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

REJOINDER
ON
JURISDICTIONAL OBJECTIONS

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8 January 2018

QUINN EMANUEL URQUHART & SULLIVAN LLP
777 6TH STREET , N.W., 11TH FLOOR, WASHINGTON, D.C. 20001

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GLOSSARY OF TERMS

Additional Claimants	Refers to Claimants whose names do not appear in the 2014 Notice of Intent: • B-Cabo, LLC; • Colorado Cancún, LLC; • Daniel Rudden; • David Figueiredo; • Deana Anthone; • Deborah Lombardi; • Diamond Financial Group, Inc.; • Douglas Black; • EMI Consulting, LLC; • Family Vacation Spending, LLC; • Financial Visions, Inc.; • Howard Burns; • James H. Watson, Jr.; • J. Johnson Consulting, LLC; • J. Paul Consulting; • Las KDL, LLC; • Louis Fohn; • Marjorie "Peg" Rudden; • Mark Burr; • Mathis Family Partners, Ltd.; • Neil Ayervais; • Palmas Holdings, Inc.; • P. Scott Lowery; • Ralph Pittman; • Randall Taylor; • Robert E. Sawdon; • Thomas Malley; • Trude Fund II, LLC; • Trude Fund III, LLC; and • Victory Fund, LLC.
Additional Mexican Enterprises	Refers to Mexican Companies not mentioned in the 2014 Notice of Intent: • Merca Gaming, S. de R.L. de C.V.; • Metrojuegos, S. de R.L. de C.V.; and • Operadora Pesa, S. de R.L. de C.V.
Affected Juegos Companies	Refers to: • 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 y Videos de México, S. de R.L. de C.V.; and

	• Juegos de Video y Entretenimiento del DF, S. de R.L. de C.V.
Amended Notice of Intent	Claimants' Amended Notice of Intent, delivered on September 2, 2016
B-Mex Companies	Refers to: • B-Mex, LLC; • B-Mex II, LLC; and • Palmas South, LLC.
Casinos	Refers to the Claimants' gaming facilities in the following Mexican cities: • Naucalpan; • Villahermosa; • Puebla; • Cuernavaca; and • Mexico City.
Controlling Disputing Investors	Refers to the Claimants who submitted the 2014 Notice of Intent: • Gordon G. Burr; • Erin J. Burr; • John Conley; • B-Mex, LLC; • B-Mex II, LLC; • Palmas South, LLC; • Oaxaca Investments, LLC; and • Santa Fe Mexico Investments, LLC.
Counter-Memorial	Claimants' Counter Memorial on Jurisdictional Objections (Jul. 25, 2017).
Economía	Secretaría de Economía (Mexico's Ministry of Economy)
E-Games	Exciting Games, S. de R.L. de C.V.
Games & Raffles Division	Division of SEGOB in charge of regulating the gaming industry in México (in Spanish, *Juegos y Sorteos*)
Grand Odyssey	Grand Odyssey S.A. de C.V.
Juegos Companies	Refers to: • Juegos de Video y Entretenimiento de México, S. de R.L. de C.V. ("**JVE Mexico**"); • Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. ("**JVE Sureste**"); • Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. ("**JVE Centro**");

	• Juegos y Videos de México, S. de R.L. de C.V. ("**JyV Mexico**"); and • Juegos de Video y Entretenimiento del DF, S. de R.L. de C.V. ("**JVE DF**")
Memorial	Respondent's Memorial on Jurisdictional Objections (May 30, 2017).
Mexican Enterprises	Refers to: • Juegos de Video y Entretenimiento de México, S. de R.L. de C.V. ("**JVE Mexico**"); • Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. ("**JVE Sureste**"); • Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. ("**JVE Centro**"); • Juegos y Videos de México, S. de R.L. de C.V. ("**JyV Mexico**"); • Juegos de Video y Entretenimiento del DF, S. de R.L. de C.V. ("**JVE DF**"); • Exciting Games, S. de R.L. de C.V. ("**E-Games**"); • Merca Gaming, S. de R.L. de C.V.; • Metrojuegos, S. de R.L. de C.V.; and • Operadora Pesa, S. de R.L. de C.V.
Mexico or Respondent	The United Mexican States
NAFTA	North American Free Trade Agreement
2014 Notice of Intent	Claimants' Notice of Intent, delivered on May 23, 2014
Option Agreement	Option Agreement between Alfredo Moreno Quijano and John Conley (Jun. 2, 2011).
Optioned Shares	Mr. Conley's 13.34% ownership interest in E-Games.
Reply	Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017).
RFA	Claimants' Request for Arbitration, submitted on June 15, 2016.
SEGOB	Secretaria de Gobernación (Mexico's Interior Ministry)
SPA	Stock Purchase Agreement
Transaction	Proposed merger transaction by Mr. Benjamin Chow designed to divest the U.S. shareholders of direct ownership in the Juegos Companies.

U.S. Shareholders	Refers to the U.S. claimant investors in the Juegos Companies
VCLT	Vienna Convention on the Law of Treaties
VGS	Video Gaming Services, Inc.
White & Case	White & Case, LLP
White & Case Letter	Letter from Ms. Andrea Menaker of White & Case to Mr. Miguel Angel Osorio Chong, and to the General Directorate of Foreign Investment of the Ministry of Economy, delivered January 16, 2013.

I. INTRODUCTION

1. In its Reply, Mexico attempts to impose a series of formalistic and unfounded obstacles to block Claimants from proceeding to the merits phase. Mexico invents purported jurisdictional requirements that are nowhere to be found in the NAFTA ("**NAFTA**" or "**Treaty**"). It advances arguments based on conjectures that are factually erroneous and legally irrelevant, attempts to ignore well-settled NAFTA jurisprudence and rests its positions not on authority and analysis, but on the bare, unsupported opinions of its counsel and fellow NAFTA parties. Mexico's objections to this Tribunal's jurisdiction are completely devoid of merit. The Tribunal should reject them and order the prompt initiation of the merits phase of these proceedings.

2. Mexico objects to Claimants' standing to bring claims on behalf of their Mexican enterprises under NAFTA Article 1117, but its objections have proven to be an exercise in waste and futility. The objections are so devoid of merit as to cause one to question why Mexico has wasted this Tribunal's time and Claimants' resources in having to respond to them.

3. According to Mexico, Claimants can only establish standing by meeting Mexico's own set of standing requirements of ownership and control, which differ from, and none of which are found, in the text of the Treaty. More specifically, Mexico would have this Tribunal find that the meaning of ownership under NAFTA Article 1117 actually means something more than majority ownership and something equating to "full or virtually full ownership," whatever that actually means. As to control, Mexico attempts to import into NAFTA Article 1117 concepts of legal control under Mexican law. Mexico does not point to a single provision of the NAFTA or to even a single case (within or outside of the NAFTA framework) that supports its spurious arguments. Instead, Mexico offers its own, unsupported, opinion as authoritative and, without hesitation, blatantly rejects accepted NAFTA jurisprudence on the issue of what constitutes "ownership" and "control" under NAFTA Article 1117.

4. The terms of NAFTA Article 1117 are clear. There are four well-established alternative avenues by which an investor may establish its standing to bring a claim on behalf of an enterprise: (1) direct ownership; (2) indirect ownership; (3) direct control; or (4) indirect control. The investor only must establish one of them to bring a claim on behalf of an enterprise. Contrary to Mexico's arguments, there are no additional, unwritten requirements, as confirmed by the treaty's text and the NAFTA jurisprudence.

5. Consistent with applicable NAFTA cases and international investment treaty practice, the ordinary meaning of the word "own" under Article 1117 refers to majority ownership and not "full or virtually full ownership," as Mexico contends. Likewise, "control" under Article 1117 refers not only to legal corporate control (as universally understood, and not tied to Mexican law peculiarities), but also to factual, *de facto* control of an enterprise, including without limitation managerial control. Mexico's arguments thus are nothing more than invented propositions meant to serve as obstacles to Claimants' legitimate claims.

6. Mexico's arguments about Claimants' supposed insufficient evidence to prove standing also fail. Claimants have done more than what the NAFTA requires of them to prove their standing to sue on behalf of the Mexican Enterprises. The evidentiary record firmly establishes that Claimants both own *and* control the Mexican Enterprises, despite that only one of those would suffice. In addition to the evidence already provided in Claimants' Counter-Memorial and the document production phase, which is in and of itself more than sufficient to establish Claimants' ownership and control of the Mexican Enterprises, each Claimant has now provided a declaration describing in detail his/her/its ownership interest in the Juegos Companies. With regards to this latter point, it bears noting that Mexico itself concedes that these statements are the "best evidence" to establish ownership interest; it should not now be heard to argue otherwise.

7. Claimants have adduced conclusive evidence of their ownership and control of the Juegos Companies, E-Games, and Operadora Pesa. Claimants own the majority of overall shares *and* Class B shares of each of the Juegos Companies, assuring them full, legal control over the enterprises. Claimants also exercise *de facto* control over the Juegos Companies through their total managerial control of the enterprises. Additionally, Claimants own and control E-Games through majority ownership, as well as through voting and *de facto* managerial control. And finally, Claimants also control all aspects of Operadora Pesa's management and operations. Claimants accordingly have standing to bring claims on behalf of all of the Mexican Enterprises under Article 1117.

8. Notwithstanding the above, Mexico claims that Claimants' evidence of their ownership in the Juegos Companies is limited, incomplete or inconsistent. These claims are wholly contradicted by the record. There simply is no authority to support the sheer volume and kinds of documents Mexico seeks to prove standing under the NAFTA. Mexico also has not put forth a single piece of evidence to rebut Claimants' evidence that they own *and* control each of the Mexican Enterprises. In a similar vein, Mexico's allegations of inconsistency in the

Claimants' evidence only reflect that Mexico either has failed to properly review the evidence already submitted by Claimants, or has chosen to ignore the evidence that does not suit its theories.

9. While Mexico also attempts to argue that Claimants lost control of the boards for the Juegos Companies to Messrs. José Benjamín Chow del Campo ("**Mr. Chow**") and Luc Pelchat ("**Mr. Pelchat**") and lost ownership of some of their shares in these companies to Mr. Chow's Grand Odyssey company, those arguments fail and do nothing more than demonstrate Mexico's opportunistic tactics. Claimants agreed to change the members of the Juegos Companies' boards for a limited time in an attempt to satisfy what it understood to be demands by Mexico that it not be associated with these companies, but they never lost their rightful legal or *de facto* control over any of these companies. Messrs. Chow and Pelchat, who now have resigned from the boards, have provided testimony confirming this and corroborating that, at all times and with very limited exceptions, they responded to the U.S. shareholders and followed their specific instructions on all matters related to the Juegos Companies' management and operations. Messrs. Chow and Pelchat have also confirmed that they never transferred any shares to Grand Odyssey.

10. To leave absolutely zero doubt over these issues, the Juegos Companies' shareholders held *asambleas* on January 5, 2018 at which they adopted resolutions that evidence the futility of Mexico's standing arguments. At the *asambleas*, the shareholders nullified and declared void *ab initio* all resolutions approved at the November 2014 *asambleas*, which purported to evidence (nonexistent) transfers of the U.S. shareholders' shares in certain Juegos Companies to Grand Odyssey. Messrs. Chow and Pelchat (and others appointed by them) also resigned as members of the Juegos Companies' Boards of Directors and were, in turn, replaced by Mr. Gordon Burr, Ms. Erin Burr and individuals who they selected. Finally, the Juegos Companies' shareholders acknowledged the validity of the Claimants' ownership in the Juegos Companies, including any transfers of shares in the Juegos Companies that had not been reflected in prior *asambleas*, and the new boards have agreed to hold additional *asambleas* on January 29, 2018 to formalize these transfers.

11. Mexico's objections based on NAFTA Article 1119 regarding Claimants' notice of intent fare no better. Claimants gave proper notice of the dispute and repeatedly approached Mexico to attempt an amicable settlement without success. Mexico had no interest in engaging Claimants in any pre-dispute settlement dialogue. Instead, it simply sought to gain an unfair

edge by sending a self-serving questionnaire, which Claimants rightfully declined to answer. Mexico has been unable to refute these critical points.

12. Faced with the overwhelming evidence provided in Claimants' Counter-Memorial establishing the above facts, Mexico simply chose to attempt to re-write history by providing an oversimplified and self-serving account of the events that led to and followed the 2014 Notice of Intent, accompanied by a single witness statement that provides no support for its version of events. In fact, this witness statement confirms that Mexico's response to the 2014 Notice of Intent was not to engage Claimants in good faith discussions, but to embark on a fishing expedition designed to provide Mexico with a head start in preparing its defense. Even more telling is Mexico's decision not to submit witness statements from SEGOB and Economía officials who had direct knowledge of Claimants' numerous and persistent attempts to discuss their claims with Mexico, and Mexico's refusal to engage them.[1]

13. In the end, Mexico asks this Tribunal to accept its hyper-technical objections that rely on standards nowhere found in the NAFTA. No NAFTA tribunal has *ever* declined to exercise jurisdiction based on technical defects in the notice of intent of the kind at issue here. By insisting robotically on form over substance, Mexico's objections depart drastically from the notice of intent requirement's object and purpose, which is to afford investors and governments an opportunity to amicably resolve a dispute before it reaches international arbitration. This Tribunal should reject Mexico's overly-formalistic and draconian reading of NAFTA Article 1119 and deny its related objections.

14. Claimants fully complied with NAFTA Article 1119 and, given Mexico's disinterest in engaging Claimants in good faith discussions, requiring the Additional Claimants to issue additional or revised notices of intent (or, worse, initiate new proceedings), would have been entirely futile. The record eloquently proves this futility as, even after receiving the Amended Notice of Intent, which included the names and addresses of each Additional Claimant whose information was omitted from the 2014 Notice of Intent, Respondent made no effort whatsoever to approach the Additional Claimants (or any Claimant, for that matter).

[1] These individuals include (1) Ms. Marcela Gonzalez Salas (former Director of SEGOB's Games and Raffles Division); (2) Mr. Luis Felipe Cangas (Ms. Salas' successor as Director of the Games and Raffles Division); (3) Mr. David Garay Maldonado (Director of the Government Unit at SEGOB); (4) Mr. Hugo Vera (Legal Director of SEGOB); (5) Mr. Luis Enrique Miranda Nava (Under-Secretary of SEGOB); and (6) Mr. Carlos Vejar (former Director of Consulting and Negotiations at Economía).

15. Not only would it be futile, but as the record now establishes, Mexico seeks this result to attempt to manufacture a limitations argument and argue that any re-filed claims are time barred. That would be simply preposterous under these facts.

16. Mexico's consent objections based on NAFTA Article 1121 not only also are wholly devoid of merit, but they are perhaps the most baffling of them all. Mexico has contorted its writings and arguments in an effort to prove that Claimants' clear expressions of written consent under Article 1121 are something different. They are not. They are the very consent required by Article 1121, pure and simple.

17. In relation to Claimants' argument that they complied with Article 1121 by the consent provided within the text of their RFA, Mexico simply notes that it has "doubts" as to whether Claimants could consent in the text of the RFA. Mexico, however, does not cite a single authority to support that a NAFTA claimant may not comply with Article 1121 by statements made in their RFA.

18. In response to Claimants' argument that they also provided their written consent in the powers of attorney they granted to counsel, Mexico attempts to invent a magical, written incantation that must be provided by NAFTA claimants in order to comply with Article 1121. Mexico's argument is entirely divorced from the text of NAFTA Article 1121.

19. Claimants complied with all three requirements in NAFTA Article 1121(3) in both the text of the RFA and powers of attorney. NAFTA Article 1121 requires nothing more, and neither should this Tribunal.

20. Mexico seems to have abandoned its consent objection regarding the filing of the Juegos Companies' consents and waivers during ICSID's registration of this case. In their Counter-Memorial, Claimants soundly refuted each of Mexico's arguments and provided evidence regarding the validity of the Juegos Companies' consents and waivers, which Mexico has not attempted to refute. This objection is nowhere found in its Reply and should thus be deemed waived.

21. Mexico similarly excluded from its Reply (and thus abandoned) its other jurisdictional objections. *First*, Mexico has not made any specific submission regarding Claimants' individual standing as investors with protected investments to bring claims under NAFTA Article 1116. *Second*, Mexico has abandoned its objection regarding Mr. Gordon Burr's authority to issue the E-Games' consent and waivers. And *third*, Mexico completely fails to respond to Claimants' arguments regarding the *Desistimiento*, the fraudulent document

that Mexico cavalierly relied on in its Memorial. Save for an oblique reference to Economía's supposed unsolicited receipt of the *Desistimiento*, it appears that Mexico paid heed to Claimants' warning that they should have consulted and done their due diligence prior to relying on a fraudulent document and making a baseless jurisdictional argument in reliance on it.

22. Mexico's Reply stands as articulate evidence of its apparent desire to deprive Claimants of their rightful day before this Tribunal. Claimants have shown throughout the length of this jurisdictional phase, that they not only complied with all of NAFTA's jurisdictional requirements, but done so convincingly. This Tribunal should take note of Mexico's dogged insistence on clinging to formalistic and often times contorted arguments that strain common sense and depart from the text of the NAFTA and established precedent. Chapter Eleven of the NAFTA provides investors with an international, impartial forum to redress the effects of the state's illegal conduct consistent with international norms of due process. It is not, as Mexico would have this Tribunal find, a labyrinth of potholes and obstacles that a disputing investor must traverse before establishing its right to have its claims heard by a tribunal.

23. For the aforementioned reasons and those that follow as well as those articulated in Claimants' Counter-Memorial, 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 Claimants incurred in defending against Mexico's spurious jurisdictional objections.

II. OVERVIEW OF SUBMISSION

A. OVERVIEW OF THIS REJOINDER

24. The remainder of this Rejoinder is organized as follows.

a. **Section III** rebuts Mexico's legal arguments from its Reply.

- *First*, this section addresses Mexico's objections to Claimants' standing to bring claims on behalf of the Mexican Enterprises they own and control under NAFTA Article 1117, as well as Mexico's general objection regarding Claimants' standing as investors with protected investments under NAFTA Article 1116 (**Section III.A.**).

- *Second*, it addresses Mexico's objections based on Claimants' Notice of Intent under NAFTA Article 1119 (**Section III.B.**).

- And, *third*, the section deals with Mexico's objections regarding Claimants' consent to arbitration under NAFTA Article 1121 (**Section III.C.**).

b. **Section IV** sets out Claimants' request for relief.

B. WITNESS STATEMENTS, EXHIBITS, AND LEGAL AUTHORITIES

25. This Rejoinder is accompanied and supported by statements from the following witnesses:

a. Gordon G. Burr dated January 7, 2018 (**CWS-7**);

b. Erin J. Burr dated January 7, 2018 (**CWS-8**);

c. Julio Gutiérrez dated January 7, 2018 (**CWS-9**);

d. Luc Pelchat dated January 3, 2018 (**CWS-10**);

e. José Benjamin Chow del Campo dated January 4, 2018 (**CWS-11**);

f. Neil Ayervais dated January 7, 2018 (**CWS-12**);

g. John Conley dated January 7, 2018 (**CWS-13**);

h. Moises Opatowski dated January 8, 2018 (**CWS-14**);

i. José Ramón Moreno dated January 3, 2018 (**CWS-15**);

j. Additional Claimant declarations dated January 4 and 7, 2018 (**CWS 16 through CWS-49**)

26. The Rejoinder also is accompanied and supported by exhibits numbered consecutively from Exhibit **C-132** to **C-210** and legal authorities numbered consecutively from **CL-40** to **CL-56**. Pursuant to Procedural Order No. 1, exhibits and legal authorities in English will not be translated into Spanish. This submission, along with all 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. LEGAL ARGUMENT

A. CLAIMANTS OWN AND CONTROL ALL CASINO ENTERPRISES IN THIS DISPUTE AND HAVE STANDING TO BRING ARTICLE 1117 CLAIMS

27. The Tribunal should dismiss Respondent's challenges to Claimants' standing under Article 1117 in their entirety. The evidentiary record firmly establishes that the Claimants own *and* control the Mexican Enterprises, despite that only one of those requirements is needed to establish standing under the NAFTA. NAFTA Article 1117 grants Claimants the right to sue on behalf of the Mexican Enterprises and hold Mexico to account for its destruction of their enterprises.

28. In the Counter-Memorial, Claimants explained that NAFTA tribunals have refused to adopt restrictive interpretations of Chapter Eleven's standing requirements that are unsupported by the treaty text.[2] This statement is by now uncontroversial. In its Reply, Mexico has nonetheless attempted to manufacture novel, formalistic and restrictive jurisdictional requirements that are *nowhere* to be found in the NAFTA, such as, for example, nonexistent requirements under Article 1117 that shareholders *must* conclude a proxy agreement in order to exercise "control" over an enterprise;[3] that investors *must* hold an ownership interest in an enterprise to have standing (despite the express terms of the provision allowing an investor who "owns or controls directly or indirectly" an enterprise to bring a claim on its behalf);[4] and that investors *must* hold "full" or "virtually full" ownership of the enterprise's shares (contrary to the universal understanding that international investment treaty protections are accorded to investments that are majority owned by foreign investors).[5] None of these requirements are supported by the treaty text or by NAFTA jurisprudence.

29. Mexico further asserts that its unsupported jurisdictional requirements must be established utilizing an exacting evidentiary standard, requiring individualized shareholder declarations complete with "lawyers' or notaries' reporting letters, copies of share certificates, cancelled cheques and/or receipts, and dividend statements."[6] And on Mexico's outlandish

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2 Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 156.

3 Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 200 – 203.

4 Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 196.

5 Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 200.

6 Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 215.

view, all of this evidence must be submitted at the very first jurisdictional briefing.[7] These requirements are nowhere to be found in the NAFTA. Mexico's objections are thus unreasonable and legally erroneous.

30. Chapter Eleven of the NAFTA provides a detailed and exhaustive set of rules and definitions for determining standing. These are the only requirements to be applied by this Tribunal in assessing Mexico's standing objections. There is simply no room to adopt the new requirements or restrictive interpretations advanced by Mexico and unsupported by the treaty's text.

31. This Tribunal need read no further than the award in *Waste Management, Inc. v. United Mexican States (II)* to understand that Mexico's efforts to import new standing requirements in this proceeding should be rejected. In that case, the NAFTA tribunal rejected Mexico's attempts to import new requirements into Chapter Eleven's rules of standing. In particular, the NAFTA tribunal in *Waste Management, Inc. (II)* rejected Mexico's attempt to add a *mens rea* requirement in the standing rules. Mexico argued that because it, as host country, was not aware that the Mexican enterprise at issue was indirectly owned by the U.S. claimant, the enterprise could not qualify as an "investor" under NAFTA. The tribunal rejected this argument, explaining in detail the scheme provided by Chapter Eleven:

> In any event there is no general requirement of *mens rea* or intent in Section A of Chapter 11. The standards are in principle objective: if an investor suffers loss or damage by reason of conduct which amounts to a breach of Articles 1105 or 1110, it is no defence for the Respondent State to argue that it was not aware of the investor's identity or national character. The only question is whether the various requirements of Chapter 11 in this regard are satisfied.
>
> 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. They deal with possible "protection shopping", i.e. with situations where the substantial control or ownership of an enterprise of a Party lies with an investor of a non-party and the enterprise "has no substantial business activities in the territory of the Party under whose law it is constituted or organized". In other words NAFTA addresses situations where the investor is simply an intermediary for interests substantially foreign, and it allows NAFTA protections to be withdrawn in such cases (subject to prior notification and consultation). There is no hint of any concern that investments are held through companies or enterprises of non-NAFTA States, if the beneficial ownership at relevant times is with a NAFTA investor.

[7] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 302.

> The scope of protection, and the care with which the relevant provisions were drafted, can be seen from the definitions in Articles 201 and 1139. …
>
> …
>
> Article 1117 deals with the special situation of claims brought by investors on behalf of enterprises established in the host State. But it still allows such claims where the enterprise is owned or controlled "directly or indirectly", i.e., through an intermediate holding company which has the nationality of a third State.
>
> 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. If the NAFTA Parties had wished to limit their obligations of conduct to enterprises or investments having the nationality of one of the other Parties they could have done so. Similarly they could have restricted claims of loss or damage by reference to the nationality of the corporation which itself suffered direct injury. No such restrictions appear in the text. It is not disputed that at the time the actions said to amount to a breach of NAFTA occurred, Acaverde was an enterprise owned or controlled indirectly by the Claimant, an investor of the United States. The nationality of any intermediate holding companies is irrelevant to the present claim. Thus the first of the Respondent's arguments must be rejected.[8]

32. As the tribunal in *Mondev v. USA* observed in its explanation of NAFTA standing rules:

> The Tribunal notes that Chapter 11 specifically addresses issues of standing and scope of application through a series of detailed provisions, most notably the definitions of "enterprise", "investment", "investment of an investor of a Party" and "investor of a Party" in Article 1139. These terms are used with care throughout Chapter 11. NAFTA does not adopt the device commonly used in bilateral investment treaties ("BITs") to deal with the foreign investment interests held in local holding companies, namely, that of deeming the local company to have the nationality of the foreign investor which owns or controls it. On the contrary, it distinguishes between claims by investors on their own behalf (Article 1116) and claims by investors on behalf of an enterprise (Article 1117). 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.[9]

33. Despite this clear precedent, the Respondent insists on attempting to insert new standing requirements into Chapter Eleven's detailed scheme. As it did in *Waste Management*

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[8] *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), **CL-36**, ¶¶ 79-85 (emphases added).

[9] *Mondev v. USA*, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), **CL-17**, ¶ 79 (emphasis added).

II, Mexico has made up the requirements it invites the Tribunal to impose here out of whole cloth. Aside from the clear absence of textual support in NAFTA itself, this conclusion is supported by Mexico's failure to raise any of these threshold jurisdictional "requirements" in its Memorial and by its abject failure to cite a single NAFTA case supporting its unique interpretations of Article 1117.

1. Article 1117 Grants Investors The Right to Bring Claims on Behalf of an Enterprise That They Own or Control, Directly or Indirectly

34. 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.

35. The express terms of Article 1117 contemplate four alternative avenues by which investors may establish their standing to bring a claim on behalf of an enterprise: (1) direct ownership; (2) indirect ownership; (3) direct control; or (4) indirect control. This is confirmed by the use of the disjunctive ("or") in the phrase "owns or controls directly or indirectly". In the words of the *Waste Management II* tribunal, "[t]he relevant provisions cover the full range of possibilities, including direct and indirect control and ownership."

36. Incredibly, Mexico disputes even this basic point. In its Reply, Mexico asserts that "[c]ontrol in Article 1117 was not intended as an alternative to ownership" and that "the relevant question for the purposes of determining standing under Article 1117 is whether the [ownership] interest held by an investor of another Party gives him/her/it control over the enterprise of a Party."[10] Mexico cites no support for this assertion, other than its own conjecture. And, based on its flawed reasoning, Mexico asserts that "[i]t follows that Chapter Eleven does not apply to measures relating to Operadora Pesa, regardless of whether Mr. Gordon Burr is the 'ultimate decision maker' (*quod non*)." Claimants will address the factual arguments with respect to Mr. Gordon Burr's ultimate control over Operadora Pesa at a later stage. The fact that Mexico considers it *irrelevant* to the question of standing whether the Claimants exercise control over an enterprise, however, amply demonstrates its undeniable misapplication of Article 1117.

37. Contrary to Mexico's unsupported theories about standing under Article 1117, Article 1117 *expressly* provides for control as an alternative to ownership to establish standing. The provision does *not* require a preliminary showing that an investor holds any ownership interest in the enterprise, much less an interest that meets a particular threshold. If the NAFTA Parties intended such a requirement, they would not have used the phrase "owns *or* controls directly *or* indirectly" and would have specified that ownership was a jurisdictional prerequisite. But they did not. Mexico's interpretation distorts the express written terms of Article 1117 beyond recognition.

38. Under Chapter Eleven, investors who directly or indirectly control an enterprise can establish their right to standing just as investors who directly or indirectly own an enterprise. Article 1117 does not differentiate between the four different methods to establish standing. As long as the investor's relationship with the enterprise falls within at least one of the scenarios contemplated by the treaty definition, Chapter Eleven grants that investor a right to bring claims on behalf of the enterprise to account for a respondent State's destruction of the enterprise.

2. Majority Ownership Is Sufficient To Establish That An Investor "Owns" An Enterprise Under Article 1117

39. For purposes of Article 1117, an investor "owns" an enterprise if it holds a majority of its shares. This is confirmed by the ordinary meaning of "own" given in international investment treaties, Canada's contemporaneous Statement of Implementation for

[10] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 245, 248.

the NAFTA, and the use of the word "own" in the denial of benefits clause under Chapter Eleven. Mexico's newfangled adopted interpretation of "own" as referring to "full ownership or virtually full ownership of the company"[11] is another attempt to import requirements that are nowhere to be found in the treaty and is at odds with the universal understanding of ownership in investment treaty practice.

40. In interpreting Article 1117, the Tribunal should be guided by the Vienna Convention on the Law of Treaties ("**VCLT**"). As a general rule of treaty interpretation, Article 31 of the VCLT 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."[12] Article 32, which outlines the supplementary means of interpretation, provides that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) Leaves the meaning ambiguous or obscure; or
>
> (b) Leads to a result which is manifestly absurd or unreasonable.[13]

41. Read in the light of the VCLT, it is clear that Article 1117 grants investors of a NAFTA Party with majority ownership of an enterprise of another Party the affirmative right to bring claims on behalf of that enterprise.

42. The ordinary meaning of the word "own" confirms that Article 1117 refers to majority ownership and not "full or virtually full ownership." In ordinary parlance, a company that is 51% held by foreign interests, e.g. Russian interests, would be considered a Russian-owned company. It would be contrary to ordinary usage to deny that the company was Russian-owned merely because it was *only* 51% (or even 80%) owned by Russian investors. But that is precisely the result that would flow from Respondent's flawed and unsupported logic. This is not an exaggeration of the Respondent's view. As the Respondent argues, the Claimants do not "own" JVE Mexico (Naucalpan) because they merely own 82.30% of the company.[14] This is plainly absurd.

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[11] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 200.

[12] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (Jan. 27, 1980), Art. 31, **CL-41**.

[13] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (Jan. 27, 1980), Art. 32, **CL-41.**

[14] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 229.

43. The ordinary usage of "own" in international investment treaty practice also firmly supports majority ownership as the relevant benchmark. For example, investment claims at the Iran-United States Claims Tribunal use the benchmark of "fifty per cent or more" ownership to determine corporate nationality.[15] Similar provisions in U.S. laws defining the relevant benchmark for ownership of an enterprise also refer to majority ownership.[16] Even where there is a specific treaty definition for ownership, the relevant standard refers to majority ownership in the enterprise, and not "full or virtually full ownership."[17] There is no reason to depart from this universally supported interpretation of the concept of ownership in the NAFTA, and Respondent has not cited any.[18]

44. The Canadian Statement on Implementation of the NAFTA further confirms the ordinary understanding of ownership as majority ownership. Specifically, the Canadian Statement observes that "[t]he NAFTA definition of investment includes minority interests, portfolio investment, and real property as well as majority-owned or controlled investments from the NAFTA countries."[19] This Statement clearly demonstrates Canada's understanding of the NAFTA at the circumstances of its conclusion, within the meaning of VCLT Art. 32.

45. Mexico does not cite a single case, whether inside or outside of the NAFTA framework, to support its interpretation of ownership of an enterprise for purposes of Article 1117. While the Respondent argues that the text of Article 1117 does not provide for partial or substantial ownership,[20] neither does it provide for "full or virtually full" ownership. In any event, this argument is unavailing. *First*, majority ownership is not the same as "partial" or

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[15] Iran-United States Claims Tribunal Claims Settlement Declaration, Art. VII(1), **CL-42**.

[16] 31 CFR § 560.313 (defining an "entity owned or controlled by the Government of Iran" as an entity "in which the Government of Iran owns a 50 percent or greater interest or a controlling interest, and any entity which is otherwise controlled by that government."), Code of Federal Regulations, 31 C.F.R. 560.313 – Entity owned or controlled by the Government of Iran, **CL-43**.

[17] *See, e.g.*, Japan-Cambodia Bilateral Investment Treaty, Art. 1(3) ("An enterprise is … 'owned' by an investor if more than 50 percent of the equity interest in it is owned by the investor.") (emphasis added), **CL-44**; Tanzania-United Kingdom BIT, Art. 8(2) ("A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party.") (emphasis added), **CL-45**.

[18] *See* Ian A. Laird, "A Community of Destiny – The *Barcelona Traction* Case and the Development of Shareholder Rights to Bring Investment Claims," pp. 87-88 (explaining that claims may be asserted under NAFTA Chapter Eleven on the basis of majority ownership). **CL-46**

[19] Canadian Statement on Implementation of the NAFTA, Canada Gazette, Part I, Jan. 1, 1994, p. 147 (emphasis added). **CL-47**

[20] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 200.

"substantial" ownership. The reason why Article 1117 does not provide for "partial" or "substantial" ownership is simply because the NAFTA Parties *did not intend* for these standards to be the benchmark for Article 1117 claims. Majority ownership refers to a clear-cut 50%+ standard, whereas "partial," "substantial," or "virtually full" ownership are subjective and do not correspond to any numerical value. *Second*, no qualifier in front of the word "owns" is needed to denote majority ownership, in contrast to the Respondent's "full or virtually full" ownership understanding. Given the consistent background of investment treaty practice and understanding that "owns" refers to majority ownership, the NAFTA Parties would have expressly qualified the word "owns" if they had intended to import a standard other than majority ownership. Thus, the text of Article 1117 would have read differently if it was meant to exclude investors who "merely" own 82.30% of the enterprise from bringing a claim, as Mexico argues.

46. The denial of benefits provision in Chapter Eleven provides further support for the conclusion that the term "owns" refers to majority ownership rather than full ownership. Article 1113 allows a NAFTA Party to deny Chapter Eleven benefits if, among other things, investors of a non-Party "own or control" an enterprise. It is clear that Mexico would not advance the absurd interpretation of "full or virtually full ownership" if it was trying to invoke the denial of benefits clause.[21] There is simply no reason to upset the customary benchmark of majority ownership here.

3. Investors May "Control" An Enterprise Through Factual Or Legal Control

47. "Control" under Article 1117 refers not only to legal corporate control, but also to factual, *de facto* control of an enterprise. Respondent, however, argues that "control" is strictly limited to legal control of a company under Mexican corporate law. Mexico *unsuccessfully* made this very same argument in *Thunderbird v. Mexico*, to no avail; the result should be the same here. Further, NAFTA cases consistently confirm that "control" for purposes of Article 1117 includes *de facto* forms of control, including without limitation managerial control.

[21] *See* The Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China, signed on 4 November 1946 and entered into force on 30 November 1948, Art. XXVI(5): "each High Contracting Party reserves the right to deny any of the rights and privileges accorded by this Treaty to any corporation or association created or organized under the laws and regulations of the other High Contracting Party which is directly or indirectly owned or controlled, through majority stock ownership or otherwise, by nationals, corporations or associations of any third country or countries." (emphasis added). **CL-48**.

48. The Tribunal should follow the *Thunderbird* tribunal in rejecting Mexico's narrow and unfounded reading of control under Article 1117. In *Thunderbird*, the tribunal was confronted 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**").[22] The claimant, Thunderbird, owned the majority of shares of three of the EDM companies, but only had a minority ownership of three other entities—36.67%, 33.3%, and 40.1%, respectively.[23] The tribunal thus considered whether Thunderbird exercised "control" over the EDM companies in which the claimant held a minority interest for the purposes of Article 1117.

49. The *Thunderbird* tribunal rejected Mexico's argument, which it has recycled here, that Article 1117 requires a showing of legal control under Mexican corporate law:

> … the present discussion turns on whether Thunderbird exercised control over the Minority EDM Entities. 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 NAFTA. In the absence of legal control however, the Tribunal is of the opinion that *de facto* control must be established beyond any reasonable doubt.[24]

50. Although Thunderbird had less than majority ownership in three of its enterprises (and therefore fell short of the "own" prong of Article 1117 for those companies), the tribunal found sufficient *de facto* "control" to allow Thunderbird to bring claims on behalf of the enterprises it held a minority share in:

> 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

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[22] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award (January 26, 2006), **CL-7**, ¶¶ 96-110.

[23] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award (January 26, 2006), **CL-7**, ¶¶ 103-104.

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

> was, through its actions, officers, resources, and expertise, the consistent driving force behind EDM's business endeavour in Mexico.
>
> It is quite common in the international corporate world to control a business activity without owning the majority voting rights in shareholders meetings. Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know how, and authoritative reputation. Ownership and legal control may assure that the owner or legally controlling party has the ultimate right to determine key decisions. However, if in practice a person exercises that position with an expectation to receive an economic return for its efforts and eventually be held responsible for improper decisions, one can conceive the existence of a genuine link yielding the control of the enterprise to that person.[25]

51. Legal corporate control, in other words, is merely one form of "control" among various others that are recognized under Article 1117. This is in accord with the ordinary meaning of the term "control." The Claimants observe that although Mexico cites the dictionary definition of "ownership,"[26] it conspicuously avoids referring to the dictionary definition of "control." This omission speaks volumes.

52. The Merriam-Webster Dictionary defines "control" as follows in relevant part:

> 2 […] a: to exercise restraining or directing influence over: regulate – control one's anger
>
> b: to have power over: rule – A single company controls the industry.
>
> c: to reduce the incidence or severity of especially to innocuous levels – control an insect population – control a disease.[27]

53. Relevantly, Mexico's own cited case, *Aguas del Tunari v. Bolivia*, after conducting an analysis of the dictionary definition of "control," concluded that the ordinary meaning of the term encompassed *both* actual exercise of powers or direction (i.e. *de facto* control) *and* the rights arising from the ownership of shares (i.e. legal control):

> To find the "ordinary meaning" of the word "controlled", the Tribunal sought guidance from standard desk dictionaries. One standard American English dictionary defined the transitive verb "control" as "to exercise restraining or directing influence over… to have power over." According to another desk dictionary, the verb control can be defined as to "manage: to exercise power or authority over something such as a business or a

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[25] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award (Jan. 26, 2006), **CL-7**, ¶¶ 107-8 (emphasis added).

