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

B-MEX AND OTHERS
(CLAIMANTS)

v.

THE UNITED MEXICAN STATES,
(RESPONDENT)

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

MEMORIAL ON JURISDICTIONAL OBJECTIONS

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30 May 2017

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GLOSSARY

Mexican Enterprises	Refers to: - Juegos de Video y Entretenimiento de México, S. de R.L., - Juegos de Video y Entretenimiento del Sureste, S. de R.L., - Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V., - Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V., - Juegos y Video de México, S. de R.L de C.V., - Exciting Games, S. de R.L. de C.V., (also referred to as EGames) - Operadora Pesa, S. de R.L. de C.V., - Metrojuegos, S. de R.L. de C.V., and - Merca Gaming, S. de R.L. de C.V.
Additional Mexican Enterprises	Refers to the Mexican companies not mentioned in the NOI, namely: - Operadora Pesa, S. de R.L. de C.V., - Metrojuegos, S. de R.L. de C.V., and - Merca Gaming, S. de R.L. de C.V.
Juegos Companies	Refers to: - Juegos de Video y Entretenimiento de México, S. de R.L. de C.V.; - Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V.; - Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V.; - Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V.; and - Juegos y Videos de México, S. de R.L. de C.V.
Original Claimants	Refers to the eight Claimants who filed the NOI dated 23 May 2014: - B-Mex, LLC, - B-Mex II, LLC, - Palmas South, LLC, - Oaxaca Investments, LLC, - Santa Fe Mexico Investments, LLC, - Gordon Burr, - Erin Burr, and - John Conley
Additional Claimants	Refers to the 31 Claimants whose name do not appear in the NOI, namely:

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

NOI or Original NOI Refers to the Notice of Intent submitted on 23 May 2014.

NOI Questionnaire Refers to the letter, sent by Ms. Martínez, then "*Directora General Adjunta de Consultoría Jurídica de Comercio Internacional B*" (Deputy General Director of International Trade B) at the Ministry of Economy, to Ms. Menaker on 24 July 2014 seeking clarification of the NOI.

RFA Request for Arbitration dated 15 June 2016.

RICO Claim A civil action commenced in the United States District Court for the District of Colorado by the Claimants (except for B-Cabo LLC and Colorado Cancun, LLC) against Jose Benjamin Chow del Campo, Luc Pelchat and Alfonso Rendon Abud, alleging various violations of the Federal Racketeering Influenced and Corrupt Organizations Act (RICO) and Colorado Organized Crime Control Act (COCCA), common law

	fraud, civil theft, and conversion in connection with alleged fraudulent deprivation of title and control of the Juegos Companies.
Amended NOI	Refers to the Amended Notice of Intent dated 2 September 2016 (received on 5 September 2016).
White & Case Letter	Refers to the letter dated 16 January 2013 from Ms. Menaker of White & Case.

I. Introduction

1. The Respondent has five grounds of objection to the Tribunal's competence to decide this claim on the merits, which it hereby submits for determination as preliminary questions pursuant to Article 45(2) of the ICSID Arbitration (Additional Facility) Rules and paragraph 14.2 of Procedural Order No. 1 ("PO-1").[1]

2. The first two grounds of objection pertain to the Claimants' failures of compliance with Articles 1119 and 1121 of the North America Free Trade Agreement ("NAFTA") that were the subject of Mexico's challenge to registration of the claim. These objections rely on interpretation and application of the relevant provisions of NAFTA Chapter Eleven in light of the Claimants' actions and omissions in attempting to submit this claim to arbitration.

3. The other three grounds of objection arise from the Claimants' failure to establish in the Notice of Intent to Submit a Claim to Arbitration ("Original NOI") or in the Request for Arbitration ("RFA"): (i) that any of the 39 claimants has standing to submit a claim to arbitration under NAFTA Article 1116; (ii) that any one or more of the Claimants have standing to submit a claim on behalf of any of the Mexican Enterprises[2] under NAFTA Article 1117; and (iii) that the purported consents and waivers belatedly submitted on behalf of the Mexican Enterprises are legally valid.

Failures of compliance with NAFTA Articles 1119 and 1121

4. Having read the disputing parties' submissions in connection with the Respondent's challenge to registration of the claim, the Tribunal will be familiar with the nature of the Respondent's objection to the jurisdiction of the Tribunal based on failures of compliance with NAFTA Articles 1119 and 1121. The Respondent submits that, according to the clear meaning of the relevant treaty text, both of these provisions are mandatory requirements for any claimant seeking to submit a claim to arbitration under Section B **(**Settlement of Disputes between a Party and an Investor of Another Party) of NAFTA Chapter Eleven. The Respondent has already explained in some detail – and will elaborate here – why the Claimants' failure of compliance resulted in failure to engage the Respondent's consent to arbitration, in addition to rendering the

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[1] In its response to the Claimants' filing of a purported 'Amended Notice of Intent' after the claim was registered by the ICSID, the Respondent made the following reservation of rights which it reiterates and relies on here:

"El uso por parte de la Demandada de los términos "Demandantes" y "Demandada" y/o la designación de un árbitro y/o la toma de medidas necesarias para defender esta reclamación no debe entenderse como que ha otorgado su consentimiento a arbitrar esta controversia, o como su aprobación al incumplimiento de las Demandantes con el Artículo 1119 y/o el Artículo 1121 del TLCAN, o como su aceptación de que el periodo de prescripción ha sido suspendido ("tolled"), extendido o pospuesto.

El Gobierno de México se reserva todos sus derechos y remedios, incluido (sin limitación) el derecho a impugnar la validez de un sometimiento a arbitraje de una reclamación en masa ("mass claim") o una reclamación única por múltiples demandantes en las circunstancias de este caso, así como la validez de los presuntos consentimientos y desistimientos presentados tardíamente a nombre de las empresas mexicanas."

[2] Please refer to the glossary for a definition of the term "Mexican Enterprises".

request for arbitration *void ab initio*, thus depriving the Tribunal of jurisdiction to decide the claim on the merits.

5. Notwithstanding the Respondent's immediate and explicit objection to the Claimants' failures of compliance, the Claimants have resolutely pressed ahead, stridently contending, *inter alia*, that NAFTA Articles 1119 and 1121 are merely procedural requirements that need not be strictly observed in circumstances where, in the case of Article 1119, it can be established that it would have been "futile" for the Additional Claimants to have attempted to engage in consultations, and in the case of NAFTA Article 1121, that the "Power of Attorney" submitted by each Claimant suffices to satisfy Article 1121(1), or that the act of counsel filing the RFA on the Claimants' behalf suffices as compliance with Article 1121(1).[3]

6. The Claimants' failures of compliance with Articles 1119 and 1121 are unprecedented. To the Respondent's knowledge, in the 59 NAFTA Chapter Eleven claims that have been submitted to arbitration since NAFTA's entry into force in 1994[4], no claimant or group of claimants has omitted to notify the disputing NAFTA Party of the names and addresses of the intended claimants as required by NAFTA Article 1119, nor has any claimant or group of claimants failed to submit a consent to arbitration in the terms required by NAFTA Article 1121. The reason, no doubt, is that these provisions are clearly worded and are supplemented by the Statement of the Free Trade Commission on notices of intent to submit a claim to arbitration.[5] It is not a difficult process to understand or implement.

7. Yet, despite having two full years after filing the Original NOI to perfect their claim, the Claimants would have the Tribunal relieve them of the consequences of their failure to deliver a notice of intent that included the names and addresses of all intended claimants, and the failure of each of them and the Mexican Enterprises to execute and deliver a simple document stating "I consent to arbitration of the within claim in accordance with the procedures set out in the North American Free Trade Agreement". The Claimants' position would render meaningless the express language of NAFTA Articles 1119 and 1121, making them optional procedures rather than mandatory requirements.

8. The Respondent will also address here the main arguments made by the Claimants in prior submissions.[6] For example:

- The Respondent disputes the Claimants' repeated contention that Mexico refused to engage in consultations following delivery of the Original NOI. The record will show that the Respondent made repeated requests for additional information about the claim that went

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[3] Claimants' Response to the United Mexican States' Objection to Claimants' Request for Approval to Access the ICSID Additional Facility and Request for Arbitration in the matter of B-Mex, LLC et al. v. United Mexican States, and Response to ICSID's Questionnaire dated July 6, 2016, of 21 July 2016, p. 12.

[4] See http://investmentpolicyhub.unctad.org/ISDS/FilterByApplicableIia

[5] Exhibit RL-001, Statement of the Free Trade Commission on Notices of Intent to Submit a Claim to Arbitration, dated 7 October 2003.

[6] Failure to address any specific submission should not be taken as an admission of any kind. The Respondent reserves the right to fully address any argument or submission made in the Claimants' Counter-Memorial on jurisdiction.

unanswered for months, and eventually resulted in counsel for the Original Claimants stating that she would advise the Respondent if her clients decided to proceed with the claim. Nothing further was heard from the Original Claimants or their counsel until the Claimants filed their RFA – with 31 additional parties named as claimants – 18 months later.

- The Respondent disputes the Claimants' contention that NAFTA jurisprudence and commentary supports the notion that the Articles 1119 to 1121 establish merely procedural requirements, or that failures of compliance can be later remedied. The *contemporary* decisions and awards, as well as the repeated submissions of all three NAFTA Parties, overwhelmingly support the Respondent's position, *i.e.*, that these are mandatory requirements that must be satisfied in order to *validly* submit a claim to arbitration under Section B of Chapter Eleven, and to thereby engage the responding NAFTA Party's consent to arbitration. Such omissions are fatal and cannot be remedied retroactively.

<u>The Claimants' failure to establish standing under NAFTA Articles 1116 and 1117, and the legal validity of the purported consents and waivers of the Mexican Enterprises</u>

9. It is impossible to determine from the information provided in the Original NOI and the RFA – even on a *prima facie* basis – whether any of the Claimants has standing to assert a claim on his/her/its own behalf under NAFTA Article 1116, or whether any one or more of the Claimants has standing to assert a claim under NAFTA Article 1117 on behalf of any of the Mexican Enterprises. Indeed, both of these questions are addressed in the Statement of the Free Trade Commission on notices of intent to submit a claim to arbitration and in the Respondent's requests for information on the Original NOI (*i.e.*, the NOI Questionnaire[7]) that went unanswered.

10. However, despite the receipt of the White & Case Letter[8], two pleadings (the Original NOI and RFA) and two submissions to the Secretary General in response to Mexico's objection to registration of the claim, the Respondent remains uninformed as to "who owns what" and other very basic information that is necessary to determine whether the Tribunal has jurisdiction *ratione personae*. The Respondent is accordingly driven to conclude that the Claimants have intentionally engaged in obfuscation in order to avoid disclosing flaws in the fundamental underpinnings of their claims.

11. Finally, in the course of applying to register the claim, the Claimants have also cast doubt on the legal validity of the purported consents and waivers filed on behalf of the Juegos Companies.[9] At first, the Claimants told the ICSID Secretariat that it could not provide waivers and consents for these companies because the actions of the Mexican State had forced the Claimants to mitigate their damages, and in the process of doing so, they lost control of the Juegos

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[7] Please refer to the glossary for the definition of the term "NOI Questionnaire".

[8] Please refer to the glossary for the definition of the term "White & Case Letter". The letter is submitted as Exhibit R-001 to this pleading.

[9] Please refer to the glossary for a definition of the term "Juegos Companies".

Companies to unscrupulous third parties.[10] The Claimants stated that they would continue with their efforts to regain control of the Juegos Companies, estimating that it would take them three or four weeks to be in a position to provide the documents.[11] Two weeks later, after the Acting Secretary General advised the Claimants that it could not approve access to the Additional Facility or register the claim as submitted, the Claimants purported to provide consents and waivers executed by Gordon Burr (an original claimant) and an individual named Luc Pelchat, who is not named among the 39 current Claimants and was sued in the RICO Claim.[12]

12. As will be explained below, the Claimants must precisely identify and provide evidence of their individual investments, as defined in NAFTA Article 1139, and identify and establish with evidence which of them "directly or indirectly owns or controls" each of the Mexican Enterprises on whose behalf claims are to be brought under Article 1117. The Claimants also have the burden of proving the legal validity of the purported consents and waivers that were tendered on behalf of the Mexican Enterprises.

Summary

13. In summary, the Respondent will establish that the Claimants' RFA was void *ab initio* for failure to comply with the clearly worded mandatory requirements stipulated by NAFTA Articles 1119 and 1121, and that the Respondent's consent to arbitration has not been engaged. It will be for the Claimants to establish (i) that each of them has at least one "investment" in the territory of Mexico in order to assert standing under NAFTA Article 1116, (ii) that one or more of them has standing to assert a claim under NAFTA Article 1117 on behalf of each the Mexican Enterprises, and (iii) that the waivers and consents of the Mexican Enterprises are legally valid.

