BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

ADDITIONAL FACILITY

BETWEEN:

Gordon G. Burr; Erin J. Burr; John Conley; Neil Ayervais; Deana Anthone; Douglas Black; Howard Burns; Mark Burr; David Figueiredo; Louis Fohn; Deborah Lombardi; P. Scott Lowery; Thomas Malley; Ralph Pittman; Daniel Rudden; Marjorie "Peg" Rudden; Robert E. Sawdon; Randall Taylor; James H. Watson, Jr.; B-Mex, LLC; B-Mex II, LLC; Oaxaca Investments, LLC; Palmas South, LLC; B-Cabo, LLC; Colorado Cancún, LLC; Santa Fe Mexico Investments, 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; Victory Fund, LLC

Claimants

and

United Mexican States

Respondent

COUNTER-MEMORIAL ON JURISDICTIONAL OBJECTIONS

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25 July 2017

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I. INTRODUCTION

1. Mexico's objections to this Tribunal's jurisdiction are completely devoid of merit. They elevate form over substance. They raise hyper-technical arguments that ultimately are based on an incorrect reading of the NAFTA. They recycle old arguments that have in the main been previously rejected by numerous NAFTA tribunals. This Tribunal should therefore reject them and tax the costs of this phase of the proceeding against Mexico.

2. The NAFTA was designed to foster and protect foreign investment by ensuring that host governments do not directly or indirectly expropriate investments, and that they treat foreign investors equitably, fairly, predictably, and consistent with the investors' legitimate expectations. Chapter Eleven of the NAFTA, including its Article 1115, sets up a dispute resolution regime whose object and purpose is to provide foreign investors from NAFTA States with an international forum to hear their grievances, consistent with international norms of due process.

3. In analyzing Mexico's objections, this Tribunal must, as required by the Vienna Convention on the Law of Treaties, interpret the NAFTA provisions at issue here with the principal object and purpose of Chapter Eleven in mind. In so doing, other tribunals hearing NAFTA disputes have continually rejected the notion that NAFTA's pre-arbitration procedural requirements pose obstacles to a tribunal's jurisdiction. Rather, these tribunals consistently have held that the sorts of objections raised here by Mexico at best raise temporary questions about the admissibility of claims and have almost uniformly noted that such issues, when and if proven, can be retroactively cured to allow NAFTA claims to proceed.

4. Notwithstanding the overwhelming and consistent precedent against it, Mexico raises a series of hyper-technical, non-substantive objections that lack merit and are easily disproven. On the back of these objections, Respondent asks this Tribunal to dismiss various claims and/or the entire case, arguing that this Tribunal lacks jurisdiction. That assertion in and of itself likely is the most glaring overstep in Mexico's submission, as none of Mexico's objections come even close of depriving this Tribunal of its jurisdiction.

5. Mexico's first objection is that Claimants lack standing to assert their claims, arguing this based on speculation and without any substantiation. Mexico conjectures that Claimants *may* not have made the requisite investments to assert their own claims, or *may* not have the requisite control or ownership to assert claims on behalf of their Mexican enterprises.

In so doing, it requests explanations and proof about Claimants' investments that Claimants need not produce, at least not at this stage of the proceedings. Mexico goes as far as to accuse Claimants, irresponsibly and without any proof, of having "intentionally engaged in obfuscation" to hide supposed fatal flaws in their case.[1] Setting to one side how it could have thought it appropriate to formally raise jurisdictional objections based on mere suppositions, Mexico's conjecture is misplaced.

6. Claimants dispense with Mexico's standing objection by providing the information and evidence needed for this Tribunal to conclude that each Claimant has standing to assert claims on their own behalf as each satisfies the definition of "investor" and each has made an "investment" as required by NAFTA Article 1116. Claimants further establish that they have standing to advance claims on behalf of their enterprises under NAFTA Article 1117, as they both own *and* control them.

7. Mexico next objects to the Tribunal's jurisdiction arguing that Claimants failed to provide pre-arbitration notice of their dispute, as required by NAFTA Article 1119. It relies on a hyper-technical and erroneous reading of that article, making arguments that have historically failed on numerous occasions before other NAFTA tribunals. Mexico asks this Tribunal to adopt a reading of NAFTA Article 1119's notice requirement that exalts form over substance and is fundamentally at odds with Chapter Eleven's object and purpose, claiming that pure technical "defects" in the NAFTA Article 1119 notice render this case subject to dismissal for lack of jurisdiction.

8. Specifically, Mexico would have this Tribunal rule that Claimants did not give Respondent proper notice of the dispute in a Notice of Intent delivered over three years ago because the *names and addresses* of a group of minority investor Claimants were not included in that document. This, even though the notice was submitted by the controlling, majority shareholders on behalf of and with the knowledge and consent of the minority shareholders and despite that the controlling shareholders notified Mexico of Claimants' dispute, including the key measures that were subject to challenge.

9. What is worse, Mexico raises this objection in direct contravention of the object and purpose of NAFTA Article 1119, because it rebuffed years of efforts by these Claimants to

[1] Mexico's Memorial on Jurisdictional Objections, ¶ 10.

engage Mexico in the very negotiations called for by Article 1118 and for which the notice period of NAFTA Article 1119 was created. The overwhelming evidence proves that Mexico has long been fully aware of Claimants' claims and of their intention to submit their claims to a NAFTA arbitration, and that it has ignored every single effort by these Claimants to engage in consultations or negotiations. Mexico chose this course of action even after receiving an amended notice in September 2016 that contains every bit of information that Mexico alleges is missing from the initial notice issued by Claimants in May of 2014. There simply is no breach of NAFTA Article 1119 under these circumstances.

10. And, even if one assumes for argument's sake that the 2014 Notice of Intent was procedurally defective in some respect, NAFTA tribunals routinely have rejected the argument that such defects create bars to their jurisdiction, holding instead that they only create temporary hurdles to admissibility of claims that can readily be cured without requiring dismissal of the already-presented claims.

11. Mexico's next objection is a real head-scratcher. It argues that Claimants did not properly consent to this arbitration under the Treaty. NAFTA Article 1121 only requires that Claimants' consent be (1) made in writing, (2) delivered to Mexico, and (3) included in the submission of a claim to arbitration. Nothing more.

12. Mexico asks this Tribunal to find that Claimants have failed to meet these requirements *despite that* Claimants unambiguously consented to this arbitration in writing in their Request for Arbitration, specifically stating that "*[b]y this Request for Arbitration, Claimants accept Mexico's offer [to submit to arbitration], and hereby submit the present dispute to arbitration under the Additional Facility Rules of ICSID*."[2] As if this were not sufficient, Claimants also each provided written powers of attorney delivered to Mexico with the Request for Arbitration through which Claimants, again, unambiguously communicated their consent to this NAFTA proceeding by instructing their attorneys:

> to take any steps required for the initiation of, and to represent [Claimants] and act on [their] behalf against the United Mexican States in, arbitration proceedings under the North American Free Trade Agreement ("NAFTA"), as well as any ancillary settlement

[2] Claimants' Request for Arbitration (June 15, 2016), ¶ 114.

> negotiations that may derive from [Claimant…]'s intent to initiate arbitration proceedings against the United Mexican States[.][3]

13. How those *two* written manifestations of Claimants' clear consent to initiate these proceedings fails to communicate to Mexico that Claimants have in fact consented to bring this case is perplexing. The reality is that Claimants, in two separate documents, met the consent requirements of NAFTA Article 1121. This ends the inquiry and requires dismissal of Mexico's NAFTA Article 1121 objection.

14. What is more, as with Mexico's NAFTA Article 1119 objection, NAFTA tribunals have unanimously rejected the notion that a defect in providing NAFTA Article 1121 consent affects a tribunal's jurisdiction. Instead, tribunals have routinely concluded that any defects in providing NAFTA Article 1121 consent go to temporary problems with the admissibility of claims that can easily and retroactively be cured.

15. Mexico's last set of "jurisdictional" objections question—again based on supposition—the legal validity of the Juegos Companies' and E-Games' consents and waivers. Predicated on an improper shifting of the burden of proof, and with no legal authority for support, Mexico argues that Claimants must prove the legal validity of the consents and waivers they submitted for the Juegos Companies and E-Games. They speculate that the consents and waivers for these enterprises *may* be invalid because (a) some of the Claimants sued the individual who signed the consents and waivers on behalf of the Juegos Companies, Mr. Luc Pelchat; and (b) Mexico found a document in its records that purportedly raises questions as to whether E-Games has waived its claims in this arbitration.

16. While Claimants maintain that these undeveloped affirmative defenses fail for lack of proof, Claimants nonetheless conclusively show that (a) Mr. Pelchat had authority to sign the Juegos Companies' consents and waivers when he signed them, and (b) the document Mexico has presented to this Tribunal as evidence of E-Games' waiver of its claims is a void and fraudulently-created document that has no effect on the validity of E-Games' consent and waiver.

17. Having relied on the fraudulent document concerning E-Games, Claimants are left to conclude, with concern, that Mexico failed to conduct proper due diligence before

[3] Claimants' Consents Waivers and Powers of Attorney, **C-4**.

utilizing this evidence with this Tribunal. Had it spoken to the fraudulent document's purported signatory, as Claimants did, Mexico would have learned the truth and—Claimants hope—would have refrained from making a baseless jurisdictional argument on its account. In response to this point, Mexico should not be heard to argue that it could not have learned of the fraudulent nature of the document until now, as Mexico's Ministry of Economy previously has concluded that they doubted the validity and legal effect of this document.[4] That Mexico chose to file this document in support of a jurisdictional objection notwithstanding its own belief that the document was of dubious validity should, Claimants respectfully suggest, figure prominently in the Tribunal's decision on costs and fees for this phase of the proceeding.

18. After Mexico illegally shut down Claimants' casino facilities using highly orchestrated, commando raids in April 2014, Claimants have been unable to access their casinos and have seen the value of their highly-profitable and substantial investments in the country's gaming industry diminish to nothing. Mexico now hopes to have this Tribunal help it escape liability for its internationally wrongful acts based on weak, unsubstantiated objections that have been rejected consistently by other NAFTA tribunals when advanced in other cases.

19. This Tribunal should find that it has jurisdiction over all claims and Claimants, and should order Respondent to pay the costs and attorneys' fees that it forced Claimants to incur to defend Mexico's groundless jurisdictional objections.

II. OVERVIEW OF SUBMISSION

A. Overview of this Counter-Memorial

20. The remainder of this Counter-Memorial is organized as follows.

a. **Section III** provides the factual background as relevant to Mexico's jurisdictional objections and Claimants' responses;

b. **Section IV** addresses the procedural history of this arbitration to date;

c. **Section V** rebuts Mexico's legal arguments. *First*, it addresses Mexico's arguments regarding Claimants' alleged lack of standing to submit a claim to arbitration under NAFTA Article 1116 and Claimants' alleged lack of standing to submit a claim to arbitration on behalf of the Mexican enterprises under

[4] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 50.

NAFTA Article 1117 (**Section V.A.)**. *Second*, this section addresses Mexico's argument regarding Claimants' alleged failure to comply with NAFTA's notice of intent requirement pursuant to Article 1119 of the Treaty (**Section V.B.**). *Third*, the section deals with Mexico's objection regarding Claimants' alleged failure to comply with NAFTA Article 1121 (**Section V.C.**). *Finally*, the section responds to Mexico's arguments regarding the legal validity of the consents and waivers submitted on behalf of five Mexican Enterprises on August 5, 2016, as well as the legal validity of E-Games' consent and waiver signed by Claimant Gordon Burr and submitted with Claimants' Request for Arbitration.

d. **Section VI** sets out Claimants' request for relief.

B. Witness Statements, Exhibits, and Legal Authorities

21. This Counter-Memorial is accompanied by statements from the following witnesses:

a. Gordon G. Burr dated July 25, 2017 (**CWS-1**);

b. Erin J. Burr dated July 25, 2017 (**CWS-2**);

c. Julio Gutiérrez Morales dated July 20, 2017 (**CWS-3**);

d. Luc Pelchat dated July 21, 2017 (**CWS-4**); and

e. José Luis Segura Cárdenas dated July 18, 2017 (**CWS-5**).

22. The Counter-Memorial also is accompanied and supported by exhibits numbered consecutively from Exhibit **C-35** to **C-131** and legal authorities numbered consecutively from **CL-1** to **CL-39**. Pursuant to Procedural Order No. 1, exhibits and legal authorities in English have not been translated into Spanish. This submission along with all other supporting documents that must be translated will be translated in accordance with Procedural Order No. 1. Claimants reserve the right to provide certified translations if a dispute over a translation arises or the Tribunal requests it.

III. FACTUAL BACKGROUND

A. CLAIMANTS' DECISION TO INVEST IN MEXICO

23. In 2004, Mr. Gordon Burr, a successful American businessman with experience on Wall Street and investment banking, met an experienced gaming entrepreneur—Mr. Lee Young—who had operated video poker facilities in the United States and owned video gaming centers in Mexico.[5] Mr. Young and his investment group owned and operated a successful facility in Monterrey, Mexico, where patrons played on machines hosting games of "skill" (as opposed to games of chance), and was in the process of opening another gaming center. Mr. Young suggested that Mr. Burr put together a group of investors to develop, own, and operate multiple gaming facilities in Mexico.[6]

24. Beginning in August 2004, Mr. Burr conducted several exploratory visits to Mexico, where he met with several key players in the Mexican gaming industry.[7] In Denver, Mr. Burr was also introduced to future investor and Claimant Mr. John Conley, a fellow businessman with over 20 years of business experience in Mexico who, like Mr. Burr, lived in Colorado. Mr. Burr quickly learned through his business trips that gaming operators were making substantial profits from their operations in Mexico.[8] He concluded the industry was ripe for expansion and decided to get more directly involved beyond just identifying and organizing investors.[9]

25. On September 17, 2004, Mexico enacted the Regulation of the Games and Raffles Federal Law ("**Gaming Regulation**"). The Gaming Regulation provided a new framework to regulate the gaming industry in Mexico.

26. From January 2005, Messrs. Burr and Conley continued their due diligence visits to Mexico.[10] Once they confirmed that the prospects of investing in the gaming industry in Mexico were sound, Mr. Burr set out to recruit fellow investors for the development and

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[5] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 6.

[6] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 6.

[7] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 7.

[8] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 7.

[9] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 8.

[10] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 8.

operation of multiple casinos in Mexico, while Mr. Conley recruited an initial team in Mexico to help open and manage the casinos.[11]

B. CLAIMANTS' INVESTMENTS IN MEXICO AND THEIR CORPORATE STRUCTURE

27. Claimants' investments in Mexico began in 2005 when they made their first substantial investments in the construction, development, and operation in the first of what eventually became five dual-function gaming facilities, each with remote gambling centers and lottery number rooms. These gaming facilities are in the following Mexican cities: (1) Naucalpan; (2) Villahermosa; (3) Puebla; (4) Cuernavaca; and (5) Mexico City (the "**Casinos**").

28. The investors, led by Mr. Burr, his daughter Erin Burr, Mr. Conley, and others created corporate structures both in the United States and Mexico to channel and manage their investments in the Casinos. On the Mexican side of the corporate structure, Claimants created the following Mexican enterprises to own each of the assets of the Casinos as follows:

- Juegos de Video y Entretenimiento de México, S de R.L de C.V. ("**JVE Mexico**"), which owns the Naucalpan Casino;
- Juegos de Video y Entretenimiento del Sureste, S de R.L. de C.V. ("**JVE Sureste**"), which owns the Villahermosa Casino;
- Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. ("**JVE Centro**"), which owns the Puebla Casino;
- Juegos y Videos de México, S de R.L. de C.V. ("**JyV Mexico**"), which owns the Cuernavaca Casino; and
- Juegos de Video y Entretenimiento del D.F., S de R.L de C.V. ("**JVE DF**"), which owns the Mexico City Casino.

These five Mexican enterprises (the "**Juegos Companies**") served as the asset holding corporate vehicles for the Casinos and their respective business operations.[12]

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[11] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 8; *see* Las Palmas Investment Opportunity (May 04, 2005), **C- 5**.

[12] Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 13; Erin J. Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 7.

29. Claimants also created Exciting Games, S. de R.L. de C.V. ("**E-Games**") in 2006, a Mexican company that eventually became the operator and permit holder of the Casinos.

30. On the U.S. side of the corporate structure the investors established B-Mex, LLC, B-Mex II, LLC, and Palmas South, LLC[13] (the "**B-Mex Companies**").

31. As explained in greater detail below and in Section V.A of this Counter-Memorial, Claimants owned, controlled, and managed all aspects of the Casino operations through a corporate structure consisting primarily of the Juegos Companies, E-Games, Operadora Pesa, S. de R.L. de C.V. ("**Operadora Pesa**") , and the B-Mex Companies.[14]

1. The B-Mex Companies

32. In 2005, Mr. Burr, Mr. Conley and Ms. Erin Burr established the B-Mex Companies, as Colorado limited liability companies in the United States, to form, capitalize and control the Mexican enterprises that would own the facilities in Mexico.[15] Claimants Messrs. Burr and Conley served on the Boards of Managers of all the B-Mex Companies, which afforded them influence and control over the B-Mex Companies' decisions.[16]

33. Initially, the B-Mex Companies directly participated in the management of the Casinos. However, it became more practical and efficient to have these services run through one entity. To that end, in 2009, Mr. Burr and Ms. Burr decided to form a separate U.S. company to pay the management team for their services in managing the casino operation, Video Gaming Services, Inc. ("**VGS**"), a corporation organized under the laws of the state of Colorado, U.S.A.[17] By way of a Management Services Agreement with the B-Mex Companies dated October 26, 2009, VGS became the contractor that would employ and pay the

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[13] Originally named B-Mex III, LLC, but subsequently renamed Palmas South, LLC.

[14] *See also* Annex A of Erin J. Burr's Witness Statement for a diagram of Claimants' casino business' corporate structure.

[15] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 22.

[16] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 16; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 23.

[17] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 26; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 12.

management team in charge of the Casino operations and Claimants' investments in the B-Mex Companies and the Juegos Companies.[18] Mr. Gordon Burr led that management team.

34. In June 2011, Claimant Gordon Burr entered into an employment agreement with VGS ("**VGS Employment Agreement**"), thus formalizing the managerial duties that Mr. Burr had already previously assumed.[19] Through consent of their respective Boards of Directors, the Juegos Companies adopted the VGS Employment Agreement, thereby cementing Mr. Burr's control over the entire business operation. The VGS Employment Agreement formalized Mr. Burr's role as President of the B-Mex Companies as well as President of the Boards of Directors of the Juegos Companies (as explained further below), but also as an employee of VGS.[20] This gave Claimants, through Mr. Burr, additional control over the casino business operation.[21]

35. Throughout the entire operation of the Casinos, the B-Mex Companies always exercised control over the operational, managerial, and decision-making aspects of the Juegos Companies.[22] The B-Mex Companies' share ownership in the Juegos Companies entitled them to appoint at least one director on the Board of each of the Juegos Companies.

2. The Juegos Companies

36. As previously mentioned, Claimants formed the Juegos Companies to hold the assets of the gaming investments in accordance with applicable Mexican laws and regulations. To this end, Claimants exercised and maintained ownership and control of the Juegos Companies and Casinos at all relevant times.[23]

37. Through majority ownership of all five Juegos Companies and control of the voting rights to appoint four out of five directors on the Boards of each of the Juegos Companies,

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[18] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 27; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 26.

[19] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 27.

[20] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 30.

[21] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 30; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 24-25.

[22] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 16; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 33-38.

[23] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 14; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 33-38.

Claimants owned and controlled the Juegos Companies through their determinative influence over shareholder and board resolutions.[24]

38. In addition, Claimants Gordon Burr, John Conley, and Daniel Rudden exercised direct control over the Juegos Companies through their executive positions on the Companies' Boards of Directors.[25] Mr. Burr sat as President of the Board of Directors of all five Juegos Companies.[26] Mr. Conley also sat on all five Boards, while Daniel Rudden sat on the Boards of JVE Mexico and JVE Sureste.[27]

39. As detailed further in Section V.A.3 of this Counter-Memorial, all Claimants[28] in this arbitration made their investments in the Juegos Companies before June 2013.[29] And as of today, all Claimant investors in the Juegos Companies remain owners of their respective shares, including as of June 15, 2016, when Claimants filed their Request for Arbitration.[30] Accordingly, Claimants have continuously maintained ownership and control of the Juegos Companies at all relevant times.[31]

3. E-Games

40. Since November 2008, E-Games has been the operator and permit holder of the Claimants' Casinos in Mexico.[32] In order to manage the Casino operations, Mr. Burr, Ms. Burr, and Mr. Conley established, held majority interests in, and directly and indirectly controlled E-Games.[33] For example, Mr. Burr, as President of E-Games, exercised direct management

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[24] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 14; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 34-35; *see infra*.

[25] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 14; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 34.

[26] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 14; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 34.

[27] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 14; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 34.

[28] As will be explained *infra*, B-Cabo, LLC and Colorado Cancún, LLC are not shareholders of the Juegos Companies, and are not pursuing claims on behalf of the Juegos Companies under NAFTA Article 1117.

[29] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 73.

[30] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 74.

[31] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 73-74.

[32] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 17; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 9.

[33] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 17; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 43.

control over it, including through his role as President of its Board of Directors.[34] In that capacity, Mr. Burr has full authority to act on E-Games' behalf, including the right to exercise legal rights.[35]

41. At all relevant times, Mr. Burr and other U.S. investors held majority ownership over E-Games, which also included voting control over the most critical decisions of the company.[36] The U.S. shareholders of E-Games, which are Claimants Oaxaca Investments, LLC (owned by Gordon and Erin Burr) and John Conley, always voted as a block on key decisions.[37] In addition, they always had the vote of other shareholders including Messrs. José Ramón Moreno Quijano and Alfredo Moreno Quijano,[38] who voted with them on all key decisions concerning the operation of the Casinos.[39] With this voting control structure in place, E-Games became another principal entity through which Mr. Burr and the U.S. investors exercised control over the Juegos Companies and the Casinos' operations.[40]

4. Operadora Pesa

42. Mr. Burr, Ms. Burr, and Mr. Conley also formed Operadora Pesa, S. de R.L. de C.V. ("**Operadora Pesa**") in 2008.[41] Operadora Pesa's principal role was to coordinate with vendors for goods and services on behalf of the Casinos to benefit from volume and other discounts.[42] Claimant Gordon Burr controlled Operadora Pesa, which exclusively serviced the

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[34] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 17.

[35] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 17.

[36] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 18.

[37] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 18.

[38] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 18. ("Alfredo could not vote the 13.34% of the stock that he held, as he essentially held it for John Conley, and he was contractually prevented from voting that percentage in any E-Games board meeting without first providing John with the right to exercise to purchase that stock at a nominal, prearranged price. The upshot of this arrangement, as it relates to voting, is that John controlled Alfredo's voting at all board meetings. The company's bylaws required a 70% to adopt resolutions, and with this voting bloc we had the votes necessary to adopt whatever resolutions we required.").

[39] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 18.

[40] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 18-19.

[41] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 25; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 45.

[42] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 25; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 45-46.

Casinos and had no other course of business from selecting the vendors which Operadora Pesa would contract with to deciding the terms of the contracts. [43]

5. B-Cabo, LLC and Colorado Cancún, LLC

43. Claimants also formed B-Cabo, LLC and Colorado Cancún, LLC as Colorado limited liability companies to pursue the development and operation of casino and hotel facilities in the Mexican resort towns of Cabo San Lucas and Cancún, respectively.[44] Through Gordon and Erin Burr, Claimants formed these companies to develop these projects and dedicated significant time and effort preparing subscription agreements, performing due diligence, and negotiating with business partners.[45] Claimants were in the process of finalizing terms with their partners, including having a finalized agreement with the Cabo partners, and were about to begin accepting capital investments into the casino resort projects when Mexico unlawfully revoked Claimants' casino permit.

C. CASINO OPERATIONS FROM 2005 TO 2012

44. On March 10, 2005, Mexico's Interior Ministry ("**SEGOB**"), the agency in charge of regulating the gaming industry in the country through its Games and Raffles Division, issued a resolution to Juegos de Entretenimiento y Video de Monterrey, S.A. de C.V. ("**JEV Monterrey**"). That resolution allowed JEV Monterrey to install and operate skill gaming machines throughout Mexico, as skill gaming machines were considered to be outside the purview of Mexican gambling laws and, as such, did not require a specific gaming permit from SEGOB ("**Monterrey Resolution**").[46]

45. In early 2005, after several exploratory due diligence visits to Mexico and meetings with some of the key players in the Mexican gaming industry, Mr. Burr decided that there was a sound business opportunity in operating the casino investments under the Monterrey Resolution (defined below). To that end, on June 13, 2005, June 30, 2006 and July 30, 2006, the Juegos Companies entered into joint venture agreements with JEV Monterrey to operate

[43] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 25; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 46.

[44] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 50-51.

[45] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 47-55.

[46] SEGOB Resolution No. UG/211/0295/2005 (Mar. 10, 2005), **C-94**.

Casinos under the auspices of the Monterrey Resolution.[47] This allowed the Juegos Companies to operate skill machines in their Casinos.[48] Claimants' initial operations in Mexico were legal and with SEGOB's knowledge.[49]

46. This operating and joint venture relationship with JEV Monterrey lasted from June 2005 until April 2008.[50] In 2008, once the new Gaming Regulation issued by SEGOB cleared various judicial hurdles, it became clear to Claimants that they had to expand the scope of their operations and move them under gaming permits.[51] Claimants initially wanted their own permit, and they therefore sought to purchase one.[52] They placed a significant down payment on purchasing a gaming permit from another company that had obtained one from SEGOB.[53] After entering into negotiations about partnering with two important private equity companies who were advanced in their discussions to invest in gaming facilities with another company, Entretenimiento de México, S.A. de C.V.'s ("**E-Mex**"), they were persuaded by the private equity companies to move their Casino operations under E-Mex's permit.[54]

47. On April 1, 2008, the Juegos Companies entered into an agreement with JEV Monterrey and E-Mex, through which the Juegos Companies terminated their previous joint venture agreements with JEV Monterrey and agreed to operate under E-Mex's permit.[55] At that point, Claimants were operating their five gaming facilities but they acquired the right to open two additional ones under the E-Mex permit given US$ 2.5 million in unused equity that they had previously paid to JEV Monterrey. JEV Monterrey and E-Mex were controlled by the same person, Juan Rojas Cardona.

48. On November 1, 2008, Claimants and E-Mex entered into an Operating Agreement,[56] whereby E-Games acquired the rights and obligations to operate fourteen casino

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[47] Joint Venture Agreements between the Juegos Companies and JEV Monterrey (June 13, 2005 for Naucalpan, July 30, 2006 for D.F. and June 30, 2006 for rest), **C-95 – C-99**.

[48] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 20.

[49] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 20.

[50] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 20-22.

[51] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 21.

[52] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 21.

[53] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 21.

[54] Transaction Agreement (April 1, 2008), **C-6**.

[55] Transaction Agreement (April 1, 2008), **C-6**.

[56] Operating Agreement (November 1, 2008), **C-7**.

facilities (7 remote gambling centers and 7 lottery number rooms) under E-Mex's dual-function permit, as provided for and in accordance with the Gaming Regulation and other applicable Mexican laws. At this point, E-Games began its role as the operator of the Casinos.[57] As of that moment, SEGOB recognized and authorized E-Games' status as a legal casino operator under E-Mex's permit on numerous occasions.[58]

49. Claimants and E-Mex eventually had a falling out over contractual disputes as well as business decisions and other actions by E-Mex that placed E-Mex's casino permit in legal and financial jeopardy and, by association, E-Games' good name and survival as an operator in the casino industry.[59] As a result, Claimants understood that they had to gain independence from E-Mex's permit to continue operating the Casinos in Mexico without jeopardizing their good name and legal status. By this time, Claimants had developed, constructed, operated and managed the Juegos Companies and five Casinos successfully for many years with SEGOB's continued seal of approval.

50. On May 27, 2009, SEGOB issued Resolution DGAJS/SCEV/0260/2009-BIS, authorizing E-Games to operate its Casinos as an independent operator, but still under the authority of E-Mex's permit. This allowed E-Games to report directly to SEGOB even though it continued to operate under E-Mex's permit.[60]

51. On February 22, 2011, following an invitation from SEGOB, E-Games applied for its own, independent casino permit.[61] By that time, E-Mex was in the midst of bankruptcy proceedings as a result of its default on its obligations to the very private equity companies that had convinced Claimants to move under E-Mex's permit. A declaration of bankruptcy or insolvency, which appeared imminent, would have allowed SEGOB to extinguish E-Mex's gaming permit under which E-Games acted as independent operator, threatening E-Games' ability to continue operating the Casinos. E-Games therefore applied for its own permit to avoid losing its considerable investments in Mexico should E-Mex be declared insolvent.

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[57] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 24.

[58] *See* SEGOB Resolution No. DGAJS/SCEV/00619/2008 (Dec. 09, 2008), **C-8**; SEGOB Resolution No. DGAJS/SCEV/0194/2009 (May 08, 2009), **C-9**.

[59] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 22-24.

[60] SEGOB Resolution No. DGAJS/SCEV/0260/2009-BIS (May 27, 2009), **C-11**.

[61] E-Games Permit Application (Feb. 22, 2011), **C-14**.

52. Starting in August 2011, Mexican government officials, through federal, state and local agencies, raided and harassed Claimants' Casinos for unexplained reasons.[62] Mexican federal agents carried out one of the raids in riot gear, with guns drawn, during business hours and with customers present.[63] Another time, Mexico's internal revenue service (*Servicio de Administración Tribuna*, in Spanish "**SAT**") closed down one of Claimants' facilities and when the Mexican courts ordered it reopened, the SAT delayed carrying out the court order for almost a month.[64] Government officials went as far as to seize funds from the Juegos Companies' bank accounts.[65]

53. Although E-Games complied with all the requirements under Mexican law as requested by SEGOB, on November 18, 2011, SEGOB informed E-Games that it had to wait until E-Mex was formally declared insolvent by a Mexican court before it could proceed to change E-Games' status—from that of operator under E-Mex's permit to that of autonomous permit holder—and grant E-Games an independent permit to operate the Casinos.

54. On December 30, 2011, E-Mex filed an *Amparo* complaint against actions taken by SEGOB and other governmental entities that were completely unrelated to E-Games and its rights vis-à-vis E-Mex's gaming permit. This commenced the *Amparo* 1668 proceeding. Indeed, E-Games was not an original party to the *Amparo* and was not joined to the case until E-Mex filed a series of amendments which dragged E-Games into the proceedings.

55. On August 15, 2012, long after E-Games had complied with requirements of SEGOB and with all applicable rules and regulations, SEGOB issued Resolution DGJS/SCEV/0827/2012, in which it recognized that E-Games was entitled to the rights and obligations under E-Mex's permit in its own name.[66] SEGOB formally approved E-Games' change of status and recognized that it was entitled to hold an independent permit to operate the Casinos, particularly since SEGOB verified and concluded that E-Games had complied with every requirement under the Gaming Regulation at all times and all requirements to have a permit issued in its own name.

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[62] White & Case Letter (Jan. 16, 2013), p. 2, **R-001**.

[63] White & Case Letter (Jan. 16, 2013), p. 2, **R-001**.

[64] White & Case Letter (Jan. 16, 2013), p. 2, **R-001**.

[65] White & Case Letter (Jan. 16, 2013), p. 2, **R-001**.

[66] SEGOB Resolution No. DGAJS/SAAJ/1227/2012 (Aug. 13, 2012), **C-15**.

56. On November 7, 2012, E-Games requested that SEGOB grant E-Games its own independent permit with a permit number separate and distinct from E-Mex's permit.

57. On November 16, 2012, SEGOB issued Resolution DGJS/SCEV/1426/2012, granting E-Games its own independent permit with its distinct permit number: DGAJS/SCEVF/P-06/2005-BIS. E-Games' independent permit was subject to the same conditions and obligations as E-Mex's permit, meaning that, while it—and Claimants' ability to operate their Casinos—was no longer tied legally to E-Mex's permit, Claimants' new permit encompassed the same conditions, rights and obligations as E-Mex's permit. The rights granted to E-Games (and therefore to Claimants) under this November resolution include, among other things, that the permit would remain valid until 2030 and that Claimants would have the right to operate up to fourteen gaming establishments (7 remote gambling centers and 7 lottery number rooms), or up to 7 dual-function gaming establishments.[67]

D. MEXICO'S NEW POLITICAL ADMINISTRATION SHOWED ESCALATING HOSTILITY TOWARDS CLAIMANTS AND THE CASINOS

58. Soon after coming to power on December 1, 2012, President Enrique Peña Nieto's government became openly hostile towards Claimants and E-Games' permit, mounting initial attacks against them in the media.[68] The attacks came from the highest levels of government, including from Ms. Marcela González Salas ("**Ms. Salas**"), who President Peña Nieto designated on January 15, 2013 as the new head of SEGOB's Games and Raffles Division. Prior to her appointment, Ms. Salas had no prior experience in the gaming industry.[69]

59. On January 27, 2013, a mere 12 days after her designation, Ms. Salas provided statements to the Mexican newspaper *La Jornada* stating that E-Games' permit was "illegal."[70]

60. Dismayed by Mexico's unjustified hostility towards Claimants and their Casinos, Claimants attempted to open a communications channel with SEGOB. Their aim was to educate SEGOB—or anyone in the Mexican government willing to listen—about the scope,

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[67] SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

[68] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 33; Julio Gutierrez Witness Statement (July 25, 2017), **CWS-3**, ¶ 10.

[69] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 10.

[70] Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón (Jan. 27, 2013) . Retrieved from http://www.jornada.unam.mx/2013/01/27/politica/013n1pol, **C-17**.

legality and success of Claimants' investments and of the Casinos, as well as to convince them to stop the unfair treatment they were now receiving by the new administration.[71] Claimants' multiple attempts to discuss and negotiate with Mexico, however, fell on deaf ears.

E. MEXICO REBUFFED THE CLAIMANTS' ATTEMPTS AT AMICABLE RESOLUTION OF THEIR ISSUES WITH SWGOB

1. Claimants' Initial Attempts To Discuss With SEGOB And The Ministry Of Economy

61. Claimants initially sought out the Mexican government with the assistance of their local Mexican counsel, Mr. Julio Gutiérrez Morales ("**Mr. Gutiérrez**"), of the Ríos Ferrer law firm, as well as through their then international counsel, White & Case, LLP ("**White & Case**").[72]

62. On January 16, 2013, White & Case sent a letter to SEGOB's Secretary, Mr. Miguel Ángel Osorio Chong, and to the General Directorate of Foreign Investment of the Ministry of Economy ("**Economía**") informing them of the government's harmful conduct against Claimants' investments and seeking their assistance to avoid escalating the dispute ("**White and Case Letter**").[73]

63. The White & Case Letter explained Claimants' investment structure and operations of the Casinos to Mexico, and recounted Mexico's raids and other hostile arbitrary actions against the Casinos.[74] The White & Case Letter further explained the arbitrary and discriminatory administrative and judicial measures taken against E-Games' permit, such as protracted delays in the processing of its application to become a permit holder and unwarranted proceedings seeking to invalidate E-Games' lawfully-issued permit.[75] The Claimants recalled the investment protections afforded them under the NAFTA and "welcome[d]" the Mexican government's cooperation in resolving the escalating dispute.[76]

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[71] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 34; Julio Gutiérrez Witness Statement (July 25, 2017), **CWS-3**, ¶ 11.

[72] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 34; Julio Gutiérrez Witness Statement (July 25, 2017), **CWS-3**, ¶¶ 8,11.

[73] White & Case Letter (Jan. 16, 2013), **R-001**.

[74] White & Case Letter (Jan. 16, 2013), pp. 1-3, **R-001**.

[75] White & Case Letter (Jan. 16, 2013), pp. 3-4, **R-001**.

[76] White & Case Letter (Jan. 16, 2013), p. 4, **R-001**.

64. On January 30, 2013, Mr. Gutiérrez arranged a meeting with Economía's Director of Consulting and Negotiations, Mr. Carlos Vejar ("**Mr. Vejar**").[77] Mr. Vejar and Mr. Gutiérrez met to address the concerns raised in the White & Case Letter, and Mr. Vejar offered to arrange a meeting with SEGOB officials. Claimants were able to secure a meeting with officials from SEGOB and Economía in late February 2013.[78]

65. On February 25, 2013, a few days before their meeting with Economía and SEGOB officials from the new Peña Nieto administration, SEGOB published on its website a Notice of Suspension against E-Games' permit.[79] This suspension likely was based on a judicial resolution issued earlier in February in an *Amparo* action that had been brought by E-Mex attacking, among other things, E-Games' independent gaming permit ("**Amparo 1151**").[80] E-Mex, by then on the brink of bankruptcy, sought to enlist the Mexican judiciary to block E-Games from use of its validly-issued gaming permit.

66. On February 28, 2013, Claimants, through Mr. Burr and legal representatives, White & Case and Mr. Gutiérrez, met with Mr. Vejar, along with SEGOB's Adjunct Director, Mr. Hugo Vera ("**Mr. Vera**").[81] In that meeting, Claimants' representatives complained of Mexico's unfavorable and hostile conduct towards them and their investments and attempted to convince Mexico to cease this behavior.[82] Mr. Vera, as SEGOB's representative, rejected Claimants' explanations concerning their compliance with the gaming laws, and reiterated that it was SEGOB's view that E-Games' permit was illegal.[83]

67. E-Games, in turn, requested that SEGOB: (1) act with legal consistency with respect to its resolutions and respect E-Games' gaming permit; (2) fairly apply the legal criteria that justified, and continue to justify, the granting and permanence of E-Games' independent permit for its term; (3) remove the notice of suspension from SEGOB's web page; (4) defend

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[77] Julio Gutiérrez Witness Statement (July 20, 2017), ¶ 10.

[78] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 35; Julio Gutiérrez Witness Statement (July 25, 2017), **CWS-3**, ¶ 11.

[79] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 11.

[80] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 11.

[81] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 11.

