

BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT
DISPUTES

ADDITIONAL FACILITY

BETWEEN:

**Gordon G. Burr; Erin J. Burr; John Conley; Neil Ayervais; Deana Anthoné;
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

CLAIMANTS’ POST-HEARING BRIEF ON JURISDICTION

17 August 2018

QUINN EMANUEL URQUHART & SULLIVAN LLP
1300 I STREET NW, 9TH FLOOR WASHINGTON, DC 20005

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I. INTRODUCTION

1. Throughout this jurisdictional phase, culminating in the Hearing on Jurisdictional Objections (the “**Hearing**”), Claimants have conclusively shown that they validly complied with all of the NAFTA’s jurisdictional requirements. Mexico, on the other hand, has repeatedly argued that Claimants’ supposed noncompliance with certain hyper-technical requirements—all of which to the extent they were not initially fully complied with by Claimants have now been fully cured—amount to jurisdictional defects. It does so without any meaningful support in the NAFTA’s text or the case law. It also has pressed the Tribunal to ignore the abundant evidence of Claimants’ standing to bring their claims on their own behalf and on behalf of the Juegos Companies, of their unequivocal consent to arbitration under the NAFTA, and of their compliance with each of the Treaty’s admissibility requirements. This Post-Hearing Brief summarizes the evidence, reasons, and authorities that support Claimants’ positions, and that compel the conclusion that Respondent’s jurisdictional objections must be rejected in their entirety.¹

2. Claimants unequivocally and validly consented to arbitration both through their Request for Arbitration and their Powers of Attorney. Mexico’s argument that NAFTA investors can only validly consent to arbitration under NAFTA Article 1121 by uttering a magical, written incantation is entirely divorced from the NAFTA’s plain text, devoid of any jurisprudential support, and should be rejected by this Tribunal. Through Article 1122, the NAFTA Parties expressed their standing, open offer of consent to arbitrate investment disputes, in an arbitration conducted in accordance with the arbitral rules and procedures laid out in Chapter Eleven. Claimants engaged and perfected this consent by expressly accepting Mexico’s offer and submitting the dispute to NAFTA arbitration. While unnecessary in Claimants’ view, after Mexico objected, Claimants also provided updated written consents uttering the magical words requested by Mexico. This should have ended Mexico’s purported concerns and mooted its unfounded objection, but Mexico continues to press its flawed argument.

3. In addition, Claimants fully complied with NAFTA Article 1119 by delivering the 2014 Notice of Intent and placing Mexico on actual notice that the present dispute was headed to international arbitration. As the record evidence demonstrates, Mr. Burr and the other investors who issued the 2014 Notice of Intent did so for the benefit and on behalf of all Claimant investors.

¹ The terms used herein have the same meaning as in Claimants’ previous submissions to the Tribunal and can be found in the Glossary of Terms in the Claimants’ Rejoinder on Jurisdictional Objections.

While Mexico continues to object that certain of the investors were not listed in the 2014 Notice of Intent, its objection rings hollow as the evidence establishes that it never intended to engage the investors in meaningful settlement consultations and in fact actively avoided Claimants' efforts to do so. Regardless, any technical defects in the 2014 Notice would go to admissibility, not jurisdiction, and were cured through the submission of the Amended Notice of Intent in 2016. The Tribunal thus should reject Mexico's jurisdictional objection under Article 1119.

4. Mexico's standing objections likewise have no basis in the NAFTA's plain text and are contradicted by consistent case law rejecting efforts to import new, hidden standing requirements to Articles 1116 and 1117. Mexico's standing arguments are also contrary to the facts in the record. As reflected in the documentary and testimonial evidence, Claimants have conclusively established their ownership over their investments in Mexico, and their ownership and control of the Juegos Companies, E-Games, and Operadora Pesa. As such, there can be no question that Claimants have standing to bring claims in their own right under Article 1116 and on behalf of their enterprises under Article 1117. Claimants' deep involvement with and passion for their highly successful Casino businesses was aptly expressed by Mr. Gordon Burr, when he explained that: "This was my life. I had spent 10, 14 years now building these companies, and it was my life. ... We put our entire lives into this company."²

5. Mexico's jurisdictional objections stand as an attempt to block Claimants from holding Mexico accountable for its illegal destruction of Claimants' investments on the back of hyper-technical, formalistic arguments. This Tribunal should reject Mexico's objections in their entirety, find that it has jurisdiction over all claims and Claimants, and promptly proceed with the scheduling of the merits phase of this arbitration.

II. CLAIMANTS CONSENTED TO ARBITRATION UNDER NAFTA ARTICLE 1121

6. Claimants consented to arbitration under NAFTA Article 1121 in their Request for Arbitration ("RFA") and also in the Powers of Attorney ("POAs") submitted as exhibits thereto.³

² G. Burr, English Transcript of the Hearing on Jurisdictional Objections ("Eng. Tr.") (Day 2), 465:6-15.

³ Claimants' Consent Waivers and Powers of Attorney, C-4; Claimants' Request for Arbitration (Jun. 15, 2016) ("RFA"), ¶¶ 114, 119; *see also* Counter-Memorial on Jurisdictional Objections (Jul. 25, 2017) ("Counter-Memorial"), ¶¶ 417-439; Rejoinder on Jurisdictional Objections ("Rejoinder"), ¶¶ 365-368.

Each of these expressions of consent satisfies the plain requirements of Article 1121 and Mexico's legally erroneous objection must be rejected.

7. In order to satisfy NAFTA Article 1121, an investor's consent (1) "shall be in writing"; (2) "shall be delivered to the disputing Party"; and (3) "shall be included in the submission of a claim to arbitration."⁴ NAFTA requires nothing more.

8. The clear NAFTA text notwithstanding, Respondent crystallized its objection under NAFTA Article 1121 at the Hearing by arguing that "Article 1121 requires the use of the phrase 'in particular' or magic words, as Claimants say, in this reference to the so-called consent and powers of attorney that they use repeatedly in later submissions that were accompanied by the request of arbitration."⁵ This argument finds no support in the text of the NAFTA or in international arbitral practice and jurisprudence. Quite simply, there are no hidden, unwritten requirements in the NAFTA dictating the form of consent that investors must satisfy—Article 1121 does not require "magic words" of any kind, and certainly does not require the specific subject headings and phrasings that Respondent puts forward in this proceeding.

9. NAFTA case law counsels against implying into the Treaty additional requirements that have no basis in the text. The tribunal in *Waste Management v. Mexico (I)*, for example, rejected Mexico's attempt to graft an unwritten requirement into Article 1121, finding that the waiver at issue was "free of the formal defects attributed to it by [Mexico] with regard to the alleged need for legalisation or notarisation", and noting that it had been "submitted in the terms laid down by the NAFTA, that is to say, in writing and in duplicate to both the ICSID and the disputing Party."⁶

10. Fundamental principles of treaty interpretation similarly stand in opposition to Respondent's attempt to import terms and requirements not found in the plain text of Article 1121. Article 31(1) of the Vienna Convention on the Law of Treaties ("VCLT") requires that NAFTA Article 1121 "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." Importing requirements that are nowhere found in the text of Article 1121 requires an interpretation that is necessarily inconsistent with the ordinary meaning of its terms. Similarly, grafting additional,

⁴ NAFTA Article 1121.

⁵ Respondent's Opening Statement, Eng. Tr. (Day 1), 52:13-18.