14. As a matter of procedural economy, the Tribunal should first decide whether there has been compliance with NAFTA Article 1121. This should be a simple matter of determining: (i) whether the identically worded Power of Attorney submitted by each Claimant and each of the Mexican Enterprises qualifies as a written consent to arbitration in accordance with the procedures set out in the NAFTA, and (ii) whether the Claimants' contention that counsel's act of submitting the RFA pursuant to the authority granted under each Power of Attorney suffices as compliance with Article 1121(3). If the answer to each of these questions is 'no' – as the Respondent submits it must be – the entire claim can be dismissed without the need to resolve the other objections.

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[10] Claimants' Response to the United Mexican States' Objection to Claimants' Request for Approval to Access the ICSID Additional Facility and Request for Arbitration in the matter of *BMex, LLC et al. v. United Mexican States*, and Response to ICSID's Questionnaire dated July 6, 2016, pp. 8-10.

[11] *Id*., pp. 10-11.

[12] Exhibit R-002, RICO Claim - Complaint, ¶ 4. See also, Rejoinder to the United Mexican States' Unauthorized Submission Replying to Claimants' July 21, 2016 Response in Support of their Request for Approval to Access the ICSID Additional Facility and Request for Arbitration in the matter of *B-Mex, LLC et al. v. United Mexican States*, and Response to ICSID's Questionnaire dated July 6, 2016, p. 2 and Annex A.

II. Relevant procedural history

15. On 16 January 2013, the General Directorate of Foreign Investment received a letter from Ms. Andrea J. Menaker of White & Case writing on behalf a group of four companies (B-Mex, LLC, B-Mex II, LLC, Palmas South, LLC, Oaxaca Investments, LLC) and three individuals (Gordon Burr, Erin Burr, and John Conley) who claimed to be "U.S. Investors" that had been adversely impacted by certain Government measures ("White & Case Letter").[13]

16. This group of alleged investors claimed to have an interest in five Mexican companies ("Juegos Companies") which "constructed and own, respectively, the gaming Facilities in Naucalpan, State of Mexico; Villahermosa, State of Tabasco; Puebla, State of Puebla; Mexico City, Federal District; and Cuernavaca, State of Morelos."[14] The group also claimed to hold an "interest" in another Mexican company, Exciting Games, S. de R.L. de C.V. ("EGames") which, according to the letter, managed the operations of the five casinos.

17. On 30 January 2013, representatives of the alleged investors met with officials from the Ministry of the Economy ("Secretaría de Economía", SE) to discuss their concerns, including those raised in the White & Case Letter. On 28 February 2013, a second meeting was held with SE and the Ministry of the Interior ("Secretaría de Gobernación", SEGOB), the government agency that regulates the operation of casinos in Mexico.

18. On 28 August 2013, SEGOB revoked EGames' permit; however, the casinos apparently continued to operate until 24 April 2014, when SEGOB finally closed them.

19. On 23 May 2014, the same group of alleged investors plus an additional U.S. entity (Santa Fe Mexico Investments, LLC) (the "Original Claimants") filed a notice of intent to submit a claim to arbitration (Original NOI). The Original NOI alleged breaches of NAFTA Article 1102 (National Treatment), Article 1103 (Most Favored-Nation Treatment), Article 1105 (Minimum Standard of Treatment) and Article 1110 (Expropriation). The Original NOI also identified six Mexican companies in which the investors allegedly held an "ownership interest" and stated simply that the Claimants intend to submit a claim "on their own behalf and on behalf of several enterprises", without specifying which enterprises would be included in the claim or which of the Original Claimants had standing to submit a claim under NAFTA Article 1117 on behalf of those enterprises. The Original NOI did not include any attachments.

20. On 24 July 2014, the then Deputy General Director of International Trade B of the Ministry of Economy, Ms. Ana Carla Martínez, sent a letter to Ms. Andrea Menaker, then counsel for the

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[13] Exhibit R-001, White & Case Letter. The letter identified the following measures: (i) "large-scale raids" conducted since August 2011 and a closure by the tax administration agency (the "Servicio de Administración Tributaria, SAT), and (ii) alleged discriminatory administrative and judicial measures, including unwarranted delays in the processing of its application to become a permit holder and legal proceedings brought to challenge and invalidate EGames' permit.

[14] According to the Original NOI: Juegos de Video y Entretenimiento de México, S. de R.L. de C.V. was the owner of the Naucalpan Facility; Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. owned the Villahermosa Facility; Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. owned the Puebla Facility; Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. was the owner of the Mexico City Facility; and Juegos y Videos de México, S. de R.L. de C.V. was the owner of the Cuernavaca Facility. See NOI, footnote 2.

Original Claimants, seeking clarification of certain aspects of the Original NOI through a questionnaire ("NOI Questionnaire").[15] The questions were aimed at determining the precise scope and nature of the claims and the standing of the alleged U.S. Investors to submit a claim to arbitration. The questions inquired *inter alia*, which investors had invested in the Juegos Companies and the size of their shareholdings, which investors had an interest in EGames and in what percentage, which of the Mexican enterprises owned the casinos, and what sort of arrangement existed between the Juegos Companies and EGames.

21. On 6 August 2014, having received no response from the alleged U.S. Investors' counsel, Ms. Martínez followed up with Ms. Menaker, who responded six days later acknowledging receipt of the NOI Questionnaire and stating that she was consulting with her client and would revert to Ms. Martinez soon.[16]

22. On 24 October 2014, SE received a letter signed by Mr. José Luis Segura Cárdenas, purporting to withdraw the Original NOI filed on behalf of EGames. Attached to the letter was a notarized power of attorney attesting to Mr. Segura's status as legal representative (*apoderado legal*) of EGames.[17]

23. Having heard nothing from counsel for the alleged U.S. Investors for more than two months, on 5 November 2014, Ms. Martínez contacted Ms. Menaker again to follow up on the NOI Questionnaire. Almost two weeks later, on 18 November 2014, Ms. Menaker wrote back stating "*I don't have any additional information to provide right now. If the client decides to pursue the claim, I will get in touch with you*."[18]

24. The Respondent did not hear from Ms. Menaker or the group of alleged U.S. Investors until 15 June 2016 (*i.e.*, more than 18 months after the last contact with Ms. Menaker) when the original group of investors plus 31 others, now represented by the Quinn Emmanuel law firm, submitted a Request for Arbitration (RFA) to ICSID under the Additional Facility Rules.

25. On 27 June 2016, the Respondent objected to the registration of the claim. The objection was based, *inter alia*, on: the failure of the vast majority of the Claimants to provide a notice of intent at least 90 days prior to the submission to arbitration; failure to identify in the Original NOI three of the Mexican companies on whose behalf a claim was submitted to arbitration under NAFTA Article 1117 (the Additional Mexican Enterprises); and failure to consent to arbitration as required under NAFTA Article 1121.[19]

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[15] Exhibit R-003, NOI Questionnaire, sent on 24 July 2014 (dated 21 July 2014).

[16] Exhibit R-004, Email exchange between Ms. Menaker and Ms. Martínez.

[17] Exhibit R-005, Letter signed by Mr. José Luis Segura Cárdenas waiving the Notice of Intent filed on behalf of EGames (*desistimiento*).

[18] Exhibit R-004, Email exchange between Ms. Menaker and Ms. Martínez.

[19] Respondent's Objection to the registration of the claim, Oficio. No. DGCJCI.511.36.331.2016, dated 27 June 2016.

26. On 6 July 2016, ICSID sent a questionnaire to the Claimants requesting further information regarding the Claimants' consents and waivers.[20]

27. On 21 July 2016, the Claimants submitted a written response to Mexico's objection and to ICSID's questionnaire. Attached to their submission were three annexes marked A through C with: (i) signed consent resolutions of the board of managers of B-Mex, B-Mex II and Palmas South, which the Claimants said were "inadvertently omitted"[21]; (ii) powers of attorney and waivers of four of the nine Mexican entities, also "inadvertently omitted"[22]; and (iii) statements by the Additional Claimants purporting to adopt the Original NOI.[23]

28. In the 21 July submission, the Claimants attempted to justify the failure to name the Additional Claimants in the Original NOI by contending, *inter alia*, that: (i) it would have been futile as Mexico had consistently refused to engage in consultations with the Original Claimants; and (ii) Counsel for the Claimants – who characterized the Additional Claimants as "minority investors" – claimed that it would have served no purpose to name them and expose them to "retaliatory measures" and "harassment" by the Mexican government. In this submission, the Claimants also attempted to argue that they had complied with NAFTA Article 1121 to provide consents to arbitration because: (i) the powers of attorney executed by each claimant were in fact consents to arbitration[24] and (ii) counsel's act of filing the RFA on their behalf amounted to consent to arbitration.[25]

29. With regard to the missing consents and waivers by the Juegos Companies, the Claimants argued that the exception in Article 1121(4) applied because they had lost board control of the Juegos Companies and Mexico was to blame.[26]

30. On 26 July 2016, the Respondent sent an additional communication to ICSID with observations regarding the Claimants' response to the questionnaire sent by ICSID (later referred to by the Claimants as the "Unauthorized Submission").[27]

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[20] ICSID questionnaire, dated 6 July 2016.

[21] Claimants' Response to United Mexican States' Objection to Claimants' Request for Approval to Access the ICSID Additional Facility Rules and Request for Arbitration in the matter of *BMex, LLC et al. v. United Mexican States*, and Response to ICSID's questionnaire, dated July 6, 2016, of 21 July 2016, p. 6. See also Annex A thereto.

[22] *Id.*, p.8. See also Annex B thereto.

[23] *Id.*, p. 11. See also Annex C thereto.

[24] *Id.*, p. 12: "Indeed, Mexico does not explain exactly how or why Claimants' written powers of attorney fail to comply with the text of NAFTA Article 1121, which only requires that a disputing investor's consent be: (1) made in writing; (2) delivered to the State Party; and (3) included in the submission of a claim to arbitration."

[25] *Id.*: "All Claimants, as disputing investors, have consented to arbitrate this dispute with Mexico pursuant to Article 1122(2) by virtue of their submission of the RFA to the Centre…"

[26] *Id.*, pp. 9-11.

[27] Respondent's Reply to Claimants' Response to the Objection, communication Oficio No. DGCJCI·511·36.365.2016, dated 26 July 2016.

31. On 2 August 2016, ICSID informed the Claimants that it was unable to grant access to the Additional Facility and register the claim because the Juegos Companies had not provided their consent to arbitration in accordance with Article 1121(2)(a) of the NAFTA. ICSID offered two choices to the Claimant: (i) to suspend the approval and registration of the claim until the request could be supplemented with the consents, or (ii) withdrawing the claims made on behalf of the Juegos Companies under NAFTA Article 1117.

32. Three days later, on 5 August 2016, the Claimants responded to Mexico's 26 July submission and attached the purported consents (*i.e.*, powers of attorney) and waivers of the Juegos Companies. In this submission, the Claimants reiterated its justification for omitting to include 31 of the RFA claimants in the Original NOI; and its arguments that the Claimants' Powers of Attorney sufficed as written consents to arbitration for the purposes of NAFTA Article 1121.

33. ICSID registered the claim to arbitration on 11 August 2016, reminding the parties that "the registration of the Request for Arbitration is without prejudice to the powers and functions of the Tribunal in regard to competence and the merits."[28]

34. On 2 September 2016, counsel for the Claimants delivered to the Respondent an "Amended Notice of intent to Submit a Claim to Arbitration under Chapter Eleven of the North American Free Trade Agreement" ("Amended NOI") on behalf of all the investors that were included in the RFA, but were not named in the Original NOI. The Amended NOI also included additional claims on behalf of three additional Mexican enterprises (the Additional Mexican Enterprises) that were not notified in the Original NOI.

35. On 19 September 2016, the Respondent wrote to the Secretary General to advise of the filing of the Amended NOI. In the letter, the Respondent rejected any implication that the filing of the Amended NOI satisfied the requirement under Article 1119 for every intended claimant to provide at least 90 days advance notice of intent to submit a claim to arbitration.[29]

36. On 14 February 2017, ICSID notified the disputing parties of the constitution of the Tribunal.

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[28] ICSID Notice of Registration, dated 11 August 2016.

[29] Exhibit R-006, Oficio No. DGCJCI.511.36.427.2016 del 19 September 2016.

III. Relevant provisions of the NAFTA and principles of treaty interpretation

A. Relevant provisions

37. This section reproduces certain provisions in Section B of NAFTA Chapter Eleven that the Respondent considers relevant to its objections to the jurisdiction of the Tribunal. Emphasis has been added to the key passages.

> **Article 1115: Purpose**
>
> Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.
>
> **Article 1116: Claim by an Investor of a Party on Its Own Behalf**
>
> 1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,
>
> and that the investor has incurred loss or damage by reason of, or arising out of, that breach.
>
> 2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.
>
> **Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise**
>
> 1. An investor of a Party, on behalf of an enterprise of another Party <u>that is a juridical person that the investor owns or controls directly or indirectly</u>, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,
>
> and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.
>
> 2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

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

4. An investment may not make a claim under this Section.

Article 1118: Settlement of a Claim through Consultation and Negotiation

The disputing parties should first attempt to settle a claim through consultation or negotiation.

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

The 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, which notice *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.