[82] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 35; Julio Gutierrez Witness Statement (July 20, 2017), **CWS-3**, ¶¶ 10-11.

[83] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 35; Julio Gutierrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 11.

its own validly-issued resolutions granting E-Games an independent permit in ongoing court proceedings; and (5) reinstate E-Games' permit or issue a new permit reaffirming E-Games' legal right to operate its casinos independently of E-Mex.[84]

68. Shortly after this meeting, SEGOB updated its website to include a new notice, falsely stating that E-Games' permit and gaming activities were linked to and dependent on E-Mex's permit, in direct contradiction to SEGOB's prior resolutions recognizing that the two companies operated independently of one another.[85] Given SEGOB's obviously retaliatory behavior, Mr. Gutiérrez again met with Mr. Vejar, who suggested that E-Games hire a lobbyist to handle its difficulties with the Mexican government.[86] This made clear that the problem was of a political, not legal, nature.

69. Continuing its pattern of harassment, on June 19, 2013, the Mexican government arbitrarily shut down Claimants' Mexico City Casino facility for a significant period of time, albeit temporarily, as Claimants were able to reopen that Casino. This discriminatory, unjustified governmental interference with Claimants' operations caused their business to lose millions of dollars in lost revenue.

70. On August 28, 2013, purported responding to a decision issued in the *Amparo* 1668 action initiated by E-Mex, SEGOB rescinded several of its prior resolutions, including, among others, the November 16, 2012 Resolution (DGJS/SCEV/1426/2012) that granted E-Games its autonomous casino permit. Claimants immediately sought review of this matter before the *Amparo* judge for constitutional protection against SEGOB's arbitrary measures, thus initiating a series of appellate and injunctive proceedings before the Mexican courts.

71. Throughout 2013 and 2014, as the dispute between Claimants and the Mexican State continued to escalate, Ms. Salas steadfastly refused to meet with Claimants or their representatives despite their repeated attempts to do so.[87]

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[84] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 11.

[85] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 12.

[86] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 12.

[87] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 36; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶¶ 11, 16-17.

2. Mexico Illegally Closes Claimants' Casinos, But Claimants Continue Their Attempts To Resolve The Dispute Consensually, To No Avail

72. On April 24, 2014, in a highly orchestrated commando raid, SEGOB closed down the Casinos, in direct violation of an injunction barring the government from impeding or otherwise hindering E-Games' operations pending the final resolution of the *Amparo* 1668 proceedings, which were by then pending before Mexico's Supreme Court.[88] During the closure, while Casino employees requested copies of the closure orders, the inspectors refused to provide them.[89] Mexican government officials also denied Claimants' lawyers access to the facilities.

73. In light of Mr. Vejar's earlier recommendation and Claimants' continued failing efforts, in April 2014 Claimants retained former New Mexico Governor, former U.S. Representative to the United Nations and former U.S. Secretary of Energy, Honorable Bill Richardson, to lobby the Mexican government on their behalf.[90]

74. On April 25, 2014, Messrs. Burr and Gutiérrez went to SEGOB in an attempt to obtain an explanation of SEGOB's decision to close the Casino's in clear violation of Claimants rights and of a valid court order, and to obtain copies of the closure orders that SEGOB had refused to provide to Claimants' representatives during the raids.[91] SEGOB officials again refused Claimants' request and refused to provide Messrs. Burr and Gutiérrez any information related to the closures.[92] Messrs. Burr and Gutiérrez returned to SEGOB almost on a daily basis to try and meet with Ms. Salas.[93] She refused to meet with them every single time.[94]

75. On April 30, 2014, Claimants reached out to trade officials in the United States' Department of Commerce seeking their assistance in relation to the closure of the Casinos.[95]

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[88] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 36; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 13.

[89] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 14.

[90] Email from Neil Ayervais to Brooke Lange (April 4, 2014), **C-100**.

[91] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 15.

[92] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 15.

[93] Gordon Burr Witness Statement (July 25 2017), **CWS-1**, ¶ 36; Julio Gutierrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 16.

[94] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 36; Julio Gutierrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 16.

[95] Neil Ayervais email to Rebecca Flores dated April 30, 2014, pp. 9-10 **C-41**.

Claimants specifically sought the Commerce Department's assistance in communicating "with SEGOB on [their] behalf to urge [SEGOB] to meet with our representatives and simply follow the law and avoid serious damage to our clients' business, loss of Mexican jobs and damage to relationships with American citizens."[96] This information was passed on to the Mexico and NAFTA desks at the Commerce Department, which attempted to secure a meeting for Claimants with SEGOB officials, but also failed despite repeated efforts.[97]

3. Claimants Attend A Series Of Perfunctory Meetings

76. At some point in late April or early May 2014, Messrs. Burr and Gutiérrez attempted once again to meet with Ms. Salas, but instead were received by Ms. Michele Aguirre ("**Ms. Aguirre**"), the Deputy Director of the Games and Raffles Division and a lower-level official within the agency.[98] Ms. Aguirre appeared disinterested with Messrs. Burr's and Gutiérrez's pleas for assistance.[99] She did not participate in any meaningful discussion with Claimants on the Casinos or Mexico's decision to close them. Instead, she only took notes and reiterated Ms. Salas' position.[100]

77. During this time, Claimants also contacted their congressional representative, United States Congressman Mike Coffman ("**Congressman Coffman**"), asking for help dealing with the Mexican government.[101] Congressman Coffman sent a letter to Mr. Luis Enrique Miranda Nava ("**Mr. Miranda**"), the Under-Secretary of SEGOB, to request a meeting with Mr. Burr.[102]

78. On May 7, 2014, Claimant Neil Ayervais, U.S. counsel to the B-Mex Companies and an investor in the Casinos himself, sent a letter to SEGOB on behalf of several Claimants (B-Mex, LLC, B-Mex II, LLC, and Palmas South, LLC) regarding the illegal closures of the

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[96] Neil Ayervais email to Rebecca Flores dated April 30, 2014, p. 10, **C-41**.

[97] Neil Ayervais email to Rebecca Flores dated April 30, 2014, p. 9, **C-41**.

[98] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 37; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 16.

[99] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 37; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 16.

[100] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 37; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 16.

[101] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 41; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 19.

[102] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 41.

Casinos. In the letter he noted that "[d]espite repeated demand by counsel for Exciting Games, your agency has not explained the basis for closing these casinos in violation of the suspension order and has not provided counsel with a copy of the closure order."[103] Additionally, Mr. Ayervais emphasized that it had come to his attention that certain individuals were claiming to represent E-Games or the Claimants, but that:

> "[t]hose individuals have no affiliation with Exciting Games, Grupo B-Mex or its casinos. Only Messrs. Gordon Burr, Julio Gutierrez and Jose Miguel Ramirez have authority to represent Exciting Games, Grupo B-Mex and its subsidiaries. Further, we have reason to believe that those individuals are affiliated with a competitor and are acting to damage Exciting Games and our clients' interests."[104]

79. On May 9, 2014, Claimants attended another meeting at SEGOB. Although Ms. Salas had agreed to meet with Claimants that day, she did not show up. Instead, Ms. Salas again sent Ms. Aguirre again with strict instructions to say only that the Casino closures were legal.[105] On May 20, 2014, Ms. Salas responded to Mr. Neil Ayervais' letter, refusing to provide an explanation of the illegal closures, purportedly because Mr. Ayervais was not E-Games' legal representative.[106]

4. Claimants Send The 2014 Notice of Intent And Mexico Retaliates And Goes On A Fishing Expedition To Prepare For The NAFTA Arbitration

80. On May 23, 2014, after over one year of Mexico's persistent refusal to engage with Claimants' in any good faith discussions regarding the government's continued and growing illegal conduct with respect to the Casinos, Claimants, through their counsel at White & Case, sent Mexico a Notice of Intent pursuant to NAFTA Article 1119 ("**2014 Notice of Intent**").[107] Shortly after submitting the Notice of Intent, the Mexican government, through its Attorney General's Office (**"PGR**") initiated criminal investigations against E-Games' representatives on baseless allegations of illegal gambling.[108]

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[103] Letter from Neil Ayervais to Luis Enrique Miranda Nava (May 7, 2014), **C-102**.

[104] Letter from Neil Ayervais to Luis Enrique Miranda Nava (May 7, 2014), **C-102**.

[105] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 38; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 17.

[106] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶¶ 44, 63; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 40.

[107] Notice of Intent to Submit a Claim to Arbitration (May 23, 2014), **C-34**.

[108] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 44.

81. On June 6, 2014, Claimants terminated their lobbying contract with Governor Richardson, who like Claimants and their other advisors, had been completely unsuccessful in reasoning with the Mexican government.[109] In agreeing to terminate his contract, Governor Richardson explained that despite his best efforts, "*it was near impossible to change things around given the vehemence of the Mexican authorities and the optics of the situation*."[110] It was more than evident to Claimants that Mexico did not want to negotiate with Claimants and that Mexico's dispute with Claimants appeared once again to be politically motivated.

82. On June 10, 2014, Mr. Gutiérrez informed Claimants that he had spoken to Mr. Vejar, who confirmed having met with Ms. Salas and her team.[111] Mr. Vejar told Mr. Gutiérrez that he would try to organize a meeting with SEGOB, but said that he thought SEGOB would not accept since he believed that SEGOB was not willing to negotiate any amicable settlement. Mr. Vejar further indicated that he would like to schedule a meeting with White & Case to discuss certain aspects of the 2014 Notice of Intent, but he never did.[112]

83. On June 11, 2014, as a result of Congressman Coffman's efforts, Messrs. Burr and Gutiérrez secured a meeting with Mr. David Garay Maldonado, then Director of the Government Unit at SEGOB.[113] During the meeting, Mr. Burr and Mr. Gutiérrez presented the facts surrounding the unlawful Casino closures.[114] Mr. Burr and Mr. Gutiérrez also explained that, while Claimants would consider possible alternatives and options with respect to the future of the Casinos, the Juegos Companies insisted on their reopening given that Claimants had made substantial investments and had obtained an independent operating permit lawfully.[115] Mr.

[109] Email from Gordon Burr to Brooke Lange (June 6, 2014), **C-106**.

[110] Letter from Gov. Bill Richardson to Gordon Burr (June 6, 2014), (emphasis added), **C-107**.

[111] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 22.

[112] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 22.

[113] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 41.

[114] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 42; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 20.

[115] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 42; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 20.

Garay said very little and showed no interest in reaching a solution; he concluded the meeting with a perfunctory promise to follow up.[116] He never did.[117]

84. On July 24, 2014, the then-Deputy General Director of International Trade of the Ministry of the Economy, Ms. Ana Martínez ("**Ms. Martínez**"), sent a questionnaire to White & Case regarding certain aspects of the Notice of Intent ("**Notice of Intent Questionnaire**").[118] The Notice of Intent Questionnaire sought detailed information beyond what had been provided in the Notice of Intent, but did not offer to amicably consult or negotiate with Claimants.[119] Claimants did not answer the Notice of Intent Questionnaire, as it appeared solely designed to elicit information to allow Mexico to begin preparing its defences to Claimants' claims.[120]

F. CLAIMANTS' ATTEMPT TO MITIGATE THE DAMAGES MEXICO WAS CAUSING RESULTED IN THE U.S. SHAREHOLDERS' TEMPORARY LOSS OF BOARD CONTROL OF THE JUEGOS COMPANIES

85. Shortly after Mexico illegally closed the Casinos in April 2014, Claimants sought to mitigate the damages that Mexico's illegal actions were causing them, including by continuing in their efforts to convince SEGOB to reopen the Casinos or, alternatively, to sell the Juegos Companies and/or their assets.[121] In this regard, Claimants were contacted by Messrs. José Benjamin Chow del Campo ("**Mr. Chow**") and Luc Pelchat ("**Mr. Pelchat**").[122] Mr. Chow, a Mexican national involved in the Mexican gaming industry since 2007, owns and control a gaming company called Grand Odyssey S.A. de C.V. ("**Grand Odyssey**").[123] Mr.

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[116] Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 42; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 20.

[117] Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 42; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 20.

[118] Notice of Intent Questionnaire (July 24, 2014), **R-003**.

[119] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 44; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 23.

[120] Julio Gutierrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 23.

[121] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 48; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶¶ 15-17, 27.

[122] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 49; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 27.

[123] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 49; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶¶ 27-28; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 6.

Pelchat, a business associate of Mr. Chow, is a Canadian national who lives in Mexico and has substantial experience in the Mexican gaming industry.[124]

86. Mr. Chow had first approached Claimants approximately in December 2013 to propose a merger of the Juegos Companies with another company, but Claimants passed on that offer.[125] After Mexico illegally shut down the Casinos , Mr. Chow approached Claimants again and offered to assist them in reopening the Casinos.[126] Mr. Chow specifically told Claimants that he had several contacts at SEGOB, including the Minister of the Ministry of the Interior and the chief decision-maker for all things relating to SEGOB, Minister Miguel Angel Osorio Chong.[127] Mr. Chow stated that he could leverage those contacts to obtain SEGOB's approval or permission to reopen the Casinos.[128] Mr. Chow explained to the U.S. investors that the Mexican government would refuse to deal with them or reopen the Casinos so long as they owned the facilities.[129]

87. Given Mexico's refusal to deal with the U.S. shareholders of the Juegos Companies—a conclusion that resonated with Claimants given their more than one year of failed attempts at good faith negotiations—Mr. Chow proposed a merger transaction designed to divest the U.S. shareholders of direct ownership in the Juegos Companies.[130] The transaction was structured as follows: (1) all Juegos Companies' shareholders, including U.S. shareholders, would transfer their shares to Grand Odyssey; (2) Grand Odyssey would contemporaneously exchange all issued and outstanding shares of Grand Odyssey (including those issued to the U.S. shareholders in exchange for the transfer of their shares in the Juegos Companies) for cash and instruments convertible into shares in a Canadian shell company; (3) the Canadian shell company would become the new owner of the Juegos Companies and issue cash and ownership

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[124] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 50; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 27; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶¶ 3-4.

[125] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 49.

[126] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 49; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 27; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 7.

[127] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 50; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 27; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 7.

[128] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 50; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 27; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 7.

[129] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 52; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 27; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 8.

[130] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 51; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 28; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶¶ 7-8.

interests to the owners of the Juegos Companies (the "**Transaction**").[131] The idea behind this Transaction was for the U.S. shareholders to retain indirect ownership of the Casinos and at the same time allay the Mexican government's open attack against Claimants to make the Casinos' reopening possible.[132] Claimants were reluctant to accede to Mr. Chow's proposal, but Mexico's actions left no alternative if they hoped to salvage what was left of their investment.[133] Claimants thus decided to explore the Transaction further.[134]

88. Messrs. Chow and Pelchat met with SEGOB officials, who repeatedly told them that the Mexican government was unwilling to reopen the Casinos if they remained under the U.S. shareholders' ownership and also if the U.S. shareholders continued to control the Casinos.[135] Messrs. Chow and Pelchat thus recommended replacing the members of the Juegos Companies' Boards of Directors with new members named by them.[136]

89. The U.S. shareholders protested to this proposed change in board control, but Messrs. Chow and Pelchat insisted that without it, SEGOB would refuse to reopen the Casinos and the Transaction would fail.[137] As a result of these representations, the U.S. shareholders ultimately agreed, albeit reluctantly, to the change in board control.[138] In doing so, however, the U.S. shareholders made it clear that Messrs. Chow and Pelchat (as well as any of their designees) were not to remain in the Juegos Companies' Boards of Directors if the proposed Transaction failed for any reason.[139]

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[131] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 51; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 28; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 7.

[132] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 51; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 28; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶¶ 7-8.

[133] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 52.

[134] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 51.

[135] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 52; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 27; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 8.

[136] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 52; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 29; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 9.

[137] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 52; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 29; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 9.

[138] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 52; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 29; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 10.

[139] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 53; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 31; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶¶ 10, 12.

90. On August 29, 2014, at the shareholder meetings of the Juegos Companies, Mr. Chow, who presided over the meeting, put to vote a resolution through which the then members of the Juegos Companies' Boards of Directors, including Mr. Burr, were removed as directors and Messrs. Chow, Pelchat, and three other individuals associated with them were appointed as the new Directors.[140] Mr. Chow also was appointed as the new President of all Juegos Companies, replacing Mr. Burr.[141]

91. On November 7, 2014, Mr. Chow called shareholder meetings for all of the Juegos Companies.[142] Mr. Chow had asked the U.S. shareholders for proxies for that meeting, but at that point the U.S. shareholders were concerned with the course of the negotiations regarding the Transaction, so they refused.[143] The only person who had valid proxies for the U.S. shareholders was Mr. Gutiérrez; no U.S. shareholder ever signed a proxy giving Messrs. Chow or Pelchat any rights over their voting shares.[144]

92. The shareholder meetings were open only to shareholders and their legal representatives.[145] Members of Mr. Gutiérrez's law firm attended the shareholder meetings. To their surprise, Messrs. Chow and Pelchat misrepresented to the meeting attendees that they had secured proxies from the U.S. investors to transfer the shares of U.S. shareholders in the Juegos Companies to Mr. Chow's Grand Odyssey, and that the U.S. shareholders had agreed to allow these transfers to take place because the Transaction had been finalized.[146] None of this was true. The U.S. shareholders never gave any proxies to Messrs. Chow and Pelchat and the Transaction was far from being finalized.[147]

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[140] Notarization of the Minutes of the General Shareholders Meeting of the Juegos Companies (Aug. 29 2014), **C-36 -C-40**.

[141] Notarization of the Minutes of the General Shareholders Meeting of the Juegos Companies (Aug. 29 2014), **C-36 -C-40**.

[142] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 55; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 32.

[143] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 55.

[144] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 58; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 32.

[145] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 33.

[146] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 56; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 33.

[147] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 56; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 32.

93. Members of Mr. Gutiérrez's law firm objected to any attempt at an illegal transfer of Claimants' shares in the Juegos Companies, even refusing to sign the draft minutes and leaving the meeting to avoid handing over the U.S. shareholders' proxies and to reiterate the obvious lack of quorum.[148] Messrs. Chow and Pelchat were unfazed and went ahead with an invalid vote on the transfer of shares, even though it was clear that without valid proxies they had no quorum to vote the U.S. shareholders' shares.[149]

94. The U.S. shareholders of the Juegos Companies immediately confronted Messrs. Chow and Pelchat about the illegal and fraudulent transfer of shares.[150] Since negotiations were still ongoing, Messrs. Chow and Pelchat told the U.S. shareholders, even in writing, that no transfer of shares had taken place at the meetings and, as such, that Grand Odyssey did not own any shares in the Juegos Companies.[151] The U.S. shareholders were clear that no share transfer had taken place, but there were shareholder minutes saying otherwise.[152] The U.S. shareholders thus requested that Messrs. Chow and Pelchat invalidate the November 7 shareholder meeting minutes.[153] Messrs. Chow and Pelchat agreed to do so, but never did.[154]

95. At this point, the U.S. shareholders were still considering the possibility of selling the assets of the Juegos Companies or the Companies themselves to potential purchasers, but SEGOB thwarted these efforts. SEGOB, who would not let anyone buy the assets or reopen the Casinos, as potential purchasers in the industry confirmed to Claimants.[155] The U.S. shareholders thus still hoped to reach an agreement with Messrs. Chow and Pelchat, and so continued with the negotiations.[156] In mid-2015, however, it became clear to everyone that the Transaction would fail primarily because the Mexican government refused to allow the Casinos

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[148] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 56; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 34.

[149] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 56; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶¶ 34, 38.

[150] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 57; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 34.

[151] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 57; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 34.

[152] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 57; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶¶ 34, 38.

[153] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 57.

[154] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 57.

[155] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 58.

[156] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 58.

to reopen.[157] The U.S. shareholders abandoned the Transaction, but still attempted several times to reach an agreement with Messrs. Chow and Pelchat to mitigate the damages that Mexico caused Claimants.[158] These efforts also failed.[159]

96. In early 2016, Mr. Gutiérrez arranged a meeting with Messrs. Chow and Pelchat, in which Messrs. Burr and Ayervais participated by phone.[160] The purpose of the meeting was to request Messrs. Chow and Pelchat to return board control of the Juegos Companies to the U.S. shareholders and for them to finally invalidate the November 7 shareholder meeting minutes.[161] To Messrs. Gutiérrez's, Burr's and Ayervais' astonishment, Messrs. Chow and Pelchat demanded millions of dollars as payment for alleged expenses they had incurred as members of the Juegos Companies' Boards of Directors.[162] Messrs. Chow and Pelchat conditioned the return of board control to the payment of the millions of dollars.[163] Messrs. Chow and Pelchat also conditioned the invalidation of the November 7 minutes to the same terms.[164]

97. The U.S. shareholders refused to give in to Messrs. Chow's and Pelchat's demands, and refused to pay them any money.[165] As a result, Messrs. Chow and Pelchat improperly retained their seats on the Juegos Companies' Boards of Directors and refused to invalidate the November 7 minutes.[166] In response, most of the U.S. shareholders sued Messrs. Chow, Pelchat and Alfonso Rendón (another one of the board directors that Mr. Chow

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[157] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 58; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 35; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 13.

[158] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶¶ 58-59; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 36.

[159] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶¶ 58-59; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 36.

[160] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 59; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 36.

[161] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 59.

[162] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 59; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 35.

[163] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 59; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 36.

[164] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 59; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 36.

[165] Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 60; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 37.

[166] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 60; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 37.

controlled) in U.S. Federal Court in Colorado ("**Colorado Action**"), asserting various claims and seeking various forms of relief, including a permanent injunction requiring Messrs. Chow, Pelchat and Rendón to resign from their positions on the Boards of the Juegos Companies.[167]

98. During the course of the Colorado Action, the U.S. shareholders reached a settlement agreement with Messrs. Pelchat and Rendón.[168] During the negotiation of their settlement with Mr. Pelchat but before the settlement was culminated, the U.S. shareholders requested that Mr. Pelchat cooperate with any matter related to the Juegos Companies, including the signing of the Companies' consents and waivers for purposes of the NAFTA arbitration.[169] Mr. Pelchat agreed to cooperate with the Claimants and signed the consents and waivers.[170] Claimants later settled with Mr. Pelchat, who admitted that no transfer of shares had occurred in the November 7, 2014 meeting, that he had no right to remain as a board director and would resign immediately upon Claimants' request.[171] The U.S. shareholders are close to reaching an agreement with Mr. Chow, at which time Claimants, as the rightful owners and controllers of the Juegos Companies, will demand that Messrs. Chow, Pelchat, and Rendón invalidate the fraudulent minutes of the November 7, 2014 shareholder meetings and resign from their director positions and return board control of the Juegos Companies to the U.S. shareholders.[172]

G. MEXICO RECEIVES A FRAUDULENT DOCUMENT PURPORTING TO WAIVE E-GAMES' NAFTA CLAIMS AND USES IT AS EVIDENCE IN THIS PROCEEDING

99. As described previously, following Claimants' 2014 Notice of Intent, Mexico's PGR initiated baseless criminal investigations against certain Claimants for alleged illegal gambling. In October 2014, Mr. Chow—then engaged in negotiations with Claimants and purportedly assisting in the reopening of the Casinos—met with Mr. Gutiérrez to discuss certain legal matters, including the PGR investigation. Specifically, Mr. Chow told Mr. Gutiérrez that

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[167] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 61; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 39; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 14.

[168] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶¶ 61-62; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 39; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 14.

[169] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 61-62; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 39; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 15.

[170] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶¶ 61-62; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 15.

[171] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶¶ 61-62; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 15.

[172] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶¶ 61-62.

SEGOB was insisting that the PGR investigation be resolved before the Casinos could be reopened.[173] In light of that demand by SEGOB, Mr. Chow asked to hire an attorney named José Luis Segura Cárdenas ("**Mr. Segura**") to assist with the PGR's investigation.[174] Mr. Segura was a junior attorney who worked at E-Games prior to Mexico's illegal closure of the Casinos.[175] E-Games' senior in-house counsel had hired him while the Casinos were open and gave him an E-Games' power of attorney for certain, discrete, legal matters, which remained in effect.[176]

100. During the meeting with Mr. Gutiérrez, Mr. Chow even showed Mr. Gutiérrez the documents he wanted Mr. Segura to sign.[177] One was a notice of appearance (*apersonamiento* in Spanish) on behalf of E-Games in the PGR proceedings, and the other was a document through which E-Games objected to the PGR proceedings for lack of proper notice.[178] Mr. Chow explained that Mr. Segura would sign these documents using his existing power of attorney on E-Games' behalf.[179] Mr. Gutiérrez asked Mr. Chow to confirm this discussion in writing and, on October 12, 2014, Mr. Chow sent an email to Mr. Gutiérrez, copying Mr. Burr, confirming their discussion.[180]

101. In light of Mr. Chow's representations, Mr. Gutiérrez discussed this matter with Mr. Burr, the President of E-Games' Board of Directors, who authorized Mr. Segura to assist in the PGR's criminal investigations.[181] Mr. Burr never gave Mr. Segura any other authorization or instruction, nor did any of E-Games' authorized representatives.[182]

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[173] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 40.

[174] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 64; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 40.

[175] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 40; José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 7.

[176] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 40; José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 7.

[177] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 41.

[178] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 41.

[179] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 41.

[180] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 42.

[181] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 65; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 42.

[182] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 65; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 44.

102. Shortly thereafter, a lawyer named Miguel Ángel Noriega Laredo ("**Mr. Noriega**") called Mr. Segura on the phone asking for his help in ongoing efforts to have the Casinos reopened.[183] Prior to this phone call, Mr. Segura's contact with Mr. Noriega had been limited, since he only knew Mr. Noriega in passing from working with him in some of the Juegos Companies' litigations and administrative proceedings in the past.[184] Mr. Noriega asked Mr. Segura to assist Mr. Adolfo Ramírez ("**Mr. Ramírez**"), who was Mr. Chow's attorney, and him in efforts to get SEGO's approval to reopen the Casinos.[185] Mr. Noriega claimed these efforts were being coordinated with Claimants.[186] Mr. Noriega even told Mr. Segura that he would not be paid for these services, but that if the Casinos reopened there would be a position for him.[187]

103. A few days later, Mr. Noriega called Mr. Segura and asked Mr. Segura to meet him at a Starbucks located in the *Zona Rosa* neighborhood in Mexico City.[188] Once there, Mr. Noriega asked Mr. Segura to accompany him to an office nearby.[189] Once at the office, Mr. Segura saw Messrs. Noriega and Adolfo Ramírez, but also Mr. Guillermo Santillán ("**Mr. Santillán**").[190] Mr. Santillán is a former SEGOB official who, upon information and belief, owns a Mexican casino business by the name of Producciones Móviles.[191] In 2012, Producciones Móviles received a gaming permit under virtually identical circumstances as E-Games; first as an independent operator under E-Mex's permit, then as an independent permit holder pursuant to a SEGOB resolution in late 2012.[192] Producciones Móviles remains in business today.[193]

104. At the meeting, Mr. Noriega told Mr. Segura that new shareholders involved in the Juegos Companies might buy out the U.S. shareholders and that, as a result of this

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183 José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 9.

184 José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 9.

185 José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 9.

186 José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 9.

187 José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 10.

188 José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 11.

189 José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 11.

190 José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 11.

191 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 49.

192 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 49.

193 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 49.

transaction, SEGOB may allow the Casinos to reopen.[194] Mr. Segura thus believed that he was to assist Messrs. Noriega and Ramírez in the reopening of the Casinos.[195] Mr Segura was under the impression, given Mr. Noriega's representations, that Claimants and Mr. Gutiérrez were aware of this.[196] In fact, Mr. Ramírez called Mr. Gutiérrez during the meeting and put him on the phone with Mr. Segura.[197] The two spoke very briefly about the PGR proceedings and nothing else.[198] Mr. Gutiérrez never said anything about the NAFTA arbitration, let alone about the withdrawal of any claims on E-Games' behalf.[199] The meeting ended with Mr. Noriega telling Mr. Segura that he would have to sign some documents necessary for the reopening of the Casinos and showed him one such document, which he said would be filed at SEGOB.[200]

105. About one week later, on October 24, 2014, Mr. Noriega asked Mr. Segura to return to the same office to sign some documents.[201] Mr. Segura had no role in the preparation or drafting of these documents.[202] Mr. Segura's meeting that day was very brief; he signed what he were various copies of two documents without the opportunity to read or even review them.[203] One of them was what later turned out to be a document that purported to accept SEGOB's declaration of the invalidity of E-Games' independent gaming permit (the "***allanamiento***"), which he had previously seen a draft of during his first meeting with Mr. Noriega.[204] Another was what later turned out to be a document purportedly waiving E-Games' NAFTA claims against Mexico (the "***desistimiento***").[205] Mr. Segura, suspicious of the pressure he was being subjected to sign the documents without review, opted to alter his normal signature

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[194] José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 12.

[195] José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶¶ 13-16.

[196] José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶¶ 13-16

[197] José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 15; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 43.

[198] José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 15; Julio Gutierrez Witness Statement (July 25, 2017), **CWS-3**, ¶ 43.

[199] José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 15; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 44.

[200] José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 17.

[201] José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 18.

[202] José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 19.

[203] José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 21.

[204] José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶¶ 17, 22.

[205] José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 24.

in the event this issue came back to haunt him.[206] Mr. Segura never received a copy of the documents he signed and is unaware of who ultimately filed those documents before SEGOB and Economía.[207]

106. The *desistimiento* purportedly was filed before Economía that same day.[208] Economía, however, did not acknowledge receipt of the *desistimiento*, nor did it reach out to Mr. Segura to ratify it. As mentioned, the preparation and filing of these and other documents occurred behind Claimants' and their advisors' backs.

107. Throughout 2014, Mr. Gutiérrez and people from his law firm visited SEGOB to review E-Games' files on a fairly routine basis and to follow up on administrative proceedings involving E-Games.[209] In early 2015, however, SEGOB, for the first time, refused Mr. Gutiérrez and his team access to E-Games' files.[210] SEGOB claimed that Mr. Gutiérrez and his team no longer had valid powers of attorney because they had been revoked.[211] Mr. Gutiérrez, however, had at the time a formal and valid power of attorney issued by E-Games, which only could have been revoked by E-Games' Board of Directors.[212] Mr. Gutiérrez attempted to regain access to E-Games' files on several occasions, but it was not possible until April 7, 2015, when Mr. Gutiérrez went to SEGOB with a Public Broker to record SEGOB's arbitrary behavior against Mr. Gutiérrez and his clients.[213]

108. Once Mr. Gutiérrez regained access to E-Games' files at SEGOB, he was met with the same hostility he and his clients had experienced from the government agency before. Specifically, the SEGOB official who dealt with Mr. Gutiérrez, Ms. Aguirre, made it a point to

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206 José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 28.

207 José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶¶ 23, 25.

208 Letter signed by Mr. José Luis Segura Cárdenas purportedly waiving the Notice of Intent filed on behalf of E-Games (*desistimiento*), **R-005**.

209 Gordon Burr Witness Statement (July 25, 2017), CWS-1, ¶ 66; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 47.

210 Gordon Burr Witness Statement (July 25, 2017), CWS-1, ¶ 66; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 47.

211 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 47.

212 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 47.

213 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 47.

reiterate (as she had done before on Director Salas' instructions), that SEGOB would never allow Claimants to reopen the Casinos.[214]

109. During his review of E-Games' SEGOB file, Mr. Gutiérrez discovered several unauthorized documents that apparently bore Mr. Segura's signature.[215] One of the unauthorized documents with Mr. Segura's signature that he discovered was the *allanamiento*.[216] The other document was the *desistimiento*.[217]

110. Neither Mr. Gutiérrez nor Mr. Burr (or anyone else with authority to speak or act for E-Games) knew of the *desistimiento's* or the *allanamiento's* existence, and never authorized Mr. Segura or anyone else to file it.[218] Mr. Gutiérrez immediately sought out Mr. Segura to understand the purpose of these documents and why they had been filed on E-Games' behalf.[219] Mr. Segura explained that he had signed the *allanamiento* and *desistimiento* at Mr. Santillán's office on Messrs. Noriega's and Ramírez's insistence.[220] Mr. Segura also explained that he was not given any real opportunity to review the documents, especially the *desistimiento*, and that he had relied on Mr. Noriega's representations and instructions when he signed them.[221] Mr. Gutiérrez lost contact with Mr. Segura shortly thereafter.[222]

111. On July 13, 2016, Mr. Gutiérrez met with Mr. Vejar from Economía.[223] Mr. Vejar told Mr. Gutiérrez that Economía doubted the validity of the *desistimiento*, which is why they did not respond to it nor did they issue an official resolution acknowledging its receipt.[224]

112. In late June and early July of 2017, Mr. Gutiérrez was able to re-establish contact with Mr. Segura.[225] On July 12, 2017, Mr. Gutiérrez returned to SEGOB where he discovered

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214 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 47.

215 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 48.

216 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 48.

217 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 48.

218 Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 65; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶¶ 46-48.

219 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 49.

220 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 49.

221 José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 21.

222 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 49.

223 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 50.

224 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 50.

225 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 51.

additional documents allegedly signed by Mr. Segura.[226] After discussing these additional documents with Mr. Segura, on July 14, 2017, Messrs. Gutiérrez and Segura went to SEGOB together with a Public Broker to review and confirm whether Mr. Segura had signed those documents.[227] Messrs. Gutiérrez and Segura reviewed the following documents, and reported as follows concerning the documents:

a. An October 24, 2014 document purporting to revoke all prior authorizations of individuals legally representing E-Games other than Mr. Segura. Mr. Segura remembers signing that document along with the *allanamiento*.

b. An October 29, 2014 document filed with SEGOB informing it that E-Games had filed the *desistimiento* with Economía.[228] The document also purported to confirm the *allanamiento*.[229] Mr. Segura identified his signature, but has no recollection of seeing or signing that document.[230] Mr. Segura believes, however, that it may have been included in the documents he signed on October 24, 2014.[231]

c. Several documents filed with SEGOB on November 28, 2014, December 2, 2014, and December 6, 2014, requesting SEGOB to promptly resolve the pending cases related to the Casinos' closures given E-Games' withdrawal from the NAFTA arbitration and its acceptance of SEGOB's resolution on the invalidity of E-Games' permit.[232] Mr. Segura identified his signature on these documents, but has no recollection of seeing or signing them.[233] Mr. Segura

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[226] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 52.

[227] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 52; José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 31.

[228] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 52; José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 34.

[229] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 52; José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 34.

[230] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 52; José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 34.

[231] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 52; José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 34.

[232] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 52; José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 35.

[233] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 52; José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 35.

believes, however, that it may have been included in the documents he signed on October 24, 2014.[234]

d. An *allanamiento* dated September 30, 2014, virtually identical to the one signed on October 24, 2014.[235] The difference between both *allanamientos* is that the September 30 one does not refer to a specific case file, while the October 24 one refers to the cases regarding the Casinos' closures.[236] Mr. Segura had no recollection of ever seeing this document and was adamant about the fact that the signature on it was not his.[237]

113. On May 30, 2017, Mexico filed its Memorial on Jurisdictional Objections. Mexico's Memorial included the September 30, 2014 *allanamiento* as Exhibit R-005. Mexico also included the *desistimiento* as Exhibit R-005 and relied upon it for one of its jurisdictional defenses.

H. CLAIMANTS ATTEMPT ONE LAST TIME TO SETTLE THE DISPUTE AMICABLY, BUT MEXICO AGAIN REBUFFS THEM

114. After two years of failed attempts, it was evident to Claimants that Mexico had no intention to engage in good faith consultations with them.[238] Claimants decided to press forward and have their claims settled by an international tribunal in a NAFTA arbitration against Mexico.[239]

115. Claimants retained Quinn Emanuel as their international counsel.[240] Claimants signed powers of attorney that expressly authorized Quinn Emanuel to initiate the NAFTA arbitration and to act in that proceeding on behalf of all Claimants.[241] Claimants knew that by

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[234] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 52; José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 35.

[235] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 52; José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 36.

[236] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 52; José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 36.

[237] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 52; José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 35.

[238] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 69.

[239] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 69.

[240] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 69.

[241] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 69.

signing these powers of attorney they were consenting to the NAFTA arbitration and were authorizing Quinn Emanuel to represent them in that proceeding.[242]

116. On June 15, 2016, Claimants filed their Request for Arbitration ("**Request for Arbitration**"). Mexico objected to the registration of the Request for Arbitration alleging, among other things, that the 2014 Notice of Intent did not provide the names and addresses of all of the U.S. investors who were included in the Request for Arbitration.[243]

117. On September 2, 2016, Claimants sent an amended Notice of Intent ("**Amended Notice of Intent**"), including the names and addresses of all Claimants that were named in the Request for Arbitration and addressing the other complaints Mexico had raised about the 2014 Notice of Intent.[244] In that Amended Notice of Intent, Claimants once again offered to meet with Mexican government officials to attempt amicable settlement or negotiations. Once again, however, Mexico simply ignored Claimants, opting instead to challenge ICSID' registration of the claim and, now, the Tribunal's jurisdiction to hear it.

IV. PROCEDURAL HISTORY

118. On May 23, 2014, Claimants sent Mexico the 2014 Notice of Intent, pursuant to and in accordance with NAFTA Article 1119.[245]

119. On June 15, 2016, Claimants filed their Request for Arbitration ("**RFA**").

120. On June 27, 2016, Respondent objected to the registration of Claimants' Request for Arbitration, alleging, among other things, that the 2014 Notice of Intent did not provide proper notice.

121. On July 6, 2016, ICSID sent a questionnaire to Claimants regarding clarification of certain procedural aspects related to the Request for Arbitration.

122. On July 21, 2016, Claimants replied to Respondent's objection to registration of Claimants' Request for Arbitration as well as to ICSID's questionnaire.

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[242] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 69.

[243] Objection to Claimants' Request for Arbitration (June 27, 2016).

[244] Claimants' Amended Notice of Intent (Sep. 2, 2016), **R-007**.

[245] 2014 Notice of Intent, **C-34**.