[26] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 198.

[27] *See* Definition of "control". Retrieved from https://www.merriam-webster.com/dictionary/control, **C-145**

> nation." Similarly, a standard British English dictionary defines "control" as both "the fact of controlling" and "the function or power of directing and regulating; domination, command, sway." … Thus while some definitions suggest the actual exercise of influence, others emphasize the possession of power over an object. Thus, the ordinary meaning of "control" would seemingly encompass both actual exercise of powers or direction and the rights arising from the ownership of shares.[28]

54. And in referring to Black's Law Dictionary, the *Aguas del Tunari* tribunal observed that "control" can be exercised through various means, and was not exclusively tied to legal ownership:

> The legal definition for the verb "control" provides several meanings for control. The first definition for "control" is "to exercise power or influence over <the judge controlled the proceedings>." The second definition is "to regulate or govern <by law, the budget officer controls expenditures>." The final definition is "to have a controlling interest in <the five shareholders controlled the company>." The first definition of control suggests the actual exercise of control with emphasis on the right to exercise control over an object but does not suggest ownership of the object. The second definition similarly points to a right to control but not ownership of that which is controlled. The third definition of control ties control to ownership interest providing that a "controlling interest" is understood as a "legal share in something … sufficient ownership of stock in a company to control policy and management; especially a greater-than-50% ownership interest in an enterprise."[29]

55. The above notwithstanding, Mexico cites *Aguas del Tunari* for a proposition the case does not stand for.[30] In *Aguas del Tunari*, Bolivia argued that the phrase "controlled directly or indirectly" mandates a showing of *de facto* or actual exercise of control.[31] The tribunal rejected that restrictive interpretation, holding that legal control sufficed; it did *not* hold that "control" could *only* be satisfied by a showing of legal control, but that either form of control sufficed.[32] The tribunal emphasized that "it is not charged with determining all forms which control might take."[33] Mexico now urges this Tribunal to adopt the inverse restrictive interpretation of "control" that Bolivia pressed for *unsuccessfully* in *Aguas del Tunari*. There

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[28] *Aguas del Tunari, S.A.,* v. *Republic of Bolivia,* ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (Oct. 21, 2005), *RL*-031, ¶ 227.

[29] *Aguas del Tunari, S.A.,* v. *Republic of Bolivia,* ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (Oct. 21, 2005), *RL*-031, ¶ 231.

[30] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 244, 247.

[31] *Aguas del Tunari, S.A.,* v. *Republic of Bolivia,* ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (Oct. 21, 2005), *RL*-031, ¶ 223.

[32] *Aguas del Tunari, S.A.,* v. *Republic of Bolivia,* ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (Oct. 21, 2005), *RL*-031, ¶ 264.

[33] *Aguas del Tunari, S.A.,* v. *Republic of Bolivia,* ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (Oct. 21, 2005), *RL*-031, ¶ 264.

simply is no support for the incorporation of this new jurisdictional requirement and restrictive interpretation unsupported by NAFTA's text.

56. Other NAFTA cases confirm that "control" for the purposes of Chapter Eleven is not limited to legal control, but includes managerial and other forms of control. Indeed, *Bilcon v. Canada*, which Respondent cites repeatedly,[34] considered that even informal forms of indirect control could be part of a tribunal's assessment of whether an investor exercises "control" for NAFTA purposes:

> However, the Tribunal also considers that the evidentiary record does not exclude any reasonable possibility that Mr. William Ralph Clayton exercised indirect control in other—less formal—ways, as the Investors contended at the hearing.
>
> As a result, the Tribunal feels that it would benefit from further evidence before arriving at a final determination. The Tribunal therefore reserves its position as to whether Mr. William Ralph Clayton qualifies as an "investor" for purposes of NAFTA. Accordingly, since the Tribunal has not been in a position positively to affirm its jurisdiction in respect of Mr. William Ralph Clayton, the Tribunal's decisions in respect of the merits of the case, below, do not apply to him.[35]

57. Legal ownership in an enterprise is not required to establish "control." In *S.D. Myers, Inc. v. Canada*, the claimant did not own shares in the enterprise in question. Notwithstanding the lack of legal control through share ownership, the tribunal held that the claimant exercised "control" over the Canadian enterprise based on its executive president's control of managerial decisions of the enterprise. According to the *S.D. Myers* tribunal:

> At the relevant time Myers Canada was undoubtedly an "enterprise", but CANADA submitted that it was not owned or controlled directly or indirectly by SDMI. This is because the shares of Myers Canada were owned not by SDMI, but equally by four members of the Myers family. They also owned the shares in SDMI, but in different proportions. As noted previously, Mr. Dana Myers owned 51% of that company. His was the authoritative voice in SDMI and the evidence of his brother, Mr. Scott Myers, was that Dana Myers was the authoritative voice in Myers Canada.
>
> …
>
> 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.
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> The uncontradicted evidence before the Tribunal was that Mr. Stanley Myers had transferred his business to his sons so that it remained wholly within the family and that

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[34] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 136, 157.

[35] *Clayton-Bilcon v. Canada*, Award on Jurisdiction and Admissibility, **RL-010**, ¶ 349 – 350 (emphasis added).

> he had chosen his son Mr. Dana Myers to be the controlling person in respect of the entirety of the Myers family's business interests.
>
> On the evidence and on the basis of its interpretation of the NAFTA, the Tribunal concludes that SDMI was an "investor" for the purposes of Chapter 11 of the NAFTA and that Myers Canada was an "investment".[36]

58. Notably, during judicial review proceedings, the Federal Court of Canada upheld this finding on the basis of the ordinary meaning of the phrase "controlled directly or indirectly."[37]

59. Faced with the overwhelming weight of authority against its position, Respondent is left to argue that it "disagrees" with the holding in *Thunderbird* that *de facto* control establishes standing for the purposes of Article 1117.[38] Mexico, however, does not cite a single NAFTA case to support its opinion. It thus relies on a purported concern that any standard of control other than legal ownership would lead to inconsistent outcomes from tribunals unable to apply anything other than a bright-line standard. Again, however, Respondent's argument lacks support and merit.

60. Relevantly, the *Perenco v. Ecuador* tribunal cited the decision in *Thunderbird* with approval in cautioning against a formalistic approach to the question of "control."[39] Consistent with this reasoning, the Tribunal should reject Mexico's formalistic objection that "control" under Article 1117 can only be satisfied by a showing of legal control.

61. In addition, Mexico's concern about inconsistency is overstated. As Claimants explained in their Counter-Memorial, the *Thunderbird* tribunal outlined various indicia of control to guide their objective analysis of the evidentiary record.[40] These factors included management authority, contribution of expertise and initial capitalization efforts. The relevant passages are worth quoting due to the close resemblance to the evidentiary record of the present arbitration:

> Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology,

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[36] *S.D. Myers, Inc.* v. *Government of Canada,* UNCITRAL, Partial Award (Nov. 13, 2000), **CL-30**, ¶¶ 227-231.

[37] *See Attorney General of Canada v. S.D. Myers, Inc*., Reasons for Orders (Jan. 13, 2004), **CL-49,** ¶¶ 67-69.

[38] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 211.

[39] *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Decision on the Remaining Issues of Jurisdiction and on Liability (Sept. 12, 2014), **CL-50** ¶¶ 526, 530.

[40] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 163.

> access to supplies, access to markets, access to capital, know how, and authoritative reputation. …
>
> 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.[41]

62. Far from risking inconsistent results, these indicia of control allow tribunals the flexibility they require to conduct case-by-case analyses of the facts and arrive at conclusions that best comport with the claimants before them. In its purported insistence on achieving consistency, Mexico relies on the very same arguments it raised in *Thunderbird* unsuccessfully. For example, as it did in *Thunderbird*, Respondent here:

- Complains about the alleged inconsistency of documents in showing who owned what and when;[42]
- Contests that management agreements establish "control";[43]
- Complains that Claimants' ownership of Class B shares is insufficient for "control" purposes because Class B shares were dispersed among other shareholders;[44]

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

[42] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Hearing Transcript Day 4 (Apr. 30, 2004), **CL-51,** pp. 1217-1218. Claimants observe that Mexico's counsel in *Thunderbird* refers to majority ownership, and not full ownership, of the casino entities at issue.

[43] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Hearing Transcript Day 4 (Apr. 30, 2004), **CL-51,** pp. 1220-1221.

[44] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Hearing Transcript Day 4 (Apr. 30, 2004), **CL-51,** pp. 1223.

- Argues that Claimants do not exercise sufficient "control" because other shareholders were involved in the management of the companies.[45]

63. The following exchanges between Mexico's counsel and the arbitrators in *Thunderbird* reveal the marked extent to which Mexico relies on the same failed arguments here:

> ARBITRATOR PORTAL-ARIOSA: No, my question was not directed to these specific sets of facts and specific interpretation you are giving to the wording of 1117. It was just an exploration of feasibility of the concept of factual control and out there are plenty of companies that operate in different ways, and that was basically my interest to find out if it was conceivable.
>
> MR. MULLICK [Mexico's counsel]: Sure, I understand.
>
> ARBITRATOR WALDE: You have put forward a very specific interpretation of Article--of the concept of indirect control in Article 1117. It's the first time I'm directly confronted with this issue for Article 1117…. Can I defer you, if the President does not tell me this is improper, that there has been two weeks ago an article published in the Journal of World Investment on concept of control of international treaties and that might help you to look, and you will see if your interpretation of 1117, which is a very imaginative one, which I understand as a former corporate lawyer, the pyramiding concept, if this is actually what is meant or if, rather, the concept of de facto control as my colleague was kind of discussing it. Effective control can be, as I think the U.S. company law, it's the ability to take a significant influence. It can be exercised in many ways.[46]
>
> …
>
> ARBITRATOR WALDE: My last question. You have gone extensively through the corporate reports of Thunderbird. . . . I mean, it does give the impression that Thunderbird is running the show.
>
> MR. MULLICK: Thunderbird certainly had an active and important role in the EDMs; that is the case. But again the question is legally based on the documents, based on the definition of control, based on the equity ownership interests, could they alone exercise sort of a dominating influence over the direction of the company, and they couldn't. They had to consult with the independent entities of Mr. Watson and Mr. Girault, all these Class B shareholders.[47]

64. If Mexico is concerned with consistency of outcomes as it professes, then it should ask the Tribunal to follow *Thunderbird* and hold that Claimants have standing under

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[45] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Hearing Transcript Day 4 (Apr. 30, 2004), **CL-51,** p. 1225.

[46] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Hearing Transcript Day 4 (Apr. 30, 2004), **CL-51,** pp. 1231-1233.

[47] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Hearing Transcript Day 4 (Apr. 30, 2004), **CL-51,** pp. 1237-1238.

Article 1117 through their *de facto* control over the Mexican Enterprises, which has been the consistent standard under NAFTA for more than a decade.

65. There is one respect in which Mexico's argument on "control" now differs—Mexico's overly-formalistic argument that an irrevocable proxy or other instrument binding the Claimants' votes is required to establish "control" under Article 1117. Yet, again, Mexico does not point to any textual support in the NAFTA, nor does it cite a single case, whether inside or outside of the NAFTA context, to support its position. Mexico also fails to explain why a legal instrument would be needed to oblige investors to vote on corporate decisions together. If a group of shareholders has the legal power to determine corporate decisions, why is it relevant under Article 1117 whether a legal instrument binds these votes together?

66. The fact is that, here, *the Claimants have exercised their vote to bring a claim on behalf of their enterprises against Mexico*. That is all that matters for Article 1117 purposes. Each of the Claimants has expressly consented to arbitration under Chapter Eleven to hold Mexico to account for its destruction of their investments.[48] Whether there is a shareholder's agreement to vote on "all shareholder matters going forward"[49] has absolutely no relevance to standing under Article 1117.

67. As Claimants have explained, NAFTA tribunals have noted the careful scheme for investors to establish standing under Chapter Eleven. There is "no room for implying into the treaty additional requirements."[50] The Respondent's repeated attempts to advance additional unwritten requirements into Chapter Eleven—for example, that share ownership *must* exist to establish standing under Article 1117 (notwithstanding the phrase "owns *or* controls"); that full or virtually full ownership is required to "own" a company (notwithstanding the consensus that majority ownership is sufficient); and that shareholders *must* execute a proxy instrument to bind their votes to "control" a company—*all should be rejected*.

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[48] Claimant Witness Statements (Jan. 4-7, 2018), **CWS-16-CWS-47**, Sec. III; Claimant Witness Statements (January 7, 2018), **CWS-48-CWS-49** Sec. II; Witness Statement of John Conley (January 7, 2018), **CWS-13**, Sec. IV; Witness Statement of Neil Ayervais (January 7, 2018), **CWS-12**, Sec. III; Second Witness Statement of Gordon Burr (January 7, 2018), **CWS-7**, Sec. V; Second Witness Statement of Erin Burr (January 7, 2018), **CWS-8**, Sec. V.

[49] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 274.

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

4. Claimants Own And Control the Juegos Companies And Have Standing To Bring Claims On Their Behalf Under Article 1117

68. Claimants are the controlling investors in the casino business operation at issue in this NAFTA dispute.[51] Each Claimant, with the exception of B-Cabo, LLC and Colorado Cancún, LLC,[52] is a U.S. shareholder of the Juegos Companies. In particular, the Controlling Disputing Investors (i.e. the investors named on the 2014 Notice of Intent) exercise ultimate managerial control over the casino corporate structure, including the Juegos Companies, E-Games, and Operadora Pesa.

69. This section explains Claimants' standing over the Juegos Companies. Claimants (i.e. the Controlling Disputing Investors and the Additional Claimants) own each of the Juegos Companies through majority ownership. This alone is sufficient to confer on them standing under Article 1117 to assert claims on behalf of the Juegos Companies. In addition, and as an alternative basis for standing, Claimants own the majority of Class B shares of the Juegos Companies and thereby hold full, legal control of the enterprises. Furthermore, and as yet another alternative basis for standing, the Controlling Disputing Investors exercise *de facto* control over the Juegos Companies. This also grants these Claimants standing under Article 1117 to assert claims on behalf of the Juegos Companies.

70. To emphasize, once again, a showing *either* of majority ownership of the shares of the Juegos Companies *or* of control of the enterprises—whether legal or *de facto*, decisional control—is sufficient to defeat Mexico's jurisdictional objection. Based on the factual record, and for the reasons explained below and in the Counter-Memorial, the Tribunal should find that Claimants have standing to bring claims on behalf of the Juegos Companies under NAFTA Article 1117 and dismiss Mexico's jurisdictional objections relating to the Juegos Companies in their entirety.

a. Claimants "Own" All Of The Juegos Companies As They Own The Majority Of The Shares In Those Enterprises

71. Claimants "own" the Juegos Companies and therefore have standing to bring claims on behalf of their enterprises under Article 1117. Claimants have majority ownership in

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[51] *See* Claimants Counter-Memorial on Jurisdictional Objections (July 25, 2017), Section V.A.2.

[52] For purposes of this section on standing over the Juegos Companies, references to "Claimants" and "Additional Claimants" exclude B-Cabo, LLC and Colorado Cancún, LLC.

all five of the Juegos Companies. This fact alone is sufficient grounds for the Tribunal to dismiss the Respondent's standing objection relating to the Juegos Companies.

72. As Mexico itself is aware, Claimants own more than 50% of overall shares (i.e. all classes of shares considered together) in all five of the Juegos Companies.[53] In particular, Claimants' ownership of the Juegos Companies ranges from 56.0% to 82.3% of all outstanding shares.[54] This majority ownership grants Claimants standing to claim on behalf of the Juegos Companies under NAFTA Article 1117.[55]

b. Claimants "Control" The Juegos Companies Within The Meaning Of Article 1117 Through Legal And Factual Control

73. In addition to owning the Juegos Companies, Claimants exercise legal *and* factual, *de facto* control over the Juegos Companies. This serves as an alternative basis to establish their standing to claim on behalf of the Juegos Companies under NAFTA Article 1117.

74. Claimants (i.e. the Controlling Disputing Investors and the Additional Claimants) hold the voting rights to control the key business decisions of the Juegos Companies through their ownership of Class B shares, thus giving them full, legal control of the enterprises. Similarly, the Controlling Disputing Investors, on their own behalf and on behalf of all Claimants, exercise *de facto* control over the affairs of the Juegos Companies. Simply put, Claimants' control over the Juegos Companies has dictated the entire operational course of the Juegos Companies, from inception to present. None of the Respondent's quibbles with the evidentiary record change this central fact.

i. Claimants Have Legal Control Of The Juegos Companies Through Control Of Voting Rights

75. Claimants hold legal control of, and exercise legal control over, the Juegos Companies through their ownership of the majority of Class B shares in each of the Juegos Companies. As explained in the Counter-Memorial, Class B is the only class of shares that

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[53] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 229.

[54] *See* Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 229 (concluding the same).

[55] The Controlling Disputing Investors hold majority ownership in four of the Juegos Companies, namely JVE Mexico (82.3%), JVE Centro (54.2%), JyV Mexico (51.9%), and JVE DF (52.6%). Accordingly, even counting only the shares owned by the Controlling Disputing Investors, Claimants have standing to bring claims on behalf of the Juegos Companies (except JVE Sureste) under Article 1117. In any event, Claimants reject Mexico's objection that the Additional Claimants purportedly failed to comply with NAFTA Article 1119, and reject Mexico's attempt to exclude the Additional Claimants' shareholding in the Juegos Companies on this ground. *See* Rejoinder, Section III.B.

carries expansive voting rights to control most resolutions at shareholders' meetings (*asambleas*) and to appoint the majority of directors on the boards of each of the Juegos Companies.[56] Mexico recognizes, and in fact argues, that legal control of the Juegos Companies "lies in the hands of the Series B shareholders."[57]

76. As of the date of the DF Casino closure (the first governmental measure for which Claimants seek damages in this proceeding), Claimants' ownership of Class B shares for the Juegos Companies ranged from 50.7% to 100%.[58] Thus, in accordance with the bylaws of the Juegos Companies, Claimants hold decisional control at general shareholders' meetings and voting control over the composition of the majority of board directors. This is more than sufficient to grant Claimants standing to bring claims on behalf of the Juegos Companies under Article 1117.[59]

ii. Claimants, Through The Controlling Disputing Investors, Always Exercised And Continue To Exercise *De Facto* Control Over The Juegos Companies

77. Claimants, and in particular through the Controlling Disputing Investors, also have at all relevant times exercised *de facto* control over the Juegos Companies. The record provides firm evidence of Claimants' management authority, contribution of expertise, and initial capitalization efforts in creating, developing, and operationalizing their profitable Casinos. In other words, Claimants here exercise the *same* types of control that were sufficient for the tribunal to conclude that the claimant in *Thunderbird* exercised sufficient control under NAFTA Article 1117.

78. Additionally, as explained in detail in the Counter-Memorial,[60] Claimants, through the Controlling Disputing Investors, exercise direct and indirect control over the Juegos Companies through (1) their positions on the Boards of Directors; (2) their managerial authority

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[56] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 210.

[57] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 64, 255.

[58] *See* Annex C of First Witness Statement of Erin Burr (July 25, 2017), **CWS-2**.

[59] The Controlling Disputing Investors hold 100% of the Class B shares of JVE Mexico (Naucalpan). Accordingly, even counting only the shares owned by the Controlling Disputing Investors, Claimants have standing to bring claims on behalf of JVE Mexico under Article 1117. In any event, Claimants reject Mexico's objection that the Additional Claimants purportedly failed to comply with NAFTA Article 1119, and reject Mexico's attempt to exclude the Additional Claimants' shareholding in the Juegos Companies on this ground. *See* Rejoinder, Section III.B.

[60] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 230-236.

pursuant to agreements between the various companies in Claimants' casino structure; and (3) their control of the B-Mex Companies.

79. The Respondent mostly glosses over this evidence and has very little to say about the Controlling Disputing Investors' *de facto* control over the enterprise. It is clear that, without the Controlling Disputing Investors, the casino business simply would not have existed or operated the way it did during its successful lifespan. This likely explains why the Respondent focuses on legal control to the exclusion of factual control, although that focus offers it no quarter.

80. The evidentiary record convincingly establishes that Claimants, through the Controlling Disputing Investors, and in particular Mr. Gordon Burr, functioned as the primary driving force behind the entire casino operations in Mexico.[61] Without Mr. Burr, the casino business simply would not have existed or operated. It was his idea to invest in Mexico in the first place.[62] Mr. Burr made the exploratory visits and, with Mr. Conley's assistance, recruited the investors and personnel needed to establish the casino business.[63] Mr. Burr also participated in and led the day-to-day management of the Casinos, was involved in every major operational decision and the expansion of the casino business.[64] The Controlling Disputing Investors' degree of involvement and control in the Juegos Companies cannot be understated. Among other responsibilities, the Controlling Disputing Investors: [65]

- Designed the company structure encompassing the Juegos Companies and the Casinos so they maintained corporate control;[66]
- Spearheaded efforts to raise funds for the capitalization and operation of the Juegos Companies;[67]

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

[62] First Witness Statement of Gordon G. Burr (July. 25, 2017), **CWS-1**, ¶¶ 5-8.

[63] *See, e.g.*, Witness Statement of José Ramón Moreno Quijano (Jan. 3, 2018), **CWS-15**, ¶¶ 4, 5 (describing Mr. Burr's role in hiring and designating Jose Ramon as Director General of the Juegos Companies and E-Games).

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

[65] *See* Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 170-177.

[66] First Witness Statement of Gordon G. Burr (July 25, 2017), **CWS-1**, ¶ 9; First Witness Statement of Erin Burr (July 25, 2017), **CWS-2**, ¶ 17; Second Witness Statement of Gordon Burr (Jan. 7, 2018), **CWS-7**, ¶ 23

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

- Decided the types of services that would be offered in the Casinos, including whether the services would be outsourced or brought in-house;[68]

- Selected the internal configurations of the Casinos and type and layout of gaming machines;[69]

- Approved every large expenditure and reviewed the financial performance of each casino location on a daily basis;[70]

- Managed security, surveillance, and cleaning operations in the Casinos;[71]

- Administered the allocation of casino revenue to the various investor groups and were responsible to investors for generating predictable returns;[72] and

- Identified and selected personnel for the management teams of the various companies.[73]

81. From the initial planning phase to Mexico's illegal closure of the Casinos and continuing thereafter, Claimants, through the Controlling Disputing Investors, have controlled the entire course of the Juegos Companies' affairs. As Mr. José Ramón Moreno Quijano, the Director General of the Juegos Companies and E-Games, attests, *de facto* control of the Juegos Companies was undeniably in the hands of Mr. Gordon Burr.[74] To that end, Mr. José Ramón Moreno would consult with Mr. Burr and only take actions with Mr. Burr's knowledge and consent.[75] Other employees of the Juegos Companies also acted at the instruction of Mr. Burr, given his role as the ultimate decision maker of the casino enterprise.[76] In short, the same

[68] First Witness Statement of Erin Burr (July 25, 2017), **CWS-2**, ¶ 18.

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

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

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

[72] First Witness Statement of Erin Burr (July 25, 2017), **CWS-2**, ¶¶ 20, 39.

[73] First Witness Statement of Gordon G. Burr (July 25, 2017), **CWS-1**, ¶¶ 11, 30; First Witness Statement of Erin Burr (July 25, 2017), **CWS-2**, ¶ 21; Witness Statement of José Ramón Moreno Quijano (Jan. 3, 2018), **CWS-15**, ¶¶ 4-5; Witness Statement of Moisés Opatowski Morgensten (Jan. 8, 2018), **CWS-14**, ¶¶ 4-5.

[74] Witness Statement of José Ramón Moreno Quijano (Jan. 3, 2018), **CWS-15**, ¶ 9.

[75] Witness Statement of José Ramón Moreno Quijano (Jan. 3, 2018), **CWS-15**, ¶ 9; Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-7**, ¶ 23.

[76] Witness Statement of Moisés Opatowski Morgensten (Jan. 8, 2018), **CWS-14**, ¶¶ 7, 11.

evidence of control that established an "unquestionable pattern of *de facto* control" in *Thunderbird* are found in the present record.[77]

82. Claimants, through Claimants Gordon Burr, John Conley and Daniel Rudden, also exercised *de facto* control over the Juegos Companies through their positions on the boards of those enterprises. The Respondent does not dispute that Messrs. Burr and Conley were members of the boards,[78] but incorrectly notes that Claimant Daniel Rudden served as a board member in only one case. Mr. Rudden in fact was a director of both JVE Mexico and JVE Sureste.[79] Additionally, the Juegos Companies' boards were typically composed of individuals who Mr. Burr, Mr. Conley, and Ms. Burr placed there and trusted.[80] In practice, board directors were hand-picked by Claimants and acted as employees and their actions were subject to the directions of Mr. Burr as a primary matter, as well as Mr. Conley and Ms. Burr.[81]

83. As mentioned, Claimants, through the Controlling Disputing Investors, also controlled the Juegos Companies through their control of the B-Mex Companies, a fact that Respondent does not contest. The B-Mex Companies are the largest investors in the Juegos Companies, and through their share ownership alone control the right to appoint one director on each of the Juegos Companies' boards. With respect to JVE Mexico (Naucalpan) in particular, B-Mex, LLC holds the power to appoint four out of five directors of JVE Mexico's board, guaranteeing B-Mex, LLC's expansive control over the company.[82] As explained in greater detail in the Counter-Memorial, the B-Mex Companies are part of a control structure that has afforded Claimants, through the Controlling Disputing Investors, effective control of the entire casino business operation since 2005 through the present.[83] Mr. Burr, Mr. Conley, and Ms. Burr, in turn, control the B-Mex Companies and, through this control structure, exercise effective *de facto* control over the Juegos Companies.[84]

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[77] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award (Jan. 26, 2006), **CL-7**, ¶¶ 107-110.

[78] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 259.

[79] Consent to Action in Lieu of Organizational Meeting of the Directors of Juegos de Video y Entretenimiento de Mexico, S de R.L. de C.V. (June 1, 2011), **C-49** (Jun. 1, 2011); Consent to Action in Lieu of Organizational Meeting of the Directors of Juegos de Video y Entretenimiento del Sureste, S de R.L. de C.V. (June 1, 2011), **C-51** (Jun. 1, 2011).

[80] Witness Statement of José Ramón Moreno Quijano (Jan. 3, 2018), **CWS-15**, ¶ 10.

[81] Witness Statement of José Ramón Moreno Quijano (Jan. 3, 2018), **CWS-15**, ¶ 12.

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

[83] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 186, 189.

[84] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 194-206.

84. Mexico seeks to minimize the Controlling Disputing Investors' vital managerial control over the Juegos Companies by referring to the legal status of the general shareholders' meetings (*asambleas*) as the highest body within the Juegos Companies under Mexican corporate law.[85] But across the international business world, directors and executives are ultimately accountable to the shareholders, and important business decisions are regularly made at shareholders' meetings. Under the Juegos Companies' bylaws, shareholder approval is not required for day-to-day operating decisions.[86] Importantly, Mexico does not allege that the Juegos Companies' shareholders ever revoked or rejected the decisions or authority of the Controlling Disputing Investors over the Juegos Companies. There is, in any event, no evidence to support such a claim. On the contrary, the shareholders have consistently entrusted the management of the Juegos Companies to the Controlling Disputing Investors, as the principal owners and controllers of the Casinos, and have supported their decisions over the Juegos Companies' affairs from inception to the present, including all decisions related to the instant NAFTA arbitration against Mexico.[87]

85. The Respondent also attempts unconvincingly to brush aside the Juegos Companies' adoption of the Employment Agreement between Mr. Burr and Video Gaming Services ("**VGS**") through a series of Board Consents to Action in June 2011.[88] In the Respondent's view, notwithstanding the clear and express language of the Consents, they are supposedly "not germane to the issue of control" because the Juegos Companies did not take

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[85] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 204, 205, 209, 263.

[86] 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), **C-89**; 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), **C-90**; 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), **C-91**; 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), **C-92**; and 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), **C-93**.

[87] Claimant Witness Statements (Jan. 4-7, 2018), **CWS-16-CWS-47**, Sec. III; Claimant Witness Statements (Jan. 7, 2018), **CWS-48-CWS-49**, Sec. II; Witness Statement of John Conley (January 7, 2018), **CWS-13**, Sec. IV; Witness Statement of Neil Ayervais (January 7, 2018), **CWS-12**, Sec. III; Second Witness Statement of Gordon Burr (January 7, 2018), **CWS-7**, Sec. V; Second Witness Statement of Erin Burr (January 7, 2018), **CWS-8**, Sec. V.

[87] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶

[88] Consent to Action in Lieu of Organizational Meeting of the Directors of Juegos y Videos de Mexico, S de R.L. de C.V. (June 1, 2011), **C-47**; Consent to Action in Lieu of Organizational Meeting of the Directors of Juegos de Video y Entretenimiento del DF, S de R.L. de C.V. (June 1, 2011), **C-48**; Consent to Action in Lieu of Organizational Meeting of the Directors of Juegos de Video y Entretenimiento de Mexico, S de R.L. de C.V. (June 1, 2011), **C-49**; Consent to Action in Lieu of Organizational Meeting of the Directors of Juegos de Video y Entretenimiento del Centro, S de R.L. de C.V. (June 1, 2011), **C-50**; Consent to Action in Lieu of Organizational Meeting of the Directors of Juegos de Video y Entretenimiento del Sureste, S de R.L. de C.V. (June 1, 2011), **C-51**

the further step to also adopt the Management Agreements between the B-Mex Companies and VGS.[89] The Respondent does not explain why this further step is necessary, but it is clear from the express wording of the Consents that the Boards of the Juegos Companies granted managerial authority to Mr. Burr, a fact that is not only highly "germane", but in fact central, to the issue of *de facto* control:

> The Directors believe that it is in the best interests of the Company for the Company to adopt an employment agreement, appended as Exhibit I, between Mr. Burr and Video Gaming Services, Inc., for the provision of services to the Company through Exciting Games, detailing his duties and responsibilities to the Company and, in view of increased competition to the Company's business, for Mr. Burr to be given direction to take all actions necessary, and the authority to take such actions in his discretion, to reduce expenses, optimize revenues and otherwise preserve and enhance the value of the Company.
>
> …
>
> RESOLVED, 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…[90]

86. This clear text notwithstanding (or perhaps because of it), Mexico asserts that the Employment Agreement between Mr. Burr and VGS formalizes Mr. Burr's role as an employee of VGS and "nothing else."[91] For this, Mexico cites a provision in the Employment Agreement requiring Mr. Burr to report directly to the Board of VGS.

87. The referenced provision in the Employment Agreement with VGS, however, directly belies Mexico's argument. That Mr. Burr was required to report to the VGS Board does not negate the very all-encompassing managerial powers that the Juegos Companies' boards expressly granted him through their Board Consents. There is nothing "specious" about

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[89] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 265.

[90] Consent to Action in Lieu of Organizational Meeting of the Directors of Juegos y Videos de Mexico, S de R.L. de C.V. (June 1, 2011), **C-47**; Consent to Action in Lieu of Organizational Meeting of the Directors of Juegos de Video y Entretenimiento del DF, S de R.L. de C.V. (June 1, 2011), **C-48**; Consent to Action in Lieu of Organizational Meeting of the Directors of Juegos de Video y Entretenimiento de Mexico, S de R.L. de C.V. (June 1, 2011), **C-49**; Consent to Action in Lieu of Organizational Meeting of the Directors of Juegos de Video y Entretenimiento del Centro, S de R.L. de C.V. (June 1, 2011), **C-50**; Consent to Action in Lieu of Organizational Meeting of the Directors of Juegos de Video y Entretenimiento del Sureste, S de R.L. de C.V. (June 1, 2011), **C-51**

[91] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 268.

this, as Mexico charges.[92] The Board Consents, dated June 2011, formally empowered Mr. Burr to manage *all* aspects of the Juegos Companies and the Casinos' operations, which he had been doing as a matter of fact since the creation of the Juegos Companies. Mr. Burr's authority is further confirmed by his appointment as the President of the Boards of the Juegos Companies in February 2011.[93]

88. The above establishes that Claimants, through the Controlling Disputing Investors, exercise *de facto* control over the Juegos Companies. None of Mexico's arguments compels a different conclusion. The Respondent does not seriously contest that the Controlling Disputing Investors exercised effective *de facto* control over the Juegos Companies, ignoring much of the evidentiary record and relying instead on a myopic focus on Claimants' legal control of the enterprises (which is equally unavailing). Quite simply, the same indicia of control that led the *Thunderbird* tribunal to find an "unquestionable pattern" of *de facto* control are found here. The Tribunal thus should dismiss the Respondent's objection and hold that Claimants have standing to bring claims on behalf of the Juegos Companies under Article 1117—both because Claimants exercise legal control (through the Claimants' collective ownership of Class B shares) and *de facto* control (through the Controlling Disputing Investors' unquestionable managerial control over the Juegos Companies).

c. Claimants Have Met Their Evidentiary Burden Of Establishing Their Shareholding In The Juegos Companies

89. Claimants have submitted numerous documents and testimony to establish their shareholding in the Juegos Companies. All of this evidence remains unrebutted. Faced with this strong showing, Mexico is left to argue, without any support, that Claimants must provide even more evidence to allow the Tribunal to find that it has jurisdiction. This is part of the Respondent's overarching and overreaching strategy to impose as many unfounded obstacles as possible to block the Claimants' substantial claims from proceeding to the merits phase.

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[92] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 267.

[93] Resolutions by the Board of Directors of Juegos y Videos de Mexico, S de R.L. de C.V. (Feb. 16, 2011) (Instrument Number 20,396), **C-146**, ¶ 6; Resolutions by the Board of Directors of Juegos de Video y Entretenimiento del DF, S de R.L. de C.V. (Feb. 16, 2011) (Instrument Number 20,397), **C-147**, ¶ 5; Resolutions by the Board of Directors of Juegos de Video y Entretenimiento del Centro, S de R.L. de C.V. (Feb. 16, 2011) (Instrument Number 20,399), **C-148**, ¶ 6; Resolutions by the Board of Directors of Juegos de Video y Entretenimiento de Mexico, S de R.L. de C.V. (Feb. 16, 2011) (Instrument Number 20,400), **C-149**, ¶ 7; Resolutions by the Board of Directors of Juegos de Video y Entretenimiento del Sureste, S de R.L. de C.V. (Feb. 16, 2011) (Instrument Number 20,401), **C-150**, ¶ 6

90. The Tribunal should dismiss Mexico's efforts to improperly raise the evidentiary bar and create a new standard and quantum of proof under the NAFTA. There simply is no authority to support the sheer volume of documents that Mexico demands to satisfy the jurisdictional requirements. What Mexico is asking this Tribunal to do with its insistence on more evidence of ownership or control is to import proof requirements into this proceeding that are *not* required by the NAFTA. Claimants' evidence conclusively establishes that they own and control the Juegos Companies (despite that the NAFTA requires one *or* the other), so Claimants have more than carried their evidentiary burden. Mexico, on the other hand, has not put forth a single piece of evidence to rebut Claimants' proof despite that it has had two full rounds of briefing and a document production phase during which to do so. This point is all the more salient given the Respondent's paltry production of documents in response to the Tribunal's orders, which contrasts starkly with the Claimants' diligent efforts to gather and produce documentary evidence of their shareholding despite the obstacles created by Mexico's illegal closure of the Casinos and other circumstances outside Claimants' control.

91. Mexico's allegations of inconsistency in the Claimants' evidence are baseless and the result of its failure to properly review the evidence already submitted by the Claimants. In any event, and to address Mexico's specious arguments about the need to formally comply with each and every aspect of Mexican corporate law even though such standards are not required by or incorporated into the NAFTA, on January 5, 2018, the Juegos Companies held *asambleas*, formally recognizing all share transfer activity that the Respondent alleges is insufficiently supported by documentary evidence and resolving to hold a future *asamblea* for each of the Juegos Companies on January 29, 2018 to formally approve these transfers under the guidance and management of the new Board of Directors just appointed for these companies.[94] As a first order of business, on January 8, 2018, the new Juegos Companies' board members adopted resolutions designating Mr. Gordon Burr as President of the Juegos Companies' boards.[95] The Juegos Companies' boards also adopted resolutions recognizing,

[94] Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Jan. 5, 2018), **C-162**; Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. (Jan. 5, 2018), **C-163**; Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. (Jan. 5, 2018), **C-164**; Minutes of the General Shareholders Meeting of Juegos y Videos de Mexico, S. de R.L. de C.V. (Jan. 5, 2018), **C-165**; Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento de Mexico, S. de R.L. de C.V. (Jan. 5, 2018), **C-166**.

[95] Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-8**, ¶ 34; Unanimous Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento de Mexico, S. de R.L. de C.V. – President (Jan. 8, 2018), **C-201**; Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. – President (Jan. 8, 2018), **C-203;** Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. – President (Jan. 8, 2018), **C-205;** Resolution in Lieu of

ratifying and approving all prior share transfers involving Claimants, setting the stage for final, formal approval at the January 29, 2018 *asambleas*.[96]

i. Mexico's Requests For More Evidence Are Unjustified And Fail To Challenge The Overwhelming Evidence Supporting Claimants' Shareholding In The Juegos Companies

92. According to Respondent, the Tribunal may only be in a position to conclude that Claimants have standing under NAFTA Article 1117 and, thus, that it has jurisdiction if Claimants were to provide it with, for example, "the precise amount loaned," the "terms of the loans including their original maturity and expiry date," and the "number and class of shares acquired by each investor and the voting rights associated with that class of shares."[97] This is simply not required. It should come as no surprise that Mexico does not cite a single authority supporting its remarkable position, as this level of specificity, information and the sheer volume of documents demanded by Mexico is not required to meet the jurisdictional requirements of the NAFTA.

93. In fact, Mexico's own cited case, *Canfor v. United States*, eviscerates Respondent's position, as it explains that "the facts as alleged by a claimant must be accepted as true *pro tempore* for purposes of determining jurisdiction."[98] That holding applies with even greater strength here, where Respondent has failed to produce a single piece of evidence challenging Claimants' voluminous and detailed showing.