Article 1120: Submission of a Claim to Arbitration

1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:

(a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;

(b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or (c) the UNCITRAL Arbitration Rules.

2. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.

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

1. A disputing investor may submit a claim under Article 1116 to arbitration *only if*:

(a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and

(b) the investor 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, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

2. 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 before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

3. 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.

4. Only where a disputing Party has deprived a disputing investor of control of an enterprise:

(a) a waiver from the enterprise under paragraph 1(b) or 2(b) shall not be required; and

(b) Annex 1120.1(b) shall not apply.

Article 1122: Consent to Arbitration

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.

2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;

(b) Article II of the New York Convention for an agreement in writing; and

(c) Article I of the Inter-American Convention for an agreement.

B. Interpretation of NAFTA Chapter Eleven

38. The general rule of interpretation in the Vienna Convention on the Law of Treaties requires that a treaty be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[30]

39. The NAFTA is a comprehensive treaty governing a wide range of economic activity, including investment-related disciplines, and its dispute settlement procedures are intricately related to other provisions in the agreement, including those covering trade in services, financial services, monopolies, state enterprises and taxation.[31] As an integral part of the broader free trade agreement, Chapter Eleven must be interpreted in the context of its relationship with the rest of the Treaty.

40. The NAFTA is carefully structured and its terms are applied consistently throughout the agreement. The English version of the NAFTA uses the verb "shall" to indicate a mandatory requirement. In Spanish, the same requirements are established using the corresponding verb in future tense.

41. For example, the substantive obligations of the NAFTA Parties are stated in the following terms in both languages:

English	Spanish
Each Party *shall accord* to investors of another Party treatment no less favorable than	Cada una de las Partes *otorgará* a los inversionistas de otra Parte un trato no menos favorable que el que otorgue, en

[30] *Vienna Convention on the Law of Treaties*, United Nations Treaty Series, Vol. 1155, p. 331 (May 23, 1969), Article 31.

[31] Some examples of the inter-relationship between Chapter Eleven and other NAFTA Chapters are as follows:

- Article 1110 (Scope and Coverage) expressly excludes measures covered by Chapter Fourteen (Financial Services);
- Article 1112 is an under-ride clause which provides that, in the event of any inconsistency between Chapter Eleven and another Chapter, the other Chapter shall prevail to the extent of the inconsistency;
- Articles 1116 and 1117 provide for the prospect of submitting a claim to arbitration based on a breach of Section A of Chapter Eleven or two substantive obligations in Chapter Fifteen (Competition Policy, Monopolies and State Enterprises);
- Article 1110 expressly excludes claims based on certain intellectual property rights to the extent that they are consistent with Chapter Seventeen (Intellectual Property);
- Article 1138 expressly excludes claims arising from measures taken by a party pursuant to Article 2102 (National Security); and
- Article 1139 (Definitions) expressly incorporates the definition of "enterprise" in Article 210 (Definitions of General Application), which also applies to the term "national" and "state enterprise" as used in the Article 1139's definition of "investor of a Party".

that it accords, in like circumstances, to its own investors…[32]	circunstancias similares, a sus propios inversionistas …
Each Party *shall accord* to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party …[33]	Cada una de las Partes *otorgará* a los inversionistas de otra Parte trato no menos favorable que el que otorgue, en circunstancias similares, a los inversionistas de cualquier otra Parte…
Each Party *shall accord* to investments of investors of another Party treatment in accordance with international law…[34]	Cada una de las Partes *otorgará* a las inversiones de los inversionistas de otra Parte, trato acorde con el derecho internacional …
Each Party *shall permit* all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay.[35]	Cada una de las Partes *permitirá* que todas las transferencias relacionadas con la inversión de un inversionista de otra de las Partes en territorio de la Parte, se hagan libremente y sin demora.

42. Section B of Chapter Eleven establish the requirements that investors of the NAFTA Parties must meet in order to submit a claim to arbitration in a similar fashion:

English	Spanish
The 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, which notice *shall* specify …[36]	El inversionista contendiente *notificará* por escrito a la Parte contendiente su intención de someter una reclamación a arbitraje, cuando menos 90 días antes de que se presente formalmente la reclamación, y la notificación *señalará* lo siguiente: …
1. A disputing investor may submit a claim under Article 1116 to arbitration *only if*: (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and [...]	1. Un inversionista contendiente podrá someter una reclamación al procedimiento arbitral de conformidad con el Artículo 1116, *sólo si*: a) consiente someterse al arbitraje en los términos de los procedimientos establecidos en este Tratado; y [...]

[32] Article 1102

[33] Article 1103

[34] Article 1105

[35] Article 1109

[36] Article 1119(1)

3. 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.[37]	3. El consentimiento y la renuncia requeridos por este Artículo *se manifestarán* por escrito, *se entregarán* a la Parte contendiente y *se incluirán* en el sometimiento de la reclamación a arbitraje.

43. The use of the word "shall" throughout the English version of the NAFTA is also consistent with the ordinary meaning of the term when "used in used in laws, regulations, or directives to express what is mandatory" or to indicate "has a duty to; more broadly, is required to".[38] It is "the mandatory sense that drafters typically intend and that courts typically uphold".[39] The text in Spanish has the same interpretation.

44. In sum, the language used in NAFTA Article 1119 and Article 1121 must be interpreted to mean that the provision of a notice of intent and consent to arbitration in accordance with the procedures set out in the NAFTA by every investor that seeks to submit a claim to arbitration are mandatory requirements that cannot be dispensed with, glossed over, or otherwise excused for any reason. To do otherwise would render meaningless the terms "shall" and "only if" and would violate the fundamental principle of *effet utile*, which provides that a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility.[40] Such an interpretation would ignore the clear meaning of the Treaty's text and the obvious intentions of the NAFTA Parties.

45. It should be added that this interpretation is entirely consistent with NAFTA's stated purposes and objectives to the extent that they are applicable to investor-state dispute settlement.

46. Article 102 (Objectives) provides that "the objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation

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[37] Article 1121(3)

[38] See for example; https://www.merriam-webster.com/dictionary/shall auxiliary verb. See also, Black's Law Dictionary, 10th Edition, definition of the term "shall".

[39] Black's Law Dictionary, 10th Edition, definition of the term "shall".

[40] See for example: Exhibit RL-002, *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, ¶ 107 ("As stated by the tribunal in the *Eureko v. Poland* case, '[i]t is a cardinal rule of interpretation of treaties that each and every clause of a treaty is to be interpreted as meaningful rather than meaningless.' The International Court of Justice and ICSID Tribunals have applied that principle in a number of treaty cases"); Exhibit RL-003, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela [I]*, ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶¶ 151-152; Exhibit RL004, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Dissenting Opinion of Laurence Boisson de Chazournes, 3 July 2013, ¶ 27; Exhibit RL-005, *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, ¶ 354. The principle of *effet utile* has been consistently cited and applied by the WTO Appellate Body when interpreting the provisions of the WTO Agreements starting with its report in *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, pp. 23 (Exhibit RL-006), citing: *Corfu Channel Case* (1949) I.C.J. Reports, p.24 (International Court of Justice); *Territorial Dispute Case* (Libyan Arab Jamahiriya v. Chad) (1994) I.C.J. Reports, p. 23 (International Court of Justice); 1966 Yearbook of the International Law Commission, Vol. II at 219; Oppenheim's International Law (9th ed., Jennings and Watts eds., 1992), Volume 1, 1280-1281; P. Dallier and A. Pellet, Droit International Public, 5è ed. (1994) para. 17.2); D. Carreau, Droit International, (1994) para. 369.

treatment and transparency, are to: [...] (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes". In order to create effective procedures for the resolution of investment disputes, Section B of Chapter Eleven sets out clearly-worded procedural requirements for the notification and submission of claims to arbitration. To override or ignore these pre-requisites would render these procedures *ineffective*.

47. Likewise, Article 1115 (Purpose) provides that "[…] this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal". In order to accord international reciprocity and due process to the disputing parties in a given case, these procedural requirements must be respected and applied as written. Again, to override or ignore these procedures would be to *deny* due process to the disputing NAFTA Party.

IV. Specific grounds for objection

A. Failure to comply with Article 1119

48. Mexico submits that the failure of the Additional Claimants to notify their intent to submit a claim to arbitration, together with the failure of the Original Claimants to identify three of the nine Mexican Enterprises on whose behalf the claim was purportedly submitted, invalidated the submission to arbitration and failed to engage the Respondent's consent to arbitrate under Article 1122(1), at least with respect to the Additional Claimants and the Additional Mexican Enterprises.

49. The requirement to provide a written notice of intent to submit a claim to arbitration and the information that the notice of intent must contain is clearly stated in Article 1119:

> **Article 1119: Notice of Intent to Submit a Claim to Arbitration**
>
> The 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, which notice 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.

50. The text of NAFTA Article 1119 expressly states that a disputing investor *shall* deliver a notice of intent to the respondent Party at least 90 days *before* the claim is submitted to arbitration. The text also provides in clear terms that the disputing investor *shall* include in the notice of intent the information specified in subparagraphs (a) through (d). This includes the name and address of the disputing investor and, importantly, "*where a claim is made under Article 1117, the name and address of the enterprise*". By virtue of the fundamental principle of *effet utile*, meaning must be given to these treaty terms.

51. If the Claimants contend, as they must, that Article 1119 should be interpreted to include the plural of "investor", allowing the filing of claims by two or more claimants, then the term "investor" must be interpreted as "investors" wherever it appears. In such case, "the disputing *investors* shall deliver to the disputing Party written notice of *their* intention to submit a claim to arbitration … which notice shall specify … the *names* and *addresses* of the disputing *investors"*. It is an undisputed fact that 31 of the 39 Claimants who purported to submit a claim to arbitration failed to comply with this requirement.[41]

52. Similarly, if the Claimants contend, as they must, that Article 1119 should be interpreted to include the plural of "enterprise", thus allowing the filing of claims behalf of two or more enterprises, it follows that they would be required to state the *names* and *addresses* of the

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[41] For a complete list of the 31 Claimants who failed to provide a notice of intent please refer to the definition of the term "Additional Claimants" in the glossary located at the beginning of this pleading.

enterprises on whose behalf claims will be brought. It is also an undisputed fact that the Original NOI failed to identify three of the nine Mexican Enterprises on whose behalf a claim was purportedly submitted to arbitration under Article 1117.[42] Thus, the claims submitted on behalf of these three companies were not notified.

53. The Claimants' failure to comply with Article 1119 has two important consequences: (i) it renders the submission of the claim to arbitration void *ab initio*, and (ii) it deprives the Tribunal of jurisdiction *ratione voluntatis*, at least with respect to the Additional Claimants and the Additional Mexican Enterprises

54. The first point is self-evident. NAFTA Article 1119 is mandatory, yet 31 of the Claimants (the "Additional Claimants") failed completely to comply. They had no legal right or standing to submit a claim to arbitration and therefore, the submission is invalid, at least as it applies to them. They cannot claim to be covered by the Original NOI submitted by the Original Claimants, nor can they rely on excuses for not giving notice, nor can they require the Respondent to show that it has suffered prejudice as a result of their failure of compliance. Such arguments render the above-noted terms *inutile* and, therefore, must be rejected. Put simply, the NAFTA Parties are *entitled* to require all intended claimants to give notice in the manner prescribed by Article 1119 (and Mexico has done so here), both with respect to the Additional Claimants and with respect to the Additional Mexican Enterprises. The Tribunal lacks jurisdiction *ratione personae* with respect to all of these parties.

55. The second point can be stated succinctly. NAFTA Article 1122 provides that each of the Parties "consents to the submission of a claim to arbitration *in accordance with the procedures set out in this Agreement*". In this case, the Claimants did not follow the procedures set out in NAFTA 1119 (or Article 1121, as explained below). Rather, they failed to comply with the most basic procedure – the giving of notice by the intended claimants. In the result, the Respondent's consent has not been engaged and this Tribunal also lacks jurisdiction *ratione voluntatis* with respect to the Additional Claimants and the Additional Enterprises.

56. The Respondent's position is wholly supported by the contemporary NAFTA jurisprudence. NAFTA tribunals have repeatedly held that compliance with the conditions and procedures set out in Chapter Eleven is necessary to engage the respondent's consent under Article 1122(1). The most frequently cited example is *Methanex Corporation v. United States of America*:

> In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.[43]

57. In *Merrill & Ring Forestry L. P v. Government of Canada*, the tribunal was called upon to decide whether to allow the addition of another claimant party to the arbitration who, as in the

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[42] The "Additional Mexican Enterprises" as defined in the glossary. The Respondent further observes that the Original NOI does not include the addresses of the six enterprises that are mentioned in the Original NOI.

