … failed to engage the Respondent's consent to arbitration 'in accordance with the procedures set out in [the NAFTA]' under Article 1122")[83] and because the defect renders their submission to arbitration void ("Failure to do so rendered their purported submission to arbitration void *ab initio*").[84] The Respondent contests that this Issue is properly characterized as going to admissibility rather than jurisdiction, but that the Additional Claimants' claims should be dismissed even if it were a matter of admissibility.[85]

71. The Claimants, on the other hand, contend that: the defective Notice does not preclude jurisdiction over the Additional Claimants;[86] the Notice was in fact filed on behalf of the Additional Claimants as well;[87] and the matter is one of admissibility and the claims should be admitted because the defect caused the Respondent no prejudice and would not have changed the course of any settlement effort.[88]

72. For the Respondent's objection to succeed, the Tribunal must find that the omission of the Additional Claimants from the Notice either (i) deprives the Tribunal of *jurisdiction* over the Additional Claimants or (ii) renders the claims by the Additional Claimants *inadmissible*. The Respondent's objections must necessarily come within the purview of that taxonomy. If the Tribunal has jurisdiction and declares the claims in question admissible, there is no other basis to dismiss the claims at this stage.

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82 Tr. (ENG), Day 2, 509:15-510:8; 512:2-7 (G. Burr), 557:9-18 (E. Burr).
83 Reply, ¶ 75.
84 Reply, ¶ 75.
85 Reply, ¶¶ 143-144.
86 Rejoinder on Jurisdictional Objections, 8 January 2018 (***Rejoinder***), ¶ 205.
87 Rejoinder, ¶ 203.
88 Rejoinder, ¶ 206.

73. Jurisdiction pertains to whether a tribunal *has* the power to adjudicate a particular dispute, whereas admissibility pertains to whether a tribunal—which does have that adjudicative power—should *exercise* that power over a particular claim. Commentators have emphasized the practical relevance of the distinction: whereas findings pertaining to jurisdiction are subject to set-aside review in most jurisdictions, findings pertaining to admissibility are not.[89]

74. The Tribunal must necessarily examine this Issue, and the parties' related submissions, within the confines of that legal framework:

a. The Tribunal understands that the Respondent's objection on at least one iteration ("They … failed to engage the Respondent's consent to arbitration 'in accordance with the procedures set out in [the NAFTA]' under Article 1122")[90] raises an objection to the Tribunal's jurisdiction: the Respondent says it simply did not consent to arbitrate with the Additional Claimants where their names were omitted from the Notice.

b. It is less clear whether the other iteration of the Respondent's objection ("Failure to do so rendered their purported submission to arbitration void *ab initio*")[91] is aimed at the Tribunal's jurisdiction or at the claim's admissibility. To say that the defect rendered the submission to arbitration "void *ab initio*" is tantamount to saying that the current submission to arbitration cannot be given any effect. This will be the case both where the Tribunal finds that it has no jurisdiction over the Additional Claimants and where it dismisses their claims as inadmissible. The Tribunal's findings as regards jurisdiction and admissibility will thus necessarily dispose of this iteration as well.

c. The Claimants' case is that the defect in the Notice only gives rise to an issue of admissibility that does not require dismissal.[92] That being so, their contention that the Notice was understood by the Additional Claimants to be sent on their behalf as well, even if proven, is neither here nor there: the information required by Article 1119(a) to be included in the Notice would still be missing; and the

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89 Z. Douglas, *The International Law of Investment Claims* (2009), ¶ 291, **RL-030**.
90 Reply, ¶ 75.
91 Reply, ¶ 75.
92 Rejoinder, ¶ 205.

question would still remain whether this defect affects the Tribunal's jurisdiction or the claims' admissibility.

75. Against this backdrop, the Tribunal 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*.

c. Does the Tribunal have jurisdiction over the Additional Claimants?

(i) The relevant test for jurisdiction

76. Whether their omission from the Notice deprives the Tribunal of jurisdiction over the Additional Claimants is a question of *consent*. To wit, the question is whether the consent given by the Respondent in Article 1122(1) was made *conditional upon* satisfaction of Article 1119(a).

77. This question is binary and automatic. If satisfaction of Article 1119(a) is a condition to which the Respondent has tethered its consent, the Tribunal cannot have jurisdiction where that condition is not satisfied. By the same token, if satisfaction of Article 1119 is not a condition to which the Respondent has tethered its consent, then a defect in a notice of intent cannot vitiate the Respondent's consent and the Tribunal does have jurisdiction. Siren songs of pragmatism and doomsday warnings of floodgates are alien to this analysis.

78. To resolve this question, the Tribunal must interpret the Treaty as judiciously and thoughtfully as it can, in accordance with the principles of treaty interpretation as codified in Articles 31 and following of the VCLT. Accordingly, the Tribunal will parse the terms of Articles 1119 and 1122, considered in their context and in light of the Treaty's object and purpose.

79. As set out below, the Tribunal finds that Article 1119 does not condition the Respondent's consent to arbitration in Article 1122 and that the Additional Claimants' failure to issue a notice of intent therefore does not deprive the Tribunal of jurisdiction over them.

(ii) The ordinary meaning of the text of Articles 1119 and 1122(1)

80. The Tribunal first examines Article 1119; then Article 1122(1).

81. First, Article 1119 is stated in mandatory terms: "shall". However, it 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. The 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).

82. Article 1122(1) also does not in terms refer back to either Article 1119 or the notice of intent. However, Article 1122(1) does provide, in the English version of the Treaty, that "[e]ach Party consents to the submission of a claim to *arbitration in accordance with the procedures set out in this Agreement*" (emphasis added). In the French and Spanish versions of the Treaty, the italicised terms appear as "*l'arbitrage conformément aux modalités établies dans le présent accord*" and "*arbitraje con apego a los procedimientos establecidos en este Tratado"*, respectively.

83. In the Treaty's English and French versions, the exact same language is used in Article 1121(1)(a): "*arbitration in accordance with the procedures set out in this Agreement*" and "*l'arbitrage conformément aux modalités établies dans le présent accord*". While slightly different language is used in the Spanish version ("*arbitraje en los términos de los procedimientos establecidos en este Tratado*"), the parties agree that the phrase as it appears in both Articles 1121 and 1122 must be given the same meaning.[93]

84. The Tribunal must accordingly resolve two questions of interpretation:

    a. Does "in accordance with the procedures set out in this Agreement" in Article 1122(1) modify "arbitration"?

[93] Respondent's PHB, ¶ 47; Claimants' Post-Hearing Brief on Jurisdiction, 17 August 2018 (***Claimants' PHB***), ¶¶ 30-32.

b. If it does, do "the procedures" with which the "arbitration" must accord include the requirements of Article 1119?

85. The Tribunal will address each question in turn.

(a) Does "in accordance with the procedures set out in this Agreement" modify "arbitration"?

86. The parties agree that the phrase "in accordance with the procedures set out in this Agreement" should be understood to modify "arbitration".[94] The Tribunal agrees with the parties.

87. This is of some import. If, on the one hand, "in accordance with the procedures set out in this Agreement" had modified "consents" in Article 1122(1), then the provision would have to be construed as requiring that the parties *consent* in accordance with the procedures set out in the Treaty. In other words, the procedures referred to would pertain to the procedures by which *consent* is to be given.

88. If, on the other hand, "in accordance with the procedures set out in this Agreement" had modified "submission of a claim", then the procedures referred to in Article 1122(1) would pertain to the procedures by which *a claim was to be submitted*.

89. But where "in accordance with the procedures set out in this Agreement" modifies "arbitration", the provisions must be construed as providing that the parties' consent is limited to *arbitration* in accordance with the procedures set out in the Treaty. On that reading, the procedures referred to pertain to the procedures with which the *arbitration* itself must accord.

90. This interpretation, subscribed to by both parties, gives meaning to Article 1122(1): the NAFTA Parties did not provide their *ex ante* consent to just *any* arbitration: they only consented to an arbitration *which accords with the procedures set out in the Treaty.*

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94 *Ibid.*

(b) Do "the procedures" with which the "arbitration" must accord include the requirements of Article 1119?

91. The question is which provisions of the Treaty can be said to contain the "procedures" with which the "arbitration" must accord. On this point, the parties disagree.

92. The Claimants' position on this point appears to have evolved.[95] In their post-hearing brief, they submitted, in response to questions from the Tribunal, that the "procedures" pertaining to arbitration are those set out in Articles 1123-1138 of the Treaty, which contain the specific rules in accordance with which a Chapter 11 arbitration is to be conducted.[96]

93. The Respondent, on the other hand, argues that "since an arbitration commences with the submission of a claim, the phrase 'in accordance with the procedures set out in this Agreement' in Article 1121 includes the procedure that must be followed to *validly* submit a claim to arbitration";[97] and similarly, in respect of Article 1122, that "the 'procedures' in respect of the arbitration itself include the procedures for a *valid* submission of a claim to arbitration".[98]

94. The relevance of the point is clear: on the Respondent's case, the "procedures" would also include the requirements for a notice of intent under Article 1119: the "requirement [of a Notice of Intent containing all the information set out in Article 1119], together with those established in Articles 1120 and 1121 (*inter alia*) establish the 'procedure' for the submission of a claim to arbitration which … marks the commencement of an arbitral proceeding".[99]

95. The Tribunal does not find support for the Respondent's interpretation in the ordinary meaning of the terms of Article 1122(1).

96. It is axiomatic that the "arbitration" to which the Respondent gives consent in Article 1122(1) does not commence or come into existence until the submission of a claim

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[95] The Claimants initially suggested that the consent of either party to arbitrate is not conditioned on "strict and literal compliance" with every procedural detail in Chapter 11. *See* Counter-Memorial, ¶¶ 337-338; Rejoinder, ¶¶ 300-301.

[96] Claimants' PHB, ¶ 35.

[97] Respondent's PHB, ¶ 39 (emphasis added).

[98] Respondent's PHB, ¶ 46 (emphasis added).

[99] Respondent's PHB, ¶ 50.

through the filing of a notice of arbitration.[100] Issuing a notice of intent neither commences the "arbitration" nor legally commits an investor to commencing "arbitration". Only the issuance of the notice of arbitration does. After issuing a notice of intent and until the filing of a notice of arbitration, an investor remains entirely free not to commence "arbitration" at all.

97. The natural and ordinary meaning of "arbitration" is therefore the procedures commenced *by*, and to be followed *upon*, the submission of a claim. Filing a notice of intent is, put at its highest, a "procedure" to be followed *prior to* an arbitration, if any; it is not a procedure with which the subsequent *arbitration* itself, if any, must accord. As further explained below—when the Tribunal addresses the context of Articles 1119 and 1122(1)—Articles 1123 to 1136 set out precisely those procedures in some detail.

98. The Respondent counters with the argument that "the 'procedures' in respect of *the arbitration itself* include the procedures for a *valid* submission of a claim to arbitration".[101] But that argument is circular. To add the qualifier "valid" before "submission of a claim" is to simply assume the very point in issue. The question precisely is whether satisfaction of Article 1119 is or is not required to "validly" submit a claim to arbitration. Simply asserting that it is, as the Respondent's argument does, does not address the question whether in fact it is.

99. The drafters of the Treaty certainly did not so provide in terms. On the contrary, while Articles 1120 ("Submission of a Claim to Arbitration") and 1121(1) ("Conditions Precedent to Submission of a Claim to Arbitration") do expressly provide that certain conditions must be met before a claim can be "validly" submitted to arbitration, satisfaction of Article 1119 is *not* stated to be one of them. Nothing in those provisions can be said to condition the "validity" of the submission of a claim to arbitration on the satisfaction of Article 1119.

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[100] Pursuant to Article 1137(1) of the Treaty, "[a] claim is submitted to arbitration under this Section when … (b) the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules has been received by the Secretary-General".

[101] Respondent's PHB, ¶ 46 (emphasis added).

100. The Tribunal now turns to the import of these other provisions, which are part of the context of Articles 1119 and 1122(1) that the Tribunal must consider.

(iii) The context provided by the provisions immediately preceding and following Article 1122

101. Article 31 of the VCLT requires that the text of a treaty provision be interpreted in context. Where the terms of Articles 1119 and 1122(1) do not provide that a failure to satisfy Article 1119 vitiates the Respondent's consent in Article 1122, the Tribunal would need to *imply* this consequence from the context of those provisions.

102. Under the applicable principles of treaty interpretation, it is possible in certain circumstances to imply terms from a provision's context. The difficulty here, however, is that the context strongly militates *against* reading such an implied term into the Treaty. It does so in two ways:

a. First, in nearly all the provisions of Section B of Chapter 11 immediately *following* Article 1122, the Treaty sets out detailed "procedures" with which an "arbitration" under Chapter 11 must accord.

b. Second, in nearly all the provisions of Section B of Chapter 11 immediately *preceding* Article 1122, the NAFTA Parties showed that, whenever they wanted to condition access to Treaty arbitration on the investor's satisfaction of certain requirements, they expressly did so.

103. The Tribunal will address each point in turn.

(a) Articles 1123 to 1136

104. The fourteen provisions immediately following Articles 1121 and 1122—Articles 1123-1136—set out detailed procedures to be followed in any arbitration pursuant to the Treaty.

105. They include, among other things, rules regarding the number of arbitrators and the method of their appointment; the appointment of a presiding arbitrator; consolidation; participation by a non-disputing NAFTA party; the place of arbitration; governing law; expert reports; interim measures; and the final award.

106. The "procedures" with which any "arbitration" under Chapter 11 must accord pursuant to Article 1122 most naturally refer to these detailed procedures for the conduct of the arbitration set out in Articles 1123-1136. The 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.

(b) Articles 1116 to 1121

107. On the other hand, the provisions preceding Article 1122 show that, whenever the drafters of the Treaty wished to condition access to Treaty arbitration on the investor's satisfaction of certain requirements, they specifically and expressly did so.

108. *Article 1116* provides that "[a]n 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".[102] *Article 1117* contains mirroring provisions for claims on behalf of an enterprise. Neither Article 1119 nor any other provision of the Treaty similarly provides that an investor "may not make a claim" if the notice of intent omits some of the information specified in that provision. That choice by the Treaty's drafters cannot be ignored.

109. *Article 1120*, styled "Submission of a Claim to Arbitration", provides that an investor may submit the claim to arbitration "*provided that* six months have elapsed since the events giving rise to a claim" and subject to the exclusions of Annex 1120.1.[103] Article 1120 does not similarly add "and provided that a notice of intent was served containing all the information specified in Article 1119". That choice by the Treaty's drafters cannot be ignored.

110. *Article 1121(1)(a)*, styled "Conditions Precedent to Submission of a Claim to Arbitration", provides that "a disputing investor *may submit a claim … to arbitration only if*'[104] the investor consents provides the requisite consent and waiver. Article 1121(a) does not similarly add "and only if the disputing investor has served a notice of intent in the manner prescribed by Article 1119". Nor is Article 1119 similarly

[102] (Emphasis added).
[103] (Emphasis added).
[104] (Emphasis added).

styled a "Condition Precedent to Submission of a Claim to Arbitration". That choice by the Treaty's drafters cannot be ignored.

111. Respondent's interpretation of Article 1122 would also lead to a strained interpretation of Article 1121(1)(a), where—and on this the parties do agree[105]—the phrase "arbitration in accordance with …" is to be given the same meaning. On the Respondent's interpretation, at the time an investor submits a claim to arbitration, it would be required by Article 1121(1)(a) to give its "consent" not only to the arbitration that it proposes to commence but also to a pre-arbitral step of its own that lies in the past. It strikes the Tribunal as more natural to read the requirement of giving consent in Article 1121(1)(a) as being prospective in nature, pertaining to a process that lies ahead.

112. *Article 1118* exhorts ("should") the parties to settle a claim through consultation or negotiation. At least one important objective of Article 1119—and on this the parties appear to agree[106]—is to enable the Respondent to assess whether it can resolve the claim through settlement discussions, as envisaged by Article 1118, and thus avoid international arbitration. That is also apparent from the Free Trade Commission's statement on notices of intent to submit a claim to arbitration (the ***FTC Statement***). After referring to both Articles 1118 and 1119, the FTC states "[t]he notice of intent naturally serves as the basis for consultations or negotiations between the disputing investor and the competent authorities of a Party".[107]

113. It is common ground that a failure to pursue such settlement discussions however is no bar to Treaty arbitration.[108] That being so, the Respondent's reading of Article 1119 presents a logical challenge. On the Respondent's case, a claimant who fails to include certain information in a notice of intent would forfeit the right to Treaty arbitration. Yet a claimant who fails altogether to pursue the settlement effort that the notice of intent is intended to facilitate, would retain that right undiminished. If failing to pursue settlement discussions does not bar access to Treaty arbitration, then at least bald logic—and at this juncture the Tribunal would not put it higher than that—

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105 Respondent's PHB, ¶¶ 39, 47; Claimants' PHB, ¶¶ 30-32.

106 *See* Reply, ¶ 42; Rejoinder, ¶ 237.

107 Statement of the Free Trade Commission on notice of intent to submit a claim to arbitration, 7 October 2003, p. 1, **CL-13**.

108 Reply, ¶ 25; Counter-Memorial, ¶ 329.

suggests that neither should a failure to comply with a step designed to facilitate such settlement discussions.

(iv) The Treaty's object and purpose

114. The Treaty's object and purpose lend further support to the textual and contextual analysis set out above.

115. In Article 102, styled "Objectives", the NAFTA Parties recorded in paragraph 1(e) that one such objective was to "create *effective procedures* for … the resolution of disputes".[109] In addition, in Article 1115, styled "Purpose", the NAFTA Parties recorded that one purpose of the dispute resolution provisions of Chapter 11 was to "establish[] a mechanism for the settlement of investment disputes that assures … *equal treatment among investors* of the Parties …".[110]

116. This suggests that access to Chapter 11 arbitration was intended to (i) provide investors access to a dispute resolution mechanism that is successful in producing the intended result of resolving investment disputes (ii) without distinction between well and ill-resourced claimants, corporate or natural persons, or more and less sophisticated investors.

117. It strikes the Tribunal as a difficult proposition that these objectives could be furthered by barring access to that dispute resolution mechanism on the basis that the names of certain investors were omitted from the notice of intent.

(v) Decisions of other tribunals

118. The Respondent submits that there is a "*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".[111]

119. There are three independent reasons why, to the Tribunal's mind, that contention does not advance the Respondent's case.

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109 (Emphasis added).
110 (Emphasis added).
111 Reply, ¶ 140.

a. First, the Tribunal's mandate is to find the terms of the Treaty as they are and to interpret them in accordance with the VCLT. If other tribunals have arrived at a different interpretation of the same provision, that does not change that mandate.

b. Second, the Tribunal is not persuaded that the decisions cited by the Respondent do form a *jurisprudence constante*. Other tribunals cited by the Claimants, such as those in in *ADF* and *Chemtura*, for example, have dismissed the proposition that a failure to satisfy the requirements of Article 1119 "must result in the loss of jurisdiction".[112] The Tribunal therefore does not break new ground by finding that consent in Article 1122 is not tethered to satisfaction of Article 1119.

c. Third, it is not even clear whether any of the decisions cited by the Respondent actually did purport to construe Article 1119 as containing a condition precedent to consent: none of them reveals any attempt to construe Article 1119 at all.[113] To the extent that those decisions are cited for the proposition that Articles 1120 and 1121(1) impose conditions that must be met for an investor to have access to Treaty arbitration, the Tribunal does unreservedly agree with them, as explained above.

120. Based on the foregoing, the Tribunal concludes that the Respondent's consent in Article 1122 is not conditioned upon the satisfaction of the requirement of Article 1119(a) to identify the Additional Claimants in the Notice. The Tribunal accordingly finds that it has jurisdiction over the Additional Claimants and dismisses the Respondent's objection insofar as it resisted the Tribunal's jurisdiction over the Additional Claimants.

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[112] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003 (***ADF***), ¶ 134, **CL-18**. *See also Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, 2 August 2010, ¶ 102, **CL-21** (quoting *ADF* with approval).

[113] *See, e.g.*, Memorial, ¶¶ 56-58, Reply, ¶¶ 131-136, Respondent's PHB, ¶¶ 34, 44-45, citing *Methanex*, ¶ 108, **CL-26** (addressing jurisdictional challenges under Article 1101, 1116-1117 and 1121 but not Article 1119); *Merrill and Ring*, ¶¶ 27-28, **CL-28** (considering only previous NAFTA decisions in discussion of Article 1119 without construing the text of the Treaty); *Canfor*, ¶ 138, **CL-29** (addressing jurisdictional challenge under Article 1901); *Cargill*, ¶ 183, **RL-016** (dismissing jurisdictional challenge on the basis that the requirements of Article 1119 had been fulfilled); *Resolute Forest*, ¶ 87, **RL-037** (addressing jurisdictional challenges under, *inter alia*, Articles 1116-1117); *Mercer*, ¶ 6.1, **RL-038** (addressing jurisdictional challenges under Articles 1116-1117, 1108 and 1503).

d. Are the claims by the Additional Claimants admissible?

121. As stated earlier, where the Tribunal finds that it has jurisdiction notwithstanding the Additional Claimants' failure to satisfy Article 1119(a), it must next examine whether it is appropriate to *exercise* that jurisdiction over them—or put differently, whether their claims are admissible.

(i) The relevant test for admissibility

122. Article 1119 imposes an obligation on the investor, but the existence of an obligation says nothing about the consequences of a failure to meet that obligation.