123. On July 26, 2016, Respondent sent an unauthorized submission ("**Unauthorized Submission**") to ICSID related to Claimants' response to Mexico's objection to registration of Claimants' RFA and ICSID's questionnaire.

124. On August 2, 2016, ICSID informed Claimants that "it cannot approve access to the Additional Facility or register the Request for Arbitration as submitted, unless the consent of [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] under NAFTA Article 1121(2)(a) is provided." ICSID thus invited Claimants to inform it by August 5, 2016 whether they want to "suspend the approval and registration process and await the supplementation of the Request with the necessary consents [… or to] withdraw the claims made on behalf of these companies under NAFTA Art. 1117. . . ."

125. On August 5, 2016, Claimants replied to Respondent's Unauthorized Submission and ICSID's letter, stating that "[w]ithout waiving their arguments regarding the Secretariat's authority to refuse access and registration on the basis of alleged noncompliance with provisions of the NAFTA, Claimants inform the Centre that the Secretariat need not suspend the approval and registration process, as Claimants have obtained the consents of the [remaining] enterprises under NAFTA Article 1121(2)(a)."

126. On August 11, 2016, ICSID registered Claimants' Request for Arbitration.

127. On September 2, 2016, Claimants delivered the Amended Notice of Intent ("**Amended Notice of Intent**"), including the full listing of the claimants that were named in the Request for Arbitration and otherwise addressing the complaints Mexico had raised about the 2014 Notice of Intent.[246] Through the Amended Notice of Intent, Claimants once again offered to meet with Mexican government officials to attempt amicable settlement or negotiations, but they continued to ignore them.[247]

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[246] Amended Notice of Intent (September 2, 2016), **R-007**.

[247] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 47; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 26.

128. On September 19, 2016, Respondent informed ICSID of the Amended Notice of Intent.

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

130. On March 28, 2017, the Tribunal held its first session at 11:00 a.m. EDT, by telephone conference. The session was adjourned at 11:45 a.m.

131. On April 4, 2017, the Tribunal issued Procedural Order No. 1.

132. On May 30, 2017, Mexico filed its Memorial on Jurisdictional Objections.

V. LEGAL ARGUMENT

A. CLAIMANTS OWN AND CONTROL ALL CASINO ENTERPRISES IN THIS DISPUTE AND HAVE MADE PROTECTED INVESTMENTS UNDER THE NAFTA

133. The Tribunal should dismiss Mexico's half-hearted challenges to Claimants' standing under NAFTA Articles 1116 and 1117. Each of the 39 Claimants is an "investor" and has made a protected "investment" under the NAFTA. Each can bring claims against Mexico for its/their breaches of the NAFTA on their own behalf under NAFTA Article 1116. In addition, Claimants directly and indirectly own and control the Mexican casino enterprises in this dispute and have standing to assert claims on their behalf under NAFTA Article 1117.

134. Mexico takes issue with what it perceives as a lack of information about the Claimants' investment found in various pre-arbitration correspondence and submissions. It challenges the Tribunal's jurisdiction *ratione personae* purportedly because the Claimants have not offered a precise explanation about their investment or how they own or control the Mexican casino enterprises in this dispute. Based on the pre-arbitration documents, Mexico accuses the Claimants of having "intentionally engaged in obfuscation in order to avoid disclosing flaws in the fundamental underpinnings of their claims."[248] It then submits a list of documentary demands which, according to Mexico, and without citation to legal authority, the Claimants

[248] Mexico's Memorial on Jurisdictional Objections (May 30, 2017), ¶ 10.

must comply with "at minimum" to show standing for the purposes of NAFTA Articles 1116 and 1117.[249] These demands are completely off base.

135. As a threshold matter, Claimants observe that Respondent has failed to articulate its precise objections to Claimants' standing, of the grounds supporting them, both with respect its objections under NAFTA Article 1116 and NAFTA Article 1117. Respondent asserts that it "is unable to comment further on [its standing objections] on the basis of the Claimants' submissions to date."[250] Claimants' initial response is that these standing objections fail for lack of proof. Mexico has the burden of sustaining the elements of its standing defense. It did not have to launch objections now on the basis of its speculations, as it has done. Having failed to sustain the burden for its defense, these objections must fail.

136. Claimants also note that they have been deprived of sufficient notice of Mexico's precise challenges to the Tribunal's jurisdiction. In view of the possible prejudice occasioned to Claimants' ability to fully respond to Respondent's subsequent challenges, the Claimants must reserve their right to further address the issue of standing, including the right to request additional submissions on the issue, as necessary.

137. In the pre-arbitration correspondence and submissions to which Mexico refers, the Claimants were under no obligation to explain their investments with the degree of specificity that Mexico now demands. Mexico's reliance on, for example, the White & Case letter of January 16, 2013 is beside the point. The letter sought the Mexican government's assistance in resolving the escalating disputes that Claimants were experiencing with the Mexican State. There was simply no need at that point for any of the Claimants to furnish evidence of, for example, their loan instruments with "the identity of the borrower and the terms of the loans, including their original maturity and expiry date," as Mexico now demands.[251]

138. Similarly, Mexico's reliance on the 2014 Notice of Intent for detailed documentary evidence of the Claimants' investments is misplaced. The text of NAFTA Article 1119 simply does not require production of this information, nor is the purpose of the notice of intent, which is to facilitate amicable consultation and negotiation, served by requiring all potential claimants to submit detailed descriptions of their entire investment with complete

[249] Mexico's Memorial on Jurisdictional Objections (May 30, 2017), ¶¶ 113, 118.

[250] Mexico's Memorial on Jurisdictional Objections (May 30, 2017), ¶¶ 114, 119.

[251] Mexico's Memorial on Jurisdictional Objections (May 30, 2017), ¶ 113.

documentary evidence, giving respondent States an effective head start in preparing for an upcoming arbitration.

139. Mexico likewise criticizes the Claimants' Request for Arbitration and two submissions to the ICSID Secretary-General responding to Mexico's objections to registration of the claim. However, in NAFTA and arbitral practice in general, disputing investors do not typically describe and provide—and are not required to describe and provide—evidence of their investments to the level of specificity requested by Mexico. General allegations of ownership and/or control of an investment are routinely made in requests for arbitration, leaving more detailed production of evidence for the merits stage. The financial details sought by Mexico, such as the precise amount loaned and the number and class of shares acquired by each investor, simply are not required at this stage of the proceedings and would seem to be most relevant at the quantum stage of the proceedings.

140. More fundamentally, nothing in the NAFTA requires Claimants to come forward with the list of financial documents and information that Mexico demands. Nowhere, for instance, does the NAFTA require disputing investors to show "in the case of shares, the number and class of shares purportedly acquired and any special rights associated with such shares" or "the number of shares that each … 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."[252]

141. Mexico's evidentiary demands appear to be part of an overall strategy to block the Claimants' substantial claims from proceeding to the merits stage or at best stall these proceedings while Claimants' damages continue to accrue and increase. Claimants dispute Respondent's unsubstantiated opinion of the information to which it is entitled from Claimants at this stage as well as the need for that information to meet the standards set forth in NAFTA Articles 1116 and 1117.

142. In the interest of transparency and to ensure the Tribunal has the benefit of a full record, this section demonstrates that Claimants own *and* control all the casino enterprises in this dispute and have made a protected investment under the NAFTA to pursue claims under NAFTA Articles 1116 and 1117.

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[252] Mexico's Memorial on Jurisdictional Objections (May 30, 2017), ¶¶ 113, 118.

143. As will be explained in greater detail below, each of the Claimants,[253] with the exception of B-Cabo, LLC and Colorado Cancún, LLC, are U.S. shareholders of the following Mexican enterprises, which directly own the Casinos and their assets (collectively, the "**Juegos Companies**"):[254]

- Juegos de Video y Entretenimiento de México, S. de R.L de C.V., which owns the Naucalpan Casino facility ("**JVE Mexico**");
- Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V., which owns the Villahermosa Casino facility ("**JVE Sureste**");
- Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V., which owns the Puebla Casino facility ("**JVE Centro**");
- Juegos y Videos de México, S. de R.L. de C.V., which owns the Cuernavaca Casino facility ("**JyV Mexico**"); and
- Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V., which owns the Mexico City Casino facility ("**JVE DF**").

144. The Claimants collectively own and control both (a) the majority of shares in the Juegos Companies and (b) the majority of the controlling Class B shares in the Juegos Companies. Class B shares carry expansive voting rights to control most resolutions at shareholder meetings, including naming the majority of each Juegos Company's Board of Directors. Claimants, thus, collectively own *and* control the Juegos Companies.

145. In particular, the eight Claimants who submitted the 2014 Notice of Intent—B-Mex, LLC, B-Mex II, LLC, and Palmas South, LLC (collectively, the "**B-Mex Companies**"), Mr. Gordon Burr, Ms. Erin Burr, Mr. John Conley, Oaxaca Investments, LLC, and Santa Fe Mexico Investments, LLC (the B-Mex Companies, Mr. Burr, Ms. Burr, Mr. Conley, Oaxaca

[253] Claimant EMI Consulting, LLC ("EMI") is a Colorado limited liability company owned and controlled by Claimant Douglas Black. Mr. Black was in the process of transferring his ownership in the Juegos Companies from his personal name to EMI around the time of the illegal closures in 2014. This transfer has not occurred, and Mr. Black no longer wishes for this transfer to occur. *See* Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 73. As of the date of the April 2014 illegal closures, and as of today, ownership of the relevant shares is registered under Mr. Douglas Black's personal name. EMI was included as a Claimant in the Request for Arbitration out of an abundance of caution in order to preserve the right of the U.S. shareholders of the Juegos Companies to pursue claims. Claimants do not intend to attain any double recovery by virtue of the inclusion of both Mr. Black and EMI as Claimants and will not object to the dismissal of EMI as a claimant at the proper procedural juncture provided that the Tribunal finds that all of Mr. Black's investments and the entire measure of the damages he suffered as a result of Mexico's unlawful conduct are fully covered by Mr. Black's claims under NAFTA Articles 1116 and 1117.

[254] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 7, 73.

Investments, and Santa Fe Mexico Investments collectively the "**Controlling Disputing Investors**")—are the principal owners and controllers of the Claimants' Casinos.[255]

146. In addition to the Juegos Companies, the Controlling Disputing Investors own and control Exciting Games, S. de R.L. de C.V. ("**E-Games**") and Operadora Pesa, S. de R.L. de C.V. ("**Operadora Pesa**"), the Mexican enterprises that (a) acted as operator and permit holder and (b) managed food, beverage and facilities services for the Casino operations, respectively.

147. B-Cabo, LLC and Colorado Cancún, LLC, in turn, are U.S. limited liability companies owned and controlled by Mr. Gordon Burr and Ms. Erin Burr that made investments in the Claimants' casino business operations' expansion projects in Los Cabos and Cancun, Mexico.

148. Each of the Claimants has incurred loss or damage by reason of, or arising out of, Mexico's breaches of its obligations under the NAFTA for purposes of NAFTA Article 1116, and each of the Mexican enterprises has incurred loss or damage by reason of Mexico's breaches for purposes of NAFTA Article 1117.

1. Legal Principles Of Standing Under The NAFTA

a. Relevant NAFTA Provisions

149. Investors have standing to bring claims on their own behalf pursuant to NAFTA Article 1116. 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,

[255] A diagram of the corporate structure for the casino operations is found in Annex A of the Witness Statement of Erin Burr.

knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

150. In addition, investors have standing to bring claims on behalf of an enterprise pursuant to NAFTA Article 1117. Article 1117 provides as follows:

> **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 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.

151. In this respect, Article 1139 of the NAFTA defines the term "investor of a Party" as "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment."

152. Article 201 of the NAFTA defines "national" as "a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex 201.1." Likewise, Article 201 defines "enterprise" as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association."

153. All Claimants are either natural persons with U.S. citizenship or entities constituted under U.S. law. Mexico does not dispute this point.

154. The term “investment” is defined in NAFTA Article 1139:

investment means:

(a) an enterprise;

(b) an equity security of an enterprise;

(c) a debt security of an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise;

(d) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the loan is at least three years,

but does not include a loan, regardless of original maturity, to a state enterprise;

(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but investment does not mean,

(i) claims to money that arise solely from

(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or

(j) any other claims to money,

that do not involve the kinds of interests set out in subparagraphs (a) through (h).

155. Article 1139 further defines "investment of an investor of a Party" as "an investment owned or controlled directly or indirectly by an investor of such Party."

b. Relevant NAFTA Case Law

156. In construing Chapter Eleven's provisions and definitions relating to standing, NAFTA tribunals have refused to adopt restrictive interpretations unsupported by the treaty text.

157. As the tribunal in *Mondev v. USA* observed, Articles 1116 and 1117 provide the exclusive rules for determining standing under Chapter Eleven. It further explained:

> Under Article 1116 the foreign investor can bring an action in its own name for the benefit of a local enterprise which it owns and controls; by contrast, in a case covered by Article 1117, the enterprise is expressly prohibited from bringing a claim on its own behalf (Article 1117(4)). Faced with this detailed scheme, there does not seem to be any room for the application of any rules of international law dealing with the piercing of the corporate veil or with derivative actions by foreign shareholders. The only question for NAFTA purposes is whether the claimant can bring its interest within the scope of the relevant provisions and definitions.[256]

158. The NAFTA tribunal in *Waste Management, Inc. v. United Mexican States (II)*, in rejecting an objection by Mexico to the investor's standing, made the following observations:

> Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise.[257]

159. The *Waste Management II* tribunal also remarked that:

> Chapter 11 of NAFTA spells out in detail and with evident care the conditions for commencing arbitrations under its provisions. In particular it distinguishes between claims brought by an investor of another Party in its own right and claims brought by an investor on behalf of a local enterprise. The relevant provisions cover the full range of possibilities, including direct and indirect control and ownership.[258]

160. Investors have in the past brought claims under Chapter Eleven against Mexico for its closures of gaming facilities, namely in *International Thunderbird Gaming Corporation*

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[256] *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), ¶ 79, **CL-17**.

[257] *Waste Management, Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), ¶ 85, **CL-36**.

[258] *Waste Management, Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), ¶ 80 (emphasis added), **CL-36**.

v. United Mexican States. The NAFTA tribunal in *Thunderbird* was faced with the question of whether a U.S. gaming corporation had standing to assert a claim under Article 1117 on behalf of several Mexican gaming companies ("the EDM companies").[259] Mexico objected that Thunderbird did not own or control any of the EDM companies, arguing that Thunderbird did not demonstrate ownership throughout the corporate structure.[260] In addition, Mexico argued that legal control must be demonstrated for Article 1117 purposes, and that Thunderbird did not have legal control over some of the EDM companies.[261] Thunderbird responded that factual control suffices to bring claims under Article 1117, and that it possessed control over all the EDM companies through shareholding and management control.[262]

161. The *Thunderbird* tribunal confirmed that, for purposes of standing under Article 1117, the relevant standard is whether an investor "owns or controls" the enterprise.[263] Thus, as the plain treaty language makes clear, an investor has standing to sue on behalf of the enterprise so long as it *either* owns *or* controls it. Regarding control, the *Thunderbird* tribunal rejected Mexico's argument that Article 1117 requires a showing of legal control. It explained in relevant part:

> … The question arises whether "control" must be established in the legal sense, or whether *de facto* control can suffice for the purposes of Chapter Eleven of the NAFTA. According to Mexico, to determine what constitutes "control" of a corporation, the Tribunal must turn to the corporate law of the Party under whose laws the enterprise was incorporated, and Article 1117 of the NAFTA therefore requires that legal control be demonstrated under Mexican corporate law.
>
> The Tribunal does not follow Mexico's proposition that Article 1117 of the NAFTA requires a showing of legal control. The term "control" is not defined in the NAFTA. Interpreted in accordance with its ordinary meaning, control can be exercised in various manners. Therefore, a showing of effective or "*de facto*" control is, in the Tribunal's view, sufficient for the purposes of Article 1117 of the

[259] *International Thunderbird Gaming Corp. v. The United Mexican States*, UNCITRAL, Award (Jan. 26, 2006), ¶¶ 96-100, **CL-7**.

[260] *International Thunderbird Gaming Corp. v. The United Mexican States*, UNCITRAL, Award (Jan. 26, 2006), ¶ 97, **CL-7**.

[261] *International Thunderbird Gaming Corp. v. The United Mexican States*, UNCITRAL, Award (Jan. 26, 2006), ¶ 98, **CL-7**.

[262] *International Thunderbird Gaming Corp. v. The United Mexican States*, UNCITRAL, Award (Jan. 26, 2006), ¶¶ 99-100, **CL-7**.

[263] *International Thunderbird Gaming Corp. v. The United Mexican States*, UNCITRAL, Award (Jan. 26, 2006), ¶ 102, **CL-7**.

> NAFTA[3]. In the absence of legal control however, the Tribunal is of the opinion that *de facto* control must be established beyond any reasonable doubt.[264]

162. Although Thunderbird only had partial ownership of three of the EDM companies, ranging from 33.3% to 40.1% of share ownership,[265] the tribunal found sufficient "control" for the purposes of Article 1117. In particular, the tribunal observed:

> Despite Thunderbird having less than 50% ownership of the Minority EDM Entities, the Tribunal has found sufficient evidence on the record establishing an unquestionable pattern of *de facto* control exercised by Thunderbird over the EDM entities. Thunderbird had the ability to exercise a significant influence on the decision-making of EDM and was, through its actions, officers, resources, and expertise, the consistent driving force behind EDM's business endeavour in Mexico.
>
> […]
>
> Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise…
>
> In the present case, having regard to the record as a whole, the Tribunal finds that without Thunderbird's key involvement and decision-making during the relevant time frame, i.e., during the planning of the business activities in Mexico, the initial expenditures and capital, the hiring of the machine suppliers, the consultations with SEGOB, and the official closure of the EDM facilities, EDM's business affairs in Mexico could not have been pursued. Namely, the key officers of Thunderbird and the Minority EDM Entities were one and the same […]. The initial expenditures, the know-how of the machines, the selection of the suppliers, and the expected return on the investment were provided or determined by Thunderbird.
>
> […]
>
> In the Tribunal's view, it is clear from the record that without the consistent and significant initiative, driving force and decision-making of Thunderbird, the investment in Mexico could not have materialized. Accordingly, the Tribunal finds that Thunderbird exercised control over the Minority EDM Entities for the purpose of Article 1117 of the NAFTA, in a manner sufficient to entitle it to bring a claim on behalf of those entities under said provision.[266]

163. Thus, in assessing control for NAFTA standing purposes, tribunals look to management authority, contribution of expertise, and initial capitalization efforts as important factors. Disputing parties also regularly reference managerial authority as a factor in determining standing under the NAFTA. For example, in *Vito G. Gallo v. Government of*

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[264] *International Thunderbird Gaming Corp. v. The United Mexican States*, UNCITRAL, Award (Jan. 26, 2006), ¶¶ 105-106 (emphasis added), **CL-7**.

[265] *International Thunderbird Gaming Corp. v. The United Mexican States*, UNCITRAL, Award (Jan. 26, 2006), ¶ 104, **CL-7**.

[266] *International Thunderbird Gaming Corp. v. The United Mexican States*, UNCITRAL, Award (Jan. 26, 2006), ¶¶ 107-110 (emphasis added), **CL-7**.

Canada, the *respondent* argued that the claimant could not be considered an investor because he "[d]id not contribute any technical, management or other expertise to the Enterprise."[267] Although the case was dismissed on *ratione temporis* grounds, both parties made submissions on the issue of managerial authority, and the *Gallo* tribunal also considered it as an important factor in its analysis.[268]

164. Mexico asserts, in a footnote,[269] that it "does not admit that a claim can be asserted under Article 1117 by a group of claimants contending that they collectively control an enterprise." Yet, Mexico cites no authority for this assertion. There simply is no reason or basis to construe Article 1117 as impliedly imposing a restriction to a tribunal's jurisdiction where a group of claimants assert treaty claims collectively.[270] Respondent's position would imply that claims under NAFTA Article 1117 could never be brought in cases where an enterprise's shares are distributed across a number of investors, effectively precluding meritorious claims simply on the basis of how an enterprise is structured internally.

165. Relevantly, as the NAFTA tribunal in *S.D. Myers, Inc. v. Government of Canada* reasoned:

> Taking into account the objectives of the NAFTA, and the obligation of the Parties to interpret and apply its provisions in light of those objectives, the Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organise the way in which it conducts its business affairs. The Tribunal's view is reinforced by the use of the word "indirectly" in the second of the definitions quoted above [*i.e.* the definition of "investment of an investor of a Party"].[271] (emphasis added)

166. In any event, because Respondent has not developed its legal position in this regard, Claimants reserve their right to respond further to Respondent's objections to Claimants' standing to bring claims, either on their personal behalf, or on behalf of any of the enterprises in this dispute, whether raised in their current form or otherwise, should Mexico later expand on its objections.

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267 *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award (Sept. 15, 2011), ¶ 145, **CL-37**.

268 *See Vito G. Gallo v. Government of Canada*, UNCITRAL, Award (Sept. 15, 2011), ¶ 281, **CL-37**.

269 Mexico's Memorial on Jurisdictional Objections (May 30, 2017), ¶ 88.

270 *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), ¶ 490 (finding jurisdiction to hear mass claims brought by over 60,000 claimant bondholders), **CL-38**.

271 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (Nov. 13, 2000), ¶ 229, **CL-30**.

2. Claimants Own And Control The Mexican Casino Enterprises And Have Standing To Assert Claims On Their Behalf Under NAFTA Article 1117

167. Claimants are the controlling investors in the casino business operation at issue in this NAFTA dispute.[272] Through their control of the boards, management and shares of the Juegos Companies, they own and control the Juegos Companies and have standing to assert claims on their behalf under NAFTA Article 1117. Claimants have maintained continuous ownership and control of the Juegos Companies, notwithstanding the fraudulent conduct of certain individuals who attempted to misappropriate their shares. Additionally, the Controlling Disputing Investors, who are the principal owners and controllers of the casino business operation, have standing to assert claims on behalf of E-Games (operator and permit holder for the Casinos) and Operadora Pesa (food, beverage, and facility services company) under NAFTA Article 1117.

168. This section on Claimants' standing under NAFTA Article 1117 is structured as follows: *First*, it discusses the Controlling Disputing Investors' managerial control over the entire casino business operation, and their initial capitalization efforts and contribution of expertise to the business operation. *Second*, it describes the corporate structure of the casino business operation and its evolution over time. *Third,* it explains the Claimants' ownership and control of the various casino enterprises at issue. And *finally*, it discusses the Claimants' continuous ownership and control of the Juegos Companies, notwithstanding a temporary change of board control which had no effect on the Claimants' continued ownership of their controlling shares in the Juegos Companies.

169. Based on the factual record, and for the reasons explained below, the Tribunal should find that Claimants have more than satisfied their burden of proof at the jurisdictional stage to show their standing to bring claims under NAFTA Article 1117 and dismiss Mexico's standing objections in their entirety.

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[272] As explained above, B-Cabo, LLC and Colorado Cancún, LLC are not investors in the Juegos Companies. B-Cabo, LLC and Colorado Cancún, LLC are both Colorado limited liability companies that Mr. Gordon Burr and Ms. Erin Burr formed to develop casino and hotel ventures in Los Cabos and Cancun, Mexico. B-Cabo, LLC and Colorado Cancún, LLC are not pursuing claims under NAFTA Article 1117. These two U.S. companies' standing to bring claims under NAFTA Article 1116 will be explained in greater detail below in Section V.A.3.

a. The Controlling Disputing Investors Are The Principal Owners and Controllers of the Casino Business Operation At Issue

170. The Juegos Companies, E-Games, and Operadora Pesa are owned and controlled within a corporate structure managed and operated by the Controlling Disputing Investors—namely, Gordon Burr, John Conley, Erin Burr, B-Mex, LLC, B-Mex II, LLC, Palmas South, LLC, Oaxaca Investments, LLC,[273] and Santa Fe Mexico Investments, LLC.[274]

171. Mr. Gordon Burr was the driving force behind the entire casino operations in Mexico.[275] Mr. Burr designed the company structure so that the business operation would be managed and controlled by U.S. investors, as he knew from past experience that direct involvement and control by investors could mean the difference between success and failure.[276] He participated in and led the day-to-day management of the Casinos, and was involved in every major operational decision, from those concerning which services would be offered and whether the services should be outsourced or brought in-house, to the internal configurations and layout of gaming machines.[277]

172. Mr. Burr approved every large expenditure, personally negotiated every gaming machine and table contract, and reviewed the financial performance of each casino location daily.[278] Mr. Burr sought advice from top gaming experts in the U.S. and devised strategies to improve the financial performance of individual sections of the Casino floors when they fell short of internal goals.[279] He also founded a new security company to handle all security matters

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[273] Mr. Gordon Burr and Ms. Erin Burr are the sole owners and controllers of Oaxaca Investments, LLC. Mr. Burr owns 49% of the company, and Ms. Burr owns 51%. Mr. Burr is the Manager of the company. *See* Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 44.

[274] Mr. John Conley owns and controls Santa Fe Mexico Investments, LLC. *See* Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 140.

[275] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 11; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 18.

[276] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 9; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 17.

[277] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 11; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 18.

[278] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 30; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 18.

[279] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 31; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 18.

for the Casinos, and managed cleaning operations in the Casinos.[280] Even when he was not in Mexico, Mr. Burr directly supervised the Casinos through the facilities' video surveillance systems and through direct contact with his brother (Claimant Mark Burr), who helped supervise the operations when Mr. Burr was not in the country.[281]

173. Ms. Erin Burr is Mr. Gordon Burr's daughter, a Claimant investor, and one of Mr. Burr's most trusted collaborators and advisors.[282] She assisted Mr. Burr in his daily management of the casino operations, and in his decision-making concerning the corporate structure of the casino enterprise.[283] Ms. Burr coordinated with U.S. and Mexican tax, accounting, and legal advisors to ensure compliance with U.S. and Mexican laws and regulations, and especially the requirements of E-Games' gaming permit.[284] Ms. Burr also participated in decisions pertaining to the most significant financial decisions involving the Casinos, such as the allocation of casino revenue to the different investor groups across the various companies within the corporate structure.[285] She authorized all U.S. expenditures to be paid out of Mexico, including all distributions out of Mexico to investors. Ms. Burr also coordinated due diligence efforts with machine suppliers and authorized machine payments when Mr. Burr was not available.[286]

174. Mr. John Conley also played an important role in the initial establishment of Claimants' casino business.[287] Mr. Conley was instrumental in identifying personnel for the initial management teams for the various companies.[288] While Mr. Conley was not as involved in the day-to-day operations as Mr. and Ms. Burr, he provided significant capital contributions, such as when Claimants moved their Puebla location to a new facility.[289] Mr. Conley also served as a liaison to the Boards of the B-Mex Companies and communicated with Mr. Burr,

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[280] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 31; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 18.

[281] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 10.

[282] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 3, 19.

[283] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 5, 19.

[284] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 5, 19.

[285] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 5, 20.

[286] *See, e.g.,* Letter from Kathleen Worley to Erin Burr (Apr. 27, 2010), **C-122**; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 20.

[287] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 21.

[288] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 21.

[289] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 21.

who was often on the ground in Mexico overseeing the operations, about the Casinos.[290] Beginning in 2014, Mr. Conley began scaling back his responsibilities in the operational side of the casino business operation, but, as explained below, remained involved in the B-Mex Companies and as shareholder in the Juegos Companies.[291]

175. Mr. Burr, Ms. Burr, and Mr. Conley contributed invaluable resources and expertise to the casino business operation, from their initial founding of the business and design of its corporate structure, to their continued management of the casino operations. Mr. Burr had extensive experience in banking and private equity ventures, with a track record of success in raising capital for, organizing investments in, and managing various types of businesses.[292] Ms. Burr had previous experience in analyzing early-stage investments in information technology companies, coordinating due diligence, providing consulting services to portfolio companies, and supporting sales and marketing initiatives.[293] Mr. Conley had operated businesses in Mexico City for over 20 years and brought additional reputation and credibility to the casino business when it was initially raising money.[294] Mr. Burr and Ms. Burr, who were closely involved in the operations side of the casino business, exercised their management positions in the various companies with the constant goal of maximizing the overall value of the enterprise and were responsible to investors for generating predictable returns.[295]

176. Mr. Burr and Mr. Conley spearheaded the efforts to raise funds for the initial capitalization and operation of the Juegos Companies.[296] Ms. Burr also participated in the fundraising efforts by building financial projections, editing investor subscription agreements, and meeting with potential investors to assist Mr. Burr in delivering presentations and answering questions.[297] In 2005, Mr. Burr, Mr. Conley, and Ms. Burr, through their U.S.

[290] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 21.

[291] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 21.

[292] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 4.

[293] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 4.

[294] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 21.

[295] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 5, 19.

[296] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 29.

[297] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 29.

counsel, Claimant Neil Ayervais, formed the B-Mex Companies to help capitalize and own the Casinos.[298]

177. The B-Mex Companies own substantial investments in the Juegos Companies, and the majority of funds that capitalized the Casinos came from the B-Mex Companies.[299] Additionally, the B-Mex Companies control the Juegos Companies through their respective Boards of Directors[300] and through various management agreements between the companies. Furthermore, in addition to the managerial duties described above, Mr. Burr and Mr. Conley also served directly on the Boards of Directors of the Juegos Companies, while Ms. Burr served as a member of the audit committees of the Boards of the Juegos Companies.[301]

b. Company Structure For The Casino Operations

i. Relationship Between Corporate Entities

178. As mentioned above, the Juegos Companies are Mexican enterprises established to own the five Casinos, and essentially function as the asset-holding corporate entities in the business operation.[302] E-Games, in turn, is the Mexican enterprise that functions as operator and permit holder for the casino enterprise.[303] Operadora Pesa is a Mexican service company that coordinates with food, beverage and facilities vendors on behalf of the five Casinos.[304]

179. On the U.S. side of the corporate structure, the B-Mex Companies owned, controlled and capitalized the Casinos.[305] The B-Mex Companies directly and indirectly own and control the Juegos Companies through a combination of majority shareholding, control of voting rights to appoint a majority of directors on the Boards of the Juegos Companies, and the voting rights to control most shareholder resolutions.

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298 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 22.

299 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 11; *see also* Annex C of Erin Burr Witness Statement.

300 Each of the B-Mex Companies is governed by a Board of Managers. Each of the Juegos Companies is governed by a Board of Directors.

301 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 20, 34.

302 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 7.

303 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 9.

304 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 10.

305 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 11.

180. Initially, the B-Mex Companies directly participated in the management of the Casinos. As explained in further detail below, in 2009, Claimants decided it would be more efficient to manage the B-Mex and Juegos Companies through a separate entity and established Video Gaming Services, Inc., a Colorado corporation, for that purpose.[306] Pursuant to a Management Services Agreement with the B-Mex Companies, Video Gaming Services became the contractor that employed and paid the management team that oversaw the investments of the B-Mex Companies in the Casinos and the Juegos Companies.[307]

181. Gordon Burr led that management team.[308] The Juegos Companies' Boards of Directors formally empowered Mr. Burr to manage all aspects of the Juegos Companies and the Casinos' operations, something he had been doing as the President of those companies, and now continued to do as an employee of Video Gaming Services.[309] Although the managerial functions were transferred to Video Gaming Services, Inc., the B-Mex Companies retained operational control over the Juegos Companies and the Casinos at all times.

182. E-Games was originally incorporated as a Mexican corporation named Juegos de Video y Entretenimiento de Morelos, S. de R.L. de C.V., which was intended to be a new casino within the Claimants' casino group.[310] In October 2006, the company's name was changed to Exciting Games, and the corporation was repurposed to be the operator and, eventually, the permit holder for the group.[311] Beginning in November 2008, E-Games had operational control over the Casinos, as will be described below.

183. Operadora Pesa exclusively services the Claimants' Casinos and has no other course of business,[312] as explained in greater detail below. It provides services to the Casinos, such as coordinating with food, beverage and facilities vendors. Mr. Burr authorized the

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[306] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 12; Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 26.

[307] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 26; Management Services Agreements between Video Gaming Services and B-Mex, LLC, B-Mex II, LLC, and Palmas South, LLC (Oct. 26, 2009), **C-42 - C-44**.

[308] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶¶ 25-28; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 18.

[309] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 28; Juegos Companies' Consents to Action (June 1, 2011), **C-47 - C-51**.

[310] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 9.

[311] Notarization of the Articles of Organization of the Articles of Incorporation of Exciting Games (Feb. 22, 2006), **C-117**; General Shareholder´s Meeting of Exciting Games (Sept. 7, 2006), p. 10, **C-67**.

[312] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 10.

creation of Operadora Pesa on the advice of financial and other advisors, and on the recommendation of Ms. Burr.[313] And as the key manager for the B-Mex Companies, the Juegos Companies and E-Games, Mr. Burr was the ultimate decision maker for Operadora Pesa and the services it provided to the Juegos Companies, E-Games and the Casinos.[314]

184. At all relevant times, Claimants have exercised control of the various casino enterprises through one, and sometimes two, control structures—even after Mexico's illegal closures of the Casinos in April 2014. Claimants initially operated their Casinos pursuant to a SEGOB Resolution ("**Monterrey Resolution**") issued in March 2005 to Juegos de Entretenimiento y Video de Monterrey, S.A. de C.V. ("**JEV Monterrey**"). Mr. Lee Young, an American citizen who operated video poker in the United States and gaming facilities in Monterrey, was the primary owner of JEV Monterrey.[315] The Monterrey Resolution allowed for the operation of "skill" gaming machines (as opposed to games of chance), which were outside the scope of the Mexican gaming laws, and which SEGOB considered to be outside its regulatory purview.[316]

185. Each of the Juegos Companies entered into a joint venture agreement with JEV Monterrey; JVE Mexico executed it in June 2005, and the remaining four Juegos Companies did so in 2006.[317] Pursuant to the joint venture agreements, the Juegos Companies had the legal right to operate certain slot machines qualifying as games of "skill" in compliance with the Monterrey Resolution. The Juegos Companies and the Casinos operated under this arrangement from 2005 until April 2008.

186. During the period when the Casinos operated under the Monterrey Resolution, the B-Mex Companies controlled the Casinos. As will be discussed in greater detail below, the B-Mex Companies, through their ownership of stock in the Juegos Companies, control the voting rights to appoint four out of five directors on the Boards of the Juegos Companies, which allowed the B-Mex Companies to control the decisions of the various Boards of the Juegos Companies. This control structure has afforded Claimants effective control of the casino

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313 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 45.

314 Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 32.

315 Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 20.

316 Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 20.

317 Joint Venture Agreements between the Juegos Companies and JEV Monterrey (June 13, 2005 for Naucalpan, July 30, 2006 for D.F., and June 30, 2006 for the rest), **C-95 – C-99**.

business operation since 2005, and continued after Mexico's illegal closures in April 2014. From 2005 to April 2008, E-Games played no role in controlling the various companies within the casino corporate structure.

187. On April 1, 2008, the Juegos Companies entered into a joint venture agreement with Entretenimiento de Mexico, S.A. de C.V. ("**E-Mex**") to operate the Casinos under E-Mex's gaming permit; the joint venture agreement with E-Mex simultaneously terminated Claimants' agreements with JEV Monterrey and acknowledged that the B-Mex Companies, going forward, would be operating the Casinos under E-Mex's gaming permit.[318] The Casinos operated under E-Mex's permit pursuant to the Juegos Companies' joint venture agreement with E-Mex from April 2008 to November 2008. The control structure of the Casinos via the B-Mex Companies continued during this time.

188. On November 1, 2008, E-Games entered into an Operating Agreement with E-Mex, whereby E-Games acquired the rights to operate fourteen casino facilities or 7 dual-function gaming facilities (with both remote gambling centers and lottery number rooms).[319] SEGOB recognized E-Games' operator status under E-Mex's permit in December 2008 and again on May 8, 2009.

189. E-Games' introduction to the corporate structure as the operator of the Casinos gave rise to an additional layer of control by Claimants over the Casinos. As explained in greater detail below, the Controlling Disputing Investors owned the majority of E-Games' shares and directly controlled E-Games' Board of Directors, which allowed them to manage and control the operational and decision-making aspects of the Juegos Companies and the Casinos.[320] Importantly, the control structure via the B-Mex Companies continued to exist. This dual-layer of control over the Juegos Companies and the Casinos—through E-Games and through the B-Mex Companies—ensured that all key decisions of the casino business operation remained within the Controlling Disputing Investors' control.[321]

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[318] Transaction Agreement (Apr. 01, 2008), **C-6**.

[319] Operating Agreement (Nov. 01, 2008), **C-7**.

[320] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 17-19.

[321] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 16-17.

ii. Shareholding Rights In The Juegos Companies

190. In general, investors of the Juegos Companies owned Class A or Class B shares.[322] Both Class A and Class B shares have voting rights for their respective classes of stock and elect their own directors. Class B shares, however, also have broad voting rights to control most resolutions at shareholder meetings by a majority vote. Class A shareholders, on the other hand, can only vote for limited types of shareholder resolutions, such as declaring bankruptcy and dissolution of the company.[323]

191. Class B shareholders are entitled to appoint three out of five directors on the Boards of the Juegos Companies.[324] With the exception of JVE Mexico, as will be explained below, Class A stock of the Juegos Companies is further divided between Class A1 and Class A2, with A1 being primarily owned by Mexican investors and A2 by the B-Mex Companies.[325] Both Class A1 and Class A2 are entitled to appoint one director.

192. The shareholding structure of JVE Mexico, as the first of the Juegos Companies, differs from the other four companies. There are three classes of JVE Mexico shares: Class A, B, and C. As with the other Juegos Companies, Class A shareholders can only vote for a limited number of resolutions, such as dissolution of the company.[326] Most resolutions are adopted by majority of Class B and Class C shares.[327]

193. The B-Mex Companies own a majority of Class A shares, and Claimants collectively own the majority of Class B shares, in all five Juegos Companies.

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[322] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 68.

[323] Notarization of the Minutes of the General Shareholders Meeting of the Juegos Companies (March 23, 2006 for Naucalpan, Apr. 25, 2007 for Villahermosa, and Jan. 10, 2011 for the rest), Article 17, **C-89 – C-93**; *see also* Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 70.