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

present case, failed to comply with NAFTA procedural requirements. The tribunal rejected the claimant's motion, observing that the safeguards in Chapter Eleven performed a substantive function and "*cannot be regarded as merely procedural niceties*":

> 28. In the specific context of NAFTA, as argued by the Claimant, both *Ethyl* (*cit*., paras. 85, 95) and *Mondev* (*cit*., para. 44) have followed the first approach - considering that minor technical failures to comply with such requirements can be corrected for the sake of efficiency and the avoidance of multiple proceedings to decide a dispute which is, in substance, within the scope of Chapter 11. The *Methanex* tribunal, however, as the Respondent pointed out, was of the view that consent to arbitration under NAFTA requires a claimant to satisfy not only Articles 1101 and 1116 or 1117, but also that "all pre-conditions and formalities required under Articles 1118-1121 are satisfied" (*cit*., para. 120). Only then will the consent to arbitration under Article 1122 be perfected.
>
> 29. The Tribunal has no doubt about the importance of the safeguards noted and finds that they cannot be regarded as merely procedural niceties. They perform a substantial function which, if not complied with, would deprive the Respondent of the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim announced. This would be hardly compatible with the requirements of good faith under international law and might even have an adverse effect on the right of the Respondent to a proper defence.[44]
>
> [Emphasis added]

58. Mexico's position is also supported by the tribunal's observations and findings in *Canfor Corporation v. United States of America*:

> 171. The above decisions make clear four points that a Chapter Eleven tribunal needs to address if and to the extent that a respondent State Party raises an objection to jurisdiction under the NAFTA:
>
> – First, a mere assertion by a claimant that a tribunal has jurisdiction does not in and of itself establish jurisdiction. It is the tribunal that must decide whether the requirements for jurisdiction are met.
>
> – Second, in making that determination, the tribunal is required to interpret and apply the jurisdictional provisions, including procedural provisions of the NAFTA relating thereto, i.e., whether the requirements of Article 1101 are met; whether a claim has been brought by a claimant investor in accordance with Article 1116 or 1117; and whether all pre-conditions and formalities under Articles 1118-1121 are satisfied.
>
> – Third, the facts as alleged by a claimant must be accepted as true pro tempore for purposes of determining jurisdiction.

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

> – Fourth, the tribunal must determine whether the facts as alleged by the claimant, if eventually proven, are prima facie capable of constituting a violation of the relevant substantive obligations of the respondent State Party under the NAFTA.[45]
>
> [Emphasis added]

59. The tribunal in *Bilcon v. Government of Canada* similarly held:

> V. THE JURISDICTION OF THE TRIBUNAL
>
> 228. In international arbitration, it is for the applicant to establish that a tribunal has jurisdiction to hear and decide a matter. A Chapter Eleven tribunal only has authority to the extent that is provided by Chapter Eleven itself.
>
> 229. In Chapter Eleven, the NAFTA Parties, in the interest of ensuring "a predictable commercial framework for business planning and investment" established protections for investors. They also enabled investors to bring a host state directly to arbitration for a legally binding decision. These remedial mechanisms mean that investors possessing the nationality of another NAFTA Party do not have to depend on their home state to espouse their grievances, as would be the case in general international law. Instead, investors can proceed directly to arbitration on their own. General international law also provides that a state is not automatically subject to the jurisdiction of international adjudicatory bodies to decide in a legally binding way on complaints concerning its treatment of a foreign investor, but must give its consent to that means of dispute resolution. The heightened protection given to investors from other NAFTA Parties under Chapter Eleven of the Agreement must be interpreted and applied in a manner that respects the limits that the NAFTA Parties put in place as integral aspects of their consent, in Chapter Eleven, to an overall enhancement of their exposure to remedial actions by investors. The Parties to NAFTA chose to go as far, but only as far, as they stipulate in Chapter Eleven towards enhancing the international legal rights of investors.[46]
>
> [Emphasis added]

60. The Respondent's position is also supported by the other two NAFTA Parties, who have repeatedly expressed their view that compliance with the conditions and formalities set out in Chapter Eleven is necessary to establish the consent of the respondent Party under Article 1122(1). Mexico made this point in its objection to the registration of the claim, citing to the Article 1128 submissions made by Canada and the United States in *KBR, Inc. v. United Mexican States.*

61. The submission of the United States described the requirement to provide a waiver in the terms required by Article 1121 as "*[o]ne of the preconditions to the NAFTA Parties' consent*".[47]

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

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

[47] Exhibit RL-011, *KBR Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, United States Article 1128 Submission, 30 July 2014.

The submission of Canada, observed that compliance with Articles 1116 to 1121 is required to engage the NAFTA Parties' consent:

> 3. The jurisdiction of any arbitral tribunal rests upon the consent of the parties before it to arbitrate a particular dispute. Under Article 1122(1), the NAFTA Parties have offered consent to arbitrate with investors provided that certain conditions are met at the time the claim is submitted to arbitration. Compliance with Articles 1116 to 1121 is necessary to perfect the consent of a NAFTA Party to arbitrate and establish the jurisdiction of the tribunal.
>
> […]
>
> 5. There is no consent to arbitration under Article 1122(1), and hence no jurisdiction for a NAFTA tribunal, unless a claimant complies with the conditions precedent to the submission of a claim to arbitration set out in Article 1121. [48]
>
> [Emphasis added]

62. In *Mesa Power Group, LLC. v. Government of Canada*, the respondent objected to the tribunal's jurisdiction on the grounds that the claimant failed to comply with the six-month waiting period established in Article 1120(1).[49] The United States' Article 1128 submission noted:

> 2. NAFTA Article 1121, entitled "Conditions Precedent to Submission of a Claim to Arbitration," provides in part that "[a] disputing investor may submit a claim under Article 1116 to arbitration only if: (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement . . . ." NAFTA Article 1122, entitled "Consent to Arbitration," further provides in part that "[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement." No Chapter Eleven claim may be submitted unless these procedures have been satisfied.
>
> 3. NAFTA Article 1120, entitled "Submission of a Claim to Arbitration," contains one such procedure. Article 1120(1) states that a disputing investor may submit a claim to arbitration "provided that six months have elapsed since the events giving rise to a claim." Together with the notice requirement in Article 1119, the "cooling-off" requirement in Article 1120(1) affords a NAFTA Party time to identify and assess potential disputes, coordinate among relevant national and subnational officials, and consider amicable settlement or other courses of action prior to arbitration. As such, any claim for which a claimant has not waited six months from the events giving rise to the claim is not submitted in accordance with Article 1120(1),[1] and thus does not satisfy the requirements of consent contained in Articles 1121 and 1122.[2]
>
> [Footnote 1] Indeed, it is the United States' general practice to refuse to move forward with an arbitration if the notice of arbitration contains such defects. The United States,

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[48] Exhibit RL-012, *KBR Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Canada Article 1128 Submission, 30 July 2014.

[49] Exhibit RL-013, *Mesa Power Group LLC v Canada*, PCA Case No. 2012-17, Award dated 24 March 2016, ¶ 239.

> therefore, would not accept as valid a notice of arbitration if a claimant failed to respect the six-month cooling-period in Article 1120(1).
>
> [Footnote 2 cites to *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, First Partial Award of the Tribunal on Jurisdiction ¶ 120 (Aug. 7, 2002) quoted earlier in this pleading (see *supra* ¶ 56).]
>
> [Emphasis added.][50]

63. It can thus be seen that the contemporary NAFTA jurisprudence and the formal submissions of all of the NAFTA Parties – including the submissions of the Claimants' own government – support Mexico's position that compliance with Articles 1119 to 1121 is a mandatory precondition to engaging a NAFTA Party's consent to arbitration under Article 1122.

64. In their submissions responding to Mexico's objections to the registration of the claim, the Claimants proffered several excuses and/or rationalizations for the Additional Claimants' failure of compliance with NAFTA Article 1119, including (*inter alia*) the following contentions:

- That the addition of "minority investors" in the RFA in order to "perfect the claim" did not cause Mexico to suffer prejudice;[51]
- that Mexico knew from the outset that the Claimants intended their claims to encompass the entirety of the investments at issue, and would thus include all damages to these entities and all relevant investors in the projects at issue;[52]
- that the inclusion of the Additional Claimants in the Original NOI would have made no difference in the outcome of the "non-existent" amicable consultations and negotiations, as Mexico at all times refused to engage in good faith consultations and negotiations;[53]and
- that including the Additional Claimants in the Original NOI would have served no practical purpose other than exposing them to Mexico's retaliation and harassment.[54]

65. The Respondent does not know whether the excuses and rationalizations described above will be reiterated by the Claimants in the response to this submission, or the extent to which any such excuses or rationalizations will be varied, augmented or otherwise or revised. The Respondent accordingly reserves the right to respond fully to each of these contentions if raised again in their current form or in some revised iteration.

66. The Respondent's remarks below concerning the Claimants' various excuses and rationalizations are without prejudice to its central position which is, simply put, that a claim

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

[51] Claimants' Response to the United Mexican States' Objection to Claimants' Request for Approval to Access the ICSID Additional Facility and Request for Arbitration in the matter of *BMex, LLC et al. v. United Mexican States*, and Response to ICSID's Questionnaire dated July 6, 2016, of 21 July 2016, p. 15.

[52] *Id.*

[53] *Id.*

[54] *Id.*, p. 17.

cannot be submitted to arbitration under NAFTA Article 1116 by any intended claimant that has not been properly identified in a notice of intent. Neither can a claim be submitted to arbitration under Article 1117 on behalf of any enterprise that has not been properly identified in a notice of intent.

67. All of the Claimants' arguments render express treaty terms *inutile* or meaningless, thereby violating the fundamental treaty interpretation principle of *effet utile*. On this basis alone, they must be rejected.

68. Mexico would also like to observe that nothing other than an express waiver on the part of the disputing NAFTA Party (*i.e.* the Respondent State) can excuse or justify a claimant's failure to give notice as required by NAFTA Article 1119. The claimant cannot be heard to say that it would have been "futile" to attempt to engage in consultations, or that the Respondent has not suffered prejudice as a result of non-compliance.

69. The Respondent also wishes to address a contention that the Claimants have relied on heavily – the allegation that Mexico resolutely refused to engage in consultations or negotiations. This allegation is wholly at odds with the procedural history of this claim, as previously described.

70. In their submissions to the Secretary-General, the Claimants contended at least seven times that Mexico refused to engage in good-faith consultations and negotiations with the Claimants. From the Claimants' first submission to the Secretary General:

> […] including the additional Claimants in the Notice of Intent would have made no difference in the outcome of the non-existent amicable consultations and negotiations, as Mexico at all times refused to engage in good faith consultations and negotiations with the Claimants identified in the Notice of Intent and in fact engaged in retaliatory acts and measures against them […] [55]
>
> – o –
>
> Additionally, requiring the Claimants who were not specifically named in the Notice of Intent to have served a separate notice of intent (or to have been specifically referenced in the Notice of Intent) would have been futile in light of Mexico's outright refusal to engage in meaningful consultations and negotiations, as envisaged in Articles 1118 and 1119 of the NAFTA. [56]
>
> – o –
>
> Moreover, the Ministry of Economy informed Claimants' Mexican local counsel of SEGOB's outright unwillingness to negotiate with Claimants over the NAFTA claims that had been noticed in the Article 1119 Notice. Even worse, as described in detail in Claimants' RFA, following Claimants' Notice of Intent, Mexico engaged in a series of retaliatory acts and measures aimed at the Claimants identified in the Notice of Intent.[57]

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[55] *Id.*, p. 15.

[56] *Id.*, p. 17.

[57] *Id.*

– o –

What purpose would their inclusion in the Article 1119 have served given that Mexico ignored the Notice, refused to engage in consultations or negotiations and only saw fit to retaliate against those leading investors who did notify them of the claims? [58]

71. From the Claimants' second submission to the Secretary-General:

This claim is particularly specious given that, over a nearly two-year period, Mexico made no attempt to negotiate in good faith with the Claimants specifically named in the notice of intent and instead specifically told Claimants' representatives that it was not interested in attempting to negotiate an amicable resolution.[59]

– o –

"Requiring the Claimants who were not specifically named in the Notice of Intent to serve a separate notice of intent (or to have been specifically referenced in the Notice of Intent) would have been an exercise in futility in light of Mexico's undisputed, retaliatory acts and unflinching refusal to engage in any negotiations and, thus, would have served no purpose other than to expose the Claimants not specifically named in the Notice of Intent to the same sorts of retaliation and harassment that Mexico launched against some of the entities and persons that were referenced in the Notice."[60]

– o –

The weakness of Mexico's position is further underscored by the fact that, to this day, it has not made a single effort to engage any of the Claimants (including those who were mentioned in the Notice of Intent and those who were not) in any kind of consultations or negotiations […][61]

72. In the so-called Amended Notice of Intent:

While Mexico has raised objections to the registration of the RFA, arguing, in part, that certain of the U.S. investors were not named or identified in the 2014 Notice of Intent, requiring separate notice from these U.S. investors would be futile given Mexico's refusal to engage in consultations or negotiations with respect to the claims and investments at issue.[62]

– o –

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58 *Id.*

59 Claimants' Rejoinder to the United Mexican States' Unauthorized Submission Replying to Claimants' July 21, 2016 Response in Support of their Request for Approval to Access the ICSID Additional Facility and Request for Arbitration in the matter of *B-Mex, LLC et al. v. United Mexican States*, and Response to ICSID's Questionnaire dated July 6, 2016; Response to ICSID's Letter of August 2, 2016, of 5 August 2016, p. 7.