94. Claimants' strong, undisputed evidence conclusively establishes that they own and control each of the Juegos Companies. Although Mexico's unreasonable and unsupported

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the Board of Directors of Juegos y Video de Mexico, S. de R.L. de C.V. – President (Jan. 8, 2018), **C-207;** Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. – President (Jan. 8, 2018), **C-209.**

[96] Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-8**, ¶ 34; Unanimous Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento de Mexico, S. de R.L. de C.V. – Transfers (Jan. 8, 2018), **C-202**; Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. – Transfers (Jan. 8, 2018), **C-204;** Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. – Transfers (Jan. 8, 2018), **C-206;** Resolution in Lieu of the Board of Directors of Juegos y Video de Mexico, S. de R.L. de C.V. – Transfers (Jan. 8, 2018), **C-208;** Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. – Transfers (Jan. 8, 2018), **C-210**.

[97] *See* Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 137-142 for Claimants' more detailed discussion of Mexico's unreasonable and unsupported evidentiary demands; *see also* Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 288-289.

[98] *Canfor Corporation* v. *United States of America, Tembec Inc., et al* v. *United States of America and Terminal Forest Products Ltd. V. United States of America,* UNCITRAL, Decision of Preliminary Question (Jun. 6, 2006), **RL-009**, ¶ 171 (emphasis added).

evidentiary standard is unprecedented and unjustified, in the spirit of good faith, Claimants have submitted detailed evidence—shareholder declarations from each individual Claimant,[99] tax filings,[100] internal corporate worksheets,[101] letters,[102] and agreements,[103] among various other documents—to prove their shareholding in the Juegos Companies. In particular, Ms. Erin Burr's first witness statement and accompanying annexes list the specific shareholding of each Claimant in each of the Juegos Companies.[104] Ms. Burr's second statement, submitted along with this Rejoinder, provide further details and clarifications on these issues. Through this copious and detailed evidence, Claimants have established their shareholding in and control of the Juegos Companies, and have more than satisfied their evidentiary burden to meet the jurisdictional requirements.

95. Mexico, on the other hand, has failed to submit or identify any evidence contradicting Claimants' ownership and control of the Juegos Companies after two rounds of submissions. Even if the Tribunal were to apply a preponderance of the evidence or sufficiency standard as Mexico advocates (both of which Claimants maintain are inapplicable),[105] the Claimants have more than satisfied their burden. It is, simply speaking, beyond any doubt that

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[99] Claimant Witness Statements (Jan. 4-7, 2018), **CWS-16-CWS-47**; Witness Statement of John Conley (January 7, 2018), **CWS-13**, Sec. I; Witness Statement of Neil Ayervais (January 7, 2018), **CWS-12**, Sec. I; Second Witness Statement of Gordon Burr (January 7, 2018), **CWS-7**, Sec. I; Second Witness Statement of Erin Burr (January 7, 2018), **CWS-8**, Sec. I.

[100] Schedule K-1 – Form 8865 of the Department of the Treasury Internal Revenue Service for Lou Fohn. **C-112**, and Schedule K-1 – Form 8865 of the Department of the Treasury Internal Revenue Service for Victory Fund, LLC., **C-113**; Schedule K-1 (Form 8865) of JyV Mexico (Year 2013), **C-183**; Schedule K-1 (Form 8865) of JyV Mexico (Year 2014), **C-184**; Schedule K-1 (Form 8865) of JVE DF (Year 2013), **C-185**; Schedule K-1 (Form 8865) of JVE DF (Year 2014), **C-186**; Schedule K-1 (Form 8865) of JVE Mexico (Year 2013), **C-187**; Schedule K-1 (Form 8865) of JVE Mexico (Year 2014), **C-188**; Schedule K-1 (Form 8865) of JVE Centro (Year 2013), **C-189**; Schedule K-1 (Form 8865) of JVE Centro (Year 2014), **C-190**; Schedule K-1 (Form 8865) of JVE Sureste (Year 2013), **C-191**; Schedule K-1 (Form 8865) of JVE Sureste (Year 2014), **C-192.**

[101] Worksheet on Capital Integration, **C-180.**

[102] Letter from Louis Fohn to Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Feb. 4, 2014), **C-75**; Letter from Victory Fund, LLC to Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Feb. 4, 2014), **C-77**; Letter from Craig Johnson to JyV Mexico (Jan. 1, 2012), **C-178**; Letter form Rios Ferrer to Palmas Mexico confirming transfer of corporate files (Sept. 04, 2009), **C-152**.

[103] Purchase Agreement between Gordon G. Burr and Trude Fund II, LLC. (Feb. 4, 2008), **C-175**; and Purchase Agreement between Gordon G. Burr and Trude Fund III, LLC. (Nov. 1, 2008), **C-176**; Subscription Agreement between Juegos y Videos de Mexico de R.L. de C.V and Randall Taylor (July 1, 2011), **C-79**; Subscription Agreement between Juegos y Videos de Mexico de R.L. de C.V and Thomas Malley (July 14, 2011), **C-80**; Subscription Agreement between Juegos y Videos de Mexico de R.L. de C.V and Diamond Financial Group, Inc. (July 22, 2011), **C-81**.

[104] First Witness Statement of Erin Burr (July 25, 2017), **CWS-2** and Annexes A-C.

[105] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 296-299.

the Claimants are controlling shareholders of the Juegos Companies. Mexico's failure to rebut Claimants' evidence reinforces this conclusion.

96. Mexico's attempt to absolve itself of its responsibility to rebut the Claimants' evidence is entirely unconvincing. Incredibly, the Respondent disclaims access to the means to disprove the evidence.[106] Yet, the Respondent has shown it is able to access information in the Foreign Investment Registry of the Ministry of Economy to retrieve foreign shareholding information, as it did in connection with its failed attempt to rebut Claimants' ownership and control of Operadora Pesa.[107] Mexico's failure to submit evidence to rebut Claimants' ownership of the Juegos Companies thus demonstrates that no such evidence exists.

97. In stark contrast with Mexico's absolute failure to adduce any evidence of its own to substantiate its arguments, Claimants have produced more than sufficient evidence confirming their ownership and control of the Juegos Companies. Claimants also have demonstrated their very diligent efforts to obtain and produce as much information as possible on the issues in discussion for this jurisdictional phase. Claimants contacted current and former lawyers, representatives, accountants, and notaries who may have been custodians of the shareholding documents.[108] Through these efforts, Claimants were able to locate the Shareholder's Registry (*Libros de Registro de Socios*) for the Juegos Companies as of September 2009[109] and certain certificates recording Claimants' original ownership in JVE Sureste.[110] Claimants also engaged a private investigator to locate Mr. José Miguel Ramírez, the former general counsel for the Mexican Enterprises, who was responsible for maintaining corporate documents.[111] Claimants hoped and expected to retrieve additional corporate records, including the updated versions of the Shareholder's Registry, but have been unable to do so despite their best efforts.[112]

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[106] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 300.

[107] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 238.

[108] Claimants' Response to the Tribunal's Decision on Respondent's Document Requests (Oct. 31, 2017), p. 2.

[109] *Libros de Registro de Socios* for Juegos de Video y Entretenimiento de México (Jun. 4, 2005), **C-154**; *Libros de Registro de Socios* for Juegos de Video y Entretenimiento del Sureste (Jan. 4, 2006), **C-155**; *Libros de Registro de Socios* for Juegos de Video y Entretenimiento del Centro (Sept. 26, 2007), **C-156**; *Libros de Registro de Socios* for Juegos y Videos de México (Apr. 18, 2006), **C-157**; and *Libros de Registro de Socios* for Juegos de Video y Entretenimiento del DF (Aug. 10, 2006), **C-158**.

[110] Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. Certificates, **C-160**; *see also* Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8,** ¶ 16.

[111] Claimants' Response to the Tribunal's Decision on Respondent's Document Requests (Oct. 31, 2017), p. 2.

[112] Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-7**, ¶ 32.

98. On current information, Claimants continue to believe that the additional shareholding records were likely destroyed in the May 2017 fire.[113] Mr. José Miguel Ramírez has been unable to locate the shareholding documents in his personal records and has confirmed that they were not in his personal office he maintained while working for Claimants.[114]

99. To the extent that these shareholding documents were lost in the May 2017 fire, Mexico should be faulted for its refusal to grant Claimants access to their facilities after the illegal closures in April 2014, when Claimants and their representatives were forced by the Respondent to leave the Casinos immediately and without the company documents or other materials. The Respondent even admits that it had access to the documents stored at the Naucalpan facility before many of the documents were lost or destroyed in the May 2017 fire.[115] As if it were not enough, Mexico has repeatedly ignored Claimants' formal requests to gain access to the Casinos.[116] Even after the Naucalpan fire, Mexico first gave landlords access to the Casinos, instead of Claimants.[117] Notwithstanding this, Mexico ridiculously seeks to lay the consequences of its actions on the Claimants by asking for the Tribunal to dismiss the claims for lack of documents.

100. Claimants' good faith efforts to locate documents during the document production phase should be contrasted with the Respondent's meager efforts to locate and produce documents responsive to Claimants' requests and its disdain for the Tribunal's production order. Specifically, in response to Claimants' 31 requests for documents, Mexico produced *only a total of eight emails and a small handful of additional documents, many of which are duplicates.*[118] It is ironic that the Respondent characterizes the Claimants' evidence as "scant" and "limited" when its document production has been so deficient, and given its absolute failure to rebut Claimants' evidence with evidence (whether documentary or testimonial) of its own.

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[113] Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-7**, ¶¶ 32; Claimants' Response to the Tribunal's Decision on Respondent's Document Requests (Oct. 31, 2017), p. 2.

[114] Second Witness Statement of Julio Carlos Gutiérrez Morales (Oct. 31, 2017), **CWS-6**, ¶ 13; *see also* Pictures of José Miguel Ramírez's Legal Office after Ransacking, **C-153**.

[115] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 70.

[116] Third Witness Statement of Julio Gutiérrez (Jan. 7, 2018), **CWS-9**, ¶ 11.

[117] Third Witness Statement of Julio Gutiérrez (Jan. 7, 2018), **CWS-9**, ¶¶ 12-13.

[118] *See* Claimants' Letter to Tribunal (Dec. 14, 2017), **C-161.**

101. Mexico's deficient production forced Claimants to seek the Tribunal's assistance in an effort to get the Respondent to comply with its document production obligations and the Tribunal's discovery orders. On January 4, 2018, the Tribunal asked the Respondent for information on "exactly when full access to the responsive documents is expected to be restored" and "what steps Respondent has taken to date to obtain access to the documents."[119] The Respondent's answers are pending as of the date of this Rejoinder and are due to the Tribunal on January 12, 2018.

ii. Claimants' Evidence Conclusively Establishes That They Own And Control The Juegos Companies

102. Claimants have adduced conclusive evidence that they own and control the Juegos Companies. First, Claimants have adduced the protocolized meeting minutes of the capitalization *asambleas* for the five Juegos Companies.[120] These minutes establish that many of the Claimants have been owners of the Juegos Companies since the capitalization phase of the companies.[121]

103. Second, Claimants produced subscription agreements evidencing subsequent share acquisitions.[122] These agreements clearly provide information on the name of the investor acquiring new shares and the number and class of units being acquired.

104. Third, Claimants have also provided email and letter correspondence discussing specific share transfers involving Claimants as additional proof that the transfers took place.[123]

105. Fourth, Claimants, through Ms. Erin Burr, have submitted a detailed witness statement and shareholding charts describing the ownership of each Claimant in each Juegos

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[119] Letter from Francisco Grob D., Secretary of the Tribunal (Jan. 4, 2018), **C-197**.

[120] 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), **C-89**; 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), **C-90**; 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), **C-91**; 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), **C-92**; and 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), **C-93**.

[121] *See* Annex D to Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8**.

[122] Subscription Agreement between Juegos y Videos de Mexico de R.L. de C.V and Randall Taylor (July 1, 2011), **C-79**; Subscription Agreement between Juegos y Videos de Mexico de R.L. de C.V and Thomas Malley (July 14, 2011), **C-80**; and Subscription Agreement between Juegos y Videos de Mexico de R.L. de C.V and Diamond Financial Group, Inc. (July 22, 2011), **C-81**.

[123] Letter from Louis Fohn to Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Feb. 4, 2014), **C-75**; Letter from Victory Fund, LLC to Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Feb. 4, 2014), **C-77**; Letter from Craig Johnson to JyV Mexico (Jan. 1, 2012), **C-178**; Letter from Rios Ferrer to Palmas Mexico confirming transfer of corporate files (Sept. 04, 2009), **C-152**.

Companies on an individual basis. Ms. Burr, who was responsible for managing investor relations and authorizing returns and dividends from the Juegos Companies, often reviewed the Juegos Companies' shareholding data, and has provided detailed testamentary evidence to establish Claimants' ownership and control.

106. This evidence, cumulative and consistent, clearly establishes that the Claimants are the majority, controlling shareholders of the Juegos Companies.

107. In addition, Claimants are submitting along with this Rejoinder a variety of other documentary evidence, including the minutes of the January 5, 2018 *asambleas*,[124] as well as witness statements from each of the Claimants with testimony corroborating their individual shareholding in the Juegos Companies.[125] As Mexico concedes, these witness statements are the "best evidence" of these matters.[126]

108. The minutes of the January 5, 2018 *asambleas* conclusively establish that Claimants are the controlling investors of the Juegos Companies.[127] Any evidentiary doubt raised by Mexico's objections was completely wiped aside by the fact that the Claimants were able to hold the *asambleas*, pass shareholder resolutions, and to set the path in motion to have all transfers not formally reflected in prior *asamblea* minutes to be confirmed in an *asamblea* to be held on January 29, 2018.[128] Indeed, as a first order of business, on January 8, 2018, the new Juegos Companies' board members adopted resolutions designating Mr. Gordon Burr as President of the Juegos Companies' boards[129] and also adopted resolutions ratifying and

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[124] Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Jan. 5, 2018), **C-162**; Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V.(Jan. 5, 2018), **C-163**; Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. (Jan. 5, 2018), **C-164**; Minutes of the General Shareholders Meeting of Juegos y Videos de Mexico, S. de R.L. de C.V. (Jan. 5, 2018), **C-165**; and Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento de Mexico, S. de R.L. de C.V. (Jan. 5, 2018), **C-166**.

[125] Claimant Witness Statements (Jan. 4-7, 2018), **CWS-16-CWS-47**, Sec. I; Witness Statement of John Conley (January 7, 2018), **CWS-13**, Sec. I; Witness Statement of Neil Ayervais (January 7, 2018), **CWS-12**, Sec. I; Second Witness Statement of Gordon Burr (January 7, 2018), **CWS-7**, Sec. I; Second Witness Statement of Erin Burr (January 7, 2018), **CWS-8**, Sec. I.

[126] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 295.

[127] Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Jan. 5, 2018), **C-162**; Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V.(Jan. 5, 2018), **C-163**; Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. (Jan. 5, 2018), **C-164**; Minutes of the General Shareholders Meeting of Juegos y Videos de Mexico, S. de R.L. de C.V. (Jan. 5, 2018), **C-165**; and Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento de Mexico, S. de R.L. de C.V. (Jan. 5, 2018), **C-166**.

[128] Second Witness Statement of Gordon G. Burr (Jan. 7, 2017), **CWS-6**, ¶ 34.

[129] Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-8**, ¶ 34; Unanimous Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento de Mexico, S. de R.L. de C.V. – President (Jan. 8, 2018), **C-201**; Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del Sureste, S.

approving all share transfers involving Claimants and agreed to hold further *asambleas* on January 29, 2018 to formally, finally approve by shareholder vote the prior transfers.[130] At these January 29, 2018 *asambleas*, the Juegos Companies will adopt resolutions to formally approve all previous transfers, including those that may have resulted in an addition or reduction of the Juegos Companies' overall capital.[131] This notwithstanding that the previous acknowledgement of share transfers at the January 5, 2018 *asambleas* should suffice under Mexican law for establishing the validity of those transfers as well, for having the shareholders as a whole formally recognizing that they actually took place.[132]

109. Claimants have also submitted additional evidence to support their early ownership in the Juegos Companies. In particular, Claimants are submitting share certificates recording their original share ownership in JVE Sureste.[133] These share certificates are consistent with the shareholding numbers expressed in the capitalization *asamblea* meeting minutes for JVE Sureste.[134]

110. In addition to the share certificates, Claimants are submitting Shareholder's Registries of the Juegos Companies, with shareholding information as of September 2009.[135] Claimants also are submitting protocolized meeting minutes of a JVE Sureste *asamblea* held on

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de R.L. de C.V. – President (Jan. 8, 2018), **C-203**; Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. – President (Jan. 8, 2018), **C-205**; Resolution in Lieu of the Board of Directors of Juegos y Video de Mexico, S. de R.L. de C.V. – President (Jan. 8, 2018), **C-207**; Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. – President (Jan. 8, 2018), **C-209**.

[130] Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-8**, ¶ 34; Unanimous Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento de Mexico, S. de R.L. de C.V. – Transfers (Jan. 8, 2018), **C-202**; Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. – Transfers (Jan. 8, 2018), **C-204**; Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. – Transfers (Jan. 8, 2018), **C-206**; Resolution in Lieu of the Board of Directors of Juegos y Video de Mexico, S. de R.L. de C.V. – Transfers (Jan. 8, 2018), **C-208**; Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. – Transfers (Jan. 8, 2018), **C-210**.

[131] Third Witness Statement of Julio Carlos Gutiérrez Morales (Jan. 7, 2018), **CWS-9**, ¶¶ 27 – 29.

[132] Third Witness Statement of Julio Carlos Gutiérrez Morales (Jan. 7, 2018), **CWS-9**, ¶ 21.

[133] Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. Certificates, **C-160**; Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8**, ¶ 16.

[134] 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), **C-90.**

[135] *Libros de Registro de Socios* for Juegos de Video y Entretenimiento de México (Jun. 4, 2005), **C-154**; *Libros de Registro de Socios* for Juegos de Video y Entretenimiento del Sureste (Jan. 4, 2006), **C-155**; *Libros de Registro de Socios* for Juegos de Video y Entretenimiento del Centro (Sept. 26, 2007), **C-156**; *Libros de Registro de Socios* for Juegos y Videos de México (Apr. 18, 2006), **C-157**; and *Libros de Registro de Socios* for Juegos de Video y Entretenimiento del DF (Aug. 10, 2006), **C-158.**

October 15, 2009.[136] Notwithstanding certain clerical errors as discussed in Ms. Erin Burr's second witness statement,[137] the meeting minutes support a number of share transfers among JVE Sureste owners that the Respondent has erroneously alleged as "inconsistencies."[138]

111. Claimants have also produced the internal corporate worksheet containing shareholding data from which Annex C of Ms. Erin Burr's first witness statement was prepared. The shareholding data, which is current as of March 2014,[139] supports and is consistent with the data in Annex C.

112. Claimants also produced capital return and dividend records of the Juegos Companies.[140] As Ms. Erin Burr explains in greater detail in her second witness statement, each of the cash amounts for every return and dividend was directly tied to an investor's proportion of share ownership in a Juegos Company.[141] The return and dividend records thus support a particular shareholder's ownership as of the date of distribution.

113. Claimants have provided their U.S. tax filings, which provide a contemporaneous record of shareholding for investors subject to U.S. taxes in a given calendar year.[142] Ms. Erin Burr explains in her second witness statement how each of the reported figures were derived, which are tied to an investor's proportion of shareholding in a Juegos Company.[143]

114. Claimants have also submitted witness statements from each of the claimant investors of the Juegos Companies, attesting to their shareholding and transfer activity.[144] The

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[136] General Shareholder's Meeting of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Oct. 15, 2009), **C-168.**

[137] Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8**, ¶ 18.

[138] Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8**, ¶ 37.

[139] Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8**, ¶ 36.

[140] Transfer Requests for the Juegos Companies (Jan. 3, 2013 – Mar. 26, 2014), **C-169**.

[141] Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8**, ¶¶ 22-23.

[142] Schedule K-1 – Form 8865 of the Department of the Treasury Internal Revenue Service for Lou Fohn. **C-112**; Schedule K-1 – Form 8865 of the Department of the Treasury Internal Revenue Service for Victory Fund, LLC., **C-113**; Schedule K-1 (Form 8865) of JyV Mexico (Year 2013), **C-183**; Schedule K-1 (Form 8865) of JyV Mexico (Year 2014), **C-184**; Schedule K-1 (Form 8865) of JVE DF (Year 2013), **C-185**; Schedule K-1 (Form 8865) of JVE DF (Year 2014), **C-186**; Schedule K-1 (Form 8865) of JVE Mexico (Year 2013), **C-187**; Schedule K-1 (Form 8865) of JVE Mexico (Year 2014), **C-188**; Schedule K-1 (Form 8865) of JVE Centro (Year 2013), **C-189**; Schedule K-1 (Form 8865) of JVE Centro (Year 2014), **C-190**; Schedule K-1 (Form 8865) of JVE Sureste (Year 2013), **C-191**; Schedule K-1 (Form 8865) of JVE Sureste (Year 2014), **C-192**.

[143] *See* Annex E to Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8**.

[144] Claimant Witness Statements (Jan. 4-7, 2018), **CWS-16-CWS-47**, Sec. I; Witness Statement of John Conley (January 7, 2018), **CWS-13**, Sec. I; Witness Statement of Neil Ayervais (January 7, 2018), **CWS-12**, Sec. I; Second Witness Statement of Gordon Burr (January 7, 2018), **CWS-7**, Sec. I; Second Witness Statement of Erin Burr (January 7, 2018), **CWS-8**, Sec. I.

testimony is consistent and establishes a detailed history of Claimants' shareholding in all of the Juegos Companies.

115. While Claimants have submitted these witness statements and additional evidence in a show of good faith and for the sake of completeness, Claimants reiterate their prior observation that Mexico's evidentiary demands for such evidence are not required by the NAFTA and appear to be part of an overall strategy to block the Claimants' substantial claims from proceeding to the merits stage or to stall these proceedings while Claimants' damages continue to accrue and increase.[145] Importantly, a full and complete corporate record as per Mexican law simply is not required by the NAFTA and thus is not necessary to find jurisdiction. The additional documents sought by Mexico would simply be duplicative of the shareholding evidence already submitted in this proceeding, which more than satisfied the jurisdictional requirements of the NAFTA.

116. In any event, under Mexican law, the corporate records to which Mexico refers—the shareholder's registry, capital variations book, and share certificates, among others—are *not* constitutive of any shareholding rights, nor are they necessary to prove share ownership.[146] The shareholder's registry and the capital variations book simply reflect the resolutions adopted in an *asamblea*,[147] and Mexican law does not even contemplate the issuance of share certificates by limited liability partnerships (in Spanish, *sociedades de responsabilidad limitada*), which is the corporate legal form of the Juegos Companies.[148]

117. The minutes of the *asambleas* are, under Mexican corporate law, the means through which shareholders can prove in Mexico their status as owners of a company, even though it is the underlying buy/sell/transfer transactions that create the ownership status.[149] The documents requested by Mexico are only a reflection of the *asambleas*, and as such would only be duplicative of the shareholding evidence already submitted by Claimants in this proceeding.[150] Also, as will be explained in further detail below, the Juegos Companies held *asambleas* on January 5, 2018 to formally recognize all previous transfers of shares, and will

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[145] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 141.

[146] Third Witness Statement of Julio Gutierrez (Jan. 7, 2018), **CWS-9**, ¶¶ 14-17.

[147] Third Witness Statement of Julio Gutierrez (Jan. 7, 2018), **CWS-9**, ¶¶ 14-15, 17.

[148] General Law of Mercantile Companies, Articles 111 and 124-126 (these articles only require the issuance of share certificates for *sociedades anónimas*, and not for *sociedades de responsabilidad limitada)*, **C-198**.

[149] Third Witness Statement of Julio Gutierrez (Jan. 7, 2018), **CWS-9**, ¶ 16.

[150] Third Witness Statement of Julio Gutierrez (Jan. 7, 2018), **CWS-9**, ¶ 17.

be holding *asambleas* on January 29, 2018 to formally approve these transfers, so, in any event, the arguments made by Mexico regarding the need to formally comply with all aspects of Mexican corporate law, while irrelevant for purposes of determining ownership under the NAFTA—have been rendered moot.

iii. Mexico's Allegations Of Inconsistencies In Claimants' Evidence Are Baseless And, Ultimately, Inconsequential

118. Respondent also attempts to cast doubt on Claimants' evidence, alleging that the evidence of Claimants' shareholding is "inconsistent."[151] The Respondent principally takes aim at Ms. Erin Burr's first witness statement and in particular its Annex C, which features a series of charts detailing the shareholding in the Juegos Companies as of June 19, 2013, the date when Mexico temporarily closed the DF Casino facility—the first governmental measure for which Claimants claim damages in this proceeding.

119. In its Memorial, the Respondent dedicated almost its entire section on Claimants' standing demanding additional information on "who owns what."[152] The detailed charts that Ms. Burr prepared more than answered that charge. Yet, Mexico continues to press this baseless argument in its Reply, even after the Tribunal denied most of Respondent's document request relating to Annex C.[153]

120. As Claimants and Ms. Burr have already explained, Annex C is based on the data contained in Exhibits C-89 to C-93 (i.e. the minutes of the general shareholder's meetings at the capitalization phase of the Juegos Companies, or the "capitalization *asambleas*") *and* an internal corporate worksheet kept contemporaneously in the regular course of business.[154] Claimants observe that the Respondent has decided not to submit this worksheet[155] and has avoided discussion of it in its Reply, despite that Claimants produced it in response to Mexico's request and the Tribunal's order. Mexico's convenient decision to ignore the worksheet has led to its erroneous charges of alleged inconsistency in Annex C.

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[151] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 214.

[152] Respondent's Memorial on Jurisdictional Objections (May 30, 2017), Sec. C.

[153] Tribunal's Decision on Requests for Production of Documents (Oct. 6, 2017), Respondent's Document Request #7.

[154] First Witness Statement of Erin Burr (July 25, 2017), **CWS-2**, ¶ 72; Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8**, ¶ 35; Tribunal's Decision on Requests for Production of Documents (Oct. 6, 2017), Respondent's Document Request #7, Claimant's Response.

[155] Worksheet on Capital Integration, **C-180**.

121. There is no "inconsistency" between Ms. Burr's Annex C and Exhibits C-89 to C-93 because they depict shareholding at different time periods.[156] Annex C shows the shareholding as of June 19, 2013. In contrast, Exhibits C-89 to C-93 show the allocation of shares at the early capitalization phase of the Juegos Companies. As the Respondent recognizes, subsequent transfers have occurred since the capitalization phase, which explains the apparent discrepancy in the numbers.[157] Yet, incredibly, only five paragraphs after acknowledging the existence of share transfers subsequent to the initial capitalization of the Juegos Companies, the Respondent charges that Ms. Burr's Annex C is unreliable because it is "inconsistent" with Exhibits C-89 to C-93.[158]

122. One of the "inconsistencies" that the Respondent alleges is illustrative of the weakness of the rest. Claimants Diamond Financial Group, Thomas Malley, and Randall Taylor have different shareholding reflected in Ms. Burr's Annex C than what is referred to in the capitalization *asamblea*, because they acquired new shares in the intervening period between the capitalization *asamblea* and the date of the DF Casino closure.[159] In particular, in 2011 these claimants acquired new Class A1 and B shares in JyV Mexico (Cuernavaca), when they contributed additional funds for a remodeling and expansion of the Cuernavaca casino facility.[160] This was already explained in Ms. Erin Burr's first witness statement[161] and the subscription agreements evidencing these transactions were previously submitted as Exhibits C-79 to C-81.[162] The Respondent, however, conveniently makes no reference to this evidence.

123. The other alleged "inconsistencies" relate to the following share transfers, all of which occurred between 2008 to 2012:[163]

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[156] *See* Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8**, ¶ 35.

[157] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 218

[158] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 223.

[159] Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8**, ¶ 19.

[160] First Witness Statement of Erin Burr (July 25, 2017), **CWS-2**, ¶¶ 32, 83; Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8**, ¶ 37

[161] First Witness Statement of Erin Burr (July 25, 2018), **CWS-2**, ¶ 83.

[162] Subscription Agreement between Juegos y Videos de Mexico de R.L. de C.V and Randall Taylor (July 1, 2011), **C-79**; Subscription Agreement between Juegos y Videos de Mexico de R.L. de C.V and Thomas Malley (July 14, 2011), **C-80**; and Subscription Agreement between Juegos y Videos de Mexico de R.L. de C.V and Diamond Financial Group, Inc. (July 22, 2011), **C-81**.

[163] Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8**, ¶ 37 (individually addressing each alleged inconsistency raised by Mexico).

- Trude Fund II, LLC acquired 1.500 Class B units in JVE Sureste, which was formally recognized in the general shareholder's meeting held on October 15, 2009.[164]

- Trude Fund III, LLC acquired 1.007 Class B units in JVE Sureste, which was formally recognized in the general shareholder's meeting held on October 15, 2009.[165]

- J. Johnson Consulting, LLC acquired 0.375 Class B units in JVE Sureste, which was formally recognized in the general shareholder's meeting held on October 15, 2009.[166]

- Deana Anthone acquired 0.25 Class B units in JVE Sureste, which was formally recognized in the general shareholder's meeting held on October 15, 2009.[167]

- Robert Sawdon acquired 0.5 Class B units in JVE Sureste, which was formally recognized in the general shareholder's meeting held on October 15, 2009.[168]

- Caddis Capital, LLC made investments in JVE Centro, JyV Mexico, and JVE DF in 2006 before the companies' capitalization.[169] However, as a result of a mistaken omission, Caddis Capital's capital contributions in JVE Centro, JyV Mexico, and JVE DF were not recognized at the companies' capitalization *asambleas*, held on December 31, 2007, May 31, 2008, and September 2, 2008, respectively. In 2012, Mr. Burr and Mr. Conley were made of aware of this omission and immediately took steps to rectify it by transferring 0.5 Class B units to Caddis Capital in each of the Juegos Companies where the capital contribution was not recorded initially.[170] Specifically, in JVE Centro and JyV Mexico, Mr. Conley and Mr. Burr each transferred 0.25 units of their Class B shares to Caddis Capital. In JVE DF, Mr. Conley and Mr. Burr (through Oaxaca Investments, LLC) each transferred 0.25 units of their Class B shares to Caddis Capital.

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[164] Witness Statement of Trude Fund II, LLC. (Jan. 7, 2018), **CWS-43**; Purchase Agreement between G. Burr and Trude Fund II, LLC. (Feb. 4, 2008), **C-175**; General Shareholder's Meeting of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Oct. 15, 2009), **C-168**, p. 4. The October 15, 2009 *asamblea* was produced to Mexico during the document production phase on September 5, 2017.

[165] Witness Statement of Trude Fund III, LLC (Jan. 7, 2018), **CWS-44**; Purchase Agreement between G. Burr and Trude Fund III, LLC. (Nov. 1, 2008), **C-176**; General Shareholder's Meeting of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Oct. 15, 2009), **C-168**, p. 4.

[166] General Shareholder's Meeting of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Oct. 15, 2009), **C-168**, p.4; Witness Statement of J. Johnson Consulting, LLC (Jan. 7, 2018), **CWS-32**.

[167] General Shareholder's Meeting of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Oct. 15, 2009), **C-168**, p. 4; Witness Statement of Deana Anthone (Jan. 7, 2018), **CWS-21**.

[168] General Shareholder's Meeting of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Oct. 15, 2009), **C-168**, p. 4; Witness Statement of Robert Sawdon (Jan. 7, 2018), **CWS-42**.

[169] Subscription Agreement between JVE Centro and Caddis Capital, LLC (Oct. 13, 2006), **C-136;** Subscription Agreement between JyV Mexico and Caddis Capital, LLC (Oct. 13, 2006), **C-137;** Subscription Agreement between JVE DF and Caddis Capital, LLC (Oct. 13, 2006), **C-138;** Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8**, ¶ 37; Witness Statement of Caddis Capital, LLC (Jan. 7, 2018), **CWS-25**.

[170] Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-7 ¶ 8, 9**; Witness Statement of John Conley (Jan. 7, 2018), **CWS-13, ¶** 6–8; Witness Statement of Oaxaca Investments, LLC (January 7, 2018), **CWS-19 ¶** 5.

124. As a preliminary matter, the shareholding situation before June 2013 is irrelevant for jurisdictional purposes. Although the Respondent appears fixated on the corporate history of the Claimants' companies, the Claimants observe that they are claiming damages for measures from June 2013 onwards. Ownership and control of a company is relevant at the time of the breaches, and not before. The Tribunal, during the document production phase, also rejected the Respondent's efforts to obtain documents pre-dating the earliest breach alleged by Claimants in this arbitration (i.e. Mexico's closure of the DF Casino facility on June 19, 2013).[171] Further, the Respondent itself cites the *Gallo v. Canada* case,[172] which held that:

> Accordingly, for Chapter 11 of the NAFTA to apply to a measure relating to an investment, that investment must be owned or controlled by an investor of another party, and ownership or control must exist at the time the measure which allegedly violates the Treaty is adopted or maintained. In a claim under Art. 1117 the investor must prove that he owned or controlled directly or indirectly the 'juridical person' holding the investment, at the critical time.[173]

125. In any case, as explained in greater detail in Ms. Erin Burr's second witness statement,[174] these transfers are supported by contemporaneous tax records,[175] distribution records,[176] and the internal worksheet ignored by the Respondent.[177] This is in addition to the individual witness statements from each shareholder testifying to their shareholding and transfer activity.

126. The Respondent also ignores the evidence of Claimants Louis Fohn's and Victory Fund, LLC's acquisitions of their shares in JVE Sureste. In addition to Ms. Burr's first witness statement, Claimants submitted contemporaneous materials as documentary evidence of those acquisitions. For example, Exhibit C-77 is a letter signed by Mr. Daniel Rudden as Manager of Victory Fund, LLC addressed to JVE Sureste, requesting that dividends issued for

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[171] Respondent's Redfern Request (Aug. 2017), **C-171**, Request #3.

[172] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 283.

[173] *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award (Sept. 15, 2011), **CL-37**, ¶ 325 (emphasis added).

[174] Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8**, Sec. II, III.

[175] Schedule K-1 – Form 8865 of the Department of the Treasury Internal Revenue Service executed by Lou Fohn. **C-112**, and Schedule K-1 – Form 8865 of the Department of the Treasury Internal Revenue Service executed by Victory Fund, LLC., **C-113**; Schedule K-1 (Form 8865) of JyV Mexico (Year 2013), **C-183**; Schedule K-1 (Form 8865) of JyV Mexico (Year 2014), **C-184**; Schedule K-1 (Form 8865) of JVE DF (Year 2013), **C-185**; Schedule K-1 (Form 8865) of JVE DF (Year 2014), **C-186**; Schedule K-1 (Form 8865) of JVE Mexico (Year 2013), **C-187**; Schedule K-1 (Form 8865) of JVE Mexico (Year 2014), **C-188**; Schedule K-1 (Form 8865) of JVE Centro (Year 2013), **C-189**; Schedule K-1 (Form 8865) of JVE Centro (Year 2014), **C-190**; Schedule K-1 (Form 8865) of JVE Sureste (Year 2013), **C-191**; Schedule K-1 (Form 8865) of JVE Sureste (Year 2014), **C-192**.

[176] Transfer Requests for the Juegos Companies (Jan. 3, 2013 – Mar. 26, 2014), **C-169**.

[177] Worksheet on Capital Integration, **C-180**.

Victory Fund's Class B membership in the company be deposited into a designated bank account, with a voided check attached.[178] Exhibit C-75 is a similar letter signed by Mr. Fohn.[179] Exhibit C-76 is an email from Daniel Rudden to Erin Burr confirming that Louis Fohn purchased his Class B shares in JVE Sureste in March of 2013.[180] Puzzlingly, Mexico complains that these documents are insufficient evidence of the Louis Fohn and Victory Fund transfers because there is no direct evidence of Mr. Fohn and Victory Fund's approval as qualified shareholders or that the transfer was registered in the Shareholder's Registry.[181] This, again, is Mexico attempting to insert dubious Mexican law requirements into this NAFTA proceeding when the text of the NAFTA treaty does not include such requirements. In any event, in addition to the evidence described above, Claimants have submitted additional evidence with this Rejoinder to support this transfer.

127. First, the shareholding data contained in the internal worksheet previously produced to the Respondent supports these two transfers. As Ms. Erin Burr explains in her second witness statement, in the worksheet containing JVE Sureste shareholding data, which is current as of March 2014, Louis Fohn and Victory Fund, LLC are listed as Investors #49 and #50 with 0.4 Class B units and 0.5 Class B units, respectively.[182]

128. Second, Louis Fohn and Victory Fund, LLC's shareholding in JVE Sureste is corroborated by the companies' distribution records in March 2014.[183] As Ms. Burr explains in greater detail in her second witness statement, the cash amounts that Louis Fohn ($758.80) and Victory Fund ($948.51) received as dividends is directly proportional to their Class B shareholding units.[184]

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[178] Letter from Victory Fund, LLC to Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Feb. 4, 2014), **C-77**.

[179] Letter from Louis Fohn to Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Feb. 4, 2014). **C-75**

[180] Email from Dan Rudden to Erin Burr (July 28, 2014), **C-76**

[181] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 228.

[182] Worksheet on Capital Integration, **C-180**, p. 2; Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8**, ¶ 38.

[183] Transfer Requests for the Juegos Companies (Jan. 3, 2013 – Mar. 26, 2014), **C-169**, p. 40; Transfer Requests for the Juegos Companies (Jan. 3, 2013 – Mar. 26, 2014), **C-169**, p. 46.

[184] Transfer Requests for the Juegos Companies (Jan. 3, 2013 – Mar. 26, 2014), **C-169**, p. 40; Transfer Requests for the Juegos Companies (Jan. 3, 2013 – Mar. 26, 2014), **C-169**, p. 46; Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8**, ¶ 39.