[324] Erin Burr Witness Statement, (July 25, 2017), **CWS-2**, Section V.C.

[325] Erin Burr Witness Statement, (July 25, 2017), **CWS-2**, ¶ 68.

[326] Notarization of the Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento de Mexico, S. de R.L. de C.V. (March 23, 2006), Article 17, **C-89**.

[327] Notarization of the Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento de Mexico, S. de R.L. de C.V. (March 23, 2006), Article 17, **C-89**.

c. Mr. Burr, Ms. Burr And Mr. Conley Control The B-Mex Companies

194. Mr. Burr, Ms. Burr, and Mr. Conley control the B-Mex Companies through (1) their positions on the Boards of each company; (2) their control of voting rights to appoint managers on the Boards of each company; and (3) their management positions through VGS.

i. Control Through Video Gaming Services

195. *First*, the three B-Mex Companies are managed by Claimants Gordon and Erin Burr through VGS, Inc. In 2009, B-Mex Companies decided that they should form and use a separate U.S. corporation to pay for Mr. Burr's management team and the services they had been providing related to their management of the gaming investments in Mexico.[328] Mr. Burr and Ms. Burr thus formed VGS under the laws of the state of Colorado.[329] In organizing VGS and its relationship with the B-Mex Companies, Mr. and Ms. Burr worked closely with legal counsel in the U.S. and Mexico, to ensure that preparation of the contracts between all the entities within the casino corporate structure would be in compliance with all applicable laws and regulations, including the requirements attending E-Games' status as operator and eventual permit holder in both countries.[330] Each B-Mex Company entered into a "Management Services Agreement" with VGS, making this company the contractor that would employ and pay the management team that would oversee the investments of the B-Mex Companies in the Casinos and the Juegos Companies.[331]

196. Under the VGS Management Services Agreements, VGS (but really Mr. and Ms. Burr) manages the affairs of the B-Mex Companies in respect of their investments in Mexico, thus consolidating Claimants' managerial control over all aspects of the casino operations.[332] Mr. Burr was employed by VGS pursuant to the VGS Employment Agreement to perform these management duties, though Mr. Burr had long exercised managerial authority since the

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[328] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 26; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 12.

[329] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 26; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 12.

[330] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 12.

[331] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 26; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 25.

[332] Management Services Agreements between Video Gaming Services and B-Mex, LLC, B-Mex II, LLC, and Palmas South, LLC (Oct. 26, 2009), **C-42 - C-44**; Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 26; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 25.

formation of the casino company group.[333] Ms. Burr served as President, Secretary, and Treasurer of Video Gaming Services.[334] Claimant Mr. Neil Ayervais is 100% owner of VGS.[335]

197. As Ms. Burr explains, the range of services that Mr. Burr and she provided in their roles at VGS include:

> assisting in the hiring and supervising of employees and independent contractors; implementing and instituting security for the Casinos; helping manage the maintenance, supplies and repairs of the Casinos; assuring, through U.S. and Mexican counsel, compliance with all applicable laws, regulations, ordinances, licenses and concessions, and compliance with the E-Games permit; overseeing the restaurants and food services and helping arrange for entertainment in the Casinos; helping establish and implement accounting and budgeting systems; recommending and overseeing capital improvements and expenditures necessary for the operation, expansion and profitability of the Casinos; and managing distributions to shareholders, among others.[336]

198. As mentioned, Mr. Burr performed his managerial duties pursuant to the VGS Employment Agreement with VGS. The VGS Employment Agreement explained that:

> "[Video Gaming Services] provides certain management services for three Colorado limited liability companies (the "LLCs") and, through the LLCs, to five Mexican companies (the "Mexican Subsidiaries"), each of which owns and operates a casino in Mexico (collectively, the "Casinos"). Executive [*i.e.* Mr. Gordon Burr] has expertise and experience in managerial capacities in general and in the business conducted by the LLCs, the Mexican Subsidiaries, and the Casinos in particular. Executive is skilled in the regulatory environment in which the LLCs and the Mexican Subsidiaries operate and in assuring that those entities comply with such regulations, possesses relationships with manufacturers of gaming machines used in the Casinos, has expertise in security for the Casinos, is knowledgeable of software, accounting and other systems used by the Casinos and generally possesses expertise, experience, and skills necessary for the management of the LLCs, the Mexican subsidiaries, and the Casinos."[337]

199. The VGS Employment Agreement further described Mr. Burr's executive duties:

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[333] Employment Agreement between Video Gaming Services, Inc. and Gordon Burr (June 1, 2011), **C-45**; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 25; Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 26.

[334] Consent to Action in Lieu of Organizational Meeting of the Board of Directors of Video Gaming Services Inc. (Oct. 28, 2009), p. 2, **C-46**.

[335] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 25.

[336] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 13; *see also* Management Services Agreements between Video Gaming Services and B-Mex, LLC, B-Mex II, LLC, and Palmas South, LLC (Oct. 26, 2009), **C-42 - C-44**.

[337] Employment Agreement between Video Gaming Services, Inc. and Gordon Burr (June 1, 2011), p. 1, **C-45**.

> "Executive shall serve as chief executive officer, president, or in any such other capacity with the LLCs and the Mexican Subsidiaries, any company into which any such entity may be merged or any present or future subsidiary of either of them, as the Board of Directors of the Company (the "Board") or any person designated by either of them may assign to Executive in connection with the business of the Company (the "Company Business")."[338]

200. The Juegos Companies' Boards of Directors adopted Mr. Burr's VGS Employment Agreement with VGS in June 2011 through various Consents to Action.[339] Through these Consents to Action, the Boards formally empowered Mr. Burr to manage all aspects of the Juegos Companies and the Casinos' operations, which he had been doing as the President of these companies since their creation.[340] Specifically, the Consents to Action provide that:

> Mr. Burr shall take all actions, expend all funds, make all personnel decisions, including directing the hiring and termination and direction of services of employed or contracted personnel (except those individuals who are members of the board), as well as amending the Company's agreement with any contractor to provide such authority, execute or require the execution of all documents and take all other actions necessary to reduce expenses, optimize revenues and otherwise preserve and enhance the value of the Company, without impairing the long-term profitability of the Company…"[341]

201. Ms. Burr, in turn, was primarily responsible for overseeing all U.S. operations of the casino business. Ms. Burr monitored the financials of the B-Mex Companies and served as controller and signer of the B-Mex Companies' bank accounts.[342] Ms. Burr managed U.S. and Mexican investor relations for both the B-Mex Companies and the Juegos Companies.

ii. Direct Managerial Control Over The B-Mex Companies

202. Mr. Burr and Mr. Conley exercised direct managerial control over the B-Mex Companies by virtue of their positions on those companies' Boards and their authority to sign for and bind the companies as Managers.[343] Mr. Burr served as President of the B-Mex

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[338] Employment Agreement between Video Gaming Services, Inc. and Gordon Burr (June 1, 2011), p. 2, **C-45**.

[339] Juegos Companies' Consents to Action (June 1, 2011), **C-47 - C-51**.

[340] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 28.

[341] Juegos Companies' Consents to Action (June 1, 2011), **C-47 - C-51**.

[342] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 26.

[343] *See, e.g.*, Consent to Action in Lieu of Organizational Meeting of the Members of B-Mex, LLC (Apr. 10, 2014), **C-72**; Minutes of a Special Meeting of Managers of B-Mex, LLC (Mar. 15, 2013), **C-123**; Consent Resolutions of the Board of Managers of B-Mex II, LLC (June 30, 2011), **C-124**; Minutes of a Special Meeting of Managers of Palmas South, LLC (Mar. 1, 2010), **C-125**.

Companies by virtue of his Employment Agreement with Video Gaming Services, while Mr. Conley held the title of Chairman.[344]

203. Under the B-Mex Companies' Operating Agreements, Mr. Burr and Mr. Conley, as managers, had the broad decision-making powers and the authority to perform a broad array of managerial activities, including having "exclusive and complete control over the business of the Company" and operating "the Company for the benefit of all of its Members."[345]

204. Pursuant to their managerial authority, Mr. Burr and Mr. Conley would, for example, make decisions concerning the hiring and firing of personnel. For instance, on April 10, 2014, signing as managers, Mr. Burr, Mr. Conley, and other board members issued a consent resolution to "take all actions and expend all funds required to investigate appropriate recourse for actions" against certain employees and officers of the Juegos Companies.[346] In particular, Mr. Gordon Burr was "directed and authorized, on behalf of the Company and its Mexican subsidiary, to take all actions and expend all funds considered by Mr. Burr to be reasonable and necessary" to effectuate this resolution.[347]

iii. Control Of Votes In The B-Mex Companies' Boards

205. Mr. Burr and Mr. Conley also controlled the voting rights to appoint a majority of managers on the Boards of B-Mex II, LLC and Palmas South, LLC.[348] Mr. Burr and Mr. Conley were the only two Class B shareholders of these two companies, which gave them exclusive voting rights to appoint two out of three members on B-Mex II's board and three out of five members on Palmas South's board.[349]

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[344] *See, e.g.*, Minutes of a Special Meeting of Managers of B-Mex, LLC (Mar. 15, 2013), **C-123**; Minutes of a Special Meeting of Managers of Palmas South, LLC (Mar. 1, 2010), **C-125**.

[345] Operating Agreement of B-Mex, LLC (May 20, 2005), Article 12, pp. 24-25, **C-69;** Operating Agreement of B-Mex II, LLC (Mar. 15, 2005), Article 12, pp. 24-25, **C-70**; Operating Agreement of Palmas South, LLC (May, 2006), Article 12, pp. 24-25, **C-73**.

[346] Consent to Action in Lieu of Organizational Meeting of the Members of B-Mex, LLC (Apr. 10, 2014), p. 1, **C-72**.

[347] Consent to Action in Lieu of Organizational Meeting of the Members of B-Mex, LLC (Apr. 10, 2014), p. 2, **C-72**.

[348] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 63, 66.

[349] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 63, 66; Operating Agreement of B-Mex II, LLC (Mar. 15, 2005), Article 12, p. 22, **C-70** ; Operating Agreement of Palmas South, LLC (May, 2006), Article 12, p. 23, **C-73**.

206. Class B stock in B-Mex, LLC was issued to the company's founders, Mr. Burr and Mr. Conley, as well as to others who were instrumental in organizational activities, including the company's U.S. legal counsel Claimant Neil Ayervais.[350] Claimants own a majority of B-Mex, LLC's Class B stock, and control the rights to appoint three of the five managers on its Board.[351]

d. The Claimants Own And Control The Juegos Companies

207. The Claimants own and control the Juegos Companies through (1) their controlling ownership of the shares of the Juegos Companies; (2) their positions on the companies' Boards; (3) their managerial authority under agreements between the various companies; and (4) their control of the B-Mex Companies.[352]

208. All Claimants,[353] with the exception of B-Cabo, LLC and Colorado Cancun, LLC, thus have standing to assert a claim on behalf of the Juegos Companies under NAFTA Article 1117.

i. Ownership And Control Of The Juegos Companies Through Shareholding

209. Each of the Claimants, with the exception of B-Cabo, LLC and Colorado Cancún, LLC,[354] are U.S. shareholders of the Juegos Companies.[355] These U.S. shareholders collectively own and control each of the Juegos Companies by holding (a) the majority of the controlling Class B shares in the Juegos Companies and (b) the majority of all issued shares in the Juegos Companies.[356] This gives Claimants the voting rights to control (1) most shareholder resolutions at the Juegos Companies; (2) four out of five directors on the Juegos Companies' respective Boards.[357]

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[350] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 59.

[351] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 60.

[352] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 33.

[353] As explained above, Claimants Douglas Black and EMI Consulting, LLC are pursuing claims based on, and in connection with, the same investments.

[354] Within this section, references to "Claimants" excludes B-Cabo, LLC and Colorado Cancún, LLC.

[355] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 73.

[356] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 76-86.

[357] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 76-86.

210. Pursuant to the Juegos Companies' bylaws on shareholding voting rights (with slight variations to be described in greater detail below), Class B is the only class of shares that carries expansive voting rights to control most resolutions at shareholders' meetings.[358] Class A shareholders can only vote for limited types of resolutions, such as declaring bankruptcy and dissolution of the company.[359] Furthermore, Class B is entitled to appoint three out of five directors on the Boards of the Juegos Companies.[360] The U.S. claimant shareholders' ownership of the majority of Class B shares in all five of the Juegos Companies is a sufficient basis in and of itself to give Claimants standing to assert claims on behalf of those enterprises under NAFTA Article 1117.[361] Claimants' majority ownership in the Juegos Companies provides a further basis for the Claimants to pursue claims under NAFTA Article 1117 on behalf of the Juegos Companies.

(a) JVE Mexico

211. JVE Mexico (which owns the Naucalpan Casino) was the first of the Juegos Companies to be established and its internal shareholding and voting rights structure differs from the other four Juegos Companies.[362] There are three classes of JVE Mexico shares: Class A, B, and C.[363] Class A shares are held by Claimant B-Mex LLC and certain Mexican nationals who invested substantial capital to construct, market, and operate the Naucalpan location.[364] Class B shares, which were allocated to founders, are owned entirely by B-Mex, LLC.[365] Class C stockholders are Mexican nationals who formed JVE Mexico at the direction of Mr. Burr, Mr. Conley, and B-Mex, LLC.[366]

212. Pursuant to JVE Mexico's bylaws governing shareholder's voting rights, in order to establish quorum and have a valid shareholder meeting, 75% of the Class B and C

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358 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 70.

359 Notarization of the Minutes of the General Shareholders Meeting of the Juegos Companies (March 23, 2006 for Naucalpan, Apr. 25, 2007 for Villahermosa, and Jan. 10, 2011 for the rest), Article 17, **C-89 – C-93**.

360 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 70.

361 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 71.

362 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 76.

363 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 76.

364 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 76.

365 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 76.

366 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 76.

shareholders are required to be present or represented.[367] In general, votes must be taken by a majority of the Class B and C shareholders.[368] In addition, certain major financial decisions require the approval of Class B and C shareholders. A vote of 75% of the Class B and C shareholders is required in order to: (a) incur a debt greater than US$ 500,000; (b) guarantee the debt of a third party or compromise properties of the company; (c) approve the payment to a partner, except for payments for the contributions of the Directors; and (d) increase the share capital.[369] Votes are cast proportionally to the amount of each shareholder's investment.[370]

213. Class A shareholders can only attend the shareholder meeting when their vote is required.[371] Specifically, Class A shareholders only vote in specified circumstances, such as: (a) dissolution of the company; (b) the sale of all or substantially all the properties of the company; (c) commencement of a bankruptcy procedure; (d) exclusion of partners; and (e) reduction of share capital. While Class A votes are required on these matters, in order to pass these particular resolutions, a vote of 75% of the members of all Classes (A, B, & C) is required.[372] The JVE Mexico Board may not pass any resolutions without the support of the Class B and C shareholders.

214. Claimant B-Mex, LLC owns 75% of the Class B and Class C shares of JVE Mexico.[373] In addition, B-Mex, LLC owns more than 75% of all shares (Class A, B, & C) of JVE Mexico.[374] Accordingly, B-Mex LLC owns and controls the voting rights, by itself, to pass all shareholder resolutions and no JVE Mexico shareholder resolutions can be passed without the vote of B-Mex, LLC.

215. This gives B-Mex LLC ownership *and* control of JVE Mexico and standing to bring claims on behalf of JVE Mexico under NAFTA Article 1117.

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367 Notarization of the Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento de Mexico, S. de R.L. de C.V. (Mar. 23, 2006), Chapter 3, Section 17, **C-89**.

368 *Id*.

369 *Id.* at Article 17.

370 *Id.*

371 *Id.*

372 *Id.*

373 *See* Annex C of Erin Burr Witness Statement.

374 *See* Annex C of Erin Burr Witness Statement.

216. In addition, B-Mex, LLC controls the voting rights to appoint four out of five directors on JVE Mexico's Board.[375] As provided in JVE Mexico's bylaws, Class B can appoint three directors, and Class A and C can each appoint one director. All of these appointments are by majority vote within each respective class.[376] B-Mex, LLC's majority ownership of Class A and Class B shares thus gives it voting rights to appoint four out of five directors.

(b) JVE Sureste, JVE Centro, JyV Mexico, and JVE DF

217. JVE Sureste (which owns the Villahermosa Casino), JVE Centro (which owns the Puebla Casino), JyV Mexico (which owns the Cuernavaca Casino), and JVE DF (which owns the Mexico City Casino) share the same internal shareholding and voting rights structure. These four Juegos Companies have three classes of shares: A1, A2, and B. Class A1 is primarily owned by Mexican investors and A2 by the B-Mex Companies.[377] Both Class A1 and A2 have the same economic and voting rights.[378]

218. JVE Sureste (which owns the Villahermosa Casino), JVE Centro (which owns the Puebla Casino), JyV Mexico (which owns the Cuernavaca Casino), and JVE DF (which owns the Mexico City Casino) share the same internal shareholding and voting rights structure. These four Juegos Companies have three classes of shares: A1, A2, and B. Class A1 is primarily owned by Mexican investors and A2 by the B-Mex Companies.[379] Both Class A1 and A2 have the same economic and voting rights.[380]On the other hand, Class A1 and A2 shareholders can only vote for shareholder resolutions where their vote is specifically required. For example, Class A1 and A2 shareholders can only vote in the limited circumstances such as: (a) dissolution of the company; (b) the sale of all or substantially all the properties of the company; (c) commencement of a bankruptcy procedure; (d) exclusion of partners; and (e)

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375 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 77.

376 See Notarization of the Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Apr. 25, 2007), Chapter 3, Section 17, **C-90**; *see also* Notarization of the Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. (Jan. 10, 2011), Chapter 3, Section 17, **C-93**; *see also* Notarization of the Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. (Jan. 10, 2011), Chapter 3, Section 17, **C-91**; *see* Notarization of the Minutes of the General Shareholders Meeting of Juegos y Videos de Mexico, S. de R.L. de C.V. (Jan. 10, 2011), Chapter 3, Section 17, **C-92**.

377 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 68.

378 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 78.

379 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 68.

380 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 78.

reduction of share capital. While Class A1 and A2 votes are required in order to pass these specified resolutions, a vote of 75% of the members of all Classes (A1, A2, & B) is required.

219. No shareholder resolutions can be passed by the Boards of JVE Sureste, JVE Centro, JyV Mexico, or JVE DF without the vote of the Class B shareholders.

220. The U.S. claimant shareholders own a majority of Class B shares in all four of these Juegos Companies.[381] Consequently, a large majority of shareholder resolutions cannot be made without the Claimants' votes.

221. Claimants, accordingly, own and control these four Juegos Companies and have standing to bring claims on behalf of these enterprises under NAFTA Article 1117 on this basis alone.

222. In addition, Claimants control the voting rights to appoint four out of five directors on the Boards of JVE Sureste, JVE Centro, JyV Mexico, and JVE DF. As provided in these Juegos Companies' bylaws, the Class B shareholders control three out of five board seats and do so by majority vote.[382] Class A1 and Class A2 shareholders, also through a majority vote, name one director respectively.[383] Claimants own a majority of Class B shares, and are consequently entitled to appoint three directors, and do so by collective proxy ahead of any shareholder's meeting.[384] In addition, Claimants (in particular, Claimants B-Mex II, LLC and Palmas South, LLC) own all of the Class A2 shares, and are entitled to appoint an additional director.[385]

223. In sum, for JVE Sureste, JVE Centro, JyV Mexico, and JVE DF, Claimants can appoint four out of five directors on their Boards of Directors. This solidifies Claimants' control

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[381] *See* Annex C of Erin Burr Witness Statement.

[382] *See* Notarization of the Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Apr. 25, 2007), Chapter 3, Section 17, **C-90**; *see also* Notarization of the Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. (Jan. 10, 2011), Chapter 3, Section 17, **C-93**; *see also* Notarization of the Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. (Jan. 10, 2011), Chapter 3, Section 17, **C-91**; *see* Notarization of the Minutes of the General Shareholders Meeting of Juegos y Videos de Mexico, S. de R.L. de C.V. (Jan. 10, 2011), Chapter 3, Section 17, **C-92**.

[383] *Id.*

[384] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 79, 81, 84, 86.

[385] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 79, 81, 84, 86.

over the internal affairs of these four Juegos Companies and gives them an additional basis for their standing to bring claims on behalf of these enterprises under NAFTA Article 1117.

(c) Identity of U.S. Claimant Investors for Each of the Juegos Companies

224. For additional clarity, the following subsections will list the particular Claimants who own and control each individual Juegos Company. The Tribunal is invited to refer to Ms. Erin Burr's witness statement submitted in support of this Counter-Memorial, and in particular Annex C thereto, for a detailed description of the precise shareholding for each of the Juegos Companies.

(1) JVE Mexico (Naucalpan Casino)

225. B-Mex, LLC is the majority owner of Class A stock in JVE Mexico.[386] It also owns all of the company's Class B stock. B-Mex owns a majority of JVE Mexico's overall shares.

(2) JVE Sureste (Villahermosa Casino)

226. B-Mex II, LLC is the sole owner of Class A2 stock in JVE Sureste.[387] The U.S. claimant investors collectively own a majority of Class B shares. In addition, the U.S. claimant investors collectively own a majority of JVE Sureste's overall shares. The following Claimants own shares in JVE Sureste:

1. B-Mex II, LLC
2. Anthone, Deana
3. Ayervais, Neil
4. Black, Douglas
5. Burns, Howard
6. Burr, Erin
7. Burr, Gordon
8. Burr, Mark
9. Caddis Capital, LLC
10. Conley, John
11. Figueiredo, David
12. Fohn, Louis
13. J. Johnson Consulting, LLC
14. Las KDL, LLC
15. Mathis Family Partners, Ltd.

[386] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 77.

[387] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 79.

16. Oaxaca Investments, LLC
17. Palmas Holdings, Inc.
18. Rudden, Daniel
19. Santa Fe Mexico Investments, LLC
20. Sawdon, Robert E.
21. Taylor, Randall
22. Trude Fund II, LLC
23. Trude Fund III, LLC
24. Victory Fund, LLC
25. Watson, James H. Jr.

(3) JVE Centro (Puebla Casino)

227. B-Mex II, LLC is the sole owner of Class A2 stock in JVE Centro.[388] The U.S. claimant investors collectively own a majority of Class B shares. In addition, the U.S. claimant investors collectively own a majority of JVE Centro's overall shares. The following Claimants own shares in JVE Centro:

1. B-Mex II, LLC
2. Anthone, Deana
3. Ayervais, Neil
4. Black, Douglas
5. Burns, Howard
6. Burr, Erin
7. Burr, Gordon
8. Burr, Mark
9. Caddis Capital, LLC
10. Conley, John
11. Family Vacation Spending, LLC
12. Figueiredo, David
13. Financial Visions, Inc.
14. J. Johnson Consulting, LLC
15. J. Paul Consulting
16. Las KDL, LLC
17. Lombardi, Deborah
18. Oaxaca Investments, LLC
19. Palmas Holdings, Inc.
20. Pittman, Ralph
21. Rudden, Marjorie "Peg"
22. Santa Fe Mexico Investments, LLC
23. Sawdon, Robert E.
24. Taylor, Randall
25. Trude Fund II, LLC
26. Trude Fund III, LLC
27. Watson, James H. Jr.

[388] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 81.

(4) JyV Mexico (Cuernavaca Casino)

228. B-Mex II, LLC is the sole owner of Class A2 stock in JyV Mexico.[389] The U.S. claimant investors collectively own a majority of Class B shares. In addition, the U.S. claimant investors collectively own a majority of JyV Mexico's overall shares. The following Claimants own shares in JyV Mexico:

1. B-Mex II, LLC
2. Anthone, Deana
3. Ayervais, Neil
4. Black, Douglas
5. Burns, Howard
6. Burr, Erin
7. Burr, Gordon
8. Burr, Mark
9. Caddis Capital, LLC
10. Conley, John
11. Diamond Financial Group, Inc.
12. Figueiredo, David
13. Financial Visions, Inc.
14. J. Johnson Consulting, LLC
15. Las KDL, LLC
16. Lombardi, Deborah
17. Malley, Thomas
18. Oaxaca Investments, LLC
19. Palmas Holdings, Inc.
20. Pittman, Ralph
21. Rudden, Daniel
22. Rudden, Marjorie "Peg"
23. Santa Fe Mexico Investments, LLC
24. Sawdon, Robert E.
25. Taylor, Randall
26. Trude Fund II, LLC
27. Trude Fund III, LLC
28. Watson, James H. Jr.

(5) JVE DF (Mexico City Casino

229. B-Mex II, LLC and Palmas South, LLC are the sole owners of Class A2 stock in JVE DF.[390] The U.S. claimant investors collectively own a majority of Class B shares. In addition, the U.S. claimant investors collectively own a majority of JVE DF's overall shares. The following Claimants own shares in JVE DF:

[389] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 84.

[390] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 86.

1. B-Mex II, LLC
2. Palmas South, LLC
3. Ayervais, Neil
4. Black, Douglas
5. Burns, Howard
6. Burr, Mark
7. Caddis Capital, LLC
8. Conley, John
9. Financial Visions, Inc.
10. J. Johnson Consulting, LLC
11. J. Paul Consulting
12. Lombardi, Debbie
13. Lowery, P. Scott
14. Oaxaca Investments, LLC
15. Palmas Holdings, Inc.
16. Rudden, Marjorie "Peg"
17. Sawdon, Robert E.
18. Taylor, Randall
19. Trude Fund II, LLC
20. Trude Fund III, LLC
21. Watson, James H. Jr.

ii. Ownership And Control Of The Juegos Companies By The Controlling Disputing Investors

230. The Controlling Disputing Investors, as explained above, are the principal owners and controllers of the casino business operation. In addition to owning and controlling the Juegos Companies through shareholding as explained above, the Controlling Disputing Investors control the Juegos Companies through (1) their positions on the Boards of Directors; (2) their managerial authority pursuant to agreements between the various companies; and (3) their control of the B-Mex Companies.

231. *First*, Claimants Gordon Burr, John Conley, and Daniel Rudden exercise direct control over the Juegos Companies through their executive positions on the Boards of Directors of the Companies. Mr. Burr is the President of the Board of Directors of all five Juegos Companies.[391] Mr. Conley also sat on all five Boards.[392] Mr. Rudden sat on the Boards of JVE Mexico and JVE Sureste.[393]

[391] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 34.

[392] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 34.

[393] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 34.

232. *Second*, as explained in greater detail above, Mr. Burr was authorized to manage all aspects of the Casino operations pursuant to his Employment Agreement with Video Gaming Services.[394] As explained, the Boards of all five Juegos Companies recognized and approved this Employment Agreement.[395] Through this Agreement, Mr. Burr was appointed as President of all the B-Mex Companies and Juegos Companies, and exercised sweeping managerial control over them.[396]

233. In addition, Video Gaming Services managed the B-Mex Companies' investments in the Juegos Companies. The B-Mex Companies hold substantial investments in Class A stock in the Juegos Companies, and directed Video Gaming Services to manage their investments on their behalf.[397] This gave Mr. Burr an additional basis of authority to control and manage the operations of the Juegos Companies.

234. *Third*, Mr. Burr and Mr. Conley exercised indirect control over the Juegos Companies by virtue of their control over the B-Mex Companies' Boards. As explained above, Mr. Burr and Mr. Conley occupied executive positions on the B-Mex Companies' Boards and controlled the voting rights to appoint a majority of managers on the Boards of B-Mex II and Palmas South. Additionally, Mr. Burr, Mr. Conley and other shareholders aligned with them, including Claimant Mr. Ayervais, held Class B stock in B-Mex, LLC, and Claimants as a group own a majority of B-Mex, LLC's Class B stock, and control the rights to appoint three of the five managers on its Board.[398] Since the B-Mex Companies were majority owners of Class A stock in all five Juegos Companies, Mr. Burr and Mr. Conley exercised additional indirect control through this relationship.

235. Board approval from the B-Mex Companies was required to approve major expenditures, including for example for remodeling work and for large machine purchases. For example, the Board of B-Mex II (which, as explained above, owns all Class A2 interests in JyV Mexico and, through that ownership, elects one director) issued a consent resolution supporting

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394 Employment Agreement between Video Gaming Services, Inc. and Gordon Burr (June 1, 2011), **C-45**.

395 Juegos Companies' Consents to Action (June 1, 2011), **C-47 - C-51**.

396 Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 28-29; Employment Agreement between Video Gaming Services, Inc. and Gordon Burr (June 1, 2011), ¶ 2.2, **C-45**.

397 Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 29; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 37.

398 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 59, 60.

the expansion and remodeling of the Cuernavaca casino facility.[399] Messrs. Burr, Conley and Rudden signed the resolution approving the expansion and remodeling as managers of B-Mex II, LLC.

236. The Controlling Disputing Investors' managerial control of the Juegos Companies gives them, as the principal owners and controllers of the casino business operation, an additional basis of standing to assert claims on behalf of the Juegos Companies under NAFTA Article 1117.

e. The Controlling Disputing Investors Own and Control E-Games

237. In addition to the Juegos Companies, the Controlling Disputing Investors, as the principal owners and controllers of the casino business operation, own and control E-Games and have standing to assert claims on its behalf.

238. The Controlling Disputing Investors, as explained earlier, designed the company structure so that they could manage and control the entire casino business operation. Within the corporate structure, E-Games acts as the operator and permit holder for the Casinos. The Controlling Disputing Investors directly own and control E-Games through their shareholding in and board control of the company.

239. With respect to board control, Mr. Burr is the President of E-Games' Board of Directors[400] and makes all strategic decisions for the company.[401] Mr. Conley is one of its Directors.[402]

240. In terms of shareholding, the Controlling Disputing Investors have held voting control of E-Games at all relevant times. The U.S. shareholders of E-Games—*i.e.* Oaxaca Investments, LLC (a Colorado limited liability company owned and controlled by Mr. Burr

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[399] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 30; Consent Resolutions of the Board of Managers of B-Mex II, LLC (Jun. 30, 2011), **C-124**.

[400] Notarization of the Minutes of the General Shareholders Meeting of Exciting Games S. de R.L. de C.V. (Feb. 21, 2014), p. 22, **C-63**.

[401] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 17.

[402] Notarization of the Minutes of the General Shareholders Meeting of Exciting Games S. de R.L. de C.V. (Feb. 21, 2014), p. 22, **C-63**.

(49%) and Ms. Burr (51%))[403] and Mr. Conley—always voted as a block on key decisions.[404] The Controlling Disputing Investors also always had and controlled the vote of Mr. José Ramón Moreno Quijano, who always bloc-voted with Mr. Burr and the U.S. shareholders on decisions related to the Casinos' operations, without exception.[405]

241. Mr. Alfredo Moreno Quijano, who was a shareholder of E-Games until October 7, 2013, also bloc-voted with the U.S. shareholders, as he followed Mr. Conley's vote on all key issues.[406] In particular, Mr. Alfredo Moreno Quijano could not freely vote his stock, since he essentially held a portion amounting to 13.34% of E-Games' shares on Mr. Conley's behalf, and was contractually prevented from voting that percentage in any E-Games board meeting without first providing Mr. Conley with the right to purchase the shares at a prearranged price.[407] Mr. Conley had previously arranged for Mr. Alfredo Moreno Quijano to hold his 13.34% of E-Games' stock and executed an option agreement, dated June 2, 2011,[408] allowing Mr. Conley to buy back that 13.34% at any time, thus giving Mr. Conley a means to control how those shares were voted.

242. After October 7, 2013, Mr. Alfredo Moreno Quijano transferred all his stock to the other shareholders of E-Games and ceased being a shareholder. The ownership of E-Games was then as follows: John Conley (33.34%), Oaxaca Investments (33.32%), José Ramón Moreno Quijano (16.67%) and Jorge Armando Guerrero Ortiz (16.67%).[409]

243. E-Games' bylaws require a 70% vote to adopt resolutions.[410] The voting bloc described above (Conley-Oaxaca-Moreno-Moreno) gave the Controlling Disputing Investors the votes to adopt whatever resolutions were needed at all relevant times.

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403 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 44.

404 Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 18.

405 Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 18.

406 Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 18.

407 Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 18.

408 Option Agreement between Alfredo Moreno and John Conley (June 2, 2011), **C-83**.

409 Notarization of the Minutes of the General Shareholders Meeting of Exciting Games S. de R.L. de C.V. (Feb. 21, 2014), p. 18, **C-63**.

410 Notarization of the Minutes of the General Shareholders Meeting of Exciting Games S. de R.L. de C.V. (Feb. 21, 2014), pp. 19-20, **C-63**.

244. Furthermore, as to majority ownership of E-Games, since October 7, 2013, the Controlling Disputing Investors have held, and continue to hold, a majority of E-Games shares (66.66%).

245. The Controlling Disputing Investors, in addition to shareholding and voting control, exercise control over E-Games through their managerial control of all gaming revenue from the Casinos. As required by Mexican gaming laws and regulations, E-Games receives all revenue from gaming activities which it operates in the Claimants' Casinos. All economic benefits from gaming revenue, however, are retained by investors of the B-Mex Companies and Juegos Companies, as opposed to the owners of E-Games.[411]

246. Mr. Burr and Ms. Burr designed the structure for the allocation of revenues from the Casinos, with Mr. Burr making the ultimate decision on such allocations.[412] Under this structure, gaming revenues were transferred to the Juegos Companies by virtue of Machine Lease Agreements.[413] Pursuant to the Machine Lease Agreements, Mr. Burr and Ms. Burr oversaw all lease payments from E-Games to the Juegos Companies (which, as explained, owned the gaming machines). E-Games also paid all casino operating expenses, gaming taxes, and other duties and expenses.[414]

247. As noted, Mr. Burr and Ms. Burr determined, upon the advice of their U.S. and Mexican tax advisors, that they should establish Video Gaming Services to handle all U.S. management services and expenditures. Video Gaming Services would invoice the B-Mex Companies for its expenditures based on a formula designed by Ms. Burr and approved by Mr. Burr which considered the number of gaming seats at each location. The B-Mex Companies, in turn, would invoice E-Games under an expense reimbursement agreement.[415] Mr. Burr and Ms. Burr's ability to reorganize and repurpose the various entities within the corporate structure is further evidence of their managerial control over the entire business operation.

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411 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 39-40.

412 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 5.

413 Machine Lease Agreement between Exciting Games and the Juegos Companies (Dec. 10, 2009 for Puebla and Dec. 9, 2009 for the rest), **C-52 - C-56**.

414 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 40.

415 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 42.

248. As the factual record demonstrates, the Controlling Disputing Investors own and control E-Games, directly and indirectly, through their (1) majority shareholding of E-Games; (2) control of rights as a voting bloc to make all the key decisions for the company; (3) their executive positions on the E-Games' Board; and (4) managerial control of revenue from the Casinos and through their general managerial control of the casino business operation.

249. This unquestionably establishes that the Controlling Disputing Investors have standing to pursue claims on behalf of E-Games under NAFTA Article 1117.

f. The Controlling Disputing Investors Control Operadora Pesa

250. The Controlling Disputing Investors control the entire course of business of Operadora Pesa and have standing to assert claims on its behalf under NAFTA Article 1117.

251. In order to better manage the Casinos' overhead, Mr. Burr decided to create Operadora Pesa in 2008 on the advice of tax and legal advisors.[416] Operadora Pesa was preceded by other service entities, including B Mex Servicios Corporativos S.C. and Servicios Administrativos para Juegos de Video México, S. de R.L. de C.V.[417]

252. More specifically, the Controlling Disputing Investors used Operadora Pesa as a corporate vehicle to coordinate with vendors on behalf of the Casinos and allocate corporate expenses to each location based on use.[418] Centralizing contracting with food, beverage and facilities vendors allowed the Casinos to obtain volume discounts, which in turn reduced costs and made the Casinos more profitable.[419] Before 2009, the vast majority of corporate expenses incurred in Mexico were aggregated by Operadora Pesa (or its predecessors) and then allocated across the Casinos. Mr. and Ms. Burr decided to shift most of the corporate overhead to E-Games, once it was recognized by SEGOB as an operator in late 2008.[420]

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[416] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 45; Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 32.

[417] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 10.

[418] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 45-46; Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 32.

[419] *See* Contract of Services between Operadora Pesa and Exciting Games, S. de R.L. de C.V., **C-126**.

[420] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 45.

g. Claimants Have Maintained Ownership And Control Over The Juegos Companies At All Times

253. Since 2005, and at all relevant times, Claimants have maintained ownership *and* control over the Juegos Companies for the purposes of NAFTA Article 1117. Mexico cannot validly object to Claimants' standing to bring claims on behalf of the Juegos Companies under NAFTA Article 1117 based on a temporary change in board control occasioned by the fraudulent actions of third-parties who have acknowledged that they acted without authority.

254. Although there was a temporary change of board control in the Juegos Companies in late August 2014, it had no impact on the U.S. Claimant shareholders' continued ownership of their controlling shares in the Juegos Companies. The U.S. Claimant shareholders always held the *right* to control the Juegos Companies, despite the illegal attempts by certain individuals, including Mr. Benjamin Chow and Mr. Luc Pelchat, to hold onto their seats on the Boards of the Juegos Companies and to illegally transfer the Claimants' stock.

255. In any event, the very terms of NAFTA Article 1117 confirm that investors have standing to bring claims on behalf of an enterprise that they own *or* control. A temporary change of board control does not, and cannot, have any impact on Claimants' standing under NAFTA Article 1117 to bring claims on behalf of the Juegos Companies given the ownership and other forms of control, direct and indirect, exerted by Claimants over the Juego Companies.

256. Claimants in this arbitration have never lost ownership or their right to control of the Juegos Companies. Claimants continue to own shares in the Juegos Companies and continue to exert some forms of control over the companies, notwithstanding the illegal presence of Messrs. Chow and Pelchat on the Boards of Directors of the Juegos Companies.