60 *Id.*

61 *Id.*

62 Exhibit R-007, Amended NOI, pp. 2-3.

> While the U.S. investors who submit this Amended Notice of Intent maintain that there is no need for them to issue a further notice of intent to Mexico, given that Mexico has been on notice of their claims since May 2014 and that issuing a further notice would in any event be futile, they nonetheless do so in an abundance of caution and with the clear understanding that neither the submission of this Amended Notice of Intent nor anything contained herein affects the limitation period […].[63]
>
> – o –
>
> Thus, Mexico was on notice as of May 2014 that the eventual arbitration would encompass and include all damages to these entities and all relevant investors in the projects at issue. Mexico, however, refused to engage in good faith negotiations with the majority U.S. investors who submitted the 2014 Notice of Intent.[64]
>
> – o –
>
> As mentioned above, the U.S. investors who submitted the 2014 Notice of Intent intended at all times to submit a claim to arbitration for the entirety of the investments at issue, including the claims related to the Additional Mexican Enterprises, which would have encompassed damages for those U.S. investors who were not specifically named in the 2014 Notice of Intent. Mexico, however, never gave these U.S. investors, or any of the others, the opportunity to discuss these claims, as it refused to engage in good faith consultations or negotiations with them. [65]
>
> – o –
>
> As explained in the statements recently provided to Mexico by the U.S. investors who were not named in the 2014 Notice of Intent, the U.S. investors who submit this Amended Notice of Intent understood that all of the U.S. investors and Mexican companies (including the U.S. investors who submit this Amended Notice of Intent and the enterprises on whose behalf they have submitted claims pursuant to NAFTA Article 1117) would have been identified to Mexico in the context of any consultations or negotiations that would have followed the submission of the 2014 Notice of Intent, had there been any, and eventually would have participated in a NAFTA arbitration against Mexico. Yet, as explained above, Mexico refused to engage in good faith consultations and negotiations with any of the U.S. investors.[66]
>
> [Emphasis added.]

73. It appears that the Claimants' current legal counsel was not informed of Mexico's repeated attempts to obtain information from the Claimants' prior legal counsel concerning the claims notified in the Original NOI. As the email exchange between Ms. Martinez and Ms. Menaker, demonstrates, Mexico attempted to obtain information requested in the NOI Questionnaire on three

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63 *Id.*, p. 3.

64 *Id.*, p.2. See also pp. 8, 10.

65 *Id.*, p. 8.

66 *Id.*, p. 10.

successive occasions but to no avail.[67] Ms. Menaker's response to Mexico's last communication was received on 18 November 2014 and stated: "*I don't have any additional information to provide right now. If the client decides to pursue the claim, I will get in touch with you.*"[68]

74. Under these circumstances, it ill-behooves the Additional Claimants to contend that they should be exempted from the requirement to submit a notice of intent because any consultations would have been futile. The Original Claimants plainly declined to engage in any discussions with Mexico's responsible government officials.

75. Finally, the Respondent is compelled to observe the obvious – a notice of intent delivered after the submission of a claim to arbitration is no notice at all. The Respondent promptly rejected the implication that the "Amended Notice of Intent" filed 79 days after the RFA was delivered to the Secretary-General and 22 days after the claim was registered, could rectify any deficiency in the RFA arising from the failure of the Original NOI to name all of the 39 Claimants.

76. In addition to the absurdity of purporting to give advance notice of something that has already happened, a nullity cannot unilaterally be given *ex post facto* legal validity. Such is the case with the RFA. It is void *ab initio*, at least with respect of the Additional Claimants and the Additional Enterprises, and the Amended Notice of Intent could do nothing to reverse that legal fact.

77. As will be explained further in the section that follows, the RFA was also rendered void *ab initio* with respect to all of the 39 Claimants by reason of the failure of each of them and each of the Mexican Enterprises to provide a written consent to arbitration in the terms and manner required by Article 1121.

B. Failure to comply with Article 1121

78. The Claimants' failure to comply with one of the "conditions precedent" to the submission of a claim to arbitration – the failure of each of them and each of the Mexican Enterprises to deliver to the Respondent a document expressly stating his/her/its consent to arbitration in accordance with the procedures set out in the NAFTA, and to include such consent in their submission to arbitration – invalidates their purported submission to arbitration and fails to engage Mexico's consent to arbitration "in accordance with the procedures set out in [the NAFTA]".

79. Article 1121 states:

> **Article 1121: Conditions Precedent to Submission of a Claim to Arbitration**
>
> 1. A disputing investor may submit a claim under Article 1116 to arbitration only if:
>
> (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and
>
> (b) the investor 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

[67] Exhibit R-004, Email exchange between Ms. Martinez and Ms. Menaker. The first attempt was made on 24 July 2014, the second one on 6 August 2014 and the third and final attempt was made on 5 November 2014.

[68] *Id.*., p. 1.

> or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.
>
> 2. 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 before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.
>
> 3. 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.
>
> 4. Only where a disputing Party has deprived a disputing investor of control of an enterprise:
>
> (a) a waiver from the enterprise under paragraph 1(b) or 2(b) shall not be required; and
>
> (b) Annex 1120.1(b) shall not apply.
>
> [Emphasis added.]

80. Thus, it is plainly evident from the ordinary meaning of the text that, in order to submit a claim under Article 1116, the investor must consent to arbitration in accordance with the procedures set out in the NAFTA, and said consent must be writing, must be delivered to the disputing Party, and must be included in the submission of the claim to arbitration. When a claim is submitted under Article 1117, the consent requirement and its respective formalities apply to *both* the investor *and* the enterprise (Article 1121(2)).

81. The Respondent submits that (i) the title of the article ("Conditions Precedent to Submission of a Claim to Arbitration"), which forms part of the immediate context of the terms of the provision within the meaning of Article 31 of the *Vienna Convention on the Law of Treaties*, (ii) the use of the term "only if", and (iii) the repeated use of the mandatory sense of the text all makes it clear that these are strict requirements that must be met in order for any investor of a Party to validly submit a claim to arbitration under Section B of NAFTA Chapter Eleven. In other words, it establishes *sine qua non* conditions for the submission of a claim and to engage the NAFTA Party's consent under Article 1122(1). To interpret this provision otherwise would render these terms meaningless and violate the fundamental treaty interpretation principle of *effet utile*.

82. NAFTA Tribunals and the three NAFTA Parties have consistently supported this reading of Article 1121. In *Detroit International Bridge Company v. Government of Canada*, Canada objected to the Tribunal's jurisdiction arguing that the investor's failure to comply with article 1121 "*renders Canada's consent to arbitration under Article 1122(1) without effect*" and "*deprives the tribunal of jurisdiction*".[69] The tribunal agreed and concluded that it lacked jurisdiction to hear the claim:

> A. PRELIMINARY CONSIDERATIONS
>
> 291. NAFTA Article 1121, entitled "Conditions Precedent to Submission of a Claim to Arbitration" stipulates the conditions that a claimant must meet in order to submit a claim under NAFTA Chapter Eleven. A claimant's failure to meet these conditions renders the NAFTA Party's consent to arbitrate without effect.
>
> […]
>
> 337. Accordingly, the Tribunal does not have jurisdiction in this case, because of DIBC's failure to comply with NAFTA Article 1121. [70]

83. In *Cargill, Inc. v. United Mexican States*, the tribunal observed that the respondent's consent under Article 1122 must be established and is subject to compliance with the obligation to provide preliminary notice, consent and waiver:

> ¶ 160. A claimant must also provide preliminary notice pursuant to Article 1119 and satisfy the conditions precedent via consent and, where appropriate, waiver, under Article 1121. Consent of the respondent must be established pursuant to Article 1122.
>
> [...]
>
> ¶ 183. The Tribunal must finally consider any challenges to the presence of consent by either of the Parties. Consent by the investor pursuant to Article 1121 is not disputed. Respondent, however, has challenged one element of the claim procedurally with respect to the import permit measure. As noted above, Respondent asserts that it was not validly notified pursuant to Article 1119. Because Claimant's capacity to initiate arbitration under Article 1122 is limited to claims "to arbitration in accordance with the procedures set out in this Agreement," the question is then whether Claimant has failed to comply with a procedural requirement with respect to the import permit measure and if so, whether this negates consent by Respondent in respect of such a claim.[71]
>
> [Emphasis added]

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69 Exhibit RL-015, *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Award on Jurisdiction, 2 April 2015, ¶ 147.

70 *Id.*, ¶ 291. The tribunal concluded that none of the waivers presented by DIBC complied with Article 1121, because of DIBC's failure to waive its right to continue with court proceedings before the U.S. courts (see ¶¶ 320 and 336 of the award).

71 Exhibit RL-016, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶¶ 160 and 183. See also, Exhibit RL-017 *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, ¶ 323.

84. In an Amicus brief filed in the case *BG Group Plc. v. Argentine Republic* the United States submitted:

> For example, the United States has taken the position under the North American Free Trade Agreement (NAFTA) that unless a claimant investor complies with the requirements enumerated in Article 1121 ("Conditions Precedent to Submission of a Claim to Arbitration"), no binding agreement to arbitrate arises with the respondent State. *See* e.g., *Tembec Inc. v. United States*, Objection to Jurisdiction of Respondent United States of America, at 35-38, UNCITRAL (Feb. 4, 2005); *Methanex Corp. v. United States*, Memorial on Jurisdiction and admissibility of Respondent United States of America, at 70-78, UNCITRAL (Nov.13,200); NAFTA Art. 1121, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993). The other two State parties to the NAFTA, Canada and Mexico, have similarly stated that Article 1121 imposes mandatory prerequisites. See *Mondev Int'l Ltd. V. United States*, Case No. ARB(AF)/99/2, Rejoinder on Competence and Liability of Respondent United States of America, at 61-62, ICSID (Oct. 1, 2001) (citing Canada's and Mexico's position).[72]
>
> [Emphasis added]

85. In *KBR, Inc. v. United Mexican States*, the United States similarly stated:

> 2. One of the preconditions to the NAFTA Parties' consent to arbitrate claims under Chapter Eleven is the waiver required by Article 1121, which is entitled "Conditions Precedent to Submission of a Claim to Arbitration. As a condition precedent to submission of a claim to arbitration, a c1aimant must submit an effective waiver together with its Notice of Arbitration.[73]
>
> [Emphasis added]

86. The same reasoning must equally apply to the specific written consent to arbitration required under Article 1121(1)(a) and 1121(2)(a).

87. The Claimants have taken two different positions regarding their purported compliance with the consent requirement. *First*, they seem to argue that they had complied through the filing of certain powers of attorney. Indeed, paragraph 119 of the RFA states:

> 119. *Fourth*, and lastly, Claimants and the Mexican Companies have provided the requisite consent to arbitration under the Additional Facility and waiver in the form contemplated by Article 1121 of the NAFTA. [Footnote 43][74]
>
> [Emphasis added]

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[72] Exhibit RL-018, *BG Group Plc. v*. Argentine Republic, UNCITRAL, United States Brief as Amicus Curiae, 10 May 2013, pp. 27-28 (of the pdf file). See also Exhibit RL-014, *Mesa Power Group LLC v Canada*, PCA Case No. 2012-17, Submission of the United States of America, 25 July 2014 (cited supra, at ¶ 62)

[73] Exhibit RL-011, *KBR Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, United States Article 1128 Submission, 30 July 2014, ¶ 2. See also, Exhibit RL-019, *Waste Management Inc. v. United Mexican States* [I] ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000, §§ 22-23.

[74] RFA, ¶ 109.

88. Footnote 43 located at the end of the passage quoted above refers the reader to Exhibit C-004 (labeled "Consent Waivers"), which contains powers of attorney granted by each of the 39 Claimants to Messrs. Orta, Urquhart, Salinas and Bennett of the law firm Quinn Emanuel Urquhart & Sullivan LLP (Quinn Emanuel) in terms identical or very similar to the following:

> THIS POWER OF ATTORNEY is given on the 19th day of May 2016 by Gordon Burr. whose residence is at 2630 W. Belleview Ave., Suite 220, Littleton. CO 80123, U.S.A. ("Mr. Burr").
>
> THIS POWER OF ATTORNEY is given to David M. Orta. A. William Urquhart, Daniel Salinas-Serrano, and Fred G. Bennett of Quinn Emanuel Urquhart & Sullivan LLP, located at 777 6"' NW. Washington. D.C., U.S.A. 20001, and to any lawyer working with them to take any steps required for the initiation of, and to represent Mr. Burr and act on his behalf against the United Mexican States in arbitration proceedings under the North American Free Trade Agreement ("NAFTA"), as well as any ancillary settlement negotiations that may derive from Mr. Burr's intent to initiate arbitration proceedings against the United Mexican States.[75]
>
> [Emphasis added]

89. The powers of attorney included in Exhibit C-004 demonstrate that the "*Claimants are represented in these proceedings by Quinn Emanuel Urquhart & Sullivan, LLP*", as stated in paragraph 5 of the RFA, which also alludes to Exhibit C-004. They are evidence of a specific grant of authority to Quinn Emmanuel and nothing more.