129. Even on Mexico's improper argument for this NAFTA proceeding that the transfers did not occur because they were not formally recognized in accordance with the bylaws of the Juegos Companies (as they claim is required by Mexican law), the shareholding numbers in Exhibits C-89 to C-93 sufficiently establish the allocation of shares and shareholders' lists at the initial capitalization phase, before transfers took place. Based on the shareholding numbers in Exhibits C-89 to C-93, the Claimants still own and control the Juegos Companies, as they held the majority of all shares, including Class B shares:

		Shareholding %	
Juegos Companies		**All Classes of Shares**	**Class B Shares**
JVE Mexico (Naucalpan)		82.26%	100.00%
JVE Sureste (Villahermosa)		66.98%	67.15%
JVE Centro (Puebla)		68.72%	64.34%
JyV Mexico (Cuernavaca)		72.33%	64.54%
JVE DF (DF)		86.07%	56.37%

130. In any event, whatever questions may arise from Mexico's unsupported arguments were rendered moot after the January 5, 2018 *asambleas*, during which the Juegos Companies' shareholders passed resolutions to, among other things, formally recognize any and all share transfers not formally reflected in prior *asamblea* minutes, and their agreement to hold *asambleas* to formally recognize these shareholdings on January 29, 2018.[185] Indeed, on January 8, 2018, the new Juegos Companies' board members adopted resolutions designating Mr. Gordon Burr as President of the Juegos Companies' boards.[186] The Juegos Companies'

[185] Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Jan. 5, 2018), **C-162**; Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V.(Jan. 5, 2018), **C-163**; Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. (Jan. 5, 2018), **C-164;** Minutes of the General Shareholders Meeting of Juegos y Videos de Mexico, S. de R.L. de C.V. (Jan. 5, 2018), **C-165**; and Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento de Mexico, S. de R.L. de C.V. (Jan. 5, 2018), **C-166**; Claimant Witness Statements (Jan. 4-7, 2018), **CWS-16-CWS-47**, Sec. V; Witness Statement of John Conley (January 7, 2018), **CWS-13**, Sec. VI; Witness Statement of Neil Ayervais (January 7, 2018), **CWS-12**, Sec. VIII; Second Witness Statement of Gordon Burr (January 7, 2018), **CWS-7**, Sec. VII; Second Witness Statement of Erin Burr (January 7, 2018), **CWS-8**, Sec. VI.

[186] Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-8**, ¶ 34; Unanimous Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento de Mexico, S. de R.L. de C.V. – President (Jan. 8, 2018), **C-201**; Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. – President (Jan. 8, 2018), **C-203**; Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. – President (Jan. 8, 2018), **C-205**; Resolution in Lieu of the Board of Directors of Juegos y Video de Mexico, S. de R.L. de C.V. – President (Jan. 8, 2018), **C-207**; Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. – President (Jan. 8, 2018), **C-209**.

board members also adopted resolutions confirming that the share transfer documentation provided at the January 5, 2018 *asambleas* accurately and completely complied with the Juegos Companies' bylaws, and ratified and approved the share transfers.[187] The January 5, 2018 *asambleas* and January 8, 2018 board resolutions thus conclusively confirm that the Claimants own *and* control the Juegos Companies.

131. Given the overwhelming, unrebutted evidence of Claimants' shareholding in and control of the Juegos Companies, the Tribunal should reject Mexico's continued pursuit down this line of inquiry. The evidentiary record firmly establishes that Claimants own and control the Juegos Companies. Whether a particular shareholder owns 0.5 or 0.75 units at a particular time does not leave in doubt the central proposition shown by Claimants' unrebutted evidence that Claimants own the majority of all shares and the majority of Class B shares in all five of the Juegos Companies.

d. The Claimants' Attempts To Mitigate Damages Through Mr. Chow and Mr. Pelchat Have No Impact On Standing

132. Mexico's arguments that the August 29, 2014 and November 7, 2014 *asambleas* somehow deprive the Claimants of standing are completely misguided, unsupported, and contrary to the factual record. As the record demonstrates, Claimants have always owned *and* controlled the Juegos Companies, irrespective of who sat on the boards, and there was never any authorization to transfer or any actual transfer of the Claimants' shares to Grand Odyssey.

i. The Parties Purposefully Structured The Transaction So As To Follow Ms. Salas' Instruction And Facilitate The Reopening Of The Casinos

133. After Mexico illegally closed the Casinos in April 2014, Mr. Burr began investigating possible avenues to mitigate the substantial damages that Mexico's conduct was causing him and his fellow investors.[188] Mr. Burr considered a number of options, and took a

[187] Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-8**, ¶ 34; Unanimous Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento de Mexico, S. de R.L. de C.V. – Transfers (Jan. 8, 2018), **C-202**; Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. – Transfers (Jan. 8, 2018), **C-204**; Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. – Transfers (Jan. 8, 2018), **C-206**; Resolution in Lieu of the Board of Directors of Juegos y Video de Mexico, S. de R.L. de C.V. – Transfers (Jan. 8, 2018), **C-208**; Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. – Transfers (Jan. 8, 2018), **C-210.**

[188] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 8; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 14.

meeting with Jose Benjamin Chow del Campo ("**Mr. Chow**").[189] Mr. Chow proposed a possible transaction wherein the Juegos Companies and their assets would merge into Grand Odyssey S.A. de C.V. ("**Grand Odyssey**"), and ultimately merge into a Canadian shell company.[190] Mr. Chow's proposal was especially attractive to Mr. Burr because Mr. Chow stated that he had connections high up at SEGOB who would facilitate the reopening of the Casinos.[191] After a meeting with Marcela Gonzales Salas ("**Ms. Salas**"), the Director General of the Games and Raffles Division at SEGOB, Mr. Chow and his colleague, Luc Pelchat ("**Mr. Pelchat**") relayed to Gordon that the Mexican government was unequivocal: they would not allow the Casinos to reopen as long as the U.S. Shareholders remained involved in the Juegos Companies.[192]

134. As a result of the Mexican government's directive, Mr. Chow and Mr. Burr structured the transaction so that all the stock in Grand Odyssey and in the Juegos Companies would be acquired by a Canadian public special purpose vehicle, and the U.S. Shareholders of the Juegos Companies would receive securities issued by the public company and cash in exchange for their shares (the "**Transaction**").[193] The U.S. Shareholders would be compensated in part by being distributed ownership shares in the Canadian public company and also partly by receiving cash payments.[194]

135. In negotiating the proposed Transaction, Mr. Burr's and the other U.S. Shareholders took all actions necessary to maximize the prospects that the Casinos reopened as soon as possible. The parties believed that the Transaction, which would allow the U.S. Shareholders to retain indirect ownership of the Juegos Companies through their ownership of

[189] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 8; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 14.

[190] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 8; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 14.

[191] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 8; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 14.

[192] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 9; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 14; First Witness Statement of Luc Pelchat (Jul. 21, 2017), **CWS-4**, ¶ 8.

[193] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 10; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 14.

[194] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 11; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 14.

shares in the Canadian special purpose vehicle, would satisfy Ms. Salas and the Mexican government, which would then allow the Casinos to reopen.[195]

ii. Messrs. Chow And Pelchat Took Positions On The Boards Solely For The Purpose Of Reopening The Casinos And The Claimants Never Lost The Legal Right To Control The Boards

136. In its Reply, Mexico states that the minutes of the August 28, 2014 *asambleas* reflect that Mr. Chow and Mr. Pelchat took positions on the Boards of the Juegos Companies, apparently to support its assertion that Claimants do not have full control of the Juegos Companies.[196] Claimants do not dispute that Mr. Chow and Mr. Pelchat assumed roles on the boards of the Juegos Companies in August 2014. Sworn testimony from each of the Claimants, along with testimony from Mr. Chow and Mr. Pelchat, establish that the Claimants agreed to a temporary change in the composition of the Juegos Companies' boards at the August 2014 *asambleas* solely in order to facilitate the proposed Transaction.[197]

137. As is described in more detail below, while Mr. Chow and Mr. Pelchat assumed roles on the boards of the Juegos Companies, all parties understood that the Claimants still controlled the Juegos Companies and have at all times maintained control of the enterprises, and that Mr. Chow and Mr. Pelchat's tenure was limited both in duration and scope, only to enable the consummation of the proposed Transaction in order to reopen the Casinos.[198]

138. Before the August 29, 2014 *asambleas*, Messrs. Chow and Pelchat informed Claimants that in order to better leverage their contacts in the Mexican government to achieve the reopening of the Casinos, both of them needed to be on the boards of the Juegos Companies.[199] Messrs. Chow and Pelchat would have replaced Mexican nationals who sat on

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[195] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 12; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 14.

[196] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 219.

[197] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 14; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶¶ 15-16; Second Witness Statement of Luc Pelchat (Jan. 3, 2018), **CWS-10**, ¶ 4; Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-8**, ¶ 11.

[198] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS 11**, ¶¶ 15-16; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 18; Second Witness Statement of Luc Pelchat (Jan. 3, 2018), **CWS-10**, ¶¶ 4-6.

[199] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 13; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 15.

the boards, while the U.S. shareholder directors would have maintained their roles.[200] The U.S. Shareholders agreed to this proposal to preserve the Transaction and the possibility of having the Casinos reopened.[201]

139. After further meetings with Mexican government officials, especially Ms. Salas, Messrs. Chow and Pelchat told Claimants that in order for the Casinos to reopen, the Mexican government was insisting on all U.S. Shareholders who held seats on the boards of the Juegos Companies being replaced with Mexican nationals.[202] Claimants protested these changes to the boards of the Juegos Companies, but ultimately and reluctantly relented after Mr. Chow stated that this was the only way that the Mexican government would ever approve the reopening of the Casinos and the only way to proceed with the Transaction.[203] As the unrebutted witness statements presented in this proceeding make clear, however, Messrs. Chow and Pelchat as well as the U.S. Shareholders, understood and agreed that Messrs. Chow and Pelchat's positions on the Boards were only temporary, and that if the Transaction failed, for any reason, then Mr. Chow and the other Mexican nationals that Mr. Chow appointed to the boards of the Juegos Companies would immediately resign and return all board positions to the U.S. Shareholders.[204]

140. Messrs. Chow and Pelchat also confirm through their sworn testimony the following key points that undercut Mexico's argument: (i) that they have always understood that the U.S. Shareholders of the Juegos Companies expected them to act solely for the benefit of the U.S. Shareholders; (ii) that they were required to do what the U.S. Shareholders instructed them to do in relation to all aspects of the Juegos Companies, including their management; and (iii) that the U.S. Shareholders always retained the legal right to control the boards of the Juegos Companies in spite of the change in board composition.[205]

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[200] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 13; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 15.

[201] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 13; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 15.

[202] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11** ¶ 14; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 16.

[203] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 14; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 17.

[204] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 15; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 18; Claimant Witness Statements (Jan. 4- 7, 2018), **CWS-16-CWS-47**, Section IV.

[205] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 16; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 18.

141. Thus, that Messrs. Chow and Pelchat temporarily assumed seats on the boards for the sole purpose of effectuating the Transaction, which ultimately never came to fruition, does not change that Claimants have always maintained the legal right to control of the Boards of the Juegos Companies. In any event, as will be explained in more detail below, at the January 5, 2018 *asambleas*, Mr. Gordon Burr, Ms. Erin Burr, and Mr. Douglas Black replaced Messrs. Chow and Pelchat and their appointees on the Juegos Companies' boards, demonstrating and formalizing the Claimants' control over the Juegos Companies.

iii. The Claimants Never Transferred Their Shares In The Juegos Companies To Grand Odyssey

142. In its Reply, Mexico also argues that Claimants have not provided sufficient evidence to prove that the transfer of the Claimants' shares in the Juegos Companies to Grand Odyssey did not take place at the November 7, 2014 *asambleas*.[206] That allegation is nonsensical. Claimants have already provided declarations from Messrs. Gordon Burr, Julio Gutiérrez and Luc Pelchat confirming that no transfer of shares occurred in the November 7, 2014 *asambleas*. They also have submitted with this Rejoinder witness statements from each individual Claimant, as well as Messrs. Neil Ayervais, Luc Pelchat (again), Julio Gutiérrez (again) and Benjamin Chow—nearly every party involved in the proposed Transaction—to lay bare the speciousness of Mexico's argument. Each witness statement states unequivocally that (1) no transfer of shares occurred at the November 7, 2014 *asambleas* and that (2) the *asambleas* did not actually transfer or approve any transfer of the shares of the U.S. Shareholders in the Affected Juegos Companies (i.e. JVE Sureste, JVE Centro, JyV Mexico, and JVE DF) to Grand Odyssey. And to avoid even the sliver of doubt, the Claimants have recently held *asambleas* that nullified the November 2014 *asamblea* and recognized that any and all actions taken in this *asamblea* are void *ab initio*, effectively mooting Mexico's arguments.

143. More specifically, the evidentiary record, including Mr. Chow's and Mr. Pelchat's witness statements, shows that Mr. Chow decided to hold the November 7, 2014 *asambleas* and execute board minutes that made it *appear* as though the U.S. Shareholders had transferred their shares in the Juegos Companies to Grand Odyssey, even though he knew that no actual transfer of shares could or would take place.[207] According to Mr. Chow, he did this because he wanted to show the officials at the Games and Raffles Division, particularly Ms.

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[206] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 271.

[207] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 18; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 21.

Salas, that a transfer had in fact taken place and that the U.S. Shareholders did not have any ownership in the Juegos Companies so as to facilitate the reopening of the Casinos.[208] That Respondent would even consider allowing the reopening of Claimants' Casinos if all U.S. influence over their operations were eliminated demonstrates the illegal disparate treatment underlying Claimants' claims and allows one to understand Mr. Chow's actions, even though they were illegal and unjustified.

144. The Claimants' witness statements confirm that the U.S. Shareholders' proxies at the November 7, 2014 *asambleas* not only objected to the proposed transfer of shares, but also refused to approve the draft minutes, and to deliver the U.S. Shareholders' proxies.[209] They then left the meeting—at no point was there the quorum necessary to approve any resolutions.[210] Since the U.S. Shareholders held a majority of Class B voting shares of each of the Juegos Companies, without their proxies and approval, any resolution purportedly taken at the November 7, 2014 meetings to transfer their shares to Grand Odyssey was void *ab initio* and never materialized.[211]

145. Nonetheless, Mr. Chow held an invalid and illegal vote without the representatives for the U.S. Shareholders and had the notary prepare fraudulent shareholder minutes stating that the shares of the U.S. Shareholders in four of the five Juegos Companies had been transferred to Grand Odyssey on November 7. Mr. Chow did this even though (1) there was no quorum at the meeting;[212] (2) he had no authority from the U.S. Shareholders to effectuate these transfers;[213] (3) there was no consideration paid for any transfer of shares;[214]

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[208] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 23.

[209] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 21; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶¶ 21; Claimant Witness Statements (Jan. 4-7, 2018), **CWS-16-CWS-47**, Section IV; Witness Statement of John Conley (January 7, 2018), **CWS-13**, Sec V; Witness Statement of Neil Ayervais (January 7, 2018), **CWS-12**, Sec. VI.

[210] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 21; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶¶ 21; Claimant Witness Statements (Jan. 4-7, 2018), **CWS-16-CWS-47**, Section IV.

[211] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 22; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶¶ 22; Claimant Witness Statements (Jan. 4-7, 2018), **CWS-16-CWS-47**, Section IV; Witness Statement of John Conley (January 7, 2018), **CWS-13**, Sec V.

[212] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 21; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 21.

[213] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶¶ 20-22; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶¶ 21-22; Claimant Witness Statements (Jan. 4-7, 2018), **CWS-16-CWS-47**, Section IV.

[214] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 22; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 22.

and (4) the share transfer was only contemplated through and upon consummation of the Transaction with Grand Odyssey and a Canadian public shell company.[215] The Transaction was not complete on the date of the November 7, 2014 *asambleas* and ultimately never came to fruition.[216] The Claimants have provided both documentary and testimonial evidence from numerous individuals, including Messrs. Chow and Pelchat as well as each Claimant in this arbitration, affirming that there was no authorization for a transfer of the Claimants' shares and in fact no transfer of shares took place at the November 7, 2014 *asambleas*.

iv. The Parties Continued Negotiations To Consummate The Transaction With The Mutual Understanding That The Claimants Owned The Shares

146. Following the November 2014 *asambleas*, the parties continued to negotiate the Transaction with the clear shared understanding that the U.S. Shareholders remained the owners of their shares in the Juegos Companies.

147. The Stock Purchase Agreements ("**SPA**s") executed in January and February 2015 plainly stated the parties' arrangement and recognition that the U.S. Shareholders remained the owners of their shares in the Juegos Companies.[217] These agreements were executed by all parties (including Messrs. Chow and Pelchat), but ultimately never became effective because Mr. Chow was unable to reopen the Casinos, a condition precedent to their effectiveness.[218] Article 1.3 of both the January and February 2015 SPAs states:

> *Until Closing, the Shareholders shall own and control ownership of the Kash Shares*[219] *and shall vote such Kash Shares as is required for approval and fulfillment of the transactions required and contemplated by this Agreement.*[220]

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[215] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 22; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 22.

[216] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 22; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 22.

[217] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 24; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶¶ 23-24; Second Witness Statement of Luc Pelchat (Jan 3, 2018), **CWS-10**, ¶ 8.

[218] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 24; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 27.

[219] In the Explanatory Statement of the SPAs, the "Kash Shares" are defined as all of the issued and outstanding shares of stock in the Juegos Companies, Operadora Pesa, S. de R.L. de C.V., Mercagaming, S. de R.L. de C.V., and Metrojuegos, S. de R.L. de C.V. *See* January 2015 SPA **C-134** and February 2015 SPA **C-135**.

[220] *See* January 2015 SPA **C-134** and February 2015 SPA **C-135**.

Article 7.2 of the Agreement further states:

> *Within thirty (30) days after execution of this Agreement, the Casino Companies shall call and conduct an assemblea (sic) of the Shareholders of each of the Casino Companies in which actions taken at assembleas (sic) conducted on November 7, 2014 which approved a transfer of shares of Class B shareholders of the Casino Companies to Grand Odyssey, and which was later formalized (protocolized) with a Mexican Notary Public are declared void and of no effect and recognizing that such transfer will not occur until Closing under this Agreement.*[221]

148. These agreements and representations plainly reflect the parties' mutual understanding that the U.S. Shareholders remained the rightful owners of their shares in the Juegos Companies at all times and that, therefore, those shares were not transferred to Grand Odyssey on the November 7, 2014 *asamblea* or at any other time.[222]

v. Claimants Have Always Had The Legal Right To Control The Juegos Companies And The Boards, And The Boards Under The Leadership Of Messrs. Chow And Pelchat Understood That They Had to Act Pursuant To The Instructions From The U.S. Shareholders

149. Messrs. Chow and Pelchat confirm in their witness statements that, once the Transaction failed at the end of June 2015, they were supposed to immediately return the board seats for the Juegos Companies to the U.S. Shareholders and to take all actions necessary to nullify the resolutions from the November 7, 2014 *asambleas*.[223]

150. Instead, when the U.S. Shareholders asked Messrs. Chow and Pelchat to resign, to formally return the boards of the Juegos Companies to the U.S. Shareholders, and to take the actions necessary to invalidate and recognize the resolutions from the November 7, 2014 *asambleas* as void *ab initio*, Messrs. Chow and Pelchat initially conditioned their agreement to take these actions on their unjustified demand that the U.S. Shareholders pay them monies that they were not entitled to in exchange for their compliance.[224]

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[221] *See* January 2015 SPA **C-134** and February 2015 SPA **C-135**.

[222] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 24; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 24; Second Witness Statement of Luc Pelchat (Jan. 3, 20018), **CWS-10**, ¶ 8.

[223] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶¶ 15, 26 31; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12,** ¶ 28; Second Witness Statement of Luc Pelchat (Jan. 3, 2018), **CWS-10**, ¶ 10.

[224] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶¶ 26-27; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶¶ 28-29; Second Witness Statement of Luc Pelchat (Jan. 3, 2018), **CWS-10**, ¶ 5

151. Messrs. Chow and Pelchat acknowledge in their witness statements that they had no right to control or remain on the boards of the Juegos Companies, that the U.S. Shareholders remained in control of the boards and had the legal right to control the boards while Messrs. Chow and Pelchat (and their cronies) were on the boards, and that they had a duty to take the other actions requested of them by the U.S. Shareholders since these shareholders were the owners of the companies.[225] They also expressly admit that they were not entitled to any money in exchange for resigning from the boards or recognizing as void the resolutions from the November 7, 2014 *asamblea*.[226]

152. What is more, Messrs. Chow and Pelchat acknowledge that, at all times, they have known they must take instructions from Mr. Burr and the other U.S. Shareholders in the execution of their responsibilities as members of the Boards of Directors of the Juegos Companies.[227] Messrs. Chow and Pelchat also recognize that they have always had a duty to manage the companies and act in the best interest of the U.S. Shareholders in handling all affairs on behalf of the Juegos Companies.[228]

153. Claimants' documentary and testimonial evidence amply establishes that the only reason Messrs. Chow and Pelchat came onto the boards of the Juegos Companies was to effectuate the Transaction and reopen the Casinos, neither of which occurred.[229] The U.S. Shareholders, who remained the majority owners of the Juegos Companies, thus continued to have the rightful control of the boards of these companies at all times and have never lost that right. Stated differently, the U.S. Shareholders also have always had the legal ability and right to control the boards of the Juegos Companies even while Mr. Chow sat as President of the

[225] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 27; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 28; Second Witness Statement of Luc Pelchat (Jan. 3, 2018), **CWS-10**, ¶ 5.

[226] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 26; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 30; Second Witness Statement of Luc Pelchat (Jan. 3, 2018), **CWS-10**, ¶ 5.

[227] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 29; Second Witness Statement of Luc Pelchat (Jan. 3, 2018), **CWS-10**, ¶ 5.

[228] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 30; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 28; Second Witness Statement of Luc Pelchat (Jan. 3, 2018), **CWS-10**, ¶ 10.

[229] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 29; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 31; Second Witness Statement of Luc Pelchat (Jan. 3, 2018), **CWS-10**, ¶ 4.

Board of Directors of each of the Juegos Companies.[230] This has been true since Mr. Chow took over the boards in August 2014 until the present.[231]

vi. The U.S. Shareholders Formally Regained Their Seats On The Boards Of The Juegos Companies In The January 5, 2018 *Asambleas*, Which Also Confirmed That No Transfer of Shares Occurred

154. The Juegos Companies held *asambleas* on January 5, 2018.[232] During these meetings, Messrs. Chow and Pelchat were formally removed from their positions on the boards of the Juegos Companies.[233] Gordon Burr, Erin Burr, and Douglas Black were appointed to the Juegos Companies Boards.[234] Further, any transfers of shares in the Juegos Companies that had not been reflected in a prior *asamblea* were formally acknowledged and the shareholders agreed that the new Board of Directors would take the necessary actions to hold *asambleas* in the near future to formally approve and record the share transfers that already are treated as final between the parties to those transactions.[235] Those new Boards of Directors, run by Mr. Gordon Burr,[236] already has set those *asambleas* to take place on January 29, 2018.[237] In addition, the minutes reflect that the shareholders also voted unanimously to confirm that the supposed transfer of

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[230] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 29; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 28; Second Witness Statement of Luc Pelchat (Jan. 3, 2018), **CWS-10**, ¶ 5.

[231] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 29; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 28; Second Witness Statement of Luc Pelchat (Jan. 3, 2018), **CWS-10**, ¶ 5.

[232] Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Jan. 5, 2018), **C-162**; Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V.(Jan. 5, 2018), **C-163**; Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. (Jan. 5, 2018), **C-164;** Minutes of the General Shareholders Meeting of Juegos y Videos de Mexico, S. de R.L. de C.V. (Jan. 5, 2018), **C-165**; and Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento de Mexico, S. de R.L. de C.V. (Jan. 5, 2018), **C-166**

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] Unanimous Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento de Mexico, S. de R.L. de C.V. – President (Jan. 8, 2018), **C-201**; Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. – President (Jan. 8, 2018), **C-203**; Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. – President (Jan. 8, 2018), **C-205**; Resolution in Lieu of the Board of Directors of Juegos y Video de Mexico, S. de R.L. de C.V. – President (Jan. 8, 2018), **C-207**; Resolution in Lieu of the Board of Directors of Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. – President (Jan. 8, 2018), **C-209**.

[237] Second Witness Statement of Gordon G. Burr (Jan. 7, 2017), **CWS-6**, ¶ 34.

shares to Grand Odyssey in November 2014 did not occur, and that such transfer was null and void.[238]

5. Claimants Own And Control E-Games And Have Standing To Bring Claims On Its Behalf Under NAFTA Article 1117

155. Mexico's challenges to Claimants' ownership and control of E-Games are nothing more than repeats of its unconvincing arguments concerning the Juegos Companies. Faced with documentary evidence that conclusively establishes Claimants' ownership and control of E-Games, Mexico again asks for more evidence, this time in the form of witness statements. It then advances the same unsupported legal requirements as before, for example, that an enduring voting proxy is required to "control" a company under the NAFTA. As already explained and expanded on below, none of these arguments holds water.

156. The Tribunal should dismiss Mexico's objections because (1) the Controlling Disputing Investors have held, and continue to hold, majority ownership of E-Games since July 16, 2013; and (2) the Controlling Disputing Investors control E-Games through voting and managerial, *de facto* control. In addition, Mexico's insistence on the production of more evidence to prove Claimants' ownership and control of E-Games and its demand for other requirements, like proxies, are simply not required by the NAFTA. This, again, is Mexico asking this Tribunal to import requirements—whether based on Mexican law or not—into the NAFTA that simply are not written into its text.

a. The Controlling Disputing Investors' Majority Ownership In E-Games Grants Them Standing Under NAFTA Article 1117

157. Since July 16, 2013, the Controlling Disputing Investors, and in particular Oaxaca Investments, LLC and John Conley, have owned, and continue to own, a majority of the shares in E-Games (66.66%).[239] In the Counter-Memorial, Claimants inadvertently and incorrectly posit that Mr. Alfredo Moreno Quijano transferred his stock to the other shareholders of E-Games and ceased being a shareholder on October 7, 2013. Although the minutes from E-Games' *asamblea* were protocolized on October 7, 2013, the share transfer itself

[238] Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Jan. 5, 2018), **C-162**; Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V.(Jan. 5, 2018), **C-163**; Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. (Jan. 5, 2018), **C-164;** Minutes of the General Shareholders Meeting of Juegos y Videos de Mexico, S. de R.L. de C.V. (Jan. 5, 2018), **C-165**; and Minutes of the General Shareholders Meeting of Juegos de Video y Entretenimiento de Mexico, S. de R.L. de C.V. (Jan. 5, 2018), **C-166**

[239] Notarization of the Minutes of the General Shareholders Meeting of Exciting Games S. de R.L. de C.V. (Feb. 21, 2014), **C-63**, p. 16.

took place and was considered final between the parties to that transaction on July 16, 2013.[240] All references to the October 7, 2013 date in the Counter-Memorial[241] should thus be corrected and understood by the Tribunal to read July 16, 2013. The shareholding percentages, however, are accurate and do not need to be corrected.

158. Since the Controlling Disputing Investors own a majority of the shares in E-Games, they have standing under Article 1117 to bring claims on behalf of E-Games relating to breaches from July 16, 2013 onwards. As explained below, however, the Controlling Disputing Investors also have standing to bring claims on behalf of E-Games long before that date because they have always controlled and still control E-Games for purposes of Article 1117.

b. The Controlling Disputing Investors Control E-Games Through Voting And *De Facto* Control

159. The Controlling Disputing Investors control E-Games and, accordingly, have standing to bring claims on its behalf. As explained in the Counter-Memorial, the Controlling Disputing Investors exercise this control through their voting rights in and managerial control over E-Games.

160. The Controlling Disputing Investors have held, and continue to hold, the votes to control E-Games' operations. As the E-Games' bylaws require a 70% vote to adopt resolutions,[242] the voting bloc consisting of Oaxaca Investments, Mr. John Conley, Mr. Alfredo Moreno Quijano, and Mr. José Ramón Moreno Quijano (the "**Oaxaca-Conley-Moreno-Moreno bloc**") assured the Controlling Disputing Investors voting control of E-Games.

161. At all relevant times, until Mr. Alfredo Moreno ceased being an E-Games' shareholder on July 16, 2013, the Oaxaca-Conley-Moreno-Moreno bloc consistently voted together on the key issues regarding E-Games and its operations.[243] The Respondent's primary argument here is that there are minor documentary concerns. For example, the Respondent complains that Claimants did not submit witness statements from the parties to the Option

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[240] Notarization of the Minutes of the General Shareholders Meeting of Exciting Games S. de R.L. de C.V. (Feb. 21, 2014).**C-63**, p. 16; *see also* Third Witness Statement of Julio Carlos Gutiérrez Morales (Jan. 7, 2018), **CWS-9**, ¶ 14.

[241] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 241, 242, 244.

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

[243] Witness Statement of José Ramón Moreno Quijano (Jan. 7, 2018), **CWS-15**, ¶ 19; Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-8**, ¶ 25.

Agreement (even though Mr. Burr provided testimony on this point) and that the exhibit submitted by Claimants of the Option Agreement is unsigned.

162. Mr. Conley has submitted testimony with this Rejoinder to confirm Mr. Burr's explanation in his prior witness statement about the Option Agreement.[244] In particular, Mr. Conley affirms that he controlled 13.34% of E-Games' shares held on his behalf by Mr. Alfredo Moreno. The testimony is consistent and establishes the following:

- In early June 2011, for reasons related to Mr. Conley's tax planning, Mr. Conley decided to transfer 13.34% of his ownership interest in E-Games to Mr. Alfredo Moreno.[245] As part of this transfer, Mr. Alfredo Moreno agreed that he would continue to vote all of his shares in the same way as Mr. Conley.[246]

- On June 7, 2011, Messrs. Conley and Moreno entered into and executed an option agreement ("**Option Agreement**"),[247] whereby Mr. Alfredo Moreno granted Mr. Conley an option to repurchase the 13.34% ownership interest in E-Games ("**Optioned Shares**").

- While Mr. Alfredo Moreno temporarily owned the Optioned Shares, he would vote them as a bloc with Mr. Conley, such that Mr. Conley controlled the votes on those shares at all times.[248] The Option Agreement also allowed Mr. Conley to repurchase the Optioned Shares at a prearranged nominal exercise price of 53,360 Mexican pesos, which roughly translated to US$ 4,567 as of the date of the Option Agreement.[249]

- On the same date, E-Games' managers and owners issued a consent resolution adopting the Option Agreement and obligating E-Games to its terms and conditions.[250]

163. As Mr. Conley attests, the Option Agreement contractually prevented Mr. Alfredo Moreno from voting the Optioned Shares unless he first notified Mr. Conley of the

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[244] Witness Statement of John Conley (Jan. 7, 2018), **CWS-13**, Section II.

[245] Witness Statement of John Conley (Jan. 7, 2018), **CWS-13**, ¶ 11.

[246] Witness Statement of John Conley (Jan. 7, 2018), **CWS-13**, ¶¶ 10-14.

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

[248] Witness Statement of John Conley (Jan. 7, 2018), **CWS-13**, ¶¶ 10, 15.

[249] Witness Statement of John Conley (Jan. 7, 2018), **CWS-13**, ¶ 17.

[250] Consent to Action in Lieu of Meeting of the Managers of Exciting Games, S de R.L de S.V. (June 7, 2011), **C-139** ("Two of the Company's interest owners, John Conley and Alfredo Moreno Quijano have entered into a certain Option Agreement with respect to certain of the ownership interests in the Company owned by Mr. Moreno Quijano. The Managers and owners consider the Option Agreement and the obligations of the Company contained in that agreement to be in the best interests of the Company and wish to adopt the Agreement and obligate the Company to its terms."); Witness Statement of John Conley (Jan. 7, 2018), **CWS-13**, ¶ 16–17.

intent to vote inconsistent with the U.S. shareholders.[251] Through this mechanism, Mr. Conley continued to control the Optioned Shares; if Mr. Alfredo Moreno intended to vote against the U.S. shareholders, Mr. Conley could exercise (and would have exercised) his right to acquire the shares prior to the vote.

164. Mr. Conley confirms in his testimony that the terms and provisions of the executed Option Agreement are the same as the ones in Exhibit C-83.[252] And as Mr. Conley attests,[253] and as confirmed by documentary evidence,[254] Mr. Conley when transferring the shares to Mr. Moreno secured and later in fact exercised his right under the Option Agreement on July 7, 2013 to repurchase the Optioned Shares for a prearranged nominal price. It is thus clear that Mr. Conley controlled the Optioned Shares at all times; Mr. Alfredo Moreno was the temporary holder in name only.[255]

165. The testimonial evidence further establishes that the Controlling Disputing Investors controlled E-Games through bloc voting.[256] According to Mr. José Ramón Moreno, he always bloc voted with the U.S. shareholders on all the key decisions regarding E-Games' operations.[257] This was because his interests and vision for E-Games was aligned with the U.S. shareholders, and due to his relationship and sense of loyalty towards Mr. Burr and Mr. Conley.[258] Mr. Alfredo Moreno also always voted in the same way as the U.S. shareholders voted on all key issues and decisions.[259] The evidence amply demonstrates that the Controlling Disputing Investors exercised voting control over E-Games at all times.

166. On July 16, 2013, Mr. Alfredo Moreno transferred all his stock to the other shareholders of E-Games and ceased being a shareholder.[260] From that point on, the Controlling

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[251] Witness Statement of John Conley (Jan. 7, 2018), **CWS-13**, ¶ 15.

[252] Witness Statement of John Conley (Jan. 7, 2018), **CWS-13**, ¶ 22.

[253] Witness Statement of John Conley (Jan. 7, 2018), **CWS-13**, ¶ 15

[254] Email exchange between John Conley and Alfredo Moreno (July 7, 2013), **C-140**.

[255] Witness Statement of John Conley (Jan. 7, 2018), **CWS-13**, ¶¶ 17-18.

[256] Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-7**, ¶ 25; Witness Statement of John Conley (Jan. 7, 2018), **CWS-13**, ¶ 10; Witness Statement of José Ramón Moreno Quijano (Jan. 3, 2018), **CWS-15**, ¶ 19.

[257] Witness Statement of José Ramón Moreno Quijano (Jan. 3, 2018), **CWS-15**, ¶¶ 19-21.

[258] Witness Statement of José Ramón Moreno Quijano (Jan. 3, 2018), **CWS-15**, ¶ 20.

[259] Witness Statement of John Conley (Jan. 7, 2018), **CWS-13**, ¶ 15; Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-8**, ¶¶ 24-25.

[260] Notarization of the Minutes of the General Shareholders Meeting of Exciting Games S. de R.L. de C.V. (Feb. 21, 2014), **C-63**, p. 16.

Disputing Investors only needed Mr. José Ramón Moreno's vote to have voting control over E-Games. As before, Mr. José Ramón voted with the U.S. shareholders without exception.[261]

167. The record thus firmly establishes the existence of the Oaxaca-Conley-Moreno-Moreno voting bloc as described in the Counter-Memorial and as affirmed by Mr. Burr's first witness statement. The Respondent's objections are hollow and unavailing.

168. In a last-ditch effort to save its objection, the Respondent asserts—without citation to authority or support of any other kind—that an enduring voting proxy or other legal instrument is necessary to establish standing under Article 1117.[262] As Claimants have already explained earlier, Mexico has made up this requirement out of whole cloth, and it is nowhere found in the NAFTA's text. Mexico does not cite a single case, commentary or other authority to support its invention. This dearth of support is as it should be; there is simply no need for such an instrument to bind votes together. The fact is that the shareholders *did* vote as a bloc and *did* control all key decisions and issues regarding E-Games' operations, as amply demonstrated by the witness statements of Messrs. Burr,[263] Conley,[264] and José Ramón Moreno.[265] This is more than sufficient to establish "control" for purposes of Article 1117.

169. The Respondent also adds, as an after-thought, that ownership and control must be maintained until the issuance of the final award. Again, it cites no case, commentary or other authority for this proposition. This is because, contrary to Mexico's position, tribunals consistently hold that claimants can sell or transfer their investments to third parties during the pendency of proceedings without jurisdictional consequences.[266] This is thus yet another attempt by Mexico to add unsupported, invented preconditions to the tribunal's jurisdiction in the hopes of thwarting Claimants' weighty claims. In any event, E-Games' shareholding has remained the same since July 16, 2013 and continues today.

170. In terms of managerial control, the Respondent does not make any serious attempt to contest the Controlling Disputing Investors' control of E-Games' business affairs.

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[261] Witness Statement of José Ramón Moreno Quijano (Jan. 3, 2018), **CWS-15**, ¶¶ 19-21.

[262] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 281.

[263] Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-8**, ¶¶ 24-25.

[264] Witness Statement of John Conley (Jan. 7, 2018), **CWS-13**, ¶ 10, 15.

[265] Witness Statement of José Ramón Moreno Quijano (Jan. 3, 2018), **CWS-15**, ¶ 21.

[266] *See, e.g., Hamester v. Ghana*, ICSID Case No. ARB/07/24, Award ¶ 95 (June 18, 2010) (holding that a claimant's sale of its investment during the pendency of proceedings does not affect the claimant's standing or the tribunal's jurisdiction), **CL-52**.

For example, the Respondent has failed to comment on the Controlling Disputing Investors' ability to reorganize E-Games' role within the Claimants' corporate structure, including the Controlling Disputing Investors' decision in 2008 to repurpose E-Games to become the operator and eventual permit holder for the casino enterprise, or their managerial control over the allocation of gaming revenue flowing through E-Games.[267] This is compelling (and now unrebutted) evidence of the Controlling Disputing Investors' *de facto* control over E-Games.