257. Mexico's objection to Claimants' standing to bring claims on behalf of the Juegos Companies must therefore fail because temporary change of board control does not, and cannot, impact Claimants' ownership of their shares in the Juegos Companies. Claimants own both the majority of Class B shares (which carry broad voting rights) and the majority of overall shares in all five Juegos Companies and never lost their majority ownership of the companies.[421]

258. The very terms of NAFTA Article 1117 confirm that investors are entitled to bring claims on behalf of an enterprise that they own *or* control. Since Claimants own the

[421] *See* Annex C of Erin Burr Witness Statement.

majority of shares in all five Juegos Companies, they directly "own" the Juegos Companies within the meaning of NAFTA Article 1117. This ownership alone is sufficient to confer standing on the Claimants and on this basis alone, have standing to bring claims on behalf of the Juegos Companies. In addition, Claimants' ownership of the majority of the controlling voting rights shares in the Juegos Companies furnish Claimants with an additional basis of standing to pursue claims on behalf of the Juegos Companies. Consequently, notwithstanding a temporary change in board control, Claimants have maintained continuous ownership *and* control over the Juegos Companies for the purposes of NAFTA Article 1117.

259. Accordingly, the Tribunal should dismiss Mexico's objections under NAFTA Article 1117 and find that Claimants are entitled to bring claims on behalf of the Juegos Companies against Mexico for its breaches of the NAFTA.

3. All Claimants Are Investors Who Have Made Protected Investments Under The NAFTA And Have Standing To Assert A Claim Under NAFTA Article 1116

260. Each of the Claimants has made an "investment"[422] under the NAFTA and have standing to assert claims under NAFTA Article 1116 against Mexico for its breaches of the treaty.[423]

261. The Claimants' investments include, but are not limited to: (1) the Juegos Companies; (2) shares in the Juegos Companies which entitle the Claimants to a share of the income and profits of the Juegos Companies and the Casinos; (3) assets and property in the Casinos, including immovable property, equipment, vehicles, inventories, intellectual property, and other intangible assets; (4) amounts invested in the modernization of production equipment and in the production capacities of the Casinos' assets; (5) loans made to the Juegos Companies, including without limitation loans made for the development of the B-Cabo project that were not fully repaid; (6) capital expended for purchase of the permits for the Casinos and the B-Cabo and Colorado Cancún projects; (7) non-capital resources expended to develop and manage operations of the Juegos Companies and the Casinos, and to develop new projects with B-Cabo

[422] As defined in NAFTA Article 1139, an "investment of an investor of a Party" is an "investment owned or controlled directly or indirectly by an investor of such Party," **CL-1**.

[423] The Tribunal is invited to refer to Section VI of the Witness Statement of Ms. Erin Burr, which describes in particular detail the investments made by individual Claimants. These descriptions are incorporated here by reference, but should not be regarded as an exhaustive listing of each claimant's investments, and are without prejudice to Claimants' positions—legal, factual, or otherwise—for the purposes of NAFTA Chapter Eleven.

and Colorado Cancún; and (8) the E-Games permit, which was valid for a period of 25 years and provided Claimants with the legally-secured expectation of opening at least 4 more gaming facilities (2 remote gambling centers and 2 lottery room numbers).

a. Claimants' Investments In The Casinos Afford Them Standing As Investors

262. Claimants' investments in the casino business operation, including but not limited to (1) the Juegos Companies; (2) the Casinos and their assets; (3) shares in the Juegos Companies; (4) shares in E-Games; (5) the E-Games permit; and (6) loans to the casino operation before and after Mexico's illegal closures of the Casinos, give the Claimants standing to assert claims under NAFTA Article 1116.

263. Each of the Juegos Companies, as an "enterprise" under NAFTA Article 1139(a), and the Casinos, as "real estate or other property … used for the purpose of economic benefit or other business purposes" under Article 1139(g), are "investments" protected under the NAFTA. As direct and indirect owners and controllers of the Juegos Companies and the Casinos, Claimants bring claims on their own behalf under NAFTA Article 1116 for the loss they incurred by reason of, or arising out of, Mexico's breaches of the NAFTA.

264. In addition, the U.S. claimant shareholders of the Juegos Companies have made an "investment" protected under the NAFTA.[424] Their shares in the Juegos Companies fall within the definition of "investment" as provided in NAFTA Article 1139, whether characterized as "an equity security of an enterprise" under Article 1139(b) or "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise" under Article 1139(e).

265. NAFTA case law confirms that ownership of shares in an enterprise confers standing on claimants to bring claims under NAFTA Article 1116, including for minority shareholders. For example, in *GAMI Investments, Inc. v. United Mexican States*, a NAFTA tribunal was faced with the issue of whether a minority shareholder was entitled to submit a claim under NAFTA Article 1116 on account of its injuries as a shareholder. The investor owned 14.18% of the shares of a Mexican holding company, whose remaining shareholders were Mexican nationals. The tribunal rejected Mexico's challenge to the investor's standing,

[424] The Tribunal is invited to refer to Annex C of Ms. Erin Burr's Witness Statement for a collection of charts demonstrating the precise shareholding for each of the Juegos Companies.

agreeing with the investor that "Chapter 11 does not require a claimant shareholder to be a majority or controlling owner for his investment to qualify for protection" and finding jurisdiction over the investor's claims.[425] All U.S. claimant shareholders are thus "investors" with "investments" for the purposes of the NAFTA and bring claims on their own behalf for the losses that Mexico caused them.

266. All U.S. claimant shareholders made their investments in the Juegos Companies by purchasing their shares before June 2013.[426] They were owners of their shares on the date they filed the RFA and remain so today.[427] Although two Claimants—Louis Fohn and Victory Fund, LLC—formally acquired their shares in JVE Sureste on January 1, 2014, both of them had already made their investments by purchasing their shares prior to June 2013.[428] In particular, Louis Fohn paid Claimant Daniel Rudden in March 2013 to purchase 0.4 units of Class B shares of JVE Sureste, and Victory Fund, LLC paid an American national in December 2012 for 0.5 units of Class B shares of the same company.[429] Claimants Louis Fohn and Victory Fund, LLC thus made their investments in JVE Sureste prior to June 2013, even if the share transfer was only finalized on January 1, 2014. Accordingly, all the U.S. claimant shareholders of the Juegos Companies have standing to bring claims under NAFTA Article 1116 for investments made prior to June 2013.

267. The above observations apply equally to Mr. John Conley's and Oaxaca Investments, LLC's shares in E-Games. Both Mr. Conley and Oaxaca Investments have been shareholders of E-Games prior to June 2013. From June 2013 to October 2013, Mr. Conley owned 15% of E-Games and Oaxaca Investments owned 28.33% of E-Games.[430] From October 7, 2013 onwards, Mr. Conley has owned 33.34% and Oaxaca Investments 33.32% of E-Games' shares.[431]

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[425] *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award (Nov. 15, 2004), ¶¶ 28, 43, **CL-39**.

[426] *See* Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 73.

[427] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 74.

[428] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 73.

[429] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 73.

[430] Notarization of the Minutes of the General Shareholders Meeting of Exciting Games S. de R.L. de C.V. (Feb. 21, 2014), **C-63**; *see also* Annex B of Erin Burr Witness Statement.

[431] Notarization of the Minutes of the General Shareholders Meeting of Exciting Games S. de R.L. de C.V. (Feb. 21, 2014), p. 7, **C-63**; *see also* Annex B of Erin Burr Witness Statement.

268. E-Games' permit, which was valid for a period of 25 years and provided Claimants with the legally-secured expectation of opening at least 4 more gaming facilities (2 remote gambling centers and 2 lottery room numbers), also is an "investment" because it is "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes" under Article 1139(g).

269. In addition to shares in the various enterprises, Claimants' loans to the casino business operation constitute "investments," since each is "a loan to an enterprise … where the enterprise is an affiliate of the investor" under Article 1139(d). Claimant Palmas South, LLC invested intercompany loans (with a loan to JVE Sureste of US$ 130,000 principal outstanding, and a loan to JVE Centro of US$ 400,000 principal outstanding),[432] and Mr. Burr made a loan to JVE DF (with US$ 110,000 in principal outstanding).[433] After Mexico illegally shut down the Casinos in April 2014, some of the Claimants made loans to the casino business in order to sustain the operations.[434] These "Member Loans" were made to B-Mex, LLC, which in turn invested the funds to finance upkeep obligations of the various casino enterprises, such as rent, security and payroll liabilities in Mexico and attorney's fees.[435] Since these casino enterprises are affiliated with the Claimant investors—and in fact are part of the same corporate structure—these Claimants have an additional basis of standing to bring claims under NAFTA Article 1116 for Mexico's breaches of its obligations.

b. Claimants' Investments In The B-Cabo And Colorado Cancún Projects Afford Them Standing As Investors

270. Claimants B-Cabo, LLC and Colorado Cancún, LLC, as previously explained, are not shareholders of the Juegos Companies. They nevertheless have standing as investors to bring claims under NAFTA Article 1116 based on their investments in Claimants' Los Cabos and Cancún casino and hotel expansion projects. These investments are comprised of loans not

[432] Consent Resolution of the Board of Managers of Palmas South, LLC. (Oct. 23, 2007), **C-82**; Promissory Note to Juegos de Video y Entretenimiento del Sureste, S. de R.L de C.V. (July 11, 2006), **C-127**; Promissory Note to Juegos de Video y Entretenimiento del Sureste, S. de R.L de C.V. (July 14, 2006), **C-128**; Promissory Note to Juegos de Video y Entretenimiento del Centro, S. de R.L de C.V. (Aug. 25, 2006), **C-129**; Promissory Note to Juegos de Video y Entretenimiento del Centro, S. de R.L de C.V. (Sept. 25, 2006), **C-130**.

[433] Wire Transfer from Gordon Burr to Juegos de Video y Entretenimiento del DF, S. de R.L. de C.V., **C-85**.

[434] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 88.

[435] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 88.

fully repaid, option payments and related investments, capital expenditures for the purchase of permits and down payments on property.[436]

271. In anticipation of receiving E-Games' gaming permit, Claimants had decided to pursue casino ventures in resort communities in Mexico, such as Los Cabos and Cancún, among others.[437] In June 2011, E-Games' Board directed and authorized Mr. Burr to "take all actions reasonable and necessary to establish the Cancun Company that will purchase a license under [E-Mex's permit] or New Permit to capitalize, construct and operate a casino in Cancun" and further resolved that Mr. Burr would serve as the "initial manager" of the Cancún project.[438]

272. When SEGOB granted E-Games its autonomous, independent gaming permit in 2012, it solidified Claimants' right to operate dual-function gaming facilities with both remote gambling centers and lottery number rooms. In total, E-Games' permit allowed Claimants to operate fourteen gaming facilities (7 remote gambling centers and 7 lottery number rooms).[439] Pursuant to the permit, Claimants only operated 5 dual-function casinos in Mexico, thereby only utilizing a total of 10 of the 14 gaming facilities under the permit. Claimants had the legally-secured expectation of opening at least four more gaming facilities, and had decided to develop casino and hotel ventures in Los Cabos and Cancún with licenses under E-Games' permit.[440]

273. Mr. Burr and Ms. Burr also invested significant sweat equity in the casino resort expansion plans. Mr. Burr, as the manager of the casino resort projects, was actively involved in all aspects of the projects, including selecting potential sites, managing efforts to obtain local permitting, and conducting negotiations with partners, landowners, and new investors.[441] Ms. Burr performed market research, prepared financial models, helped draft agreements, and met with and presented to prospective investors and partners.[442] Mr. Burr and Ms. Burr formed Colorado Cancún, LLC and B-Cabo, LLC, both Colorado limited liability companies, to

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[436] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 53.

[437] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 47-50.

[438] Consent to Action in Lieu of Organizational Meeting of the Directors of Exciting Games, S de R.L. de S.V. (June 7, 2011), **C-64**.

[439] SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

[440] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 52.

[441] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 49, 51.

[442] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 49.

develop these projects.[443] Mr. Burr and Ms. Burr had dedicated significant time and effort preparing subscription agreements, performing due diligence, and negotiating with business partners, and were in the process of finalizing terms with partners to begin accepting capital when Mexico unlawfully revoked E-Games' permit.[444]

274. B-Mex II, LLC invested US$ 2.5 million of equity in relation to gaming licenses intended for the expansion projects in Los Cabos and Cancún. Earlier, in 2006, B-Mex II had purchased rights for the operation of machines for the Puebla and the DF Casinos. As the Puebla and DF locations opened with half of the permitted number of machines, part of B-Mex II's investment, amounting to US$ 2.5 million of equity, was unused.[445] When Claimants moved under E-Mex's permit, they negotiated and received the right to open two additional gaming facilities in recognition of the unused equity.[446] Since Claimants only operated 5 dual-function casinos, and had remaining rights to open gaming facilities, they planned to use their licenses on the casino resort ventures. B-Mex II, LLC was in the process of selling those licenses to Colorado Cancún, LLC and B-Cabo, LLC for their respective casino resort projects, when Mexico unlawfully revoked E-Games' permit.[447]

275. With respect to the Cancún project, Colorado Cancún, LLC invested US$ 250,000 towards an option to purchase a gaming license from B-Mex II, LLC.[448] Colorado Cancún, LLC's investments fall within the meaning of "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory" under NAFTA Article 1139(h), or "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes" under NAFTA Article 1139(g). B-Mex II, LLC's investments in gaming licenses fall within the meaning of "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes" under NAFTA Article

[443] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 50.

[444] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 51.

[445] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 52.

[446] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 52.

[447] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 52.

[448] Right of First Refusal Agreement between Colorado Cancun, LLC and B-Mex II, LLC (Apr. 27, 2011), **C-88**; *see also* Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 54.

1139(g). Mexico's unlawful revocation of the E-Games permit destroyed the value of these investments completely.

276. B-Cabo, LLC invested US$ 600,000 through loans to Medano Beach, S. de R.L. de C.V., a Mexican enterprise, for the purchase of property for the B-Cabo hotel and casino project beginning in April 2013.[449] As described in the "Investment/Loan Agreement" between B-Cabo and Medano Beach, the Los Cabos casino resort project was planned to encompass the "construction of a high end eight story boutique hotel, containing approximately 200 rooms … in Cabo San Lucas, Mexico and for the acquisition and merger … of certain parcels of land … necessary for the Hotel project, a 2071.38 sq/m 22,300 sq/ft. parcel of land" and formation of a casino company to "construct and own a casino … in the Hotel."[450] Claimants were close to finalizing their agreement with their business partners in the Cabo project when Mexico unlawfully revoked E-Games' permit.[451] At that time, B-Mex II, LLC was in the process of selling one of its licenses to B-Cabo, LLC. These investments fall within the meaning of "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory" under NAFTA Article 1139(h), and "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes" under NAFTA Article 1139(g).

277. Based on the factual record and above analysis, the Tribunal should find that every Claimant is an "investor" with a protected "investment" under Chapter Eleven. Accordingly, the Tribunal should dismiss Mexico's objections to every Claimants' standing and find that all Claimants are entitled to bring claims under NAFTA Article 1116 against Mexico for its violations of the NAFTA as well as under NAFTA Article 1117 on behalf of their Mexican enterprises.

B. CLAIMANTS COMPLIED WITH NAFTA ARTICLE 1119 AND ANY POSSIBLE TECHNICAL NON-COMPLIANCE DOES NOT DEPRIVE THIS TRIBUNAL OF JURISDICTION

278. Mexico asserts that its consent to arbitrate under Chapter Eleven was not perfected with respect to 31 of the 39 Claimants because they were not named in the Notice of

[449] Investment/Loan Agreement between B-Cabo, LLC and Medano Beach Hotel, **C-65**.

[450] *Id.*

[451] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 51.

Intent they served on Mexico in 2014 (the "**2014 Notice of Intent**").[452] Mexico makes this argument despite that every one of the Claimants was named in the Request for Arbitration, and thereby consented to arbitrate this dispute with Mexico, that every one of the minority shareholder Claimants not specifically named in the 2014 Notice of Intent has filed a statement stating that they were aware of that notice and endorse and ratify its contents and despite that all Claimants sent the Amended Notice of Intent to Mexico almost a year ago without as much as one phone call from Mexico in response to that amended notice.[453]

279. According to Mexico, the RFA is void *ab initio* and the Tribunal has no jurisdiction over Claimants' claims, at least with respect to Claimants and Enterprises that were not textually included in the 2014 Notice of Intent, simply because *the names and addresses* of those Claimants and Enterprises were omitted from the 2014 Notice of Intent.[454] The Tribunal should reject Mexico's unsubstantiated and contorted interpretation of NAFTA Article 1119 for at least five reasons.

280. *First*, Claimants' 2014 Notice of Intent complied with Article 1119's requirements, and applied to, and was delivered to, Mexico on behalf of, *all* Claimants and sought the full damages on behalf of and caused to the Juegos Companies by Mexico's actions. The 2014 Notice of Intent also put Mexico on actual notice that all of the U.S. investors involved in Claimants' casino venture would be presenting the NAFTA dispute to arbitration should Mexico not resolve the dispute with Claimants during the notice period.

281. *Second*, Mexico was on notice of Claimants' dispute before they sent the 2014 Notice of Intent. In fact, the 2014 Notice of Intent was just one part of Claimants' attempts to engage the Mexican State in a dialogue to try and resolve the mounting problems that Claimants were facing due to the State's ongoing and growing measures. Claimants' efforts failed as

[452] Mexico also argues, for the same reasons, that its consent to arbitration under Chapter Eleven was not perfected as to 3 of the 9 Mexican enterprises, namely Metrojuegos, S. de R.L. de C.V. ("Metrojuegos"), Merca Gaming, S. de R.L. de C.V. ("Merca Gaming"), and Operadora Pesa, S. de R.L. de C.V. ("Operadora Pesa"). Claimants included these entities in their Request for Arbitration in an abundance of caution, but have concluded that Metrojuegos and Merca Gaming are not necessary parties to this proceeding. Claimants, therefore, hereby withdraw any claims on behalf of those two enterprises. Claimants maintain their claims on behalf of Operadora Pesa.

[453] Mexico's Memorial on Jurisdictional Objections, ¶ 48.

[454] *Id.*, ¶ 53.

Mexico rebuffed them at every turn, but Mexico was fully apprised of the full scope of the Claimants' dispute during that process.

282. *Third*, even if one assumes for the sake of discussion that the 2014 Notice of Intent did not cover or apply to the 31 Claimants (which it did) and ignores Mexico's actual notice of the dispute, Claimants' exclusion of certain disputing investors from the 2014 Notice of Intent would amount to nothing more than a technical non-compliance with Article 1119. Mexico's hyper-technical and flawed reading of the NAFTA notwithstanding, NAFTA jurisprudence consistently has held that technical non-compliances, such as the one Mexico alleges, do not deprive a tribunal of jurisdiction and are curable. The Claimants, in fact, cured any alleged defect under Article 1119 by delivering to Respondent the Amended Notice of Intent.

283. *Fourth,* in any event, requiring a separate notice of intent for each Claimant would have been an exercise in futility, given Mexico's complete refusal to enter into any discussions or negotiations with Claimants.

284. *Finally*, Mexico has not suffered any prejudice from the technical defect it alleges. Claimants, on the other hand, would be irreparably harmed if the Tribunal dismissed their claims (or the claims of certain of them) for lack of jurisdiction, as they would be deprived of a forum before which to bring their substantial and meritorious claims. Allowing this result would be draconian, unjust and not in keeping with the spirit and purpose of NAFTA.

1. The 2014 Notice of Intent Applies To All Claimants And Gave Mexico Ample Notice of the Dispute

285. Mexico claims that the omission of the *names and addresses* of some of the disputing investors and Mexican enterprises in the 2014 Notice of Intent is a failure to comply with NAFTA Article 1119(a), thus depriving the tribunal of jurisdiction to hear their claims. Mexico, however, was well aware of the nature of the dispute before the 2014 Notice of Intent and long before the initiation of arbitration. Yet, it did nothing. That these Claimants with identical issues and claims were added in Claimants' Request For Arbitration to perfect the claims against Mexico under NAFTA Articles 1116 and 1117 does not render invalid the 2014 Notice of Intent or affect the validity of Claimants' claims or the Tribunal's jurisdiction over them. This is even more so since the 2014 Notice of Intent was submitted by the principal

owners and controllers of the casino business operation for the benefit of *all* Claimants, and with the knowledge and consent of *all* Claimants.[455]

286. *Philip Morris v. Uruguay* stands for the proposition that, in arbitrations with multiple claimant parties, investment tribunals consider that the actions of one claimant taken to pursue settlement negotiations for the benefit of the other claimants can be considered collectively for the purposes of a treaty's settlement attempt requirement. The *Philip Morris* tribunal observed that:

> It is true that some letters were sent and administrative oppositions filed by [one of the claimants] alone. But the latter's actions were aimed at removing the effects of the measures to the extent they limited the marketing of tobacco in Uruguay by all of the Claimants. Due to the identity of positions and interests involved, [the claimant's] actions were to the benefit also of the other Claimants. Documents in the evidentiary record show that [the claimant] acted in some cases expressly on behalf also of the other Claimants.[456] (emphasis added)

287. Similarly, in the context of a jurisdictional objection based on the domestic litigation requirement, the *Philip Morris* tribunal held that:

> … even if the [domestic litigation challenges] were filed by [one of the claimants], the latter clearly acted in the interest also of the other Claimants considering that it is wholly-owned by Phillip Morris Brands and the brands [the claimant] sells in Uruguay are sub-licensed from [Phillip Morris].[457]

288. Given that (1) the Claimants who submitted the 2014 Notice of Intent are the principal owners and controllers of the casino operation, and did so with the knowledge and consent of, and on behalf and for the benefit of all Claimants and their entire investments; and (2) Mexico received notice of the dispute through (and even before and then again after) the 2014 Notice of Intent, the Tribunal should find that the 2014 Notice of Intent applies to all Claimants and accordingly reject Mexico's objection under NAFTA Article 1119.

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[455] Letter from Claimants in Response to the United Mexican States' Objection to Claimants' Request for Approval to Access the ICSID Additional Facility and Request for Arbitration, Annex C**,** (July 21, 2016), **C-121**.

[456] *Philip Morris Brands et al v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013), ¶ 95, **CL-12**.

[457] *Id.*, ¶ 114.

a. The Claimants Who Submitted the 2014 Notice of Intent Did So for the Benefit of All Claimants and to Encompass the Entire Casino Operation, and the 2014 Notice Gave Mexico Ample Notice of the Dispute

289. The principal owners and controllers of the casino business—Gordon Burr, Erin Burr, John Conley, B-Mex, LLC, B-Mex II, LLC, Palmas South, LLC, Oaxaca Investments, LLC, and Santa Fe Mexico Investments, LLC—submitted the 2014 Notice of Intent.[458] These persons and entities had the power and authority to issue the 2014 Notice of Intent and negotiate with Mexico on behalf of *all* of the U.S. claimant investors.[459] And, as noted, they did so with the knowledge and consent of all Claimants.[460]

290. Mr. Burr, Ms. Burr, and Mr. Conley designed the corporate structure so they would principally control and manage the entire casino business operation.[461] In 2005, Mr. Burr, Ms. Burr, and Mr. Conley formed B-Mex, B-Mex II, and Palmas South to help capitalize and own the Casinos.[462] They further established the five Juegos Companies to own the Casino facilities, and later established and utilized E-Games to act as the operator and eventual permit holder for the casino enterprise. Since 2005, Mr. Burr, Ms. Burr, and Mr. Conley have managed the construction, development, capitalization and operation of the entire casino business.[463] Gordon and Erin Burr are the sole owners and controllers of Oaxaca Investments, LLC.[464] John Conley owns and controls Santa Fe Mexico Investments, LLC.[465]

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458 Notice of Intent to Submit a Claim to Arbitration (May 23, 2014), ¶ 1, **C-34**; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 139.

459 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 139; *see also* Letter from Claimants in Response to the United Mexican States' Objection to Claimants' Request for Approval to Access the ICSID Additional Facility and Request for Arbitration, Annex C**,** (July 21, 2016), p. 15 (all claimant shareholders adopting the 2014 Notice of Intent and attesting to their knowledge of the 2014 Notice and the events that ensued), **C-121**.

460 Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 39; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 139; *see also* Letter from Claimants in Response to the United Mexican States' Objection to Claimants' Request for Approval to Access the ICSID Additional Facility and Request for Arbitration, Annex C**,** (July 21, 2016), p. 15 (all claimant shareholders adopting the 2014 Notice of Intent and attesting to their knowledge of the 2014 Notice and the events that ensued), **C-121**.

461 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 17; Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 9.

462 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 22; Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 16.

463 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 17-21; Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 9.

464 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 140.

465 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 140.

291. In submitting the 2014 Notice of Intent, the principal owners and controllers of the enterprise, led by Mr. Burr, Ms. Burr and Mr. Conley, acted in the interest and for the benefit of all Claimants. As Mr. Burr explains, as the Claimants "had been unable to engage in any meaningful discussion with Mexico since the Casinos were closed, on May 23, 2014, White & Case sent Mexico [the 2014 Notice of Intent], putting the government on notice of a NAFTA dispute due to Mexico's actions against our investment […]."[466] Mr. Burr was directly involved and helped manage the process that yielded the 2014 Notice of Intent, and he "personally coordinated with [the] entire U.S. investor group on the hiring of White & Case and the decision to issue the 2014 Notice of Intent."[467] Mr. Burr also explains that while the 2014 Notice of Intent "only named the principal U.S. investors in the body of the notice, [Claimants] issued this notice on behalf of all of the U.S. investors."[468]

292. The Claimants that were not specifically named in the 2014 Notice of Intent all have confirmed that Mr. and Ms. Burr, Mr. Conley and their companies were acting with their knowledge and consent and on their behalf when they issued that notice to Mexico.[469] They all have said that they ratify the contents of the notice and that they would have participated in, and had to approve, any settlement discussion and proposals, had Mexico engaged Claimants in any settlement dialogue after it received the 2014 Notice of Intent.[470]

293. And both Mr. and Ms. Burr confirm that they and Mr. Conley submitted the 2014 Notice of Intent with the knowledge and consent of the all U.S. investors, who regularly were apprised of events in Mexico and actions taken on their behalf.[471] No Claimant investor ever objected to any of the actions taken on their behalf to enforce their rights under the NAFTA and all have submitted statements in this proceeding to validate those actions.[472]

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[466] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 39.

[467] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 39.

[468] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 39.

[469] Letter from Claimants in Response to the United Mexican States' Objection to Claimants' Request for Approval to Access the ICSID Additional Facility and Request for Arbitration, Annex C**,** (July 21, 2016), **C-121**.

[470] Id.

[471] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 39; Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 139.

[472] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 138; Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 69.

294. Importantly, the 2014 Notice of Intent clearly identified (1) the legal names of the Mexican enterprises that own the gaming facilities; (2) the location of the gaming facility owned by each of these Mexican enterprises; and (3) the name of the Mexican enterprise (*i.e.* E-Games) that holds the casino permit at issue and through which the Claimants operate their Casinos in Mexico.

295. Thus, the 2014 Notice of Intent provided to Mexico information about the investment relationship between (1) the Claimants and their permit; (2) the Claimants and their Casinos; and (3) their Casinos and their permit. It also provided Mexico with notice of the key measures that formed the basis for the dispute. The 2014 Notice further explained the process by which E-Games obtained its independent gaming permit from SEGOB—first, through SEGOB's recognition of E-Games' status as an independent operator under E-Mex's permit in 2009; then, through SEGOB's grant to E-Games of its own gaming permit in 2012.[473] Through the 2014 Notice, Mexico thus was sufficiently apprised of the factual basis of the dispute.

296. The 31 Claimants are shareholders of the Juegos Companies pursuing the *same claims* with the *same operative facts* as the Claimants included in the 2014 Notice of Intent. Across all five Juegos Companies, almost all of these shareholders hold less than 2% of the enterprises' stock each.[474] In total, the omitted Claimants hold approximately 15% of the shares in JVE Sureste, JVE Centro and JVE DF, and 25% of the shares in JyV Mexico. None of the omitted Claimants holds any shares in JVE Mexico or in E-Games. To argue that Mexico was somehow deprived of notice of the NAFTA claims against it or of an opportunity to amicably settle them because the 2014 Notice of Intent did not include the names and addresses of minority shareholders in the Juegos Companies strains credulity.

297. Similarly, Operadora Pesa, the only Mexican enterprise not named in the 2014 Notice of Intent and on whose behalf Claimants continue to press the claims in this proceeding, provides services for the operation of the Casinos by coordinating with vendors on behalf of the Casinos; it has no other course of business.[475] Mexico boldly argues, however, that the omission of this local service company from the 2014 Notice of Intent and its inclusion in the Request for Arbitration is "void *ab initio* and it deprives the Tribunal of jurisdiction *ratione voluntatis*,

[473] Notice of Intent to Submit a Claim to Arbitration (May 23, 2014), ¶ 6, **C-34**.

[474] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 141.

[475] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 10.

at least with respect to the Additional Claimants and the Additional Mexican Enterprises."[476] This argument is hyper-technical and disingenuous in the extreme.

298. The Government also cannot credibly claim to have been in the dark about the corporate and general shareholding structure of Claimants' investment even though not knowing these details would not invalidate Claimants' Article 1119 notice. Even prior to the 2014 Notice of Intent, Mexico was aware that the Juegos Companies had U.S. shareholders. In compliance with Mexico's Foreign Investment Law, the Juegos Companies, and E-Games, have reported the amounts of foreign capital subscribed in each of the companies to the Ministry of Economy.[477] In addition, in meetings with SEGOB and the Ministry of Economy, Claimants, through their counsel, explained to Mexican officials from Economía and SEGOB the corporate shareholding structure of the investments at issue.[478] During a meeting in February 2013, for example, Claimants, through their counsel and through Mr. Burr and Mr. Conley, *informed SEGOB and Economía officials of the percentage and number of shareholders in the Juegos Companies that were Mexican nationals and the corresponding percentage and number that were foreign nationals*.[479] During this meeting, Claimants also gave SEGOB and Ministry of Economy officials the names of all of E-Games' shareholders, as well as the names of the members of E-Games' Board of Directors.[480] Mexico, thus, was well aware of the investors and investments involved in the dispute even if it did not have the names of all of the minority shareholders.

299. Ultimately, Mexico's complaint against the inclusion in Claimants' Request for Arbitration of the Claimants and enterprises not mentioned in the 2014 Notice of Intent seeks to elevate form and technicalities over substance and fairness. Tellingly, Mexico does not allege that the 2014 Notice omits the provisions of the NAFTA alleged to have been breached (per Art. 1119(b)), the issues and the factual basis for the claims (per Art. 1119(c)), or the relief sought and the approximate amount of damages claimed (per Art. 1119(d)). Thus, since the 2014 Notice of Intent was served, Mexico has known that the measures it implemented illegally interfering with E-Games' casino operations were the subject of a brewing NAFTA dispute.

[476] Mexico's Memorial on Jurisdictional Objections, ¶ 53.

[477] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 8.

[478] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 8.

[479] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 8.

[480] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 8.

Yet, instead of meaningfully engaging with the investors—the true object and purpose of the treaty's Notice of Intent requirement—Mexico has refused to meet with them. The Claimants were ready and willing to participate in negotiations with the Respondent's officials. But those officials steadfastly refused.[481]

300. Given this reality, Mexico should not be heard to argue now that SEGOB officials would have been willing to enter into negotiations with the 31 minority shareholders and one local service company when, during that time, they ignored the principal owners and controllers of the Casinos. This assertion is all the more absurd considering that, after Claimants "call[ed] Mexico's bluff" and sent an Amended Notice of Intent September 2016, Mexico failed to participate in negotiations with any of the 39 Claimants.[482] It really defies logic for Mexico to suggest that it needed to have the names and addresses of the minority shareholders to validly consent to arbitrate this dispute or that its decision to ignore Claimants' various efforts to engage Mexico in settlement discussions would have been different had it known the names and addresses of the minority shareholders or the name and address of Claimants' service company, Operadora Pesa.

301. This is not a situation where significant and powerful decision-makers of Claimants' business operation were purposefully omitted by the Claimants in order to deprive Mexico of a meaningful opportunity to resolve the present NAFTA dispute before resorting to arbitration. The claims at issue are identical. The measures the same. The ultimate investments, the same. The Claimants not specifically listed in the 2014 Notice of Intent all have endorsed the 2014 Notice Of Intent and all have said the controlling Claimants that sent the notice were speaking on their behalf. All Claimants assert the claims under NAFTA Article 1117 with respect to the very same enterprises included in the 2014 Notice—namely, the Juegos Companies and E-Games. They also assert claims on behalf of Operadora Pesa. Since 2014, Mexico has known of these enterprises and how the government's illegal actions and omissions have destroyed their business operations in contravention of Mexico's NAFTA obligations. Claimants sent Mexico an Amended Notice of Intent almost a year ago containing all of the information that Mexico claims was missing from the 2014 notice, and Mexico has ignored it, claiming that the defects in the initial notice cannot be cured.

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[481] *See infra*.

[482] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 47.

302. As in *Philip Morris*, there is a clear uniformity of interest and positions between the Claimants included in and those omitted from the 2014 Notice of Intent. Given this uniformity, the Tribunal should find that compliance with Article 1119 by the Claimants included in the 2014 Notice of Intent includes and inures to the benefit of the Claimants omitted from the 2014 Notice.

b. Mexico Had Been On Actual Notice of the Dispute Long Before the 2014 Notice of Intent

303. Mexico received actual notice that disputes were brewing even before the 2014 Notice of Intent and long before Claimants filed the Request for Arbitration. Since the beginning of 2013, Claimants and their representatives attempted to consult and negotiate with Mexican officials in order to avoid recourse to arbitration. Even Mexico's illegal closure of Claimants' Casinos did not deter them from seeking out someone in the Government who would be willing to resolve the dispute amicably. Claimants' 2014 Notice of Intent did not come without warning, but as part of these ongoing efforts to negotiate.

i. Letter and Meeting to Seek Assistance from Mexico to Avoid Escalation of the Dispute

304. On January 16, 2013, as explained *infra*, Claimants, through their counsel at the time, White & Case LLP, sent a letter ("**White & Case Letter**") to SEGOB and Economía officials informing them of Mexico's harmful measures against their investments in Mexico and seeking their assistance to avoid escalating the dispute to an international arbitration.[483]

305. On January 30, 2013, Claimants' counsel, Mr. Gutiérrez, arranged a meeting with Mr. Vejar to address the concerns raised in the White & Case Letter and to discuss the legally unfounded statements by SEGOB officials attacking the validity of E-Games' permit.[484] Notwithstanding the government's actions, E-Games sought to build an effective working relationship with the newly-installed Peña Nieto administration, in order to resolve the dispute and avoid international arbitration.

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[483] White & Case Letter (Jan. 16, 2013), **R-001**.

[484] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 11.

ii. Unproductive Meeting with Mr. Hugo Vera of SEGOB

306. On February 28, 2013, E-Games' representatives, on instructions from Claimants, attended a meeting with Mr. Carlos Vejar and Mr. Hugo Vera, the Director of SEGOB's Legal Department, to correct SEGOB's factually and legally erroneous opinion about the legality of E-Games' permit.[485] Ms. Salas, the Director of SEGOB's Games and Raffles Division who had publicly spoken out against E-Games' permit within days of her appointment, was invited to the meeting, but did not attend. No other representatives from the Mexican government attended the meeting. Three days before the meeting, on February 25, 2013, SEGOB had published on its website a notice of "Suspension" against E-Games' permit.[486]

307. During the February 28 meeting, E-Games' representatives spoke with Messrs. Vejar and Vera about the escalating dispute. In particular, as explained earlier,[487] E-Games made several requests to SEGOB including that it respect Claimants' rights and investments and that it apply fairly the legal criteria that justified, and continues to justify, the granting and permanence of E-Games' independent gaming permit. Mr. Vera, however, criticized the resolutions of the previous administration that recognized E-Games as an independent permit-holder, and reiterated the Peña Nieto administration's position that E-Games' permit was illegal.[488]

308. Shortly after this meeting, SEGOB updated its website to include a new notice, falsely stating that E-Games' activities were related to and dependent on E-Mex's permit, in direct opposition to SEGOB's prior recognition that the two companies operated independently of one another.[489] E-Games' counsel, Mr. Gutiérrez, then spoke with Mr. Vejar one-on-one.[490] Mr. Vejar stated that Mr. Vera and SEGOB's attitude towards E-Games was not based on legal issues, but that rather was a politically-driven matter. He suggested that E-Games hire a lobbyist to handle the difficulties with SEGOB.[491]

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485 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 11.

486 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 11.

487 *See supra*, ¶ 67.

488 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 11.

489 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 12.

490 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 12.

491 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 12.

iii. Hiring Governor Richardson as Lobbyist and Mexico's Closure of the Casinos

309. In light of Mr. Vejar's conversation with Mr. Gutiérrez, as previously explained,[492] Claimants retained former New Mexico Governor Bill Richardson.[493] Mr. Richardson went to work on behalf of Claimants, but, as noted below, he ultimately reported to Claimants that the Mexican State remained vehemently opposed to Claimants' concerns and that the political environment within Mexico ("the optics of the situation") did not allow him to convince the Mexican State to change its hostile stance toward Claimants.[494]

310. E-Games had previously obtained an injunction from a competent Mexican court barring the Mexican government from impeding or otherwise hindering the Casinos' operations pending the final resolution of another legal proceeding involving the constitutionality of SEGOB's resolution recognizing E-Games as an independent operator under E-Mex's permit, which remained pending before the Mexican Supreme Court.[495]

311. On April 24, 2014, in direct violation of the injunction, SEGOB personnel, aided by Mexican federal police dressed in special operations SWAT gear and carrying rifles, entered the Casinos and immediately blocked all entrances and exits. SEGOB personnel refused to provide a copy of the closure order to management and took custody of all five Casinos, padlocking them and refusing to allow any of the Claimants, their counsel, or their representatives to access the facilities. Two days later, Claimants learned that SEGOB had held an internal meeting to discuss the closures, and Claimants asked Governor Richardson whether he had spoken to SEGOB officials, in particular, Mr. Luis Enrique Miranda Nava, about it.[496]

312. From April to June of 2014, Governor Richardson was unable to procure any meetings for the Claimants with Mr. Miranda or any other official within SEGOB with authority.[497] The Claimants terminated their contract with Governor Richardson, who

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[492] *See supra*, ¶ 68.