⁶ *Waste Management, Inc. v. United Mexican States (I)*, ICSID Case No. ARB/98/2, Award (Jun. 2, 2000), **RL-019**, ¶ 23.

unstated requirements onto Article 1121 would create unfair and arbitrary obstacles to investors' access to NAFTA's dispute resolution mechanism. This, in turn, would run contrary to the stated object and purpose of the NAFTA—to “create effective procedures for the implementation and application of [NAFTA],” and to “establish[] a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties ... and due process before an impartial tribunal.”⁷

11. NAFTA Article 1121 is clear and requires nothing more than what its plain text provides. Here, Claimants satisfied each of the requirements of Article 1121 by accepting Mexico's standing offer of consent to arbitrate in writing and delivering their consent to Mexico in the RFA and in their POAs.

A. Claimants Delivered Their Written Consent in the Request For Arbitration

12. Claimants consented to arbitration in the RFA by expressly accepting Mexico's standing offer of consent to submit investment disputes to NAFTA arbitration.⁸ As noted, NAFTA Article 1121 requires only that an investor's written consent to arbitration be “included in the submission of a claim to arbitration.” In an arbitration under the ICSID Additional Facility Rules such as this one, NAFTA Article 1137(1)(b) makes clear that a claim is submitted to arbitration when “the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules has been received by the Secretary-General.”⁹ The “notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules,” in turn, refers to the “request” for arbitration through which the disputing investors inform the ICSID Secretariat of their “wish[...] to institute arbitration proceedings” against the Respondent.¹⁰ The NAFTA's express language thus contemplates that disputing investors can accept a Respondent state's standing offer of consent to arbitrate by submitting their Request for Arbitration to ICSID. That is precisely what Claimants did.¹¹

⁷ NAFTA Article 102; NAFTA Article 1115.

⁸ RFA, ¶ 114 (“By this Request for Arbitration, Claimants accept Mexico's offer, and hereby submit the present dispute to arbitration under the Additional Facility Rules of ICSID.”); ¶ 119 (“Claimants and the Mexican Companies have provided the requisite consent to arbitration under the Additional Facility and waiver in the form contemplated by Article 1121 of the NAFTA.”).

⁹ NAFTA Article 1137(1)(b).

¹⁰ Article 2, Schedule C, ICSID Additional Facility Rules.

¹¹ Counter-Memorial, ¶¶ 417-424; Rejoinder, ¶¶ 365-368.

13. This conclusion also is consistent with a plain reading of Article 1121 in context with Article 1122, titled “Consent to Arbitration”. Article 1122(1) records the NAFTA Party’s open, standing offer of consent to arbitration. Article 1122(2), in turn, provides that the “consent given by [Article 1122(1)] and the *submission by a disputing investor of a claim to arbitration*” satisfies the requirements of “... the Additional Facility Rules for *written consent of the parties*.”¹² These words say that a claimant’s submission of a claim to arbitration, by itself and without more, already amounts to the investor’s “written consent” to arbitration. Accordingly, there is no basis to read Article 1121 as prohibiting investors from consenting to arbitrate with one of the NAFTA Parties by delivering their RFA with wording expressing that the Claimants are submitting the dispute to NAFTA arbitration, as the Claimants have done.

14. As the *Ethyl v. Canada* tribunal explained, Article 1121 memorializes the general principle in investment disputes that “the initiation of arbitration constitutes consent to arbitration by the initiator.”¹³ It would be contrary to treaty interpretation principles and case law to read Article 1121 as prohibiting investors from communicating their written consent within the text of the RFA, or to require a specific incantation to accept a NAFTA Party’s standing offer of consent.¹⁴

15. In this case, Claimants not only submitted the dispute to arbitration through the RFA but also clearly and expressly consented to arbitration by accepting Mexico’s standing offer in the text of the RFA.¹⁵ As Mr. Burr testified with respect to Paragraph 114 of the RFA: “this grants my consent to move forward with a NAFTA arbitration.”¹⁶ This unequivocal consent was expressed in writing in the submission to arbitration and was delivered to Mexico. The Tribunal should accordingly dismiss Mexico’s objection under Article 1121.

B. Claimants Also Consented to Arbitration Through Their Powers of Attorney

16. In addition to consenting to arbitrate within the text of the RFA, Claimants also consented to arbitration under Article 1121 through the submission of their POAs, which satisfy all three requirements found in Article 1121. An investor who executes a power of attorney instructing its

¹² NAFTA Article 1122(2) (emphasis added).

¹³ *Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction (Jun. 24, 1998) (“*Ethyl v. Canada*”), CL-5, ¶ 90.

¹⁴ See Procedural Order No. 5, tribunal’s question 3 (iv).

¹⁵ RFA, ¶¶ 114, 119.

¹⁶ G. Burr Eng. Tr. (Day 2), 356:19-21.

legal representatives to take all necessary steps to commence NAFTA arbitration necessarily is consenting to NAFTA arbitration. Mexico's hyper-technical arguments to the contrary must be rejected, along with its baseless objection.

17. The plain text of the POAs makes clear that Claimants expressly consented in writing to proceed with NAFTA arbitration and authorized Quinn Emanuel to represent them and act on their behalf in that arbitration. Specifically, the POAs instruct Quinn Emanuel to "take any steps required for the initiation of ... arbitration proceedings under the [NAFTA]". This unambiguous text communicated to Mexico Claimants' consent to the submission of the claim to arbitration in accordance with NAFTA procedures.¹⁷ A contrary interpretation of the POAs not only would be inconsistent with their plain text, but also a gross distortion of the Claimants' intent in executing the POAs and delivering them to Mexico.

18. As Mr. Gordon Burr testified at the Hearing, Claimants "absolutely consented to arbitration."¹⁸ According to Mr. Burr: "when we hired Quinn Emanuel and decided to move forward with the Request for Arbitration, I gave power of attorney, as we all did, to Quinn Emanuel to represent us in this arbitration, and that was consent to me."¹⁹ Mr. Ayervais confirmed the same, testifying that, through the powers of attorney, the Claimants "gave Quinn Emanuel the power to do whatever was necessary to bring a case/prosecute a case under NAFTA, whatever that was. And whatever procedures are required, whatever language is required, whatever substantive filings are required, we said, 'Quinn Emanuel, take our case, protect us, prosecute our rights under NAFTA whatever that is.'"²⁰ Additionally, each Claimant provided a witness statement confirming that he/she intended to consent and in fact consented to this arbitration against Mexico, through the Request for Arbitration and the POAs, in accordance with the procedures set out in the NAFTA and under the ICSID Additional Facility Rules, and expressly rejected Mexico's unfounded arguments by reaffirming that consent.²¹

¹⁷ See Procedural Order No. 5, tribunal's question 3 (ii); Claimants' Consent Waivers and Powers of Attorney, **C-4**.

¹⁸ G. Burr Eng. Tr. (Day 2), 355:3.

¹⁹ G. Burr Eng. Tr. (Day 2), 354:20-355:2.

²⁰ N. Ayervais Eng. Tr. (Day 4), 904:1-8.

²¹ G. Burr First Witness Statement, **CWS-1**, ¶ 69; G. Burr Second Witness Statement, **CWS-7**, ¶ 31; E. Burr Second Witness Statement, **CWS-8**, ¶ 44; N. Ayervais Witness Statement, **CWS-12**, ¶ 13; J. Conley Witness Statement, **CWS-13**, ¶ 24; and Claimant Witness Statements, **CWS-16–CWS-47**, Section III; **CWS-48–CWS-49**, Section II.

19. Claimants' clear and explicit expressions of consent in their POAs amply satisfy all three requirements found in Article 1121. The POAs were "in writing," "included in the submission of a claim to arbitration," and "delivered" to Mexico.²² As explained above, Article 1121 requires nothing more, and Respondent's arguments to the contrary are foreclosed by the plain text of the NAFTA and unsupported by authority or practice.