123. The Treaty does not in terms require a sanction of dismissal. As seen above, unlike the provisions of Articles 1116, 1117, 1120 and 1121(1), neither Article 1119 nor any other provision of the Treaty provides that a claim can be submitted to arbitration "only if" or "provided that" the requirements of Article 1119 have been met. Similarly, the FTC Statement does not provide that non-compliance with Article 1119 must result in dismissal of the claim. Absent any language in the treaty so mandating, the Tribunal cannot imply a *right* to dismissal of the claim merely because to some it might seem desirable to do so.[114]

124. Where the object and purpose of the Treaty includes the "creat[ion] [of] *effective procedures* for … the resolution of disputes",[115] it is also difficult to see how reading Article 1119 as *necessarily* and *automatically* implying a sanction of dismissal could be consistent with that object and purpose.

125. Decisions by other treaty tribunals exhibit no uniformity in their approaches to these issues. Other tribunals have not always drawn a clear distinction between jurisdiction and admissibility, and whenever in substance they addressed a preliminary objection

[114] This trite point requires no authority but by way of illustration, see *South West Africa Cases (Liberia v. South Africa/Ethiopia v. South Africa)*, Judgment (Second Phase), 1966 ICJ Rep., p. 6, at ¶ 91: "It may be urged that the Court is entitled to engage in a process of 'filling in the gaps', in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes. The Court need not here enquire into the scope of a principle the exact bearing of which is highly controversial, for it is clear that it can have no application in circumstances in which the Court would have to go beyond what can reasonably be regarded as being a process of interpretation, and would have to engage in a process of rectification or revision. *Rights cannot be presumed to exist merely because it might seem desirable that they should*" (emphasis added).

[115] Treaty, Article 102.

that the investor had failed to satisfy a pre-arbitral step, they have exhibited a diversity of approaches.

126. While some treaty tribunals have dismissed claims and required a refiling upon the defect being cured,[116] others have admitted the claims when doing so best served the interests of justice, considering factors such as futility, efficiency, due process, prejudice and a balancing of the parties' interests.[117]

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[116] See, for example, *Western NIS Enterprise Fund v. Ukraine,* ICSID Case No. ARB/04/2, Order, 16 March 2002, **CL-33**.

[117] For other NAFTA decisions, see *ADF*, ¶¶ 134, 138, **CL-18** ("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 provisions [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. … Finally, we observe that the Respondent has not shown that it has sustained any prejudice by virtue of the non-specification of Article 1103 as one of the provisions allegedly breached by the Respondent. Although the Investor first specified its claim concerning Article 1103 in its Reply to the Respondent's Counter-Memorial, the Respondent had ample opportunity to address and meet, and did address and meet, that claim and the Investor's supporting arguments, in its Rejoinder"); *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Decision on Harmac Motion, 24 February 2000, ¶ 18, **CL-6** ("The requirement in Article 1121(3) that a waiver required by Article 1121 shall be included in the submission of a claim to arbitration does not necessarily entail that such a requirement is a necessary prerequisite before a claim can competently be made. Rather it is a requirement that before the Tribunal entertain the claim the waiver shall have been effected. That has now been done. Canada has sustained no prejudice in this respect."); *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", 7 August 2000, ¶ 26, **CL-19** ("That objective, found in Article 1115, is to provide a mechanism for the settlement of investment disputes that assures 'due process' before an impartial tribunal. Lading that process with a long list of mandatory preconditions, applicable without consideration of their context, would defeat that objective, particularly if employed with draconian zeal"); *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 86, **CL-17** ("Having regard to the distinctions drawn between claims brought under Articles 1116 and 1117, a NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor. There are various ways of achieving this, most simply by treating such a claim as in truth brought under Article 1117, provided there has been clear disclosure in the Article 1119 notice of the substance of the claim, compliance with Article 1121 and no prejudice to the Respondent State or third parties. International law does not place emphasis on merely formal considerations, nor does it require new proceedings to be commenced where a merely procedural defect is involved"). For other treaty decisions, see, *Philip Morris Brands et al v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, ¶¶ 145, 147, **CL-12** ("As held by the ICJ, 'it is not apparent why the arguments based on the sound administration of justice, which underpin the *Mavrommatis* case jurisprudence, cannot also have a bearing in a case such as the present one. It would not be in the interest of justice to oblige the Applicant, if it wishes to pursue its claims, to initiate fresh proceedings. It is preferable except in special circumstances, to conclude that the condition has, from that point on, been fully met'. In 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. The Court stated: 'Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of

form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications'. The Tribunal agrees with and accepts this reasoning. It also notes that the same reasoning applies regardless how Article 10(2)'s domestic litigation requirement is characterized. Whether regarded as jurisdictional, admissibility or procedural, the considerations identified in the *Mavrommatis* case apply fully. … Nor does the Tribunal have to decide between the position taken by the International Court in *Croatia v Serbia* and the position taken by Judge Abraham, dissenting, in that case. In *Croatia v Serbia*, Judge Abraham expressed the view that the *Mavrommatis* principle cannot be applied if it is no longer possible to recommence the proceedings (because of supervening changes in jurisdictional provisions, for example) at the time when the decision is taken. In the present case, the BIT remains in force and it would be perfectly possible for the Claimants to commence these same proceedings on the day after a decision by this Tribunal is handed down, a situation where dismissal of the Claimants' claims would merely multiply costs and procedures to no use" (footnotes omitted)); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 343-346, **CL-22** ("The Republic's objection depends upon the characterisation of the six-month period in Article 8(3) of the BIT as a condition precedent to the Arbitral Tribunal's jurisdiction, or the admissibility of BGT's claims. In the Arbitral Tribunal's view, however, properly construed, this six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. Its underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible. Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding. If it did so, the provision would have curious effects …. In the Arbitral Tribunal's view, such consequences 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. Equally, this is not to render the relevant wording in Article 8(3) superfluous (as was suggested, *e.g.*, in *Generation Ukraine v. Ukraine*). Treaties often contain hortatory language, and there is an obvious advantage in a provision that specifically encourages parties to attempt to settle their disputes. There is no reason, however, why such a direction need be a strict jurisdictional condition. Although there are different approaches to this issue, in part depending upon the particular treaty provisions in question, the Arbitral Tribunal notes that its analysis is in line with that adopted in many previous arbitral awards, in respect of equivalent provisions (as cited by BGT)"); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶¶ 100, 102, **CL-23** ("The Tribunal agrees with the view that the notice requirement does not constitute a prerequisite to jurisdiction. Contrary to Pakistan's position, the non-fulfilment of this requirement is not 'fatal to the case of the claimant' (Tr. J., 222:34). As Bayindir pointed out, to require a formal notice would simply mean that Bayindir would have to file a new request for arbitration and restart the whole proceeding, which would be to no-one's advantage (Tr. J., 184:18 *et seq.*). … The Tribunal further notes that Pakistan made no proposal to engage in negotiations with Bayindir following Bayindir's notification of 4 April 2002, which made an explicit reference to the failure of the efforts to negotiate. In the Tribunal's view, if Pakistan had been willing to engage in negotiations with Bayindir, in the spirit of Article VII of the BIT, it would have had many opportunities to do so during the six months following the notification of 4 April 2002. Along the lines of the award rendered in *Lauder v. The Czech Republic*, the Tribunal is prepared to find that preventing the commencement of the arbitration proceedings until six months after the 4 April 2002 notification would, in the circumstances of this case, amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties and hold[s] 'that the six-month waiting period in [the BIT] does not preclude it from having jurisdiction in the present proceedings'"(footnotes omitted)); *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award, 14 April 2014, ¶ 321, **CL-58** ("With these cumulative explanatory factors, the Tribunal considers that it would not be right to construe the terms of Article 8 of the Treaty as barring absolutely the Claimant's claims in this arbitration as a matter of jurisdiction; nor, for the same reason and on the facts of this case, to consider such claims inadmissible as regards the exercise of jurisdiction by this Tribunal. Having regard to the object and purpose of Article 8 under Article 31 of the Vienna Convention on the Law of Treaties, given also the context of the Treaty intended (by its preamble) expressly to encourage and protect foreign investments in Poland, the Tribunal decides that the over-strict meaning, for which the Respondent contends, is too semantic in its approach and unduly harsh in its result. This is particularly so where the Claimant's non-compliance is only formalistic and where the Respondent has suffered no prejudice which could not be compensated by an appropriate order by this Tribunal for legal and arbitration costs unnecessarily incurred or wasted by reason of the Claimant's undue

127. If a common denominator can be derived from these diverging approaches, it is that there is no automaticity between the existence of an admissibility defect and the dismissal of the claim. Instead, the question of whether to admit the claim notwithstanding the defect is one that involves a margin of judicial appreciation by the tribunal.

128. This is the approach that the Tribunal will adopt here.[118] In exercising judgment as to whether the Additional Claimants' claims should be admitted, the Tribunal must do what best serves the interests of justice. To that end, the Tribunal considers that it must give particular weight to whether the defect has caused the Respondent any prejudice and which course is favoured by an efficient administration of justice.

129. As explained in the next section, in the specific circumstances of this case, the foregoing considerations militate against a dismissal of the Additional Claimants' claims.

(ii) Whether the claims by the Additional Claimants are admissible

130. As seen earlier, the FTC Statement indicates that the purpose of a notice of intent is to provide a NAFTA Party with the information it needs to assess amicable settlement opportunities as contemplated in Article 1118. It is possible for that purpose to be fulfilled even where the notice of intent fails to include all of the requisite information.

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haste in commencing this arbitration."); *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 584, **CL-38** ("This conclusion derives more from a weighting of the specific interests at stake rather than from the application of the general principle of futility: It is not about whether the 18 months litigation requirement may be considered futile; it is about determining whether Argentina's interest in being able to address the specific claims through its domestic legal system would justify depriving Claimants of their interests of being able to submit it to arbitration").

[118] The Tribunal notes that other tribunals have sometimes gone further, considering they had a margin of judicial appreciation even where a pre-arbitral step is an express condition on a party's consent to arbitration. The Tribunal does not (and does not need to) follow that approach. *See, e.g., Philip Morris Brands et al v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, ¶ 144, **CL-12** ("*[E]ven if the [domestic litigation] 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. The Tribunal notes that the ICJ's decisions show that the rule that events subsequent to the institution of legal proceedings are to be disregarded for jurisdictional purposes has not prevented that Court from accepting jurisdiction where requirements for jurisdiction that were not met at the time of instituting the proceedings were met subsequently (at least where they occurred before the date on which a decision on jurisdiction is to be taken)") (emphasis added).

131. In the same vein, the Respondent acknowledges that Article 1119 may need to be approached with some flexibility when it observes that "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".[119] One could think of other examples, such as the estimation of damages required by Article 1119(d): how many notices can be said in hindsight to have included a truly accurate estimate? NAFTA case law may in that sense well be rife with technically inaccurate Article 1119 notices. Yet nobody would suggest that this should have barred those claims.

132. While the Tribunal takes the Respondent's point that the omission of the names of the Additional Claimants is not a "minor flaw" akin to a misspelling of their names, the fact remains that the addition of those names would not have expanded on the notice given to the Respondent as regards the nature of the dispute. The claims by the Additional Claimants being co-extensive with those asserted by the Original Claimants in the Notice, the Notice still provided the Respondent with sufficient information regarding the dispute to enable a meaningful settlement effort.

133. This is therefore not a situation where a respondent State has been ambushed, hearing about the dispute as such for the first time upon receipt of the request for arbitration. Where the purpose of the Notice was to facilitate settlement discussions pursuant to Article 1118, the Notice here did serve that purpose.

134. The Respondent submits that the claims by the Additional Claimants should nonetheless be dismissed because they failed to cure the defect by doing one of two things:

> 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. …
>
> 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 …

[119] Reply, ¶ 39 (emphasis added).

and apply later to have the two cases consolidated under NAFTA Article 1126.[120]

135. The Claimants did indeed neither of those things. Instead, they served an Amended Notice (including the names of all the Additional Claimants) after the registration of the Request, on 2 September 2016, and they did not refile the Request. The Tribunal was constituted more than five months later, on 14 February 2017.

136. The Tribunal accepts that the Amended Notice did not allow any renewed settlement effort to take place *prior to* arbitration, as envisaged—albeit in exhortatory terms only—by Article 1118. In the circumstances of this case, however, the Tribunal cannot see how dismissal on that basis can be either reconciled with the precept of an efficient administration of justice or warranted by the existence of prejudice.

137. First, where, as here, the Notice did in fact contain information sufficient to enable meaningful settlement discussions *prior to* the arbitration, there is no discernible prejudice to the Respondent. Second, even if that had not been the case, where the parties then still had more than five months before the constitution of the Tribunal to pursue settlement efforts, the appropriate sanction would not have been dismissal.

138. Instead, in that case the Respondent would have been entitled to compensation for any resultant financial wastage.[121] Where an investor impairs the ability of the NAFTA Party to pursue settlement prior to arbitration, it is well within the powers of a NAFTA tribunal to allocate responsibility for any resultant wastage to the investor. Failure to comply with Article 1119 may in that sense come at considerable financial cost to the investor, and there is no risk of Article 1119 being rendered nugatory.

139. Based on the foregoing considerations, the Tribunal dismisses the Respondent's objection insofar as it sought the dismissal of the Additional Claimants' claims as inadmissible. The Tribunal emphasizes that it reaches that conclusion in light of the circumstances specific to this case—what best serves the interests of the

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120 Reply, ¶¶ 79-80.

121 Conceptually this is not novel. The Tribunal notes that in the domestic legal context, where a contract requires a notice of dispute prior to commencement of arbitration for the same purpose of enabling settlement discussions, a failure to issue a compliant notice of dispute is treated in some jurisdictions in the same manner as any breach of contract: where that breach of contract can be shown to have caused financial loss to the other party, the applicable remedy in those systems is to award damages; not to decline arbitral jurisdiction. See G. Born and M. Scekic, *Pre-Arbitration Procedural Requirements*, in D. Caron *et al.* (eds.), *Practising Virtue: Inside International Arbitration* (2015), p. 249.

administration of justice will necessarily yield different conclusions in different circumstances.

B. THE CLAIMANTS' CLAIM UNDER ARTICLE 1117 ON BEHALF OF THE MEXICAN COMPANIES

140. The Respondent has raised all three Issues in respect of the claims under Article 1117 on behalf of the Mexican Companies: consent by the Mexican Companies (Article 1121); consent by the Respondent (Articles 1119/1122); and ownership or control (Article 1117).

141. The Tribunal can readily dispose of the second of those objections. As with the Additional Claimants, the failure to identify Operadora Pesa in the original Notice does not vitiate the Respondent's consent under Article 1122. All the reasoning set out in Section V.A.2 above applies *mutatis mutandis* to the Respondent's objection insofar as it pertains to Operadora Pesa.

142. The Tribunal will address the two remaining objections in this order: first the objection giving rise to Issue 3 (ownership or control), and then the objection giving rise to Issue 1 (consent by the Mexican Companies).

1. Article 1117: did the Claimants own or control the Mexican Companies at the relevant time(s)?

143. For the Claimants to be able to pursue claims on behalf of the Mexican Companies under Article 1117, they must establish that they owned or controlled those companies at the relevant time(s). To resolve the Respondent's objection that the Claimants have failed to do so, the Tribunal must answer each of the following questions:

a. What is or are the relevant time(s) at which the Claimants must be able to demonstrate ownership or control?

b. What number and type of shares did the Claimants own at such time(s)?

c. Based on the foregoing, did the Claimants "own" the Mexican Companies at such time(s)?

d. Based on the foregoing, did the Claimants "control" the Mexican Companies at such time(s)?

144. The Tribunal will address each question in turn.

a. What is or are the relevant time(s) at which the Claimants must be able to demonstrate ownership or control?

145. The parties agree that the Claimants must establish that they owned or controlled the Mexican Companies *at the time of the treaty breaches*.[122] At least one other NAFTA tribunal to have confronted this issue has so held,[123] and this Tribunal agrees.

146. The parties disagree, however, as to whether the Claimants must also establish that they owned or controlled the Mexican Companies *at the time of the submission of the claim*. The Claimants submit that they must not.[124] The Respondent submits that they must.[125]

147. The Tribunal agrees with the Respondent.

148. This is clear from the terms of Article 1117 itself, which uses the present tense: an investor may make a claim "on behalf of an enterprise of another Party that is a juridical person that the investor *owns or controls* directly or indirectly".[126] Thus, the investor must own or control the enterprise at the time it submits a claim on the enterprise's behalf. The drafters of the Treaty could have said an enterprise "that the investor owned or controlled at the time of the alleged breach". They chose not to.

149. Similarly, Article 1121(1)(b) requires that an investor submitting a claim to arbitration "and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person *that the investor owns or controls* directly or indirectly, the enterprise",[127] waive their right to initiate or continue proceedings before any domestic forums. Again, the Treaty clearly envisages that the investor own or control the enterprise at the time arbitration is commenced. The drafters of the Treaty could have used the past tense; they chose not to.

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122 Respondent's PHB, ¶ 110; Claimants' PHB, ¶ 93.

123 *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award, 15 September 2011 (***Gallo***), ¶ 332, **RL-32**.

124 Claimants' PHB, ¶¶ 94-95.

125 Respondent's PHB, ¶ 110.

126 (Emphasis added).

127 (Emphasis added).

150. These textual points alone are, in the Tribunal's mind, dispositive: disregarding that unequivocal direction in the text of the Treaty would offend the principles of interpretation of the VCLT that the Tribunal must apply.

151. The Tribunal observes that the fact that Article 1117 requires the investor to own or control the enterprise at the time it submits a claim on that enterprise's behalf does not deprive an investor of Treaty protection where a NAFTA Party expropriates, otherwise causes the loss of, or destroys the value of, its investment.

152. In those circumstances, the investor's claims under Article 1116 will survive undiminished. Article 1116 does not require subsistence of the investment at the time a claim is submitted. Indeed, unlawful expropriation being the textbook example of wrongful conduct against which the Treaty seeks to protect, any other interpretation would eviscerate the protections of Chapter 11. However, where the investor no longer owns or controls the enterprise at the time of submission of the claim, it can no longer pursue an Article 1117 claim "on behalf of" that enterprise.

153. The authorities cited by the Claimants on this point[128] are inapposite. None of them addressed the question of whether ownership or control for purposes of Article 1117 must be established at the time of submission of the claim. The Claimants themselves admit that the tribunal in *Mondev* "did not specifically address ownership/control under Article 1117".[129] In *Gallo*, as the Respondent rightly points out,[130] the issue was whether a claimant had to own or control the enterprise *at the time of the breach* in order to bring an Article 1117 claim.[131] Further, *Daimler* and *EnCana* are not NAFTA cases and do not shed any light on this point of interpretation of Article 1117. To the extent that any of these cases suggest that a claimant does not need to own or control its investment at the time of submission of the claim, these cases were in the context of an investor bringing claims on its own behalf, similar to claims under

[128] Claimants' PHB, ¶ 94.

[129] Claimants' PHB, ¶ 94(i). *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 80, **CL-17** (making a finding as to the definition of an investor under Article 1116 and 1117, but not ownership or control).

[130] Respondent's PHB, ¶ 114, fn. 103.

[131] *Gallo*, ¶¶ 321-330, **RL-32**.

Article 1116.[132] As already explained, the Tribunal agrees that Article 1116 does not require subsistence of the investment at the time of the claim.

b. What number and type of shares did the Claimants own in the Juegos Companies at the relevant times?

154. One would have thought that this question would be the least controversial part of the case. Unfortunately it was not. There are three reasons for that:

a. Controversy has arisen as to whether in November 2014 the Claimants transferred their shares in the Juegos Companies to a third party—which the Tribunal will refer to as the ***Grand Odyssey Controversy***.

b. Evidentiary difficulties have arisen from the fact that the Claimants have been unable to produce most of the relevant shareholder registries and capital variation books for the Juegos Companies.

c. Controversy has arisen as to whether *asambleas* conducted for the Juegos Companies in January 2018 could validly and retroactively approve certain share transfers allegedly made prior to 2014.

155. The Tribunal will address each point in turn.

(i) The Grand Odyssey controversy

156. The Respondent alleges that, pursuant to resolutions adopted at *asambleas* held in 7 November 2014 for four of the Juegos Companies—all except JVE Mexico—the Claimants transferred their shares in those Juegos Companies to a third party, Grand Odyssey.[133]

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[132] *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶ 90, **CL-63** (finding that the claimant was exercising a "direct right of action" that was "independent[] from those of the corporation concerned"); *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award, 3 February 2006, ¶ 126, **CL-65** ("EnCana is not acting 'on behalf of an enterprise which the investor owns or controls directly or indirectly…'. Rather it is bringing a claim on its own behalf, alleging loss or damage to itself arising out of the Respondent's measures").

[133] Reply, ¶¶ 219-220; Respondent's PHB, ¶¶ 102, 168.

157. The Claimants contend that no such transfer occurred,[134] that they called *asambleas* in early 2018 to declare the *asambleas* held on 7 November 2014, and the resolutions adopted during those *asambleas* in favour of Grand Odyssey, to be void *ab initio*.[135]

158. The Tribunal has carefully reviewed the record relating to this matter. On that basis, the Tribunal finds that no transfer of shares to Grand Odyssey occurred, whether prior to, during, or after the November 2014 *asambleas*. The Tribunal sets out below its findings leading to that conclusion.