[493] Email from Neil Ayervais to Brooke Lange (April 4, 2014), **C-100**.

[494] Letter from Governor Bill Richardson to Gordon Burr (June 6, 2014), **C-107**.

[495] Order of the *Segunda Sala Región de Hidalgo México* (Jan. 28, 2013), **C-115**; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 13.

[496] Email from Gordon Burr to Brooke Lange (April 26, 2014), **C-116**.

[497] Email from Gordon Burr to Brooke Lange (April 26, 2014), **C-116**.

confirmed in his response to the termination that "it was near impossible to change things around given the vehemence of the Mexican authorities and the optics of the situation."[498]

iv. In-Person Visits at SEGOB's Offices Following The Illegal Closures

313. In addition to the lobbying efforts of Governor Richardson, Claimants sought direct meetings with SEGOB officials. Immediately after the Casinos were illegally shut down on April 24, 2014, Claimants, through Mr. Gordon Burr and counsel, made multiple attempts (beginning on April 25, 2014) to meet with Ms. Marcela Salas in person at her office.[499] They were refused a meeting each time.[500]

314. Mr. Burr and Mr. Gutiérrez sought to find out why SEGOB had closed the Casinos.[501] SEGOB officials, however, refused to show Claimants the closure order(s), nor would they even inform Claimants who had authorized the closures.[502] Despite numerous requests, to this day, Claimants have not seen a copy of the closure order(s).[503] Likewise, Mr. Burr and Mr. Gutiérrez have not met with Ms. Salas to this day.[504]

315. In the time between SEGOB's illegal closure of Claimants' Casinos on April 24, 2014 and Claimants' submission of the 2014 Notice of Intent on May 23, 2014, Claimants and their representatives have only been able to secure meetings with one SEGOB official, Ms. Michele Aguirre, the Deputy Director of the Games and Raffles Division.[505] These meetings, however, were perfunctory and served only for SEGOB to reiterate its unwillingness to amicably engage with Claimants. In particular, on May 9, 2014, Claimants attended a meeting at SEGOB in which Ms. Salas, who had agreed to meet with Claimants, did not show up.[506]

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498 Letter from Governor Bill Richardson to Gordon Burr (June 6, 2014), **C-106**.

499 Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 36; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 16.

500 Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 36; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶¶ 16-17.

501 Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 36; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 15.

502 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 15; Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 36

503 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 15.

504 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶¶ 11, 22; Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 35.

505 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶¶ 16-17.

506 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 17.

Instead, Ms. Salas sent Ms. Aguirre to the meeting with strict instructions to say that the Casino closures were legal. Claimants were not given an opportunity to present their positions or engage in any meaningful discussion. Ms. Aguirre did not explain why Ms. Salas refused to meet with Claimants.[507]

v. Request For Meeting through Congressman Coffman

316. On May 7, 2014, U.S. Congressman Mike Coffman, acting on Mr. Gordon Burr's behalf, sent a letter to Mr. Miranda to arrange a meeting with Mr. Burr.[508] This was not the first time that Congressman wrote to Mexico on Mr. Burr's behalf, having sent a letter on April 14, 2011 to the SEGOB's Games and Raffles Division expressing concern.[509]

317. After seeking meetings personally, through local Mexican counsel, a U.S.-based lobbyist and a U.S. Congressman to discuss Mexico's illegal conduct with respect to Claimants' investments, they understandably were left to conclude that Mexico was not interested in amicably resolving the dispute and avoiding arbitration and instead now faced the grim reality of seeing their substantial investments in the Casinos imperiled by the government's closure of the facilities.[510]

vi. Request To SEGOB For An Explanation Of The Illegal Closures

318. On May 7, 2014, Claimant Mr. Neil Ayervais wrote to Mr. Miranda to request an explanation of the legal basis for SEGOB's actions.[511] Writing on behalf of several Claimants (B-Mex, LLC, B-Mex II, LLC, and Palmas South, LLC), Mr. Ayervais stated in his letter:

> "Despite repeated demand by counsel for Exciting Games, your agency has not explained the basis for closing these casinos in violation of the suspension order and has not provided counsel with a copy of the closure order…
>
> Please provide us with an explanation of the actions of your agency in closing our clients casinos and the legal basis for those actions.

[507] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 17.

[508] Letter from Congressman Coffman to Luis Enrique Miranda Nava (May 7, 2014), **C-86**.

[509] Letter from Congressman Coffman to Ms. Lopez Mares (April 14, 2011), **C-108**.

[510] Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶ 138; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 26; Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 39.

[511] Letter from Neil Ayervais to Luis Enrique Miranda Nava (May 7, 2014), **C-102**.

> Please also provide us with a copy of the closure order in its original form."[512]

319. On May 20, 2014, Ms. Marcela Salas of SEGOB responded to Mr. Neil Ayervais' letter, refusing to provide an explanation, purportedly because Mr. Ayervais was not the legal representative of E-Games.[513] Claimants thus found themselves without any explanation for the closures of their Casinos.[514]

320. Three days later, on May 23, 2014, Claimants submitted to Mexico their 2014 Notice of Intent to Submit a Claim to Arbitration.[515] By that time, however, Mexico was well-aware, and on actual notice, of Claimants' escalating dispute and of their intent to use the dispute resolution mechanisms afforded to them under NAFTA to protect their investments.[516]

321. These facts, Mexico's continued indifference and refusal to engage Claimants in any dialogue about their concerns and disputes even after receiving the Amended Notice of Intent pursuant to NAFTA Article 1119, and Mexico's unquestionable awareness of the Claimants' dispute underscore the hypocrisy of Respondent's argument for dismissal for alleged noncompliance with NAFTA Article 1119.[517]

322. This unwillingness by Mexico to engage with Claimants about their concerns and dispute also is supported by statements made directly by SEGOB officials to others who attempted to get SEGOB to reopen the Casinos after SEGOB had shut them down. In particular Mr. Luc Pelchat confirms that in his meetings with representatives of SEGOB they made clear that they were unwilling to reopen the Casinos as long as they were directly owned or controlled by U.S. citizen shareholders of the Juegos Companies.[518]

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[512] Letter from Neil Ayervais to Luis Enrique Miranda Nava (May 7, 2014), **C-102**.

[513] Letter from SEGOB to Neil Ayervais (May 20, 2014), **C-103**.

[514] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶¶ 15-16, 20; _; Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 38.

[515] Notice of Intent to Submit a Claim to Arbitration (May 23, 2014), **C-34**.

[516] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 39.

[517] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 26; Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 47.

[518] Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 8.

323. The Tribunal thus should reject Mexico's arguments and hold that it has jurisdiction over the claims of every Claimant and Enterprise identified in the Request for Arbitration.

2. Any Potential Non-Compliance With Article 1119 Is Merely Technical And Does Not Deprive The Tribunal of Jurisdiction

324. At its core, Mexico's argument is that the Tribunal lacks jurisdiction over the claims of the certain U.S. Claimants (who are minority shareholders) and one Mexican enterprise because they have not complied with a technical detail of NAFTA Article 1119, namely providing the names and addresses of these parties in the 2014 Notice of Intent. The Tribunal should reject this hollow, hyper technical argument.

325. In interpreting the procedural provisions of Chapter Eleven—which include Article 1119—tribunals distinguish between technical and material non-compliance. Technical non-compliance is where an investor has actually complied with the action required by the treaty provision, such as by presenting a notice of intent before submitting a dispute to arbitration, but may not have complied with certain formal requirements of the provision. Where there is merely a formal, technical defect in a claimant's compliance with a procedural requirement, tribunals routinely hold that the defect does not affect their jurisdiction and either excuse the defect or allow the claimant an opportunity to cure it. This is especially the case where the defect does not prejudice the respondent or where requiring initial compliance would have been futile, given the object and purpose of the procedural provision.

326. Material non-compliance, on the other hand, is where an investor has flouted a requirement in a given provision by departing from its object and purpose in a substantive and serious manner. Only where there is a material, substantive defect will a tribunal refuse to hear a claim.

a. Claimants Materially Complied With NAFTA Article 1119

327. A notice of intent is meant to put a respondent State on notice of a potential dispute and serves as the basis for consultations and negotiations. Claimants' 2014 Notice of Intent did just that. Not only did Mexico receive actual notice of the NAFTA dispute at hand, but it also knew of the investment involved and of the measures about which Claimants complained. Likewise, as explained above, Claimants had actively sought consultation and

negotiations with Mexico before they sent the 2014 Notice of Intent, but Mexican officials refused to engage in any meaningful discussion with Claimants.

328. Mexico does not dispute that NAFTA Article 1119 is designed and intended to pave the way for consultations and negotiations pursuant to Article 1118 prior to the formal submission of a claim to arbitration. The Statement of the NAFTA Free Trade Commission on notices of intent to submit a claim to arbitration states:

> Efforts to settle NAFTA investment claims through consultation or negotiations have generally taken place only after the delivery of the notice of intent. The notice of intent naturally serves as the basis for consultations or negotiations between the disputing investor and the competent authorities of a Party. In order to provide a solid foundation for such discussions, it is important that the notice of intent clearly identify the investor and the investment and specify the precise nature of the claims asserted.[519]

329. The link between Article 1118 and Article 1119 is important and sheds light on the procedural framework of the NAFTA dispute settlement mechanism. Article 1118 provides that "[t]he disputing parties should first attempt to settle a claim through consultation or negotiation," while Article 1119 sets out the notice of intent requirement. Importantly, as Ms. Meg Kinnear's NAFTA Commentary confirms, Article 1118 is not a mandatory requirement, as "[c]learly there are no sanctions for failure to consult, and hence the provision appears to require a good faith effort at most."[520] Ms. Kinnear's Commentary further observes that, NAFTA Article 1119 "is stated in mandatory form ("shall"), although the article does not specify the consequences of failing to provide the necessary information in the notice of intent."[521] If, however, the purpose of the notice of intent is to pave the way for consultation and negotiation—which is not a mandatory pre-condition to arbitration—then non-compliance with the strict letter of Article 1119 cannot operate as a bar to the tribunal's jurisdiction.

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[519] Statement of the Free Trade Commission on notices of intent to submit a claim to arbitration (Oct. 7, 2003), **CL-13**.

[520] "Article 1118 – Settlement of a Claim through Consultation and Negotiation" in Meg N. Kinnear, Andrea K. Bjorklund , et al., Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11, Supplement No. Main work (Kluwer Law International 2006), pp. 1118-2 ("First, it is debatable whether Article 1118 imposes a mandatory obligation to consult and negotiate or simply encourages consultation and negotiation. Clearly there are no sanctions for failure to consult, and hence the provision appears to require a good faith effort at most."), **CL-14**.

[521] "Article 1119 – Notice of Intent to Submit a Claim to Arbitration" in Meg N. Kinnear, Andrea K. Bjorklund, et al., Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11, Supplement No. 1 (Kluwer Law International 2006), pp. 1119-5, **CL-15**.

330. Claimants have substantively complied with the notice of intent requirement. This is not a case of a claimant who flaunted the notice of intent requirement completely by jumping directly into arbitration. As explained above, although the 2014 Notice of Intent omitted the names and addresses of some of the minority Claimants, Mexico received actual notice of the potential NAFTA dispute against it for the purposes of NAFTA Article 1119 even before receiving the 2014 Notice. The eight claimant parties named in the 2014 Notice are the principal owners and controllers of the Casinos and submitted the Notice on behalf of all U.S. claimant investors. Through the 2014 Notice of Intent, these Claimants informed Mexico of the nature of the investments at issue, the gravamen of the disputes, and the factual and legal bases for their claims. And the minority shareholders who were not named in that notice were aware of the actions being taken by the majority, controlling shareholders and have endorsed and adopted the 2014 Notice.[522] They also all have said that the majority shareholders were issuing that 2014 Notice of Intent on their behalf and that they would have had to be consulted with respect to any consultations with Mexico had there been any and would have had to have authorize any possible settlement should one have materialized through consultations.[523] Accordingly, by submitting the 2014 Notice of Intent, Claimants have substantively complied with NAFTA Article 1119 and the omission of names and addresses is a technical defect, which does not deprive the Tribunal of jurisdiction.

i. NAFTA Jurisprudence Consistently Holds That Technical Non-Compliance Does Not Deprive A Tribunal of Jurisdiction

331. NAFTA tribunals, bearing in mind the object and purpose of the notice of intent requirement, have allowed arbitrations to proceed despite non-compliance with the strict letter of Article 1119.

332. This practice and understanding is consistent with the treaty interpretation principle of *effet utile.* Tribunals recognize that procedural provisions are pre-arbitral requirements which must be given effect. The principle of *effet utile*, however, stands as a buffer against hyper-technical applications of treaty provisions that render null the treaty's or the provision's object and purpose. As the Respondent's own cited authority states, "one must

[522] Letter from Claimants in Response to the United Mexican States' Objection to Claimants' Request for Approval to Access the ICSID Additional Facility and Request for Arbitration, Annex C**,** (July 21, 2016), **C-121**.

[523] [523] Letter from Claimants in Response to the United Mexican States' Objection to Claimants' Request for Approval to Access the ICSID Additional Facility and Request for Arbitration, Annex C**,** (July 21, 2016), **C-121**.

recall that this principle does not require that a maximum effect be given to a text. It only excludes interpretations which would render the text meaningless, when a meaningful interpretation is possible."[524] In drawing a distinction between technical and substantive defects, tribunals preserve the effect of the provision by requiring material compliance with the provision, but avoid overly formalistic interpretations that would frustrate the overall object and purpose of the treaty.

333. In *Mondev International Ltd. v. United States of America*, a NAFTA tribunal accepted jurisdiction despite the claimant's failure to notify a claim under NAFTA Article 1117 on behalf of a company that it owned ("LPA").[525] Similar to Mexico's objection in this case, the United States objected to the tribunal's jurisdiction on NAFTA Article 1119 grounds, stressing that the claimant's notice of intent made no mention of NAFTA Article 1117, nor did it give the address of the enterprise as required by NAFTA Article 1119(a).[526] The United States further argued that "[i]f Mondev wished to claim on behalf of LPA as an enterprise, it could only do so by submitting a further notice of intent under Article 1119 (which would, in any event, be out of time)."[527] In response, Mondev argued that "[t]he only information required under Article 1119 which Mondev did not provide was the address of LPA, and this deficiency was soon afterwards corrected."[528]

334. The tribunal rejected the United States' objections and concluded that Mondev had standing under NAFTA Article 1116 to bring its claim,[529] and that it would have been

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[524] *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 (Dec. 30, 2010), ¶ 114, **CL-16.** The *CEMEX* tribunal itself evidently found the principle of *effet utile* to "be of no use" in deciding between two competing interpretations. *See id.*, ¶ 115(d).

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

[526] *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), ¶ 49, **CL-17**.

[527] *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), ¶ 49, **CL-17**.

[528] *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), ¶ 50, **CL-17**.

[529] *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), ¶ 83, **CL-17**.

prepared to treat the claim as brought under NAFTA Article 1117, in spite of the omissions in the claimant's notice of intent.[530] Very relevant, the tribunal explained:

> International law does not place emphasis on merely formal considerations, nor does it require new proceedings to be commenced where a merely procedural defect is involved. In the present case there was no evidence of material nondisclosure or prejudice, and Article 1121 was complied with.[531] (emphasis added).

335. Thus, the tribunal in *Mondev* treated non-compliance with NAFTA Article 1119(a) to provide "the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise" as a procedural matter with no jurisdictional consequence. This reasoning is directly applicable to the alleged non-compliance here. Both in *Mondev* and the present case, the alleged non-compliance relates to the same NAFTA procedural provision (*i.e.* NAFTA Article 1119(a)) and ultimately go to the respondent state's knowledge of the names and addresses of the Claimants. As *Mondev* recognized, an omission of this information from the notice of intent does not deprive the tribunal of jurisdiction.

336. Similarly, in *ADF Group Inc. v. United States of America*, a NAFTA tribunal found that omission of information required in Article 1119 is a procedural matter with no jurisdictional consequence. In *ADF*, the claimant introduced a new claim under NAFTA Article 1103 in its reply memorial. The United States objected that the tribunal was "bereft of jurisdiction" on the ground that neither the notice of intent nor request for arbitration referred to NAFTA Article 1103, as required under Article 1119(b).[532] In rejecting that argument, the tribunal explained that "[w]e find it difficult to conclude that failure on the part of the investor to set out an exhaustive list of 'other relevant provisions' in its Notice of *Intention* to Submit a Claim to Arbitration must result in the loss of jurisdiction to consider and rely upon any unlisted but pertinent NAFTA provision in the process of resolving the dispute."[533]

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

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

[532] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003), ¶ 127, **CL-18**.

[533] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003), ¶ 133 (emphasis in original), **CL-18**.

337. The *ADF* tribunal expressly rejected the suggestion, urged now by Mexico,[534] that NAFTA Article 1122 limits the respondent State's consent on the claimant's strict and literal compliance with every single procedure set out in Section B of Chapter 11 of the NAFTA.[535] The tribunal reasoned:

> It should … be noted that Article 1121(1) and (2) use exactly the same phrase "in accordance with the procedures set out in this Agreement" in respect of the consent of the investor and of the enterprise owned or controlled by the investor. … When Articles 1122 and 1121 are read together, they appear to us to be saying essentially that the standing consent of a NAFTA Party constituted by Article 1122(1), when conjoined with the consent of a disputing investor given in a particular case, generate the agreement to arbitrate required under the ICSID Convention and the Additional Facility Rules, the New York Convention and the Inter-American Convention. We see no logical necessity for interpreting the "procedures set out in the [NAFTA]" as delimiting the detailed boundaries of the consent given by either the disputing Party or the disputing investor.[536] (emphasis added)

338. The *ADF* tribunal's reasoning is directly applicable here. The notice of intent in *ADF* omitted reference to Article 1103 as a NAFTA provision alleged to have been breached, as required by the letter of Article 1119. Despite this omission and the late introduction of the Article 1103 claim in the claimant's reply memorial, the *ADF* tribunal allowed the claim to proceed. Here, while the names and addresses of some minority shareholders and one local enterprise were omitted from the 2014 Notice of Intent, all names and addresses were provided to Mexico as early as the Request for Arbitration and then again in the Supplemental Notice of Intent. Consistent with *ADF*, the Tribunal has jurisdiction over the present NAFTA claims even if the Tribunal concludes that this is a technical omission.

339. In a similar vein, the tribunal in *Ethyl Corporation v. Government of Canada* treated a technical defect under NAFTA Article 1119 as a procedural matter rather than a jurisdictional bar.[537] In *Ethyl*, the investor brought a claim after filing its notice of intent and request for arbitration against a legislative bill, which eventually became Canada's Manganese-based Fuel Additives Act ("MMT Act"). Canada raised jurisdictional objections under NAFTA Articles 1119 and 1120, claiming that the mandatory notice of intent and cooling off period requirements had not been satisfied. Specifically, in relation to NAFTA Article 1119, Canada

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[534] Mexico's Memorial on Jurisdictional Objections, ¶ 55.

[535] *ADF Group Inc. v. United States of America,* ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003), ¶ 127, **CL-18**.

[536] *ADF Group Inc. v. United States of America,* ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003), ¶¶ 132-133, **CL-18**

[537] *Ethyl Corp. v. Government of Canada*, UNCITRAL, Award on Jurisdiction (June 24, 1998), ¶ 85, **CL-5**.

argued that the notice of intent could not have been effective because that measure, the MMT Act, was not in effect at the time of delivery of the notice of intent.[538] The *Ethyl* tribunal rejected Canada's objections, finding no need to address the arguments since more than six months had passed since the MMT Act had come into effect.[539] In doing so, the tribunal implicitly affirmed that the passage of time can cure an alleged defect under NAFTA Article 1119. In effect, it excused the failure to comply with Chapter Eleven's six-month cooling period on the ground that compliance would have been futile.[540]

340. In asserting jurisdiction over the claimant's claims relating to the MMT Act, the *Ethyl* tribunal further emphasized that, in any event, the claimant would have been able to resubmit this very claim. The tribunal accordingly concluded that, "[c]learly a dismissal of the claim at this juncture would disserve, rather than serve, the object and purpose of NAFTA."[541]

341. Other NAFTA tribunals similarly have eschewed overly formalistic readings of the procedural provisions of Chapter Eleven. For example, the *Pope & Talbot Inc. v. Government of Canada* tribunal remarked that:

> [S]trict adherence to the letter of [Articles 1116–1122] is not necessarily a precondition to arbitrability, but must be analyzed within the context of the objective of NAFTA of establishing investment dispute resolution in the first place. That objective, found in Article 1115, is to provide a mechanism for the settlement of investment disputes that assures 'due process' before an impartial tribunal. Lading that process with a long list of mandatory preconditions, applicable without consideration of their context, would defeat that objective, particularly if employed with draconian zeal.[542] (emphasis added)

342. Consistent with this, in *Marvin Roy Feldman Karpa v. United Mexican States*, a NAFTA tribunal rejected Mexico's objection that a claimant could not pursue a claim based on an article omitted from the claimant's notice of arbitration. The claimant had filed a notice of intent alleging a breach of NAFTA Article 1102, but had omitted this article in the subsequent notice of arbitration. The tribunal nevertheless allowed the NAFTA Article 1102 claim to proceed, because, notwithstanding this technical defect, the claimant had already specified the relevant provisions and "Respondent's major concern has been already taken here into

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[538] *Ethyl Corp. v. Government of Canada*, UNCITRAL, Award on Jurisdiction (June 24, 1998), ¶ 80, **CL-5**.

[539] *Ethyl Corp. v. Government of Canada*, UNCITRAL, Award on Jurisdiction (June 24, 1998), ¶ 85, **CL-5**.

[540] *Ethyl Corp. v. Government of Canada*, UNCITRAL, Award on Jurisdiction (June 24, 1998), ¶ 84, **CL-5**.

[541] *Ethyl Corp. v. Government of Canada*, UNCITRAL, Award on Jurisdiction (June 24, 1998), ¶ 85, **CL-5**.

[542] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award Concerning the Motion by Government of Canada Respecting the Claim Based Upon Imposition of the "Super Fee"(Aug. 7, 2000), ¶ 26, **CL-19**.

account."[543] In effect, the *Feldman* tribunal reasoned that, because Mexico was not prejudiced by this formal defect, such a technical omission should not stop the tribunal from hearing the claim.

343. Similarly, the NAFTA tribunal in *Chemtura Corporation v. Government of Canada* rejected an overly restrictive interpretation of the procedural provisions, while citing *Pope & Talbot* and *ADF* approvingly.[544] In *Chemtura*, Canada objected to the tribunal's jurisdiction to hear a claim under NAFTA Article 1103 that was not spelled out in three prior notices of intent. The tribunal rejected the objection, explaining that:

> It is true that the main argument made in such notices in connection with Article 1103 did not concern the potential import of a fair and equitable treatment provision from another treaty through the MFN clause in Article 1103. Yet, the facts mentioned therein are essentially the same as those subsequently referred to in the Claimant's Memorial in support of the claim under Article 1103.
>
> More fundamentally, the fact that the Claimant may have advanced arguments in its Memorial which were not spelled out in its previous submissions in connection with Article 1103 has not caused any prejudice to the ability of the Respondent to respond to such arguments. Indeed, the Respondent has had ample opportunity to state its position, and has done so in its briefs and at the hearings.[545] (emphasis added)

344. Outside of the NAFTA context, tribunals consistently have exercised jurisdiction despite complete, substantive (as opposed to technical) non-compliance with the notice of intent or other notice-type provisions under bilateral investment treaties ("BITs"). For example, the tribunal in *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* rejected a jurisdictional objection even though the claimant had filed its request for arbitration before the six-month cooling off period under the applicable BIT had elapsed. The tribunal held:

> In the Arbitral Tribunal's view, however, properly construed, this six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. Its underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible. Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding. If it did so, the provision would have curious effects, including:
> – preventing the prosecution of a claim, and forcing the claimant to do nothing until six months have elapsed, even where further negotiations are obviously futile, or settlement obviously impossible for any reason;

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[543] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (Dec. 6, 2000), ¶ 56, **CL-20**.

[544] *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award (Aug. 2, 2010), ¶ 102, **CL-21**.

[545] *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award (Aug. 2, 2010), ¶¶ 103-4, **CL-21**.

– forcing the claimant to recommence an arbitration started too soon, even if the six-month period has elapsed by the time the Arbitral Tribunal considers the matter.[546]

345. The *Biwater Gauff* tribunal rejected the notion that such an interpretation of the six-month cooling off period requirement would render the provision superfluous or *inutile*, finding "no reason" as to why such a provision imposes a strict jurisdictional condition.[547]

346. Similarly, in *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, the tribunal observed that "[i]n the specific setting of investment arbitration, international tribunals tend to rely on the non-absolute character of notice requirements to conclude that waiting period requirements do not constitute jurisdictional provisions but merely procedural rules that must be satisfied by the Claimant."[548]

347. Public international law cases also demonstrate that initial notice and other similar defects do not preclude the assertion of jurisdiction under international treaties. The Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case expressly rejected the notion that defects existing at the institution of proceedings must result in dismissal of a suit. The Court held:

> Even assuming that before that time the Court had no jurisdiction because the international obligation referred to in Article II was not yet effective, it would always have been possible for the applicant to re-submit his application in the same terms after the coming into force of the Treaty of Lausanne, and in that case, the argument in question could not have been advanced. Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications.[549] (emphasis added)

348. Likewise, in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia)*,

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[546] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (Jul. 24, 2008), ¶ 343, **CL-22**.

[547] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008), ¶ 345, **CL-22**.

[548] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (Nov. 14, 2005), ¶ 99, **CL-23**.

[549] *Mavrommatis Palestine Concessions,* Permanent Court of International Justice, Judgment No. 2 (Aug. 30,1924) ¶ 34, **CL-24**.

the International Court of Justice asserted jurisdiction where an initial defect in a procedural act was subsequently cured:

> It is the case that the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings. However, the Court, like its predecessor, the Permanent Court of International Justice, has always had recourse to the principle according to which it should not penalize a defect in a procedural act which the applicant could easily remedy.[550]

349. In sum, international tribunals do not mindlessly apply the strict letter of pre-arbitration procedural provisions, as the Respondent urges this Tribunal to do. In assessing whether events occurring after the commencement of arbitration cured initial non-compliance, tribunals are more concerned about the purpose of the procedural requirement than the strict letter of the provision. Here, that purpose (to foster pre-arbitration resolution of disputes) and Mexico's steadfast refusal to engage Claimants in any good faith negotiations, both after receipt of the 2014 Notice of Intent and after its receipt of the Supplemental Notice of Intent, require a holding that the exclusion of the names and addresses of certain minority shareholders and a local enterprise from the 2014 Notice of Intent has *no effect* on the Tribunal's jurisdiction over every Claimants' claims.

ii. Mexico Misconstrues And Misapplies The Case Law It Cites

350. While Mexico boldly claims that its position is "wholly supported by the contemporary NAFTA jurisprudence,"[551] it omits reference to longstanding NAFTA precedent holding that non-compliance with purely formal, technical requirements is not a jurisdictional defect warranting dismissal of an investor's claims.[552]

351. Mexico does not cite <u>any</u> NAFTA awards where a tribunal dismissed on jurisdictional grounds an investor's claims simply because of technical non-compliance with

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[550] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia),* Preliminary Objections, Judgment (July 11, 1996), I.C.J. Reports 1996, pp. 613-614, ¶ 26, **CL-25**.

[551] *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia),* Preliminary Objections, Judgment (July 11, 1996), I.C.J. Reports 1996, pp. 613-614, ¶ 56, **CL-25**.

[552] Mexico attempts to avoid mention of *Ethyl v. Canada*, *Pope & Talbot v. Canada*, and *Mondev v. USA* through its professed reliance on "contemporary" NAFTA jurisprudence. Nevertheless, it relies on a decision in *Methanex v. USA* issued in August 2002. Decisions which directly dealt with analogous Article 1119 issues as the present case were published in June 1998 in *Ethyl*, August 2000 in *Pope & Talbot*, and in October 2002 in *Mondev*. These decisions continue to be cited approvingly by recent tribunals.

the formal notice of intent requirements in Article 1119. That is because no such NAFTA award exists. And while the Respondent contends that it is "self-evident" that the submission of arbitration is "invalid" as a result of the omission of names and addresses, it cites no authority explaining how a properly registered Request for Arbitration can be "void *ab initio*."[553]

352. Mexico's hyper-technical interpretation of NAFTA Article 1119 is legally unsupported. Mexico misconstrues the arbitral jurisprudence by citing generic observations on NAFTA procedure and ignoring the actual reasoning and outcome of its cited cases. What is more, Mexico's repeated advocacy in support of a strictly literal interpretation of Chapter Eleven's procedural provisions would yield absurd and unjust results, ignore the true object and purpose of the NAFTA provisions it cites, depriving meritorious claimants with weighty, substantive claims to be heard by a tribunal because of a technical omission in the notice of intent. This result turns even more egregious when coupled with the uncontested fact that Mexico received ample notice of the dispute and cannot articulate any discernible prejudice (other than having to defend its unlawful conduct) that it would suffer as a result of the technical omission. A close examination of Mexico's cited cases exposes the weakness of its position.

353. *First*, Mexico cites *Methanex Corporation v. United States of America* to support its assertion that compliance with the conditions set out in Article 1119 is necessary to engage a respondent State's consent. The *Methanex* tribunal, however, did not consider or rule on the scope and effect of noncompliance with the technical requirements in Article 1119. In the Partial Award that Mexico cites,[554] the *Methanex* tribunal dealt with the issue of whether certain environmental measures "relate to" the investor for the purposes of NAFTA Article 1101(1), which defines the scope and coverage of NAFTA Chapter Eleven. The tribunal declined jurisdiction over the claims that did not "relate to" the investor, but allowed the investor to submit a fresh pleading that would meet the requirements of NAFTA Article 1101(1).[555] That the *Methanex* tribunal dismissed claims because they were beyond the scope and coverage of Chapter Eleven, as defined in NAFTA Article 1101(1), does not support the Respondent's hyper-technical interpretation of NAFTA procedures, and in particular Article 1119.

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[553] *See* Mexico's Memorial on Jurisdictional Objections, ¶¶ 54, 76. Claimants' Request for Arbitration was properly registered on August 11, 2016.

[554] Mexico's Memorial on Jurisdictional Objections, ¶ 56.

[555] *Methanex Corporation v. United States of America*, Partial Award (Aug. 7, 2002), ¶ 172(2)-(5), **CL-26**.

354. Furthermore, in the Final Award in *Methanex*, which Mexico does not even cite or rely on, the United States objected to the claimant's introduction of an additional measure late in the proceedings on the grounds, among others, that the formal requirements of NAFTA Article 1119 had not been met.[556] That objection by the United States is much more analogous to Mexico's objections herein than the NAFTA Article 1101(1) ruling by the *Methanex* tribunal on which Mexico relies. The tribunal analyzed the various grounds asserted by the United States, but did not consider the notice of intent objection, omitting it from discussion.[557] The *Methanex* tribunal, therefore, implicitly rejected that the failure to provide notice of the additional measure was not a relevant factor in its analysis.

355. *Second*, Respondent cites to a decision in the *Merrill & Ring Forestry L.P. v. Government of Canada* case,[558] which was issued in response to a request to add a new party. This decision, however, is clearly distinguishable. In *Merrill & Ring*, the claimant submitted the motion to add a new party *after* the tribunal had already been constituted, and *after* both claimant and respondent had made substantive submissions in the proceeding. In the present case, Claimants are not attempting to add a new party after proceedings had already commenced; rather, all Claimants and Enterprises were identified in the Request for Arbitration. In addition, all Claimants sent Mexico an Amended Notice of Intent in September 2016 *before* the constitution of the tribunal. Additionally, all of the claimant parties' claims are identical, such that the addition of parties in the Request for Arbitration whose names and addresses were not included in the 2014 Notice of Intent has no effect on Mexico's knowledge of the gravamen of the dispute or its ability to defend against the claims. In contrast, there were notable differences in the questions of law and fact raised by the addition of the new party in *Merrill & Ring*.[559]

356. *Third*, Mexico cites to *obiter dicta* in *Canfor Corporation v. United States of America* to support its position.[560] The issue in *Canfor*, however, was whether NAFTA Article

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[556] *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005), Part II – Chapter F, ¶ 18, **CL-27**.

[557] *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005), Part II – Chapter F, ¶¶ 19-29, **CL-27**.

[558] Mexico's Memorial on Jurisdictional Objections, ¶ 57.

[559] *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Administered Case, Decision on a Motion to Add a New Party (Jan. 31, 2008), ¶¶ 23-24, **CL-28**.

[560] Mexico's Memorial on Jurisdictional Objections, ¶ 58.

1901(3) bars a tribunal from considering claims with respect to antidumping and countervailing duties under Chapter Eleven.[561] This is a far cry from whether technical aspects of procedural provisions must be strictly and mandatorily complied with in order for a tribunal constituted under Chapter Eleven to assert jurisdiction.

357. *Fourth*, in *Bilcon v. Government of Canada*, the tribunal had no occasion to consider whether technical non-compliance with Chapter Eleven procedures deprives it of jurisdiction. There simply was no discussion at all about Article 1119's notice of intent requirement, much less on whether alleged defects in a notice of intent can render a submission to arbitration "void *ab initio.*"

358. *Fifth*, Mexico's reliance on submissions from the United States and Canada in *Mesa Power Group, LLC v. Government of Canada* and in *KBR, Inc. v. United Mexican States* are unavailing.[562] As an initial matter, there is no reason to afford conclusive or even persuasive weight to Article 1128 submissions by non-disputing Parties, especially when submitted in other arbitral proceedings where the issue at hand is not presented. Judge Brower in *Mesa Power* warned against the influence of these submissions on interpretive issues, disagreeing that interpretation of the NAFTA should be "materially influenced" by the apparent agreement of the three NAFTA Parties.[563] Judge Brower astutely observed that, in his experience, non-disputing Parties inevitably "club together" and never differ "from the interpretation being advanced by the respondent State."[564] Because "only three Ministers of the States Party to NAFTA, convened as the Free Trade Commission, can 'resolve disputes that may arise regarding [NAFTA's] interpretation or application,'" Judge Brower urged that "caution should be exercised, if not skepticism," when non-disputing Parties team up in arbitrations to support the respondent State's interpretation of a treaty provision.

359. More fundamentally, the actual holdings in *Mesa Power v. Canada* and *KBR v. Mexico do not* support Mexico's interpretation of Article 1119.

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[561] *Canfor Corporation v. United States of America and Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Decision on Preliminary Question (June 6, 2006), ¶ 138, **CL-29**.

[562] Mexico's Memorial on Jurisdictional Objections, ¶ 61.

[563] *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award (Mar. 24, 2016), ¶ 270, **CL-31**.

[564] *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award (Mar. 24, 2016), ¶ 270, **CL-31**.

360. In *Mesa Power*, the respondent argued that because the claimant had filed its submission to arbitration only three months after the challenged governmental measure, the claimant did not comply with Article 1120(1)'s six-month waiting period requirement. According to Canada, this non-compliance meant that it had not consented to arbitrate and that the tribunal lacked jurisdiction.[565] However, the *Mesa Power* tribunal rejected Canada's objections, holding that the claimant had indeed satisfied the requirements of Article 1120(1). The tribunal expressly "dispense[d] with" the question of whether the requirements are jurisdictional or procedural in nature.[566]

361. The *Mesa Power* tribunal observed that the object and purpose of notice-type requirements in investment treaties is to "appraise the State of a possible dispute and to provide it with an opportunity to remedy the situation before the investor initiates an arbitration."[567] It further noted that:

> Typically, consultations between the disputing parties take place after a notice of intent has been submitted. Thus, through the notice of intent – in which an investor must articulate its claims with a reasonable degree of specificity – a disputing NAFTA Party is informed of the claims against it. It then has at least 90 days to consider and possibly settle the claims.[568]

362. Nowhere in *Mesa Power* does the tribunal adopt the strictly literal interpretation urged by Respondent. On the contrary, the *Mesa Power* tribunal was carefully attuned to the object and purpose of NAFTA's procedural provisions. In striking contradiction to the Respondent's position, it referenced the holding by the *Ethyl* tribunal with approval.[569]

363. In *KBR*, the tribunal was faced with a scenario of material, substantive non-compliance with the waiver requirements of NAFTA Article 1121. In particular, despite submitting a written waiver, the investor maintained ongoing litigation proceedings in New

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[565] *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award (Mar. 24, 2016), ¶ 270, **CL-31**.

[566] *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award (Mar. 24, 2016), ¶ 318, **CL-31**.

[567] *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award (Mar. 24, 2016), ¶ 296, **CL-31**.

[568] *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award (Mar. 24, 2016), ¶ 297, **CL-31**.

[569] *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award (Mar. 24, 2016), ¶ 301, **CL-31**.

York and Luxembourg based on the subject matter of the NAFTA dispute (*i.e.* an ICC award).[570] Thus, instead of a technical omission, the *KBR* case presented an issue of whether the investor was entitled to pursue these simultaneous proceedings notwithstanding the waiver requirement under NAFTA Article 1121.

364. Notably, Mexico cites the submissions of Canada and the United States, but does not provide a copy of the Award in *KBR* nor does it refer to the tribunal's precise reasoning in reaching its outcome.[571] The tribunal in *KBR* very likely declined jurisdiction due to the investor's substantive, material non-compliance with the waiver requirement based on the ongoing proceedings in New York and Luxembourg, and not because of a technical defect in the notice of intent.[572] In fact, there is absolutely no reason to believe that the *KBR* tribunal dealt with any arguments regarding technical, non-compliance with Article 1119's notice requirements, or anything similar to that. The *KBR* case therefore has no relevance to the objections raised by Mexico herein. This is especially so given that in the present case, all Claimants have substantively complied with NAFTA's pre-filing procedures, including Article 1121's waiver requirement.