20. There can be no serious dispute regarding Claimants' consent to arbitration under NAFTA Article 1121. Claimants consented to this NAFTA arbitration in writing and communicated it to Mexico in the submission of the claim to arbitration, both in the text of the Request for Arbitration and in the POAs attached as exhibits thereto. Mexico's objection that investors can only consent to NAFTA arbitration using particular words with a particular subject heading is legally unfounded and hyper-technical in the extreme;²³ the Tribunal should reject it outright.

C. In Any Event, Alleged Defects in Compliance with Article 1121 Requirements Are Curable and Go to Admissibility, not Jurisdiction

21. NAFTA tribunals have repeatedly held that alleged formal defects in consents and waivers go only to admissibility, and do not mandate a jurisdictional dismissal. In particular, tribunals are consistent in concluding that any non-compliance with the formal requirements of Article 1121, including their timely presentation, can be cured.

22. In this case, each investor and enterprise presented its consent and waiver. That some enterprises filed the documents after the RFA was presented (but long before the Tribunal was constituted to hear the claims), does not affect the Tribunal's jurisdiction or alter the effective date of submission of the claim to arbitration. Article 1137(1)(b), under the heading "Time when a Claim is Submitted to Arbitration," ties the date of submission to when the ICSID Secretary-General receives the request for arbitration. And as NAFTA case law demonstrates, any defect in the consent or waiver that is subsequently cured is deemed effective as of the date of submission to arbitration, independent of the date of cure.²⁴

²² See NAFTA Article 1121; see Procedural Order No. 5, tribunal's question 3 (iii).

²³ See Respondent's Reply on Jurisdictional Objections (Dec. 1, 2017) ("Reply"), ¶¶ 96, 99.

²⁴ *Pope & Talbot v. Canada*, UNCITRAL, Decision on Harmac Motion (Feb. 24, 2000), **CL-6**, ¶ 18 ("there is nothing in Article 1121 preventing a waiver from having retroactive effect to validate a claim commenced before that date.").

23. Although the respondent NAFTA Parties have repeatedly argued in Article 1128 non-disputing Party submissions²⁵ that compliance with Article 1121 conditions their consent to arbitration, NAFTA tribunals have squarely and repeatedly rejected that argument and view compliance with the consent and waiver requirements as procedural matters that go to admissibility and are curable. These documents have been submitted in NAFTA proceedings as late as with a claimant’s memorial, without affecting the tribunal’s jurisdiction or the date of submission to arbitration.²⁶ For example:

- (i) The *Thunderbird v. Mexico* tribunal rejected Mexico’s “over-formalistic” argument that the claimant had failed to validly submit a claim to arbitration based on its failure to submit the relevant waivers with its notice of arbitration, only doing so with the statement of claim.²⁷ Although “Article 1121 of the NAFTA is concerned with conditions precedent to the submission of a claim to arbitration,” the *Thunderbird* tribunal reasoned, “a failure to meet such requirement cannot suffice to invalidate the submission of a claim if the so-called failure is remedied at a later stage of the proceedings.”²⁸ In interpreting Article 1121, the *Thunderbird* tribunal took “into account the rationale and purpose of that article,” which was “to prevent a party from pursuing concurrent domestic and international remedies,” and “join[ed] the view of other NAFTA Tribunals that have found that Chapter Eleven provisions should not be construed in an excessively technical manner.”²⁹
- (ii) The *Ethyl v. Canada* tribunal similarly rejected Canada’s argument that jurisdiction was absent because the written consents and waivers were only provided later with the statement of claim.³⁰ The *Ethyl* tribunal observed that “[w]hile Article 1121’s title

²⁵ As Claimants have previously argued, the Tribunal should not give any special weight to Article 1128 submissions, which are no more than non-binding, post-execution submissions by respondent governments whose interests in defeating claims filed by NAFTA investors against them are aligned with the Respondent’s. See Claimants’ Observations on Article 1128 Submissions (Mar. 30, 2018), ¶¶ 3–14; Rejoinder, ¶¶ 333-340; see also Concurring and Dissenting Opinion of Judge Charles N. Brower in *Mesa Power LLC v Government of Canada* (March 25, 2016), **CL-40**, ¶ 30.

²⁶ See Counter-Memorial, ¶¶ 440-443, 468-470.

²⁷ *International Thunderbird Gaming Corp. v. The United Mexican States*, UNCITRAL, Award (Jan. 26, 2006) (“*Thunderbird v. Mexico*”), **CL-7**, ¶¶ 114-118.

²⁸ *Thunderbird v. Mexico*, **CL-7**, ¶¶ 115, 117.

²⁹ *Thunderbird v. Mexico*, **CL-7**, ¶¶ 117-118.

³⁰ *Ethyl v. Canada*, **CL-5**, ¶¶ 89-91.

characterizes its requirements as ‘Conditions Precedent,’ it does not say to what they are precedent,” and concluded that “Canada’s contention that they are a precondition to jurisdiction, as opposed to a prerequisite to admissibility, is not borne out by the text of Article 1121, which must govern.”³¹

- (iii) The *Pope & Talbot v. Canada* tribunal, in rejecting Canada’s argument that certain claims were time-barred because the applicable waiver was submitted too late, explained that:

[T]here is nothing in Article 1121 preventing a waiver from having retroactive effect to validate a claim commenced before that date. The requirement in Article 1121(3) that a waiver required by Article 1121 shall be included in the submission of a claim to arbitration does not necessarily entail that such a requirement is a necessary prerequisite before a claim can competently be made. Rather it is a requirement that before the Tribunal entertain the claim the waiver shall have been effected.³²

24. As the Tribunal observes,³³ Article 1121 is titled “Conditions Precedent to Submission of a Claim to Arbitration,” which is consistent with viewing compliance with the formal requirements of Article 1121 as raising only issues of admissibility, not jurisdiction. Specifically, nothing in the title of Article 1121 suggests or requires that a Tribunal be deprived of jurisdiction and, therefore, that a claim cannot be submitted to arbitration pursuant to Article 1137 if there are formal defects with the claimant’s expression of its consent and waiver when the RFA is filed with ICSID. The *Thunderbird* tribunal squarely addressed this question, rejecting Mexico’s argument that failure to submit written waivers at the time of submission to arbitration invalidates the submission and deprives the tribunal of jurisdiction.³⁴ The *Thunderbird* tribunal explained that the requirement to attach written waivers with the RFA is “purely formal,” and thus does not mandate a jurisdictional dismissal.³⁵

25. Had the NAFTA Parties wanted to make Article 1121 a condition to their consent to arbitrate, they could and would have done so. Article 1122(1) does not read, for example, “Each Party’s consent to arbitration is conditioned on compliance with Article 1121 before a claim is submitted to arbitration.” And as noted above, pursuant to Article 1122(2), an investor’s

³¹ *Ethyl v. Canada*, **CL-5**, ¶ 91.

³² *Pope & Talbot v. Canada*, Decision on Harmac Motion, **CL-6**, ¶ 18 (emphasis added).

³³ See Procedural Order No. 5, tribunal’s question 3(i).

³⁴ *Thunderbird v. Mexico*, **CL-7**, ¶¶ 114-118.

³⁵ *Thunderbird v. Mexico*, **CL-7**, ¶ 117.

submission of a claim to arbitration satisfies the requirement of “written consent of the parties” and perfects the tribunal’s jurisdiction to hear the dispute.³⁶ This is a further reason to read the consent and waiver requirements of Article 1121 like the tribunals in *Ethyl* and *Pope & Talbot* did: as “conditions precedent” only to the admissibility of a claim, and not the tribunal’s jurisdiction.