159. Some time prior to August 2014, an individual named Benjamin Chow contacted Gordon Burr, offering to assist the Claimants in reopening the casinos. Chow proposed a plan which involved, amongst other things, giving control of the Boards of the Juegos Companies to Chow and his associates (including an individual named Luc Pelchat), and the transfer of the Claimants' shares in the Juegos Companies to Grand Odyssey.[136]

160. On 29 August 2014, the five Juegos Companies each held an *asamblea* in which the shareholders: (i) granted control of the Boards to Chow, Pelchat and another of their associates;[137] and (ii) in the case of four of the Juegos Companies—all except JVE Mexico—*authorised* the Claimants to execute a transfer of their shares to Grand

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134 Rejoinder, ¶ 142; Claimants' PHB, ¶¶ 124-127.

135 Notarised Minutes of the General Shareholders' Meeting of JVE Sureste on 5 January 2018 (notarised on 2 April 2018), p. 14, **C-225**; Notarised Minutes of the General Shareholders' Meeting of JVE Centro on 5 January 2018 (notarised on 2 April 2018), p. 21, **C-226**; Notarised Minutes of the General Shareholders' Meeting of JVE DF on 5 January 2018 (notarised on 2 April 2018), p. 13, **C-227**; Notarised Minutes of the General Shareholders' Meeting of JyV Mexico on 5 January 2018 (notarised on 2 April 2018), p. 13, **C-228**; Notarised Minutes of the General Shareholders' Meeting of JVE Mexico on 5 January 2018 (notarised on 2 April 2018), pp. 12-13, **C-229**. *See also* Further 32 Claimants' WS, Part V, **CWS-16** to **CWS-47**; Gordon Burr Second Witness Statement dated 8 January 2018 (***G. Burr Second WS***), ¶ 34, **CWS-7**; E. Burr Second WS, ¶ 45, **CWS-8**; Ayervais WS, ¶ 31, **CWS-12**; Conley WS, ¶ 29, **CWS-13**.

136 G. Burr First WS, ¶ 52, **CWS-1**; Julio Gutierrez Morales First Witness Statement dated 25 July 2017 (***Gutierrez First WS***), ¶¶ 28-30, **CWS-3**; Benjamin Chow Witness Statement dated 8 January 2018 (***Chow WS***), ¶¶ 14-15, **CWS-11**.

137 Notarised Minutes of the General Shareholders Meeting of JVE Sureste held on 29 August 2014 (notarised on 10 September 2014), p. 32, **C-36**; Notarised Minutes of the General Shareholders Meeting of JVE Centro held on 29 August 2014 (notarised on 10 September 2014), p. 32, **C-37**; Notarised Minutes of the General Shareholders Meeting of JVE DF held on 29 August 2014 (notarised on 10 September 2014), p. 33, **C-38**; Notarised Minutes of the General Shareholders Meeting of JVE Mexico held on 29 August 2014 (notarised on 10 September 2014), p. 31, **C-39**; Notarised Minutes of the General Shareholders Meeting of JyV Mexico on 29 August 2014 (notarised on 4 September 2014), p. 32, **C-40**; G. Burr First WS, ¶ 54, **CWS-1**; Chow WS, ¶ 15, **CWS-11**; Luc Pelchat Witness Statement dated 8 January 2018 (***Pelchat WS***), ¶ 10, **CWS-4**; Gutierrez First WS, ¶ 30, **CWS-3**.

Odyssey while noting that such transfers would still have to be formalised.[138] Subsequently, the Claimants continued negotiating a Share Purchase Agreement with Chow in respect of the transfer of shares to Grand Odyssey.[139]

161. On 7 November 2014, Chow called another *asamblea* for each of the four Juegos Companies (except JVE Mexico). At the *asambleas*, Chow purported to *approve* a transfer of shares from the Claimants to Grand Odyssey[140] and represented that he had secured proxies from the Claimants to do so.[141]

162. However, the evidence on record shows clearly that Chow did not have the proxies and that there was no quorum at the November 2014 *asambleas*.[142] Instead, the record shows that the Claimants, who did not attend the *asambleas*, had expressly refused to give their proxies to Chow when he asked;[143] and that they gave their proxies to their Mexican counsel, Mr. Julio Gutierrez, and his firm, Rios Ferrer.[144] The record further shows that, upon hearing Chow's representations, Gutierrez and his associates: immediately objected to the transfer of any shares;[145] refused to sign the meeting minutes;[146] refused to deliver the proxies (without which there was an insufficient quorum to hold a shareholders vote);[147] and then left the meeting.[148] The Tribunal

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138 Notarised Minutes of the General Shareholders Meeting of JVE Sureste on 29 August 2014, 10 September 2014, p. 32, **C-36**; Notarised Minutes of the General Shareholders Meeting of JVE Centro on 29 August 2014, 10 September 2014, p. 31, **C-37**; Notarised Minutes of the General Shareholders Meeting of JVE DF on 29 August 2014, 10 September 2014, p. 32, **C-38**; Notarised Minutes of the General Shareholders Meeting of JVE Mexico on 29 August 2014, 10 September 2014, pp. 29-30, **C-39**.

139 Tr. (ENG), Day 2, 401:18-20, 415:16-22 (G. Burr); Day 4, 887:14-888:14 (Ayervais).

140 Notarised Minutes of the Asamblea held on 7 November 2014 of JVE Sureste (notarised on 10 November 2014), **R-011**; Notarised Minutes of the Asamblea held on 7 November 2014 of JVE Centro (notarised on 10 November 2014), **R-012**; Notarised Minutes of the Asamblea held on 7 November 2014 of JVE DF (notarised on 10 November 2014), **R-013**; Notarised Minutes of the Asamblea held on 7 November 2014 of JyV Mexico (notarised on 10 November 2014), **R-014**.

141 Chow WS, ¶¶ 19-21, **CWS-11**; Gutierrez First WS, ¶ 33, **CWS-3**.

142 Gutierrez First WS, ¶¶ 32-34, **CWS-3**; G. Burr First WS, ¶¶ 55-56, **CWS-1**; Ayervais WS, ¶¶ 20-22, **CWS-12**.

143 Tr. (ENG), Day 2, 358: 10-16 (G. Burr).

144 Chow WS, ¶ 22, **CWS-11**; Gutierrez First WS, ¶ 32, **CWS-3**; G. Burr First WS, ¶ 55, **CWS-1**; Ayervais WS, ¶ 20, **CWS-12**; Tr. (ENG), Day 2, 358:17-21 (G. Burr), 572:13-18 (J. Gutierrez); Day 3, 631:14-16 (J. Gutierrez).

145 Chow WS, ¶ 22, **CWS-11**; Gutierrez First WS, ¶ 34, **CWS-3**; G. Burr First WS, ¶ 56, **CWS-1**; Ayervais WS, ¶ 21, **CWS-12**.

146 Gutierrez First WS, ¶ 34, **CWS-3**; G. Burr First WS, ¶ 56, **CWS-1**.

147 Gutierrez First WS, ¶ 34, **CWS-3**; G. Burr First WS, ¶ 56, **CWS-1**.

148 Chow WS, ¶ 22, **CWS-11**; Gutierrez First WS, ¶ 34, **CWS-3**; G. Burr First WS, ¶ 56, **CWS-1**; Ayervais WS, ¶ 21, **CWS-12**.

accordingly finds that the resolutions purportedly passed by Chow at the November 2014 *asambleas* were manifestly infected with irregularity.

163. It is also difficult to see what share transfers those *asambleas* could have approved: it was not until 15 January 2015 and 3 February 2015 that the Claimants entered into two SPAs with Grand Odyssey.[149] It is abundantly cler from the terms of these SPAs themselves that, as of the date of their execution, there was no transfer of shares:

a. The SPAs provided that, until Closing, the shareholders of the Juegos Companies "shall own and control ownership of the [shares in the Juegos Companies]".[150]

b. In the SPAs, each of the shareholders warranted that they had "all the requisite power and authority to enter into" the SPAs.[151]

c. The SPAs provided that *asambleas* would be called to declare the November 2014 resolutions "void and of no effect" and to recognize that no share transfer would occur "until Closing under this Agreement".[152]

d. The parties subjected that Closing to the condition precedent that "the Facilities are open and operating under the Grand Odyssey License or such other license as may be obtained by Grand Odyssey in substantially the same manner as prior to

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149 Executed Stock Purchase Agreement, 15 January 2015 (***January 2015 SPA***), **C-134**; Executed Stock Purchase Agreement, 3 February 2015 (***February 2015 SPA***), **C-135**.

150 January 2015 SPA, Clause 1.3, **C-134**; February 2015 SPA, Clause 1.3, **C-135** ("*Consideration for the Kash Shares*. … Until Closing, the Shareholders shall own and control ownership of the Kash Shares and shall vote such Kash Shares as is required for approval and fulfilment of the transactions required and contemplated by this Agreement") (emphasis added). The "Kash Shares" are defined as "all or substantially all of the issued and outstanding shares of stock of the Companies." The "Shareholders" are defined as "the individuals and entities who own shares of stock in [the Companies]". *See* January 2015 SPA, p. 1, **C-134**; February 2015 SPA, p. 1, **C-135**. The "Companies" are the Juegos Companies, Operadora Pesa, Mercagaming, S. de R.L. de C.V. and Metrojuegos S. de R.L. de C.V. *See* January 2015 SPA, pp. 44-45, **C-134**; February 2015 SPA, pp. 47-48, **C-135**.

151 January 2015 SPA, Clause 2.1, **C-134**; February 2015 SPA, Clause 2.1, **C-135** ("Each Shareholder, severally and not jointly, represents and warrants to Grand Odyssey and to Boomer, and acknowledges that each of Grand Odyssey and Boomer are relying on such representations and warranties in entering into this Agreement, as follows: … (a) *Authority*. Each Shareholder has all the requisite power and authority to enter into this Agreement and the agreements and documents contemplated hereby and to consummate the transactions contemplated hereby …") (emphasis added).

152 *Id*., Clause 7.2 ("*Casino Companies Obligation*. Within thirty (30) days after execution of this Agreement, the Casino Companies shall call and conduct an assemblea of the Shareholders of each of the Casino Companies in which actions taken at assembleas conducted on November 7, 2014 which approved a transfer of shares of Class B shareholders of the Casino Companies to Grand Odyssey, and which was later formalized (protocolized) with a Mexican Notary Public are declared void and of no effect and recognizing that such transfer will not occur until Closing under this Agreement") (emphasis added).

their closure and there existing no proceedings to terminate or cease the operations of any Facility"—an event which, it is undisputed, never came to pass.[153]

e. The parties agreed that the SPAs could be terminated "if the Closing Date shall not have occurred on or before June 30, 2015".[154]

164. Consistent with these provisions of the SPAs, on 2 June 2015 Ayervais sent an email to Chow asking him to, *inter alia*, "[c]all for an *asamblea* 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."[155] When read in context, the Tribunal understands Ayervais's reference to "reverse the stock transfers" to be a shorthand paraphrasing of the aforementioned requirement of the SPAs that "actions taken at *asambleas* conducted on November 7, 2014 which approved a transfer of shares of Class B shareholders of the Casino Companies to Grand Odyssey … are [to be] declared void and of no effect …".[156] On 1 July 2015, Ayervais sent an email to the parties to the SPAs notifying them of the termination of the SPAs pursuant to Clause 10.1(f).[157] On 6 July 2015, Ayervais followed up with a letter to the parties to the SPAs stating the same.[158]

165. In early 2016, there was a phone meeting between Ayervais, Gordon Burr, Gutierrez, Chow and Pelchat in which Ayervais and Burr requested that Chow and Pelchat return Board control to them, and properly document that the 7 November 2014 *asambleas* minutes were invalid and that no share transfer to Grand Odyssey had occurred. Chow and Pelchat refused and demanded "millions of dollars" for alleged expenses.[159] On

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[153] *Id.*, Clause 8.1 ("*Closing*. … At Closing, the Kash Shares shall be transferred to Grand Odyssey in exchange for payment of the [Consideration]…." Clause 8.2: "*Mutual Conditions Precedent*. The obligation of the parties to complete the transactions contemplated hereunder are subject to the satisfaction of all parties, on or before the Closing Date, of the following conditions precedent, each of which may only be waived with the mutual consent of all of the parties: … (e) the Facilities are open and operating under the Grand Odyssey License or such other license as may be obtained by Grand Odyssey in substantially the same manner as prior to their closure and there existing no proceedings to terminate or cease the operations of any Facility") (emphasis added).

[154] *Id.*, Clause 10.1 ("*Termination.* This Agreement may be terminated and all transactions abandoned upon the following events: ... (f) [b]y the Companies on their own behalf and on behalf of the Shareholders by written notice to the other parties <u>if the Closing Date shall not have occurred on or before June 30, 2015</u> …") (emphasis added).

[155] Email from Benjamin Chow to Neil Ayervais, 2 June 2015, **R-015**.

[156] January 2015 SPA, Clause 7.2, **C-134**; February 2015 SPA, Clause 7.2, **C-135**

[157] Email from Neil Ayervais to Benjamin Chow, *et al.*, 1 July 2015, **C-143**.

[158] Letter from Neil Ayervais to Benjamin Chow, *et al.*, 6 July 2015, **C-144**.

[159] G. Burr First WS, ¶ 59, **CWS-1**; Gutierrez First WS, ¶ 36, **CWS-3**. *See also* Chow WS, ¶ 26, **CWS-11**.

6 June 2016, the Claimants eventually filed a Federal Racketeering Influenced and Corrupt Organizations Act (RICO) claim against Chow and Pelchat in the District Court of Colorado in order to recover Board control.[160] The Claimants testified that they went down the RICO litigation route for lack of confidence in the Mexican court system.[161] The Claimants eventually reached a settlement agreement with Pelchat and Chow in April 2017[162] and August 2017[163] respectively.

166. Based on this evidence, it is clear that the condition precedent in Clause 8.2(e) of the SPAs was not met; that the SPAs were terminated; and that the share transfer envisaged in those SPAs never occurred. It is also clear from the SPAs—which were executed between, *inter alia*, some of the Claimants and Chow (as President of the Board of Grand Odyssey)—that the parties to those instruments understood and recognized that the November 2014 *asambleas* did not result in a transfer of shares. Not to put too fine a point on it but they would not have entered into SPAs providing for the transfer of those shares if those shares had already been transferred.

167. This disposes of the point. The Tribunal notes that, in their evidence given to the Tribunal, Chow and Pelchat both also testified that no share transfer had occurred.[164] The Tribunal would have reached its conclusion without that evidence, to which it assigns weight commensurate with the credibility of those witnesses. The Tribunal also need not place reliance on the 5 January 2018 *asambleas* declaring the November 2014 *asambleas* resolutions to be void *ab initio*. While those *asambleas* are confirmatory of the Tribunal's findings, it would have made those findings regardless.

(ii) Evidentiary issues arising from the destruction of evidence

168. The Claimants contend, and have submitted witness evidence affirming, that many of the corporate documents that would have evidenced the extent of their shareholdings

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[160] G. Burr First WS, ¶ 61, **CWS-1**; Ayervais WS, ¶ 29, **CWS-12**.

[161] Tr. (ENG), Day 2, 461:20-462:5 (G. Burr).

[162] G. Burr First WS, ¶ 61, **CWS-1** (states 26 April); G. Burr Second WS, ¶ 20, **CWS-7** (states 10 April); Ayervais WS, ¶ 30, **CWS-12** (states 10 April).

[163] Chow WS, ¶ 28, **CWS-11**; G. Burr Second WS, ¶ 20, **CWS-7**; Ayervais WS, ¶ 30, **CWS-12**.

[164] Tr. (ENG), Day 3, 714:6-715:19 (Chow), 790:8-17 (Pelchat).

in the Mexican Companies were either destroyed in a May 2017 fire at the Naucalpan casino or were ransacked from the office of their lawyer, Mr. Jose Miguel Ramirez.[165]

169. The Respondent does not dispute that the fire at the Naucalpan casino or the ransacking occurred. The Respondent argues, however, that no matter what reasons the Claimants have provided for their failure to provide certain corporate documents, the Claimants have ultimately failed to put forward sufficient evidence to meet their burden of showing ownership of shares in the Mexican Companies.[166]

170. The Tribunal discerns nothing in the record that casts doubt on the Claimants' evidence as to how the documentary evidence came to be lost. The witness evidence on this point also stands unchallenged.[167] As a matter of first principles, the Claimants should therefore be afforded a fair opportunity to adduce evidence of their shareholding through other means.

171. The manner in which that evidence was eventually marshalled by the Claimants, however, was less than ideal:

a. First, with its Counter-Memorial, the Claimants only introduced the 2006-2008 capitalisation *asambleas* and tables in Erin Burr's witness statement purporting to lay out the Claimants' shareholding in the Mexican Companies from 19 June 2013 to 25 July 2017 (i.e. when her witness statement was submitted).[168]

b. In its Reply Memorial, the Respondent objected that this evidence was insufficient. The Respondent argued that the minutes of the 2006-2008 *asambleas* were, "at best, evidence of the Claimants' shareholding in the Mexican [Companies] as of the date of the respective *asamblea*."[169] The Respondent submitted that the Claimants had to do more than that:

> 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, and the

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[165] Claimant's Response to the Tribunal's Decision on Respondent's Request for Documents, 31 October 2017, p. 2; Rejoinder, ¶¶ 98-99; Julio Gutierrez Morales Third Witness Statement dated 8 January 2018 (***Gutierrez Third WS***), ¶¶ 10, 31 **CWS-9**.

[166] Reply, ¶¶ 214-217; Respondent's PHB, ¶¶ 87-89, 159-160.

[167] Reply, ¶¶ 70, 215, 271; Respondent's PHB, ¶¶ 87, 159.

[168] E. Burr First WS, Annex B and C, **CWS-2**.

[169] Reply, ¶ 218.

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.[170] (emphasis in original)

c. With their Rejoinder, the Claimants then "called the Respondent's bluff",[171] as they put it, and produced witness statements by each of the Claimants attesting to their respective shareholdings as of 2006-2008 and from June 2013 through the present.[172] The Claimants also adduced additional documentary evidence to prove their share ownership during that period using a combination of the following:

i. Schedule K-1s (Form 8865), which are US tax documents used to report a partner's share of partnership income, deductions, credits, etc. of a foreign partnership.[173] The forms reflect every partner's percentage interest in the partnership income at the start and end of the year for which the form is filed. US investors who receive this form from the companies have to file it with their annual income tax returns. For all the Juegos Companies, the forms filed at the end of 2013 and 2014 reflect the Series A shareholding from the beginning of 2013 to the end of 2014. Further, for JVE Sureste and JVE Mexico, the forms filed reflect the Series B shareholding in those companies at that time.

ii. Transfer request forms authorising the payment of dividends or the return of premiums to shareholders, pro rata their interest in the company.[174] For all the Juegos Companies except JVE Centro, there were payments to Series

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170 Reply, ¶ 215.

171 Letter from the Claimants to the Tribunal, 6 March 2018, p. 2.

172 G. Burr Second WS, Part I, **CWS-7**; E. Burr Second WS, Part I, **CWS-8**; Ayervais WS, Part I, **CWS-12**; Conley WS, Part I, **CWS-13**; Further 32 Claimants' WS, Part I, **CWS-16** to **CWS-47**.

173 *See* Schedule K-1 (Form 8865) of JyV Mexico (Year 2013), **C-183**; Schedule K-1 (Form 8865) of JyV Mexico (Year 2014), **C-184**; Schedule K-1 (Form 8865) of JVE DF (Year 2013), **C-185**; Schedule K-1 (Form 8865) of JVE DF (Year 2014), **C-186**; Schedule K-1 (Form 8865) of JVE Mexico (Year 2013), **C-187**; Schedule K-1 (Form 8865) of JVE Mexico (Year 2014), **C-188**; Schedule K-1 (Form 8865) of JVE Centro (Year 2013), **C-189**; Schedule K-1 (Form 8865) of JVE Centro (Year 2014), **C-190**; Schedule K-1 (Form 8865) of JVE Sureste (Year 2013), **C-191**; Schedule K-1 (Form 8865) of JVE Sureste (Year 2014), **C-192**.

174 Transfer Requests for the Juegos Companies, 3 January 2013 – 26 March 2014, **C-169**.

A shareholders at various times between 2013 to 2014 that reflect the Series A shareholding. Further, for JVE Sureste and JVE Mexico, there were also payments to Series B shareholders during this period that reflect the Series B shareholding.

iii. An internal worksheet, maintained by the legal departments of the Juegos Companies, depicting the complete shareholding in each company (the ***2014 Shareholding Worksheet***).[175] This 2014 Shareholding Worksheet functioned as an internal business record.[176] The version submitted into evidence by the Claimants is current as of March 2014.[177] It was attached to an email sent from Erin Burr to José Ramón Moreno on 11 March 2014 in response to his request to have a complete and updated list of shareholdings for the Juegos Companies.[178]

d. Finally, the Claimants introduced notarized minutes of *asambleas* of the Juegos Companies held in January 2018 that purported to retroactively approve a list of undated share transfers that had occurred between 2009 and June 2013 (with a handful that occurred between June 2013 and January 2014), and to certify share ownership since those transfers occurred.[179]

e. The Respondent was afforded the opportunity to respond to that evidence, including with evidence of its own; and to test the evidence of any number of the Claimant-witnesses through examination at the hearing (and the testimony of any Claimant-witnesses examined at the hearing is in the record).