171. The Respondent also launches a few inconsequential attacks on Claimants, for example, accusing them of "falsely claim[ing]" that they created E-Games.[268] E-Games was formed in 2006, and the Respondent's argument has no relevance to the present arbitration, which is concerned with breaches from June 2013 onwards. In any event, that Messrs. Alfredo Moreno Quijano and Antonio Moreno Quijano's names appear on incorporation documents does not negate the crucial role that Mr. Burr and Mr. Conley played in the establishment of E-Games and the rest of the casino business.[269] As a matter of fact, Mr. Burr and Mr. Conley instructed the Moreno brothers to incorporate E-Games.[270] Furthermore, Mr. Burr and Mr. Conley provided the capital to the Moreno brothers used to incorporate the company, which was mostly drawn from the funds Mr. Burr and Mr. Conley raised from investors in the United States.[271]

172. The Respondent also refers, in a cursory fashion, to several documents bearing the name of Mr. Alfredo Moreno and, in one instance, Mr. José Ramón Moreno, as supposed proof that Claimants' allegations regarding their role in the creation of E-Games are false.[272] But, again, these extraneous allegations do not negate that the Controlling Disputing Investors had absolute managerial control over E-Games. In Mr. José Ramón Moreno's words:

> "… the U.S. investors—and especially Mr. Burr—were without a doubt the owners and controllers of E-Games. Therefore, given their position as owners and majority shareholders of E-Games, they were the ones who had the necessary expertise to make the decisions that were best suited to the interests of the company; another reason why

[267] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 245-247.

[268] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 232.

[269] Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-7**, ¶¶ 24-25; Witness Statement of John Conley (Jan. 7, 2018), **CWS-13**, ¶ 10.

[270] Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-8**, ¶ 23.

[271] Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-7**, ¶ 23.

[272] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 285.

> I always voted—and I repeat, would have continued to vote—with the U.S. investors as a bloc."[273]

173. In addition, the Controlling Disputing Investors exercised direct managerial control over E-Games through their board positions. As Mexico itself recognizes, Messrs. Burr and Conley occupied board positions as President and Director of E-Games, respectively, on July 16, 2013.[274] This is *before* the arbitrary cancellation of E-Games' permit on August 28, 2013. Through their board positions, Messrs. Burr and Conley made important strategic decisions for E-Games and directly exercised control over the company.

174. For the above reasons, the Tribunal should dismiss Mexico's objections relating to the Controlling Disputing Investors' control of E-Games and find that they have standing to assert claims on behalf of E-Games under NAFTA Article 1117.

6. The Controlling Disputing Investors Control Operadora Pesa And Have Standing Under NAFTA Article 1117 To Assert Claims On Its Behalf

175. The Respondent does not address the Controlling Disputing Investors' control of Operadora Pesa. In fact, it entirely omits discussion of Operadora Pesa in its Reply section addressing the Claimants' control of the Mexican Enterprises.[275] This is because there can be no genuine dispute that the Controlling Disputing Investors, and in particular Mr. Gordon Burr, exercise *de facto* control over that enterprise. They accordingly have standing under Article 1117 to assert claims on behalf of Operadora Pesa.

176. The sole purpose of Operadora Pesa was to coordinate food, beverage, and facility services on behalf of the Casinos.[276] As previously explained, Mr. Burr decided to

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[273] Witness Statement of José Ramón Moreno Quijano (Jan. 3, 2018), **CWS-15**, ¶ 21. ("*Asimismo, los inversionistas estadounidenses—y sobre todo el Sr. Burr—eran sin ninguna duda los dueños de, y quienes ejercían control sobre, E-Games. Por lo tanto, dada su postura como dueños y socios mayoritarios de E-Games, eran quienes tenían el conocimiento necesario para saber qué decisiones mejor convenían a los intereses de la empresa; otra razón por la cual siempre voté—y repito, hubiese continuado votando—en bloque con los inversionistas estadounidenses*.").

[274] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 286. Mexico erroneously cites July 6, 2013 as the date when Messrs. Burr and Conley assumed board positions. The correct date is July 16, 2013. *See* Notarization of the Minute of the General Shareholders Meeting of Exciting Games S. de R.L. de C.V. (Feb. 21, 2014), **C-63**, p. 18.

[275] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), Part Two, Section B.2.

[276] Witness Statement of Moisés Opatowski Morgensteren (Jan. 8, 2018), **CWS-14**, ¶ 8.

create Operadora Pesa in 2008 on the advice of tax and legal advisors, and on the recommendation of Ms. Burr.[277]

177. Mr. Moisés Opatowski, the manager of the company, has submitted a witness statement with testimony contradicting several of the Respondent's inflammatory accusations. First, the Respondent accuses the Claimants of making a false claim about their role in forming Operadora Pesa.[278] As Mr. Opatowski explains, however, he established Operadora Pesa on Mr. Burr's express instructions.[279]

178. The Respondent then charges that the Claimants are taking a "disingenuous" position about their control of the company as they do not own a direct interest in Operadora Pesa.[280] As previously explained, however, Mexico's position that ownership of an enterprise is required to bring a claim under Article 1117 is incorrect. Article 1117 grants the affirmative right to an investor who *either* owns *or* controls the enterprise to bring a claim on its behalf. According to the express terms of the Treaty, this ownership or control can be exercised *either* directly *or* indirectly.

179. In the words of the *S.D. Myers v. Canada* tribunal, which rejected a similar standing objection from Canada arguing that the claimant company did not own shares in the local enterprise:

> 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.[281]

180. By maintaining that direct ownership is required, Mexico attempts to turn a blind eye towards NAFTA's express text and to read out the various avenues expressly contemplated by the terms of Article 1117 to establish standing.

181. The Controlling Disputing Investors exercise total control over the entire course of Operadora Pesa's business. According to Messrs. Burr and Opatowski, Mr. Burr, Ms. Burr,

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

[278] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 237.

[279] Witness Statement of Moisés Opatowski Morgensteren (Jan. 8, 2018), **CWS-14**, ¶ 10.

[280] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 240.

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

and Mr. Conley decided to establish Operadora Pesa as a service company for the Casinos.[282] Mr. Burr personally selected Mr. Opatowski to be the manager and a founding shareholder of Operadora Pesa. Mr. Burr decided to assign this responsibility to Mr. Opatowski due to Mr. Opatowski's prior experience as treasurer for the Juegos Companies and E-Games.[283] This made particular sense since Operadora Pesa functioned as the corporate vehicle through which the Casinos' expenses would be centralized. As Mr. Opatowski testifies, he accepted Mr. Burr's offer with the understanding that Mr. Burr would be in charge of the operational decisions of Operadora Pesa, and Mr. Opatowski's role would be limited to ministerial tasks related to handling the company's finances.[284] Thus, it was clear that, even though Claimants and the Controlling Disputing Investors would not be directly invested as shareholders, they would be the true controllers and decision makers of the company. Mr. Opatowski remained largely involved with his duties as treasurer of the Mexican Enterprises and continued to follow the instructions of the Controlling Disputing Investors in all aspects of Operadora Pesa's management and operations.[285]

182. Mr. Burr exercised ultimate managerial control of the enterprise and made every single operational decision for Operadora Pesa. Mr. Opatowski followed Mr. Burr's instructions and consulted with Mr. Burr at all times; he would not proceed without Mr. Burr's express knowledge, authorization, or consent.[286] In the words of Mr. Opatowski:

> "… the reality is that it was the Claimants, and specifically Mr. Burr, who controlled Operadora Pesa, since they were the ones who made all of the decisions concerning the company, which I was obliged to follow and did in fact follow."[287]

183. In this way, the Controlling Disputing Investors, and in particular Mr. Burr, have exercised control over Operadora Pesa since its inception. While Mexico argues it is irrelevant whether Mr. Burr is the "ultimate decision maker" of Operadora Pesa, the express terms of Article 1117 provide for standing where investors indirectly control the enterprise. And as Mr.

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[282] Witness Statement of Moisés Opatowski Morgensteren (Jan. 8, 2018), **CWS-14**, ¶ 8; *see also* Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-7**, ¶¶ 26, 27.

[283] Witness Statement of Moisés Opatowski Morgensteren (Jan. 8, 2018), **CWS-14**, ¶ 10; *see also* Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-7**, ¶ 27.

[284] Witness Statement of Moisés Opatowski Morgensteren (Jan. 8, 2018), **CWS-14**, ¶ 11.

[285] Witness Statement of Moisés Opatowski Morgensteren (Jan. 8, 2018), **CWS-14**, ¶¶ 12-13.

[286] Witness Statement of Moisés Opatowski Morgensteren (Jan. 8, 2018), **CWS-14**, ¶ 13.

[287] Witness Statement of Moisés Opatowski Morgensteren (Jan. 8, 2018), **CWS-14**, ¶ 14 ("la realidad es que eran las Demandantes, y en concreto el Sr. Burr, quienes controlaban Operadora Pesa, ya que eran ellos quienes tomaban todas las decisiones concernientes a la empresa, las cuales yo estaba obligado a acatar y en efecto siempre acaté.").

Opatowski confirms, the Controlling Disputing Investors, through the employees they selected, have always exercised control over the entire course of Operadora Pesa's business.

184. In light of the foregoing and for the reasons set forth in Claimants' Counter-Memorial, the Tribunal should reject Mexico's objections and hold that the Controlling Disputing Investors have standing to assert claims on behalf of Operadora Pesa under Article 1117.

7. Mexico Solely Focuses On the Purported Lack Of Evidence Establishing Claimants' Investments And Has Thereby Waived All Other Jurisdictional Objections

185. The Respondent solely focuses on the purported lack of evidence establishing Claimants' investments in the Juegos Companies and has failed to make specific submissions on the individual Claimants' standing to bring claims under NAFTA Article 1116. The Reply was the Respondent's last opportunity to make submissions challenging the tribunal's jurisdiction. It has accordingly waived the rest of its jurisdictional objections. Any effort by Mexico to raise additional arguments must be rejected.

186. With respect to each individual Claimants' standing as "investors" with protected "investments" under Chapter Eleven, the only objection that Mexico advances is its general complaint about documentary evidence relating to the Claimants' shareholding in the Juegos Companies. *Mexico has accordingly waived all other jurisdictional objections related to Claimants' status as investors with protected investments*.

187. As Claimants explained in their Counter-Memorial, their 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 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).[288]

188. The U.S. claimant shareholders of the Juegos Companies have made protected "investments" under the NAFTA. As explained in greater detail in the Counter-Memorial,[289] Claimants' shares in the Juegos Companies fall within the definition of "investment" under NAFTA Article 1139. And as explained above, Claimants have conclusively established their shareholding in the Juegos Companies through documentary and testamentary evidence.[290]

189. It is clear that Mexico's general evidentiary objection is a ham-fisted, unsupported attempt to cast doubt over the unquestionable fact that the Claimants are investors and made qualifying investments under the NAFTA. The Respondent, for example, charges that Claimants' evidence "does not purport to deal with the types of shares purportedly acquired and any special rights associated with such shares," among other baseless accusations.[291] However, Claimants submitted the bylaws of the Juegos Companies describing the voting and economic rights of the different types of shares.[292] In fact, the Respondent also referred to these bylaws in describing the different types of shares and the rights associated with them.[293]

190. The Respondent's accusations are also wildly inappropriate. In its Memorial, the Respondent accused the Claimants of intentionally obfuscating evidence as to "who owns what."[294] Ms. Erin Burr made a considerable effort to individually describe each Claimants' investments.[295] In its Reply, the Respondent has proceeded to question the evidentiary value of Ms. Burr's witness statement, ignoring whole sections of it describing in meticulous detail the shareholding and other investments held by each Claimant. With this submission, each of the

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[288] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 261.

[289] Claimant's Counter-Memorial (July 25, 2017), ¶¶ 264-266.

[290] *See supra*, Section III.A.4(c).

[291] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 293.

[292] 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), **C-89**; 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), **C-90**; 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), **C-91**; 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), **C-92**; and 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), **C-93**.

[293] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 251-255.

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

[295] First Witness Statement of Erin Burr (July 25, 2017), **CWS-2**, ¶¶ 87-134.

Claimants have submitted declarations confirming their ownership in Claimants' casino businesses.[296]

191. The Respondent boldly asserts that Ms. Burr's "sparse indirect evidence" is "contradicted by contemporaneous documents."[297] Yet, the very documents that the Respondent describes as "contemporaneous"—i.e. Exhibits C-89 to C-93—were criticized earlier by the Respondent as outdated.[298]

192. The last paragraph in Mexico's Reply makes obvious its entire jurisdictional strategy. Although professing concern for evidentiary support in most of its Reply submission, the Respondent then concludes by stating that it will object to inclusion of evidence in the Claimants' Rejoinder on the grounds that the Respondent will be denied an opportunity to seek production of documents.[299] This blatantly reveals that the Respondent is not at all concerned by the quantity or quality of the evidence—after all, it has ignored much of the Claimants' evidence and has only conducted a half-hearted analysis of the evidence to find unsubstantiated "inconsistencies"—but with gamesmanship and an overriding desire to keep the Claimants from putting forth the merits of their claims.

193. The Respondent then asks the Tribunal to defer deciding any issue related to the Claimants' standing.[300] It asks the Tribunal to grant it an additional opportunity to make submissions, including a further production of documents. Fundamental fairness, and adherence to this Tribunal's Procedural Order No. 1, requires this Tribunal to reject this request by Mexico. Mexico has already had two opportunities to challenge the Tribunal's jurisdiction and its requests for documents have previously been rejected. The Tribunal clearly established the rules in its Procedural Order No. 1, and those rules must be enforced.

194. Claimants have submitted protocolized *asamblea* meeting minutes, subscription agreements, letters and email correspondence, an internal business worksheet, distributions records, tax filings, share certificates, shareholders' registries, and testamentary evidence from

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[296] Claimant Witness Statements (Jan. 4-7, 2018), **CWS-16–CWS-47**, Sec. I; Witness Statement of John Conley (January 7, 2018), **CWS-13**, Sec. I; Second Witness Statement of Gordon Burr (January 7, 2018), **CWS-7**, Sec. I; Second Witness Statement of Erin Burr (January 7, 2018), **CWS-8**, Sec. I, Witness Statement of Neil Ayervais (January 7, 2018), **CWS-12**, Sec. I.

[297] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 301.

[298] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 218; *see also* Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8**, ¶ 35.

[299] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 302.

[300] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 305.

each individual Claimant to demonstrate their shareholding in the Juegos Companies. This is more than sufficient to establish Claimants' standing as investors with protected investments under Article 1116 of the NAFTA.

195. With respect to investments in E-Games, as Mexico itself recognizes, Mr. Conley and Oaxaca Investments, LLC own E-Games' shares.[301] From March 2, 2012 to July 16, 2013, Mr. Conley owned 15% and Oaxaca Investments owned 28.33% of E-Games. From July 16, 2013 onwards, Mr. Conley has owned 33.34% and Oaxaca Investments 33.32% of E-Games' shares.[302] Yet, the Respondent asks for an order from the Tribunal dismissing the claims of "*all* of the Claimants" under Article 1116. This request should be denied.

196. In focusing solely on Claimants' shareholding investments, Mexico has failed to address Claimants' other investments.

197. As explained in the Counter-Memorial,[303] in addition to their shareholding investments, Claimants made loans to the Juegos Companies. Claimants submitted promissory notes and other documentary evidence of Palmas South, LLC's and Mr. Gordon Burr's loan investments in the Juegos Companies.[304] Mexico has failed to make any specific objection with regards to those investments, waiving its opportunity to do so. Likewise, Mexico has failed to address B-Mex, LLC's investment in the form of the Member Loans to the Juegos Companies and E-Games following the illegal closures of the Casinos.[305] Mexico thus has also waived its objections with respect to those investments.

198. The Respondent similarly has failed to make any objection related to the Los Cabos and Cancún casino resort projects. Both the Counter-Memorial and Ms. Erin Burr's first witness statement dedicated an entire section describing the Los Cabos and Cancún projects and

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[301] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 234.

[302] Notarization of the Minutes of the General Shareholders Meeting of Exciting Games S. de R.L. de C.V. (Feb. 21, 2014), **C-63**, pp. 16-17.

[303] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 269.

[304] *See* Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 269; Consent Resolution of the Board of Managers of Palmas South, LLC. (Oct. 23, 2007), **C-82**; Wire Transfer from Gordon Burr to Juegos de Video y Entretenimiento del DF, S de R.L. de C.V. (June 14, 2017), **C-85**; 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**.

[305] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 269; First Witness Statement of Erin Burr (July 25, 2017), **CWS-2**, ¶¶ 88-89.

the particular investments made to support them.[306] These investments are comprised of loans not fully repaid, option payments, capital expenditures for the purchase of permits, and down payments on property.[307] In particular, 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 Los Cabos hotel and casino project.[308] Colorado Cancún, LLC invested US$ 250,000 towards an option to purchase a gaming license from B-Mex II, LLC.[309] B-Mex II, LLC invested US$ 2.5 million of equity in relation to gaming licenses intended for the Los Cabos and Cancún projects.[310] Mr. Burr and Ms. Burr also invested significant sweat equity in the casino resort expansion plans.[311] In choosing not to make any comment whatsoever in its Reply regarding these investments, Mexico has waived all jurisdictional objections relating to the Los Cabos and Cancún casino resort investments.

199. In sum, Claimants have adduced conclusive evidence of their ownership and control of the Juegos Companies, E-Games, and Operadora Pesa. Claimants own the majority of overall shares and Class B shares of each of the Juegos Companies, assuring them legal control over the enterprises. Claimants, through the Controlling Disputing Investors, in particular exercise *de facto* control over the Juegos Companies. The record provides firm evidence of the Controlling Disputing Investors' management authority, contribution of expertise, and initial capitalization efforts in creating, developing, and operationalizing the Juegos Companies and the Casinos. The Controlling Disputing Investors also own and control E-Games through majority ownership and through voting and *de facto* managerial control. They also control all aspects of Operadora Pesa's management and operations. Claimants have also submitted evidence of their investments in the form of loans to the Juegos Companies as well as investments in the Los Cabos and Cancún projects. Mexico, however, has failed to address these investments.

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[306] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 270-277; First Witness Statement of Erin Burr (July 25, 2017), **CWS-2**, Section IV.

[307] First Witness Statement of Erin Burr (July 25, 2017), **CWS-2**, ¶ 53.

[308] Investment/Loan Agreement between B-Cabo, LLC and Medano Beach Hotel (Apr. 5, 2013), **C-65**.

[309] Right of First Refusal Agreement between Colorado Cancun, LLC and B-Mex II, LLC (Apr. 27, 2011), **C-88**; *see also* First Witness Statement of Erin Burr (July 25, 2017), **CWS-2**, ¶ 54.

[310] First Witness Statement of Erin Burr (July 25, 2017), **CWS-2**, ¶ 52.

[311] First Witness Statement of Erin Burr (July 25, 2017), **CWS-2**, ¶¶ 49, 51.

200. In light of the foregoing and for the reasons set forth in Claimants' Counter-Memorial, the Tribunal should reject all of Mexico's objections to Claimants' standing under NAFTA Articles 1116 and 1117 and proceed to the merits stage.

B. MEXICO ADMITS THAT CLAIMANTS HAVE COMPLIED WITH ARTICLE 1119 FOR ALL PRACTICAL PURPOSES BUT INSISTS ON ITS HYPER-TECHNICAL OBJECTIONS

201. The Respondent does not seriously contest that the Claimants sought repeatedly to negotiate with Mexican officials before *and* after the 2014 Notice of Intent was submitted. Instead, Mexico presses its hyper-technical objection by focusing on the questionnaire it sent to Claimants, and which Claimants had no obligation to answer. The Respondent also does not seriously contest that it had actual notice of the dispute, focusing instead on the technical omissions of certain names and addresses to contest the Tribunal's jurisdiction. The Tribunal should reject the Respondent's objection for at least seven reasons.

202. *First,* the 2014 Notice of Intent accomplished its purpose by placing Mexico on actual notice of the NAFTA dispute. The Respondent does not seriously contest this point, but focuses instead on technical details to avoid answering for its breaches of Chapter Eleven. The Claimants have accordingly complied with Article 1119.

203. *Second*, the 2014 Notice of Intent was made for the benefit, and on behalf of, the entire casino business and all the Claimant investors. As each of the Additional Claimants have affirmed and continue to affirm, they were informed of, consented to, and adopted the 2014 Notice of Intent in all respects, and delegated the initial advancement and management of all claims against Mexico to the owner group led by Gordon and Erin Burr.

204. *Third*, further notice information would have been futile. Mexico never wanted to pursue negotiations with the Claimants, and sought to use the period of time following the 2014 Notice of Intent to gather information beyond that to which it was entitled in order to get a head start in preparing its defense. Mexico's own arguments demonstrate the futility of its objection. Further, the content of the notice of intent would not have altered the course of SEGOB's behavior, as the agency was adamantly opposed to Claimants' continued involvement in the Juegos Companies and had no intention to discuss possible resolution of the dispute with Claimants.

205. *Fourth,* Mexico's insistence that the Tribunal lacks jurisdiction based on the technical omission of names and addresses from the Notice of Intent is unsupported by case law. In fact, not a single NAFTA tribunal has ever declined to exercise jurisdiction based on

technical defects in the notice of intent. On the contrary, NAFTA tribunals consistently hold that minor formal defects, such as the one alleged here, are merely a matter of technical non-compliance. Tribunals routinely hold that such technical defects do not affect their jurisdiction and either excuse the defect or allow the claimant an opportunity to cure it.

206. *Fifth,* the only *feigned* prejudice that Mexico alleges it suffered from the omission of the names and dates from the 2014 Notice of Intent is that it did not have an opportunity to seek responses to its questionnaire from the omitted individuals. But Mexico presents no evidence to suggest that those individuals would have replied or that the additional information, even if received, would have altered its conduct. And, as the next paragraph illustrates, we actually know that the additional information did *not* cause Mexico to alter its conduct. In fact, each of those individuals has confirmed that they delegated all aspects of the handling of their claims to Gordon and Erin Burr, who rightly declined to respond to Mexico's fishing expedition. In any event, Mexico could have avoided any supposed prejudice here by engaging Claimants in negotiations, which it steadfastly refused to do.

207. *Sixth*, even though not necessary on the facts of this case, Claimants took corrective action to satisfy all the technical requirements that Mexico alleges are unmet. The claimants all submitted an Amended Notice of Intent in September 2016 (more than 90 days before the Tribunal was constituted in February 2017), supplying all the omitted names and addresses, and thus curing any alleged defects in the 2014 Notice of Intent. Even after receiving that notice, however, Mexico never sought to negotiate with Claimants and in fact rebuffed all of their approaches, demonstrating the complete futility of its objection.

208. *Lastly*, Mexico's conduct and strategy are contrary to the purposes of Article 1119 and the broader purposes of the NAFTA in promoting foreign investment. After refusing to negotiate with Claimants, Mexico presses its hyper-technical objection in an admitted attempt to time-bar some of the Claimants' claims. It now seeks the extraordinarily draconian remedy of a jurisdictional dismissal. Mexico's vision of dispute settlement under Chapter Eleven—a process filled with technical traps to block Claimants from pursuing their substantial claims—should not be countenanced.

1. Mexico Received Actual Notice of the Dispute

209. The 2014 Notice of Intent placed Mexico on actual notice of the dispute. It performed its intended function of alerting Mexico that U.S. investors involved in the casino venture at issue would avail themselves of their rights under the NAFTA and submit their

dispute to arbitration under that Treaty should Mexico fail to resolve the dispute with them during the period provided in the Treaty for amicable resolution. The Respondent does not contest that it was placed on actual notice of the dispute. Instead, the Respondent diverts attention towards technical details that the Respondent alleges were missing from the 2014 Notice of Intent. The Respondent's nitpicking is backed by an extremely formalistic argument that no NAFTA tribunal has ever accepted.

210. As Claimants explained in their Counter-Memorial,[312] the Claimants delivered the 2014 Notice as part of their earnest and ongoing efforts to negotiate with Mexico, and after they had tried many times to resolve the dispute amicably. Mexico rebuffed Claimants at every turn, however. Claimants' numerous requests for meetings were routinely ignored or denied, and on the rare occasion when a meeting occurred, it was unproductive and made clear that Mexican officials, particularly in SEGOB, were not interested in negotiating.

211. While Claimants continued to harbor hope that Mexico would act in accordance with its obligations under the NAFTA, Mexico instead responded by illegally shutting down all of the Claimants' Casinos using highly orchestrated, commando raids in April 2014. Claimants delivered the 2014 Notice of Intent to Mexico one month later, in compliance with Article 1119, and in response to Mexico's evident bad faith and escalation of the dispute. Claimants fully expected the Mexican government to take the 2014 Notice seriously, and to engage them in meaningful discussion regarding the measures it had taken against their investments. Except for one perfunctory meeting in June 2014 with Mr. David Garay Maldonado, then Director of the Government Unit at SEGOB, the Mexican government continued its refusal to meet with Claimants.

212. Respondent had actual notice of the dispute, and it has chosen to ignore the overwhelming evidence establishing this point. In fact, Mexico does not contend otherwise. The Respondent does not discuss, or even make reference to, Claimants' persistent efforts over a two-year period to secure meetings with its officials in an attempt to discuss a potentially amicable resolution to their claims. According to the Respondent's version of events, after Claimants sent the White & Case Letter in January 2013, Claimants refused to negotiate with Mexico. Later, in May 2014, Claimants delivered their Notice of Intent and, according to Mexico, refused to engage with Mexican officials any further. Claimants then abruptly initiated arbitration, catching Mexico by surprise that there was even a NAFTA dispute involving

[312] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 303-323.

Claimants' Casinos to begin with. Mexico describes Claimants' behavior as "blatant, extraordinary and egregious"[313] and Claimants' version of events as "self-serving."[314] Mexico's account, however, clashes with the overwhelming documentary and testimonial evidence of record.

213. Specifically, Mexico invites the Tribunal to turn a blind eye to the long list of Claimants' actions seeking negotiations with responsible Mexican officials. The Respondent has left out several important meetings. It complains that Claimants have not submitted witness statements from each and every person in attendance at the various meetings cited by Claimants.[315] Yet, the Respondent noticeably has failed to submit witness statements from important SEGOB and Economía officials who participated in meetings with Claimants and would be in a position to rebut Claimants' account, including without limitation:

- Ms. Marcela Gonzalez Salas (former Director of SEGOB's Games and Raffles Division);
- Mr. Luis Felipe Cangas (Ms. Salas' successor as Director of the Games and Raffles Division);
- Mr. David Garay Maldonado (Director of the Government Unit at SEGOB);
- Mr. Hugo Vera (Legal Director of SEGOB);
- Mr. Luis Enrique Miranda Nava (Under-Secretary of SEGOB); and
- Mr. Carlos Vejar (former Director of Consulting and Negotiations at Economía).

214. The only witness statement that Mexico submits is a very short one from Ms. Ana Carla Martinez Gamba confirming that Economía was merely interested in gathering information through its questionnaire. Importantly, there is no indication in Ms. Martinez's statement that Economía or any other Mexican instrumentality was ever interested in engaging Claimants in discussions in an attempt to resolve the dispute with Claimants amicably. On the contrary, Ms. Martinez's statement confirms that SEGOB officials were entrenched in their view that E-Games' permit was invalid and that Mexico's decision to close Claimants' casinos

[313] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 5.

[314] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 101.

[315] *See, e.g.*, Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 53. The Respondent criticizes Claimants for providing witness statements of only two of the four participants in a meeting in February 2013 with officials from SEGOB and Economía. Respondent appears immune to irony, however, as it has failed to submit a single witness statement from the government officials who attended the meeting.

illegally was justified.[316] As will be discussed in greater detail later, after Economía officials met with SEGOB officials and learned of SEGOB's adamant opposition to Claimants' investments, Economía started preparing for Mexico's defense by fishing for information through its questionnaire.

215. Mexico's failure to submit witness statements from its officials to rebut Claimants' version of events is particularly conspicuous given Mexico's penchant for requiring multiple witness statements from Claimants, even when duplicative of existing testimonial and documentary evidence. In preparing its Reply, Mexico surely would have discussed with its officials in SEGOB and Economía the many events described by Claimants in order to verify them. Mexico's failure to submit even a single witness statement rebutting Claimants' well-documented account of events should be read to confirm its veracity.

216. Mexico's unsubstantiated version of events also leaves out at least six substantial events:

- *First*, after the White & Case Letter, Claimants' counsel Mr. Julio Gutiérrez reached out to and arranged a meeting with Economía's Mr. Carlos Vejar to avoid escalating the dispute to international arbitration.[317] Claimants also sought in particular to address the legally unfounded statements by Ms. Marcela Salas and other SEGOB officials in the newly-installed Peña Nieto administration attacking the validity of E-Games' permit. Mexico avoids discussion of this event in the interest of making consistent its false narrative that Claimants have steadfastly refused to engage in consultations from the beginning.

- *Second*, E-Games' representatives, on instructions from Claimants, met with Messrs. Hugo Vera of SEGOB and Carlos Vejar of Economía to attempt again to resolve the dispute without resorting to international arbitration.[318] Mr. Vera flatly criticized the resolutions of the previous administration in recognizing E-Games' independent gaming permit and reiterated the Peña Nieto administration's position that E-Games' permit was illegal.[319] Shortly after this meeting and in apparent retaliation against Claimants, SEGOB updated its website to falsely state that E-Games' activities were related to and dependent on E-Mex's permit, among other statements described in the Counter-Memorial.[320] This evidence objectively shows that SEGOB was clearly not disposed to negotiate with Claimants.

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[316] Witness Statement of Ana Carla Martínez Gamba (Dec. 1, 2017), ¶ 7.

[317] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 305.

[318] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 306-308.

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

[320] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 65-68; 306-308.

- Indeed, after the meeting, as Mr. Vejar expressed in an internal email with Economía officials dated March 15, 2013, he *saw no need for a further meeting with Claimants* if they were going to submit the dispute to investor-state arbitration.[321] This comment was made in relation to a request from Ms. Andrea Menaker, Claimants' prior counsel at White & Case, seeking a meeting with SEGOB and Economía officials.[322] The Respondent cannot now claim that it was surprised when Claimants initiated arbitration, or that it was ever interested in negotiating, as its internal documents prove otherwise.

- *Third*, Claimants hired 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, given the Peña Nieto administration's political opposition towards E-Games' permit, as confirmed by Mr. Vejar.[323] Despite his best efforts, Governor Richardson ultimately reported to Claimants that the Mexican government was vehemently opposed to re-opening the Casinos and that "it was near impossible to change things around given the vehemence of the Mexican authorities and the optics of the situation."[324] The Respondent completely ignores Governor Richardson's efforts and his damning observation, and makes no comment on the fact that, from April to June of 2014, Governor Richardson was unable to procure *a single meeting* for Claimants with responsible SEGOB officials.[325]

- *Fourth*, Claimants, through Mr. Burr and their counsel Mr. Gutiérrez, made repeated in-person visits to SEGOB's offices immediately after the Casino closures attempting to meet with Ms. Marcela Salas in person.[326] They were only able to secure meetings with one SEGOB official, Ms. Michele Aguirre, who merely reiterated that the Casino closures were legal and did not offer Claimants an opportunity to engage in meaningful discussion. Ms. Aguirre also did not explain why Ms. Salas refused to meet with Claimants. Claimants' multiple efforts to secure in-person meetings with Ms. Salas, which Mexico omits from its unsubstantiated version of events, defeats Mexico's narrative that Claimants adamantly refused consultations.

- *Fifth*, U.S. Congressman Mike Coffman sent a letter on Mr. Burr's behalf to Mr. Miranda Nava of SEGOB to arrange a meeting with Mr. Burr.[327] Claimants did not receive a response before submitting the 2014 Notice of Intent. Congressman Coffman's efforts ultimately led to a perfunctory meeting in June 2014 with Mr. David Garay Maldonado of SEGOB, which will be discussed in greater detail below.

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[321] Email from Carlos Vejar Borrego to Salvador Behar Lavalle (Mar. 15, 2013), **C-132**.

[322] Email from Carlos Vejar Borrego to Salvador Behar Lavalle (Mar. 15, 2013), **C-132**.

[323] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 73, 81, 309.

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

[325] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 312.

[326] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 313-315.

[327] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 316; Letter from Congressman Coffman to Luis Enrique Miranda Nava (May 7, 2014), **C-86**.

- *Sixth*, Claimant and counsel to the B-Mex Companies Neil Ayervais wrote to Mr. Miranda Nava to request a legal explanation for SEGOB's illegal closures of Claimants' Casinos.[328] On May 20, 2014 (three days before the 2014 Notice), Ms. Salas responded for Mr. Miranda Nava and refused to provide an explanation, purportedly because Mr. Ayervais was not registered as a legal representative for E-Games.[329]

217. It is in this context that Claimants delivered the 2014 Notice of Intent to Mexico. The 2014 Notice formally notified the Mexican government that a NAFTA dispute relating to the Casinos was headed for Chapter Eleven arbitration. Yet, instead of participating in negotiations with Claimants in the hopes of resolving the dispute amicably, the Respondent chose to further rebuff Claimants. There was a two-year period for the Respondent to engage in negotiations with Claimants in attempting to amicably resolve the dispute. But it failed to do so. In light of this, Mexico cannot now claim that it did not know of the dispute or that it was surprised that the Claimants initiated NAFTA arbitration, as Claimants indicated would occur in both the White & Case Letter and in the 2014 Notice. It also cannot claim credibly that further information in the 2014 Notice or further notices from the other Claimants not specifically referenced in the 2014 Notice would have changed Mexico's stance.

218. In sum, the 2014 Notice performed its intended function of placing Mexico on actual notice that a NAFTA dispute was headed towards international arbitration. Mexico does not dispute this point, nor can it credibly do so as demonstrated by its failure to address the numerous steps taken by Claimants to secure meetings and its failure to submit witness statements from its officials to rebut Claimants' account of events. Mexico, however, chose to ignore the various opportunities presented by Claimants to engage in dialogue to resolve the dispute amicably, even though Claimants gave them more than two years to do so. This is not a case where no notice of intent was served at all. Here, Claimants complied with Article 1119 by placing Mexico on actual notice of the dispute. The Tribunal should accordingly reject Mexico's objection under Article 1119 and find that it has jurisdiction to consider the entire NAFTA dispute as well as each Claimant's claims.

2. The 2014 Notice of Intent Was Submitted On Behalf Of All Claimants

219. The Controlling Disputing Investors submitted the 2014 Notice of Intent for the benefit and on behalf of all Claimant investors. All Claimant investors were aware of and

[328] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 318-319.

[329] Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 11.

consented to the issuance of the 2014 Notice, and agreed to and adopted its contents in all respects.[330]

220. The Respondent repeatedly objects that there is insufficient evidence of Mr. Gordon Burr's authority to act on behalf of all claimants.[331] Throughout the Reply, the Respondent attempts to paint Mr. Gordon Burr as an unreasonable and "self-serving" individual who has usurped the claims of other investors and who is unable to act cooperatively with Mexican authorities.[332] Respondent's accusations are unfounded and inappropriate. Respondent's invective aside, the evidence of Mr. Burr's role and authority to act on behalf of all Claimants—as well as his and the rest of the Claimants' willingness to resolve this dispute amicably—is ample and unrebutted.

221. Each of the Claimant investors have submitted witness statements affirming that they all expressly delegated management of their claims against Mexico to their co-investors led by Mr. Gordon Burr, Ms. Erin Burr, and Mr. John Conley.[333] Specifically, the Claimant witness statements affirm that:

> Gordon and Erin [Burr] kept me fully apprised of all efforts being taken to remedy or at least lessen the effects of Mexico's illegal conduct against our investments in [Mexico]. Following Mexico's illegal closure of our casino businesses in April 2014, a group of our co-investors led by Gordon Burr, John Conley, and Erin Burr, hired counsel and issued the 2014 Notice of Intent on their and my behalf. As I previously indicated in this arbitration in my prior signed statement dated July 2016, not only did I consent to the issuance of the 2014 Notice of Intent, but I also reviewed it, agreed with all of its contents, and have adopted it in all respects.[334]

222. Each Claimant investor affirms that the principal owners and controllers of the Juegos Companies issued the 2014 Notice of Intent in order to recoup the damages suffered by *all investors and enterprises* due to Mexico's unlawful actions. In other words, as Claimants have explained all along, the 2014 Notice of Intent encompassed the *entire* casino investment

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[330] *See* Claimants' Response to Mexico's Objection to Claimants' Request for Approval to Access the ICSID Additional Facility and Request for Arbitration, and Response to ICSID's Questionnaire dated July 6, 2016, Annex C.

[331] *See, e.g.*, Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 101.

[332] *See, e.g.,* Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 40, 47, 48, 68, 101.

[333] Claimant Witness Statements (Jan. 4 – 7, 2018), **CWS-16 – CWS-47**, Section II; **CWS-48 – CWS-49**, Section I; Witness Statement of Neil Ayervais (January 7, 2018), **CWS-12**, Section III.

[334] Claimant Witness Statements (Jan. 7, 2018), **CWS-16 – CWS-46**, Section II; **CWS-48 – CWS-49**, Section I; Witness Statement of Neil Ayervais (January 7, 2018), **CWS-12**, Section III.

and sought recovery of *all* of the damages resulting from Mexico's illegal measures. All of the claimant investors are unanimous on this point.

223. Each Claimant investor further affirms that the 2014 Notice was a precursor to an arbitration by *all* Claimants should the matter have to proceed to a NAFTA arbitration:

> In compliance with the North American Free Trade Agreement ("NAFTA") Article 1119, the notice was issued on behalf of all of the investors, including myself, to notify Mexico that the U.S. shareholders would be initiating a NAFTA case against Mexico if it did not remedy the damages it had caused to our investments. Although my name was not expressly listed in the 2014 Notice of Intent, my co-investors kept me informed of everything that was occurring and, after consulting me and obtaining my consent, took action on my behalf, including their various efforts to initiate a dialogue with Mexico to amicably settle our dispute through consultation and negotiation. The U.S. shareholder group … authorized Gordon Burr to speak and act on behalf of us all.

224. This unquestionably establishes that (1) Mr. Gordon Burr was authorized to act on behalf of the U.S. shareholder Claimant group; (2) Mr. Burr's actions on behalf of the Claimant group were taken after consultations and with informed consent from each Claimant investor; (3) the 2014 Notice was issued on behalf of all the Claimant investors; (4) the 2014 Notice was intended to encompass all claims for damages that had been caused to the entirety of Claimants' investments; and (5) any NAFTA arbitration that would ensue following the 2014 Notice was intended by Claimants to be on behalf of *all* of the Claimants. There thus is nothing ambiguous or uncertain about Mr. Burr's authority to issue the 2014 Notice of Intent on behalf of all the Claimant investors.