90. These powers of attorney cannot be equated to the express written consent to arbitration required under Article 1121. The fact that certain lawyers from Quinn Emanuel have been granted the power to "*take any steps required for the initiation of […] arbitral proceedings under the North American Free Trade Agreement*", is not equivalent to providing the Respondent with each Claimants' written consent to arbitration in accordance with the procedures set out in the NAFTA, pursuant to Article 1121.

91. *Second*, the Claimants contend that they consented to arbitration simply by the filing of the RFA by their authorized representatives:

> [...] Here, Claimants have complied with that simple requirement by submitting a copy of the NAFTA, which records Respondent's consent to arbitrate under the Additional Facility, and which Claimants accepted with the filing of their Request for arbitration pursuant to NAFTA Article 1122.5 Those two acts—Mexico's offer to arbitrate investment disputes under the Additional Facility in NAFTA and Claimants' acceptance of that offer by submission of their RFA—make the agreement to arbitrate complete. [76]
>
> [...]

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[75] Exhibit C-004, "Consent Waivers", p. 1.

[76] Claimants' Response to the United Mexican States' Objection to Claimants' Request for Approval to Access the ICSID Additional Facility and Request for Arbitration in the matter of *BMex, LLC et al. v. United Mexican States,* and Response to ICSID's Questionnaire dated July 6, 2016, of 21 July 2016, p. 3.

> All Claimants, as disputing investors, have consented to arbitrate this dispute with Mexico pursuant to Article 1122(2) by virtue of their submission of the RFA to the Centre through their authorized representatives at Quinn Emanuel, and they expressly granted Quinn Emanuel the authority to prepare and submit the RFA in the Article 1121 consents and powers of attorney. Mexico fails to point to a single reason why the RFA fails to record Claimants' consent to submit their dispute with Mexico to arbitration under the NAFTA as provided in NAFTA Article 1122(2).[77]
>
> [Emphasis added]

92. This contention is specious. *First*, Articles 1121(1)(a) and 1121(2)(a) require a very specific form of consent (i.e., "*consent to arbitration in accordance with the procedures set out in this Agreement*"). This language or its precise equivalent must be included in the claimant's consent. *Second*, it also clear from the text of Article 1121(3) that consent must be in writing and delivered to the disputing NAFTA Party. Thus, a claimant cannot implicitly or constructively consent to arbitration "by virtue of [its] submission of the RFA to the Centre" or by "acceptance of that offer by submission of their RFA". To permit such an interpretation of these provisions would rob them of meaning and violate the fundamental treaty interpretation principle of *effet utile.*

93. Finally, the Respondent notes that, in their submissions regarding Mexico's objection to registration, the Claimants relied on several arbitral decisions and awards for their contention that the requirements under Article 1121 are merely procedural and can be cured at a later stage of the proceedings. Mexico has a response for each of them, but will not elaborate upon them here unless the Claimants reaffirm their reliance on them in their Counter-Memorial on jurisdiction. It simply bears noting that such arguments must be rejected because they violate the principle of *effet utile*, and also that the contemporary NAFTA jurisprudence and the consistent submissions of the NAFTA Parties together establish conclusively that Article 1121 must be applied as written.

C. Challenges to jurisdiction *ratione personae* arising from failure to explain each Claimants' investment and who owns or controls the Mexican Enterprises

94. The Claimants have failed on five occasions to explain precisely how any one of the 39 Claimants has an "investment" as defined in NAFTA Article 1139 that establishes standing under Article 1116, and how any one or more of them "directly or indirectly owns or controls" any one or more of the Mexican Enterprises that establishes standing under Article 1117. These facts must be proven in order to establish the Tribunal's jurisdiction to decide the claim.

95. *First*, the White & Case letter (on behalf of the Original Investors except for Santa Fe Investments, Inc.) does not reveal "who owns what":

> White & Case LLP represents U.S. nationals Gordon Burr, Erin Burr, and John Conley, and U.S. companies B-Mex, LLC, B-Mex II, LLC, Palmas South, LLC, and Oaxaca Investments, LLC (together, the "U.S. Investors"). The U.S. Investors have invested, directly and indirectly, tens of millions of dollars in the United Mexican States, including through the construction and operation of five gaming facilities in Mexico ("Facility" or "Facilities"). […]

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[77] *Id.*, p. 12.

A. Investment Structure And Operations

> The U.S. Investors hold an interest in five Mexican companies ("The Mexican Enterprises"): (1) Juegos de Video y Entretenimiento de México, S de RL de CV; (2) Juegos de Video y Entretenimiento del Sureste, S de RL de CV; (3) Juegos de Video y Entretenimiento del Centro, S de RL de CV; (4) Juegos de Video y Entretenimiento del DF, S de RL de CV; and (5) Juegos y Videos de México, S de RL de CV. The Mexican Enterprises constructed and own, respectively, the gaming Facilities in (1) Naucalpan, State of Mexico; (2) Villahermosa, State of Tabasco; (3) Puebla, State of Puebla; (4) Mexico City, Federal District; and (5) Cuernavaca, State of Morelos. The U.S. Investors also hold an interest in Exciting Games, S de RL de CV ("Exciting Games"), a Mexican company that manages operations and compliance with regulatory and tax obligations at the five Facilities.[78]
>
> [Emphasis added]

96. It can be seen that White & Case letter does not state (or provide any evidence of) precisely how any one of the Original Claimants qualifies as an investor under NAFTA Article 1139, or how any one or more of them directly or indirectly owns or controls any one of the Mexican Enterprises. They are simply described as the "U.S. Investors" and that they "hold an interest" in the Juegos Companies and in EGames. Moreover, there is no suggestion that there are other investors in the Mexican gaming facilities who might later be included as claimants.

97. *Second*, the Original NOI (also presented by the Original Claimants) is similarly ambiguous:

> B-Mex, LLC, B-Mex II, LLC, Palmas South, LLC, Oaxaca Investments, LLC, Santa Fe Mexico Investments, LLC, Gordon Burr, Erin Burr, and John Conley (together, the "U.S. Investors") provide the United Mexican States ("Mexico" or the "State") with this written notice of their intention to submit a claim to arbitration under Chapter Eleven of the NAFTA, on their own behalf and on behalf of several enterprises.
>
> I. IDENTIFICATION OF THE DISPUTING INVESTORS
>
> 1. This Notice is submitted by the U.S. Investors. B-Mex, LLC, B-Mex II, LLC, Palmas South, LLC, Oaxaca Investments, LLC, and Santa Fe Mexico Investments, LLC are limited liability companies incorporated under the laws of the State of Colorado, United States of America. Gordon Burr, Erin Burr, and John Conley are nationals of the United States of America. Each of the U.S. Investors is an investor of a Party under Article 1139 of the NAFTA.
>
> […]
>
> 5. Through their ownership interest in five Mexican companies (the "Mexican Enterprises"),[Footnote 2] the U.S. Investors own and/or have invested in gaming facilities in the following cities in Mexico: (1) Naucalpan, State of Mexico; (2) Villahermosa, State of Tabasco; (3) Puebla, State of Puebla; (4) Mexico City, Federal District; and (5) Cuernavaca, State of Morelos (each a "Facility," and together, the "Facilities"). In addition, the U.S. Investors are assisted in the management of their

[78] Exhibit R-001, White & Case Letter, dated 16 January 2013, p. 1.

> investment in the Facilities through their ownership interest in Mexican company Exciting Games, S. de R.L. de C.V. ("Exciting Games").
>
> [Footenote 2]: The Mexican Enterprises include Juegos de Video y Entretenimiento de México, S. de R.L. de C.V. (owner of the Naucalpan Facility); Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (owner of the Villahermosa Facility); Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. (owner of the Puebla Facility); Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. (owner of the Mexico City Facility); and Juegos y Videos de México, S. de R.L. de C.V. (owner of the Cuernavaca Facility).
>
> […]
>
> 7. Each of the Facilities and Mexican Enterprises, as well as Exciting Games, constitutes an investment of an investor of a Party under Article 1139 of the NAFTA.[79]
>
> [Emphasis added]

98. It can be seen that the Original NOI does not state (or provide any evidence of) how any one of the Original Claimants qualifies as an investor under Article 1139, or how any one or more of them directly or indirectly owns or controls any one of the Mexican enterprises on whose behalf a claim might be brought. They are simply described as the "U.S. Investors" and that they would bring a claim on their own behalf and "on behalf of several enterprises". It is further alleged, in general terms, that they have "an ownership interest" in five Mexican enterprises, that they "own and/or have invested in" gaming facilities in five Mexican cities, and that they have an "ownership interest" in EGames. Again, there is no suggestion that there are other investors in the various Mexican gaming operations who might later be included as claimants.

99. *Third*, the RFA (filed two years later by 39 alleged investors) continues to avoid the issue of "who owns what", despite nearly quintupling the number of claimants and expanding the nature of their claims to include (*inter alia*) loans, entitlements to share revenues and/or profits, revenues from service contracts, contribution of 'sweat equity', and contribution of property and rights under agreements:

> 4. Claimants therefore are considered investors of a Party, the United States of America, for purposes of Articles 1139 of the NAFTA and have made investments in the Mexican Companies, all of which they own and control, directly or indirectly.
>
> […]
>
> 8. Claimants' investment in the Mexican gaming industry began in 2005 when Claimants started to make substantial investments, as defined by NAFT A, in the construction, development and operation of what eventually came to be five (5) dual-function gaming facilities in Mexico, each with remote gambling centers and lottery number rooms. Claimants also had the legally-secured expectation of opening at least four (4) more. Claimants also obtained a substantial ownership interest in and control over the five (5) Mexican companies that were utilized to establish each of the dual-function casinos. The five initial casinos were located in the following Mexican cities: {l) Naucalpan, State of Mexico; (2) Villahermosa, State of Tabasco; (3) Puebla, State

[79] Original NOI, ¶¶ 1, 5 and 7.

of Puebla; (4) Mexico City; and (5) Cuernavaca, State of Morelos (collectively the Casinos). Additionally, certain of the Claimants established, had a majority interests in, and directly and indirectly controlled the operations of, another Mexican company, Exciting Games, S. de R.L. de C.V. (E-Games), which was organized to act as the operator of and to manage the Claimants' investments in the Casinos. Claimants also formed B-Cabo, *LLC* to purse the opening of a gaming and hotel facility in Cabo San Lucas, Mexico, and Colorado Cancun, LLC to pursue the opening of a gaming and hotel facility in Cancun, Mexico. Lastly, certain of the Claimants directly and indirectly controlled three other Mexican companies, namely Operadora Pesa, S. de R.L. de C.V., Metrojuegos, S. de R.L. de C.V., and Merca Gaming, S. de R.L. de C.V., all of which provided indispensable services to the Casinos.

[…]

17. From May 2005 and well into the beginning of 2006, Mr. Burr and his daughter, Ms. Erin Burr, through counsel and with the involvement of accounting and other professionals and individuals, carried out all the necessary steps to incorporate B-MEX, B-MEX II, and Las Palmas South 10 as U.S. LLCs (the B-Mex Companies) in the United States as well as the Mexican Companies in Mexico. Once the B-Mex Companies and the Mexican Companies were duly incorporated and operational, the B-Mex Companies were able to secure approximately US$42.5 million in funds, of which approximately US$35 million were invested by US investors in the Mexican Companies and the Casinos.

18. The B-Mex Companies were formed, in part, to form, capitalize and control the Mexican Companies. Once formed and capitalized, these companies transferred the funds raised by them to the Mexican Companies for the construction and operation of the Casinos. The investments were used to, among other things: (i) lease facilities (none of which had previously been used for gaming), and then construct the physical plant of the casino facilities and completely refurbish the leased premises; (ii) purchase the machines to be installed in the Casinos; (iii) purchase ownership interests in the Mexican Companies to be used for their capital and operational needs; (iv) pay Monterrey a fee for the authority the Mexican Companies used to operate their businesses under the Monterrey Resolution (while retaining certain portions of that authority to be used for future entities or maintained as an asset of the Mexican Companies); (v) retain and compensate legal and other advisors to assure the legality and most tax-effective formation and operation of the Mexican Companies; and (vi) invest in the authorizations and permits necessary for the operation of the Casinos, as well as additional permits for the development of new casino projects.

19. As a result, Claimants collectively own majority ownership interests in, and directly and/or indirectly control the Mexican Companies and E-Games. The value of Claimants' ownership interest/investments in the Mexican Companies was tied to and partially dependent on the profitability of the Casinos. As such, Claimants stood to benefit from the capital gains generated by the successful operation of the Casinos. Moreover, Claimants had a valid 25-year permit that provided them the legally secured expectation of operating the 5 dual-function Casinos and opening at least four more gaming facilities (2 remote gambling centers and 2 lottery room numbers) and operating them for the life of the permit.