172. It is the Tribunal's view that the Claimants' approach to corporate formality (which has been at times cavalier—for example, they failed to convene the required annual

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175 Shareholding Worksheet, 2014, **C-180**; E. Burr Second WS, ¶ 21, **CWS-8**; Tr. (ENG), Day 2, 527:19-528:5.

176 E. Burr Second WS, ¶ 21, **CWS-8**.

177 E. Burr Second WS, ¶ 40, **CWS-8**.

178 E. Burr Second WS, ¶ 36, **CWS-8**; Email chain between Erin Burr and Jose Ramon Moreno, 11 March 2014, **C-179**.

179 Notarised Minutes of the General Shareholders Meeting of JVE Mexico held on 29 January 2018 (notarised on 3 April 2018), p. 13, **C-230**; Notarised Minutes of the General Shareholders Meeting of JVE Sureste held on 29 January 2018 (notarised on 3 April 2018), pp. 19-20, **C-231**; Notarised Minutes of the General Shareholders Meeting of JVE Centro held on 29 January 2018 (notarised on 3 April 2018), p. 27, **C-232**; Notarised Minutes of the General Shareholders Meeting of JyV Mexico held on 29 January 2018 (notarised on 3 April 2018), pp. 16-17, **C-233**; Notarised Minutes of the General Shareholders Meeting of JVE DF held on 29 January 2018 (notarised on 3 April 2018), pp. 15-16, **C-234**.

asambleas at the Juegos Companies, the minutes of which could have recorded how the shares were held at such times) and their drip-feeding of important evidence into the record have made this proceeding more cumbersome than it could have been. That, however, is an observation relevant only to costs, and the Tribunal returns to this in due course. The question for present purposes is what the aggregate of the evidence thus marshalled and placed on the record proves to the Tribunal's satisfaction. The Tribunal turns to this next.

(iii) The Claimants' share ownership in the Juegos Companies and the January 2018 *asambleas*

173. The evidentiary record regarding the Claimants' shareholding in the Juegos Companies is bookended on either side by *asambleas*. Minutes of those *asambleas* were taken and notarized. As a result, these minutes are a matter of public record.

174. The notarized minutes record what the shareholding was in the Juegos Companies during the period 2006-2008 (i.e., at the time of their capitalization) and as at January 2018. The Tribunal is satisfied that the Claimants' share ownership in the Juegos Companies *as at those times* was as recorded in those *asamblea* minutes.[180] Table 1 below reproduces the share ownership in each of the Juegos Companies on either date.

JVE Mexico						
Date	**Shareholding**					**Evidence**
27 February 2006		A Shares	B Shares	C Shares	Total Shares	
	Total shares owned by Claimants	42,000	9,000	0.000	51,000	**C-89**, pp. 69-60; **C-154**, pp. 2-5.[181]

180 The Respondent has suggested that there may not have been a quorum at the 2018 *asambleas*. The Tribunal is satisfied, on the preponderance of the evidence, that there was a quorum, including the fact that: (i) the Scrutineer, Mr. Gutierrez, testified at the hearing that there was a quorum; (ii) the minutes themselves refer to the existence of a quorum; (iii) the Mexican notary public stated in the notarised *asamblea* minutes that he or she saw the list of attendance; (iv) the Claimants' expert, Mr. Zamora, stated in his expert report that he saw the list of attendance; and (v) no shareholder has challenged the validity of these *asambleas*. *See* Tr. (ENG), Day 2, 579:11-582:3 (Gutierrez); Notarised Minutes of the General Shareholders Meeting of the Juegos Companies held on 5 January 2018 (notarised on 2 April 2018): **C-225**, pp. 11, 25; **C-226**, pp. 15, 43; **C-227**, pp. 10, 23; **C-228**, pp. 10, 25; **C-229**, pp. 10, 22. Notarised Minutes of the General Shareholders Meeting of the Juegos Companies held on 29 January 2018 (notarised on 3 April 2018): **C-230**, pp. 10, 15; **C-231**, pp. 13, 24; **C-232**, pp. 15, 30; **C-233**, pp. 10, 19; **C-234**, pp. 10, 18. R. Zamora Expert Report, ¶¶ 111-112; Tr. (ENG) Day 5, 1040:1-9 (Zamora). *See also* Tr. (ENG) Day 5, 979:22-980:3, 987:7-987:19, 990:2-12, 992:2-9, 994:15-995:6 (Irra Ibarra).

181 Notarised Minutes of the General Shareholders' Meeting of JVE Mexico held on 27 February 2006 (notarised on 23 March 2006), pp. 69-70, **C-89**; Shareholder Registry for JVE Mexico, 4 June 2005, **C-154**, pp. 2-5.

	Total outstanding shares of each type	50,000	9,000	3,000	62,000		
	Percentage owned by Claimants	**84.0%**	**100.0%**	**0.0%**	**82.3%**		
29 January 2018		A Shares	B Shares	C Shares	Total Shares		
	Total shares owned by Claimants	42,000	9,000	0.000	51,000		**C-229**, pp. 15-16; **C-230**, pp. 13-14.[182]
	Total outstanding shares of each type	50,000	9,000	3,000	62,000		
	Percentage owned by Claimants	**84.0%**	**100.0%**	**0.0%**	**82.3%**		
JVE Sureste							
Date	**Shareholding**						**Evidence**
28 February 2007		A1 Shares	A2 Shares	B Shares	Total Shares		
	Total shares owned by Claimants	0.000	13,000	24,175	37,175		**C-90**, pp. 78-86; **C-155**, pp. 3-8.[183]
	Total outstanding shares of each type	6,500	13,000	39,000	58,500		
	Percentage owned by Claimants	**0.0%**	**100.0%**	**62.0%**	**63.5%**		
29 January 2018		A1 Shares	A2 Shares	B Shares	Fixed Shares[184]	Total Shares	
	Total shares owned by Claimants	0.000	13,000	20,175	0.000	33,175	**C-225**, pp. 17-19; **C-231**, pp. 20-23.[185]
	Total outstanding	6,500	13,000	38,800	3,000	61,300	

182 Notarised Minutes of the General Shareholders' Meeting of JVE Mexico held on 5 January 2018 (notarised on 2 April 2018), pp. 15-16, **C-229**; Notarised Minutes of the General Shareholders' Meeting of JVE Mexico held on 29 January 2018 (notarised on 3 April 2018), pp. 13-14, **C-230**.

183 Notarised Minutes of the General Shareholders' Meeting of JVE Sureste held on 28 February 2007 (notarised on 25 April 2007), pp. 78-86, **C-90**; Shareholders' Registry for JVE Sureste, pp. 3-8, **C-155**.

184 The Tribunal notes later in Table 3 that at a 2009 *asamblea*, JVE Sureste's total issued shares included fixed shares. This is also consistent with the 2014 Shareholding Worksheet and the 29 January 2018 *asamblea* minutes. The Tribunal therefore finds that the 29 January 2018 minutes accurately reflects the total issued shares, and the types of issued shares, in JVE Sureste.

185 Notarised Minutes of the General Shareholders' Meeting of JVE Sureste held on 5 January 2018 (notarised on 2 April 2018), pp. 17-19, **C-225**; Notarised minutes of the General Shareholders' Meeting of JVE Sureste held on 29 January 2018 (notarised on 3 April 2018), pp. 20-23, **C-231**.

	shares of each type						
	Percentage owned by Claimants	**0.0%**	**100.0%**	**52.0%**	**0.0%**	**54.1%**	
JVE Centro							
Date	**Shareholding**						**Evidence**
31 December 2007		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0.000	20,651	34,298	41,000	96,449	**C-91**, pp. 63-65.[186]
	Total outstanding shares of each type	6,000	20,651	53,308	50,000	129,959	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**64.3%**	**82.0%**	**74.2%**	
29 January 2018		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0.000	20,651	34,433	41,000	96,084	**C-226**, pp. 27-31; **C-232**, pp. 21-25.[187]
	Total outstanding shares of each type	6,000	20,651	52,933	50,000	129,584	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**65.1%**	**82.0%**	**74.1%**	
JyV Mexico							
Date	**Shareholding**						**Evidence**
31 May 2008		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0.000	22,667	34,438	0.000	57,105	**C-92**, pp. 56-58.[188]
	Total outstanding shares of each type	4,000	22,667	52,588	3,000	82,255	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**65.5%**	**0.0%**	**69.4%**	

[186] Notarised Minutes of the General Shareholders' Meeting of JVE Centro held on 31 December 2007 (notarised on 10 January 2011), pp. 63-65, **C-91**.

[187] Notarised Minutes of the General Shareholders' Meeting of JVE Centro held on 5 January 2018 (notarised on 2 April 2018), pp. 27-31, **C-226**; Notarised Minutes of the General Shareholders' Meeting of JVE Centro held on 29 January 2018 (notarised on 3 April 2018), pp. 21-25, **C-232**.

[188] Notarised minutes of the General Shareholders' Meeting of JyV Mexico held on 31 May 2008 (notarised on 10 January 2011), pp. 56-58, **C-92**.

29 January 2018		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	4,000	22,667	36,963	0.000	63,630	**C-233**, pp. 16-19.[189]
	Total outstanding shares of each type	8,000	22,667	54,963	3,000	88,630	
	Percentage owned by Claimants	**50.0%**	**100.0%**	**67.3%**	**0.0%**	**71.8%**	
JVE DF							
Date	**Shareholding**						**Evidence**
2 September 2008		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0.000	28,669	37,462	0.000	66,131	**C-93**, pp. 62-65.[190]
	Total outstanding shares of each type	4,000	28,669	65,337	3,000	101,006	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**57.3%**	**0.0%**	**65.5%**	
29 January 2018		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0.000	28,669	37,962	0.000	66,631	**C-234**, pp. 16-17.[191]
	Total outstanding shares of each type	4,000	28,669	64,962	3,000	100,631	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**58.4%**	**0.0%**	**66.2%**	

Table 1: The Claimants' shareholding in 2006-2006 and January 2018

175. As these tables show, both at the time of the Juegos Companies' capitalization and in January 2018, the Claimants held more than 50% of the Series B shares and more than 50% of the outstanding stock in each of the Juegos Companies. The question however is what the Claimants' share ownership was in between those two bookends, and

[189] Notarised minutes of the General Shareholders' Meeting of JyV Mexico held on 29 January 2018 (notarised on 3 April 2018), pp. 16-19, **C-233**.

[190] Notarised Minutes of the General Shareholders' Meeting held on 2 September 2008 (notarised on 10 January 2011), pp. 62-65, **C-93**.

[191] Notarised Minutes of the General Shareholders' Meeting of JVE DF held on 5 January 2018 (notarised on 2 April 2018), pp. 16-18, **C-227**; Notarised Minutes of the General Shareholders' Meeting of JVE DF held on 29 January 2018 (notarised on 3 April 2018), pp. 16-17, **C-234**.

specifically between June 2013 (the first instance of allegedly wrongful conduct) and June 2016 (the submission of the claim to arbitration). As noted above, these are the relevant points in time at which ownership or control must be established.

176. The Claimants contend that the 2014 Shareholding Worksheet accurately represents the Claimants' share ownership from June 2013 through the present. To the extent there are discrepancies between the 2006-2008 *asamblea* resolutions and the 2014 Shareholding Worksheet, they submit that those are due to certain share transfers prior to 2014 that were not duly approved by *asambleas* at the time, as required by the By-Laws of the Juegos Companies.

177. According to the Claimants, that lack of requisite *asamblea* approval is inconsequential for two reasons. First, they contend, as a matter of Mexican law, the share transfers were valid and effective as of the date of their execution, regardless of *asamblea* approval.[192] Second, even if *asamblea* approval were necessary to give effect to the share transfers, the January 2018 *asambleas* could and did retroactively give them effect.[193]

178. The Respondent submits that, as a matter of Mexican law, the share transfers did not come into existence until they were approved by an *asamblea*, i.e., in January 2018, and that the January 2018 *asambleas* could not retroactively approve the share transfers.[194] As a result, the Respondent contends, there is still no conclusive evidence of share ownership between 2006-2008 and January 2018.[195]

179. Both parties presented expert evidence on Mexican law in support of their positions. The examination of both experts revealed a considerable body of agreement between them. The experts agreed that: (i) under Mexican law, the validity *inter se* of a contract

192 Claimants' PHB, ¶ 135.

193 Claimants' PHB, ¶ 137; Gutierrez Third WS, ¶ 21, **CWS-9**; Notarised Minutes of the General Shareholders Meeting of JVE Mexico held on 29 January 2018 (notarised on 3 April 2018), p. 13, **C-230**; Notarised Minutes of the General Shareholders Meeting of JVE Sureste held on 29 January 2018 (notarised on 3 April 2018), p. 20, **C-231**; Notarised Minutes of the General Shareholders Meeting of JVE Centro held on 29 January 2018 (notarised on 3 April 2018), p. 27, **C-232**; Notarised Minutes of the General Shareholders Meeting of JyV Mexico held on 29 January 2018 (notarised on 3 April 2018), p. 17, **C-233**; Notarised Minutes of the General Shareholders Meeting of JVE DF held on 29 January 2018 (notarised on 3 April 2018), pp. 15-16, **C-234**.

194 Rebuttal Submission in Response to New Evidence, 25 April 2018 (***Rebuttal Submission***), ¶¶ 52-54.

195 Rebuttal Submission, ¶ 91.

for the transfer of shares does not depend on approval by the company;[196] but (ii) approval by the company is still necessary for the transferee to be recognised as a shareholder and to be able to exercise its rights as one *vis-à-vis* the company, i.e. receive dividends and exercise any voting rights associated with the shares.[197]

180. They maintained their disagreement, however, as to whether the company can retroactively recognise such shareholder status by retroactively approving a share transfer. The Claimants' expert insisted that it can because lack of contemporaneous approval infects the transfer only with relative nullity which can be cured retroactively;[198] the Respondent's expert, while agreeing that legal acts infected with relative nullity can be retroactively ratified,[199] contended the opposite because here it is the company's approval of the transfer that is simply non-existent.[200] The Claimants' expert also accepted that there can be no retroactivity even for cases of relative nullity where this causes prejudice to third parties with acquired rights.[201]

181. In the Tribunal's view, much of the experts' debate, scholarly and helpful as it was, has limited practical relevance for purposes of this phase, for two reasons.

182. First, and on this point the experts' examination at the hearing was elucidating, it is now undisputed that the share transfers were valid and effective *inter partes* as at the time they occurred. It is therefore uncontested that the shares were in fact owned by the transferee shareholders as at that time.

183. The only point in dispute is whether the transferee shareholders were also recognized as such by the Juegos Companies and could exercise the rights to receive dividends and to vote attached to those shares. In this respect, the record is conclusive that indeed they could and did.

184. None of the Juegos Companies or any third party has *ever* contested the validity of the share transfers or denied the transferee shareholders the right to receive dividends or

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196 Tr. (ENG), Day 5, 1030:18-21; 1031:8-1033:6 (Zamora); Tr. (ENG), Day 5, 934:6-935:18, 968:15-969:6 (Irra Ibarra).

197 Tr. (ENG), Day 5, 926:4-927:18; 935:4-935:18 (Irra Ibarra); Tr. (ENG), Day 5, 1030:18-1031:7, 1032:9-1033:2 (Zamora).

198 Tr. (ENG), Day 5, 1033:19-1035:13 (Zamora).

199 Tr. (ENG), Day 5, 960:4-960:10, 960:17-961:17 (Irra Ibarra).

200 Tr. (ENG), Day 5, 927:12-928:4, 1010:13-20 (Irra Ibarra).

201 Tr. (ENG), Day 5, 1077:19-1078:9 (Zamora).

to vote associated with those shares on the basis that the transfers had not been formally approved. On the contrary, the record shows that the Juegos Companies issued dividends *consistent with* the share transfers, and that those dividend payments were regularly reported for US tax purposes.

185. On that record, the Tribunal finds that (i) as a matter of Mexican law the transferee shareholders did own the shares upon the transfer of those shares to them, and (ii) as a matter of fact, the transferee shareholders have been able to exercise the rights attached to the shares since the date of their transfer.

186. Second, even if the Tribunal gave no probative value to the (largely uncontested) witness and documentary evidence evidencing this ownership and *de facto recognition* 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 still have owned more than 50% of the Series B shares (or, in the case of JVE Mexico, 50% of the combined Series B and C shares, and at least 50% each of the Series A and B shares), which, as explained below, the parties agree is the relevant threshold for proving the legal capacity to control the Juegos Companies under Article 1117.

187. Put differently, the share movements between 2006 and 2014 were always insufficient to ever reduce the Claimants' Series B shareholding below that threshold and they therefore do not bear on the Tribunal's determination whether the Claimants controlled the Juegos Companies for purposes of Article 1117 between June 2013 and June 2016.

188. In light of the foregoing, and based on the evidentiary record as a whole, the Tribunal finds that the Claimants' share ownership between June 2013 and June 2016 was as represented in Tables 2 to 6 below.

(a) JVE Mexico

189. The Claimants collectively held at all relevant times at least 84.0% of the A shares, 100.0% of the B shares, 75% of the combined B and C shares and 82.3% of the total outstanding stock of JVE Mexico.

Date	Shareholding					Evidence
Beginning 2013		A Shares	B Shares	C Shares	Total Shares	
	Total shares owned by Claimants	42,000	9,000	-	-	**C-187**; **CWS-8**, Annex E, Table 1.[202]
	Total outstanding shares of each type	50,000	9,000	-	-	
	Percentage owned by Claimants	**84.0%**	**100.0%**	-	-	
19 June 2013		A Shares	B Shares	C Shares	Total Shares	
	Total shares owned by Claimants	42,000	9,000	0.000	51,000	**CWS-2**, Annex C; **CWS-16**, ¶ 2.[203]
	Total outstanding shares of each type	50,000	9,000	3,000	62,000	
	Percentage owned by Claimants	**84.0%**	**100.0%**	**0.0%**	**82.3%**	
End 2013		A Shares	B Shares	C Shares	Total Shares	
	Total shares owned by Claimants	42,000	9,000	-	-	**C-187**; **CWS-8**, Annex E, Table 1.[204]
	Total outstanding shares of each type	50,000	9,000	-	-	
	Percentage owned by Claimants	**84.0%**	**100.0%**	-	-	
Beginning 2014		A Shares	B Shares	C Shares	Total Shares	
	Total shares owned by Claimants	42,000	9,000	-	-	**C-188**; **CWS-8**, Annex E, Table 1.[205]
	Total outstanding shares of each type	50,000	9,000	-	-	

202 Schedule K-1 (Form 8865) of JVE Mexico (Year 2013), **C-187**; E. Burr Second WS, Annex E, Table 1, **CWS-8**.

203 E. Burr First WS, Annex C, **CWS-2**; B-Mex, LLC Witness Statement, ¶ 2, **CWS-16**.

204 Schedule K-1 (Form 8865) of JVE Mexico (Year 2013), **C-187**; E. Burr Second WS, Annex E, Table 1, **CWS-8**.

205 Schedule K-1 (Form 8865) of JVE Mexico (Year 2014), **C-188**; E. Burr Second WS, Annex E, Table 1, **CWS-8**.

	Percentage owned by Claimants	**84.0%**	**100.0%**	**-**	**-**	
11 March 2014		A Shares	B Shares	C Shares	Total Shares	
	Total shares owned by Claimants	42,000	9,000	0,000	51,000	**C-180**, p. 3.[206]
	Total outstanding shares of each type	50,000	9,000	3,000	62,000	
	Percentage owned by Claimants	**84.0%**	**100.0%**	**0.0%**	**82.3%**	
End 2014-Present		A Shares	B Shares	C Shares	Total Shares	
	Total shares owned by Claimants	42,000	9,000	-	-	**C-188**; **CWS-8**, Annex E, Table 1.[207]
	Total outstanding shares of each type	50,000	9,000	-	-	
	Percentage owned by Claimants	**84.0%**	**100.0%**	**-**	**-**	

Table 2: Claimants' shareholding in JVE Mexico

190. Claimants' ownership of 84.0% of the Series A shares in JVE Mexico from 7 January 2013 to 9 April 2014 is also evidenced by the transfer requests for the company, which have been omitted from Table 1 above to avoid repetition.[208]

(b) JVE Sureste

191. The Claimants collectively held at all relevant times at least 100.0% of the A2 Shares, 50.4% of the B shares and 54.1% of the total outstanding stock of JVE Sureste.

[206] Shareholding Worksheet, 2014, p. 3, **C-180**.

[207] Schedule K-1 (Form 8865) of JVE Mexico (Year 2014), **C-188**; E. Burr Second WS, Annex E, Table 1, **CWS-8**.

[208] *See* Transfer Requests for the Juegos Companies, 3 January 2013 – 26 March 2014, **C-169**. The requests show that Claimants owned 84% of the Series A shares in JVE Mexico on 7 January 2013 (p. 3), 28 March 2013 (p. 9), 2 May 2013 (p. 16), 31 May 2013 (p. 21), 9 August 2013 (p. 26), 6 September 2013 (p. 30), 10 March 2014 (p. 37) and 9 April 2014 (p. 43).