225. The Respondent has not made any comment in its Reply on the *Philip Morris v. Uruguay* case, even though it first relied on this case in its Memorial on Jurisdictional Objections.[335] As Claimants noted, *Philip Morris* stands for the proposition that, in arbitrations with multiple claimant investors, the actions of one claimant taken to satisfy pre-arbitration procedures for the benefit of the other claimants can be considered collectively so as to satisfy the procedures for all of them.[336] In particular, the *Philip Morris* tribunal rejected jurisdictional objections based on a pre-arbitration settlement attempt requirement and a domestic litigation requirement, *even though not all claimants participated in the settlement attempts and domestic litigation proceedings*.[337] According to the *Philip Morris* tribunal:

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[335] Respondent's Memorial on Jurisdictional Objections (Dec. 1, 2017), ¶ 112.

[336] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 286-287.

[337] *Philip Morris Brands et al v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013), **CL-12**, ¶¶ 95, 114.

> 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.[338]

226. The *Philip Morris* tribunal's decision finding collective compliance sufficient, even without each claimant's specific and direct participation, reflects a purposeful application of pre-arbitration requirements that eschews extreme formalism in favor of substance. In an arbitration with multiple claimant parties, the rationale for requiring individualized procedural compliance loses force where a principal claimant acts for the benefit and on behalf of the other claimant parties. In those cases, the substantive purpose of the procedural requirement is fulfilled, as the initial interests sought to be safeguarded are addressed.

227. That is exactly the situation here. Although the investor group led by Mr. Burr placed Mexico on actual notice through the 2014 Notice, which was sent on behalf, for the benefit, and with the knowledge and consent of all Claimant investors, Mexico presses an aridly formal argument regarding the notice of intent requirement of the Treaty. The argument, as can be seen, bears little relationship with the notice of intent requirement or its purpose, which is to alert the respondent State of a dispute headed towards international arbitration and to give it an opportunity to settle it amicably before it reaches arbitration. As explained in the Counter-Memorial and below, Mexico was never deprived of an opportunity to negotiate and settle the dispute amicably. In fact, it actively avoided Claimants' repeated attempts to do so.

228. The question raised by *Philip Morris*, thus, is not whether collective compliance with pre-arbitration procedures is possible in multi-party arbitrations—the tribunal held that it is—but whether the claimant parties' positions and interests are sufficiently uniform to credit the collective compliance. In this case, the positions and interests are identical and were closely coordinated at all times.

229. The Additional Claimants are minority shareholders who hold less than 2% of each of the Juegos Companies' stock.[339] Mexico does not dispute this. Their role in this arbitration pertains solely to their status as shareholders of the Juegos Companies. These shareholders are pursuing the *same claims* with the *same operative facts* as the Controlling

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[338] *Philip Morris Brands et al v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013), **CL-12**, ¶ 95 (emphasis added).

[339] First Witness Statement of Erin Burr (July 25, 2017), **CWS-2**, ¶ 141.

Disputing Investors. In fact, they all expressly delegated management of their claims against Mexico to the Controlling Disputing Investors. Given the uniformity of claims, investments, and interests, this case squarely falls within the *Philip Morris* standard for finding collective compliance with treaty requirements.

230. Mexico's attempt to challenge this point regarding the uniformity of positions and interests is summarized in paragraphs 65-66 of its Reply. Mexico accuses the Claimants, as it did in its Memorial, of a "conscious attempt to obscure the details of their alleged ownership and control" of the Juegos Companies, and again cites to the Request for Arbitration—a pre-arbitration document that does not require the unprecedented level of exacting detail that Mexico demands.[340]

231. Mexico's myopic focus on the Request for Arbitration—and its blind eye towards the Counter-Memorial—betrays the weakness of its argument. Specifically, Mexico ignores the section in Claimants' Counter-Memorial specifically listing the particular Claimants who are invested in each individual Juegos Company.[341] Mexico also ignores Erin Burr's comprehensive witness statement explaining the Juegos Companies' corporate structure, rights of shareholding, the list of investments made by each particular Claimant, and the detailed Annex displaying each and every Claimants' precise shareholding as of Mexico's illegal temporary closure of the DF Casino facility. This more than answered the question of "who owns what," and plainly does not reflect a "conscious attempt to obscure the details." On the contrary, the detail of these materials amply demonstrates the hyperbole of Mexico's accusations. Furthermore, Mexico's insistence that all U.S. control over and involvement in the Juegos Companies be eliminated before it would even consider allowing Claimants' Casinos to reopen manifests Mexico's continuing awareness of, and antipathy towards, Claimants' ownership of the Juegos Companies. Mexico at all times knew "who owned what" and that knowledge motivated its illegal actions.

232. Mexico's additional argument that only some of the Claimants are invested in E-Games is similarly specious. The Additional Claimants are making claims in respect and on behalf of the *Juegos Companies*. The Controlling Disputing Investors are making claims in respect of the Juegos Companies, E-Games, and Operadora Pesa. This was all previously

[340] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 65.

[341] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 224-229.

explained.[342] That the Additional Claimants are not invested in E-Games and Operadora Pesa is irrelevant because they are not pursuing claims on behalf of those companies. The Additional Claimants' claims in respect of the *Juegos Companies* involve *the same set of governmental measures, interests, and positions* as the Controlling Disputing Investors'. Mexico received actual notice of these claims but decided to ignore the dispute and allow it to escalate to international arbitration. It should not now be heard to argue that it would have acted differently if only it had known the names and addresses of minority shareholders in the Juegos Companies. That argument fails even the straight-face test.

233. Finally, notwithstanding Mexico's aspersions against Mr. Burr, it asks for an explanation from Mr. Burr as to why the Additional Claimants did not file their own notice or join the Controlling Disputing Investors in a fresh notice.[343] The answer is simple: it was unnecessary, as each Additional Claimant had specifically entrusted Mr. Burr with the prosecution of their claims. The Amended Notice of Intent itself was delivered out of an abundance of caution to address Mexico's purported concerns over the omitted names and addresses, which it raised at the registration stage of the proceedings, and which the ICSID Secretariat found insufficient to avoid registration.[344] There was absolutely no need for a separate or fresh notice of intent, because all Claimants already had complied with Article 1119 through the 2014 Notice.

234. Given that the Controlling Disputing Investors submitted the 2014 Notice of Intent on behalf, for the benefit, and with the express knowledge and consent of the Additional Claimants, the Tribunal should find that Claimants have collectively complied with Article 1119 and reject Mexico's objection in its entirety.

3. Mexico Confirms That It Was Not Interested in Negotiations, Demonstrating the Futility of its Notice of Intent Argument

235. Mexico's primary argument is that Claimants' efforts to seek negotiations and amicable resolution of the dispute is "irrelevant" for purposes of NAFTA Article 1119.[345] The Respondent makes this argument because, from the beginning, it has not been interested in negotiating with Claimants. Mexico's indifference and refusal to engage with Claimants

[342] *See* Amended Notice of Intent (Sept. 2, 2016).

[343] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 183.

[344] Claimants' Counter-Memorial on Jurisdictional Objections, ¶ 379; Amended Notice of Intent (Sept. 2, 2016).

[345] *See, e.g.*, Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 7, 26, 27, 41, 49.

persisted after the 2014 Notice of Intent, after the Request for Arbitration, and after the Amended Notice of Intent.

236. Respondent's legal strategy amply demonstrates the futility of requiring a more detailed notice of intent. Mexico never intended to do what Article 1119 was designed to foster—providing the respondent government and the claimants an opportunity to amicably settle a dispute through consultation or negotiation. In fact, for all its rhetoric, Mexico does not even allege that it ever was interested in negotiating with Claimants. And the evidence of record proves that it never was. Requiring a more detailed notice of intent in this case thus would have been an exercise in pure futility, given SEGOB's apparently entrenched views regarding the invalidity of Claimants' gaming permit and SEGOB's steadfast refusal to allow Claimants to re-open their Casinos. The inclusion of additional names and addresses would not have altered SEGOB's behavior, as SEGOB wanted the U.S. shareholders excised from the Juegos Companies' boards and operations altogether as a condition to re-opening the Casinos.[346]

a. The Purpose of Article 1119 is To Offer the Respondent State an Opportunity to Amicably Settle the Dispute Through Negotiations, But Mexico Refused To Do So

i. The Purpose of the Notice of Intent Is to Serve As a Basis for Consultations or Negotiations

237. Tribunals consistently excuse non-compliance with notice or waiting period requirements where there is nothing to be gained because negotiations are bound to be futile.[347] This is because the purpose of a notice of intent or waiting period requirement is to encourage amicable settlement of the dispute through consultation or negotiation. This is the view taken by distinguished scholars and arbitrators across the international investment arbitration community.

238. There is a simple reason why the Respondent so desperately casts Claimants' efforts to engage in amicable consultation and negotiation as "irrelevant" [348]: *the Respondent never wanted to negotiate with Claimants and never intended to resolve the dispute before the*

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[346] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 9; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 16; First Witness Statement of Gordon G. Burr (July 25, 2017), **CWS-1**, ¶ 52; First Witness Statement of Luc Pelchat (July 21, 2017), **CWS-4**, ¶ 8.

[347] *Ethyl Corp. v. Government of Canada*, UNCITRAL, Award on Jurisdiction (June 24, 1998), ¶ 84, **CL-5**; *Occidental Petroleum Corporation v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction (Sept. 9, 2008), **CL-34**, ¶¶ 92–95.

[348] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 7, 40-41.

claim reached international arbitration. Requiring a more detailed notice of intent from Claimants thus would have been futile.

239. Meg Kinnear's Commentary on the NAFTA, co-authored with Andrea Bjorklund and John Hannaford, confirms Claimants' position. The Respondent charges that Claimants are being "disingenuous" in their reading of Kinnear, *et al*.[349] This strong charge, however, is disproved by the portion of the passage that Mexico chose not to underline in its Reply:

> **B Form of Notice of Intent**
>
> Article 1119 sets out basic information which must be included in a notice of intent. It is stated in mandatory form ("shall"), although the article does not specify the consequences of failing to provide the necessary information in the notice of intent. Nor does Article 1119 specify a format for notices of intent. However, on October 7, 2003, the Free Trade Commission issued a suggested format for notices of intent. While use of this format is not obligatory, following it is one way for claimants to ensure that the requirements of Article 1119 are addressed.[350]

240. Article 1119 does not contain the words "conditions precedent to submission of a claim to arbitration." As Kinnear *et al* points out, in its commentary on Article 1121:

> Article 1121 is entitled "Conditions Precedent to the Submission of a Claim to Arbitration." It sets forth procedural steps an investor must take in order to submit a claim to arbitration. Though other articles deal with procedural issues, Article 1121 is the only article with the words "conditions precedent" in its title.[351]

241. The absence of the words "conditions precedent to submission of a claim to arbitration" confirms that Article 1119 is a procedural provision, not a condition precedent as Mexico argues. Accordingly, compliance with this provision should be dealt with as an issue of admissibility, not jurisdiction. This directly contradicts the Respondent's assertion that Claimants' submission to arbitration was "void *ab initio*" as a result of alleged technical defects in the 2014 Notice of Intent.[352]

242. The Respondent selectively emphasizes the words "must," "require," and "mandatory" in Kinnear *et al*, but completely ignores the following phrase: "the article [i.e.

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[349] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 37.

[350] 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), **CL-15**, p. 4.

[351] Article 1121 – Conditions Precedent to Submission of 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), **RL-025**, p. 4.

[352] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 75.

Article 1119] does not specify the consequences of failing to provide the necessary information in the notice of intent." *This is the precise debate here—what consequences, if any, arise where names and addresses are omitted from the notice of intent, and where the purpose of the notice of intent has been fulfilled given the actual notice of the respondent government and its refusal to negotiate and settle the dispute amicably.* Mexico's empty accusations that Claimants are "disingenuous" demonstrate that Mexico misapprehends the issue in this case and underscores its penchant for extreme formalism.

243. Kinnear *et al* also describes the negotiating history of Article 1119, which confirms that the notice of intent requirement was born out of a desire to encourage resolution of disputes through consultation and negotiation:

> **I Negotiating Text**
>
> The early negotiating drafts of NAFTA did not require a claimant to file a notice of intent to arbitrate. Rather, the claimant was encouraged to seek resolution through consultation and negotiation, failing which the dispute could be submitted directly for arbitration in a variety of suggested fora.[353]

244. The Statement of the NAFTA Free Trade Commission on notices of intent to submit a claim to arbitration, which is *binding* on the Tribunal pursuant to Article 1131 (unlike the Article 1128 non-disputing party submissions repeatedly cited by the Respondent), states:

> **B. Notice of Intent to Submit a Claim to Arbitration**
>
> 1. Article 1118 of the NAFTA provides that "[t]he disputing parties should first attempt to settle a claim through consultation or negotiation." Article 1119 of the NAFTA requires that a disputing investor provide written notice of its intent to submit a claim to arbitration at least 90 days before the claim may be submitted.
>
> 2. Efforts to settle NAFTA investment claims through consultation or negotiation 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.[354]

[353] 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), **CL-15**, p. 1.

[354] Statement of the Free Trade Commission on notices of intent to submit a claim to arbitration (Oct. 7, 2003), **CL-13**, p. 1 (emphasis added).

245. The Respondent posits that Article 1118 has "no relevance" and has "no legal nexus" to Article 1119.[355] In fact, this is the Respondent's *first and main* point in its Article 1119 argument:

> The Claimants are fixated on the idea that the sole purpose of giving notice under Article 1119 is to trigger the commencement of negotiations which they were entitled to eschew because, in the opinion of Gordon Burr, such negotiations would have been futile.
>
> First, it bears noting that the text of Chapter Eleven nowhere states or even implies that the sole purpose of Article 1119 is to trigger or foster negotiations. As explained above, Article 1118 exhorts the disputing parties to engage in negotiation and consultation before submission of a claim to arbitration, but it does not require them to do so. Article 1119 mandates the giving of 90-days notice by each disputing investor and Article 1120 mandates a six-month waiting period running from the date of the impugned measure(s).[356]

246. As Claimants have explained,[357] and as the binding Statement of the NAFTA Free Trade Commission confirms, there is an inextricable link between Article 1118 and Article 1119. Mexico's rigid separation of these provisions, symptomatic of its conveniently formalistic reading of the NAFTA, reveals its misapplication of Chapter Eleven's procedural framework. As the *Mesa Power* tribunal observed:

> At the outset, it bears recalling the reason why States provide for cooling off or waiting periods in investment treaties. The object and purpose of these periods 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. In most bilateral investment treaties, notice and consultation period requirements are included in a single provision. By contrast, the NAFTA deals with this matter in three distinct provisions. Article 1118 of the NAFTA provides that disputing parties should attempt to settle a claim through consultation or negotiation. Article 1119 requires a disputing Party to send a written notice of its intent to submit a claim to arbitration at least 90 days before the submission. The notice must specify the provisions of the Agreement alleged to have been breached as well as the issues and the factual basis for the claim. A different provision – Article 1120 – addresses the submission of a claim to arbitration and specifies that six months must have elapsed since the events giving rise to a claim.[358]

247. The Respondent has failed to submit a single authority supporting the proposition that the notice of intent requirement is *not* for the purpose of fostering negotiations. The dearth of authority is unsurprising, as the notice of intent requirement was not created as an escape valve to allow a respondent State to avoid responsibility by nit-picking any

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[355] *See, e.g.*, Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 7, 26, 27, 41, 49.

[356] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 40, 41.

[357] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 327-330.

[358] *Mesa Power Group, LLC v. Government of Canada,* UNCITRAL, PCA Case No. 2012-17, Award (Mar. 24, 2016), **CL-31**, ¶ 296 (emphasis added).

imperfection in the notice. Article 1119 was designed to place a NAFTA Party on notice that a dispute was headed to international arbitration and to offer the government a chance to amicably resolve the dispute. The 2014 Notice of Intent did just that.

ii. Mexico's Officials Never Intended to Amicably Resolve the Dispute

248. The Respondent asserts it is "dubious" that negotiations would have been futile after filing the 2014 Notice of Intent.[359] However, after two rounds of submissions, Mexico has failed to allege that it was ever interested in negotiating with any of the Claimants in good faith. The unrebutted evidence of record proves that it was not.

249. The evidence of Mexico's recalcitrance goes beyond Mr. Gordon Burr's opinion, as the Respondent suggests.[360] Governor Richardson came to the same conclusion, remarking that "it was near impossible to change things around given the vehemence of the Mexican authorities and the optics of the situation."[361]

250. As explained earlier, long before delivering the 2014 Notice of Intent, the Claimants and their representatives sought, on multiple occasions, consultations and negotiations with officials in the Peña Nieto administration in the hopes of amicably resolving the dispute. Mexico not only rebuffed these repeated efforts, but in fact aggravated the dispute by shutting down the Claimants' Casinos, among other illegal measures.

251. Mexico describes what it views as a "fair appraisal" of the record in paragraph 44 of its Reply. This "fair appraisal" notably omits the following facts, which disprove Mexico's account:

- On February 25, 2013, SEGOB published on its website a Notice of Suspension against E-Games' permit.[362]
- After a meeting on February 28, 2013, SEGOB retaliated against Claimants by updating its website to falsely state that E-Games' activities were related to and dependent on E-Mex's permit, among other blatantly false statements.[363]

[359] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 47.

[360] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 47.

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

[362] First Witness Statement of Julio Carlos Gutiérrez Morales (July 25, 2017), **CWS-3**, ¶ 11.

[363] First Witness Statement of Julio Carlos Gutiérrez Morales (July 25, 2017), **CWS-3**, ¶ 12.

- Continuing its pattern of harassment, on June 19, 2013, the Mexican government arbitrarily shut down Claimants' DF Casino facility.

- On August 28, 2013, SEGOB arbitrarily and illegally rescinded its prior November 16, 2012 Resolution granting E-Games' independent gaming permit.

- On April 24, 2014, in a highly orchestrated commando raid, SEGOB illegally shut down the Claimants' Casinos.

- Claimants engaged the Governor Richardson in April 2014 to lobby on their behalf and to seek a meeting with responsible Mexican officials. Gov. Richardson was unable to secure a meeting due to "the vehemence of the Mexican authorities".[364]

- Claimants' repeated in-person visits to SEGOB's offices and Ms. Salas' refusal to attend even a single meeting with them, let alone amicably resolve the dispute.[365]

- Ms. Salas' refusal to offer any explanation for Mexico's closure of the Casinos, notwithstanding Claimant Neil Ayervais' written request demanding it.[366]

- During Mr. Vejar's call with Mr. Gutiérrez on June 10, 2014, Mr. Vejar explained that he was unsure whether SEGOB would accept a meeting with Claimants and expressed that SEGOB was not willing to negotiate any amicable settlement with Claimants.[367] The Respondent has failed to submit a witness statement from Mr. Vejar, leaving this documented account uncontradicted.

- During the same call, Mr. Vejar said he intended to organize a meeting between E-Games, SEGOB, and Economía to discuss the case. *He never did.*[368]

- Between April to June 2014, Claimants reached out to trade officials in the U.S. Department of Commerce seeking their assistance in securing a meeting with SEGOB officials. This information was passed on to the Mexico and NAFTA desks at the Commerce Department, but the officials failed despite repeated efforts.[369]

- Shortly after submitting the Notice of Intent, the Mexican government, through its Attorney General's Office, initiated criminal investigations against E-Games' representatives on baseless allegations of illegal gambling.[370]

- As discussed in more detail below, Ms. Marcela Gonzalez Salas and Mr. Luis Felipe Cangas, the former and current Directors of SEGOB's Games and Raffles Division,

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

[365] First Witness Statement of Gordon G. Burr (July 25 2017), **CWS-1**, ¶ 36; First Witness Statement of Julio Carlos Gutiérrez Morales (July 25, 2017), **CWS-3**, ¶ 16.

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

[367] First Witness Statement of Julio Carlos Gutiérrez Morales (July 25, 2017), **CWS-3**, ¶ 22.

[368] First Witness Statement of Julio Carlos Gutiérrez Morales (July 25, 2017), **CWS-3**, ¶ 22.

[369] Neil Ayervais email to Rebecca Flores dated April 30, 2014, **C-41**; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12** ¶ 11.

[370] First Witness Statement of Gordon G. Burr (July 25, 2017), **CWS-1**, ¶ 44.

directly and unequivocally stated that SEGOB would not allow the Casinos to reopen as long as the Claimants remained involved in the Juegos Companies.[371]

252. As Respondent itself acknowledges, *after* the 2014 Notice of Intent, Messrs. Burr and Gutiérrez met with Mr. David Garay Maldonado from SEGOB to further discuss the illegal closures. An internal email written by Mr. Vejar confirms that *Claimants* were the ones who requested the meeting.[372] Thus, even on Mexico's distorted reading of the record, it recognizes that the Claimants *did in fact attempt to engage in consultations after delivery of the 2014 Notice of Intent.*

253. The meeting with Mr. Garay turned out to be purely perfunctory and did not evidence any good faith intention to negotiate. Mr. Garay explained that he only met with Claimants as a courtesy to Congressman Coffman and clarified that he had no authority to settle or resolve Claimants' claims.[373] He did not attempt to compromise or negotiate, nor did he offer any suggestions as to how Claimants could reopen their Casinos. Although Mr. Garay said he would serve as an interlocutor with Ms. Salas and promised to follow up, he never did (or, if he did, Ms. Salas decided not to engage with Claimants).

254. Since the Respondent has failed to submit a witness statement from Mr. Garay, the uncontradicted record demonstrates that (1) Claimants *did* in fact attempt to settle the dispute through amicable consultation, and (2) Mr. Garay, on behalf of the Respondent, *refused to compromise or negotiate.*

255. But that is not the only way in which Respondent's "fair appraisal" of the record misrepresents the evidence.

256. Respondent asserts that, after the second meeting between Claimants and Economía officials in February 2013, "[t]he Original Claimants made no further contact with Economía until 23 May 2014 when they submitted the Original NOI."[374] This is wrong. As explained earlier, Ms. Andrea Menaker, on behalf of Claimants, requested a meeting with SEGOB and Economía officials in March 2013.[375] Mr. Vejar, however, stated in an internal

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[371] First Witness Statement of Luc Pelchat (Jul. 21, 2017), **CWS-4**, ¶ 8; Second Witness Statement of Luc Pelchat (Jan. 3, 2018), **CWS-10**, ¶ 9; Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-12**, ¶ 9.

[372] Email from Carlos Vejar Borrego to Landgrave Fuentes José Raúl (June 10, 2014), **C-142**.

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

[374] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 44.

[375] Email from Carlos Vejar Borrego to Salvador Behar Lavalle (Mar. 15, 2013), **C-132**.

email between Economía officials that he *saw no need for a further meeting with Claimants* if they were going to submit the dispute to investor-state arbitration.[376] This is direct evidence that the Respondent's officials were not interested in negotiating and were allowing the dispute to escalate to international arbitration.

257. U.S. government officials in the U.S. Department of Commerce also shared the view that Mexican officials were unwilling to negotiate. Ms. Colleen Fisher, an officer at the NAFTA desk of the U.S. Commerce Department, remarked that she had "spoken with several of [her] colleagues here [in Mexico] and given the current state of play, the Embassy [of the United States] is unable to engage in a way that will change the outcome of [Claimants'] case."[377]

258. On June 3, 2014 (i.e. *after* the 2014 Notice of Intent was delivered), Ms. Fisher sent Claimants, and in particular Mr. Ayervais, the following email:

> Neil –
>
> Good afternoon. I wanted to give you an update of our engagement with SEGOB.
>
> Our industry specialist, Silvia Cardenas, has been in contact with officials at SEGOB for the last week. She has spoken with many of Nava's team members, including the Second Personal Assistant of Under Secretary for Government (Mr. Enrique Miranda Nava). Her contacts have told her that Enrique Miranda Nava has not met with Exciting Games. She is trying to understand more about where the disconnect is within the SEGOB ministry.
>
> Best,
> Colleen[378]

259. Respondent has offered absolutely no evidence to contradict Claimants' persistent, documented efforts to engage Mexico, or Mexico's steadfast refusal to do so.

260. In the document production phase, Claimants requested from Respondent documents prepared in connection with, *inter alia*, (a) the January 16, 2013 White & Case letter; (b) the January 30, 2013 meeting with Economía; (c) the February 28, 2013 meeting with SEGOB and Economía; (d) the meetings in late April or early May 2014 with Ms. Michele Aguirre; (e) the meeting between SEGOB and Economía as confirmed by Mr. Vejar in his call to Mr. Gutiérrez on June 10, 2014; (f) the June 11, 2014 meeting with Mr. Garay; (g) Hon. Bill

[376] Email from Carlos Vejar Borrego to Salvador Behar Lavalle (Mar. 15, 2013), **C-132**.

[377] Exchange of emails between Neil Ayervais and Collen Fisher (May-June, 2014), **C-41**, p. 4.

[378] Exchange of emails between Neil Ayervais and Collen Fisher (May-June, 2014), **C-41**, p. 1 (emphasis added).

Richardson's efforts to secure meetings for Claimants; (h) the U.S. Department of Commerce's efforts to secure meetings for Claimants; (i) the 2014 Notice of Intent; (j) the Amended Notice of Intent; and (k) any meetings between January 1, 2013 and December 31, 2014 between Economía and/or SEGOB and Claimants' representatives.[379]

261. The Respondent was unable to produce *a single document* evidencing an intent from any official to negotiate; indeed, for certain document requests, the Respondent was unable to produce any documents whatsoever to Claimants. The Tribunal should conclude that no such document exists, because Mexico never engaged or intended to engage Claimants in any good faith discussion with respect to their claims.

262. Nor can the Respondent rely on the omission of the Additional Claimants as justification. As explained earlier, the Additional Claimants are minority shareholders who have delegated the management of their claims against Mexico to their co-investors led by Mr. Burr and Ms. Burr. The omission of their names and addresses from the 2014 Notice of Intent did not prejudice the course of the non-existent negotiations. That Mexico never approached the Additional Claimants for discussion of their claims after the submission of the Amended Notice of Intent serves as compelling, direct proof of this fact.

b. Mexico Was Unwilling To Allow the Casinos To Reopen, Further Underscoring The Futility of Its Notice of Intent Objection

263. An uninformed observer reading Mexico's submissions would be left to conclude that SEGOB had a minor, if any, role in the events that lead to Claimants' losses and in those that followed Claimants' 2014 Notice of Intent. This is a conspicuous omission, given SEGOB's absolutely central and leading role in destroying the Claimants' casino investments and in continually frustrating the Claimants' efforts to attempt an amicable resolution of the dispute.

264. The Respondent attempts to minimize SEGOB's actions by emphasizing the role of the *Consultoria Juridica de Comercio Internacional* ("**CJCI**") in coordinating Mexico's defense in investor-State arbitrations.[380] This is, however, an unconvincing ploy to avoid responsibility for SEGOB's conduct. SEGOB is an instrumentality of the Mexican government and all of its actions are attributable to the Respondent. That one lawyer in the CJCI was willing

[379] Claimants' Document Requests (Oct. 31, 2017), Documents Nos. 3-9 and 12-16.

[380] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 44.

to call Claimants' representative—and yet would not engage in any meaningful discussions about a possible resolution of the dispute with Claimants—does not negate the overarching reality that SEGOB was adamantly opposed to discussions or negotiations with Claimants. And if the CJCI was the "right" entity to dialogue with Claimants about their 2014 Notice in an effort to try and reach a resolution, then why didn't SEGOB pass along to it all of Claimants' efforts to engage SEGOB in dialogue and why didn't the CJCI contact Claimants to initiate communications about the 2014 Notice? Why hasn't it done so to date? The answer by this point must be clear to the Tribunal.

265. More fundamentally, the Respondent's documents show that after receiving the 2014 Notice of Intent, Economía officials coordinated their defense efforts with SEGOB, which also presumably involved the CJCI. After SEGOB officials communicated their steadfast opposition to Claimants' casino investments in a meeting held between the agencies on June 5, 2014,[381] Economía officials started preparing for Mexico's defense and sent the questionnaire to fish for additional information from Claimants.[382] Importantly, the Respondent has failed to produce a single document evidencing any intent to negotiate after hearing from SEGOB about its adamant opposition to Claimants' investments. Likewise, Mr. Vejar, who had communicated with Mr. Gutiérrez on a few occasions, stopped communicating with him altogether after hearing from SEGOB.[383]

266. From the beginning of the dispute, high-ranking officials in SEGOB were entrenched in their view that E-Games' permit was invalid and that Claimants' Casinos had to be shut down. Claimants will have much more to say about this in the merits phase of this case. Despite Claimants' repeated efforts to engage amicably with SEGOB, as detailed above, SEGOB officials simply turned down or ignored Claimants' requests for meetings. When meetings did occur, they were perfunctory and made clear that SEGOB was not willing to allow the Casinos to reopen nor would SEGOB recognize the validity of E-Games' independent gaming permit.

267. There is, however, even more evidence of SEGOB's steadfast refusal to allow the Casinos to reopen. *First*, near the end of the 90-day notice period after delivery of the 2014 Notice of Intent, SEGOB continued to demonstrate its political opposition towards E-Games by

[381] Witness Statement of Ana Carla Martinez Gamba (Dec. 1, 2017), ¶ 7.

[382] Witness Statement of Ana Carla Martinez Gamba (Dec. 1, 2017), ¶ 11.

[383] Second Witness Statement of Julio Carlos Gutiérrez Morales (Jan. 7, 2018), **CWS-6**, ¶ 5.

denying its requests for new permits on unsubstantiated and specious grounds. *Second*, as Messrs. Benjamin Chow and Luc Pelchat attest, in a meeting with Ms. Marcela Gonzalez Salas in June or July 2014 and with Mr. Luis Felipe Cangas in August 2015, the former and current Directors of SEGOB's Games and Raffles Division both unequivocally stated that SEGOB would not allow the Casinos to reopen as long as the Claimants were involved in the Juegos Companies.

i. SEGOB Denied E-Games' Request for New Permits on Specious Grounds

268. The Respondent does not address SEGOB's arbitrary denial of E-Games' requests for new gaming permits. Claimants explained in their Counter-Memorial that, notwithstanding SEGOB's illegal revocation of E-Games' valid independent gaming permit, Claimants nevertheless sought to fix the unravelling situation by requesting new and independent permits for the Casinos.[384] SEGOB, however, continued to demonstrate its political, arbitrary, and illegal opposition to E-Games by denying the request on unsubstantiated and purely technical grounds.[385] The Respondent has not adduced any evidence or argument to contradict Claimants' account.

269. Importantly, SEGOB's denial of E-Games' request took place on August 15, 2014, at the tail end of the 90-day notice period following the 2014 Notice of Intent. If SEGOB had any intention of settling (or even de-escalating) the dispute, it would have honestly evaluated E-Games' requests in accordance with objective legal criteria under the Gaming Regulations and applicable provisions of Mexican law. And it would have used the pending applications as a basis to have talks with Claimants about the NAFTA dispute notice. It did neither. Instead, SEGOB denied the permit request on specious, arbitrary grounds. And, what is worse, it did so without affording E-Games the opportunity to correct the alleged technical errors SEGOB claimed (wrongly) were in the requests, nor did it discuss those matters in the normal course of governmental business as no doubt SEGOB would have done with a Mexican entity and perhaps other non-U.S. investors in the casino sector. SEGOB simply did not want the Claimants involved in the Mexican gaming industry, no matter what the Claimants did to show their continued compliance with the Gaming Regulations.

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[384] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 396-397.

[385] SEGOB's denial of E-Games' requests (Aug. 15, 2015), **C-27 – C-33**.

270. It is in this context that the notice period expired. Nothing would have changed if the 2014 Notice had included the names and addresses of the Additional Claimants. Nothing would have changed if Claimants requested further meetings. Nothing would have changed if another notice of intent was delivered, as demonstrated by Mexico's non-response after Claimants delivered the Amended Notice of Intent. Any of these efforts would have been futile, as Mexico had long decided to destroy Claimants' investments and expel Claimants from the Mexican casino industry. On these facts, a dismissal of any of Claimants' claims for omitting the names and addresses of minority investors from the 2014 Notice of Intent would be wrong, would reward formalism over substance and, ultimately, justice, and would undermine the object and purpose of the NAFTA.[386]

ii. Ms. Salas and Mr. Cangas Insisted that SEGOB Would Not Allow the Casinos to Reopen if Claimants Remained Involved

271. No matter the content of the notice of intent or the names and addresses included in it, the evidence shows that SEGOB was unwilling to allow the dispute to be resolved before international arbitration, rendering any additional or amended notice an exercise in futility. This is directly evidenced by Mr. Benjamin Chow's and Mr. Luc Pelchat's interactions with SEGOB. As confirmed by their consistent witness statements, Messrs. Chow and Pelchat learned in meetings with Ms. Salas and Mr. Cangas that SEGOB, and in particular the Games and Raffles Division, would not allow the Casinos to reopen so long as the Claimants remained involved in the Juegos Companies, whether as shareholders or directors.[387] They also learned that SEGOB would not allow the Casinos to reopen under the E-Games' permit and that SEGOB wrongly believed that Claimants remained involved with their former business partner, Entretenimiento de Mexico. S.A. de C.V. ("**E-Mex**"), and that this incorrect belief may have, at least partly, motivated Mexico's harmful measures against Claimants.[388] This evidence makes clear that Mexico wanted Claimants completely out of the picture, and it cannot continue to rely on its formal objection given this unrebutted reality.

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[386] *See Ethyl Corp. v. Government of Canada,* UNCITRAL, Award on Jurisdiction (June 24, 1998), **CL-5**, ¶ 85 ("No disposition is evident on the part of Canada to repeal the MMT Act or amend it. Indeed, it could hardly be expected. Clearly a dismissal of the claim at this juncture would disserve, rather than serve, the object and purpose of NAFTA.").

[387] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶¶ 7-9; First Witness Statement of Luc Pelchat (July 21, 2017), **CWS-4**, ¶ 8; Second Witness Statement of Luc Pelchat (January 3, 2018), **CWS-10**, ¶ 9.

[388] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 25; Second Witness Statement of Luc Pelchat (January 3, 2018), **CWS-10**, ¶ 9.

272. More specifically, in June or July 2014, Messrs. Chow and Pelchat met with Ms. Salas to discuss how they could get the Casinos to be reopened.[389] Ms. Salas initially refused to meet with them, until after officials at the Canadian Embassy in Mexico got involved and sent communications to SEGOB to arrange a meeting.[390] At the meeting, Ms. Salas unequivocally stated that SEGOB would not allow the Casinos to reopen *if the U.S. shareholders of the Juegos Companies remained as owners or managers of the Juegos Companies.*[391] In fact, in light of Ms. Salas' comments, Messrs. Chow and Pelchat deliberately structured the merger transaction they were negotiating with the U.S. shareholders of the Juegos Companies so that the U.S. shareholders would only remain as indirect owners of the Casinos.[392] This would have addressed the Mexican government's desire to exclude the U.S. shareholders of the Juegos Companies and their affiliates from the Mexican gaming industry, while allowing Claimants to retain indirect ownership in the Juegos Companies and the Casinos that they had built in Mexico.[393]

273. After taking seats on the boards of the Juegos Companies in the August 2014 *asamblea*, Mr. Chow scheduled *asambleas* for the Juegos Companies to be held on November 7, 2014.[394] Shortly before the November *asambleas*, Mr. Chow had another conversation with a representative from SEGOB's Games and Raffles Division, who would naturally have been a subordinate of Ms. Salas.[395] This representative told Mr. Chow that removal of the U.S. shareholders from the Juegos Companies' boards was not sufficient from Mexico's perspective.[396] The official explained that Mexico would not allow the Casinos to reopen unless Claimants were extricated entirely from the management and ownership structure of the Juegos Companies.[397] The representative explained that the Juegos Companies' ownership had to be

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[389] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 9; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 16.

[390] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 9.

[391] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 9; First Witness Statement of Luc Pelchat (Jul. 21, 2017), **CWS-4**, ¶¶ 8, 9.

[392] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 11; First Witness Statement of Luc Pelchat (Jul. 21, 2017), **CWS-4**, ¶ 8.

[393] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 12.

[394] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 17; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 20; First Witness Statement of Gordon Burr (Jul. 25, 2017), **CWS-1**, ¶ 55.

[395] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 17.

[396] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 17.

[397] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 17.

changed so as to completely remove the U.S. shareholders from any involvement in the companies.[398] Mexico insisted on the U.S. shareholders' removal as a condition to the possibility of allowing the Casinos to reopen.

274. As Mr. Chow explains, in order to placate Mexico's wish to have Claimants completely removed from the Juegos Companies, he decided to hold the November 7, 2014 *asambleas* and execute board minutes that made it appear as though the U.S. shareholders had transferred their shares in the Juegos Companies to Grand Odyssey, even though no actual transfer of shares occurred.[399] Mr. Chow further had the meeting minutes formalized by a Mexican notary to give the appearance of legitimacy to the supposed transfer to Grand Odyssey. As Mr. Chow explains, he did this only because he wanted to show the officials at the Games and Raffles Division, and in particular Ms. Salas, that a transfer had taken place and that the U.S. shareholders no longer held any ownership in the Juegos Companies.[400] Mr. Chow took these actions without Claimants, and Claimants vehemently opposed them and ultimately sued Mr. Chow when they learned that he had done this and after he conditioned reversing this conduct on receiving payment of monies from Claimants that they did not owe him.[401]

275. At some point in 2015, Ms. Salas left SEGOB and was replaced by a new Director of the Games and Raffles Division, Mr. Luis Felipe Cangas.[402] On August 18, 2015, Messrs. Chow and Pelchat met with Ms. Cangas and asked him to reopen the Casinos.[403] At the meeting, Mr. Cangas explained that he would not allow the Casinos to reopen, because in his view the U.S. shareholders remained involved.[404] Mr. Cangas also explained that he and others in SEGOB would not deal with the U.S. shareholders because SEGOB understood (completely mistakenly) that the U.S. shareholders remained in business with their former

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[398] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 17.