20. Claimants, collectively, also directly and/or indirectly control other Mexican Companies, namely Operadora Pesa, Metrojuegos, and Merca Gaming, which provided

> indispensable services for the successful operation of the Casinos and in which Claimants invested resources. Additionally, in carrying out their investments into the Casinos and casino business, certain of the Claimants (i) purchased personal property in Mexico related to the Casino operations; (ii) made investments in the form of loans to the Mexican Companies; (iii) invested in the provision of resources in the development and operation of the Casinos; (iv) invested considerable time and sweat equity in managing the casino project; and, (v) executed contracts and other agreements to allow them to operate the Casinos for which they gave valuable consideration. For example, Claimants entered into different types of agreements, including, but not limited to, joint-venture agreements, concession agreements, machine lease agreements, software licensing and services agreements, all of which entitled them to share in the income or profits of the Mexican Companies and the Casinos. Certain of the Claimants also made investments, including, but not limited to, loans to Medano Beach, S. de R.L. C.V. as well as other resources including time and sweat equity to develop the B-Cabo casino Project, including through the formation of B-Cabo, LLC and investment of funds into the B-Cabo in Cabo San Lucas Project through that entity, and formed Colorado Cancun LLC for purposes of exploring the development of a casino in Cancun.
>
> 21. Claimants also made additional capital investments in the Mexican Companies and the Casinos to improve the Casino facilities and expanding the scope of their operations. This additional capital was invested, among other things, in remodeling, enhancing and expanding the Casinos' facilities, and updating and purchasing new gaming machines, as well as the development of new opportunities, including internet gaming and new gaming and hospitality facilities in Los Cabos and Cancun. By way of example, Claimants constructed new rooms/areas for gaming activities; enhanced/constructed stages for live music and entertainment; enhanced/purchased/constructed buffets and other concession (food/beverage) areas; and, built exclusive VIP areas in the Casinos.
>
> 22. Overall, Claimants' (sic) made, *inter alia*, various types of investments encompassed within the definition of "investments" in Article 1139 of the NAFTA, including, without limitation, [investments as defined in items (a) through (g), excluding only (h) investments involving the commitment of capital or other resources in the territory of a party …][80]
>
> [Emphasis added]

100. It can be seen that, through the indiscriminate use of the term "Claimants", the RFA creates the impression that each of the individuals and corporate entities named as claimants invested in each of the Mexican Enterprises (including the three Additional Mexican Enterprises) and the related casinos and that they (*i.e.*, all of them) "collectively own majority ownership interests in, and directly and/or indirectly control" at least five of the Mexican Enterprises, if not all eight of them. Put simply, the reader remains uninformed as to precisely who among them, if anyone, actually owns or controls each of the Mexican Enterprises, and in what manner.

101. *Fourth,* the Claimants' response to Mexico's objection to registration of the claim is inconsistent with the allegations in the RFA on the issue of who among the 39 claimants owns or controls the Mexican Enterprises. The Claimants seemingly contend that those named in the

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[80] RFA, ¶¶ 4, 8 and 17-22.

Original NOI own or control the Mexican Enterprises and that the 31 Additional Claimants are merely "minority investors" whose added presence is immaterial to the question of whether Mexico had proper notice of the claim.

> Mexico's objections regarding the Notice of Intent are meritless and should ring entirely hollow because: (i) the Claimants identified in the Notice of Intent are either the majority owners of the Mexican Companies **or** are the ones who directly and indirectly control all of the Mexican Companies, and the addition of minority investors in the RFA in order to perfect the claims does not prejudice Mexico in any way;
>
> [...]
>
> The Claimants identified in the Notice of Intent represent the majority owners of **most** of the Mexican Companies, as well as of B-Cabo, LLC and Colorado Cancún, LLC. As the majority owners, these Claimants notified Mexico of the investments at issue, the claims on their own behalf pursuant to Article 1116 of the NAFTA and on behalf of the Mexican Companies pursuant to Article 1117 of the NAFTA. It follows, then, that Mexico knew, from the moment it received the Notice of Intent, the identity of the principal U.S. investors, the nature of the ºinvestments that were at issue, the gravamen of the disputes at issue and the basis of their claims. These Claimants are the ones that directly and indirectly control B-Cabo, LLC, Colorado Cancún, LLC as well as the three additional Mexican Companies that were included in Claimants' RFA. The addition of B-Cabo, LLC, Colorado Cancún, LLC, the three Mexican Companies, and a group of minority investors, all of whom were identically affected by Mexico's illegal actions, does not change anything and certainly does not affect Claimants' ability to access the Additional Facility or the Secretariat's duty to register their RFA. […] Adding individual, minority investors, BCabo, LLC, Colorado Cancún, LLC, and three additional Mexican Companies in Claimants' RFA does not affect the sufficiency of that notice or prejudice Mexico in any way. This is particularly so as Mexico was fully aware at all times that Claimants intended their claims under NAFTA to encompass the entirety of the investments at issue and, thus, that the eventual arbitration would encompass and include all relevant investors in the casino projects at issue. [...] [81]
>
> [Emphasis added]

102. The Claimants' characterization of the Additional Claimants as "minority investors" contributes to the ambiguities in the facts. It seems this was a pretext calculated to persuade the Secretary-General that the inclusion of these new claimants was immaterial.

103. The Claimants' rejoinder to Mexico's objection to registration of the claim continues the pretext that the addition of 31 claimants is immaterial to question of whether there had been compliance with NAFTA Article 1119:

> As explained in Claimants' Response, the Claimants identified in the Notice of Intent constitute and represent the majority owners of most of the Mexican Companies, as well as of B-Cabo, LLC and Colorado Cancún, LLC. These Claimants, in turn, notified Mexico of the investments at issue and of the potential NAFTA claims in dispute on

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[81] Claimants' Response to the United Mexican States' Objection to Claimants' Request for Approval to Access the ICSID Additional Facility and Request for Arbitration in the matter of *BMex, LLC et al. v. United Mexican States*, and Response to ICSID's Questionnaire dated July 6, 2016, of 21 July 2016, pp. 15-16.

> their own behalf pursuant to Article 1116 of the NAFTA and on behalf of the Mexican Companies pursuant to Article 1117 of the NAFTA. In so doing, the Notice of Intent clearly informed Mexico of the identity of the principal U.S. investors, the nature of the investments that were at issue, the gravamen of the disputes at issue and the factual and legal bases for their claims. The only information referenced under Article 1119—which only requires disclosure of the name and address of a claimant, the provisions of the NAFTA that have been breached, the basis of the claims against the state and the amount of damages—that was not included in Claimants' Notice of Intent was the name and addresses of a circumscribed group of minority investors. That minor omission, however, was unnecessary given that the majority owners sent the Notice of Intent and did not deprive Mexico of notice of the Claimants' claims. On the contrary, the Notice of Intent gave Mexico proper and sufficient notice of the nature and scope of the investors and of the claims asserted against it in connection with the investments at issue and, thus, more than adequately satisfied the purpose of Article 1119, which was to "serve as the basis for consultations or negotiations between the disputing investor and the competent authorities of a Party."[82]
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> [Emphasis added]

104. In contrast, the civil action complaint filed by the Claimants (except B-Cabo and Colorado Cancun) on June 6, 2016 against Messrs. José Benjamín Chow, Luc Pelchat and Alfonso Rendón (*i.e.*, the RICO Claim) seemingly indicates that all of them collectively have voting control of the Juegos Companies that own the casino facilities:

> 1. Plaintiffs collectively own a majority of the controlling Series B shares in five Mexican companies (Juego Companies), each of which owns a Mexican casino (collectively, the Casinos). Series B is the only series of shares that carries expansive voting rights to control most resolutions at shareholder meetings, including naming the majority of each Juego Company's board of managers.
>
> [...]
>
> 54. Initially, the Burrs and Conley used Plaintiff B-Mex to establish the framework and foundation for their operations and to construct the Naucalpan casino through Juegos de Video y Entretenimiento de Mexico. Then in 2006, the Burrs and Conley used Plaintiffs B-Mex II, LLC and Palmas South, LLC to capitalize and control the operation of the four Affected Juego Companies and to begin establishing the other four Casinos. More Coloradans joined the effort, becoming investors and participants in management.
>
> 55. Series B shares of the Juego Companies, unlike Series A shares, carry broad voting rights. The B-Mex Companies own the majority of Series A and A2 shares in each Company. Plaintiffs other than the B-Mex Companies collectively own voting control of each Juego Company by holding a majority of Series B shares.[83]

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[82] Rejoinder to the United Mexican States' Unauthorized Submission Replying to Claimants' July 21, 2016 Response in Support of their Request for Approval to Access the ICSID Additional Facility and Request for Arbitration in the matter of *B-Mex, LLC et al. v. United Mexican States*, and Response to ICSID's Questionnaire dated July 6, 2016; Response to ICSID's Letter of August 2, 2016, of 5 August 2016, pp. 5-6.

[83] Exhibit R-002, RICO Claim - Complaint, ¶¶ 1, 54-55.

[Emphasis added]

105. This is different from prior descriptions of the ownership issues contained in the White & Case Letter, the Original NOI, the RFA and the two submissions responding to Mexico's objections to registration of the claim. The plaintiffs in the RICO Claim (other than B-Mex Companies) contended without reservation that they "collectively own voting control …" of the Juegos Companies through the ownership of the Series B shares (which carry voting rights)[84] and requested the Colorado courts to declare that said shares were not transferred away from the plaintiffs.[85]

106. In other words, when attempting to excuse their failure to give notice of an intended claim, the 31 Additional Claimants are portrayed as unimportant minority investors, but they are portrayed as essential participants when they, as plaintiffs in the RICO Action, seek to re-establish their voting control at shareholders' meetings of the "Juegos Companies". But control of the Juegos Companies is at issue in this arbitration as well – the plaintiffs in the RICO action would be the very same parties that would collectively have voting control of those companies for the purposes of seeking to establish standing under NAFTA Article 1117.

107. The Respondent will further elaborate on what is required to establish that the Claimants directly or indirectly own or control the Mexican Enterprises in the following sections.

1. Failure to establish that any of the Claimants has standing to assert a claim under NAFTA Article 1116

108. Article 1116 provides as follows:

> **Article 1116: Claim by an Investor of a Party on Its Own Behalf**
>
> 1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.
>
> 2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

109. Each of the Claimants must establish that he/she/it is an "*investor of a Party" in order to assert a claim against another Party under NAFTA Chapter Eleven. The term "Investor of a Party*" is defined as "a Party or state enterprise thereof, or a national or an enterprise of such Party that

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[84] *Id.*, ¶ 55.

[85] *Id.*, p. 50.

seeks to make, is making or has made an investment". Investment is defined in a broad but closed list of assets and legal rights in Article 1139.

110. Each Claimant must state precisely which assets or legal rights he/she/it contends comprise his/her/its investment (or investments) for the purposes of this arbitration and then establish that fact with evidence. As these facts must be proven in order establish the Tribunal's jurisdiction *ratione personae* with respect to each individual claimant, each of them has the onus of tendering such proof now, in the jurisdiction phase. This is well-established in the applicable jurisprudence.

111. For example, in *Emmis International Holding v. Hungary*, the Tribunal held:

> 171. The Tribunal must [decide the question of whether the Claimants owned an investment capable of expropriation] finally at the jurisdictional stage on the balance of probabilities. The Claimants bear the burden of proof. If the Claimants' burden of proving ownership of the claim is not met, the Respondent has no burden to establish the validity of its jurisdictional defences. As the tribunal held in *Saipem v Bangladesh*:
>
> > "In accordance with accepted international practice (and generally also with national practice), a party bears the burden of proving the facts it asserts. For instance, an ICSID tribunal held that the Claimant had to satisfy the burden of proof required at the jurisdictional phase and make a prima facie showing of Treaty breaches".
>
> 172. This passage touches upon two types of jurisdictional proof. The first relates to questions of fact that must be definitively determined at the jurisdictional stage. The second involves questions of fact that go to the merits, which the Tribunal must ordinarily not prejudge, unless they are plainly without foundation. This latter question necessarily involves assessing whether the alleged conduct of the Respondent is capable of constituting a breach of the substantive protections of the investment treaty so as to fall within the jurisdiction of the Tribunal *ratione materiae* but this has to be determined on a *prima facie* basis only.
>
> 173. In the context of the present case, the Claimants bear the burden of proving that they owned an investment capable of expropriation. This task lies fully within the ambit of the jurisdictional phase. This burden is to be contrasted with the need to establish on a *prima facie* basis at the jurisdictional phase that the Respondent breached the treaty. This question is based on whether the alleged unlawful conduct giving rise to the treaty breach—if it can be established in the merits phase—is capable of falling within the treaty provisions invoked. [86]
>
> [Footnotes omitted.]

112. The Tribunal in *Philip Morris v. Uruguay* similarly observed as follows:

> 29. Regarding burden of proof, it is commonly accepted that at the jurisdictional stage the facts as alleged by the claimant have to be accepted when, if proven, they would constitute a breach of the relevant treaty. However, if jurisdiction rests on the

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[86] Exhibit RL-020, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶¶ 171-173.

> satisfaction of certain conditions, such as the existence of an "investment" and of the parties' consent, the Tribunal must apply the standard rule of onus of proof *actori incumbit probatio*, except that any party asserting a fact shall have to prove it.[87]
>
> [Footnotes omitted.]

113. The Respondent accordingly submits that, at a minimum, the Claimants must state precisely and prove with evidence:

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

114. The Respondent is unable to comment further on this objection on the basis of the Claimants' submissions to date and reserves the right to further address this issue after the Claimants have made their submissions and adduced evidence supporting their alleged standing under NAFTA Article 1116.

2. Failure to establish that any of the Claimants has standing to assert a claim under NAFTA Article 1117 on behalf of any of the Mexican Enterprises

115. NAFTA Article 1117 provides as follows:

> **Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise**

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[87] Exhibit RL-021 *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, ¶ 29, citing (at footnote 4): *Feldman v. Mexico*, Award, 16 December 2002, para. 117; *Soufraki v. UAE*, Award, 7 July 2004, paras 58,81; Thunderbird v. Mexico Award, 26 January 2006, para. 95; *Saipem v. Bangladesh*, Decision on Jurisdiction, 21 March 2007, para 83. See also the ICJ in: *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America*), Judgment, 26 November 1984, ICJ Reports 1984, p. 437, para. 101; Case concerning *Avena and other Mexican Nationals (Mexico v. United States*), Judgment, 31 March 2004, ICJ Reports 2004, p. 41, paras 55-57. See also Article 27(1) of the 2010 UNCITRAL Arbitration Rules. See also, Exhibit RL-022, *Francisco Hernando Contreras S.L. v. Republic of Equatorial Guinea*, ICSID Case No. ARB(AF)/12/2, Award on Jurisdiction, 5 December 2015 [Spanish], ¶ 94.

> 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 under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.
>
> 2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.
>
> 3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.
>
> 4. An investment may not make a claim under this Section.

116. Any of the Claimants that seek to assert claims on behalf of any of the Mexican Enterprises must be able to establish that he/she/it is an "investor of a Party" and that he/she/it "directly or indirectly owns or controls" a particular enterprise. As with the claims asserted under Article 1116, those Claimants bear the onus of proving their standing to submit claims to arbitration under Article 1117 now, in the jurisdiction phase. The jurisprudence cited above applies equally here.

117. As explained in detail above, the Claimants' pleadings and submissions on this subject are ambiguous, confusing and contradictory. The Claimants must state precisely who among them is alleged to directly or indirectly own or control each of the Mexican Enterprises and how such ownership or control is alleged to exist, and then to prove their allegations with evidence.

118. The Respondent accordingly submits that, at a minimum, the Claimants must state precisely and prove with evidence the following:

- The identity of the Claimant or group of Claimants that is alleged to have standing to assert a claim for each one of the Mexican Enterprises;
- the number of shares that each such Claimant holds in each of the Mexican Enterprises, the percentage such shares represent in the total issued shares in that class, and the voting rights associated with that class of shares;
- the dates that all such shares were acquired and disposed of or lost;
- the precise manner in which the Claimants claim to exercise direct or indirect control of each of the Mexican Enterprises; and

- the terms of any shareholders' agreement, voting proxy or any other instrument that purports to convey any shareholder's right to any of the other Claimants, or any third party.

119. The Respondent is unable to comment further on this objection on the basis of the Claimants' submissions to date and reserves the right to address and fully respond to the Claimants' anticipated submissions on this issue.[88]

3. Failure to establish the legal validity of the purported consents and waivers belatedly submitted on behalf of the Mexican Enterprises

120. The Respondent's objection to the registration of the claim observed, *inter alia,* that the RFA did not include powers of attorney (which the Claimants refer to as consents) or waivers for any of the Juegos Companies.[89]

121. On 6 July 2016, ICSID wrote to the Claimants seeking clarification of certain aspects of their RFA. Section "b" of the letter included a specific request for "*copies of the waivers issued by the Mexican Companies in accordance with NAFTA Article 1121*".[90]

122. In response to Mexico's objection and ICSID's questions, on 21 July 2016, the Claimants filed a submission contending that:

> […] Mexico's measures forced Claimants to mitigate damages by all available means, including through various attempts to sell the Casinos' assets. These attempts to mitigate damages led to negotiations with third parties, who took advantage of the precarious position that Mexico had placed Claimants in to illegally place themselves and their cronies on the boards of directors, and in control, of some of the Mexican Companies, namely [the Juegos Companies]. […] While Claimants attempted to remedy this predicament before filing the RFA, Messrs. Chow and Pelchat would not agree to do so. Claimants therefore have taken other steps to remedy it and regain board control so that they may provide the consents and waivers provided for by Article 1121. […][91]

123. The Claimants further contended that they were excused from providing the waivers as per the exception included in Article 1121(4) of the NAFTA and explained that they anticipated regaining control of the Juegos Companies in the next three to four weeks, at which time they would be in a position to provide the necessary waivers:

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88 The Respondent's does not admit that a claim can be asserted under Article 1117 by a group of claimants contending that they collectively control an enterprise.

89 Mexico's objection to the registration of the claim, ¶¶ 19-21.

90 ICSID Questionnaire, dated 6 July 2016, p. 2.

91 Claimants' Response to the United Mexican States' Objection to Claimants' Request for Approval to Access the ICSID Additional Facility and Request for Arbitration in the matter of *BMex, LLC et al. v. United Mexican States*, and Response to ICSID's Questionnaire dated July 6, 2016, of 21 July 2016, pp. 9-10.

> The above notwithstanding, Claimants will continue in their efforts to regain board control of the Juegos Companies and will provide the waivers for the Juegos Companies once it has done so. This is without prejudice to their argument that they are excused from meeting this requirement per the provisions of NAFTA Article 1121(4). ICSID may want to wait to grant Claimants access to the Additional Facility and to register the RFA until Claimants finalize their current efforts to obtain these documents from the Juegos Companies' boards and existing managers. Claimants anticipate that they will be in a position to provide these waivers over the next three to four weeks. […][92]

124. As for the missing consents of the Juegos Companies, the Claimants similarly contended that:

> […] for the same reasons explained in the context of the Article 1121 waivers, Mexico is responsible for Claimants' loss of board control of the Juegos Companies. This notwithstanding, just as with the Article 1121 waivers, Claimants will continue in their efforts to regain board control of the Juegos Companies and will provide the consents for the Juegos Companies once it has done so. […] Claimants anticipate that they will be in a position to provide these consents over the next three to four weeks. […][93]

125. On 2 August 2016, ICSID wrote a second letter to Claimants noting that it was unable to proceed with the approval and registration of the claim as submitted because the Juegos Companies had not provided their consent to arbitration in accordance with NAFTA Article 1121(2). ICSID then offered two alternatives to the Claimants: (i) suspend the approval and registration process until the required consents were provided, or (ii) to withdraw the claims made on behalf of said companies.[94]

126. On 5 August 2016, the Claimants informed ICSID that "the Secretariat need not suspend the approval and registration process, as Claimants have obtained the consents of the above-listed enterprises under NAFTA Article 1121(2)(a). Those consents are attached herewith as Annex A. Claimants also have obtained waivers under Article 1121(1)(b), which accompany the consent of each enterprise attached herewith as Annex A."[95] These consents and waivers where signed by Messsrs. Luc Pelchat, who is identified as a "Member of the Board of Managers" of the Juegos Companies and Mr. Gordon G. Burr, identified as "President of the Board".[96]

127. The Respondent will observe that Mr. Luc Pelchat is not named among the 39 Claimants and is one of the individuals who according to the Claimants "took advantage of the precarious position that Mexico had placed Claimants in to illegally place themselves and their cronies on the boards

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92 *Id.,* p. 10.

93 *Id.,* p. 11.

94 ICSID Letter dated 2 August 2016.

95 Claimants' Rejoinder to the United Mexican States' Unauthorized Submission Replying to Claimants' July 21, 2016 Response in Support of their Request for Approval to Access the ICSID Additional Facility and Request for Arbitration in the matter of *B-Mex, LLC et al. v. United Mexican States*, and Response to ICSID's Questionnaire dated July 6, 2016; Response to ICSID's Letter of August 2, 2016, of 5 August 2016, p. 2

96 *Id.,* Annex A.

of directors"[97]. Mr. Pelchat, together with Messrs. Chow and Rendon, were subsequently sued by the Claimants in the United States for alleged violations of the Federal Racketeering Influenced and Corrupt Organizations Act (RICO) and Colorado Organized Crime Control Act (COCCA), common law fraud, civil theft, and conversion (*i.e.*, the RICO Claim).

128. The Claimants have offered no explanation as to the circumstances under which they were able to secure Mr. Pelchat's cooperation or any evidence as to Mr. Pelchat's authority to execute the corresponding consents and waivers on behalf of the Juegos Companies.

129. Given the lack of information regarding the ownership and control of the Mexican Enterprises and the Claimants' struggle with Messrs. Pelchat and Chow over control of the Juegos Companies, the Respondent respectfully submits that the Claimants must establish with evidence that the purported consents and waivers provided on behalf of the Mexican Enterprises were signed by a duly authorized representative and are legally valid.

130. The Claimant's must also explain, and prove with evidence, that the *desistimiento* filed by EGames on 24 October 2014[98]did not have the effect of withdrawing EGames as an enterprise on whose behalf a claim would be brought under the Original NOI. Likewise, they must explain and prove with evidence how is it legally possible for Mr. Burr to now execute a consent and waiver on behalf of EGames, when the apparently authorised representative of EGames purported to desist and withdraw on behalf of the company 5 months after the Original NOI was issued.

131. Assuming the consents and waivers of the Juegos companies are found to be legally valid, the Respondent submits that the effective date of the submission to arbitration of the claims made on behalf of the Juegos Companies would be 5 August 2016, being the date that the consents and waivers were submitted to ICSID, thus completing the requirements for submission of the RFA on behalf of those entities.[99] This is, of course, without prejudice to the Respondent's argument that the purported consents, which are actually powers of attorney, failed to satisfy the requirements of NAFTA Article 1121.

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97 Claimants' Response to the United Mexican States' Objection to Claimants' Request for Approval to Access the ICSID Additional Facility and Request for Arbitration in the matter of *BMex, LLC et al. v. United Mexican States,* and Response to ICSID's Questionnaire dated July 6, 2016, of 21 July 2016, p. 9.

98 Exhibit R-005, Letter signed by Mr. José Luis Segura Cárdenas waiving the Notice of Intent filed on behalf of EGames (*desistimiento*).

99 Article 1137 (1) (Time when a Claim is Submitted to Arbitration) provides that "[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. However, as Article 1121(3) provides that the consent and waiver required by Article 1121 shall be included in the submission of a claim to arbitration, it follows that a notice of arbitration could not be considered to be complete until the required consents and waivers are delivered to the ICSID.

V. Concluding remarks and relief requested

132. Upon receipt of the RFA, the Respondent immediately put the Claimants on notice that their failures of compliance with NAFTA Articles 1119 and 1121 were manifest and serious, and that the Respondent would maintain its objections to the validity of their attempt to submit this claim to arbitration. The Claimants nevertheless pressed ahead with registration of this claim, attempting only to remediate their problem by filing the Amended NOI, 25 days after the claim was registered by the Secretary-General.

133. The Respondent has demonstrated that it would offend the ordinary meaning of the text of Articles 1119 and 1121, the fundamental treaty interpretation principle of *effet utile*, the applicable NAFTA jurisprudence and the obvious intentions of the NAFTA Parties – reinforced by their consistent submissions on the mandatory nature of these provisions – to somehow infer the existence of an exception or to employ some legal artifice to avoid applying them as written.

134. As noted in the Introduction section, procedural economy calls for the Tribunal first to consider the Respondent's preliminary objection based on the failure of each Claimant and each of the Mexican Enterprises to comply with Article 1121 as it would dispose of the claim in its entirety.

135. The Respondent has accordingly structured its request for relief as follows, while firmly maintaining the position that the Tribunal should decline jurisdiction over the entire claim:

- to decline jurisdiction over the claim in its entirety and issue an award dismissing the claims of each of the Claimants, and the claims made on behalf of each of the Mexican Enterprises, for failure to comply with NAFTA Article 1121;
- alternatively, to decline jurisdiction over the claim in its entirety and issue an award dismissing the claims of each of the Claimants (including the claims made on behalf of each of the Mexican Enterprises) for failure to establish that any of them have standing under as an "investor of a Party" as defined in NAFTA Article 1139 and/or that any one or more of them directly or directly own or control any of the Mexican Enterprises;
- alternatively, to decline jurisdiction over the claims of the Additional Claimants and the Additional Mexican Enterprises and issue an award dismissing those claims for failure to comply with NAFTA Article 1119;
- to order the Claimant to bear all of the arbitration costs and to fully indemnify Mexico for its costs of legal representation.

May 30, 2017

Respectfully submitted,

_(Signed in the original)_____
Leticia M. Ramírez Aguilar
Deputy Counsel for the United Mexican States