<table>
<tr><th>Date</th><th colspan="6">Shareholding</th><th>Evidence</th></tr>
<tr><td rowspan="4">19 October 2009</td><td></td><td>A1 Shares</td><td>A2 Shares</td><td>B Shares</td><td>Fixed Shares</td><td>Total Shares</td><td></td></tr>
<tr><td>Total shares owned by Claimants</td><td>0.000</td><td>13,000</td><td>19,675</td><td>0,000</td><td>32,675</td><td rowspan="3">C-168, pp. 4-5; CWS-8, ¶ 18.[209]</td></tr>
<tr><td>Total outstanding shares of each type</td><td>6,500</td><td>13,000</td><td>36,000</td><td>3,000</td><td>58,500</td></tr>
<tr><td>Percentage owned by Claimants</td><td>0.0%</td><td>100.0%</td><td>54.7%</td><td>0.0%</td><td>55.9%</td></tr>
<tr><td rowspan="4">Beginning 2013</td><td></td><td>A1 Shares</td><td>A2 Shares</td><td>B Shares</td><td>Fixed Shares</td><td>Total Shares</td><td></td></tr>
<tr><td>Total shares owned by Claimants</td><td>0,000</td><td>13,000</td><td>19,675</td><td>-</td><td>-</td><td rowspan="3">C-191; CWS-8, Annex E, Table 2.[210]</td></tr>
<tr><td>Total outstanding shares of each type</td><td>6,500</td><td>13,000</td><td>39,000</td><td>-</td><td>-</td></tr>
<tr><td>Percentage owned by Claimants</td><td>0.0%</td><td>100.0%</td><td>50.4%</td><td>-</td><td>-</td></tr>
<tr><td rowspan="4">3 January / 14 March / 12 April / 23 May 2013</td><td></td><td>A1 Shares</td><td>A2 Shares</td><td>B Shares</td><td>Fixed Shares</td><td>Total Shares</td><td></td></tr>
<tr><td>Total shares owned by Claimants</td><td>0,000</td><td>13,000</td><td>19,675</td><td>-</td><td>-</td><td rowspan="3">C-169, pp. 4-6, 10-15, 22-24; CWS-8, ¶¶ 22-23, 26.[211]</td></tr>
<tr><td>Total outstanding shares of each type</td><td>6,500</td><td>13,000</td><td>39,000</td><td>-</td><td>-</td></tr>
<tr><td>Percentage owned by Claimants</td><td>0.0%</td><td>100.0%</td><td>50.4%</td><td>-</td><td>-</td></tr>
<tr><td rowspan="3">19 June 2013</td><td></td><td>A1 Shares</td><td>A2 Shares</td><td>B Shares</td><td colspan="2">Total Shares</td><td></td></tr>
<tr><td>Total shares owned by Claimants</td><td>0.000</td><td>13,000</td><td>19,675</td><td colspan="2">32,675</td><td rowspan="2">CWS-2, Annex C; CWS-7, Part I; CWS-8, Part I;</td></tr>
<tr><td>Total outstanding shares of each type</td><td>6,500</td><td>13,000</td><td>38,800</td><td colspan="2">58,300</td></tr>
</table>

[209] Notarised Minutes of the General Shareholders' Meeting of JVE Sureste held on 15 October 2009 (notarised on 19 December 2009), pp. 4-5, **C-168**; E. Burr Second WS, ¶ 18, **CWS-8**.

[210] Schedule K-1 (Form 8865) for JVE Sureste (Year 2013), **C-191**; E. Burr Second WS, Annex E, Table 2, **CWS-8**.

[211] Transfer Requests for the Juegos Companies, 3 January 2013 to 26 March 2014, pp. 4-6, 10-15, 22-24, **C-169**; E. Burr Second WS, ¶¶ 22-23, 26, **CWS-8**.

	Percentage owned by Claimants	**0.0%**	**100.0%**	**50.7%**	**56.0%**[213]		**CWS-12**, Part I; **CWS-13**, Part I; **CWS-16** to **CWS-47**, Part I.[212]
6 August / 30 August 2013		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0.000	13,000	19,675	-	-	**C-169**, pp. 27-29, 31-33; **CWS-8**, ¶¶ 22-23, 26.[214]
	Total outstanding shares of each type	6,500	13,000	39,000	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**50.4%**[215]	-	-	
End 2013		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	13,000	19,675	-	-	**C-191**; **CWS-8**, Annex E, Table 2.[216]
	Total outstanding shares of each type	6,500	13,000	38,800	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**50.7%**	-	-	
Beginning 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	13,000	19,675	-	-	**C-192**; **CWS-8**,

[213] The Tribunal notes that, unlike the 2014 Shareholding Worksheet and the January 2018 *asamblea* minutes, the figures in Erin Burr's witness statement failed to take into account the existence of fixed shares in the company.

[212] E. Burr First WS, Annex C, **CWS-2**; G. Burr Second WS, Part I, **CWS-7**; E. Burr Second WS, Part I, **CWS-8**; Ayervais WS, Part I, **CWS-12**; Conley WS, Part I, **CWS-13**; Further 32 Claimants' WS, Part I, **CWS-16** to **CWS-47**.

[214] Transfer Requests for the Juegos Companies, 3 January 2013 to 26 March 2014, pp. 27-29, 31-33, **C-169**; E. Burr Second WS, ¶¶ 22-23, 26, **CWS-8**.

[215] The Tribunal notes the discrepancy between Erin Burr's second witness statement detailing the shareholding in June 2013 and the transfer request forms detailing the shareholding in August 2013. Erin Burr's witness statement suggests that by June 2013 the total number of Series B shares issued by the company had decreased by 0.200 shares to 38,800 as a result of a non-Claimant's bankruptcy. *See* E. Burr Second WS, ¶ 41, **CWS-8**. By contrast, the transfer request forms show that this shareholder continued to receive dividend payments, and thus held shares in the company, until the end of 2013. *See* Transfer Requests for the Juegos Companies, 3 January 2013 to 26 March 2014, pp. 27-29, 31-33, **C-169**.

[216] Schedule K-1 (Form 8865) for JVE Sureste (Year 2013), **C-191**; E. Burr Second WS, Annex E, Table 2, **CWS-8**.

	Total outstanding shares of each type	6,500	13,000	38,800	-	-	Annex E, Table 2.[217]
	Percentage owned by Claimants	**0.0%**	**100.0%**	**50.7%**	-	-	
1 January 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	13,000	20,175	-	-	**CWS-8**, ¶¶ 38-39; **CWS-45**, ¶ 2; **CWS-30**, ¶ 2; **CWS-40,** ¶ 2; **CWS-24**, ¶ 2.[218]
	Total outstanding shares of each type	6,500	13,000	38,800	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**52.0%**[219]	-	-	
5 March 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	13,000	20,175	-	-	**C-169**, pp. 38-40; **CWS-8**, ¶¶ 22-23, 26, 38-39.[220]
	Total outstanding shares of each type	6,500	13,000	38,800	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**52.0%**	-	-	
11 March 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	13,000	20,175	0,000	33,175	**C-180**, pp. 1-2.[221]
	Total outstanding shares of each type	6,500	13,000	38,800	3,000	61,300	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**52.0%**	**0.0%**	**54.1%**	

[217] Schedule K-1 (Form 8865) for JVE Sureste (Year 2014), **C-192**; E. Burr Second WS, Annex E, Table 2, **CWS-8**.

[218] E. Burr Second WS, ¶¶ 38-39, **CWS-8**; Victory Fund, LLC Witness Statement (***Victory Fund WS***), ¶ 2, **CWS-45**; Louis Fohn Witness Statement (***Fohn WS***), ¶ 2, **CWS-30**; Daniel Rudden Witness Statement, ¶ 2, **CWS-40**; Mark Burr Witness Statement, ¶ 2, **CWS-24**.

[219] The Tribunal notes that Claimants' tables in Annex 1 of their post-hearing brief are inconsistent with the witness evidence. The table in the post-hearing brief suggests that Claimants Victory Fund, LLC and Louis Fohn have been shareholders in JVE Sureste since June 2013. By contrast, the evidence of Victory Fund, LLC's and Louis Fohn show that the transfers of shares to them were only completed on 1 January 2014. Victory Fund WS, ¶ 2, **CWS-45**; Fohn WS, ¶ 2, **CWS-30**. The Tribunal's findings reflect Victory Fund, LLC's and Fohn's evidence.

[220] Transfer Requests for the Juegos Companies, 3 January 2013 to 26 March 2014, pp. 38-40, **C-169**; E. Burr Second WS, ¶¶ 22-23, 26, 38-39, **CWS-8**.

[221] Shareholding Worksheet, 2014, pp. 1-2, **C-180**.

26 March 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	13,000	20,175	-	-	**C-169**, pp. 44-46; **CWS-8**, ¶¶ 22-23, 26, 38-39.[222]
	Total outstanding shares of each type	6,500	13,000	38,800	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**52.0%**	-	-	
End 2014-Present		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0.000	13,000	20,175	-	-	**C-192**; **CWS-8**, Annex E, Table 2.[223]
	Total outstanding shares of each type	6,500	13,000	38,800	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**52.0%**	-	-	

Table 3: Claimants' shareholding in JVE Sureste

(c) JVE Centro

192. The Claimants collectively held at all relevant times at least 100.0% of the A2 shares, 65.1% of the B shares, and 69.2% of the total outstanding stock of JVE Centro.

Date	Shareholding						Evidence
Beginning 2013		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	20,651	-	-	-	**C-189**; **CWS-8**, Annex E, Table 3.[224]
	Total outstanding shares of each type	6.000	20,651	-	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	-	-	-	

[222] Transfer Requests for the Juegos Companies, 3 January 2013 to 26 March 2014, pp. 44-46, **C-169**; E. Burr Second WS, ¶¶ 22-23, 26, 38-39, **CWS-8**.

[223] Schedule K-1 (Form 8865) for JVE Sureste (Year 2014), **C-192**; E. Burr Second WS, ¶¶ 24-25, and Annex E, Table 2, **CWS-8**.

[224] Schedule K-1 (Form 8865) for JVE Centro (Year 2013), **C-189**; E. Burr Second WS, Annex E, Table 3, **CWS-8**.

Date		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
19 June 2013		A1 Shares	A2 Shares	B Shares	Total Shares		
	Total shares owned by Claimants	0.000	20,651	34,433	55,084		**CWS-2**, Annex C; **CWS-7**, Part I; **CWS-8**, Part I; **CWS-12**, Part I; **CWS-13**, Part I; **CWS-16** to **CWS-47**, Part I.[225]
	Total outstanding shares of each type	6,000	20,651	52,933	79,584		
	Percentage owned by Claimants	**0.0%**	**100.0%**	**65.1%**	**69.2%**[226]		
End 2013		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	20,651	-	-	-	**C-189**; **CWS-8**, Annex E, Table 3.[227]
	Total outstanding shares of each type	6,000	20,651	-	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	-	-	-	
Beginning 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	20,651	-	-	-	**C-190**; **CWS-8**, Annex E, Table 3.[228]
	Total outstanding shares of each type	6,000	20,651	-	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	-	-	-	
11 March 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	20,651	34,433	41,000	96,084	**C-180**, pp. 6-7.[229]

225 E. Burr First WS, Annex C, **CWS-2**; G. Burr Second WS, Part I, **CWS-7**; E. Burr Second WS, Part I, **CWS-8**; Ayervais WS, Part I, **CWS-12**; Conley WS, Part I, **CWS-13**; Further 32 Claimants' WS, Part I, **CWS-16** to **CWS-47**.

226 The Tribunal notes that, unlike the capitalisation *asamblea* minutes, the 2014 Shareholding Worksheet and the January 2018 *asamblea* minutes, the figures in Erin Burr's witness statement failed to take into account the existence of fixed shares in the company.

227 Schedule K-1 (Form 8865) for JVE Centro (Year 2013), **C-189**; E. Burr Second WS, Annex E, Table 3, **CWS-8**.

228 Schedule K-1 (Form 8865) for JVE Centro (Year 2014), **C-190**; E. Burr Second WS, Annex E, Table 3, **CWS-8**.

229 Shareholding Worksheet, 2014, pp. 6-7, **C-180**.

	Total outstanding shares of each type	6,000	20,651	52,933	50,000	129,584	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**65.1%**	**82.0%**	**74.1%**	
End 2014-Present		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	20,651	-	-	-	**C-190**; **CWS-8**, Annex E, Table 3.[230]
	Total outstanding shares of each type	6,000	20,651	-	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	-	-	-	

Table 4: Claimants' shareholding in JVE Centro

(d) JyV Mexico

193. The Claimants collectively held at all relevant times at least 44.4% of the A1 shares, 100.0% of the A2 shares, 66.6% of the B shares, and 70.6% of the total outstanding stock of JyV Mexico.

Date	Shareholding						Evidence
End 2012		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	4,000	22,667	36,963	0,000	63,630	**C-79**; **C-80**; **C-81**; **CWS-8**, ¶ 37; **CWS-26**, ¶ 2; **CWS-36**, ¶ 2; **CWS-47**, ¶ 2; **CWS-22**, ¶ 5; **CWS-29**, ¶ 3; **CWS-7**, ¶ 9; **CWS-13**, ¶ 7; **CWS-25**, ¶ 4; **CWS-8**, ¶ 37.[231]
	Total outstanding shares of each type	9,000	22,667	55,838	3,000	90,505	
	Percentage owned by Claimants	**44.4%**	**100.0%**	**66.2%**	**0.0%**	**70.3%**	

230 Schedule K-1 (Form 8865) for JVE Centro (Year 2014), **C-190**; E. Burr Second WS, Annex E, Table 3, **CWS-8**.

231 Subscription Agreement between Randall Taylor and JyV Mexico, 1 July 2011, **C-79**; Subscription Agreement between Thomas Malley and JyV Mexico, 14 July 2011, **C-80**; Subscription Agreement between Diamond Financial Group and JyV Mexico, 22 July 2011, **C-81**; E. Burr Second WS, ¶ 37,

Beginning 2013		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	4,000	22,667	-	-	-	**C-183**; **CWS-8**, Annex E, Table 4.[232]
	Total outstanding shares of each type	9,000	22,667	-	-	-	
	Percentage owned by Claimants	**44.4%**	**100.0%**	-	-	-	
19 June 2013		A1 Shares	A2 Shares	B Shares	Total Shares		
	Total shares owned by Claimants	4,000	22,667	36,963	63,630		**CWS-2**, Annex C; **CWS-7**, Part I; **CWS-8**, Part I; **CWS-12**, Part I; **CWS-13**, Part I; **CWS-16** to **CWS-47**, Part I.[233]
	Total outstanding shares of each type	9,000	22,667	55,463	87,130		
	Percentage owned by Claimants	**44.4%**	**100.0%**	**66.6%**	**73.0%**[234]		
End 2013		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	4,000	22,667	-	-	-	**C-183**; **CWS-8**, Annex E, Table 4.[235]
	Total outstanding shares of each type	9.000	22.667	-	-	-	
	Percentage owned by Claimants	**44.4%**	**100.0%**	-	-	-	

CWS-8, ¶ 37; Diamond Financial Group Witness Statement, ¶ 2, **CWS-26**; Thomas Malley Witness Statement, ¶ 2, **CWS-36**; Randall Taylor Witness Statement, ¶ 2, **CWS-47**; Douglas Black Witness Statement, ¶ 5, **CWS-22**; Financial Visions Inc. Witness Statement, ¶ 3, **CWS-29**; G. Burr Second WS, ¶ 9, **CWS**-7; Conley WS, ¶ 7, **CWS-13**; Caddis Capital, LLC Witness Statement (***Caddis Capital WS***), ¶ 4, **CWS-25**; E. Burr Second WS, ¶ 37, **CWS-8**.

232 Schedule K-1 (Form 8865) of JyV Mexico (Year 2013), **C-183**; E. Burr Second WS, Annex E, Table 4, **CWS-8**.

233 E. Burr First WS, Annex C, **CWS-2**; G. Burr Second WS, Part I, **CWS-7**; E. Burr Second WS, Part I, **CWS-8**; Ayervais WS, Part I, **CWS-12**; Conley WS, Part I, **CWS-13**; Further 32 Claimants' WS, Part I, **CWS-16** to **CWS-47**.

234 The Tribunal notes that, unlike the capitalisation *asamblea* minutes, the 2014 Shareholding Worksheet and the January 2018 *asamblea* minutes, the figures in Erin Burr's witness statement failed to take into account the existence of fixed shares in the company.

235 Schedule K-1 (Form 8865) of JyV Mexico (Year 2013), **C-183**; E. Burr Second WS, Annex E, Table 4, **CWS-8**.

		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
Beginning 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	4.000	22.667	-	-	-	**C-184**; **CWS-8**, Annex E, Table 4.[236]
	Total outstanding shares of each type	9.000	22.667	-	-	-	
	Percentage owned by Claimants	**44.4%**	**100.0%**	-	-	-	
11 March 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	4.000	22.667	36.963	0,000	63.630	**C-180**, pp. 4-5.[237]
	Total outstanding shares of each type	9.000	22.667	55.463	3.000	90.130	
	Percentage owned by Claimants	**44.4%**	**100.0%**	**66.6%**	**0.0%**	**70.6%**	
End 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	4.000	22.667	-	-	-	**C-184**; **CWS-8**, Annex E, Table 4.[238]
	Total outstanding shares of each type	9.000	22.667	-	-	-	
	Percentage owned by Claimants	**44.4%**	**100.0%**	-	-	-	
5 January 2018		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	4.000	22.667	36.963	0,000	63.630	**C-228**, pp. 16-19.[239]
	Total outstanding shares of each type	9.000	22.667	55.463	3.000	90.130	

236 Schedule K-1 (Form 8865) of JyV Mexico (Year 2014), **C-184**; E. Burr Second WS, Annex E, Table 4, **CWS-8**.

237 Shareholding Worksheet, 2014, pp. 4-5, **C-180**.

238 Schedule K-1 (Form 8865) of JyV Mexico (Year 2014), **C-184**; E. Burr Second WS, Annex E, Table 4, **CWS-8**.

239 Notarised Minutes of the General Shareholders' Meeting of JyV Mexico held on 5 January 2018 (notarised on 2 April 2018), pp. 16-19, **C-228**.

	Percentage owned by Claimants	44.4%	100.0%	66.6%	0.0%	70.6%	

Table 5: Claimants' shareholding in JyV Mexico

(e) JVE DF

194. The Claimants collectively held at all relevant times 100.0% of the A2 shares, and at least 58.4% of the B shares and 66.2% of the total outstanding stock of JVE DF.

Date	Shareholding						Evidence
End 2012		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0.000	28,669	37,962	0,000	66,631	**CWS-8**, ¶ 37; **CWS-19**, ¶ 5; **CWS-25**, ¶ 5; **CWS-13**, ¶ 8.[240]
	Total outstanding shares of each type	4,000	28,669	65,337	3,000	101,006	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**58.1%**	**0.0%**	**66.0%**	
Beginning 2013		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	28,669	-	-	-	**C-185**; **CWS-8**, Annex E, Table 5.[241]
	Total outstanding shares of each type	4,000	28,669	-	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	-	-	-	
19 June 2013		A1 Shares	A2 Shares	B Shares	Total Shares		
	Total shares owned by Claimants	0,000	28,669	37,962	66,631		**CWS-2**, Annex C; **CWS-7**, Part I; **CWS-8**, Part I; **CWS-12**,
	Total outstanding shares of each type	4,000	28,669	64,962	97,631		

[240] Erin Burr Second WS, ¶ 37, **CWS-8**; Oaxaca Witness Statement (***Oaxaca WS***), ¶ 5, **CWS-19**; Caddis Capital WS, ¶ 5, **CWS-25**; Conley WS, ¶ 8, **CWS-13**.

[241] Schedule K-1 (Form 8865) of JVE DF (Year 2013), **C-185**; E. Burr Second WS, **CWS-8**, Annex E, Table 5.

	Percentage owned by Claimants	**0.0%**	**100.0%**	**58.4%**	**68.2%**[243]		Part I; **CWS-13**, Part I; **CWS-16** to **CWS-47**, Part I.[242]
End 2013		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	28,669	-	-	-	**C-185**; **CWS-8**, Annex E, Table 5.[244]
	Total outstanding shares of each type	4,000	28,669	-	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	-	-	-	
Beginning 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	28,669	-	-	-	**C-186**; **CWS-8**, Annex E, Table 5.[245]
	Total outstanding shares of each type	4,000	28,669	-	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	-	-	-	
11 March 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	28,669	37,962	0,000	66,631	**C-180,** pp. 8-9; **CWS-8**, ¶ 41.[246]
	Total outstanding shares of each type	4,000	28,669	64,962	3,000	100,631	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**58.4%**	**0.0%**	**66.2%**	

243 The Tribunal notes that, unlike the capitalisation asamblea minutes, the 2014 Shareholding Worksheet and the January 2018 asamblea minutes, the figures in Erin Burr's witness statement failed to take into account the existence of fixed shares in the company.

242 E. Burr First WS, Annex C, **CWS-2**; G. Burr Second WS, Part I, **CWS-7**; E. Burr Second WS, Part I, **CWS-8**; Ayervais WS, Part I, **CWS-12**; Conley WS, Part I, **CWS-13**; Further 32 Claimants' WS, Part I, **CWS-16** to **CWS-47**.