[399] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 18.

[400] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 23.

[401] First Witness Statement of Gordon G. Burr (July 25, 2017), **CWS-1**, ¶ 61; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 29.

[402] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 25.

[403] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 25; Second Witness Statement of Luc Pelchat (Jan. 7, 2018), **CWS-10**, ¶ 9; Email Exchange between Lorena Ochoa, Commercial Attaché at the Canadian Embassy and Karen Badillo Garduño of the Games and Raffles Division at the Ministry of the Interior (Aug. 14, 2015), **C-133.**

[404] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 25; Second Witness Statement of Luc Pelchat (January 3, 2018), **CWS-10**, ¶ 9.

business partner, Entretenimiento de Mexico. S.A. de C.V.[405] He noted that Messrs. Chow and Pelchat continued to work with the U.S. shareholders and, like Ms. Salas before him, expressed SEGOB's adamant and persistent view that it would not allow the Casinos to reopen as long as the U.S. shareholders remained involved in the Juegos Companies.[406]

276. In sum, the evidentiary record clearly demonstrates that, no matter the content of the notice of intent or the inclusion of the names and addresses of minority shareholders, Respondent, through SEGOB and otherwise, was not interested in dealing or meeting with Claimants, much less in engaging them in a possible settlement dialogue regarding their 2014 Notice. Accordingly, Mexico cannot claim that omission of the Additional Claimants was crucial to the course of the dispute; delivery of any updated or more complete notice of intent would have been an exercise in futility, as in fact the Claimants' Amended Notice of Intent and Mexico's inaction following its receipt of the same eloquently demonstrates.

277. In light of the above, the Tribunal should reject the Respondent's objections under Article 1119 and uphold its jurisdiction over all claims identified in the Request for Arbitration.

4. Mexico's Objections Are Legally Unsupported, And Technical Non-Compliance with Article 1119's Requirements Does Not Deprive A Tribunal of Jurisdiction

278. As Mexico itself admits, this is the first time a Respondent State has ever challenged a NAFTA tribunal's jurisdiction based on the omission of some of the minority investors' names in a notice of intent under Article 1119.[407] Mexico thus admits that *no case law exists to support its position.*

279. Mexico's attempts to distinguish contrary case law are unavailing, arbitrary, and incorrect. Mexico fares no better with the cases it cites, as none supports its hyper-technical legal argument.

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[405] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 25; Second Witness Statement of Luc Pelchat (January 3, 2018), **CWS-10**, ¶ 9.

[406] Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), **CWS-11**, ¶ 25; Second Witness Statement of Luc Pelchat (January 3, 2018), **CWS-10**, ¶ 9.

[407] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 106.

a. Mexico's Attempts to Distinguish Contrary Cases Are Unavailing

280. To avoid the weight of case law contradicting its position, Mexico arbitrarily erects an artificial and unsupported distinction between "early" and "contemporary" NAFTA jurisprudence. The text of the NAFTA provisions at issue here have not changed, nor has the weight of authority contradicting Mexico's position. In fact, although Mexico professes reliance on only "contemporary" jurisprudence, it nevertheless relies on decisions pre-dating the ones it spurns as outmoded.[408] Mexico cannot pick and choose the cases it likes, just as it cannot wish away longstanding NAFTA precedent holding that technical noncompliance is not a jurisdictional defect warranting dismissal of an investor's claims.

281. Specifically, Mexico chides the Claimants for relying on the time-honored and well-cited cases of *Ethyl v. Canada*, *Pope & Talbot v. Canada*, *Mondev v. USA*, and *Thunderbird v. Mexico*.[409] The *Thunderbird* award was rendered in 2006. With no sense of irony, the Respondent relies on *Waste Management v. Mexico I* (2000), *Methanex v. USA* (2002) and *Canfor v. USA* (2006) to illustrate what it deems as the "contemporary" NAFTA practice. Mexico's attempt to distinguish contrary case law is as disingenuous as it is ill-executed.

282. Although the Respondent vigorously contests the well-accepted proposition that technical noncompliance can be excused, it concedes that numerous NAFTA decisions and awards have excused a disputing investor's failure to comply with the procedural provisions of the NAFTA.[410] Strangely, after its admission that excuse is a well-accepted concept in the jurisprudence, Respondent attempts to invent new concepts of "delay," "condonation," or "acquiescence" as purported justifications for the excuse. This is despite the clear and express reasoning of the tribunals accepting the excuse based on findings of futility, cure, or lack of prejudice—the very same considerations that are present here.

283. The Respondent's attempts to distinguish or cast doubt upon the specific awards and decisions contradicting its position are similarly unavailing.

284. Respondent criticizes the award in *Ethyl v. Canada* because it was never subject to judicial review or post-award proceedings.[411] This is specious, as post-award proceedings

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[408] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), fn. 552.

[409] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 105.

[410] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 107.

[411] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 16, 110.

are not required to "validate" an award. The time-honored reasoning in *Ethyl* has been continually cited with approval by more recent NAFTA decisions, including in a case relied on by the Respondent, *Mesa Power v. Canada*.[412]

285. The Respondent then admits that the *Ethyl* decision does not reveal when Canada first raised its objections to jurisdiction.[413] This is interesting in light of Mexico's claim that its challenges differ from prior awards due to the "immediacy" of Mexico's objections and the "delay" by other Respondent states in objecting.[414] If Mexico does not know when Canada first raised its jurisdictional objections in *Ethyl*, then it cannot distinguish that case on the grounds of the "immediacy" of its objection here.

286. More fundamentally, Mexico does not provide any reason (much less a compelling one) to give the immediacy of a state's objection any weight in deciding whether the objection has any substantive weight. Whatever its timing, an objection that a State claims is jurisdictional should rise and fall depending on the text of the treaty at issue and the facts of the particular case. Here, both factors strongly militate in favor of rejecting Mexico's hyper-technical jurisdictional objection premised on the Claimants' valid Notice of Intent.

287. Respondent also argues that, in its *opinion*, the *Ethyl* tribunal was "wrong" in deciding not to enforce the six-month waiting period requirement under Article 1120.[415] But Mexico's bare, unsupported opinion does not change the well-accepted distinction between procedural rules and jurisdictional bars.

288. As the *Ethyl* tribunal pointedly explained:

> It is important to distinguish between jurisdictional provisions, *i.e*., the limits set to the authority of this Tribunal to act at all on the merits of the dispute, and procedural rules that must be satisfied by Claimant, but the failure to satisfy which results not in an absence of jurisdiction *ab initio*, but rather in a possible delay of proceedings, followed ultimately, should such non-compliance persist, by dismissal of the claim.[416]

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[412] *Mesa Power Group, LLC v. Government of Canada,* UNCITRAL, PCA Case No. 2012-17, Award (Mar. 24, 2016), **RL-013**, ¶ 300 fn. 52, (citing *Ethyl v. Canada* and *Pope & Talbot v. Canada* approvingly); *see also Occidental Petroleum Corporation v. Republic of Ecuador,* ICSID Case No. ARB/06/11, Decision on Jurisdiction (Sept. 9, 2008), **CL-34**, ¶ 94 fn. 10 (citing *Ethyl v. Canada* for the proposition that "where negotiations are bound to be futile, there is no need for the waiting period to have fully lapsed.").

[413] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 112.

[414] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 107.

[415] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 118.

[416] *Ethyl Corp. v. Government of Canada,* UNCITRAL, Award on Jurisdiction (June 24, 1998), **CL-5**, ¶ 58.

289. Next, Respondent argues that *Ethyl* does not apply here because "the Claimants' insistence on proceeding with registration of the claim and the establishment of the Tribunal amounts to persistent non-compliance and calls for dismissal of the claim."[417] Once again, Respondent fails to cite to a single authority supporting its newfangled theory of persistent non-compliance that should lead to dismissal. Taken to its logical conclusion, Respondent's argument could well support the conclusion that, because it opposed registration and failed, its objection should be dismissed now. But Respondent knows all too well that registration is a function of the ICSID Secretariat that it undertakes independent and prior to the constitution of the Tribunal.

290. The Respondent also fails to mention the Claimants' Amended Notice of Intent, which was delivered more than 90 days *before* the constitution of the Tribunal on February 14, 2017. As Claimants explained in the Counter-Memorial, to the extent that there were defects in the 2014 Notice of Intent, they were cured *long before any of the parties could submit formal briefing for dispute resolution purposes.*[418] The Claimants delivered the Amended Notice of Intent in good faith to address Mexico's purported concerns regarding the 2014 Notice, so there can be no "persistent non-compliance" as claimed. And it is clear that the reasoning in *Ethyl* does not bar corrective action after registration of a claim and instead supports that corrective action taken by a claimant to remedy a procedural defect is possible and that procedural defects go only to admissibility, not jurisdiction. As the Respondent recognizes, the claimant in *Ethyl* did not submit its consent and waiver until it filed its statement of claim, four and a half months *after* the claim was submitted to arbitration.[419] While the *Ethyl* tribunal dismissed Canada's jurisdictional objection, it never reached the question of whether *Ethyl*'s correction of its waiver was sufficiently timely and corrective to allow the procedural defect to be cured for purposes of admissibility, as the case settled after the tribunal issued the jurisdictional award.

291. As a last-ditch attempt to undermine *Ethyl*, the Respondent provides a list of bullet points in paragraph 123 of its Reply that purportedly distinguish that case from this one.[420] This attempt is unconvincing for the following reasons:

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[417] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 122.

[418] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 381.

[419] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 111.

[420] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 123.

- Mexico argues that Claimants declined to engage in consultations following delivery of the 2014 Notice.[421] As explained in great detail above and in the Counter-Memorial, Claimants not only did not decline to engage in consultations, but *actively sought* to consult and negotiate with Mexican officials, particularly in SEGOB. In particular, after the 2014 Notice, Claimants met with Mr. Garay with the aim of reaching an amicable solution.[422] Mexico, however, rebuffed each of these efforts.

- Mexico also points to its questionnaire as a distinguishing point.[423] The Claimants refused to respond to the questionnaire because, as the Respondent admits, it was designed to elicit information to give it a head start in preparing its defenses to Claimants' claims. Nothing in the questionnaire or Claimants' refusal to participate in Respondent's fishing expedition make *Ethyl's* reasoning or holding inapplicable here.

- Mexico also refers to its early objection at the registration phase to distinguish the respondent's fate in *Ethyl* from the one Mexico should suffer here.[424] As Mexico admits, however, the *Ethyl* decision does not reveal when Canada first raised its objections to jurisdiction, rendering Mexico's argument that it objected during registration irrelevant. Moreover, there is not good reason to find that the timing of a State's objection to a procedural defect should convert the objection into one that goes to jurisdiction rather than admissibility.

- Mexico next implies that registration distinguishes the case from *Ethyl.*[425] As explained, the claimant in *Ethyl* did not submit its consent and waiver until it filed its statement of claim, four and a half months *after* the claim was submitted to arbitration. That ICSID accepted Claimants' arguments and registered the claim does not distinguish the case from *Ethyl.*

- Mexico states that Claimants will not be in a position to simply refile and carry on with the arbitration as the applicable limitations period has now expired.[426] However, as discussed in greater detail below, the Respondent's admitted strategy that it is simply seeking to run out the limitations period makes the Respondent's conduct more reprehensible and furnishes an additional reason to reject its dismissal request. Canada in *Ethyl* proceeded in good faith, unlike the Respondent here. In any event, that the claimant in *Ethyl* could refile does not detract from the tribunal's main holding that compliance with NAFTA's procedural requirements go to admissibility, not jurisdiction, and may be excused on the grounds of futility.

- Mexico also derides *Ethyl* as part of an older line of NAFTA cases, implying that somehow the passage of time has rendered it less authoritative. As explained, the Respondent's distinction between early and "contemporary" NAFTA jurisprudence is arbitrary and unsupported. In addition, in the absence of supporting jurisprudence,

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[421] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 123.

[422] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 387-389.

[423] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 123.

[424] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 123.

[425] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 123.

[426] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 123.

> Mexico relies on Article 1128 submissions from the NAFTA Parties. Respondent's reliance on submissions from other respondent states, many of which were rejected by the presiding tribunals, demonstrates that no investment case law supports its hyper-technical position. Contrary to the Respondent's view, the Tribunal has before it well-established jurisprudence, both inside and outside of the NAFTA context, holding that technical noncompliance with procedural rules is a matter of admissibility and can be excused, especially on the facts of this case. Modern NAFTA tribunals continue to follow this approach and cite *Ethyl* and other cases that the Respondent attempts to hide from with strong approval.

292. With respect to *Pope & Talbot v. Canada*, the Respondent continues to characterize the case as an early NAFTA decision and thus not reflective of "contemporary" NAFTA practice. It ignores Claimants' observation in the Counter-Memorial that the recent NAFTA tribunal in *Chemtura v. Canada* cited *Pope & Talbot* approvingly in rejecting Canada's objection that the tribunal lacked jurisdiction to hear a claim because the claim was not spelled out in three prior notices of intent.[427]

293. The *Pope & Talbot* tribunal, as the Respondent points out, rejected Canada's jurisdictional objection against the inclusion of a new claim relating to the so-called Super Fee. The tribunal found that the Super Fee claim was not in substance a new claim but an extension of a previously asserted claim. Importantly however, the *Pope & Talbot* tribunal took pains to emphasize that it disagreed with Canada's argument that the NAFTA's procedural rules must be followed as a jurisdictional matter. Relevantly, the *Pope & Talbot* tribunal explained:

> [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.[428]

294. The *Pope & Talbot* tribunal would have rejected Mexico's extremely formalistic reading of the NAFTA here, especially on the factual record presented in this case. This Tribunal should do the same.

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[427] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 343; *Chemtura Corporation v. Government of Canada,* UNCITRAL, Award (Aug. 2, 2010), **CL-21**, ¶ 102 (citing *Pope & Talbot Inc. v. Government of Canada, UNCITRAL, Decision on Harmac Motion (Feb. 24, 2000),* and *ADF Group Inc. v. United States of America,* ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003)*,* **CL-6***,* approvingly)

[428] *Pope & Talbot Inc. v. Government of Canada,* UNCITRAL, Decision on Harmac Motion (Feb. 24, 2000), **CL-19**, ¶ 26.

295. With respect to *Mondev v. United States*, the Respondent states that the claimant there "complied with the requirements set out in the NAFTA."[429] This is a revealing admission because, as the Respondent recognizes, although the *Mondev* claimant timely filed a notice of intent, this notice did not include the address of its subsidiary enterprise ("LPA") and did not specify whether Mondev intended to make a claim on behalf of the enterprise under Article 1117. *This is the very same information that Mexico alleges is missing from the 2014 Notice of Intent*. In particular, the United States in *Mondev* argued that the tribunal lacked jurisdiction because of the claimant's alleged failure to comply with Article 1119(a) by not providing the address of the enterprise. Specifically, the United States asserted 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)."[430] The *Mondev* tribunal directly rejected this argument, treating non-compliance with Article 1119(a)—the very same provision that Mexico alleges that Claimants have failed to comply with—as a procedural matter and not as a jurisdictional bar.

296. As the Respondent itself admits, the *Mondev* tribunal found no evidence of material non-disclosure or prejudice as a result of Mondev's omissions in its notice of intent. In other words, the *Mondev* tribunal concluded that claimant's omission of the address of the subsidiary and of the intention to make a claim on its behalf under Article 1117 was a formal, insubstantial defect that did not materially prejudice the respondent state. More fundamentally, this technical omission *did not deprive the tribunal of jurisdiction*.

297. The Respondent does not offer extended observations on *Mondev* like it does with *Ethyl* and makes no attempt to distinguish *Mondev* from the present case. This is perhaps surprising because the reasoning in *Mondev* is directly applicable to the case here. In *Mondev*, the missing information required under Article 1119(a) was cured, and the technical omission caused no substantive prejudice.[431] The tribunal allowed *Mondev*'s claims to proceed and dismissed the applicable jurisdictional objections.[432] Likewise, in the present case, the technical omission of the minority shareholders in the 2014 Notice did not prejudice Mexico's ability to

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[429] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 124.

[430] *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), **CL-17**, ¶ 49.

[431] *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), **CL-17**, ¶ 50.

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

genuinely engage in negotiations (because it steadfastly refused to do so) and any defect was cured by the Amended Notice of Intent.

298. Desperate to blunt *Mondev*'s impact on its case, Respondent cites a passage of the *Mondev* award suggesting that compliance with Article 1121 "may be" a matter of jurisdiction. That same passage, however, holds that compliance with the other procedural rules of Chapter Eleven, including Article 1119, is a matter of admissibility that can be remedied. The relevant passage, quoted in context below, demonstrates that the *Mondev* tribunal rejected the very same argument that Mexico advances here:

> International tribunals distinguish between issues going to their jurisdiction and questions of procedure in relation to a claim which is within jurisdiction. Arguably, NAFTA Article 1122 elides that distinction by providing that NAFTA Parties consent to the submission of a claim "in accordance with the procedures set out in this Agreement". The United States raised a series of objections, some apparently of a procedural character, but argued that since these concerned "procedures set out in this Agreement" within the meaning of Article 1122, they went to the Tribunal's jurisdiction. According to the United States, its consent to arbitration was given only subject to the conditions set out in NAFTA, which conditions should be strictly and narrowly construed.
>
> In the Tribunal's view, there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties. These are set out in Articles 31-33 of the Vienna Convention on the Law of Treaties, which for this purpose can be taken to reflect the position under customary international law.
>
> It may be that a distinction is to be drawn between compliance with the conditions set out in Article 1121, which are specifically stated to be "conditions precedent" to submission of a claim to arbitration, and other procedures referred to in Chapter 11. Unless the condition is waived by the other Party, non-compliance with a condition precedent would seem to invalidate the submission, whereas a minor or technical failure to comply with some other condition set out in Chapter 11 might not have that effect, provided at any rate that the failure was promptly remedied. Chapter 11 should not be construed in an excessively technical way, so as to require the commencement of multiple proceedings in order to reach a dispute which is in substance within its scope.[433]

299. The last sentence from the *Mondev* passage quoted above is particularly relevant in light of the position the Respondent takes in its Reply. The Respondent boldly asserts that, in order to avoid its jurisdictional objection, the Additional Claimants were required to initiate a separate proceeding or to suspend ICSID registration.[434] In line with *Mondev*, Chapter Eleven should not be construed in the hyper-technical manner urged by Mexico, which would require

[433] *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), **CL-17**, ¶ 42-44 (emphases added; footnotes omitted).

[434] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 79-80.

the wasteful commencement of multiple proceedings for the same substantive dispute. As the *Mondev* tribunal held, the omission of information in the notice of intent required under Article 1119(a) does *not* deprive the tribunal of jurisdiction.

300. Respondent similarly makes no credible effort to distinguish *ADF v. USA*. That may be because the *ADF* tribunal expressly rejected many of the arguments that the Respondent makes here. As Claimants have explained,[435] the *ADF* tribunal held that omission of information in the notice of intent *does not* deprive a NAFTA tribunal of jurisdiction. The *ADF* tribunal expressly rejected the notion that a NAFTA Party's consent is conditioned on the investor's strict and literal compliance with every procedural detail in Chapter Eleven. In the tribunal's words:

> 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.[436]

301. The Respondent does not refute Claimants' application of the *ADF* tribunal's reasoning to the present case. In *ADF*, despite the claimant's omission of its intention to bring an Article 1103 claim and the late introduction of the claim in its *reply memorial*, the tribunal found that it had jurisdiction to consider the claim. In the present case, all the names and addresses omitted from the 2014 Notice of Intent were provided to Mexico as early as the *Request for Arbitration* and again in the *Amended Notice of Intent*, long before the Tribunal was even constituted. If the omission of an entirely new substantive claim did not cause prejudice to the United States in *ADF*, the omission here surely did not prejudice to Mexico, especially in light of Mexico's actual notice of the dispute and its adamant refusal to negotiate with Claimants.

302. There is a further reason why the Respondent may be avoiding discussion of *ADF*. The *ADF* award was rendered in January 2003, which is *after* the *Methanex* decision in August 2002 that the Respondent hails as emblematic of the "contemporary" practice. Mexico's conveniently selective and inconsistent demarcation of the "contemporary" period of NAFTA

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[435] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 336-338.

[436] *ADF Group Inc. v. United States of America,* ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003), **CL-18**, ¶ 133.

jurisprudence reveals the frivolity of the argument, and unmasks it as a poorly-veiled effort to downplay the consistent stream of decisions holding against Respondent's hyper-technical and erroneous interpretation of Article 1119.

303. The Respondent's self-serving emphasis on *Methanex* is also highly unpersuasive because, as Claimants have explained,[437] the *Methanex* tribunal did not consider or rule on the effect of noncompliance with the technical requirements of Article 1119. The *ADF* and *Mondev* tribunals, on the other hand, carefully considered the effect of noncompliance with Article 1119 and found jurisdiction despite technical omissions in the notices of intent. Mexico's decision to focus on the *dates* of the awards rather than the *reasoning* therein amply demonstrates precariousness of its jurisdictional objections.

304. Mexico's treatment of non-NAFTA jurisprudence is similarly deficient.

305. Respondent attempts to diminish the value of the *Biwater Gauff v. Tanzania* award merely by referring to it as non-NAFTA jurisprudence,[438] even though the Respondent relies on multiple non-NAFTA cases in its Reply when convenient to its position.[439] The Respondent then asserts that the Tanzania-United Kingdom BIT, upon which the *Biwater* case was brought, does not contain a notice of intent provision. The Tanzania-United Kingdom BIT, however, contains a provision that conditions the institution of ICSID proceedings on the observance of a six-month cooling period.[440] Claimants concur with the Respondent that a treaty should be read in accordance with its own terms. Claimants would add, however, that a treaty should be interpreted in *good faith* in accordance with the ordinary meaning and *in the light of its object and purpose*, as provided in Article 31 of the VCLT.

306. The *Biwater* tribunal, upon reading the treaty's terms based on their ordinary meaning and in light of the object and purpose of the six-month cooling-off period requirement, concluded that the six-month period was *procedural* rather than jurisdictional in nature. The Tribunal should follow the same interpretive approach and reach the same conclusion as the

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[437] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 353-354.

[438] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 167.

[439] *See, e.g.*, Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 30, 31, 171, 246, 296, 297, 298, 299.

[440] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Production of Investments (Aug. 2, 1996), Article 8(3), **CL-45**.

Biwater tribunal, since the purpose of Article 1119's notice of intent requirement is also to foster negotiations and amicable settlement. Relevantly, the *Biwater* 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.
>
> …
>
> Although there are different approaches to this issue, in part depending upon the particular treaty provisions in question, the Arbitral Tribunal notes that its analysis is in line with that adopted in many previous arbitral awards, in respect of equivalent provisions (as cited by BGT).
>
> In this case, the course of events amply demonstrated that any further delay on BGT's part would not have served any useful purpose. By the time the Request for Arbitration was filed, a long process of negotiation and renegotiation had already failed, and the Republic's position was entrenched – in particular by virtue of Minister Lowassa's public statement of 13 May 2005, and the steps that had since been taken to deport City Water personnel, and take over its operations. It was therefore entirely reasonable for BGT to proceed to arbitration, rather than seeking to resolve the dispute through "local remedies or otherwise".[441]

307. Respondent also fails to address several of the cases that Claimants cited in their Counter-Memorial, including NAFTA cases, despite having proclaimed in its Reply that it "had responses for each of these decisions and awards."[442]

308. The Respondent, for example, does not offer any observations on *Feldman v. Mexico*, where a NAFTA tribunal rejected Mexico's hyper-technical objection that a claimant could not pursue a claim based on an article omitted from the claimant's notice of *arbitration*.[443] Mexico cannot hide from the fact that a NAFTA tribunal has previously rejected its hyper-technical arguments based on omission of information.

309. Respondent also failed to address *Chemtura v. Canada*, where a NAFTA tribunal held that a claimant's omission of its Article 1103 argument in three prior notices of intent did not deprive the tribunal of jurisdiction to hear that claim.[444] "More fundamentally,"

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[441] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award (July 24, 2008), **CL-22**, ¶¶ 343, 346-347 (emphases added).

[442] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 104.

[443] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 342.

[444] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 343.

according to the *Chemtura* tribunal, the respondent was not prejudiced by this technical omission.[445]

310. Respondent is similarly silent on the *Bayindir v. Pakistan* tribunal's observation 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."[446]

311. Likewise, the Respondent fails to make any comment on the *Mavrommatis Palestine Concessions* case, where the Permanent Court of International Justice rejected the notion that defects existing at the institution of proceedings automatically must result in dismissal of a suit.[447] This directly contradicts the Respondent's view that the submission to arbitration was "void *ab initio*" based on alleged defects in the notice of intent.

312. Finally, the Respondent fails to comment on the *Bosnia & Herzegovina v. Yugoslavia* case, in which the International Court of Justice asserted jurisdiction where an initial defect in a procedural act was subsequently cured.[448] Perhaps the Respondent does not comment because it cannot criticize these decisions as "non-contemporary" practice.

313. Unaided by awards on point and unable to distinguish (or, in many instances, even address) Claimants' cited authorities, Respondent resorts to citing a string of generic observations on NAFTA procedure, none of which discusses Article 1119 or the consequences of technical noncompliance with that provision.[449] This tactic is not new, as the Respondent resorted to it in its Memorial. In fact, the Respondent cites the same awards that Claimants carefully addressed on an individual basis in their Counter-Memorial.[450] The Respondent even goes so far as to say that the awards it likes (ignoring the awards rejecting its position) have

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[445] *Chemtura Corporation v. Government of Canada,* UNCITRAL, Award (Aug. 2, 2010), **CL-21**, ¶ 104.

[446] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 346; *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), **CL-23**, ¶ 99.

[447] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 347.

[448] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 348.

[449] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 131-136.

[450] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 350-365, 433-436.

achieved the status of *jurisprudence constante*.[451] This is extremely disingenuous and reflects the shallowness of Mexico's arguments.

314. In sum, the Respondent's futile attempts to distinguish contrary case law are unavailing. Instead of engaging with the contrary reasoning, the Respondent resorts to legal gimmicks such as declaring the cases it likes as *jurisprudence constante* or arbitrarily creating a distinction between "early" and "contemporary" jurisprudence (a distinction that the Respondent itself fails to abide by). In other cases, the Respondent simply fails to make any comment whatsoever, demonstrating the weakness of its position.

b. Mexico's Responses to Claimants' Arguments Make Clear That Its Cases Do Not Support Its Position

315. The Respondent attempts to address Claimants' arguments about the cases it relies on but, in doing so, admits that its cases do not actually support its legal objections under Article 1119. The Respondent first concedes that its cases involve alleged failures of compliance with *different* NAFTA provisions.[452] It then admits that, in some of the cases, the investor was found to have "sufficiently complied" with the requirements at issue.[453]

316. Mexico, in other words, expressly admits that *its own cases do not support its Article 1119 objection*.

317. Further, Mexico concedes that Claimants' legal argument was right all along. Mexico's own cases recognize a distinction between technical versus substantive defects in compliance, such that an investor that has, in Mexico's words, "sufficiently complied" with the substance of a provision may assert claims notwithstanding a formal defect or omission. This is precisely the Claimants' argument. Tribunals require material compliance with Article 1119, but avoid overly formalistic interpretations that would frustrate the object and purpose of the NAFTA.

318. The Respondent's attempts to address Claimants' observations further reveal that none of the cases it relies on provides support for its overly-formalistic legal argument. With respect to *Methanex*, Claimants noted that the Partial Award does not support the Respondent's hyper-technical interpretation of Article 1119's notice of intent requirement. This is because the *Methanex* tribunal dismissed claims that were beyond the scope and coverage of Chapter

[451] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 140.

[452] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 137.

[453] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 137.

Eleven altogether. In particular, the tribunal declined jurisdiction because the environmental measures at issue did not "relate to" the investor as required by Article 1101(1).[454] *Methanex* did not address whether the omission of names and addresses in the notice of intent constitutes a jurisdictional bar. The generic passage from *Methanex* that Respondent cites simply does not address this point.

319. As Mexico recognizes, in the Final Award, the *Methanex* tribunal did not see it necessary to address the United States' Article 1119 objection against the claimant's introduction of an additional measure late in the proceedings. The Respondent seems to infer from the generic passage it cites from the Partial Award that the *Methanex* tribunal viewed Article 1119 as an absolute jurisdictional prerequisite. But the *Methanex* award does not support this erred inference. Although the *Methanex* tribunal carefully analyzed the various grounds asserted by the United States, it chose not to rule on the notice objections. One would expect the *Methanex* tribunal to discuss Article 1119, however briefly, if it viewed the provision with the absolute jurisdictional importance that the Respondent infers from the generic passage it cites. But the *Methanex* tribunal did not, and Respondent's reliance on the Partial Award in that case offers no support for its arguments.

320. The Respondent also cites to the Decision on a Motion to Add a New Party in the *Merrill & Ring v. Canada* case, but states it is "beside the point" that Claimants here are not attempting to add a new party in ongoing proceedings.[455] As Claimants observed, the claimant in *Merrill & Ring* submitted the motion to add a new party *after* the tribunal had been constituted and *after* both claimant and respondent had made substantive submissions. In light of the advanced stage of the proceedings, the *Merrill & Ring* tribunal was concerned that adding a new party would cause serious procedural prejudice. There is no delay or risk of serious procedural prejudice here, as all parties were identified upon submission of the claim to arbitration, *not* after the Tribunal had been constituted and the parties had made substantive submissions.

321. Further, there is no indication that Georgia Basin, the proposed new party in *Merrill & Ring*, submitted a notice of intent or took any corrective action to cure the procedural defect alleged there. Claimants, on the other hand, delivered the 2014 Notice of Intent and

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[454] *Methanex Corporation v. United States of America*, Partial Award (Aug. 7, 2002), **CL-26**, ¶¶ 79, 84, 101, 102, 105, 106, 108, 115.

[455] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 152.

placed Mexico on actual notice of the dispute, and again delivered an Amended Notice of Intent with all names and addresses to address Mexico's purported concerns. All of this occurred many months before the constitution of the Tribunal. Moreover, all of the claimant parties' claims concern the same dispute here, whereas in *Merrill & Ring*, there were "many differences" in the questions of law and fact raised by Georgia Basin.[456]

322. With respect to *Canfor*, the Respondent denies that it is citing *obiter dicta.* The Respondent acknowledges that the question in the cited Decision on Preliminary Question in *Canfor* was whether NAFTA Article 1901(3) barred the tribunal from considering claims with respect to antidumping and countervailing duties under Chapter Eleven's dispute settlement process.[457] *Canfor* did not concern compliance with Articles 1119 or 1121, as the Respondent acknowledges, or any other provision within Chapter Eleven for that matter. The tribunal's observations regarding the procedural provisions of Chapter Eleven, thus, were classic *obiter dicta*, as they were "an incidental and collateral opinion that [was] uttered by [the tribunal] but is not binding."[458]

323. In any event, the holding in *Canfor*—that claims relating to antidumping and countervailing duties cannot be arbitrated under Chapter Eleven—had nothing to do with whether technical noncompliance with Article 1119 deprives the tribunal of jurisdiction.

324. Regarding *Bilcon*, the Respondent argues that the fact there was simply no discussion at all in the award about Article 1119 is "beside the point."[459] But the Respondent cites this case as support for its spurious argument that alleged defects in a notice of intent under Article 1119 render a submission to arbitration "void *ab initio*." The Respondent does not seem at all concerned that the case it cites for support does not even discuss the relevant NAFTA (or an analogous) provision.[460]

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[456] *Merrill & Ring Forestry L.P. v Government of Canada*, UNCITRAL, ICSID Administered, Decision on a Motion to Add a New Party (Jan. 31, 2008), **RL-008**, ¶ 23.

[457] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 154; *Canfor Corporation v. United States of America, Tembec Inc. et. Al. v. United States of* America, UNCITRAL, Decision of Preliminary Question (June 6, 2006), **RL-009**, ¶ 1.

[458] Definition of "Obiter Dictum". Retrieved from: https://www.merriam-webster.com/dictionary/obiter%20dictum

[459] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 157.

[460] There is an aspect of the *Bilcon* award, however, that *is* relevant to the present case. As discussed in further detail in the section regarding Claimants' standing, the *Bilcon* tribunal held that an investor can exercise informal types of indirect "control" over an enterprise under Article 1117. This ruling—which Respondent unsurprisingly does not cite in connection with its spurious arguments regarding Claimants' control of the Juegos Companies—

325. The Respondent's reference to *Mesa Power v. Canada* is similarly counterproductive. While Respondent mentioned the *Mesa Power* award in their Memorial,[461] it criticizes Claimants for actually analyzing it. In the Memorial, the Respondent cited the United States' submission but avoided discussion of the actual holdings in the case, which dismissed most of Canada's jurisdictional objections. Most concerning, the Respondent falsely argued that *Mesa Power* was not concerned with compliance with Article 1119. But it was. In *Mesa Power*, Canada objected to the claimant's inclusion in its Notice of Arbitration of certain events that had occurred after the Notice of Intent but before the submission to arbitration.[462] The *Mesa Power* tribunal decided to address this objection in the context of Canada's Article 1120 cooling-off period objection, given the similarity of the issues raised.

326. The *Mesa Power* tribunal dismissed Canada's Article 1120 objection, holding that the events at issue occurring after the Notice of Intent (and which had transpired less than six months before the submission to arbitration) were merely developments of events that had taken place prior to the six-month period.[463] Accordingly, the *Mesa Power* tribunal "dispense[d] with determining whether these requirements go to consent and are thus jurisdictional or whether they are procedural and could accordingly be satisfied by the passage of time."[464] This negates any inference that the Respondent appears to draw from this case in support of its position.

327. The Respondent then asserts that the *Mesa Power* award is "of no assistance" to the Tribunal.[465] As Claimants explained earlier, however, the *Mesa Power* tribunal offered an extended treatment of notice-type requirements in investment treaties. This discussion, which analyzed the object and purpose of the notice of intent requirement under Article 1119, provides much more assistance than the generic passages the Respondent repeatedly cites. In the words of the *Mesa Power* tribunal:

> At the outset, it bears recalling the reason why States provide for cooling off or waiting periods in investment treaties. The object and purpose of these periods is to appraise the State of a possible dispute and to provide it with an opportunity to remedy the situation

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contradicts Respondent's view that "control" may only be established through legal control via ownership interests. With respect to Article 1119, however, *Bilcon* offers Respondent no help whatsoever.

[461] Respondent's Memorial on Jurisdictional Objections (May 30, 2017), ¶ 62 (citing *Mesa Power v. Canada*, PCA Case No. 2012-17, Award, **RL-013**).

[462] *Mesa Power v. Canada,* PCA Case No. 2012-17, Award, **RL-013**, ¶ 268.

[463] *Mesa Power v. Canada,* PCA Case No. 2012-17, Award, **RL-013**, ¶ 310.

[464] *Mesa Power v. Canada,* PCA Case No. 2012-17, Award, **RL-013**, ¶ 318.

[465] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 163.

> before the investor initiates an arbitration. In most bilateral investment treaties, notice and consultation period requirements are included in a single provision. By contrast, the NAFTA deals with this matter in three distinct provisions. Article 1118 of the NAFTA provides that disputing parties should attempt to settle a claim through consultation or negotiation. Article 1119 requires a disputing Party to send a written notice of its intent to submit a claim to arbitration at least 90 days before the submission. The notice must specify the provisions of the Agreement alleged to have been breached as well as the issues and the factual basis for the claim. A different provision – Article 1120 – addresses the submission of a claim to arbitration and specifies that six months must have elapsed since the events giving rise to a claim.
>
> 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. The six-month period in Article 1120(1) of the NAFTA provides an additional opportunity to resolve the dispute amicably. The six-month period is an additional requirement. While it may partially overlap with the 90 days of Article 1119, it is a distinct condition deriving from a separate provision.
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> …
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> Moreover, Article 102(1)(e) of the NAFTA, which this Tribunal must take into consideration when interpreting Article 1120(1), sets out the object and purpose of the Agreement as "creat[ing] effective procedures [...] for the resolution of disputes." It could hardly be said that this objective is satisfied by an interpretation of Article 1120(1) requiring the Claimant to initiate a new arbitration in respect of two out of a series of events that give rise to the claims before this Tribunal. This would clearly be counterproductive in terms of effective dispute settlement and would trigger the usual drawbacks of multiple proceedings, including a waste of resources and risks of conflicting decisions. This is particularly true here where sufficient events giving rise to the claim had already occurred before the six-month cooling-off period – and all the more so considering that the Respondent was fully notified of the claims in accordance with Article 1119 of the NAFTA.[466]

328. The *Mesa Power* award—rendered in March 2016—is also significant because it cites both *Ethyl* and *Pope & Talbot* with approval—the very awards that the Respondent derides as "non-contemporary."[467]

329. With respect to *KBR*, the Respondent acknowledges that there is no public version of the award. As Claimants observed earlier,[468] the disputing investor in *KBR* maintained ongoing litigation proceedings in New York and Luxembourg based on the same subject matter of the NAFTA dispute (i.e. an ICC award), despite having submitted a written

[466] *Mesa Power Group, LLC v. Government of Canada,* UNCITRAL, PCA Case No. 2012-17, Award (Mar. 24, 2016), **CL-31**, ¶¶ 296-297, 300.

[467] *Mesa Power Group, LLC v. Government of Canada,* UNCITRAL, PCA Case No. 2012-17, Award (Mar. 24, 2016), **CL-31**, ¶ 300

[468] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 363.

waiver under NAFTA Article 1121.[469] Article 1121 requires investors to, among other things, "waive their right to initiate or continue before any administrative tribunal or court under the law of any Party … any proceedings with respect to the measure of the disputing Party that is alleged to be a breach." The *KBR* case thus presented a situation of substantive non-compliance with the waiver requirement based on the maintenance of ongoing proceedings in New York and Luxembourg, and not due to a technical defect, such as, for example, an omitted phrase in the written waiver.