365. At bottom, none of the NAFTA cases on which Mexico relies supports its hyper-technical interpretation of the notice of intent requirement of Article 1119. There is no support for Mexico's assertion that a request for arbitration is "void *ab initio*" as a result of technical defects, especially where the claimants substantively complied with the procedural requirement and the request was properly registered by the administering institution. There also is no support for Mexico's argument that the "defects" of which it complains concerning Claimants' 2014 Notice of Intent should deprive this Tribunal of jurisdiction over any of the Claimants' claims.

366. In fact, these arguments by Mexico ignore the true "object and purpose" of Article 1115, 1119, 1121 and 1122. In so doing, Mexico is ignoring and violating certain principles of international law that apply to it as it relates to obligations it incurs upon signing international treaties. In interpreting these NAFTA provisions, as the Tribunal must to resolve Mexico's objections, the Tribunal must be guided by the Vienna Convention on the Law of

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[570] *KBR Inc. v. United Mexican States*, UNCITRAL Case No. UNCT/14/1, Claimant's Final Submission on Preliminary Question of Waiver (Aug. 14, 2014), ¶ 10, **CL-32**.

[571] *See* Memorial on Jurisdictional Objections, ¶¶ 60, 61, 85.

[572] The final award in *KBR, Inc. v. United Mexican States* is not public.

Treaties ("**VCLT**"), and in particular on the provisions of that Convention that relate to treaty interpretation.

367. It is a basic tenet of treaty interpretation that a State must refrain from taking actions that defeat the object and purpose of a treaty. In fact, Article 18 of the VCLT provides that a State must refrain from taking any such actions after it has a signed a treaty and even before the treaty has been ratified. In addition, once a treaty enters into force, a State has a duty under international law to perform that treaty according to its object and purpose and must do so in good faith. This principle is enshrined in Article 26 of the VCLT, titled "*Pacta Sunt Servanda*", which provides that "Every treaty in force is binding upon the parties to it *and must be performed by them in good faith*." (emphasis added).

368. In relation to an arbitral tribunal's interpretation of the text of the treaty, a tribunal must faithfully apply the provisions of Article 31 of the VCLT. Article 31, of the VCLT, titled "*General Rule of Interpretation*", provides that "[a] treaty shall 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*." ("emphasis added")

369. Keeping these principles in mind, we see that Mexico's Article 1119 objection appears to violate its duty not to take actions that violate the "object and purpose" of NAFTA as well as it duty to perform its obligations under NAFTA "in good faith."

370. Article 1115, titled "Purpose", provides that the main purpose of Chapter Eleven's dispute settlement provisions is to facilitate the "mechanism for the settlement of investment disputes" "in accordance with the principle of international reciprocity and due process before an impartial tribunal." This principal purpose of Chapter 11, as articulated in Article 1115, must be the lens through which this Tribunal interprets the requirements of Articles 1119, 1121 and 1122. Thus, these provisions must be interpreted to ensure that a investors are provided with a mechanism for the settlement of investment disputes that afford them due process and that allow them to have this process before an impartial tribunal.

371. Article 1119 requires a claimant to provide a State with advance notice of its intention to present an investment dispute to arbitration. This is confirmed by Article 1118, which provides that parties to an investment dispute under NAFTA should first try to settle the dispute through consultations or negotiations. The aim of Article 1119 thus is, as mentioned, to allow the States (and the investors) an opportunity to resolve the dispute before the investor

initiates the arbitration. It is not, as Mexico seems to argue, to set up a web of hard procedural notice requirements that create a web of procedural pitfalls that an investor must clear failing which its claims cannot be presented to an international tribunal for resolution.

372. Article 1121, in turn, requires an investor to consent in writing to arbitrate its dispute in accordance with the provisions of Chapter 11 and to waive its right to pursue other proceedings outside of the NAFTA proceeding in relation to the same measures that are at issue in the NAFTA case. Article 1122 simply confirms that Mexico consented to arbitrate disputes with U.S. (and Canadian) investors when it signed and ratified NAFTA and that U.S. investors provide their consent to arbitrate their NAFTA disputes, as required by Article 1121, when they submit their claims to arbitration, as Claimants here did when they presented their Request for Arbitration to ICSID for registration.

373. Claimants presented Mexico with the notice required by Article 1119. This is so even if Mexico can articulate some technical deficiencies with the notice. Again, the object and purpose of Article 1119 is to provide Mexico with an opportunity to engage Claimants in consultations and negotiations to try and resolve their dispute. Mexico chose not to do that, and has shown no interest in pursuing such discussions to date. With Claimants having complied with the requirements of Articles 1119, 1121 and 1122, the Tribunal must decide Mexico's jurisdictional objections, including its Article 1119 objection, keeping in mind the principal object and purpose of Section B of Chapter 11, which is to provide Claimants an international forum to have its claims resolved.

374. With that in mind, it becomes clear that Mexico's arguments about, at best, technical deficiencies in Claimants' 2014 Notice of Intent cannot deprive this Tribunal of jurisdiction over any of Claimants' claims.

b. The Amended Notice Of Intent Cured Any Alleged Technical Non-Compliance

375. Even if the Tribunal were inclined to find a defect in the 2014 Notice of Intent, it should follow longstanding NAFTA precedent holding that non-compliance with technical details of NAFTA procedure is merely formal in nature and subject to cure, even during the course of proceedings.

376. Investment tribunals routinely accept that events occurring after the initiation of arbitration can cure non-compliance with a treaty's procedural requirements. In *Philip Morris*

Brands et al v. Oriental Republic of Uruguay, the tribunal confronted a scenario where a domestic litigation requirement had not been satisfied at the time the arbitration was instituted.[573] The tribunal rejected Uruguay's jurisdictional objection and reasoned that:

> … even if the [domestic litigation] requirement were regarded as jurisdictional, the Tribunal concludes that it could be, and was, satisfied by actions occurring after the date the arbitration was instituted. The Tribunal notes that the ICJ's decisions show that the rule that events subsequent to the institution of legal proceedings are to be disregarded for jurisdictional purposes has not prevented that Court from accepting jurisdiction where requirements for jurisdiction that were not met at the time of instituting the proceedings were met subsequently (at least where they occurred before the date on which a decision on jurisdiction is to be taken).[574] (emphasis added)

377. Even in cases where tribunals consider that proper notice is an element of a State's consent, they have granted the claimant an opportunity to remedy its failure to provide proper notice. In *Western NIS Enterprise Fund v. Ukraine*, for example, the tribunal concluded that failure to give proper notice "does not, in and of itself, affect the Tribunal's jurisdiction" and granted the claimant "an opportunity to remedy the deficient notice."[575]

378. Claimants reserved their right to amend their 2014 Notice of Intent.[576] To that end and in light of Mexico's formalistic objection to the registration of Claimants' Request for Arbitration, on September 2, 2016, Claimants sent to Mexico the Amended Notice of Intent pursuant to NAFTA Article 1119.[577] The Amended Notice of Intent provided the full listing of the Claimants named in the Request for Arbitration and dealt with Mexico's other formalistic complaints. This Amended Notice of Intent, thus, cured any alleged defects in the 2014 Notice of Intent.

379. As a threshold matter, it is important to emphasize that the Amended Notice of Intent was not necessary, and was only delivered out of an abundance of caution and, in Claimant Gordon Burr's words, to call "Mexico's bluff."[578] While the Claimants took this good faith step to, once again, notify Mexico of the NAFTA dispute before it now remedying all of

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[573] *Philip Morris Brands et al v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013), ¶ 144, **CL-12**.

[574] *Philip Morris Brands et al v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013), ¶ 144, **CL-12**.

[575] *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, Order (Mar. 16, 2002), ¶ 7, **CL-33**.

[576] Notice of Intent to Submit a Claim to Arbitration (May 23, 2014), ¶ 18, **C-34**.

[577] Amended Notice of Intent (Sep. 2, 2017), **R-007**.

[578] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 47.

the alleged defects in the initial 2014 notice, Mexico has continued to ignore them to this day. There have been no efforts by Mexico to engage in consultations or negotiations.[579] This aftermath is ample evidence that, even had the 2014 Notice of Intent included the names and addresses of all parties, Mexico would not have attempted to meaningfully engage and settle the dispute.

380. As the Amended Notice of Intent explains:

> Through the 2014 Notice of Intent, the U.S. investors with majority interests and control over the Juegos Companies, E-Games, and the Additional Mexican Enterprises fulfilled the intended purpose of NAFTA Article 1119 of placing Mexico on notice of the present dispute under the NAFTA and of all of the U.S. investors' intent to submit a claim to arbitration for the entirety of the investments at issue, with an eye towards engaging in good faith consultations and negotiations with Mexico in the hopes of reaching an amicable resolution of the dispute. Accordingly, Mexico knew since at least May 24, 2014 that the U.S. investors intended their claims under NAFTA to encompass the entirety of the investments at issue as the claims were being asserted directly by the majority U.S. investors who submitted the 2014 Notice of Intent as well as on behalf of the Juegos Companies and E-Games. 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.[580]

381. Claimants served the Amended Notice of Intent before the Tribunal's constitution. Thus, to the extent that there were defects in the 2014 Notice, they were cured *long before any of the parties could submit formal briefing for dispute resolution purposes.* What is more, in submitting the Amended Notice of Intent, the Claimants did not seek a tactical advantage in the arbitration, but were proceeding in good faith to address Mexico's purported concerns regarding the 2014 Notice of Intent. Notably, more than 90 days have passed since service of the Amended Notice of Intent and the constitution of the Tribunal on February 14, 2017.

382. Mexico cannot now hide behind its formalistic objections and claim that the Tribunal lacks jurisdiction to hear this substantial dispute. As in *Mondev*, the Tribunal should find that the Amended Notice of Intent cured the omission of some minority claimants' names and addresses from the 2014 Notice of Intent, to the extent that omission is considered a defect for purposes of NAFTA Article 1119(a). In so ruling, the Tribunal would be well supported by

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[579] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 47; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 26.

[580] Amended Notice of Intent (Sep. 2, 2017), p. 2, **R-007**.

authority outside of the NAFTA context as well, including *Philip Morris*, *Western NIS Enterprise Fund*, and *Mavrommatis Palestine Concessions*, among others.

3. Requiring A Separate Notice Of Intent Would Have Been Futile, Given Mexico's Refusal To Amicably Consult And Negotiate With Claimants And Their Representatives

383. It would be an exercise in futility to require the Claimants whose names and addresses were not included in the 2014 Notice of Intent to have served a separate notice of intent, even though they did do just that in September of 2016. Long before serving the 2014 Notice of Intent, the Claimants have sought, on multiple occasions, to amicably resolve the dispute. As explained earlier, Mexico consistently rebuffed these efforts and in fact aggravated the dispute.

384. Even before SEGOB unlawfully shut down the Claimants' Casinos in April 2014, the Claimants and their representatives sought to amicably consult with responsible SEGOB officials.[581] To this end, the Claimants have exhausted various methods to secure meetings, including by (1) directly requesting meetings with Economía and SEGOB, even arriving at SEGOB's offices in person; (2) having U.S. Congressman Mike Coffman write to SEGOB; (3) engaging the lobbying services of Governor Bill Richardson; (4) writing to SEGOB to request a legal explanation for the closures; and (5) meeting with officials at Mexico's Ministry of Economy. Even when meetings occurred, they were perfunctory and unproductive, and made clear that Mexico had no intention to amicably settle the dispute. As former Governor Bill Richardson remarked, despite his lobbying efforts, "it was near impossible to change things around given the vehemence of the Mexican authorities and the optics of the situation."[582]

385. On the contrary, it was clear that Mexico wanted Claimants out of the Mexican gaming industry. Mr. Luc Pelchat confirms this when he recounts that SEGOB officials at meetings in 2014 and 2015 told him and Mr. Benjamin Chow that SEGOB would never allow U.S. Claimants to reopen their casinos in Mexico.[583]

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581 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶¶ 10-11.

582 Letter from Governor Bill Richardson to Gordon Burr (June 6, 2014), **C-107**.

583 Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 8.

386. In the face of these incontrovertible facts, Mexico surmises that "[i]t 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 [2014 Notice of Intent]."[584] And by "repeated attempts" Mexico really is referring only to a questionnaire from Economía, which Claimants were under no obligation to answer that sought information that Claimants were under no obligation to provide. As will be described below, far from conveying a desire to negotiate, the questionnaire clearly was a fishing expedition in preparation for arbitration. Importantly, just as had happened previously, Mexico did not offer any avenues to meet with government officials or to advance serious, good faith discussions with the Claimants. Mexico's recalcitrance continued after Claimants served the 2014 Notice of Intent, persisted after it received the Amended Notice of Intent and has remained constant to date. Respondent's attempt to hide behind the questionnaire is completely disingenuous.

a. Mr. Garay's Perfunctory Meeting With Claimants

387. The Claimants' efforts to consult and negotiate with Mexico were ongoing and continued after service of the 2014 Notice of Intent.

388. On June 11, 2014, Mr. Burr and E-Games' counsel Mr. Gutiérrez met with Mr. David Garay Maldonado, then Director of the Government Unit at SEGOB.[585] Mr. Garay explained that he only met with them as a courtesy to Congressman Coffman.

389. Messrs. Burr and Gutiérrez explained Mexico's illegal actions as well as their wish to reach an amicable solution that would lead to the reopening of the Casinos in the near future.[586] Mr. Garay took notes but clarified that he had no authority to settle or resolve Claimants' claims, or even to discuss Mexico's position on a possible settlement. He said he would serve as an interlocutor with Ms. Salas and that he would follow up after the meeting, *but never did*.

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[584] Memorial on Jurisdictional Objections, ¶ 73.

[585] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 41; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 19.

[586] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 42; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 20.

b. Requests For Meeting Through U.S. Department Of Commerce And U.S. Embassy In Mexico

390. Between April and June 2014, Claimants contacted the U.S. Department of Commerce for assistance in arranging meetings. Claimants specifically sought the Department's assistance in communicating "with SEGOB on our behalf to urge it to meet with our representatives and simply follow the law and avoid serious damage to our clients' business, loss of Mexican jobs and damage to relationships with American citizens."[587]

391. Ultimately, however, officials at both the U.S. Embassy in Mexico as well as the U.S. Department of Commerce concluded that they were unable to engage in a way that could improve E-Games' situation.[588] On June 3, 2014, trade officials at the U.S. Embassy informed the Claimants that despite attempts to arrange a meeting with SEGOB officials, including Mr. Miranda, the officials would not meet with E-Games.

c. Interactions With The Ministry Of Economy

392. On June 10, 2014, Mr. Gutiérrez spoke with Mr. Vejar, who explained that he recently had a meeting with Ms. Salas and her team at SEGOB and *he was unsure whether SEGOB would accept the meeting and expressed that SEGOB was not willing to negotiate any amicable settlement with E-Games.*[589] Mr. Vejar did not explain why SEGOB was taking that position. After this discussion, Mr. Vejar never contacted Claimants to arrange a meeting, nor did Claimants or their representatives ever hear from Ms. Salas or any other official within SEGOB.[590]

393. As alluded to above, on July 24, 2014, the Ministry of Economy sent to Claimants' international counsel at White & Case an extensive questionnaire, requesting information that Claimants were under no obligation to provide to Mexico. The Ministry did not offer any avenues to meet with SEGOB officials, nor did it offer any indication that the dispute could be amicably resolved. The questionnaire was, in reality, a thinly-veiled attempt to gain information from the Claimants in preparation for the arbitration. On advice of counsel,

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[587] Exchange of emails between Neil Ayervais, Cal Frye, Patrice Williams, and Caroline Croft (Apr-May, 2014), **C-101**.

[588] Exchange of emails between Neil Ayervais and Collen Fisher (May-June, 2014), p. 1, 4, **C-41**.

[589] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 22 (emphasis added).

[590] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 22; Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 43.

Claimants did not respond to the questionnaire.[591] Additionally, Claimants feared forceful reprisals from governmental actors, especially in the wake of criminal investigations launched against E-Games' representatives shortly after the 2014 Notice of Intent was served.[592]

394. Mexico's assertion that Claimants "plainly declined to engage in any discussions with Mexico's responsible government officials" because they declined to respond to Respondent's questionnaire is forcefully contradicted by the factual record of Claimants' repeated efforts to engage in good faith discussions with the Mexican government, and Mexico's consistent refusal to accept any of Claimants' invitations to enter into consultations regarding the issues in dispute between the parties.

395. The questionnaire, however, is enlightening in at least one way. In it, Mexico identified the main governmental measures, investments, parties, and claims at issue, demonstrating the Mexican government's understanding of the Claimants' NAFTA dispute. Yet, despite being apprised of the Claimants' intention to bring this dispute to international arbitration, Mexico took no substantive action to remedy its illegal conduct, nor did it engage with any of the Claimants.

d. Requests for New Gaming Permits

396. Even in the face of Mexico's refusal to engage in good faith discussions, Claimants persisted in their attempts to improve their lot. Specifically, notwithstanding Mexico's illegal revocation of its valid independent gaming permit, on April 4, 2014 E-Games sought to fix the unravelling situation by requesting new and independent permits for the Casinos. Claimants hoped and expected that SEGOB would honestly evaluate the requests in accordance with objective legal criteria under the Gaming Regulations and applicable provisions of Mexican law.

397. SEGOB, however, denied E-Games' requests. On August 15, 2014 (three months after the 2014 Notice of Intent), SEGOB denied the request for new permits relying on unsubstantiated and purely technical grounds, and without affording E-Games the opportunity to correct the alleged errors in its requests.[593] This is additional evidence that SEGOB was in

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[591] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 23; Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 44.

[592] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 44.

[593] SEGOB's denial of E-Games' requests (Aug. 15, 2015), **C-27 - C-33**.

no mood to settle the dispute and allow the Claimants to resume operation, no matter what the Claimants did to show their (continued) compliance with the Gaming Regulations.

e. No Negotiations After Amended Notice of Intent

398. Claimants sent to Mexico the Amended Notice of Intent pursuant to NAFTA Article 1119 on September 2, 2016.[594] Through the Amended Notice of Intent, Claimants offered, once again, to meet with officials from the Mexican government to discuss and attempt to resolve the dispute.[595]

399. After service of the Amended Notice of Intent, however, Mexico took no action whatsoever to negotiate in good faith with any of the claimant parties.[596] This is further evidence of the futility of requiring a separate notice of intent with all the omitted names and addresses.

400. It is obvious, then, that including the omitted Claimants in the 2014 Notice of Intent would have made no difference to Mexico. Mexico's own actions to date prove this. Significantly, the challenged measures and deprivations remain unaddressed to this day. One of the Casinos, the facility at Naucalpan, was burned down while it was under the custody of the Mexican government.[597] Even more recently, the Mexican government allowed gaming machines to be illegally removed from the facility without the consent or authorization of the lawful owners of the equipment. There is nothing to indicate that, were the Tribunal to encourage the Parties to amicably negotiate with one another, Mexico would engage in any meaningful consultations or negotiations, or remedy its illegal actions and allow the Casinos to resume operations.

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[594] Amended Notice of Intent (Sep. 2, 2017), **R-007**.

[595] Amended Notice of Intent (Sep. 2, 2017), p. 2, **R-007**.

[596] Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 26; Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 47.

[597] *See* Reportan incendios en predio de antiguo casino en Naucalpan (May 11, 2017). Retrieved from http://www.excelsior.com.mx/comunidad/2017/05/11/1162915#imagen-1 (contains pictures and videos), **C-118**; Incendio en tela de juicio. Retrieved from https://elinsurgente.mx/incendio-en-tela-de-juicio/amp/, Exhibit **C-119**; Grupo Kash exige se investigue incendio de casino en Naucalpan (May 15, 2017). Retrieved from https://noticiasenlamira.com/grupo-kash-exige-se-investigue-incendio-casino-en-naucalpan/, **C-120**.

401. In light of these factual circumstances, requiring the Claimants who were not specifically named in the 2014 Notice to serve now yet another separate notice of intent and resubmit a request for arbitration would be an exercise in futility.

402. *Ethyl v. Canada* is closely analogous to the facts here. In *Ethyl*, the tribunal excused the claimant's non-compliance with Articles 1119 and 1120 because Canada would not have repealed the challenged measure after further negotiations.[598] Here, Mexico's failure to engage Claimants in any good faith discussions geared towards potentially resolving the dispute demonstrates the futility of requiring a more precise notice under Article 1119, as there is no indication or reason to believe that providing the names of the additional minority shareholders would have altered Mexico's conduct so that negotiations in fact would have taken place.

403. Several non-NAFTA tribunals also have excused a party's failure to comply with pre-arbitration procedures where there was nothing to be gained from attempts at negotiations. For example, the tribunal in *Occidental Petroleum Corporation v. Republic of Ecuador* excused non-compliance with the waiting period after citing to a number of tribunals that had concluded that there is no need for a proscribed waiting period to lapse where negotiations are bound to be futile.[599] In addition, the tribunal in *Ronald S. Lauder v. The Czech Republic* excused compliance with the cooling off period requirement where the respondent State had not sought to negotiate.[600]

404. Simply put, through its actions, Mexico has demonstrated eloquently that it never had (and still does not have) any intention to discuss settlement options with any of the Claimants. To argue, as Mexico must, that including minority shareholders and an additional local enterprise in the Notice of Intent would have altered this result does not stand to reason and is flatly contradicted by Mexico's actions to this day.

405. Given these circumstances, the Tribunal should hold that Claimants complied with the Article 1119 requirements. In the alternative, it should find that requiring a separate notice of intent from the Claimants not specifically named in the 2014 Notice of Intent before filing the Request for Arbitration would have been futile, and that said futility excused

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[598] *Ethyl Corp. v. Government of Canada,* UNCITRAL, Award on Jurisdiction (June 24, 1998), ¶ 85 ("No disposition is evident on the part of Canada to repeal the MMT Act or amend it."), **CL-5**.

[599] *Occidental Petroleum Corporation v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction (Sept. 9, 2008), ¶¶ 92–95, **CL-34**.

[600] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award (Sept. 3, 2001), ¶¶ 189-190, **CL-35**.

Claimants from including the additional, minority shareholders and the local enterprise in the 2014 Notice of Intent.

4. Granting Mexico's Request For Dismissal Would Be Draconian And Unjust

406. Mexico's extreme requested relief—dismissal of (at least) the additional Claimants' claims for lack of jurisdiction—would have unjust, draconian consequences for Claimants. Specifically, dismissing the claims of the omitted shareholders would unfairly punish these investors for what is, at most, appears to be a minor technicality, and which pales in comparison to Mexico's destruction of their investment. The omitted shareholders might be unable to seek recourse for at least some of their injuries due to the three-year limitations period under the NAFTA.

407. That Mexico has suffered no prejudice from the alleged noncompliance with Article 1119 only highlights the injustice of the remedy it seeks. Mexico has been aware of the existence of the dispute for over 4 years; instead of seeking to negotiate, it has taken every step possible to aggravate the dispute. The 2014 Notice of Intent, submitted by the U.S. investors with majority interests and control over the Juegos Companies, E-Games, and the Additional Mexican Enterprises, specifically informed Mexico of the factual underpinnings, substance and legal basis for Claimants' NAFTA claims, giving Mexico ample notice and understanding of the dispute. The Claimants and Enterprise whose names and addresses were omitted from the 2014 Notice of Intent have *the very same claims based on the very same facts and under the same NAFTA provisions* as the Claimants whose information was included in the 2014 Notice of Intent. Mexico thus cannot (and in fact does not) claim that it would be prejudiced in any way by allowing all claimants and enterprises to seek redress for their claims.

408. Under these circumstances, granting Mexico the remedy it seeks not only would reward Respondent's obsession with arid formalism over substance, but would do so at the expense of Claimants' substantive rights and of fundamental principles of justice. Nothing in NAFTA or in its Article 1119 requires such an unjust, draconian result. More importantly such a result contradicts the object and purpose of Article 1115, as it would deprive, even if temporarily, certain of the Claimants of their right to have their international grievances heard by an international tribunal.

C. CLAIMANTS CONSENTED TO ARBITRATION UNDER NAFTA ARTICLE 1121

409. The Claimants complied with NAFTA Article 1121 by communicating to Mexico in writing their acceptance of Mexico's offer to arbitrate disputes under the requirements of NAFTA, including its NAFTA Article 1121, independently and through a combination of the written statements of consent included in their Request for Arbitration ("**RFA**") AND the statements of consent included within the powers of attorney each executed in favor of their counsel.

410. NAFTA Article 1122(1) records Mexico's open offer of consent to "the submission of a claim to arbitration in accordance with the procedures set out in this Agreement." NAFTA Article 1121(1), in turn, requires that "the investor consents to arbitration in accordance with the procedures set out in this Agreement." NAFTA Article 1121(3), in turn, sets forth the requirements for a disputing investor's consent to the submission of claim of arbitration under NAFTA Articles 1116 and 1117. Specifically, Article 1121(3) requires only that "[a] consent and waiver required by this Article shall be in writing, shall be delivered to the disputing party, and shall be included in the submission of a claim to arbitration."[601] This provision, importantly, does not say that the consent or the waiver must be provided in a separate, signed writing by each Claimant.

411. Despite this clear text, Mexico would have this Tribunal rule that hidden somewhere in these simple requirements are words that must be recited as an incantation, in some separate document signed by each Claimant, absent which the Tribunal lacks jurisdiction to hear Claimants' weighty claims. NAFTA Article 1121 provides for no such requirement. And Mexico does not cite to any legal authority in support of this proposition because none exists.

412. According to Mexico, Claimants' powers of attorney, which were submitted as Exhibit C-4 to Claimants' RFA, "cannot be equated to the express written consent to arbitration required under Article 1121", as they are merely a grant of authority to Claimants' counsel to act on their behalf.[602] Mexico also alleges that Claimants' filing of the Request for Arbitration, without more, similarly is an insufficient communication of consent under NAFTA Article

[601] NAFTA Article 1121(3), **CL-1**.

[602] Mexico's Memorial on Jurisdictional Objections, ¶ 90.

1121.[603] Mexico then argues that since compliance with NAFTA Article 1121 is a "condition precedent" to the submission of a claim to arbitration, Claimants' alleged failure to deliver a document stating each Claimant's consent to arbitration deprives this Tribunal of jurisdiction over Claimants' claims.[604]

413. Mexico's objection rests on various faulty pillars. *First*, Mexico's reading of NAFTA Article 1121 is wrong and unsubstantiated. Claimants' powers of attorney and their RFA express Claimants' clear, explicit, and categorical consent to arbitrate claims against Mexico under the NAFTA and comply with each of the requirements articulated in Article 1121. Each separately are (i) in writing, (ii) were delivered to the disputing party (here Mexico), and (iii) were included in the submission of the claim to arbitration, as the POAs were annexed and referred to in the RFA, and the RFA is the submission of Claimants' claims to arbitration.

414. *Second*, the NAFTA, like many other bilateral and multilateral treaties, provides a standing offer of consent that investors can accept by initiating proceedings against the disputing Party and providing their consent therein. NAFTA Article 1121 does not add to or depart from this generally accepted proposition, and nothing else in NAFTA prohibits a disputing investor from providing its written consent to arbitration through and in the Request for Arbitration. Lacking authority to support its objection, Mexico simply calls Claimants' argument "specious" without explaining how it is wrong and without citing to a single authority in support of its position, relying instead on an entirely conclusory *effet utile* argument. Mexico's position, however, overlooks the plain text of Article 1121.

415. *Third*, for all the same arguments articulated above as to why technical arguments about "deficiencies" in meeting NAFTA's procedural requirements cannot deprive this Tribunal of jurisdiction, this argument by Mexico cannot do so either. As noted in more detail below, other NAFTA tribunals dealing with objections by NAFTA States concerning the adequacy of consents presented pursuant to Article 1121 consistent have held that such deficiencies go only to admissibility—do not affect the Tribunal's jurisdiction—and can readily be cured.

416. *Fourth*, Mexico has been unable to articulate a single way in which Claimants' explicit communication of their consent in the powers of attorney and in the RFA have

[603] Id., ¶ 91.

[604] Id., ¶ 78.

prejudiced the State or its ability to defend against the claims. And a finding that it lacks jurisdiction notwithstanding Claimants' insistence that it has consented as per the requirements of Article 1121, would be meting the most drastic remedy for a technical noncompliance that had no practical consequences and caused no prejudice to Mexico. This result would be contrary to the object and purpose of Chapter Eleven, as argued in the preceding sections and would be fundamentally unfair.

1. Claimants Provided Their Written Consent To Arbitration in Their Request for Arbitration

417. Claimants delivered their consent to arbitration in writing in the body of their RFA. There is an entire section in the RFA dealing with Claimants' consent.[605] As demonstrated below, Claimants' expression of consent to arbitrate its dispute pursuant to the requirements of NAFTA is evident.

418. Paragraph 114 of the RFA could not be clearer on this point. Paragraph 114 of the RFA very clearly provides that Claimants "accept" Mexico's offer of consent to arbitrate under NAFTA and submit their disputes to arbitration under the Additional Facility Rules of ICSID, making evident their consent to arbitrate as required by Article 1121(3):

> Moreover, Article 1122(1) of the NAFTA expressly recognizes the right to refer a dispute to arbitration under different procedures, including the Additional Facility Arbitration Rules. In this regard, Mexico made a unilateral offer to submit to arbitration claims for breaches of a substantive obligation of the chapter. In addition, Article 1222(2) states that "[t]he consent given by Paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of … the Additional Facility Rules for written consent of the parties." **By this Request for Arbitration, Claimants accept Mexico's offer, and hereby submit the present dispute to arbitration under the Additional Facility Rules of ICSID.**

419. Paragraph 119 of the RFA also expressly provides that "Claimants and the Mexican Companies have provided the requisite consent to arbitration under the Additional Facility and waiver in the form contemplated by Article 1121 of the NAFTA."[606] This sentence includes a reference, at footnote 43, to the powers of attorney, attached to the RFA as Exhibit C-4. As with the powers of attorney, Respondent does not claim that Claimants' expression of

[605] Claimants' Request for Arbitration (June 15, 2016), Section VI.A, ¶¶ 107 – 122.

[606] Id., ¶ 119.

their consent in the RFA was not made in writing, delivered to Mexico and included in the Claimants' submission of a claim to arbitration. Each of these requirements is met.

420. Instead, Mexico claims that Claimants' position that the above constitutes valid consent as per the requirements of Article 1121 is "specious". There is, however, nothing specious or even debatable about Claimants' compliance with the plain text of Article 1121(3). Both in the RFA and in the Powers of Attorney that have been provided, Claimants have consented to arbitrate this dispute under NAFTA.

421. Mexico next argues that Claimants contend that that they consented to arbitration by "simply filing" the Request for Arbitration.[607] Mexico goes on to say that "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.'"[608] The Tribunal need not decide *that* argument, however, as Claimants have not made it. While Claimants do think that the submission of the RFA is unmistakable evidence that they have consented to arbitrate this dispute under NAFTA and ICSID's Additional Facility Rules, Claimants have in fact provided other written consent beyond the submission of the RFA. Their express written communication of consent is included within the text of the RFA, and in particular paragraphs 114 and 119—not just the mere filing of the RFA. This, without question, complies with the requirements of Article 1121(3).

422. It bears noting that nothing in the NAFTA prevents a disputing investor from communicating its written consent within the body of the request for arbitration itself. By adopting the Treaty, each NAFTA Party made an open, standing offer of consent to submit disputes with disputing investors to arbitration.[609] It is generally accepted that that a disputing investor may accept the disputing Party's offer of consent by its submission of a claim to arbitration (i.e., filing the Request for Arbitration),[610] provided the disputing investor's written consent is included in that submission as required by Article 1121. That is precisely what Claimants did in their RFA, and Mexico fails to cite a single authority in support of its argument that Claimants' consent is invalid.

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607 Mexico's Memorial on Jurisdictional Objections, ¶¶ 91 – 92.

608 Mexico's Memorial on Jurisdictional Objections, ¶ 92.

609 C. Schreuer et al., *The ICSID Convention: A Commentary* (2009), pp. 214 – 215, **CL-4**.

610 C. Schreuer et al., *The ICSID Convention: A Commentary* (2009), p. 212, footnote 614, **CL-4**.

423. Mexico's reliance on the principle of *effet utile* is of no moment, as it is based on Respondent's mischaracterization of Claimants' argument. Claimants' contention is not that it "implicitly or constructively" consented to arbitration,[611] but that their express statements of consent in the RFA itself comply with Article 1121's requirements.

424. In sum, Claimants complied with the requirements of Article 1121 in communicating their written consent to arbitration to Mexico in the submission of their claims to arbitration through the express text within the RFA, including paragraphs 114 and 119. The Tribunal, therefore, should dismiss Respondent's objection to its jurisdiction under NAFTA.

2. Claimants Also Separately Submitted Their Consent to Arbitration Against Mexico Under NAFTA In Compliance With NAFTA Article 1121 Through Their Powers of Attorney

425. While the clear consent to arbitrate submitted by each of the Claimants and their enterprises within the RFA is sufficient to meet the requirements of Article 1121, Claimants also provided their consent to arbitrate this dispute under the requirements of NAFTA through the Powers of Attorney that each have submitted in this proceeding. There can be no question—and Mexico does not dispute—that the powers of attorney were (1) made in writing; (2) delivered to Mexico; and (3) included in the submission of a claim to arbitration, which NAFTA Article 1137 establishes occurs when the Request for Arbitration "has been received by the [ICSID] Secretary General."[612] NAFTA Article 1121 requires nothing more.[613]

426. The powers of attorney submitted by each Claimant along with Claimants' Request for Arbitration communicates, for each Claimant, its consent to arbitration:

> This POWER OF ATTORNEY is given is given to David M. Orta, A. William Urquhart, Daniel Salinas-Serrano, and Fred Bennett of Quinn Emanuel Urquhart & Sullivan, LLP, located at 777 6th 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 […] and act on [his/her/its] behalf against the United Mexican States in, arbitration proceedings under the North American Free Trade Agreement ("NAFTA"), as well as any**

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[611] Mexico's Memorial on Jurisdictional Objections, ¶ 92.

[612] NAFTA Article 1137(1)(b), **CL-1**. With respect to arbitrations under the ICSID Additional Facility Rules, Article 1137(1)(b) provides that a claim is submitted to arbitration "when the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules has been received by the Secretary-General […]." When NAFTA came into force on January 1, 1994, the operative ICSID Additional Facility Rules were those adopted in 1978. Article 2 of Schedule C of those Rules spoke in terms of a "notice" of arbitration. In 2003, the Additional Facility Rules were amended, and their Article 2 was modified to speak of a "request" for arbitration, which is the terminology Claimants use above.

[613] Mexico's Memorial on Jurisdictional Objections, ¶ 80.

ancillary settlement negotiations that may derive from [Claimant]'s intent to initiate arbitration proceedings against the United Mexican States.[614] (emphasis added)

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

428. And although Mexico has not articulated it in so many words, its argument necessarily implies that the Claimants' written expressions of consent in the powers of attorney are insufficient because they fail to recite certain specific words that, under Mexico's reading of Article 1121, are necessary to comply with that provision's requirements. But Article 1121 does not prescribe a specific formulation or format beyond the three requirements contained in its plain text.

429. What is more, Claimant Gordon Burr confirms that all of the Claimants, and their Mexican enterprises, desired and agreed to resort to arbitration against Mexico under NAFTA after Mexico rebuffed their attempts at amicable settlement.[615] Mr. Burr and his daughter, Claimant Erin Burr, met with or spoke to each Claimant to explain that the powers of attorney were intended to record their consent and authorization to file the NAFTA arbitration against Mexico, and they obtained all of Claimants' signatures.[616] Thus, Mr. Burr confirms that "[b]y signing the powers of attorney, all Claimants expressly consented to this NAFTA arbitration and authorized Quinn Emanuel to represent and act on behalf of all Claimants for all aspects of this arbitral proceeding and other related actions."[617]

430. Mexico relies on inapposite NAFTA awards and submissions from NAFTA State Parties in support of its strained argument.[618] Of the awards on which Mexico relies, not

[614] Claimants' Consent Waivers and Powers of Attorney, **C-4**.

[615] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 69.

[616] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 69.

[617] Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 69.

[618] Mexico's Memorial on Jurisdictional Objections, ¶¶ 82 – 87.

a single one deals with the issue of consent. Nor can Respondent point to an award finding a written expression of consent delivered to the disputing party in the submission of the claim to arbitration insufficient for purposes of NAFTA Article 1121.

431. Mexico instead relies on NAFTA awards and United States' submissions in cases dealing with the sufficiency of a claimant's waiver of its "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" of the NAFTA.[619] Respondent's reliance on these cases and positions, however, is unavailing. While contained in the same NAFTA article, the consent and waiver provisions exist and operate under very different circumstances. When considering the adequacy and sufficiency of a claimant's waiver under NAFTA Article 1121(1)(b) and (2)(b), Tribunals necessarily are called to delve into issues, both factual and legal, that are absent from the evaluation of a parties' compliance with the consent provisions of Article 1121. For example, a Tribunal considering the sufficiency and scope of a waiver might have to evaluate whether the waiver, as drafted, effectively waives the claimant's right to continue a proceeding under the law of the state where that proceeding is pending, or whether a pending proceeding in fact is "with respect to the measure of the disputing Party that is alleged to breach" the NAFTA.

432. Those considerations, however, are completely absent from and foreign to the simple requirements that Article 1121 calls for with respect to a claimant's consent to submit its dispute to arbitration. As mentioned, NAFTA Article 1121(3) only requires that the consent be expressed in writing, delivered to Mexico and submitted with the RFA. Claimants' powers of attorney comply with each of those requirements. Thus, Mexico's reliance on waiver cases that, in some cases, entail a very different analysis to measure the sufficiency of the waiver, is unavailing. One of the cases on which Mexico relies illustrates this point.

433. A prime example of this is Mexico's reliance on *Detroit International Bridge Company v. Government of Canada*. The tribunal in *DIBC* dismissed the claimant's claims for failure to comply with the material requirements of NAFTA's Article 1121 waiver provision.[620] In *DIBC*, the claimant had submitted with its notice of arbitration a written waiver that carved

[619] NAFTA Art. 1121(1)(b); 1121(2)(b), **CL-1**; *see* Mexico's Memorial on Jurisdictional Objections, ¶¶ 82-86.