244 Schedule K-1 (Form 8865) of JVE DF (Year 2013), **C-185**; E. Burr Second WS, Annex E, Table 5, **CWS-8**.

245 Schedule K-1 (Form 8865) of JVE DF (Year 2014), **C-186**; E. Burr Second WS, Annex E, Table 5, **CWS-8**.

246 Shareholding Worksheet, 2014, pp. 8-9, **C-180**; E. Burr Second WS, ¶ 41, **CWS-8**.

End 2014-Present		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	28,669	-	-	-	**C-186**; **CWS-8**, Annex E, Table 5.[247]
	Total outstanding shares of each type	4,000	28,669	-	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	-	-	-	

Table 6: Claimants' shareholding in JVE DF

(iv) The Claimants' share ownership in E-Games and Operadora Pesa

(a) E-Games

195. The Claimants have introduced the minutes of *asambleas* held on 6 March 2013, 16 July 2013 and 23 July 2013,[248] all recording the Claimants' share ownership in E-Games. This evidence has not been contested by the Respondent.[249]

196. From 7 June 2011 to 16 July 2013, the Claimants collectively held 43.33% of the total outstanding stock in E-Games. John Conley further held an option during that period to purchase another 13.33% of the total outstanding stock pursuant to an option agreement with Mr. Alfredo Moreno Quijano.[250] Since 16 July 2013, Claimants have held 66.66% of the total outstanding stock in E-Games.

Date	Shareholder	Shareholding	Evidence
17 February 2006	Alfredo Moreno Quijano	50.00%	**C-117**, p. 38.[251]
	Antonio Moreno Quijano	50.00%	
	Percentage owned by Claimants	**0.00%**	
9 July 2009	Oaxaca Investments LLC	28.33%	
	John Conley	28.34%	

[247] Schedule K-1 (Form 8865) of JVE DF (Year 2014), **C-186**; E. Burr Second WS, Annex E, Table 5, **CWS-8**.

[248] Notarised Minutes of the General Shareholders' Meeting of E-Games held on 6 March 2013, 16 July 2013 and 23 July 2013 (notarised on 7 March 2013, 7 October 2013 and 21 February 2014), pp. 36-39, 39-40, 44-47, **C-63**.

[249] Reply, ¶ 234.

[250] Option Agreement (unexecuted), undated, **C-83**; Conley WS, ¶¶ 11-22, **CWS-13**.

[251] Notarised Articles of Incorporation of E-Games for 17 February 2006 (notarised on 22 February 2006), p. 38, **C-117**.

	Alfredo Moreno Quijano	15.00%	**C-63**, pp. 31-32; **CWS-19**, ¶ 6; **CWS-13**, ¶ 9.[252]
	Tomás Fernando Ruíz Ramírez	28.33%	
	Percentage owned by Claimants	**56.70%**	
7 June 2011	Oaxaca Investments LLC	28.33%	**C-63**, p. 33; **C-83**; **CWS-13**, ¶¶ 11-22; **CWS-19**, ¶ 6; **C-139**, pp. 1, 3.[253]
	John Conley	15.00%	
	Alfredo Moreno Quijano	28.34%	
	Tomás Fernando Ruíz Ramírez	28.33%	
	Total Shares Owned by Claimants	**43.33%**	
4 July 2011	Oaxaca Investments LLC	28.33%	**C-63**, p. 34.[254]
	John Conley	15.00%	
	Alfredo Moreno Quijano	28.34%	
	José Ramón Moreno Quijano	28.33%	
	Total Shares Owned by Claimants	**43.33%**	
1 March 2012	Oaxaca Investments LLC	28.33%	**C-63**, p. 36.[255]
	John Conley	15.00%	
	Alfredo Moreno Quijano	28.33%	
	José Ramón Moreno Quijano	14.17%	
	Jorge Armando Guerrero Ortiz	14.17%	
	Total Shares Owned by Claimants	**43.33%**	
19 June 2013	Oaxaca Investments LLC	28.33%	**CWS-2**, Annex B[256]
	John Conley	15.00%	
	Alfredo Moreno Quijano	28.33%	
	José Ramón Moreno Quijano	14.17%	
	Jorge Armando Guerrero Ortiz	14.17%	

252 Notarised Minutes of the General Shareholders' Meeting of E-Games held on 9 July 2009 (notarised on 6 October 2009), pp. 31-32, **C-63**; Oaxaca WS, ¶ 6, **CWS-19**; Conley WS, ¶ 9, **CWS-13**.

253 Notarised Minutes of the General Shareholders' Meeting of E-Games held on 9 June 2011 (notarised on 7 July 2011), p. 33, **C-63**; Option Agreement (unexecuted), undated, **C-83**; Conley WS, ¶¶ 11-22, **CWS-13**; Oaxaca WS, ¶ 6, **CWS-19**; Consent to Action in Lieu of Meeting of the Managers of E-Games, 7 June 2011, pp. 1, 3, **C-139**.

254 Notarised Minutes of the General Shareholders' Meeting of E-Games held on 4 July 2011 (notarised on 12 August 2011), p. 34, **C-63**.

255 Notarised Minutes of the General Shareholders' Meeting of E-Games held on 6 March 2011 (notarised on 7 March 2011), p. 36, **C-63**.

256 E. Burr First WS, Annex B, **CWS-2**.

	Total Shares Owned by Claimants	**43.33%**	
16 July 2013-Present	Oaxaca Investments, LLC	33.32%	**C-63**, p. 40; **CWS-19**, ¶ 6; **CWS-13**, ¶¶ 9, 19-21; **CWS-2**, Annex B; **CWS-1**, ¶ 18; **CWS-7**, ¶ 25.[257]
	John Conley	33.34%	
	José Ramón Moreno Quijano	16.67%	
	Jorge Armando Guerrero Ortiz	16.67%	
	Total Shares Owned by Claimants	**66.66%**	

Table 7: Claimants' shareholding in E-Games

(b) Operadora Pesa

197. The Claimants do not own, and have never owned, any shares in Operadora Pesa.[258]

c. Did the Claimants "own" the Mexican Companies at the relevant times?

198. The Respondent submits that the Claimants do not own the Mexican Companies because ownership requires "full ownership or virtually full ownership of the company".[259] The Claimants submit that they do because majority ownership (50% + 1) of the company's shares is sufficient to "own" the company.[260]

199. The Tribunal agrees with the Respondent. To reach that conclusion, the Tribunal has considered the ordinary meaning of the terms of Article 1117, read in context.

200. First, Article 1117 refers to owning "an enterprise". It does not refer to owning "equity securities of an enterprise". That choice of words should be given due weight. Elsewhere in Chapter 11, when defining "investment", the drafters of the Treaty took care to distinguish between "(a) an enterprise" and "(b) *an equity security of* an enterprise".[261] If the drafters of the Treaty would have wanted to equate ownership of

257 Notarised Minutes of the General Shareholders' Meeting of E-Games held on 16 July 2013 (notarised on 7 October 2013), p. 40, **C-63**; Oaxaca WS, ¶ 6, **CWS-19**; Conley WS, ¶¶ 9, 19-21, **CWS-13**; E. Burr First WS, Annex B, **CWS-2**; G. Burr First WS, ¶ 18, **CWS-1**; G. Burr Second WS, ¶ 25, **CWS-7**. *See also* Tr. (ENG), Day 2, 487:10-14 (E. Burr).

258 *See* Claimants' PHB, Annex 3; Notarised Articles of Organization of Operadora Pesa dated 29 February 2008 (notarised on 7 March 2008), p. 17, **C-109**.

259 Reply, ¶ 200.

260 Rejoinder, ¶ 39.

261 NAFTA, Article 1139 (emphasis added).

an "enterprise" with ownership of a certain number of the "equity securities of an enterprise", this suggests they knew how to do so, and that they would have done so.

201. Second, Article 1117 does not refer to any share ownership threshold that, on the Claimants' case, must be reached to "own" the enterprise. The Claimants suggest that it is 50% + 1. But it would have been easy for the drafters of the Treaty to say that if that is what they had in mind. In fact, in another multilateral treaty to which all NAFTA Parties are also parties, that is what was done. Article XXVIII(n) of the GATS specifies that a company is "'owned' by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member".[262] In the Treaty, the NAFTA Parties chose not to so define ownership of an enterprise.

202. Third, while Article 1117 does not specify an ownership threshold, its context indicates that the NAFTA Parties envisaged a shareholding threshold that must *always*, regardless of applicable law or bylaws, be sufficient to confer the legal capacity to control the enterprise:

a. Article 1117(3) addresses the situation where an investor pursues claims under Article 1117 and either the investor "or a *non-controlling* investor in the enterprise" pursues parallel claims under Article 1116. This paragraph thus assumes that the only investor who can pursue an Article 1117 claim on behalf of an enterprise will be a *controlling* investor, because a "non-controlling" investor is deemed limited to the pursuit of an Article 1116 claim. It follows that the "ownership" of an enterprise in paragraph 1 of Article 1117 must *always* be sufficient to give the investor the legal capacity to control.

b. Article 1121(2) requires the enterprise to consent and provide a waiver as a condition precedent to the submission of an Article 1117 claim on its behalf by an investor. This again suggests that the investor has an equity holding that always confers on it the legal capacity to control the enterprise. If it has not, it cannot be presumed capable of procuring the consent and waiver from the enterprise. Article 1121(4) further confirms this when it provides that the waiver

[262] General Agreement on Trade in Services, **CL-72**.

from the enterprise is not required when the NAFTA Party has deprived the investor of control.

c. Article 1113 contains the so-called denial of benefits clause. It allows a NAFTA Party to deny the benefits of the Treaty to an investor of another NAFTA Party that is an enterprise of that NAFTA Party when investors from non-NAFTA parties "own or control the enterprise and the enterprise has no substantial business activities in the territory of [that NAFTA Party]." The purpose is to avoid an obligation to extend Treaty benefits to a "sham" company set up by an investor from a non-NAFTA party. It is intrinsic to the notion of a sham company that its shareholders can control it so as to gain access to Treaty benefits. That is also how Canada interpreted this provision in its Statement of Implementation, where it stated "[u]nder [A]rticle 1113, a Party may deny the benefits of this chapter in the case that investors of a non-Party *control* the investment and the denying Party does not maintain diplomatic relations with the non-Party or the denying Party has prohibited transactions with enterprises of the non-Party which could be circumvented if the NAFTA applied. A Party may also deny benefits in the case of 'sham' investments (i.e., where there are no substantial business activities in a NAFTA country)."[263] Thus, again, the requisite ownership threshold is assumed to be one that always confers the legal capacity to control.

203. As the facts of this case show, the requisite share ownership that confers the legal capacity to control is not necessarily 50% + 1 of the outstanding stock. What that threshold is will vary for each enterprise, depending on what its by laws and/or the governing law provide for. The only equity holding that will *always*, independently of the circumstances, confer the legal capacity to control is ownership of *all* or virtually all of the outstanding stock. Contextual analysis therefore suggests that by "ownership" of an enterprise, the NAFTA Parties contemplated ownership of all the outstanding shares of that enterprise.

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[263] Canadian Statement on Implementation of the NAFTA, Canada Gazette, 1 January 1994, Part I, p. 147, at p. 8, **CL-47** (emphasis added). The Claimants have relied on this document where it refers to "majority-owned" companies in support of their position that to own an enterprise means to majority-own an enterprise. *See,* Rejoinder, ¶ 44. However, the passage cited by the Claimants is a summary of the Treaty's definition of investment—which clearly does protect majority shareholding—and not Article 1117.

204. The Tribunal also did not find "any relevant rules of international law applicable in the relations between the parties" within the meaning of Article 31(3)(c) of the VCLT that would affect this plain reading of "ownership" in Article 1117. The definitions of "ownership" in GATS Article XXVIII(n) and Article 13(a)(ii) of the MIGA Convention[264] are of limited import because, as argued by the Respondent, the NAFTA Parties' choice not to further define "ownership" under Article 1117 must be respected.[265] The Claimants' reference to Mexico's notification under the OECD Declaration as to the definition of "owned or controlled directly or indirectly" in that instrument is also inapplicable because it is not a rule applicable in the relations between all the NAFTA Parties. In performing an analysis under Article 31(3)(c) of the VCLT, the Tribunal will not "rewrite" or "substitute a plain reading"[266] of Article 1117.

205. This interpretation of "own" also gives meaning to "or control" in Article 1117. As discussed in the next section, "control" can mean both the legal capacity to control and *de facto* control. Article 1117 thus applies whenever the investor:

a. owns all of the outstanding shares in an enterprise (an enterprise that the investor "owns");

b. owns a lesser number of shares that is still sufficient in the specific circumstances to confer the legal capacity to control (an enterprise that the investor "controls"); or

c. does not own a number of shares sufficient to confer the legal capacity to control but is otherwise able to exercise *de facto* control (also an enterprise that the investor "controls").

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264 Claimants' Additional Submission on the interpretation of NAFTA Article 1117, 21 December 2018, (***Claimants' PO7 Submission***), ¶¶ 18, 30.

265 Respondent's Supplemental Submission Under Procedural Order 7, 21 December 2018 (***Respondent's PO7 Submission***), ¶ 10.

266 *Vattenfall AB and others v. Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, ¶ 154 (as cited in Claimants' PO7 Submission, ¶ 7 and Respondent's PO7 Submission, ¶ 6).

206. If, as the Claimants contend, "ownership" extended to scenario (b), then "control" would only be relevant to scenario (c). Yet, as explained below, the ordinary meaning of "control" encompasses both scenarios (b) and (c).

207. Based on the foregoing, the Tribunal finds that the Claimants did not "own" the Juegos Companies or E-Games at the relevant times for purposes of Article 1117. As they never owned any shares in Operadora Pesa, they naturally did not "own" that company either.

d. Did the Claimants "control" the Mexican Companies at the relevant times?

208. To answer this question, the Tribunal must answer the following questions:

a. Does "control" mean legal capacity to control, *de facto* control, or both?

b. To have the legal capacity to control, must the Claimants be contractually bound to vote as a block?

c. To have the legal capacity to control, what percentage of which class of shares in the Mexican Companies must the Claimants have owned at the relevant times?

d. On the evidence before the Tribunal, did the Claimants thus "control" the Mexican Companies at the relevant times?

(i) Does "control" mean legal capacity to control, de facto control, or both?

209. The Respondent submits that "control" can only mean legal capacity to control.[267] The Claimants submit that "control" can mean both legal capacity to control and *de facto* control.[268]

210. In the Tribunal's view, the ordinary meaning of "control" favours the Claimants' position.

211. The Merriam-Webster dictionary defines "control" to mean:

a: to exercise restraining or directing influence over

[267] Reply, ¶ 203.
[268] Rejoinder, ¶ 47.

> b: to have power over
>
> c: to reduce the incidence or severity of especially to innocuous levels".[269]

212. In the context of Article 1117, any ability to "exercise restraining or directing influence over" or to "have power over" a company would satisfy the ordinary meaning of control. There is no specific manner or form that "control" must take.

213. The tribunal in *Thunderbird* determined that this indeed is the ordinary meaning of control:

> 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 NAFTA.[270]

214. The tribunal in that case further observed:

> It is quite common in the international corporate world to control a business activity without owning the majority voting rights in shareholders meetings. Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know how, and authoritative reputation. 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 with an expectation to receive an economic return for its efforts and eventually be held responsible for improper decisions, one can conceive the existence of a genuine link yielding the control of the enterprise to that person.[271]

215. The parties have given less airtime to the Tribunal's decision in *Aguas del Tunari*. That may be so because that tribunal was called upon to interpret control in the context of another investment treaty. The Tribunal finds the opinion by its preeminent

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[269] Merriam-Webster Dictionary, "Definition of *control*", https://www.merriam-webster.com/dictionary/control (last accessed 25 March 2019).

[270] *International Thunderbird*, ¶ 106 (emphasis in original), **CL-7**.

[271] *Id.*, ¶ 108, **CL-7**.

majority (consisting of the late Professor David Caron and Mr. Henri Alvarez QC) to nonetheless provide a helpful disquisition on the subject.

216. The majority first observed that "the ordinary meaning of 'control' would seemingly encompass both actual exercise of powers or direction and the rights arising from the ownership of shares".[272] After an extensive analysis deploying the interpretation tools available under the VCLT, the majority concluded that "control", as used in the treaty under examination in that case, did include the legal capacity to control:

> the phrase 'controlled directly or indirectly' means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity. Subject to evidence of particular restrictions on the exercise of voting rights, such legal capacity is to be ascertained with reference to the percentage of shares held.[273]

217. Unlike the Respondent's submissions in this case, the respondent in that case had argued that "control" meant only *de facto* control—and not the legal capacity to control. The majority rejected that proposition:

> In the Tribunal's view, the BIT *does not require* actual day-to-day or ultimate control as part of the 'controlled directly or indirectly' requirement …. The Tribunal observes that it is not charged with determining all forms which control might take. It is the Tribunal's conclusion, by majority, that, in the circumstances of this case, where an entity has both majority shareholdings and ownership of a majority of the voting rights, control as embodied in the operative phrase 'controlled directly or indirectly' exists" (emphasis added).[274]

218. While the majority only opined that a showing of *de facto* control was not *required*—and thus left open the possibility of establishing control in that manner—it also expressed apprehension about the definitional and evidentiary challenges of a *de facto* control standard:

> Respondent's argument that 'control' can be satisfied by only a certain level of actual control has not been defined by the Respondent with sufficient particularity. Rather, the concept is sufficiently vague as to be unmanageable. … Once one admits of

[272] *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 (***AdT v. Bolivia***), ¶ 227, **RL-031**.

[273] *AdT v. Bolivia*, ¶ 264, **RL-031**.

[274] *AdT v. Bolivia*, ¶ 264, **RL-031**.

> the possibility of several controllers, then the definition of what constitutes sufficient 'actual' control for any particular controller, particularly when an entity may delegate such actual control, becomes problematic. This becomes apparent with Respondent's difficulty in offering the Tribunal the details of its 'actual' control test. … Moreover, the many dimensions of actual control of a corporate entity range from day to day operations up to strategic decision-making. … The difficulty in articulating a test in the Tribunal's view reflects not only the fact that the Respondent did not provide such a test, but also the possibility that it is not practicable to do so and that, as discussed in the next paragraph, the resultant uncertainty would directly frustrate the object and purpose of the BIT.[275]

219. This evidentiary challenge of proving *de facto* control also appears to have been on the mind of the *Thunderbird* tribunal:

> In the absence of legal control however, the Tribunal is of the opinion that de facto control must be established beyond any reasonable doubt.[276]

220. The Tribunal is unclear as to whether the *Thunderbird* tribunal intended to set a different standard of proof for *de facto* control and, if so, on what basis. What is clear, however, is the dual consonance of the *Thunderbird* and *Aguas del Tunari* opinions. To wit, both tribunals considered that: (i) there is nothing in the ordinary meaning of control that precludes either prong of control—legal capacity or *de facto*; and (ii) *de facto* control will typically, and logically, present a greater evidentiary challenge.

221. This reading of "control" is not affected by "any relevant rules of international law applicable in the relations between the parties" within the meaning of Article 31(3)(c) of the VCLT. As with the meaning of "ownership",[277] the definitions of "control" in GATS Article XXVIII(n) and Mexico's reservation to the OECD Declaration are not "relevant rules" for purposes of interpreting Article 1117; and even if they were, the Tribunal would take them into account by concluding that, had the NAFTA Parties wished to apply those definitions to Article 1117, they would have done so in the Treaty. The Tribunal therefore finds that "control" in Article 1117, in accordance with its ordinary meaning, means both legal capacity to control and *de facto* control.

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275 *AdT v. Bolivia*, ¶ 246, **RL-031**.
276 *International Thunderbird*, ¶ 106, **CL-7**.
277 *See* above, ¶ 196.

(ii) To have the legal capacity to control, must the Claimants be contractually bound to vote as a block?

222. The Respondent submits that a binding agreement among shareholders is required to establish that they collectively control the company.[278] The Claimants submit that no such binding agreement is required among shareholders to establish that they collectively control the company.[279]

223. The Tribunal agrees with the Claimants. Where they can show that their collective shareholding and voting rights confer upon them the *legal capacity* to control the Mexican Companies by aligning their votes, there is no further requirement that they are legally *bound* to do so.

224. If there were, multiple shareholders in an enterprise would never be able to pursue an Article 1117 claim on behalf of the enterprise absent a binding agreement among them requiring them to vote as a block. Nothing in the text or context of Article 1117 suggests that this was the intention of the drafters of the Treaty.

225. When the issue has arisen in other treaty arbitrations, it has proven uncontroversial.

a. In *Micula*, the two individual claimants each held 50% of shares in two of the corporate claimants, and each held 46.72% of shares in the third corporate claimant.[280] The tribunal held that it had jurisdiction over the corporate claimants as they were "effectively controlled" by the two Swedish citizens collectively.[281] There was no discussion of any binding instrument between the shareholders or the need for it.

b. In *von Pezold*, eight family members owned indirectly 86.49% of the corporate claimants.[282] Again, the tribunal found that it had jurisdiction over the corporate claimants because they were "effectively controlled" by these eight individuals

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[278] Respondent's PHB, ¶ 101.

[279] Claimants' PHB, ¶¶ 90-91.

[280] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, ¶¶ 112-113, **CL-61**.

[281] *Id.*, ¶¶ 109, 115, **CL-61**.

[282] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 127, **CL-59**.

together.[283] There was no discussion of any binding instrument between the shareholders or the need for it.

c. In *Perenco*, the tribunal held that four individuals who each owned 25% of the parent company of the claimant had, collectively, control over that company and its subsidiaries.[284] There was no discussion of any binding instrument between the shareholders or the need for it.

d. In *Azinian*, three claimants asserted a claim on behalf of a company of which they allegedly "collectively 'own[ed] and control[led] 74%'."[285] There was no discussion of any binding instrument between the shareholders or the need for it.