26. Importantly, even on the hypothetical (but erroneous) reading that the consents and waivers constitute requirements that condition a NAFTA Party’s consent,³⁷ it would only deprive a tribunal of jurisdiction to consider the claims if the applicable consents and waivers remain absent by the time the tribunal decides on the jurisdictional objections. Where an investor refuses to consent to arbitration, the tribunal has no jurisdiction to hear the case, as there is no arbitration agreement to speak of. However, where there are formal defects in compliance with Article 1121 and an investor has taken the steps to cure those defects, there is no jurisdictional impediment to the tribunal’s consideration of the claims.

27. Thus, the arbitration cannot move forward if an investor refuses to submit consents and waivers, not because the tribunal has no jurisdiction, but because the claims have not satisfied all “conditions precedent” to the admissibility of the claim by the time the tribunal assesses a respondent’s objections to the claims moving forward to the merits phase. This preserves the *effet utile* of the term “Conditions Precedent,” by requiring that investors meet all the requirements by the time the tribunal resolves the objections before it.³⁸

28. In this case, all claimant investors and enterprises have submitted valid consents and waivers. Claimants have not initiated or pursued concurrent remedies in Mexico and have validly and repeatedly consented to the present arbitration proceeding. With respect to consent, even ignoring Claimants’ valid written expressions of consent through the RFA and their POAs, Claimants’ multiple and unequivocal expressions of consent following the submission of the RFA would have cured any supposed defects with their initial consents, leaving no reasonable doubt as to Claimants’ compliance with Article 1121. Accordingly, Mexico’s Article 1121 objections must be dismissed in its entirety.

³⁶ See Procedural Order No. 5, tribunal’s question 3(iv).

³⁷ See Procedural Order No. 5, tribunal’s question 3(i).

³⁸ See Procedural Order No. 5, tribunal’s question 2(i).

**III. THE NAFTA PARTIES' CONSENT UNDER ARTICLE 1122 IS NOT
CONDITIONED ON THE DISPUTING INVESTORS' COMPLIANCE WITH
EVERY DETAIL OF EVERY PROCEDURAL PROVISION OF THE NAFTA**

29. The NAFTA Parties enshrined their consent to arbitrate investment disputes under the NAFTA in Article 1122. The arbitration that would follow an investor's acceptance of the NAFTA Party's consent would be carried out "in accordance with the procedures set out in [the NAFTA]." In this context, the reference to "procedures" in Article 1122 must be read to refer to the procedures set out in NAFTA Articles 1123 through 1138, the NAFTA provisions that deal with procedural issues appurtenant to the arbitral proceedings that would follow. This reference to "procedures", however, does not mean that the NAFTA Parties conditioned their consent to arbitrate on an investor's compliance with every single detail of every procedural provision in the Treaty, only that the ensuing arbitration will be conducted in keeping with the procedural articles that follow Article 1122.

**A. The NAFTA Parties Consented to Settle Disputes in an Arbitration
Conducted Following the Procedures Set Out in Articles 1123 through 1138**

30. Articles 1121 and 1122 contain the exact same phrase "in accordance with the procedures set out in this Agreement," which modifies the term "arbitration" in each provision.³⁹ The phrase "in accordance with" does not restrict the NAFTA Parties' consent; Mexico's suggestion that this simple phrase adds a long list of mandatory jurisdictional preconditions that must be met by claimants failing which their claims are jurisdictionally barred is erroneous and contrary to principles of treaty interpretation.

31. The VCLT requires that Article 1122 be read in good faith, in accordance with its ordinary meaning, in context with Article 1121, and considering the object and purpose of the NAFTA.⁴⁰

32. Fundamental principles of statutory and treaty interpretation require that identical phrases employed by the drafters of a treaty in two consecutive provisions (here, Articles 1121 and 1122) be given the same meaning.⁴¹ NAFTA tribunals have followed this basic principle of interpretation, noting that terminology used repeatedly in the NAFTA should be given the same

³⁹ See Procedural Order No. 5, tribunal's question 4(i).

⁴⁰ VCLT, Article 31.

⁴¹ See Procedural Order No. 5, tribunal's question 4(i)(d).

meaning throughout the treaty.⁴² As a result, the phrase “in accordance with the procedures set out” can only be read as modifying the term “arbitration,” and cannot be read as modifying the term “consent” in each of those NAFTA articles.

33. Article 1121 provides that the “investor consents to arbitration in accordance with the procedures set out in this Agreement.” Chapter Eleven, however, does not set out “procedures” (or steps) for how an investor is to express its consent; the only single act required for the investor to consent is to do so in writing in the terms provided by Article 1121. Accordingly, Article 1121’s use of the phrase “in accordance with [NAFTA] procedures” cannot be read as modifying the term “consent”—since the only “procedure” for an investor to follow in expressing its consent is a single act laid out in the same provision—and must be read as modifying the term “arbitration.”⁴³

34. Similarly, Article 1122, titled “Consent to Arbitration,” records the NAFTA Parties’ open offer of consent to arbitrate.⁴⁴ There are no “procedures” for respondent governments to follow in order to express their consent; they already have granted it through Article 1122.

35. Thus, the investor and the respondent government both consent to an arbitration to be conducted under the procedures set out in the NAFTA. And this must mean that they have consented to arbitrate in accordance with the arbitral procedures that follow in the text of the Treaty — those laid out in Articles 1123 through 1138. As the *ADF v. USA* tribunal explained, the phrase “procedures set out in the [NAFTA]” does not delimit the boundaries of the disputing parties’ consent.⁴⁵ Chapter Eleven does not set out “procedures”—or steps—for either investors or respondent governments to follow in order to express their consent, nor does it restrict their consent based on the other party’s compliance with the requirements of Articles 1119 or 1121. In fact, as Claimants already have observed, Article 1122 does not refer to Articles 1119 or 1121 at all.

36. Chapter Eleven does, however, set out detailed arbitral “procedures” defining how the ensuing arbitration is to be conducted, which are set out in Articles 1123 through 1138. These procedural provisions govern a broad swath of aspects that are essential to the arbitration

⁴² *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003) (“*ADF v. USA*”), **CL-18**, ¶¶ 132-133; *see also Ratzlaf v. United States*, 510 U.S. 135, 143 (1994), **CL-57** (“A term appearing in several places in a statutory text is generally read the same way each time it appears.”).

⁴³ *See* Procedural Order No. 5, tribunal’s question 4(i)(a).

⁴⁴ *See* Procedural Order No. 5, tribunal’s question 4(i)(b); Counter-Memorial, ¶¶ 410, 414; Rejoinder, ¶¶ 366, 371.

⁴⁵ *ADF v. USA*, **CL-18**, ¶ 133 (“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.”).

proceeding, from the appointment of arbitrators and constitution of the tribunal (Arts. 1123-1125), consolidation (Art. 1126), notice to and participation by other NAFTA parties (Arts. 1127-1128), exchange of documents (Art. 1129), place of the proceeding (Art. 1130), governing law (Art. 1131), and expert evidence (Art. 1133), to the availability of interim measures of protection (Art. 1134) and the effect and finality of an award (Arts. 1135-1136). Common sense and the ordinary meaning of the word “procedures” thus militate in favor of reading the phrase “in accordance with the procedures set out in [the NAFTA]” to refer to the procedural provisions of Articles 1123-1138, and not as a limit or condition to the respondent state’s consent to arbitration for noncompliance with Articles 1119 and 1121.