330. As noted, there is no reason to believe that the *KBR* tribunal considered any argument regarding technical, non-compliance with Article 1119's notice of intent requirement. Further, there is no indication whether the *KBR* tribunal considered compliance with the waiver requirement as a matter of admissibility or jurisdiction. Without the award, Mexico's reliance on *KBR* remains an exercise in speculation, as it is impossible to know whether the tribunal accepted or rejected the United States' position in its non-disputing party submission.

331. Even after Mexico has had a chance to respond to Claimants' observations, the conclusion remains the same: none of the cases Mexico cites support its extremely formalistic reading of Article 1119. As Mexico itself admits, most of its cases do not even discuss Article 1119, which explains its reliance on generic observations about the advisability of following the NAFTA's procedural rules. But Mexico's analysis misses the mark.

332. The issue before this Tribunal is not whether there are rules that should be followed, but whether alleged defects in compliance with NAFTA's procedural provisions at issue here should yield the extraordinary result of a jurisdictional dismissal. As Mexico itself appreciates, in many NAFTA cases, tribunals have decided to exercise jurisdiction when the investor is found to have "sufficiently complied" with the procedural rules at issue. This is particularly so where—as here—requiring perfect compliance would be an exercise in futility, corrective action has been taken, and there is a lack of prejudice to the respondent state. Mexico's legal artifices—erecting an arbitrary distinction between "early" and "contemporary" jurisprudence, or deeming the cases it likes to be *jurisprudence constante*—fail to address the careful distinction observed by tribunals between technical and material noncompliance.

[469] *KBR Inc. v. United Mexican States*, UNCITRAL Case No. UNCT/14/1, Claimant's Final Submission on Preliminary Question of Waiver (Aug. 14, 2014), **CL-32**, ¶ 10.

c. Mexico Repeatedly Relies On Non-Disputing Party Submissions Under Article 1128 Because Its Legal Position Is Unsupported By The Case Law

333. Throughout its legal argument, Mexico repeatedly relies on non-disputing Party submissions under Article 1128, purportedly as an authority in support of its legal position. Mexico even goes so far as to argue that the Article 1128 submissions constitute a "subsequent practice in the application of the treaty" under VCLT Article 31(3).[470] Mexico's mental gymnastics, however, demonstrate that its legal position is entirely unsupported by actual NAFTA case law.

334. There is no reason to afford any special weight to Article 1128 submissions by non-disputing Parties. As Judge Brower explained in *Mesa Power*:

> I have never experienced a case in which the other Party or Parties to a treaty subject to interpretation, appearing in a non-disputing capacity, have ever differed from the interpretation being advanced by the respondent State. Inevitably, they club together. Moreover, the interpretation given by a State Party in actual litigation cannot be regarded as an authentic interpretation. In the end (Article 2001(2)(c)), 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." That does not mean that the Tribunal is in any way barred from interpreting NAFTA. To the contrary. It does suggest at least, however, that caution should be exercised, if not skepticism, when confronted by that with which the Tribunal is dealing in the Award's paragraph 410.[471]

335. The Respondent's attempt to invoke VCLT Article 31(3) is entirely unconvincing. If the three NAFTA Parties truly believed that strict and literal compliance with every single detail of NAFTA procedure was necessary to trigger their consent to arbitration, then the Free Trade Commission would have issued a binding interpretation to that effect. As mentioned, however, the Free Trade Commission's pronouncement on the subject in fact *contradicts* Mexico's arguments here.

336. Mexico ignores that in many of the cases in which the submissions were made the presiding NAFTA tribunal actually *rejected* the respondent's jurisdictional objections. This was the case in *Ethyl v. Canada*; *Waste Management v. Mexico II*; *Pope & Talbot v. Canada*; *Mondev v. United States*; *ADF v. United States*; and *Mesa Power v. Canada*. The Respondent characterizes the tribunal decisions and awards in some of these cases as "out-of-step" and

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[470] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 141.

[471] Concurring and Dissenting Opinion of Judge Charles N. Brower in *Mesa Power LLC v Government of Canada* (March 25, 2016), **CL-40**, ¶ 30.

contrary to the "contemporary" practice, but somehow has no issue citing the briefs submitted (and rejected) in those cases.[472]

337. The Respondent, for example, cites the United States' Counter-Memorial and Rejoinder submissions in the *ADF* case.[473] That the United States government has taken a pro-respondent position in a prior arbitration is somehow construed as a rebuke of the Claimants' position. The *ADF* tribunal, however, expressly *rejected* the position adopted by the United States government in that case and held that "[w]e see no logical necessity for interpreting the 'procedures set out in the [NAFTA]' as delimiting the detailed boundaries of the consent given by either the disputing Party or the disputing investor."[474]

338. Mexico even cites to *its own submissions* as an authority purportedly establishing the mandatory nature of NAFTA procedure.[475] This is even more blatant considering that, in the same paragraph, the Respondent argues that the *Mesa Power* award that rejected its arguments is "of no assistance" to the Tribunal.[476] Ultimately, the weight to be ascribed to Article 1128 submissions is dubious, at best. These submissions are, by their very nature self-serving, submitted by government lawyers who are themselves often involved in defending against Chapter Eleven arbitrations.

339. There also is no reason to transpose litigation submissions from one proceeding to another. Each dispute presents its own legal issues, colored by its own factual circumstances. Claimants will address the Article 1128 submissions of Canada and the United States at the appropriate juncture, should either Party decide to make non-disputing Party submissions in this proceeding. But the facts here clearly militate in favor of the Tribunal rejecting Mexico's arguments and exercising jurisdiction over all Claimants and all claims.

340. It is clear that Mexico has chosen to rely on non-disputing Party submissions (many of them rejected by the tribunals before which they were submitted) because there is no case law to support its position. As Mexico recognizes,[477] no NAFTA tribunal has ever dismissed a claim based on the omission of names and addresses from a notice of intent. Given

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[472] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 17, 105, 130.

[473] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 130, 139 (citing to **R-008**).

[474] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003), **CL-18**, ¶ 133.

[475] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 163.

[476] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 163.

[477] *See* Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 106.

the absence of supporting case law, Mexico relies on generic passages regarding NAFTA's procedural requirements, none of which support the precise point that Mexico seeks to make—that any technical non-compliance with procedures nullifies its consent to arbitration. Instead, the opposite is true. NAFTA tribunals have consistently held that technical noncompliance does not deprive a tribunal of jurisdiction. The Tribunal should follow this consistent jurisprudential approach and reject Mexico's jurisdictional objections.

5. Mexico's Alleged Prejudice Is Illusory and Entirely Divorced from the Purposes of Article 1119

341. The Respondent attempts to cast Claimants as the obstructionist party in this dispute, notwithstanding Mexico's consistent refusal to engage them in amicable consultation or negotiation. It repeatedly accuses Claimants of intentionally concealing the existence of the Additional Claimants, a proposition that is not only false, but also irrelevant as a matter of law for jurisdictional purposes. More fundamentally, Mexico has admitted for all intents and purposes that, since it received the 2014 Notice, all it intended to do was gather information to prepare for its defense. This admission demonstrates the Respondent's lack of good faith.

342. As a preliminary matter, the principle of *pacta sunt servanda* requires parties to perform their treaty obligations in good faith.[478] Yet, Mexico appears to have abandoned all pretense that it was ever interested in amicable resolution of the dispute, which, as explained, is the very purpose of undergirding the NAFTA's notice of intent requirement.

343. On Mexico's own theory, the only prejudice that it suffered from Claimants' allegedly incomplete 2014 Notice of Intent was its inability to obtain information and responses to its questionnaire from the Additional Claimants so that it could begin preparing its defenses to this case sooner.[479] Mexico does not even purport to link the questionnaire with any sincere purpose to amicably resolve the dispute. As such, it is entirely divorced from the purposes of Article 1119.

344. From the beginning, Claimants understood that Mexico's questionnaire had nothing to do with amicable negotiations and was geared solely towards fishing for information from Claimants so that Mexico could get a head start in preparing its defense. As Mr. Burr stated in his first witness statement: "We understood that the questions did not reflect an

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[478] Article 26 of the Vienna Convention on the Law of Treaties (May 23, 1969) states that "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*," **CL-41**, pp. 12-13.

[479] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 81.

intention to negotiate on Mexico's part, but were instead an attempt to obtain information that we were under no obligation to provide the government and that Mexico was seeking to mount its defenses to our threatened claims."[480]

345. Instead of refuting Mr. Burr's understanding, Mexico poses a number of "rhetorical" questions in paragraph 46 of its Reply meant to generate speculation regarding how Respondent's officials would have acted had the 2014 Notice of Intent included the names and addresses of the Additional Claimants.[481] Mexico's invitation to speculate, however, is irrelevant as it is divorced from the record. At no point did Mexico engage the Claimants whose names and addresses were listed in the 2014 Notice of Intent in discussions geared towards amicably resolving the dispute. Much less did Mexico ever offer any compensation to them. There is not a single document to substantiate such an intention. Instead, where there are documents, the record shows that the Respondent's officials amply understood the dispute and the actors involved, and decided to eschew good faith negotiations in favor of gamesmanship.

346. For example, on May 27, 2014, Deputy Director Martinez sent a letter to Ms. Salas of SEGOB to inform her of the 2014 Notice of Intent and the factual and legal basis of the claim.[482] The record further shows that Economía and SEGOB officials gathered for a meeting on June 5, 2014.[483] After SEGOB officials explained their adamant opposition to Claimants' casino investments at the June 5, 2014 meeting, Economía officials decided to prepare the Respondent's defense and sent the questionnaire to fish for additional information.

347. Mexico continues down the path of speculative, rhetorical questions in paragraphs 68 to 70 of its Reply.[484] The questions are confusing and completely miss the mark. The Respondent first asks: "Would further efforts to persuade the Claimants to provide information concerning the basis of their claim have resulted in cooperation from the Claimants?" In response, Mexico offers the following: "Perhaps not, if Mr. Gordon Burr was responsible for instructing counsel."[485] Quite simply, whether Mexico would have made additional efforts to obtain information from Claimants is entirely irrelevant to the Tribunal's jurisdiction. And, in any event, Mr. Burr *was* in fact in charge of instructing counsel on behalf

[480] First Witness Statement of Gordon G. Burr (July 25, 2017), **CWS-1**, ¶ 44.

[481] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 46.

[482] Witness Statement of Ana Carla Martinez Gamba (Dec. 1, 2017), pp. 6-8.

[483] Witness Statement of Ana Carla Martinez Gamba (Dec. 1, 2017), ¶ 7.

[484] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 68-70.

[485] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 68.

of *all* Claimants (including the Additional Claimants), so Mexico's speculative answer to its own question is contrary to the factual record. The Respondent then asks: "Did Mexico loose [*sic*] an opportunity to secure documentary evidence or testimony because of this concealment?" This question is not only irrelevant to the Tribunal's jurisdiction but starkly confirms that all Mexico was concerned about was preparing for its defense, not engaging in good faith negotiations with Claimants.[486]

348. The Tribunal need not speculate, however, as Mexico has failed to provide even a shred of evidence to prove that the Additional Claimants would have answered Mexico's questionnaire, or that they would have acted any different than the Claimants whose names and addresses were included in the 2014 Notice of Intent. In fact, the evidence of record conclusively establishes that the Additional Claimants had entrusted the handling of their claims against Mexico to Gordon and Erin Burr, and thus would have acted consistent with their guidance even if their names and addresses had been listed in the 2014 Notice.[487]

349. The record is equally clear that Mexico would not have acted differently had the Additional Claimants' names and addresses been listed in the 2014 Notice. Not only does Mexico fail to articulate a single reason why it would have acted any different if the 2014 Notice included the Additional Claimants' names and addresses, but its conduct proves otherwise. As explained previously, Mexico never reached out to the Additional Claimants after receiving the Amended Notice of Intent. Respondent's suggestion that it would have acted different had it known that same information at an earlier point in time strains credulity.

350. In light of Mexico's inability to articulate any actual prejudice from the omission of the names and addresses of minority investors from the 2014 Notice of Intent, the Tribunal should reject Mexico's Article 1119 objection and exercise jurisdiction over all claims and Claimants in this proceeding.

6. The Amended Notice of Intent Cured Any Technical Defect

351. As Claimants explained in the Counter-Memorial,[488] they served the Amended Notice of Intent more than 90 days before the Tribunal's constitution, and cured any defects in the 2014 Notice. As previously explained, tribunals consistently hold that noncompliance with

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[486] Mexico's own words confirm this conclusion.

[487] Claimant Witness Statements (Jan. 4 - 7, 2018), **CWS-16 – CWS-47**, Section II; **CWS-48-CWS-49**, Section I; Claimants' Response to Mexico's Objection (July 21, 2016), Annex C.

[488] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 375-382.

technical procedures of NAFTA are merely formal defects *that may be cured* even during the course of proceedings.

352. The *Mondev* tribunal, as discussed earlier, rejected a jurisdictional challenge from the United States under NAFTA Article 1119, even though the claimant's notice of intent omitted the address of the enterprise. The address was subsequently provided, curing the formal defect.[489] The Respondent did not address *Mondev* in any significant detail, merely characterizing it as an "early" NAFTA award.

353. Following *Mondev*, even if the Tribunal were inclined to find a defect in the 2014 Notice of Intent, it should hold that the Amended Notice of Intent cured any and all defects, and that requiring the Additional Claimants to refile another Request for Arbitration or to institute a separate proceeding, as the Respondent suggests, would be unnecessary, wasteful and, as described below, grossly prejudicial to the Claimants, especially in light of Mexico's argument that any new claims by Claimants based on the measures at issue would be time-barred.[490]

354. The Respondent has also failed to comment on the decision in *Western NIS Enterprise Fund v. Ukraine*, which allowed the claimant an opportunity to cure a deficient notice of intent.[491] Even though the *Western NIS* tribunal considered proper notice to be an element of the State's consent, it nevertheless held that failure to provide proper notice did not "in and of itself" affect its jurisdiction, and granted the claimant an opportunity to remedy by serving a fresh notice.[492] The decision in *Western NIS* stands for the proposition that even if non-compliance with Article 1119 goes to the Respondent's consent (a position that Claimants reject), it is still curable and does not affect the Tribunal's jurisdiction.

355. Thus, the Tribunal should find that the Amended Notice of Intent cured any alleged defect in the 2014 Notice and accordingly reject Mexico's Article 1119 objection.

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[489] *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), **CL-17**, ¶ 50.

[490] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 79-80.

[491] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 377.

[492] *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, Order (Mar. 16, 2002), **CL-33**, ¶¶ 7-8.

7. The True Aim of Mexico's Article 1119 Objection Is To Limit Claimants' Claims under NAFTA's Limitations Period

356. Claimants warned in their Counter-Memorial that Mexico was attempting to raise a statute of limitations argument through the back door of NAFTA Article 1119.[493] In its Reply, Respondent finally admitted that its hyper-technical and unsubstantiated jurisdictional objections—including the objection under NAFTA Article 1119—was conceived to obtain the "juridical benefit of the passage of time" so that it can avoid answering for its destruction of Claimants' investments.[494] As Mexico itself recognizes, its requested relief under its Article 1119 objection would only pertain to the Additional Claimants' claims. Although these shareholders are advancing the *very same claims* based on the *very same measures* and under the *very same NAFTA provisions* for Mexico's destruction of the Juegos Companies, Mexico urges the Tribunal to deny them recourse for the injuries which now, after two rounds of submissions, would arguably fall outside of the NAFTA's three-year limitations period depending on how a new tribunal would interpret the applicable NAFTA provisions. This result would be highly unjust and draconian, especially in light of the nature and effect of the alleged non-compliance with NAFTA Article 1119.

357. The Respondent's hyper-technical objection has led it to the absurd suggestion that the Additional Claimants initiate additional proceedings.[495] Requiring a separate notice of intent, a separate request for arbitration, and a separate proceeding, however, would be wasteful in the extreme. In the words of the *Mondev* tribunal, "Chapter 11 should not be construed in an excessively technical way, so as to require the commencement of multiple proceedings in order to reach a dispute which is in substance within its scope."[496]

358. Mexico's extreme requested relief—dismissal of the Additional Claimants' claims for lack of jurisdiction—would possibly foreclose the Additional Claimants' ability to seek recourse for at least some of their very substantial injuries. This result would be overly draconian and would unfairly punish the Additional Claimants for what is, at most, technical noncompliance with a formal procedure. This remedy would award Mexico's obsession with

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[493] Claimants' Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 406.

[494] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 24.

[495] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 80.

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

arid formalism over substance, and would be at the expense of the Additional Claimants' substantive rights and fundamental principles of justice.

359. The Tribunal should reject the Respondent's objections under Article 1119 and uphold its jurisdiction over all claims and Claimants in this dispute.

C. CLAIMANTS CONSENTED TO ARBITRATION UNDER NAFTA ARTICLE 1121

360. Having charted a dead-end course, Mexico's Reply makes clear that its consent objections have died on the vine. Seemingly aware of its weakness, Mexico dedicates merely two paragraphs out of its 305-paragraph submission to its arguments challenging Claimants' obviously explicit expressions of consent to arbitrate pursuant to the NAFTA and ICSID Additional Facility Rules, resting on purported "doubts" and lacking any analysis, discussion, or citation to legal authority. Unsurprisingly, Mexico does not address, let alone refute, any of the arguments that Claimants set forth in their Counter-Memorial, leaving them unrefuted.

361. As it does with respect to its arguments challenging Claimants' standing under NAFTA Article 1117, Mexico persists in deviating from the clear text of the NAFTA (here, NAFTA Article 1121) by inventing a requirement that is nowhere to be found therein. Specifically, Mexico would have this Tribunal believe that, *for the benefit* of the NAFTA party, a disputing investor must not only offer its consent to arbitration clearly and in writing, but must do so by reciting a set of magic words, an incantation that Mexico finally spelled out in its Reply and that even includes a specific subject heading. Without this, Mexico argues, Claimants do not properly communicate their consent to arbitrate and Mexico's open offer of consent to arbitrate pursuant to the NAFTA is not perfected. The result of this hyper-technical and unsupported argument, were it to be accepted by the Tribunal, is the complete dismissal of Claimants' claims. Mexico fails to cite to any legal authority or other support in aid of its position and, more importantly, turns a blind eye to NAFTA's clear text.

362. Cognizant of its precarious position, Mexico attempts to challenge the well-settled principle in international arbitration that an alleged noncompliance with a formal requirement in NAFTA's consent provision is an issue of admissibility, not jurisdiction. In doing so, Mexico discusses, in a rather convoluted and distorted manner, the tribunals' holdings in *Ethyl*, *Thunderbird*, and *RDC*. As will be explained in greater detail below, Mexico cannot dispute that NAFTA tribunals have held consistently that formal non-compliances with consent requirements are curable issues of admissibility and do not affect the Tribunal's jurisdiction.

Thus, even if the Tribunal were inclined to conclude that Claimants did not comply with the formal terms of Article 1121—with which Claimants disagree—it should also find that Claimants fully cured any non-compliance and thus fully engaged Mexico's consent to arbitrate pursuant to the NAFTA and ICSID Additional Facility Rules.

1. Claimants Provided Their Written Consent To Arbitration In Their Request for Arbitration

363. Claimants argued in their Counter-Memorial that Mexico had failed to set forth a cogent argument as to how or why Claimants' written consents to arbitration in the text of the Request for Arbitration ("**RFA**") do not meet the requirements of NAFTA Article 1121. Mexico again fails to articulate such an argument in its Reply. Instead, Respondent mounts a jurisdictional objection of this magnitude simply by expressing "doubts" as to whether Claimants' consent and waivers were properly communicated in the RFA and by noting, without more, that it "does indeed dispute that there was an expression of the Claimants' consent in the RFA that was made in writing, delivered to Mexico and included in the Claimants' submission of a claim to arbitration."[497] This vacuous, unsupported argument borders on the frivolous.

364. In its Counter-Memorial, Claimants explained how they provided their consent in the body of the RFA, explaining with particularity how each of the relevant paragraphs of that submission unequivocally establishes Claimants' compliance with the plain text of NAFTA Article 1121(3).[498] Claimants also clarified that, contrary to Respondent's misconstruction of their position, Claimants had never argued that they consented to arbitration by simply filing the RFA and that, in fact, they provided textual, written consent within the text of the RFA.[499] Claimants also debunked Mexico's *effet utile* argument in detail and with conclusive support.[500]

365. In its Reply, Mexico fails to provide any response to Claimants' arguments that paragraphs 114 and 119 of the RFA clearly and expressly provided Claimants' written consent to arbitration as required by NAFTA Article 1121(3). Mexico also does not refute Claimants'

[497] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 94.

[498] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 417 – 424.

[499] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 421.

[500] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 423.

position that nothing in the NAFTA prevents a disputing investor from communicating its written consent within the body of the request for arbitration.[501]

366. The only somewhat-developed argument in Mexico's Reply regarding Claimants' consent is that, through paragraph 114 of their RFA, Claimants conflate the consent required in NAFTA Article 1122 with the one required in NAFTA Article 1121. This is not the case. Claimants have explained in their Counter-Memorial that by adopting the Treaty, each NAFTA Party made an open, standing offer of consent to submit disputes with disputing investors to arbitration.[502] A disputing investor can accept such a standing offer of consent in the submission of its claim to arbitration as long as the consent is expressed clearly and in writing in the submission in accordance with NAFTA Article 1121. That is precisely what Claimants did here.

367. When they filed the RFA, the submission contained Claimants' written consent to arbitration as required by NAFTA Article 1121(3). This express written statement of consent appears in paragraph 114 of the RFA right below Claimants' reference to NAFTA Article 1122; it was even highlighted in bold and underlined in Claimants' Counter-Memorial.[503] Mexico cites no authority and fails to set forth any good argument as to why Claimants' consent as expressed in the RFA is invalid or insufficient under NAFTA Article 1121. Claimants also expressed their express, written consent to arbitration in paragraph 119 of the RFA, which Mexico does not contest in any way.

368. Claimants have thus complied with the requirements of NAFTA Article 1121. The Tribunal thus should dismiss this groundless objection.

2. Claimants' Consent Through The Powers of Attorney Also Was Unequivocal And Made Pursuant To NAFTA Article 1121

369. In addition to consenting to arbitrate within the text of the RFA (which is sufficient on its own to comply with Article 1121), Claimants also consented through the powers of attorney that they submitted to Mexico with their RFA. Mexico nonetheless continues to insist that NAFTA Article 1121 requires that a disputing investor recite a specific phrase with a particular subject heading in order for its consent to comply with the article.[504] Specifically,

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[501] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 422.

[502] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 422; *see also* C. Schreuer et al., *The ICSID Convention: A Commentary* (2009), pp. 214 – 215, **CL-4**.

[503] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 418.

[504] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 96.

Mexico argues that Claimants had an obligation to include in the power of attorney a heading titled "Consent" followed by a sentence stating that Claimants "consent to arbitration in accordance with the procedures set out in the NAFTA."[505] According to Mexico, failure to do so deprives this Tribunal of jurisdiction. This argument is as hyper-technical as it is unsupported by the clear NAFTA text or any authority.

370. Mexico's "magic words" reading of Article 1121 finds no support in the clear text of the Treaty. Article 1121 requires only that a claimant's consent be: (1) made in writing; (2) delivered to Mexico; and (3) included in the submission of a claim to arbitration. This is all that Article 1121 requires; there is no specific formulation or format beyond these three requirements. As explained in greater detail in the Counter-Memorial, Claimants' powers of attorney comply with each of these requirements.[506]

371. In its Reply, Mexico again fails to cite to any legal authority in support of its argument. Not a single NAFTA tribunal has ever held that Article 1121 requires a disputing investor to recite a specific set of words in order to accept a NAFTA party's standing offer of consent under Article 1121. Nor has a NAFTA tribunal ever found that expressions of consent in a power of attorney (or in the RFA, for that matter) are insufficient to satisfy Article 1121.

372. Mexico's arguments that Claimants' consent in the powers of attorney (and also in the RFA) was somehow implied, inferred or intended, but flawed are equally misplaced and contradicted by the evidence of record.[507] There is nothing implied, inferred or suggested in the express consent provided by Claimants in paragraphs 114 and 119 of the RFA, or in the powers of attorney.

373. In addition to these clear, explicit written expressions of consent, each Claimant with this Rejoinder has provided a declaration confirming his unequivocal consent to arbitration under the NAFTA and the ICSID Additional Facility Rules in further compliance with Article 1121 (not that further compliance was required).[508]

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[505] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 96 and 99.

[506] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 425 – 439.

[507] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 100 – 101.

[508] Second Witness Statement of Gordon G. Burr (Jan. 7, 2018), **CWS-7**, ¶ 31; Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8**, ¶ 44; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 13; Witness Statement of John Conley (Jan. 7, 2018), **CWS-13**, ¶ 24; and Claimant Witness Statements (Jan. 4-7, 2018), **CWS-16–CWS-47**, Section III; **CWS-48 – CWS-49**, Section II.

374. Moreover, Mr. Gordon Burr confirms that he always had authority to speak on Claimants' behalf and that they all expressed their consent in writing to his representation on their behalf and to the arbitration in accordance with the NAFTA and the ICSID Additional Facility Rules.[509] Mr. Burr also confirms that all Claimants signed an investor consent form, in their capacity as owners and shareholders of the B-Mex Companies and the Juegos Companies, through which they expressly consented in writing to proceed with the NAFTA arbitration and to the engagement of Quinn Emanuel to represent them and act on their behalf.[510] These signed investor consent forms also authorized Mr. Burr to speak and make decisions on Claimants' behalf in all matters related to the arbitration.[511] Again, each Claimant has not only corroborated Mr. Burr's testimony, but also confirmed, for the avoidance of any doubt, that they provided written consent to arbitration in accordance with the procedures set out in the NAFTA.[512]

375. The Tribunal's inquiry into the sufficiency of Claimants' powers of attorney begins and ends with the three requirements in NAFTA Article 1121(3). Claimants have established through comprehensive, unrebutted, evidence that they have satisfied each of these requirements. The Tribunal should thus dismiss Mexico's baseless objection.

3. Article 1121 Consent Goes To Admissibility, Not Jurisdiction, And Defects In Consent Are Curable

376. Claimants have been clear that compliance with Article 1121's consent requirements go to admissibility, not jurisdiction, and that any defects in the consents are curable. While Claimants insist that the consents provided with the RFA are fully compliant, the additional consents provided by Claimants would in any event cure any supposed defect.

377. Claimants have provided ample NAFTA precedent in their Counter-Memorial to back their positions. Unable to find authority to support its position, Mexico turns to misconstruction of the ample authority against its position.

378. There is nothing to Mexico's self-serving disapproval of the *Ethyl* tribunal's holding that NAFTA Article 1121's consent requirement goes to admissibility, not

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[509] Second Witness Statement of Gordon G. Burr (Jan. 7, 2017), **CWS-6**, ¶ 31.

[510] Second Witness Statement of Gordon G. Burr (Jan. 7, 2017), **CWS-6**, ¶ 31.

[511] Second Witness Statement of Gordon G. Burr (Jan. 7, 2017), **CWS-6**, ¶ 31.

[512] Second Witness Statement of Erin Burr (Jan. 7, 2018), **CWS-8**, ¶ 44; Witness Statement of Neil Ayervais (Jan. 7, 2018), **CWS-12**, ¶ 13; Witness Statement of John Conley (Jan. 7, 2018), **CWS-13**, ¶ 24.; and Claimant Witness Statements (Jan. 4-7, 2018), **CWS-16–CWS-47**, Section III; **CWS-48 – CWS-49**, Section II.

jurisdiction.[513] Mexico argues "that many have been perplexed" by a statement in *Ethyl*'s holding on consent,[514] yet there is not a single citation to any authority confirming this alleged perplexity, much less to any supporting Mexico's arguments here. Mexico then advances an opinion regarding its belief that *Ethyl* was "patently incorrect", supported only by equally self-serving opinions of the other NAFTA parties.[515] As Claimants have previously stated, however, there is no reason to afford conclusive or even persuasive weight to NAFTA parties' opinions, including when they have been advanced in cases that have nothing to do with the consent requirements in NAFTA Article 1121.[516] Mexico's disapproval of *Ethyl*'s holding, which Respondent concedes has been approved in other cases,[517] is therefore of no moment. This Tribunal thus should follow *Ethyl's* holding that compliance with NAFTA Article 1121's requirement to present written consents and waivers goes to admissibility, not jurisdiction.[518]

379. Mexico also misses the mark when characterizing Claimants' argument in their Counter-Memorial with respect to admissibility. Claimants have been clear all along that they have complied with the requirements of NAFTA Article 1121 through the written consents included in the RFA and the powers of attorney. By providing these written consents in both the RFA and the powers of attorney, Claimants, in line with the *Ethyl* tribunal's holding, have complied with 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.[519]

380. Notwithstanding the above, Claimants contend that should this Tribunal find that there was some formal non-compliance with, or untimely presentation of, their expressions of consent, then NAFTA awards, like *Ethyl*, preclude a dismissal for lack of jurisdiction.[520]

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[513] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 117 – 121.

[514] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 117.

[515] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 108, 119 – 120.

[516] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 358.

[517] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 124.

[518] *Ethyl Corp. v. Government of Canada,* UNCITRAL, Award on Jurisdiction (June 24, 1998), ¶ 91 (emphasis added), **CL-5**.

[519] *Ethyl Corp. v. Government of Canada,* UNCITRAL, Award on Jurisdiction (June 24, 1998), ¶ 91 (emphasis added), **CL-5**.

[520] *Ethyl Corp. v. Government of Canada,* UNCITRAL, Award on Jurisdiction (June 24, 1998), ¶ 91 (emphasis added), **CL-5**.

381. Similarly, Mexico's "disagreement" with the holding in *Thunderbird* is not only irrelevant, but wrong.[521] Contrary to Mexico's arguments, a considerable number of tribunals under the NAFTA and the CAFTA have ruled that non-compliance with formal requirements in the presentation of a disputing investor's written consent and waiver, including timeliness of the presentation, is a mere formal defect *that can be cured during the course of the proceedings*.[522] Mexico's bald assertion that *Thunderbird*'s holding "would be aberrant today in light of the consistent stream of contrary decisions and awards…",[523] is once again unsupported by citation to a single NAFTA award. Mexico's argument that that the *Thunderbird* tribunal may have been influenced by Mexico's apparent lack of objection when the notice was filed is nothing more than self-serving speculation that should be disregarded here and is, nevertheless, contradicted by the Tribunal's holding.[524]

382. Again, without admitting that any defects existed in their initial consents, Claimants contend that their various expressions of consent following the submission of the RFA would have cured any supposed defects with the initial consents presented with the RFA.

383. Finally, Mexico's reliance on *Railroad Development Corporation v. Guatemala* ("*RDC*")[525] is as unavailing as its previous, unsuccessful, dependence on *Detroit International Bridge Company v. Government of Canada* ("***DIBC***").[526] Like *DIBC*, *RDC* is a waiver case dealing with a specific issue that is not in dispute in this case. In *RDC*, the issue in dispute was the claimant's initiation of domestic arbitration proceedings alongside the CAFTA arbitration,

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[521] *International Thunderbird Gaming Corp. v. The United Mexican States*, UNCITRAL, Award (Jan. 26, 2006), ¶117, **CL-7**.

[522] *Ethyl Corp. (U.S.) v. Government of Canada*, UNCITRAL, Award on Jurisdiction (June 24, 1998), ¶ 91, **CL-5**; *Pope & Talbot, Inc. (U.S.) v. Canada*, UNCITRAL, Award on the Harmac Motion (Feb. 24, 2000), ¶¶ 16 – 18, **CL-6**; *International Thunderbird Gaming Corp. v. The United Mexican States*, UNCITRAL, Award (Jan. 26, 2006), ¶117, **CL-7**; *United Parcel Svc. of Am. Inc. (U.S.) v. Government of Canada*, UNCITRAL, Award on the Merits (June 11, 2007), ¶ 35, **CL-53**; *Railroad Development Corporation v. Republic of Guatemala*, Decision on Objection to Jurisdiction (November 17, 2008), ¶ 61, fn 36, **RL-029** ("In [*Thunderbird*], the tribunal held that unambiguous waivers submitted with the Particularized Statement of Claim were sufficient for the purposes of NAFTA Art. 1120(1)(b); the failure to file these with the Notice of Arbitration was a merely formal defect. In the present case, by contrast, the Claimant has maintained the domestic arbitrations over the Respondent's objection, and there is no question of a merely formal defect at the outset of the international arbitral procedure.");

[523] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 127.

[524] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 128.

[525] *Railroad Development Corporation v. Republic of Guatemala*, Decision on Objection to Jurisdiction (November 17, 2008), ¶ 61, **RL-029;** Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶¶ 171 – 172.

[526] Respondent's Memorial on Jurisdictional Objections (May 30, 2017), ¶ 82; Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 433 – 435.

resulted in an insufficient waiver.[527] As previously explained,[528] however, the consent and waiver provisions, while contained in the same NAFTA provision, exist and operate under very different circumstances and, as a result, the considerations and analysis in insufficient waiver cases are inapposite to the question of whether a disputing investor fulfilled the consent requirements of NAFTA Article 1121. Therefore, Mexico's reliance on yet another waiver case that applied a very different analysis to assess the insufficiency of the waiver at issue there does nothing to advance its unsupported objections regarding Claimants' consent to arbitration in this case.

4. Mexico Does Not Challenge The Validity Of The Juegos Companies' Consents And Waivers

384. In the consent section of its Reply, Mexico represented to the Tribunal that it would deal with the validity of the powers of attorney and waivers filed by the Juegos Companies in the second part of its submission.[529] It did not. Claimants have combed through the second part of Mexico's Reply and have been unable to find any analysis or discussion addressing, let alone refuting, any of the arguments set forth by Claimants in their Counter-Memorial.[530] More importantly, Mexico at no point challenges Mr. Pelchat's authority to execute the Juegos Companies' consents and waivers.[531]

385. Mexico had previously conceded that this objection was separate from its objection regarding Claimants' proper consent to arbitration pursuant to NAFTA Article 1121.[532] In its Memorial, Mexico questioned the validity of the Juegos Companies' consent and waivers on the basis that there allegedly was no evidence of Mr. Pelchat's authority to sign them, and because the circumstances under which Claimants were able to obtain his signature were unclear.[533] This time around, however, Mexico does not even refer to any of its previous objections. Claimants found a single oblique passage in Mexico's Reply referring to the Juegos Companies' consents and waivers, but which has nothing to do with the issue of their validity:

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[527] *Railroad Development Corporation v. Republic of Guatemala*, Decision on Objection to Jurisdiction (November 17, 2008), ¶ 48 **RL-029**.

[528] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 431 – 432.

[529] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 103.

[530] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 444 – 462.

[531] Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 452 – 462.

[532] Respondent's Memorial on Jurisdictional Objections (May 30, 2017), ¶ 131; Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶ 447.

[533] Respondent's Memorial on Jurisdictional Objections (May 30, 2017), ¶ 128.

> To the Respondent's knowledge, **the Claimants have never recovered control of the Board of the Juegos Companies**. In fact, when the Claimants eventually filed the purported consents and waivers for the Juegos Companies they filed two sets: the first was signed by Mr. Luc Pelchat (an individual who is not a claimant in these proceedings) and the second by Mr. Gordon Burr as "President of the Boards" despite the fact that he no longer held that position. Their inability to reappoint Mr. Gordon Burr et al. to the board before submitting the claim to arbitration (and to this date) **speaks volumes about their purported "control" over the Juegos Companies**.[534] (emphasis added)

386. This passage makes an argument related to the control of the Juegos Companies, which is a completely different issue and which Claimants address and refute separately in this Rejoinder. Again, Mexico nowhere addresses, much less disputes, Claimants' arguments and evidence conclusively proving that Mr. Pelchat had authority to sign the Juegos Companies' consents and waivers.[535] Nor does Mexico dispute or take issue with the circumstances under which the Claimants were able to obtain Mr. Pelchat's cooperation and signature.[536] That Mr. Pelchat is not a claimant in this arbitration, as Mexico repeats without any discussion, is completely irrelevant to this objection.

IV. RELIEF SOUGHT

387. For the foregoing reasons and for the reasons set forth in Claimants' Counter-Memorial, 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 promptly with the scheduling of the merits phase of this arbitration;

c. order Mexico to pay all of Claimants' costs and fees incurred in connection with Mexico's jurisdictional objections, including, without limitation, the arbitrators' costs and fees, Claimants attorneys', expert and consultant fees, and fees for the time Claimants' own employees spent on responding to Respondent's objections, plus interest at a reasonable rate from the date on which such costs and fees were incurred to the date of payment; and

d. such other relief as the Tribunal may deem just and proper.

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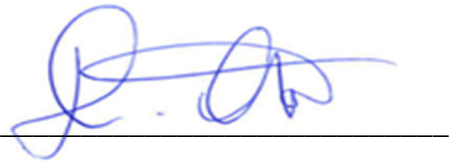
[534] Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017), ¶ 262.

[535] Respondent's Memorial on Jurisdictional Objections (May 30, 2017), ¶ 128; Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 452 – 462.

[536] Respondent's Memorial on Jurisdictional Objections (May 30, 2017), ¶ 128; Claimant's Counter-Memorial on Jurisdictional Objections (July 25, 2017), ¶¶ 452 – 462.

388. Claimants reserve their right to (i) modify or supplement their arguments, claims and prayer for relief stated in this Rejoinder on Jurisdiction, including if the Tribunal orders Mexico to produce further documents in response to Claimants' pending objections to the sufficiency of Mexico's document production; (ii) to advance additional claims, arguments, and prayers for relief; (iii) to produce further evidence (whether factual or legal) as may be necessary to complete and supplement the presentation of those claims; and (iv) to respond to any further or other arguments or allegations raised by Mexico. These reservations of rights apply, without limitation, to any submissions, whether related to or independent of this Rejoinder, that may be necessary in light of Mexico's responses to the Tribunal's letter of 4 January 2018, as well as any documents that Mexico may produce in response thereto and to any subsequent order of the Tribunal.

Respectfully submitted,



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