(iii) To have the legal capacity to control, which percentage of which class of shares must the Claimants have owned at the relevant times?

226. The Tribunal will address this question first for the Juegos Companies and then for E-Games.

(a) The Juegos Companies

227. 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".[286]

228. The Tribunal agrees that a simple majority of the Series B shares suffices to confer the legal capacity to control for the Juegos Companies:

a. The bylaws of the JVE Sureste, JVE Centro, JyV Mexico and JVE DF are broadly similar. Generally, resolutions at a shareholders meeting can be adopted with a simple majority of the Series B shares. A shareholder with more than 50% of the Series B shares can also appoint three out of five members of the Board.[287] Only

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283 *Id.,* ¶ 226, **CL-59**.

284 *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on the Remaining Issues of Jurisdiction and on Liability, 12 September 2014, ¶¶ 465, 529, **CL-50**.

285 *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Interim Decision Concerning Respondent's Motion for Directions, 22 January 1998, ¶ 16.

286 Reply, ¶ 255.

287 Notarised Minutes of the General Shareholders Meeting of JVE Sureste held on 28 February 2007 (notarised on 25 April 2007), p. 65, **C-90**; Notarised Minutes of the General Shareholders Meeting of

a closed list of five decisions, including dissolution of the company or sale of substantially all its assets, requires a 75% vote of all shareholders. A further closed list of four decisions, including acquisition of a debt over US$ 5 million and increasing the capital stock, requires the vote of 75% of the Series B shares.[288] Thus, a shareholder owning a majority of the Series B shares would have the power to (i) appoint a majority on the Board; (ii) adopt shareholder resolutions for most of the company's affairs, and (iii) veto all but a limited number of resolutions.

b. The bylaws of JVE Mexico differ slightly. Shareholder resolutions are generally adopted through a majority vote of the combined Series B and C shares in the company.[289] Only a closed list of five major decisions, including dissolution of the company or sale of substantially all its assets, requires a 75% vote of all shareholders. A further closed list of four decisions, including acquisition of a debt over US$ 5 million and increasing the capital stock, require the vote of 75% of the Series B and C shares.[290] This means that a shareholder owning 50% of the combined B and C shares will be able to (i) adopt most shareholder resolutions; and (ii) veto all but a limited number of shareholder decisions. Further, a shareholder owning more than 50% of Series A shares and 50% of Series B shares will have power to appoint a majority of the Board of JVE Mexico.[291]

JVE Centro held on 31 December 2007 (notarised on 10 January 2011), p. 50, **C-91**; Notarised Minutes of the General Shareholders Meeting of JyV Mexico held on 31 May 2008 (notarised on 10 January 2011), pp. 45-46, **C-92**; Notarised Minutes of the General Shareholders Meeting of JVE DF held on 2 September 2008 (notarised on 10 January 2011), p. 49, **C-93**.

288 Notarised Minutes of the General Shareholders Meeting of JVE Sureste held on 28 February 2007 (notarised on 25 April 2007), pp. 62-63, **C-90**; Notarised Minutes of the General Shareholders Meeting of JVE Centro held on 31 December 2007 (notarised on 10 January 2011), pp. 47-48, **C-91**; Notarised Minutes of the General Shareholders Meeting of JyV Mexico held on 31 May 2008 (notarised on 10 January 2011), pp. 43-44, **C-92**; Notarised Minutes of the General Shareholders Meeting of JVE DF held on 2 September 2008 (notarised on 10 January 2011), pp. 46-47, **C-93**.

289 Notarised Minutes of the General Shareholders Meeting of JVE Mexico held on 27 February 2006 (notarised on 23 March 2006, p. 54, **C-89**.

290 Notarised Minutes of the General Shareholders Meeting of JVE Mexico held on 27 February 2006 (notarised on 23 March 2006), pp. 53-54, **C-89**.

291 Notarised Minutes of the General Shareholders Meeting of JVE Mexico held on 27 February 2006 (notarised on 23 March 2006, p. 56, **C-89**.

(b) E-Games

229. From 7 June 2011 to 16 July 2013, the by-laws of E-Games required a 75% of the vote of the shareholders to adopt any resolution.[292] After 16 July 2013, E-Games's bylaws require a 70% shareholding to adopt most resolutions, including the election of members to the Board.[293] Only a closed list of 8 major decisions, including acquisition of a debt over US$ 5 million, amendment of the bylaws, dissolution of the company or a sale of substantially all its assets, require 85% of the votes.[294]

230. The Claimants must therefore—both parties agree—own 75% or 70% of the shares (as the case may be) in order to prove their legal capacity to control E-Games.[295]

(iv) On the evidence before the Tribunal, did the Claimants thus "control" the Mexican Companies at the relevant times?

231. The Tribunal will answer the question first for the Juegos Companies, then for E-Games.

(a) The Juegos Companies

232. Having found that the Claimants at all relevant times owned at least 50% of the Series B shares in each of JVE Sureste, JVE Centro, JyV Mexico and JVE DF, the Tribunal concludes that they had at all relevant times the legal capacity to control those companies. Further, having found that the Claimants at all relevant times owned at least 50% of each of the Series A and Series B shares, and at least 50% of the combined Series B and C shares, of JVE Mexico, the Tribunal also concludes that they had at all relevant times the legal capacity to control JVE Mexico. The Tribunal therefore concludes, on that basis, that the Claimants at all relevant times "controlled" the Juegos Companies for purposes of Article 1117.

233. The Tribunal also finds that the Claimants were unable to exercise *de facto* control over the Juegos Companies (other than JVE Mexico) between, at least, September

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[292] Claimants' PHB, ¶ 147; Consent to Action in Lieu of Organizational Meeting of the Directors of E-Games, 7 June 2011, p. 3, **C-64**.

[293] Notarised Minutes of the General Shareholders' Meeting of E-Games held on 16 July 2013 (notarised on 10 October 2013), p. 41, **C-63**.

[294] Notarised Minutes of the General Shareholders' Meeting of E-Games held on 16 July 2013 (notarised on 10 October 2013), pp. 41-42, **C-63**.

[295] Reply, ¶ 276; Rejoinder, ¶ 160.

2014 and July 2016, as a result of the August 2014 *asambleas* and their subsequent dispute with Chow and Pelchat. The Claimants squarely conceded as much when on 21 July 2015 they advised ICSID that they "do not have board control of the Juegos Companies".[296]

234. The Tribunal, however, has already established that an investor can be said to "control" an enterprise *either* if it has the legal capacity to control (and regardless of whether it *de facto* exercises control) *or* if it exercises *de facto* control (and regardless of whether it has the legal capacity to control). In this case, the Claimants at all times retained the share ownership necessary to confer the legal capacity to control and, shortly after the Request was filed, recovered their ability to exercise *de facto* control.

235. The Claimants' temporary loss of *de facto* control does therefore not detract from the Tribunal's finding that the Claimants did, at all relevant times, "control" the Juegos Companies for purposes of Article 1117.

(b) E-Games

236. It is uncontroversial that the Claimants never held 70% of the shares in E-Games. They therefore did not have the legal capacity either to appoint all members of the Board or to push through proposed shareholder resolutions.

237. They did, however, at all times have sufficient shares (more than 25% or 30%) to veto any proposed shareholder resolutions. In addition, the quorum required for a valid shareholder meeting being 85% of the capital stock on a first call and 70% of the capital stock on second call or later calls, the Claimants had the ability to prevent a quorum from ever being reached for any Board meeting.[297] That already gave them a considerable degree of *de facto* control.

238. Further, the evidence on record establishes to the Tribunal's satisfaction that the two Original Claimants that are shareholders in E-Games—Oaxaca and John Conley—exercised *de facto* control over E-Games.

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[296] Letter from the Claimants to ICSID, 21 July 2016, p. 13.

[297] Notarised Minutes of the General Shareholders' Meeting of E-Games held on 16 July 2013 (notarised on 10 October 2013), pp. 41-42, **C-63**.

239. The framework within which the Tribunal has assessed the evidence of *de facto* control is the one set out by the *Thunderbird* tribunal, which the Tribunal considered persuasive. The *Thunderbird* tribunal found that the "ability to exercise significant influence on the decision-making" and being the "driving force" in the company would be significant evidence of *de facto* control.[298] Beyond influence on decision-making, the *Thunderbird* tribunal also took into account other factors such as (i) being exposed to the economic consequences of decisions in the company[299] and (ii) having expertise and involvement in the capitalisation and operation of the business.[300] To the Tribunal's mind, these are examples of relevant factors, although by no means the only ones.

240. The record shows that the Claimants wielded pervasive influence over the decision-making in E-Games:

a. *Board control*. Prior to 16 July 2013, Jose Ramon Moreno testified that he and his brother, Alfredo Moreno, as Directors on the Board of E-Games "always" acted subject to the instructions of the Claimants, and the "reality" was that "in no case" did he act without the knowledge of Gordon Burr.[301] Further, Claimant Gordon Burr has been the President of the Board of E-Games since 16 July 2013 to the present,[302] and Claimant John Conley has been a director on the Board since 16 July 2013 to the present.[303] This latter point is accepted by the Respondent.[304]

b. *Shareholder voting control*. The Claimants were able to always align the votes of the non-Claimant shareholders:

i José Ramón Moreno, who has been a shareholder in E-Games since 4 July 2011, testified that, while he "always had freedom" in making voting

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298 *Thunderbird*, ¶ 107, **CL-7**.
299 *Thunderbird*, ¶ 108, **CL-7** (if a person made key decisions with an "expectation to receive an economic return for its efforts and eventually be held responsible for improper decisions", one could conceive "the existence of a genuine link yielding the control of that enterprise" to that person).
300 *Thunderbird*, ¶ 109, **CL-7** (focusing on "[t]he initial expenditures, the know-how …, the selection of the suppliers, and the [determination of] expected return on the investment" as evidence of *de facto* control).
301 J.R. Moreno WS, ¶ 9, **CWS-15**; Tr. (ENG) Day 3, 666:13-666:1 (J.R. Moreno).
302 Notarised Minutes of the General Shareholders Meeting of E-Games held on 16 July 2013 (notarised on 10 October 2013), p. 43, **C-63**.
303 Notarised Minutes of the General Shareholders Meeting of E-Games held on 16 July 2013 (notarised on 10 October 2013), p. 43, **C-63**.
304 Reply, ¶ 286.

decisions,[305] he has always voted—and would have continued to vote[306]—with the Claimants on decisions related to the casinos' operations, without exception.[307]

ii Alfredo Moreno followed Mr. Conley's vote on "all key issues".[308] Further, from June 2011 until 16 July 2013, Alfredo Moreno was contractually prevented under an option agreement from voting 13.34% of his shares in a manner inconsistent with Mr. Conley's views without first providing Conley with the right to purchase those shares at a prearranged price.[309]

c. *Control over incorporation*. In 2006, Gordon Burr and Conley instructed José Ramón Moreno and Alfredo Moreno to incorporate E-Games to hold casino assets.[310] It was a decision taken by the Claimants "despite [the fact that Jose Ramon Moreno and Alfredo Moreno] are listed in [the] paperwork."[311] The Claimants also provided a "significant majority" of the capital used to incorporate the company.[312]

d. *Control over direction and purpose of E-Games*. The Claimants have continued to hold decision-making power over the direction and purpose of E-Games after incorporation. In 2008, Claimants Conley, Gordon Burr and Erin Burr decided to "repurpose" E-Games as the permit holder for the casino business.[313] Gordon Burr also testified that he had power to "replace[]" employees of E-Games.[314]

e. *Economic exposure to the business*. Gordon Burr testified that E-Games never paid out any dividends.[315] Instead, at the end of every month, E-Games would transfer all its net profits to each of the Juegos Companies, pursuant to the

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[305] Tr. (ENG) Day 3, 688:22 (J.R. Moreno).
[306] José Ramón Moreno Quijano Witness Statement (***J.R. Moreno WS***), ¶ 20, **CWS-15**.
[307] J.R. Moreno WS, ¶¶ 19-21, **CWS-15**; Tr. (ENG) Day 3, 688:22-689:22 (J.R. Moreno). *See also* G. Burr First WS, ¶ 18, **CWS-1**.
[308] G. Burr First WS, ¶ 18, **CWS-1**; Conley WS. ¶ 15, **CWS-13**.
[309] Option Agreement between Alfredo Moreno and John Conley, 2 June 2011, ¶ 6(c), **C-83**; Conley WS, ¶ 15, **CWS-13**; G. Burr Second WS, ¶ 25, **CWS-7**; G. Burr First WS, ¶ 19, **CWS-1**.
[310] G. Burr Second WS, ¶ 23, **CWS-7**; Tr. (ENG) Day 2, 434:13-435:1 (G. Burr).
[311] G. Burr Second WS, ¶ 24, **CWS-7**.
[312] G. Burr Second WS, ¶ 23, **CWS-7**.
[313] G. Burr Second WS, ¶ 24, **CWS-7**.
[314] Tr. (ENG) Day 2, 435:7-435:20 (G. Burr).
[315] Tr. (ENG) Day 2, 424:3-10 (G. Burr).

Machine Lease Agreements[316] between E-Games and those companies.[317] As a result, the Claimants were exposed to the performance of E-Games through their majority shareholding in the Juegos Companies.

241. Based on the foregoing, the Tribunal is satisfied, on the preponderance of the evidence, that the Claimants *de facto* controlled E-Games at all relevant times.

(c) Operadora Pesa

242. The Claimants own no shares in Operadora Pesa. The Respondent submits that, even if the Claimants did at all relevant times control Operadora Pesa (which it does not concede), the Tribunal would still have no jurisdiction over an Article 1117 claim on its behalf because the Claimants have made no investment in Operadora Pesa.[318]

243. The Tribunal agrees with the Respondent.

244. Article 1101 of the Treaty provides 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 …" Article 1117 requires that the enterprise be owned or controlled by an "*investor*". Article 1139 in turn defines "investor of a Party" as "… a national or an enterprise of such Party, *that seeks to make, is making or has made an investment*."

245. Reading these provisions together, the Claimants must establish that they are "investors" in Operadora Pesa for the Treaty to apply to measures allegedly adopted against Operadora Pesa. For the Claimants to be "investors" in Operadora Pesa, they must show that they seek to make, are making or have made an investment in that company. It is undisputed that they have not. The mere fact that the Claimants may control Operadora Pesa—a point the Tribunal need not decide—would still not make Operadora Pesa an "investment of" the Claimants.

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316 Machine Lease Agreement between E-Games and JyV Mexico, 9 December 2009, Clause 3, **C-52**; Machine Lease Agreement between E-Games and JVE Centro, 10 December 2009, Clause 3, **C-53**; Machine Lease Agreement between E-Games and JVE Sureste, 9 December 2009, Clause 3, **C-54**; Machine Lease Agreement between E-Games and JVE Mexico, 9 December 2009, Clause 3, **C-55**; Machine Lease Agreement between E-Games and JVE DF, 9 December 2009, Clause 3, **C-56**.

317 E. Burr First WS, ¶ 40, **CWS-2**.

318 Reply, ¶¶ 240-243.

246. Article 1117 cannot be read as allowing the nationals of one NAFTA Party to pursue Treaty claims on behalf of an enterprise of another NAFTA Party if they cannot show to have an investment in that enterprise. If the Claimants were right, it might be possible, for example, for a Mexican company to appoint a US national as its sole director and for that director then to pursue claims under the Treaty on behalf of the Mexican company against Mexico, claiming that she need not be an "investor" herself to pursue such Treaty claim if she exercises *de facto* control. That proposition runs counter not only to the terms of Chapter 11, but also to its fundamental object and purpose, which is the protection of investments by investors of another NAFTA Party.

247. For the foregoing reasons, the Tribunal dismisses the Claimants' claim under Article 1117 insofar as it pertains to Operadora Pesa.

2. Article 1121: have the Mexican Companies given consent in accordance with Article 1121?

248. Article 1121(2) requires that the Mexican Companies have consented to Treaty arbitration and waived the right to pursue domestic proceedings. As explained above, Article 1121(3) required their consent to be conveyed in a certain manner.

249. The Respondent objects that: (i) the Juegos Companies did not consent, or at least did not consent until 5 August 2016, when the relevant POAs were submitted by Quinn Emanuel;[319] and (ii) there is insufficient proof of consent by E-Games where the Respondent received on 24 October 2014 a letter purportedly sent on behalf of E-Games stating that it was "desisting from" the Notice (referred to as the ***desistimiento***).[320]

250. The Claimants submit that: (i) the Juegos Companies validly consented as the consents were signed by a member of the Board, Pelchat, who had full authority to execute such waivers;[321] (ii) the submission of the Juegos Companies' consents on 5 August 2016 did not change the date of the submission of the claim to arbitration—15 June 2016—

[319] Memorial, ¶ 131.
[320] Memorial, ¶ 130.
[321] Counter-Memorial, ¶ 462.

as it was a matter of admissibility that could be subsequently cured;[322] and (iii) the *desistimiento* had no effect on the validity of E-Games's consent.[323]

251. The Tribunal will address the objection first as it pertains to the Juegos Companies; then as it pertains to E-Games.

(a) The Juegos Companies

252. The chronology surrounding the submission of the POAs of the Juegos Companies is undisputed. On 6 July 2016, the Centre wrote to the Claimants, requesting "copies of the Mexican Companies' written consent to arbitration" and "copies of the waivers issued by the Mexican Companies".[324] The Claimants then admitted, in a reply letter to the Centre on 21 July 2016, that "because Claimants do not have board control of the Juegos Companies, they are not at moment in a position to provide the requested affirmation."[325] As Claimants explained then, this was because Chow and Pelchat, who had been elected to the Boards of the Juegos Companies on 29 August 2014,[326] still refused to step down at the time of the filing of the Request.[327]

253. Eventually, on 5 August 2016, the Claimants sent a letter to the Centre, attaching POAs from the Juegos Companies signed by Pelchat, who was then a member of the Board of the Juegos Companies, albeit one who had overstayed his welcome. Nonetheless, Pelchat had the power to "submit [the company] to arbitration" pursuant to POAs granted by the shareholders of each of the Juegos Companies when Pelchat was elected to their Boards.[328]

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322 Counter-Memorial, ¶ 468.

323 Counter-Memorial, ¶¶ 472-490.

324 Letter from ICSID to the Claimants, 6 July 2016, p. 2.

325 Letter from the Claimants to ICSID, 21 July 2016, p. 13.

326 Notarised Minutes of the General Shareholders Meeting of JVE Sureste held on 29 August 2014 (notarised on 10 September 2014), p. 32, **C-36**; Notarised Minutes of the General Shareholders Meeting of JVE Centro held on 29 August 2014 (notarised on 10 September 2014), p. 32, **C-37**; Notarised Minutes of the General Shareholders Meeting of JVE DF held on 29 August 2014 (notarised on 10 September 2014), p. 33, **C-38**; Notarised Minutes of the General Shareholders Meeting of JVE Mexico held on 29 August 2014 (notarised on 10 September 2014), p. 31, **C-39**; Notarised Minutes of the General Shareholders Meeting of JyV Mexico on 29 August 2014 (notarised on 4 September 2014), p. 32, **C-40**; G. Burr First WS, ¶¶ 52-54, **CWS-1**; Chow WS, ¶ 15, **CWS-11**; Pelchat WS, ¶ 10, **CWS-4**; Gutierrez First WS, ¶ 30, **CWS-3**.

327 Letter from the Claimants to ICSID, 21 July 2016, p. 9. *See also* Pelchat WS, ¶ 16, **CWS-4**; Chow WS, ¶ 27, **CWS-11**.

328 Notarised Minutes of the General Shareholders Meeting of JVE Sureste held on 29 August 2014 (notarised on 10 September 2014), p. 33, **C-36**; Notarised Minutes of the General Shareholders Meeting

254. It is clear from the foregoing that, at the time the Request was filed with the Centre, the Claimants did not have *de facto* control over the Juegos Companies and that this was the reason why they were unable to procure POAs from the Juegos Companies at that time. It is equally clear that when on 5 August 2016 the POAs were submitted, the Claimants had recovered that *de facto* control.

255. The POAs for the Juegos Companies are not only prospective in nature. They also ratify all steps taken previously by Quinn Emanuel on the Juegos Companies' behalf in connection with this arbitration, including the filing of the Request.[329] No suggestion has been made, and certainly no evidence has been presented to establish, that, as a matter of Mexican (or any other applicable) law, the Juegos Companies could not so ratify all prior actions by their agent, including the acceptance of the Respondent's offer to arbitrate; or that such ratification could not produce its effects *ex tunc*, as at the time of the ratified act.

256. The Tribunal therefore concludes that the Juegos Companies have consented to arbitration as required by Article 1121(2) and that their consent was effective as of the date the Request was filed.

257. While the POAs were submitted some 7 weeks after the Request was filed and were therefore not "included in the submission of a claim to arbitration" as required by Article 1121(3), the Tribunal has already observed that that requirement goes to admissibility and that a defect in this regard can be cured—as indeed here it was.

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of JVE Centro held on 29 August 2014 (notarised on 10 September 2014), p. 32, **C-37**; Notarised Minutes of the General Shareholders Meeting of JVE DF held on 29 August 2014 (notarised on 10 September 2014), p. 34, **C-38**; Notarised Minutes of the General Shareholders Meeting of JVE Mexico held on 29 August 2014 (notarised on 10 September 2014), p. 31, **C-39**; Notarised Minutes of the General Shareholders Meeting of JyV Mexico on 29 August 2014 (notarised on 4 September 2014), p. 32, **C-40**. *See also* Counter-Memorial, ¶ 458.