37. Had the NAFTA Parties wanted to make, for example, Articles 1119 and 1121 a condition to making effective their offer to arbitrate and thus a condition to jurisdiction, they very easily could have done so by stating this clearly in Article 1122. For example, the NAFTA Parties could have expressly provided that their consent to arbitration is “conditioned on the disputing investor’s strict compliance with all provisions of the treaty including those embodied in Articles 1119-1121 before investors can validly submit their claims to arbitration.” They did not, and importing such a substantive and impactful provision into the NAFTA by operation of a phrase whose ordinary meaning provides otherwise would run counter to fundamental principles of treaty interpretation.

38. As noted, the object and purpose of the NAFTA is to “create effective procedures for the implementation and application of [NAFTA],” and to “establish[] a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties ... and due process before an impartial tribunal.”⁴⁶ An interpretation of Article 1122 that imports multiple jurisdictional traps not expressly spelled out in that article to block investors from pursuing their claims runs counter to this object and purpose. As 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. ... 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.⁴⁷

⁴⁶ NAFTA Article 102; NAFTA Article 1115.

⁴⁷ *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award Concerning the Motion by Government of Canada Respecting the Claim Based Upon Imposition of the “Super Fee”(Aug. 7, 2000), **CL-19**, ¶ 26.

39. Mexico’s citations to generic passages in various NAFTA awards, such as *Methanex*, *Canfor*, and *Bilcon*, in support of its contrary, strained interpretation of Article 1122 are unavailing. As Claimants have shown, these generic passages are *obiter dicta* and a careful analysis of the awards reveals that they do not address the particular issues in this proceeding—such as, for example, whether the omission of names and addresses in the notice of intent constitutes a jurisdictional bar.⁴⁸ As Mexico itself appreciates, in many NAFTA cases, tribunals have exercised jurisdiction when the investor is found to have “sufficiently complied” with the procedural rules at issue.⁴⁹ Tribunals carefully distinguish between technical and substantive non-compliance and only decline to hear the claims where there are serious, material defects in compliance, such as in *Waste Management (I)*, where the claimant continued to prosecute two suits and initiated an arbitration in complete violation of the waiver requirement.⁵⁰

40. Applying the principles of treaty interpretation embodied in the VCLT, it is accordingly clear that the phrase “in accordance with the procedures set out in this Agreement” does not modify the term “consent” in Articles 1121 and 1122, but the term “arbitration.” Consequently, as the NAFTA jurisprudence demonstrates, compliance with procedural provisions such as Article 1119 raises only a matter of admissibility of the claims presented and does not affect the Tribunal’s jurisdiction over the Claimants or their claims.

B. The NAFTA Parties’ Consent Under Article 1122 Is Not Conditioned on Compliance with Article 1120

41. Alternatively, the Tribunal asks the parties to comment on whether the NAFTA Parties’ consent under NAFTA Article 1122 should be interpreted to be conditioned on compliance with the provisions of Article 1120, in particular with the six-month waiting period.⁵¹ In short, Claimants posit that the answer to that question is “no.” Claimants understand that observance of the waiting period provided in Article 1120, like compliance with the requirements of Articles 1119 and 1121, goes to the admissibility of the claim, rather than to the tribunal’s jurisdiction to hear a claim, such that failure to observe the six-month waiting period set out in Article 1120 can

⁴⁸ Counter-Memorial, ¶¶ 350-365; Rejoinder, ¶¶ 315-332.

⁴⁹ Reply, ¶ 137.

⁵⁰ *Waste Management, Inc. v. United Mexican States (I)*, ICSID Case No. ARB/98/2, Award (Jun. 2, 2000), **RL-019**, ¶¶ 25, 28.

⁵¹ See Procedural Order No. 5, tribunal’s question 4(ii).

be cured or waived, allowing a tribunal to decide claims presented by claimants who failed to fully comply with the waiting period.

42. As a matter of treaty interpretation, Claimants maintain that this reading of Article 1120, as articulated in the preceding section, best comports with the ordinary meaning of the word “procedures” and with the structure and order of the relevant treaty provisions: the NAFTA State Parties expressed their open offer of consent to arbitration of investor disputes through Article 1122 in accordance with the procedural provisions set out in Articles 1123-1138. As explained above, this reading gives full effect to the ordinary meaning of Article 1122, harmonizes the use of the phrase “in accordance with the procedures” in that article with the use of the same phrase in Article 1121, and reflects the procedural nature of the provisions included in Articles 1123-1138.

43. The proposed alternative interpretation in which the “procedures” referred to in Article 1122 were meant to mean compliance with the requirements of Article 1120, on the other hand, yields a less harmonious (and less logical) reading of the relevant provisions, as the phrase “in accordance with the procedures” (which is not found in Article 1120 at all) would refer to one set of procedures in relation to Article 1121 and another in connection with Article 1122.

44. Even if the proposed alternative reading were correct (and assuming, *arguendo*, that compliance with the requirements of Article 1120 went to the Tribunal’s jurisdiction), however, it would not alter the result here. As the Tribunal points out, Article 1120 allows a disputing investor to submit a claim to arbitration if six months have elapsed since the events giving rise to the claim, and gives the disputing investor an option to submit the claim to arbitration pursuant to one of three sets of rules.⁵² Here, there is no dispute that Claimants submitted their claims to arbitration in June 2016, more than six months after the events at issue, and that they chose to submit their claims under the ICSID Additional Facility and pursuant to the ICSID Additional Facility Rules.⁵³ Indeed, Mexico has not argued that Claimants have run afoul of NAFTA Article 1120.⁵⁴ Therefore, there can be no question that Claimants complied with Article 1120’s procedures.

⁵² See Procedural Order No. 5, tribunal’s question 4(ii)(b).

⁵³ RFA, ¶ 114 (“By this Request for Arbitration, Claimants accept Mexico’s offer, and hereby submit the present dispute to arbitration under the Additional Facility Rules of ICSID.”); RFA, Section VI.A.4 (“Agreement to Submit Disputes Under the NAFTA to the Additional Facility”).

⁵⁴ Mexico has not challenged Claimants’ compliance with the six-month waiting period and has expressly affirmed that it is not challenging Claimants’ compliance with the ICSID Additional Facility Rules. See Respondent’s Supplemental Submission (Apr. 25, 2018), ¶ 21.

45. Thus, even if the Tribunal is minded to interpret the phrase “in accordance with the procedures” in Article 1122 as a reference to the requirements of Article 1120, and to conclude that noncompliance with those requirements carries jurisdictional implications, it must nonetheless find that it has jurisdiction *ratione voluntatis* over the parties and the claims because the Claimants in fact complied with that provision of the treaty.

IV. CLAIMANTS COMPLIED WITH ARTICLE 1119 AND THE TRIBUNAL HAS JURISDICTION OVER ALL CLAIMS AND CLAIMANTS IN THIS DISPUTE

46. Claimants complied with Article 1119 by delivering the 2014 Notice of Intent and placing Mexico on actual notice of the NAFTA dispute. In any event, given Mexico’s disinterest in engaging Claimants in good faith negotiations, requiring the Additional Claimants to issue additional notices of intent would have been entirely futile. Mexico’s Article 1119 objection departs drastically from the notice of intent requirement’s object and purpose and is based on an erroneous interpretation that has been repeatedly rejected by investment tribunals.

A. The 2014 Notice of Intent Was Submitted on Behalf of All Claimants

47. The Controlling Disputing Investors submitted the 2014 Notice of Intent for the benefit and on behalf of all Claimant investors.

48. As the record evidence demonstrates, the Controlling Disputing Investors, and more specifically Mr. Gordon Burr,⁵⁵ had the authority and power to issue the 2014 Notice of Intent on behalf of all the U.S. claimant investors and on behalf of all the casino enterprises.⁵⁶

49. The U.S. investors entrusted the Controlling Disputing Investors with the obligation to manage and protect their investments.⁵⁷ In fact, each of the Claimant investors has submitted witness statements affirming that they expressly delegated management of their claims against Mexico to their controlling co-investors led by Mr. Burr, Ms. Burr, and Mr. Conley.⁵⁸

⁵⁵ G. Burr Eng. Tr. (Day 2), 353:1-9.