[620] *Detroit International Bridge Company v. Government of Canada*, UNCITRAL, PCA Case No. 2012-25 (Award on Jurisdiction) (Apr. 2, 2015), **CL-3.**

out a pending litigation before the district court in Washington, D.C., which Claimant did not withdraw after the initiation of the NAFTA arbitration.[621] During the course of the proceedings, the claimant submitted two additional waivers, yet maintained the pending litigation in Washington D.C.[622] Canada objected to the jurisdiction of the tribunal and alleged that it had not consented to arbitration because the claimant did not "act consistently with that waiver" by not withdrawing from the pending litigation in Washington, D.C.[623]

434. The *DIBC* tribunal analyzed the nature and scope of the pending litigation in Washington, D.C., and concluded that:

> considering that (i) the Washington Litigation involves the same measures as those at stake in this arbitration; (ii) the Washington Complaint contains a request for damages against Canada; and (iii) the Washington Litigation is a court procedure initiated before U.S. Courts (and not before Canadian Courts), the waiver does not comply with Article 1121. Accordingly, the absence of a valid waiver prevents the Tribunal from having jurisdiction in this case.[624]

435. The *DIBC* tribunal's analysis and holding—replicated in other cases on which Mexico relies dealing with the adequacy and sufficiency of a claimant's waiver of pending or future proceedings—are irrelevant and inapposite to the evaluation of Claimants' consent in this case.

436. None of the waiver cases relied upon by Mexico stand for the proposition that there is specific language that must be utilized by a claimant in satisfying NAFTA Article 1121(3) and without which a Claimant cannot satisfy the requirements of NAFTA Article 1121(3). None stand for the proposition that Claimants must present a separate, signed writing with particular details to satisfy the requirements of NAFTA Article 1121(3). Instead, they all

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[621] The waiver at issue in *DIBC* read as follows: "DIBC and CTC] 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 in the foregoing Notice of Arbitration to be a breach referred to in Article 1116 or Article 1117 . . . . For the avoidance of doubt, this waiver does not and shall not be construed to extend to or include any of the claims included in the Complaint filed on or about March 22, 2010, in the action titled Detroit International Bridge Company et al. v. The Government of Canada et al., in the United States District Court for the District of Columbia." (emphasis added).

[622] *Detroit International Bridge Company v. Government of Canada*, UNCITRAL, PCA Case No. 2012-25, Award on Jurisdiction (Apr. 2, 2015), ¶ 237, **CL-3**.

[623] *Detroit International Bridge Company v. Government of Canada*, UNCITRAL, PCA Case No. 2012-25, Award on Jurisdiction (Apr. 2, 2015), ¶ 155, **CL-3**.

[624] *Detroit International Bridge Company v. Government of Canada*, UNCITRAL, PCA Case No. 2012-25, Award on Jurisdiction (Apr. 2015), ¶ 320, **CL-3**.

deal with situations inapposite to the present case. They therefore do not support Mexico's request for dismissal.

437. This Tribunal's inquiry into the sufficiency of the Claimants' powers of attorney as expressions of their consent to arbitrate their dispute against Mexico begins and ends with the three requirements of NAFTA Article 1121(3). These are satisfied, an thus Claimants' consent is sufficient.

438. As noted above, Claimants provided their consent to arbitrate this dispute within their RFA, and thus the additional consent they provided via the powers of attorney were not required. And yet they were provided, more than satisfying the requirements of NAFTA Article 1121(3).

439. And one cannot reasonably question that these consents, individually, or certainly when taken together, more than meet the consent requirements of NAFTA Article 1121(3). Mexico's NAFTA Article 1121 objection should therefore be dismissed.

3. NAFTA Article 1121's Consent Requirement Goes To Admissibility, Not Jurisdiction, And Dismissal Therefore Is Not Appropriate

440. The tribunal's holding in *Ethyl*[625] is important in relation to this objection. In *Ethyl*, which was an UNCITRAL case, claimants did not provide their NAFTA Article 1121 consents and waivers until they presented their Statement of Claim, and had not presented them with their Request for Arbitration. Canada objected, arguing that the Tribunal lacked jurisdiction given its argument that written consent and waivers must be filed with the request for arbitration, and that the failure to provide them at that time divested the Tribunal of jurisdiction. The tribunal disagreed.

441. The *Ethyl* tribunal found that Claimant's submission of its request for arbitration perfected the Tribunal's jurisdiction.[626] It further held that the question of compliance with NAFTA Article 1121's requirement to present written consents and waivers goes to admissibility, not jurisdiction.[627] The tribunal's words are instructive:

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[625] *Ethyl Corp. (U.S.) v. Canada*, (UNCITRAL) (Award on Jurisdiction) (June 24, 1998), **CL-5**.

[626] *Ethyl Corp. v. Government of Canada,* UNCITRAL, Award on Jurisdiction (June 24, 1998), ¶ 90 (emphasis added), **CL-5**.

[627] *Ethyl Corp. v. Government of Canada,* UNCITRAL, Award on Jurisdiction (June 24, 1998), ¶ 91 (emphasis added), **CL-5**.

> The Tribunal has little trouble deciding that Claimant's unexplained delay in complying with Article 1121 *is not of significance for jurisdiction in this case.* While Article 1121's title characterizes its requirements as "Conditions Precedent," it does not say to what they are precedent. *Canada's contention that they are a precondition to jurisdiction, as opposed to prerequisite to admissibility, is not borne out by the text of Article 1121, which must govern*. Article 1121(3), instead of saying "shall be included in the submission of a claim to arbitration" – in itself broadly encompassing concept – , could have said "shall be included with the Notice of Arbitration" if the drastically preclusive effect for which Canada argues truly were intended. *The Tribunal therefore concludes that jurisdiction here is not absent due to Claimant's having provided the consent and waivers necessary under Article 1121 with its Statement of Claim rather than with its Notice of Arbitration*.[628]

442. Here, unlike in *Ethyl*, Claimants did provide the NAFTA Article 1121 consents and waivers with their RFA, and there can be no legitimate question that Claimants provided all of the consents and waivers before ICSID registered the RFA. As the Tribunal found in *Ethyl*, the written consent and waiver is meant to memorialize in writing the general principle that the initiation of international arbitration proceedings is a manifestation of a claimant's consent to that specific dispute settlement mechanism, thereby precluding any other dispute settlement mechanisms. Here, as noted in the prior section, Claimants' RFA and Powers of Attorney did just that.

443. Applying the holding in *Ethyl*, even if the Tribunal were to conclude that some of the consents and waivers were provided after Claimants' submission of the RFA, which they were not, dismissal for lack of jurisdiction would not be the proper remedy.[629] The proper remedy would be to allow Claimants to cure the defect, but as noted there can be no question that the various writings already provided by Claimants demonstrate their consent to this proceeding to the exclusion of others.

D. THE JUEGOS COMPANIES' CONSENT AND WAIVERS ARE VALID AND THE ALLEGED *DESISTIMIENTO* HAD NO LEGAL EFFECT ON E-GAMES' CONSENT

1. The Juegos Companies' Consents Are Valid

444. On August 2, 2016, ICSID informed Claimants that it could not approve or register Claimants' RFA unless it received the Juegos Companies' consents to arbitration

[628] *Ethyl Corp. v. Government of Canada,* UNCITRAL, Award on Jurisdiction (June 24, 1998), ¶ 91 (emphasis added), **CL-5**.

[629] *Ethyl Corp. v. Government of Canada,* UNCITRAL, Award on Jurisdiction (June 24, 1998), ¶ 91 (emphasis added), **CL-5**.

pursuant to NAFTA Article 1121(2). ICSID offered Claimants the option to suspend approval and registration until presentation of the Juegos Companies' consents or to withdraw the claims on behalf of the Juegos Companies.

445. On August 5, 2016, Claimants informed ICSID that there was no need to suspend the approval and registration of Claimants' RFA because they had obtained the Juegos Companies' consents and waivers, which they submitted as an annex to the letter.[630]

446. ICSID registered Claimants' RFA on August 11, 2016.

447. Mexico now argues in its Memorial on Jurisdiction that Claimants have failed to prove the *legal validity of the Juegos Companies' consents*. As Mexico concedes, this is a separate argument from Mexico's objection that Claimants have not properly consented to this proceeding per the requirements of NAFTA Article 1121.[631]

448. According to Mexico, the legal validity of the Juegos Companies' consents and waivers are in question because the person who signed them, Mr. Luc Pelchat ("**Mr. Pelchat**"), is not one of the 39 Claimants in these proceedings and is a defendant in a litigation initiated by Claimants in a U.S. Federal Court in Colorado against certain individuals ("**Colorado Action**").[632] And because Claimants previously indicated having lost board control of the Juegos Companies,[633] Mexico argues, the circumstances under which Claimants were able to obtain Mr. Pelchat's cooperation and his authority to sign the Juegos Companies' consents and waivers are unclear.[634]

449. In light of the above, Mexico raises the following four objections: (1) that there is no evidence of Mr. Pelchat's authority to execute the Juegos Companies' consents and waivers or the circumstances that gave way to their execution;[635] (2) that Claimants must prove with evidence that the *desistimiento* filed on October 24, 2014 did not have the effect of withdrawing E-Games from the 2014 Notice of Intent;[636] (3) that Claimants must explain how

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630 Claimants' Letter to ICSID (August 5, 2016), **C-131**.

631 Mexico's Memorial on Jurisdictional Objections, ¶ 131.

632 *Id*., ¶ 127.

633 *Id*., ¶ 122, 124.

634 *Id*., ¶ 128.

635 *Id*., ¶ 128.

636 *Id*., ¶ 129.

it is legally possible for Mr. Gordon Burr to sign E-Games' consent and waiver if their apparent authorized representative submitted an alleged voluntary dismissal (*desistimiento*, in Spanish) of the arbitration to the Mexican government;[637] and (4) that, assuming the Juegos Companies' consents are legally valid, the effective date of the Juegos Companies submission of their claim to arbitration should be August 5, 2016, the date in which Claimants submitted the consents to ICSID.[638]

450. As a threshold matter, Claimants note that Mexico's arguments are predicated on an improper attempt to shift the burden of proof regarding Mexico's affirmative defenses unto Claimants. Nothing in the NAFTA requires a disputing investor to prove the "legal validity" of the consents and waivers it submits; should a disputing Party wish to contest that validity, it would be required to come forth with evidence and arguments for the claimant to rebut. Mexico has failed to do that in its Memorial, and its objection must therefore also fail.

451. In the interest of dispensing with Mexico's objections so as to proceed to the merits of this dispute, Claimants address each of Mexico's arguments in turn, proving that the Tribunal should dismiss each of these objections. In so doing, however, Claimants do not accept Mexico's effort to shift the burden proof nor do they waive any argument in that regard. Claimants, therefore, contend that the Tribunal can and should dismiss each of the above objections set forth in paragraph 41 on the basis that Mexico has not sustained its burden of proof with respect to any of these grounds.

a. Luc Pelchat Had Authority To Execute The Juegos Companies' Consents

452. When the Mexican government illegally closed the Casinos in April 2014, Claimants sought to mitigate their substantial and mounting losses, including by exploring the possibility of selling the Casinos' assets to third parties.[639] This led to negotiations with Mr. Benjamin Chow and Mr. Pelchat.[640] Mr. Chow represented to Claimants that he had contacts in SEGOB and could arrange for the reopening of the Casinos through those contacts.[641] Up to

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[637] *Id.*

[638] *Id.*, ¶ 131.

[639] Claimants' RFA (June 15, 2016), ¶ 79; Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 48.

[640] Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 49-50; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 27; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 7.

[641] Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 50; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 27; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 7.

that point, Mexico had rebuffed all of Claimants' independent efforts to resolve the disputes and reopen the Casinos.[642]

453. Messrs. Chow and Pelchat proposed a transaction that contemplated the sale of the Juegos Companies that would have allowed the U.S. shareholders to remain as indirect owners of the Juegos Companies.[643]

454. Messrs. Chow and Pelchat also told Mr. Burr that "SEGOB was unwilling to reopen the Casinos as long as the U.S. shareholders directly owned or controlled them and the Juegos Companies"[644] and recommended "replacing the current Board of Directors of the Juegos Companies with new members named by [Mr. Chow]."[645]

455. Claimants reluctantly agreed to Mr. Chow's and Mr. Pelchat's proposal and allowed them to appoint new board members for the Juegos Companies.[646] In agreeing to the change in board control of the Juegos Companies, Claimants made it clear to Messrs. Chow and Pelchat that they were doing so "under protest and only because of Mr. Chow's representations that change in board control was a necessary precondition to allow the transaction to proceed."[647]

456. On August 29, 2014, at the Juegos Companies' shareholder meetings, Mr. Chow, Mr. Pelchat, and three other individuals replaced Mr. Burr and the other members on the Boards of Directors of the Juegos Companies. Mr. Chow also took over Mr. Burr's role as the President, and chief executive manager, of all of the Juegos Companies.[648]

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[642] Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 35-36; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 26.

[643] Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 51; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 28.

[644] Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 52; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 8.

[645] Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 52; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 9.

[646] Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 52.

[647] Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 53.

[648] *See* Notarization of the Minutes of the General Shareholders Meeting of the Juegos Companies (Aug. 29, 2014), **C-36 – C-40**; Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 54; Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 30; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 10.

457. The Minutes of the Juegos Companies Shareholder Meetings ("**Minutes**") clearly evince Mr. Pelchat's designation as a Member of the Juegos Companies' Board of Directors:

> **RESOLUTIONS**
>
> **Nine.** Daniel Bernard Urden [sic], Gordon Gay Burr Jr, John Edward Conley, Eduardo Gómez Alonso and Alfredo Moreno Quijano **were removed as members of the Directors' Council of the Partnership**.
>
> […]
>
> **Eleven.** "The Partners of the Series B" nominated by unanimity José Benjamin Chow del Campo, **Luc Pelchat** and José Adolfo Ramirez Lugo **as Directors**.
>
> […].[649] (emphasis added).

458. Additionally, these Minutes attest to Mr. Pelchat's defined powers and authorities, including the specific authority to exercise all types of legal rights and actions before any competent judicial, administrative, or arbitral authority:

> Powers of attorney and authorizations are approved for José Benjamín Chow del Campo, Luc Pelchat and José Adolfo Ramírez Lucio, specifying that they will be joint only in cases that involve acts of ownership, subjecting such authorization to being performed with the joint signature of the Chairman of the Board of Directors. Likewise, powers of attorney are granted to the aforementioned individuals with a joint signature from both the Chairman and the Secretary of the Board of Directors, in relation to juristic acts with the purpose of granting bonds, guarantees and/or securities, committing all or part of the company assets.
>
> The powers of attorney and authorizations to be granted to José Benjamín Chow del Campo, Luc Pelchat and José Adolfo Ramírez Lucio are the following:
>
> **A. GENERAL POWER OF ATTORNEY FOR LITIGATION AND COLLECTIONS,** with all of the general and special authorizations that, in accordance with the law, require a special power of attorney or clause, pursuant to the terms of the first paragraph of article 2,554 (TWO THOUSAND FIVE HUNDRED FIFTY-FOUR) and pursuant to the terms of article 2,587 (TWO THOUSAND FIVE HUNDRED EIGHTY-SEVEN) of the Federal Civil Code and its correlating articles for the Federal District and its correlating articles from the other Civil Codes of the States of the Republic, to file and withdraw from all types of suits and appeals, including constitutional claims, to file and settle all types of complaints or issues and continue with all of their procedures, instances or incidents until the final decision thereof, to be in agreement or object to the resolutions of the authorities as they deem appropriate, as well as file the appropriate legal appeals.

[649] *See* Notarization of the Minutes of the General Shareholders Meeting of the Juegos Companies (Aug. 29, 2014), pg. 11, **C-36 – C-40**.

B. This includes but is not limited to the following other authorizations:

> […]
>
> b). To submit to arbitration,
>
> […]
>
> i). To represent the Company before individuals and before all types of authorities, whether civil, judicial or administrative, in common, federal, state or municipal jurisdictions and arbitration and reconciliation boards, whether federal or local.
>
> […][650]

459. Mr. Pelchat retained his board seat, with all of the attendant powers, on all of the Boards of Directors of the Juegos Companies on August 5, 2016 when he signed the NAFTA Article 1121 consents and waivers on behalf of each of the Juegos Companies.[651] It follows, then, that Mr. Pelchat had full authority to execute the Juegos Companies' consents and waivers, which he did on August 5, 2016.[652]

460. The Colorado Action was initiated to remedy the defendants' (including Messrs. Chow and Pelchat) decision to *remain* as Directors of the Juegos Companies despite Claimants' requests for them to step down in breach of the conditions under which Claimants allowed them to become Directors.

461. During the course of the Colorado Action, the U.S. shareholders reached confidential settlement agreements with Messrs. Rendón and Pelchat, and are close to reaching an agreement with Mr. Chow.[653] As part of the settlement negotiations and as a gesture of good faith, Mr. Pelchat voluntarily agreed to Claimants' request that he sign the Juegos Companies' consents and waivers, given his existing authority to do so as Member of the Juegos Companies Boards of Directors.[654] Mr. Pelchat is fully aware that he will have to resign to his position as

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650 *Id*., pg. 14.

651 *Id*.; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 16.

652 *Id*.; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 16.

653 Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 62; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 15.

654 Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 73; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 16.

soon as the U.S. shareholders request it, which they plan to do as soon as their settlement with Mr. Chow is finalized.[655]

462. Considering the above, it is patent that Mr. Pelchat had the proper authority to sign the Juegos Companies' consent and waivers and that the Colorado Action had no immediate effect on that authority. The Juegos Companies' consents and waivers are, therefore, valid, and the Tribunal should dismiss Mexico's objection.

b. The Effective Date Of The Juegos Companies' Submission Of The Claim To Arbitration Is June 15, 2016.

463. Mexico also argues that the effective date of the Juegos Companies' submission of their claim to arbitration should be August 5, 2016, the date on which Claimants submitted the Juegos Companies' consents and waivers to ICSID, and not June 15, 2016, when the Claimants submitted their RFA. Mexico would have this tribunal believe that "a notice of arbitration could not be complete until the required consents and waivers are delivered to ICSID."[656] Mexico is wrong.

464. Article 1137 defines when a claim is submitted to arbitration for purposes of the Treaty, and, as relevant, ties that event only to "*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*."[657] (emphasis added) Article 2 of Schedule C of the ICSID Additional Facility Rules, in turn, provides as follows:

> (1) Any State or any national of a State wishing to institute arbitration proceedings shall send a request to that effect in writing to the Secretariat at the seat of the Centre. It shall be drawn up in an official language of the Centre, shall be dated and shall be signed by the requesting party or its duly authorized representative.
>
> (2) The request may be made jointly by the parties to the dispute.

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[655] Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 73; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 15.

[656] Mexico's Memorial on Jurisdiction, ¶ 131, footnote 99.

[657] As explained at note 612, *supra*, NAFTA's reference to the "notice" under Article 2 of Schedule C of the ICSID Additional Facility Rules" must be read to refer to the "request" for arbitration under that same provision of the 2003 ICSID Additional Facility Rules.

465. Although not specifically referenced in NAFTA Article 1137, Article 3 of Schedule C of the ICSID Additional Facility Rules sets forth the information that the Request must contain:

> (1) The request shall:
>
> (a) designate precisely each party to the dispute and state the address of each;
>
> (b) set forth the relevant provisions embodying the agreement of the parties to refer the dispute to arbitration;
>
> (c) indicate the date of approval by the Secretary-General pursuant to Article 4 of the Additional Facility Rules of the agreement of the parties providing for access to the Additional Facility;
>
> (d) contain information concerning the issues in dispute and an indication of the amount involved, if any; and
>
> (e) state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request.

466. Neither the text of NAFTA Article 1137 nor the article of the Additional Facility Rules to which it refers condition the *effective submission* of the claim to arbitration to the presentation of valid consents and waivers.

467. Although Mexico does not articulate it expressly, its insistence that NAFTA Article 1137 be read together with NAFTA Article 1121 so as to push back the filing date of Claimants' RFA is an attempt to bring a statute of limitations argument through the back door. Should the Tribunal credit Mexico's strained interpretation of when a claim is "submitted to arbitration", Mexico will next argue that the Claimants are barred from asserting claims on behalf of the Juegos Companies pursuant to NAFTA Article 1117(2) based on measures that predate August 5, 2013. This would, for example, preclude Claimants from advancing claims in relation to the measures articulated in the RFA that occurred before this date. The Tribunal should reject this effort.

468. In any event, Mexico's argument to shift the date of the RFA's filing is contradicted by NAFTA precedent. It is well-settled that NAFTA consents and waivers submitted after the request for arbitration is filed have a retroactive effect to the date the claim was submitted. In *Pope & Talbot, Inc. v. Government of Canada*, for example, the tribunal

expressly held that nothing in NAFTA Article 1121 prevents a waiver from having retroactive effect.[658] In the words of the *Pope & Talbot* tribunal:

> **There is nothing in Article 1121 preventing a waiver from having retroactive effect to validate a claim commenced before that date**. The requirement in Article 1121(3) that a waiver required by Article 1121 shall be included in the submission of a claim to arbitration **does not necessarily entail that such a requirement is a necessary prerequisite before a claim can competently be made.** Rather it is a requirement that before the tribunal entertain the claim the waiver shall have been effected. That has now been done.[659]

469. Moreover, in *Ethyl Corp. v. Canada* (discussed above) and *International Thunderbird Gaming Corp. v. Mexico*, the tribunals held that procedural defects in relation to consents and waivers do not affect a Tribunal's jurisdiction and only go to questions of admissibility.[660] Both tribunals held that those documents can be submitted at a later stage in the proceedings, including with a claimant's memorial, without affecting the tribunal's jurisdiction to hear the disputing investor's claims.[661] Specifically, the *Thunderbird* tribunal held that unambiguous waivers submitted with the Particularised Statement of Claim were sufficient for the purposes of NAFTA Art. 1120(1)(b), as the failure to file these with the Notice of Arbitration was a mere formal defect.[662]

470. Here, any failure of the Juegos Companies to submit their consents and waivers with the Request for Arbitration is a formal, remediable defect that does not affect the Tribunal's jurisdiction, nor the date on which the RFA was filed.

471. There simply is no basis whatsoever for Mexico's argument that the effective date of the Juegos Companies' claims should be August 5, 2016. The Tribunal should dismiss this unfounded and unwarranted objection and rule that (i) the consents and waivers submitted

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[658] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL (Decision on Harmac Motion) (Feb. 24, 2000), **CL-6**.

[659] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL (Decision on Harmac Motion) (Feb. 24, 2000), ¶ 18, **CL- 6**. (emphasis added).

[660] *Ethyl Corp. (U.S.) v. Canada*, (UNCITRAL) (Award on Jurisdiction) (June 24, 1998), ¶¶ 89 – 91, **CL-6**; *International Thunderbird Gaming Corp. (U.S.) v. The United Mexican States*, (UNCITRAL) (Jan. 26, 2006), ¶¶ 114- 118, **CL-7**.

[661] *Ethyl Corp. v. Government of Canada,* UNCITRAL, Award on Jurisdiction (June 24, 1998), ¶¶ 89-91, **CL-5**; *International Thunderbird Gaming Corp. v. The United Mexican States*, UNCITRAL, Award (Jan. 26, 2006), ¶¶ 114-118, **CL-7**

[662] *International Thunderbird Gaming Corp. (U.S.) v. The United Mexican States*, (UNCITRAL) (Jan. 26, 2006), ¶¶ 114- 118, **CL-7**.

by the Juegos Companies are valid; and (ii) Claimants submitted their claims on behalf of the Juegos Companies to arbitration with the presentation of the RFA on June 15, 2016.

2. The *Desistimiento* Did Not Have Any Effect On The Validity Of E-Games' Consent to Arbitration Or Mr. Burr's Authority To Execute It

472. Mexico next argues that Claimants must "explain, and prove with evidence, that the *desistimiento*[663] filed by E-Games on 24 October 2014 did not have the effect of withdrawing E-Games as an enterprise on whose behalf a claim would be brought under the 2014 Notice of Intent."[664] Mexico further argues that, in light of the purported effect of the *desistimiento*, Claimants must prove with evidence Mr. Burr's authority to sign E-Games' consent and waiver.[665]

a. The *Desistimiento* Is A Fraudulent Document With No Legal Effect

473. On October 24, 2014, Mr. José Luis Segura Cárdenas apparently signed a letter addressed to Mexico's Ministry of Economy, which purported to withdraw the 2014 Notice of Intent on behalf of E-Games. Specifically, the letter states the following:

> "…since it is in the interest of whom I represent, I hereby withdraw from the "Notice of Intent to Submit a Claim to Arbitration under the terms of Section B of Chapter XI of the North American Free Trade Agreement" filed by my principal; as well as from all other administrative proceedings or procedures initiated by Exciting Games S. de R.L. de C.V. before any office of this Honorable Secretary, with regards to violations of the North American Free Trade Agreement."[666]

474. This document, however, is a fraudulent, failed, attempt to foreclose E-Games' ability to seek redress from Mexico under NAFTA, submitted to the Ministry of Economy without knowledge of, or authorization from, any individual with authority to speak for and bind E-Games. As the initiation of this arbitration evidences, E-Games never intended to withdraw itself from the 2014 Notice of Intent, just as none of the Claimants' intended to effect such a withdrawal on E-Games' behalf.

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663 Letter signed by Mr. José Luis Segura Cárdenas purportedly waiving the Notice of Intent filed on behalf of E-Games (*desistimiento*), **R-005**.

664 Mexico's Memorial on Jurisdictional Objections, ¶ 130.

665 Mexico's Memorial on Jurisdictional Objections, ¶ 130.

666 Letter signed by Mr. José Luis Segura Cárdenas purportedly waiving the Notice of Intent filed on behalf of E-Games (*desistimiento*), **R-005**.

475. What is more, Mr. Segura, the person who apparently signed that *desistimiento*, is now before the Tribunal explaining that he did not have authorization from E-Game's board or President to sign this document, that he did not receive instructions from any authorized E-Games representative to sign the *desistimiento*, and that he signed it under false pretenses without knowledge of exactly what he was signing or of the effects that document purported to have.[667] For these reasons, the Tribunal should dismiss Mexico's reliance on the *desistimiento*.

476. Claimants Gordon Burr, Erin Burr and John Conley, E-Games' principal owners and controllers,[668] never authorized or instructed Mr. Segura to sign the *desistimiento*.[669] In fact, Claimants never even mentioned the NAFTA arbitration to Mr. Segura, much less gave him instructions to take actions in relation to it.[670] Furthermore, it strains credulity to believe that Claimants, now pursuing a NAFTA claim for hundreds of millions of dollars in damages caused by Mexico's destruction of their casino investments, would have a junior attorney who never had any significant role in E-Games' representation, to withdraw the enterprise—which happens to be the permit holder—from the arbitration. This simply did not happen.

477. Mr. Julio Gutiérrez, E-Games' external, Mexican counsel and authorized legal representative, and Mr. Luc Pelchat, Member of the Juegos Companies' Boards of Directors, also did not authorize or instruct Mr. Segura (or anyone else) to sign or submit the *desistimiento*, nor did they even discuss the NAFTA proceeding with him.[671]

478. Mr. Segura also confirms that he never received any authorization or instruction from the abovementioned individuals, and that he never even spoke to them about anything related to the NAFTA arbitration, let alone E-Games' withdrawal from the 2014 Notice of Intent.[672]

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667 José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶¶ 21, 24, 26-27.

668 Erin Burr Witness Statement (July 25, 2017), **CWS-2**, ¶¶ 43-44; Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 17.

669 Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 65; José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶¶ 26-27.

670 Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 65; José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶¶ 26-27.

671 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 43.; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 18; José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶¶ 21, 26-27.

672 José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶¶ 21, 26-27.

b. The Circumstances Under Which Mr. Segura Apparently Signed The *Desistimiento* Confirm That It Is A Fraud With No Legal Effect

479. As previously mentioned,[673] on October 24, 2014, Mr. Segura was asked by individuals who did not speak for or represent E-Games or the Claimants to sign certain documents on the pretense that they were necessary for the reopening of the Casinos.[674] Mr. Segura signed several documents that he neither prepared or drafted without reviewing them.[675] One of the documents was an *allanamiento* to be filed at SEGOB, and another was the *desistimiento*.[676] Mr. Segura signed these documents relying on Mr. Noriega's false representation that E-Games' shareholders and Directors had authorized him to do so, and that Claimants were aware of these documents.[677]

480. The entire scheme to have Mr. Segura sign the *allanamiento* and the *desistimiento* and to file them at the Ministry of the Economy and SEGOB was carried out behind Claimants' backs. Mr. Segura—after recently inspecting the documents—has confirmed that he did not sign the version of the *allanamiento* that Respondent filed in this proceeding, and that he does not recall having seen or signed most of the other documents that Mr Gutiérrez identified as improperly filed at SEGOB.[678] Mexico's use of the *desistimiento* in this proceeding to cast doubt over E-Games' consent, thus, is disingenuous at best. This disingenuousness is further highlighted by the fact that Mr. Carlos Vejar ("**Mr. Vejar**"), then Director of Consulting and Negotiations at the Ministry of Economy, told Mr. Gutiérrez in a meeting on July 13, 2016, that the Ministry of Economy never responded to the *desistimiento* because they doubted its validity and legal effect.[679]

481. Given these factual circumstances, the Tribunal should discard the *desistimiento* as a fraudulent document and find that it had no effect on E-Games' consent to file the arbitration.

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673 *See supra*, ¶¶ 99 – 113.

674 José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 18.

675 José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 21.

676 José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 24.

677 José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶¶ 13, 21, 27.

678 José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶¶ 32-37.

679 Julio Gutiérrez Witness Statement (July 20, 2017), **CWS-3**, ¶ 49.

c. In Any Event, The *Desistimiento* Is An Invalid *Ultra Vires* Act

482. Mexican law, a legal representative of a company is only authorized to execute acts entrusted to him by the company's board. Article 2562 of the Mexican Civil Code provides that:

> [t]he agent, in the performance of his mandate, shall adhere to the instructions received from the principal and in no case shall proceed against express commands.

483. In a similar vein, Article 2563 of the Mexican Civil Code states that:

> In what is not foreseen and expressly prescribed by the principal, the agent must consult with him, whenever the nature of the business allows it. If it is not possible to consult or if the agent were authorized to act in his own discretion, he will do what prudence dictates, taking care of the business as his own.

484. Mr. Segura, as E-Games' legal representative (*apoderado legal*), was only authorized to execute acts specifically entrusted to him by the company's Board.[680] E-Games' Board never instructed or authorized Mr. Segura to sign the *desistimiento*.[681] Furthermore, Mr. Segura should have consulted E-Games' Board before signing the *desistimiento*, but he never did.[682] In signing the *desistimiento* without consulting and obtaining authorization from the E-Games Board, Mr. Segura clearly exceeded his authority as E-Games' *apoderado legal*.

485. Article 2583 of the Mexican Civil Code provides that a legal representative's action beyond his scope of authority is void, unless the principal tacitly or expressly ratifies it.[683] Additionally, Mexican courts have repeatedly held that an action taken by a legal representative while exceeding the authority granted to him, unless ratified by the principal, is void.[684]

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680 Civil Code for the Federal District of Mexico, Article 2562, **CL-8**.

681 Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 65; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 18; José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 26.

682 Gordon Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 65; Luc Pelchat Witness Statement (July 21, 2017), **CWS-4**, ¶ 18; José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 26.

683 Civil Code for the Federal District of Mexico, Article 2583 ("The acts performed by an agent in the name of a principal, but exceeding the express limits of the mandate, shall be void, in relation to the principal, if not tacitly or expressly ratified by the principal."), **CL-8**.

684 *See, e.g.*, Order of the *Primera Sala de la Suprema Corte de Justicia de la Nación* (May, 2007) (holding that "…the acts carried out by the agent in the name of the principal, but exceeding the express limits of the mandate, will be void in relation to the principal, if not tacitly or expressly ratified."), **CL- 9**; Order of the *Tercera Sala de la Suprema Corte de Justicia de la Nación* (April, 1959) (holding that "whatever is executed by the agent outside the limits of his power is, for the principal, *res inter alios acta*."),**CL- 10.**

486. Because Games' Board of Directors did not authorize Mr. Segura to sign or file the *desistimiento*, and did not ratify this *ultra-vires* act, that document lacks any legal effect and the Tribunal should disregard it completely.

487. But the *desistimiento* is void for another reason as well. Mexican law also requires that any waiver or dismissal of rights be documented through in an indubitable and reliable instrument (such as a notarized document).[685] If the waiver is not contained in an indubitable and reliable instrument, Mexican law requires that the private document that purports to carry out the waiver be ratified by the person who signs the document.[686] Ratification of a document consists of the governmental agency where the document was filed requesting the person who signs the document to confirm that he has the authority necessary to sign it, and that the document reflects the will of the person who signs it, or of the person in whose name it is presented. Private documents, such as the *desistimiento*, are not considered indubitable and reliable instruments, and thus, must be ratified.[687] Unless ratified, private documents, like the *desistimiento*, only provide an indication of what is stated in them, and not "full proof" of the information they contain.[688]

488. Because the *desistimiento* is an *ultra vires* act, E-Games' Board of Directors did not authorize Mr. Segura to sign or file the *desistimiento*, and did not ratify this *ultra-vires* act, that document lacks any legal effect and the Tribunal should disregard it completely that sought to waive and dismiss E-Games' rights as a Claimant in the NAFTA arbitration, E-Games' Board of Directors must have ratified it in order for the *desistimiento* to have had effect. It was not ratified, so it never had legal effect. Importantly Claimants have no record of Economia's acknowledgement of receipt for the *desistimiento*, or of any request to ratify it.[689] Mr. Vejar's statements to Mr. Gutierrez as detailed above confirm that not even Mexico took the *desistimiento* as a valid document until its jurisdictional objections.[690]

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685 *Id.*

686 Civil Code for the Federal District of Mexico, Article 7; Order of the *Cuarto Tribunal Colegiado en Materia Civil del Primer Circuito* (Sept. 1992) (holding that "[a] waiver of rights, as provided in Article 7 of the Civil Code for the Federal District, must be made in clear and precise terms, in such a way that there is no doubt of the right that is being waived, in order for it to produce an effect. To achieve the satisfaction of these requirements, it is indispensable that the renunciation be documented in an indubitable and reliable instrument, since only in this way will there be clarity and precision in the terms of the withdrawal and an absence of doubts about the right that is being renounced."), **CL- 11.**

687 Order of the *Cuarto Tribunal Colegiado en Materia Civil del Primer Circuito* (Sept. 1992), **CL- 11**.

688 Order of the *Cuarto Tribunal Colegiado en Materia Civil del Primer Circuito* (Sept. 1992), **CL- 11**.

689 José Luis Segura Cárdenas Witness Statement (July 18, 2017), **CWS-5**, ¶ 25.

690 *See*, *supra*, para. 68.

d. The *Desistimiento* Had No Effect On Gordon Burr's Authority To Sign E-Games' Consent And Waiver

489. For the reasons mentioned above, the *desistimiento* has no legal effect whatsoever on E-Games' claims in this arbitration or on Claimants' ability to bring claims on E-Games' behalf. Mexico, however, has made an additional argument: that Claimants must prove Mr. Burr's ability to sign the E-Games' consent and waiver, in light of the *desistimiento*.

490. Mr. Burr not only is an E-Games shareholder, but also its CEO and President, and the individual who exercised all management control over the company.[691] The Minutes of E-Games' Board of Directors clearly evidence Mr. Burr's designation as the President of the Board:

> "The new integration of the Board of Directors is approved, and it is to be comprised in the following way:
>
> | 1. **NAME** | 2. **TITLE** |
> |---|---|
> | 3. Gordon G. Burr | 4. President |
>
> […]"[692]

491. It follows, then, that Mr. Burr has full authority to execute E-Games' consent and waiver, just as he did on July 21, 2016.[693] The fraudulent *desistimiento* had no effect whatsoever on Mr. Burr's role within E-Games or on his authority to represent and bind the company.

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[691] Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 17.

[692] Notarization of the Minutes of the General Shareholders Meeting of Exciting Games S. de R.L. de C.V. (Feb. 21, 2014), p. 22, **C-63**.

[693] Claimants' Response to the United Mexican States' Objection to Claimant's Request for Approval to Access the ICSID Additional Facility and Request for Arbitration in the matter of of BMex, LLC et al. v. United Mexican States, and Response to ICSID's Questionnaire (July 6, 2016), Annex B, p. 11, **C-121**; Gordon G. Burr Witness Statement (July 25, 2017), **CWS-1**, ¶ 74.

VI. RELIEF SOUGHT

492. For the foregoing reasons, Claimants respectfully request that the Tribunal:

a. reject and dismiss in their entirety all of Mexico's objections to the Tribunal's jurisdiction;

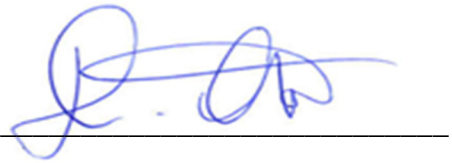
b. proceed with the scheduling of the merits phase of this arbitration

c. order Mexico to pay all costs incurred in connection with Mexico's jurisdictional objections, including the arbitrators' costs and fees, as well as Claimants' costs and legal expenses incurred in connection with Mexico's jurisdictional objections, including, without limitation, the fees of their legal counsel, experts and consultants, and those of Claimants' own employees, plus interest at a reasonable rate from the date on which such costs were/are incurred to the date of payment; and

d. such other relief as the Tribunal may deem just and proper.

493. Claimants reserve their right to modify or supplement the claims and prayer for relief stated in this Counter-Memorial on Jurisdiction, to advance further claims, arguments, and prayers for relief and to produce further evidence (whether factual or legal) as may be necessary to complete and supplement the presentation of those claims, or to respond to any arguments or allegations raised by Mexico.

Respectfully submitted,



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