[329] Letter from the Claimants to ICSID, 5 August 2016, Annex A, pp. 2, 6, 10, 14, 18 ("This Power of Attorney extends to all actions taken before the date of this Power of Attorney by Messers. Orta, Urquhart, Salinas-Serrano, and Bennett to initiate and represent the Company in an arbitration pursuant to the NAFTA against the United Mexican States, including, without limitation, the filing of a certain Application for Access to the Additional Facility and Request for Arbitration, filed before the International Centre for Settlement of Investment Disputes on June 15, 2016") and pp. 3, 7, 11, 15, 19 ("This Waiver is effective as of June 15, 2016, the date on which the Company filed a certain Application for Access to the Additional Facility and Request for Arbitration before the International Centre for Settlement of Investment Disputes and shall remain in full force and effect from that date forward".)

(b) E-Games

258. The Respondent's objection as regards consent by E-Games is not based on the belatedness of the relevant POA.[330] Rather, the Respondent alleged in its Memorial that E-Games purportedly withdrew "as an enterprise on whose behalf a claim would be brought under the [Notice]", thus casting doubt on whether it ever consented.[331] The Respondent based this contention on a document, the *desistimiento*, signed by a Mr. José Luis Cárdenas Segura (***Segura***).[332] The Respondent has not pressed the point, never returning to it in any of its pleadings after its initial memorial, save for a brief mention in the Reply in a different context—as evidence that the Claimants refused to participate in negotiation discussions.[333]

259. The Claimants contend in response that Segura manifestly did not have the authority to sign the *desistimiento*; it was done unbeknownst to the Claimants; it was the result of a fraud perpetrated against them; and those circumstances render the *desistimiento* a document without any legal effect.[334] The Claimants also argue that E-Games does not have "standing as an investor under NAFTA to pursue claims on its own behalf" and therefore has no "authority to withdraw or desist from claims advanced on its behalf by the Claimants" under Article 1117.[335]

260. The Tribunal has carefully reviewed the record relating to this matter. It finds that, on the preponderance of the evidence, the following facts have been established.

    a. Segura started working at E-Games in 2009 in his first job as a lawyer.[336] In May 2014, Segura was asked to leave E-Games after the closure of the casinos in April 2014.[337] On 10 October 2014, after Mexico initiated investigations against the Claimants for alleged illegal gambling activities (the ***PGR Investigation***), Chow met with Gutiérrez to discuss their legal strategy. Chow asked Gutiérrez to hire

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330 In the case of E-Games, the relevant POA was submitted slightly late, on 21 July 2016. It is uncontroversial however that this was the result of mere oversight. To the extent this was technically inconsistent with the requirement of Article 1121(3), the Tribunal is satisfied that the resultant ground for inadmissibility was properly cured.

331 Memorial, ¶ 130.

332 *Desistimiento* letter, 24 October 2014, **R-005**.

333 Reply, ¶ 44.

334 Counter-Memorial, ¶¶ 473-491.

335 Claimants' PHB, ¶ 140.

336 Tr. (ENG) Day 4, 823:10-13 (Segura).

337 Tr. (ENG) Day 4, 819:14-820:7 (Segura).

Segura to assist with the defence against these investigations.[338] Gutiérrez asked Chow to confirm this discussion in writing.[339] At this time, Segura apparently continued to hold a valid power of attorney by E-Games that authorized him to act on their behalf in respect of certain limited matters despite no longer working for E-Games.[340]

b. On 12 October 2014, Chow sent an email to Gutiérrez, copying Gordon Burr, confirming their discussion regarding the hiring of Segura.[341] That same day or the following day, Gutierrez spoke with Burr on the phone. Burr, as President of the Board of E-Games, approved the hiring of Segura to assist with the PGR Investigation. Gordon Burr did not give Segura any other authorisation or instruction.[342]

c. Shortly after, in mid-October 2014, a lawyer by the name of Noriega, called Segura and asked for his help in ongoing efforts to reopen the casinos.[343] Segura had only had limited previous interactions with Noriega but knew Noriega as a lawyer who "occasionally" provided advice to E-Games.[344] Noriega asked Segura to work with Chow's attorney, a man named Ramírez, in these efforts to reopen the casinos.[345] Noriega also told Segura that the Claimants were aware of these efforts.[346]

d. Two or three days after the call, Noriega met with Segura. Present at the meeting were Noriega, Ramírez, a man by the name of Santillán, and another person whose name Segura could not recall.[347] Santillán was allegedly a "former SEGOB official … who owns a company in the casino business in Mexico called Producciones Móviles."[348] Producciones Móviles allegedly received a gaming permit under virtually identical circumstances as E-Games: "first as an

338 Gutierrez First WS, ¶¶ 40-41, **CWS-3**.
339 Gutierrez First WS, ¶ 42, **CWS-3**.
340 Tr. (ENG) Day 4, 831:2-15 (Segura).
341 Gutierrez First WS, ¶ 42, **CWS-3**.
342 G. Burr First WS, ¶¶ 64-65, **CWS-1**; Gutiérrez First WS, ¶ 42, **CWS-3**.
343 Jose Luis Cardenas Segura Witness Statement (***Segura WS***), ¶ 9, **CWS-5**; Tr. (ENG) Day 4, 814:14-815:21 (Segura).
344 Segura WS, ¶ 9, **CWS-5**; Tr. (ENG) Day 4, 822:21-823:9 (Segura).
345 Segura WS, ¶ 9, **CWS-5**.
346 Segura WS, ¶ 9, **CWS-5**; Tr. (ENG) Day 4, 834:13-835:2 (Segura).
347 Segura WS, ¶ 11, **CWS-5**.
348 Gutierrez First WS, ¶ 49, **CWS-3**.

independent operator under E-Mex's permit, then as an independent permit holder pursuant to a SEGOB resolution in late 2012."[349]

e. At the meeting, Noriega made representations that new shareholders might buy out the US shareholders in the Juegos Companies in order to allow the casinos to reopen, and asked for Segura's help in this regard.[350] He also represented that "all those involved" knew of these efforts, which Segura assumed included the Claimants.[351] Ramírez called Gutiérrez and put him on the phone with Segura, and Gutiérrez and Segura briefly discussed the PGR Investigation, but not the NAFTA claim.[352] This phone call further led Segura to believe that the Claimants knew of these apparent efforts to reopen the casinos since Gutiérrez was the Claimants' attorney.[353] The meeting ended with Noriega telling Segura that he would have to sign some documents necessary for the reopening of the casinos at the next meeting. Noriega showed him one such document, where E-Games purported to accept SEGOB's declaration of the invalidity of E-Games' independent gaming permit (the ***allanamiento***).[354]

f. On 24 October 2014, Noriega asked to meet Segura again to sign the documents. Noriega did not tell Segura about the contents of the documents, only that they were necessary for the reopening of the casinos.[355] When Segura arrived at the meeting at Santillán's offices, Alfredo Moreno, who used to be Segura's "boss" at E-Games, was in the waiting room.[356] However, they did not have a conversation other than an exchange of greetings.[357] The secretary ushered Segura into a meeting room, and asked Segura to sign several documents.[358] One of them turned out later to be the *allanamiento* and the other turned out to be the *desistimiento*.

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349 Gutierrez First WS, ¶ 49, **CWS-3**; Counter-Memorial, ¶ 103.
350 Segura WS, ¶ 12, **CWS-5**; Tr. (ENG) Day 4, 822:7-16.
351 Tr. (ENG) Day 4, 834:13-835:2 (Segura); Segura WS, ¶ 13-14, **CWS-5**.
352 Segura WS, ¶¶ 15-16, **CWS-5**; Gutierrez First WS, ¶¶ 43-44, **CWS-3**.
353 Segura WS, ¶ 15, **CWS-5**; Tr. (ENG) Day 4, 816:18-817:2 (Segura).
354 Segura WS, ¶ 17, **CWS-5**.
355 Segura WS, ¶¶ 18-19, **CWS-5**; Tr. (ENG) Day 4, 842:19-843:3 (Segura).
356 Segura WS, ¶ 20, **CWS-5**.
357 Tr. (ENG) Day 4, 836:19-837:3, 845:14-846:13 (Segura).
358 Segura WS, ¶ 20, **CWS-5**.

g. Segura testified at the hearing that while he was working at E-Games "it was quite common to sign a lot of documents very rapidly" and that he "often signed [] documents without reading them or reviewing them."[359] Segura further testified that he signed the documents as he "trusted" Noriega.[360] In relation to the *desistimiento*, Segura testified that he was not able to read the contents of the document because the secretary did not let go of it.[361] He was only able to see that it was for the Ministry of Economy.[362] After signing the documents, Segura was not given a copy of the documents, nor did he submit it to the Ministry of Economy.[363] The Ministry also never contacted Segura regarding this document, whether to acknowledge receipt or to ratify it.[364] Segura, suspicious of the pressure he was being subjected to sign the documents without review, testified that he deliberately altered his normal signature in the event this issue came back to haunt him.[365] Segura further testified that Noriega did not contact him again after this.[366]

h. On the same day, i.e. 24 October 2014, both the Claimants and the Respondent agree, the Ministry of Economy received the *desistimiento* signed by Mr. Segura.[367] Ms. Martínez testified that, at the time, she "most likely [] was thinking that this was something related to the litigation with the [casino operation] permit" and "saw this [as something] separate from the arbitration".[368] On 5 November 2014, Ms. Martínez sent an email to Ms. Menaker, a partner at White & Case, following up on the "NOI Questionnaire" sent on 24 July 2014.[369] Her email made no mention of the *desistimiento*. On 18 November 2014, Ms. Menaker responded to Ms. Martínez, stating "I don't have any additional information to

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359 Tr. (ENG) Day 4, 844:6-15 (Segura).
360 Tr. (ENG) Day 4, 825:15-21 (Segura).
361 Tr. (ENG) Day 4, 850:5-851:5 (Segura).
362 Segura WS, ¶ 24, **CWS-5**.
363 Segura WS, ¶ 25, **CWS-5**, Tr. (ENG) Day 4, 843:4-10 (Segura).
364 Segura WS, ¶ 25, **CWS-5**; Tr. (ENG) Day 4, 844:16-20 (Segura).
365 Segura WS, ¶¶ 28-29, **CWS-5**.
366 Tr. (ENG) Day 4, 826:3-11 (Segura).
367 Counter-Memorial, ¶ 106; Memorial, ¶ 22.
368 Tr. (ENG) Day 1, 280:14-282:9, 283:1-3 (Martinez).
369 Email exchange between Ms. Menaker and Ms. Martinez, **R-004**.

provide right now. If the client decides to pursue the claim, I will get in touch with you."[370]

i. In April 2015, after regaining access to SEGOB's files, Gutiérrez discovered several unauthorized documents with Segura's signature, including the *allanamiento* and *desistimiento*.[371] Neither Burr nor Gutiérrez knew of these documents, so they approached Segura. Segura explained the facts surrounding the signing of the documents, including the *desistimiento*, to Burr and Gutiérrez.[372] Segura testified at the hearing that this was the first time he had spoken to anyone from E-Games about the signing of the documents.[373]

j. On 13 July 2016, Gutiérrez met with Vejar (Director of Consulting and Negotiations) from the Ministry of Economy. According to Gutierrez, Vejar told him that the Ministry doubted the validity of the *desistimiento*, which is why they did not respond to it nor did they issue an official resolution acknowledging its receipt.[374]

261. This record suggests that the provenance of the *desistimiento* was dubious and that Segura may have been used as a pawn in a scheme to which the Claimants were not privy. Whether those circumstances would prevent the *desistimiento* from having legal effect vis-à-vis the Respondent as a matter of Mexican law remains an open question. No evidence of the relevant Mexican law on this point was proffered.

262. The Tribunal, however, need not resolve that question to dispose of the Respondent's objection. That objection fails on the terms of the *desistimiento* and the terms of the Treaty—even if it is assumed that it did have legal effect under Mexican law:

a. First, E-Games is not a party to this proceeding. It could not withdraw a claim it did not submit to arbitration. Only the Claimants could do so. Therefore, the effect of the *desistimiento* could not be the withdrawal of the Article 1117 claim.

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370 Email from Ms. Menaker to Ms. Martinez, 18 November 2014, **R-004**.

371 Gutierrez First WS, ¶ 48, **CWS-3**; G. Burr First WS, ¶ 66, **CWS-1**.

372 Gutierrez First WS, ¶ 49, **CWS-3**; G. Burr First WS, ¶ 68, **CWS-1**.

373 Tr. (ENG) Day 4, 826:12-16 (Segura).

374 Gutiérrez First WS, ¶ 50, **CWS-3**.

b. Second, the stated object of the *desistimiento* is *not* the withdrawal of the Article 1117 claim—the claim had not yet been submitted at the time of the *desistimiento*. Rather, the *desistimiento* purports to inform the Respondent that E-Games is "desisting" from the *Notice*—the notice of intent—issued on its behalf. Accordingly, E-Games would, at most, have "desisted" from the Notice.

c. But third, E-Games could not even do that because it did not issue the Notice. At most, in the *desistimiento* E-Games would have informed the Respondent that it did not, in fact, *intend to* consent to the submission of an Article 1117 claim on its behalf.

263. This is also how the Respondent appears to have deployed the *desistimiento* in this proceeding: as evidence of E-Games's refusal to consent to arbitration. But that proposition cannot prosper. The Claimants have produced a POA for E-Games that confirms its consent to this arbitration. Even if the effect of the earlier *desistimiento* were that the Notice should be read to exclude E-Games from its scope (because E-Games "desisted" from that Notice), that could not undo the subsequent confirmation by E-Games of its consent under Article 1121(2) to the submission of the Article 1117 claim on its behalf.

264. Instead, put at its highest, the *desistimiento* would give rise to a defect under Article 1119: effectively the Notice would not have been sent on behalf of E-Games, even though later a claim was submitted on its behalf. The Tribunal would dispose of that defect as it did in respect of the Additional Claimants.

VI. COSTS

265. On 1 October 2018 the parties submitted their statements of costs incurred in connection with this phase of the proceeding. Pursuant to Procedural Order No. 4, the parties' statements were divided into four categories: (a) attorney fees; (b) expert fees; (c) share of each party's advance requested by ICSID to cover the arbitration costs;[375] and (d) any other arbitration-related disbursements incurred in connection with this phase. The Claimants claim a total of US$ 8,453,600.11. The Respondent claims a total of US$ 1,699,362.40.

266. The Tribunal defers its decision regarding category (c) above—arbitration costs incurred in connection with this phase—to the final award in this proceeding. Below the Tribunal proceeds to apportion categories (a), (b) and (d) above—legal costs incurred in connection with this phase.

267. The Tribunal has wide discretion under the Additional Facility Rules to apportion legal costs. Absent contrary agreement by the parties, the guiding principle should be that costs follow the event.

268. At first blush, application of that principle in this case should favour the Claimants: they did defeat the Respondent's objections save insofar as Operadora Pesa is concerned.

269. There are a number of reasons, however, why application of the principle in this case does not warrant an award of all—or even the majority—of the Claimants' legal costs.

270. First, the Tribunal observes that the Claimants' legal costs are more than 580% of the Respondent's legal costs, even though the Respondent's legal team displayed the same level of professional competence, effectiveness, integrity and courtesy as the Claimants' legal team. Part of that discrepancy may be explained by the fact that the Respondent's legal team was hybrid in composition, including both in-house counsel

[375] The arbitration costs include the (i) fees and expenses of the Tribunal, (ii) the Centre's administrative fees, and (iii) any other direct expenses of the proceeding. As of the date of the parties' statements on costs (i.e. 1 October 2018), the two advance payments requested by the Centre to cover the arbitration costs amounted to US$300,000 per party. The Centre requested a third advance payment of US$150,000 per party on 30 April 2019. The Centre received Claimants' share of the third advance payment on 28 May 2019. The Respondent's payment was received on 5 July 2019. The third advance payment requested by the Centre is not reflected in the parties' statements on costs.

from the Government and external lawyers from Mr. Mowatt's firm. To fix a benchmark for reasonable legal costs that can be awarded relating to this phase, the Tribunal will therefore take the amount of legal costs incurred by the Respondent and multiply it by two, to US$ 2,798,724.8.

271. Second, a number of factors militate against an award of 100% of that reasonable amount of legal costs:

a. First, the Respondent was successful in its Article 1117 objection regarding Operadora Pesa.

b. Second, the Tribunal recognises that the Respondent's objections were not frivolous. Issues 2 and 3 in particular raised questions of law that remain largely unsettled.

c. Third, while they were ultimately largely victorious, the Claimants could have avoided all debate for some of these objections and much of the debate for others, if they had: served a fully compliant Notice; observed all applicable corporate formalities at the Juegos Companies, such as holding annual *asambleas* as required by law and the by laws of those companies;[376] and adduced from the outset all of the requisite evidence to prove their control of the Mexican Companies.

d. Fourth, the Tribunal places particular weight on the Claimants' failure to file a fully compliant Notice, not only because it would have avoided the Respondent's objection under Article 1119 but it could have significantly narrowed the issues in dispute relating to the Respondent's Article 1122 objection: had the Additional Claimants been included in the Notice, the Claimants would not have been required, as they were, to hedge their Article 1117 defence by trying a difficult case that the Original Claimants had, in June 2016, *de facto* control over the Juegos Companies.[377]

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[376] Tr. (ENG) Day 3, 614:17-21 (Gutierrez); Day 4, 895:19-896:10 (Ayervais).

[377] Counter-Memorial, ¶¶ 170, 230; Rejoinder, ¶ 74.

272. Based on the foregoing, the Tribunal awards the Claimants 50% of US$ 2,798,724.8, i.e., US$ 1,399,362.40, in connection with the legal costs they incurred in this phase.

VII. DISPOSITIF

273. For the reasons set out above, the Tribunal:

a. Dismisses the Respondent's objection based on Article 1121 of the Treaty in respect of the Claimants and the Mexican Companies;

b. Dismisses the Respondent's objections based on Articles 1119 and 1122 of the Treaty in respect of the Additional Claimants and Operadora Pesa;

c. Grants the Respondent's objection based on Article 1117 of the Treaty in respect of Operadora Pesa;

d. Dismisses the Respondent's objection based on Article 1117 of the Treaty in respect of the Mexican Companies other than Operadora Pesa;

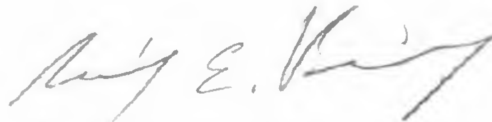
e. Decides accordingly that it has jurisdiction over the claims by the Claimants on their own behalf under Article 1116 of the Treaty and on behalf of the Juegos Companies and E-Games under Article 1117 of the Treaty, and that those claims are admissible;

f. Awards the Claimants US$ 1,399,362.40 in legal costs, payable by the Respondent within sixty (60) days from the date of this Partial Award; and

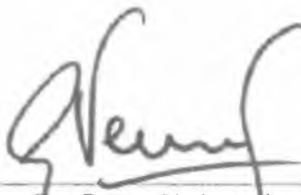
g. Directs the Parties to confer regarding a procedural timetable for the merits phase and to report to the Tribunal regarding the same by 15 August 2019.

Seat of arbitration: Toronto, Canada

Prof. Gary Born
Arbitrator
Date 2 JULY 2019



Prof. Raúl Emilio Vinuesa
Arbitrator
Subject to the partial dissenting opinion attached
Date 6 JULY 2019



Dr. Gaëtan Verhoosel
President of the Tribunal
Date: 28 JUNE 2019

Partial Dissenting Opinion
Arbitrator Raúl 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."

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[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.*

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[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.

I.A.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.

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[8] Partial Award, ¶ 75.

[9] *Id.*, ¶ 79.

[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

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[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 "*notificará.*"

35. The ordinary meaning of "shall deliver […] [a] notice" ("*notificará*" 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" ("*notificará*" 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" ("*notificará*" 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.

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[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.,* ¶ 140.

[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.

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[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 prejudges 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.*, ¶ 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 uttile* 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

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[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 <u>and due process before an impartial tribunal.</u>" (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

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[37] *Id.*, ¶ 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

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[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] "It 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

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[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

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[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 relay 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

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[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.

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[53]Submission 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 prejudge 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 prejudge 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 prejudge 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,

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[56] Partial Award, ¶ 264.

[57] *Id.,* ¶¶ 147-148.

[58] *Id.,* ¶¶ 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

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[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 *nulidad 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

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[62] Transcript (Spanish version), Hearing on Jurisdiction, Day 5, Statement by Respondent's Expert René 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.

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[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 Pezol 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]

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[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.

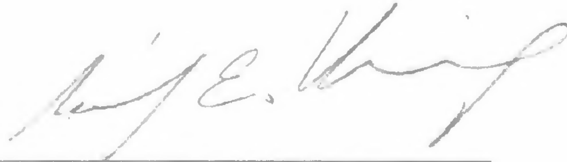
[77] *Id.,* ¶¶ 237 *et seq*. *Conf.* Claimants' Post-Hearing Brief, 17 August 2018, Annex 2.

[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. Raúl Emilio Vinuesa
Arbitrator
Date: 6 JULY 2019