⁵⁶ G. Burr Eng. Tr. (Day 2), 351:9-14; E. Burr Eng. Tr. (Day 2), 503:19-504:13; 508:8-11; 511:18-512:1; E. Burr First Witness Statement, **CWS-2**, ¶ 139; *see also* Letter from Claimants in Response to Mexico’s Objection to Claimants’ Request for Approval to Access the ICSID Additional Facility, Annex C (Jul. 21, 2016), p. 15 (all claimant shareholders adopting the 2014 Notice of Intent and attesting to their knowledge of the 2014 Notice and the events that ensued), **C-121**; Counter-Memorial, ¶ 289; Rejoinder, ¶¶ 219, 222, 374.

⁵⁷ N. Ayervais Eng. Tr. (Day 4), 868:2-8; E. Burr Eng. Tr. (Day 2), 509:17-20; 510: 7-8; Counter-Memorial, ¶¶ 289-302; Rejoinder, ¶ 221.

⁵⁸ Claimant Witness Statements, **CWS-16–CWS-47**, Section II; **CWS-48–CWS-49**, Section I; N. Ayervais Witness Statement, **CWS-12**, Section II.

50. All Claimants paid to engage White & Case, the law firm that initially advised them on their dispute with Mexico,⁵⁹ and were kept apprised of the steps taken on their behalf to initiate the NAFTA arbitration,⁶⁰ including through investor updates, conference calls, and in person conversations.⁶¹ The 2014 Notice, which White & Case sent as part of the engagement for which all Claimants paid, was issued on behalf of *all* the Claimant investors after repeated consultations and with the knowledge and informed consent of each one of the Claimants.⁶²

51. As Mr. Ayervais testified at the Hearing, “all the day-to-day and significant decision-making is ascribed to the managers, which in this case primarily were Gordon Burr and John Conley. [...] Erin Burr was [also] critical and key to the day-to-day operations.”⁶³ According to Mr. Ayervais, “the owners entrusted [the management team] with the obligation to protect their investments. And so everything they ever did, for right or wrong, was on behalf of the investors.”⁶⁴ Mr. Ayervais further explained he was not “concerned” that his name was not listed in the 2014 NOI, as the people whose names were in the Notice “represented me and all the investors.”⁶⁵

52. No Claimant investor ever objected to any of the actions taken on their behalf to enforce their rights under the NAFTA.⁶⁶ On the contrary, each Claimant was supportive of the actions taken by the Controlling Disputing Investors on their behalf in protecting their investments, including filing the 2014 Notice of Intent.⁶⁷

53. As Claimants have noted, *Philip Morris v. Uruguay* 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 to satisfy

⁵⁹ G. Burr Eng. Tr. (Day 2), 349:12-16; 463:19-464:1; E. Burr Eng. Tr. (Day 2), 485:12-19.

⁶⁰ Counter-Memorial, ¶¶ 291, 293; G. Burr First Witness Statement, **CWS-1**, ¶ 39; E. Burr First Witness Statement, **CWS-2**, ¶ 139.

⁶¹ G. Burr Eng. Tr. (Day 2), 350:19-351:3; 351:22-352:5; E. Burr Eng. Tr. (Day 2), 480:2-7; 481:1-486:5; 508: 9-11; 513:5-10; N. Ayervais Eng. Tr. (Day 4), 870:10-871:6; *see also* Counter-Memorial, ¶ 429.

⁶² Counter-Memorial, ¶¶ 291-293; Rejoinder, ¶ 219.

⁶³ N. Ayervais Eng. Tr. (Day 4), 866:2-9.

⁶⁴ N. Ayervais Eng. Tr. (Day 4), 868: 2-8.

⁶⁵ N. Ayervais Eng. Tr. (Day 4), 867:21; 868:17-20.

⁶⁶ G. Burr Eng. Tr. (Day 2), 450:22-451:10; E. Burr Eng. Tr. (Day 2), 482:15-22; E. Burr First Witness Statement, **CWS-2**, ¶ 138; Counter-Memorial, ¶ 293.

⁶⁷ E. Burr Eng. Tr. (Day 2), 481:5; 482:15-22; 485:9-11; 513:5-10.

the procedures as to *all* of them.⁶⁸ As in *Philip Morris*, there is a complete identity between the Controlling Disputing Investors who issued the 2014 Notice and the Additional Claimants: all claimant investors are pursuing the *same claims* in relation to the *same harm* caused by the *same measures* to the *same investments*. Furthermore, not only are the claimant investors' positions and interests identical, but they also were closely coordinated at all times.⁶⁹

54. Precluding the Additional Claimants from pursuing their claims under these circumstances would elevate form over substance at the expense of the NAFTA's object and purpose to promote and protect investment, and to the detriment of the most basic notions of fairness and justice. Given the uniformity of interests and positions among all Claimants, the Tribunal should find that Claimants have collectively complied with Article 1119.

B. Mexico's Refusal to Amicably Consult and Negotiate with Claimants Demonstrates the Futility of its Notice Objection

55. The 2014 Notice of Intent placed Mexico on actual notice that U.S. investors involved in the casino venture at issue would pursue their rights under the NAFTA.⁷⁰ Claimants delivered the 2014 Notice as part of their ongoing efforts to negotiate an amicable resolution of the dispute over a two-year period.⁷¹ During this period, however, responsible Mexican officials repeatedly refused to meet with Claimants, much less engage in meaningful consultation and negotiation. Mexico was never interested in settling the dispute before heading to international arbitration, demonstrating that issuing another notice would have been an exercise in futility.

56. Even before delivering the 2014 Notice of Intent, Claimants engaged in numerous efforts to negotiate with Mexico's officials, including:

- (i) the White & Case Letter, seeking Mexico's "assistance in remedying this situation... in order to avoid an escalation of the dispute and recourse to arbitration";⁷²

⁶⁸ Counter-Memorial, ¶¶ 286-288; Rejoinder, ¶¶ 225-234; *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.

⁶⁹ Claimant Witness Statements, **CWS-16 – CWS-47**, Section II; **CWS-48 – CWS-49**, Section I; N. Ayervais Witness Statement, **CWS-12**, Section II.

⁷⁰ Counter-Memorial, ¶¶ 285-323; Rejoinder, ¶¶ 209-234.

⁷¹ Counter-Memorial, ¶¶ 303-321; Rejoinder, ¶¶ 216-218.

⁷² White & Case Letter (Jan. 16, 2013), **R-001**; Counter-Memorial, ¶ 304.

- (ii) the January 30, 2013 meeting between Mr. Gutiérrez and Mr. Vejar to address the concerns raised in the White & Case Letter;⁷³
- (iii) the February 28, 2013 meeting between Claimants, Economía, and SEGOB (Mr. Hugo Vera) to further discuss concerns raised in the White & Case Letter;⁷⁴
- (iv) in March 2013, Ms. Andrea Menaker, on behalf of Claimants, requested a meeting with SEGOB and Economía officials, but Mexico’s officials saw no need for a further meeting with Claimants if they were going to submit the dispute to international arbitration, as revealed in internal Economía emails;⁷⁵
- (v) Claimants’ engagement of Governor Richardson in April 2014 shortly after the illegal casino closures, who concluded that “*it was near impossible to change things around given the vehemence of the Mexican authorities and the optics of the situation*”;⁷⁶
- (vi) Claimants’ efforts to secure meetings with SEGOB through the U.S. Department of Commerce and the U.S. Embassy in Mexico, but with U.S. trade officials ultimately concluding that they were “unable to engage in a way that will change the outcome of [Claimants’] case” and that there was a “disconnect[] within the SEGOB ministry”;⁷⁷
- (vii) multiple in-person visits at SEGOB by Mr. Burr and Mr. Gutiérrez to try to speak with Ms. Salas, but she refused each time to meet with Claimants;⁷⁸
- (viii) Congressman Coffman’s letter to SEGOB on behalf of Mr. Burr requesting a meeting, which, as noted below, resulted in a purely perfunctory meeting;⁷⁹ and

⁷³ Counter-Memorial, ¶ 305; Rejoinder, ¶ 216; J. Gutiérrez First Witness Statement, **CWS-3**, ¶ 11.

⁷⁴ Counter-Memorial, ¶¶ 306-307; Rejoinder, ¶ 216; J. Gutiérrez First Witness Statement, **CWS-3**, ¶ 11.

⁷⁵ Rejoinder, ¶ 216; Email from Carlos Vejar Borrego to Salvador Behar Lavalle (Mar. 15, 2013), **C-132**.

⁷⁶ Counter-Memorial, ¶¶ 309, 312; Rejoinder, ¶¶ 216, 251; Letter from Governor Bill Richardson to Gordon Burr (June 6, 2014), **C-107** (emphasis added).

⁷⁷ Counter-Memorial, ¶¶ 390-391; Rejoinder, ¶ 251; Exchange of emails between Neil Ayervais, Cal Frye, Patrice Williams, and Caroline Croft (Apr-May, 2014), **C-101**; Exchange of emails between Neil Ayervais and Collen Fisher (May-June, 2014), p. 1, 4, **C-41**.

⁷⁸ Counter-Memorial, ¶¶ 313-315; Rejoinder, ¶¶ 216, 251; G. Burr First Witness Statement, **CWS-1**, ¶¶ 36-38; J. Gutiérrez First Witness Statement, **CWS-3**, ¶¶ 15-17.

⁷⁹ Counter-Memorial, ¶¶ 316-317; Rejoinder, ¶ 216; Letter from Congressman Coffman to Luis Enrique Miranda Nava (May 7, 2014), **C-86**.

(ix) Mr. Ayervais' letter to SEGOB requesting an explanation for the illegal closures, but Claimants were ignored by Ms. Salas in writing.⁸⁰

57. Even after Claimants delivered the 2014 Notice of Intent, Mexico continued to show no interest in resolving the dispute amicably. In June 2014, at the meeting between Mr. Burr, Mr. Gutiérrez, and Mr. Garay of SEGOB—which was held at Claimants' request and insistence—Mr. Garay “did not attempt to compromise or negotiate” with Claimants and ended the meeting “with the perfunctory promise that he would follow up.”⁸¹ He never did.⁸² Mr. Chow and Mr. Pelchat likewise reported from their meetings with Ms. Salas and Mr. Cangas that SEGOB was “unwilling to allow the Casinos to reopen if they were directly owned or controlled in any fashion by any of the U.S. citizen shareholders of the Juegos Companies.”⁸³

58. It bears note that Mexico's single witness, Ms. Ana Carla Martínez, confirmed in her testimony that she had no personal knowledge of *any* of Claimants' attempts to obtain meetings with Mexican officials to seek amicable consultations with them.⁸⁴ Mexico chose not to call any of the SEGOB or Economía officials that participated in meetings with Claimants, or those with personal knowledge of Claimants' multiple requests for meetings, and Claimants' recounting of their treatment by the Mexican government stands undisputed.⁸⁵ And as discussed further below, there is no indication in Ms. Martínez's witness statement or testimony that Mexico ever was interested in engaging Claimants in discussions to amicably resolve the dispute. On the contrary, Ms. Martínez confirmed SEGOB's adamant and arbitrary opposition to Claimants' gaming permit and continued involvement in the Mexican casino industry, with SEGOB officials going so far as to assert that Claimants had a “dubious reputation.”⁸⁶ This is consistent with Mr. Carlos Vejar's

⁸⁰ Counter-Memorial, ¶¶ 318-319; Rejoinder, ¶¶ 216, 251; Letter from Neil Ayervais to Luis Enrique Miranda Nava (May 7, 2014), **C-102**; Letter from SEGOB to Neil Ayervais (May 20, 2014), **C-103**.

⁸¹ Counter-Memorial, ¶¶ 387-389; Rejoinder, ¶¶ 252-253; G. Burr First Witness Statement, **CWS-1**, ¶ 42; J. Gutiérrez First Witness Statement, **CWS-3**, ¶ 20; Email from Carlos Vejar Borrego to Landgrave Fuentes José Raúl (June 10, 2014), **C-142**.

⁸² *Id.*

⁸³ B. Chow Witness Statement, **CWS-11**, ¶¶ 9, 25; L. Pelchat First Witness Statement, **CWS-4**, ¶¶ 7-8; L. Pelchat Second Witness Statement, **CWS-10**, ¶ 9.

⁸⁴ A. Martínez Eng. Tr. (Day 1), 256:17-257:1.

⁸⁵ Rejoinder, ¶¶ 213-215.

⁸⁶ A. Martínez Eng. Tr. (Day 1), 285:20-286:3; 286:17-287:6.

explanation, as recounted by Mr. Gutiérrez, that he was unsure whether SEGOB would accept a meeting with Claimants and that SEGOB was *not willing to negotiate any amicable settlement with Claimants*.⁸⁷

59. Ms. Martínez's admission that Mexico had *never* sent a questionnaire in any other investment arbitration case underscores Mexico's flagrant lack of interest in negotiating with the Claimants.⁸⁸ Ms. Martínez's testimony that Mexico had engaged in consultations or negotiations in *all other investment arbitration cases*,⁸⁹ but did not do so with Claimants here, further confirms that Mexico was intent on creating arbitrary obstacles to derail the advancement of the Claimants' claims. As explained further below, Mexico's questionnaire did not evidence an intent to negotiate, but was a tool to fish information from the Claimants in order to get a head start in preparing its defenses. There is no mention of this questionnaire within the NAFTA's text and it is common ground that the Treaty does not require Claimants to respond to such a questionnaire in order for Mexico to engage them in consultations. We also know now thanks to Ms. Martínez's testimony that Mexico has engaged all other claimants who have filed NAFTA arbitrations against it in consultations without requiring them to respond to a questionnaire.

60. Lastly, through the Amended Notice of Intent, which listed the name and address of every single investor including the Additional Claimants, Claimants offered, once again, to meet with officials from the Mexican government.⁹⁰ Mexico again refused Claimants' efforts to engage in good faith negotiations with any of the claimant investors. Mexico's decision to ignore the Amended Notice of Intent stands as eloquent evidence that inclusion of the Additional Claimants' names and addresses in the 2014 Notice of Intent would not have altered the course of the non-existent negotiations, and that requiring a separate notice of intent would be an absolute exercise in futility.

C. Mexico Cannot Articulate Any Genuine Prejudice From The 2014 Notice Of Intent

61. Mexico has suffered no prejudice from the Additional Claimants' alleged non-compliance with Article 1119. Here, all parties were identified upon submission of the claim to arbitration

⁸⁷ J. Gutiérrez First Witness Statement, **CWS-3**, ¶ 22.

⁸⁸ A. Martínez Eng. Tr. (Day 2), 342:16-343:2.

⁸⁹ A. Martínez Eng. Tr. (Day 2), 343:8-16.

⁹⁰ Counter-Memorial, ¶¶ 398-399; Rejoinder, ¶¶ 270, 276; Amended Notice of Intent (Sep. 2, 2017), **R-007**.

(and again in the Amended NOI), before the Tribunal had been constituted and long before the parties had made substantive submissions in the proceeding. Mexico had been aware of the dispute for years, but instead of seeking consultations towards an amicable resolution, repeatedly rebuffed the Claimants' efforts to secure non-perfunctory meetings.

62. The only alleged prejudice that Mexico has managed to claim is its inability to solicit responses to its questionnaire from the Additional Claimants so that it could begin preparing its defenses sooner. Claimants' position regarding the questionnaire has always been that its purpose was to improperly fish for information and was completely unrelated to any attempt to amicably negotiate and resolve the dispute with Claimants.⁹¹ As Mr. Burr explained at the Hearing: "when I got this questionnaire, after lengthy discussion with White & Case and with my counsel in the U.S., and reviewing it, we decided that it was not a sincere attempt to meet with us and negotiate."⁹² And as Mr. Burr pointed out, there was no logical reason why Mexico had to precondition a meeting on response to the questionnaire, and had Mexico actually asked for a meeting, he "would have been there."⁹³ However, Mexico never reached out for a meeting, and is now left to disingenuously argue that its questionnaire evidenced its intent to negotiate.

63. Mr. Ayervais likewise explained that, in light of the numerous efforts he and other Claimants had taken to try and meet with Mexican officials, he viewed the questionnaire as "more tactical than serious."⁹⁴ According to Mr. Ayervais, counsel at White & Case also concluded that there was no obligation to respond to the questionnaire, and that it was "being done for a strategic rather than a meaningful purpose."⁹⁵ Mr. Ayervais also insightfully pointed out that in the world of litigation, "[i]f this isn't what it appears to be, then it's for some purpose to gain an advantage."⁹⁶

64. As mentioned above, Mexico's own witness confirms that, in sending the questionnaire, it was merely fishing for information, and that the questionnaire was not part of Mexico's standard process when faced with NAFTA claims, but a tool deployed only in this case. Ms. Ana Carla

⁹¹ Counter-Memorial, ¶¶ 84, 386, 394-395; Rejoinder, ¶ 345; Notice of Intent Questionnaire (July 24, 2014), **R-003**.

⁹² G. Burr Eng. Tr. (Day 2), 390:10-14.

⁹³ G. Burr Eng. Tr. (Day 2), 390:15-17; 391:1-4; 391:22-392:2.

⁹⁴ N. Ayervais Eng. Tr. (Day 4), 881:9-14.

⁹⁵ N. Ayervais Eng. Tr. (Day 4), 882:1-5.

⁹⁶ N. Ayervais Eng. Tr. (Day 4), 882:6-11.

Martínez testified that in *all* other NAFTA and international arbitration cases that she had participated in, Mexico had in fact reached out to investors through phone calls or participated in consultations and meetings.⁹⁷ Ms. Martínez also confirmed that this was the first time that Mexico used the questionnaire in a NAFTA case.⁹⁸ Mexico has not provided any evidence that it has used this (or even a similar) questionnaire in any other NAFTA arbitration of which it has been a part. As Ms. Martínez testified, Mexico did not seek consultations with the Claimants.⁹⁹

65. The Claimants, thus, did not answer Mexico's questionnaire because they and their counsel saw it for the ploy that it was. It bears underscoring that the Additional Claimants are represented by the same counsel as the Claimants whose names and addresses were included in the 2014 NOI, and in fact entrusted the handling of their claims to Mr. and Ms. Burr. Mexico's suggestion that it was prejudiced by the absence of the Additional Claimants' names and addresses from the 2014 NOI because it was unable to obtain answers to the questionnaire from them, thus, strains credulity.

66. Mexico has not and cannot articulate any genuine prejudice from the omission of the Additional Claimants' names and addresses. This is underscored by the fact that Mexico could have obtained answers if it simply agreed to meet and negotiate with Claimants. The Tribunal should accordingly reject the Respondent's Article 1119 objection and exercise jurisdiction over all claims and claimants.

D. Mexico's Objections Are Legally Erroneous; Technical Non-Compliance with Article 1119's Requirements Does Not Deprive a Tribunal of Jurisdiction

67. No NAFTA tribunal has ever declined to exercise jurisdiction over a claim or claimant based on alleged technical defects in the notice of intent. As the case law demonstrates and as a good faith interpretation of Article 1119 mandated by the VCLT confirms, Article 1119 is not a jurisdictional bar, but a procedural provision that, at most, goes to a claim's admissibility.

68. As explained in greater detail in sections II and III, *supra*, the NAFTA Parties did not condition their consent to arbitration to the disputing investor's strict compliance with the technical requirements of Article 1119. As the Tribunal observes, Article 1119 is not concerned with

⁹⁷ A. Martínez Eng. Tr. (Day 2), 343:8-17.

⁹⁸ A. Martínez Eng. Tr. (Day 2), 342:16-343:2.

⁹⁹ A. Martínez Eng. Tr. (Day 2), 337:19-22; 341:18-342:2.

submission of a *claim*, but only with submission of a notice of *intent*.¹⁰⁰ The notice of intent, in other words, does not commence the NAFTA arbitration proceeding (which is accomplished in accordance with NAFTA Article 1137)—it is simply a preliminary step designed to *avoid* escalation to international arbitration. In the words of the *ADF v. USA* tribunal, it is “difficult to conclude” that an investor’s failure to list all required information “in its Notice of *Intention* to Submit a Claim to Arbitration must result in the loss of jurisdiction.”¹⁰¹

69. The terms of Article 1119 must be interpreted in accordance with its object and purpose pursuant to the VCLT.¹⁰² As the Free Trade Commission explains in its statement on notices of intent, the object and purpose of Article 1119 is to facilitate amicable resolution of disputes through consultation and negotiation.¹⁰³ Article 1119 is a part of a series of provisions in the NAFTA aimed at encouraging amicable settlement of the dispute (i.e. Articles 1118 to 1120). The *Mesa Power v. Canada* tribunal explained it this way:

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.

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

¹⁰⁰ See Procedural Order No. 5, tribunal’s question 4(ii)(a).

¹⁰¹ *ADF v. USA*, **CL-18**, ¶ 134.

¹⁰² See Procedural Order No. 5, tribunal’s question 2(i).

¹⁰³ Statement of the Free Trade Commission on notices of intent to submit a claim to arbitration (Oct. 7, 2003), **CL-13**, p. 1 (“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.”).

it may partially overlap with the 90 days of Article 1119, it is a distinct condition deriving from a separate provision.¹⁰⁴

70. Ms. Kinnear *et al*'s account of the negotiating history of Article 1119 confirms this conclusion, explaining that “[t]he 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.”¹⁰⁵ The Tribunal should take this negotiating history as a supplementary means¹⁰⁶ to confirm the interpretive conclusion that Article 1119 is a procedural provision that raises, at most, admissibility concerns should the issue remain unresolved by the time the Tribunal is prepared to address the merits of the dispute.

71. The NAFTA drafters’ decision to omit the terms “conditions precedent” from Article 1119 explicitly negates Respondent’s assertion that Claimants’ Request for Arbitration was “null and void” as a result of alleged technical defects in the 2014 Notice of Intent.¹⁰⁷ As the Tribunal observes and as Claimants have previously noted,¹⁰⁸ Articles 1119 and 1120 do not contain the terms “conditions precedent to submission of a claim to arbitration,” despite their use in Article 1121. The NAFTA drafters decided to omit those terms, and the principle of *effet utile* requires the treaty interpreter to give effect to that choice.¹⁰⁹

72. Importantly, the use of the term “shall” in Articles 1119 and 1120 does not mandate that the tribunal decline jurisdiction for any non-compliance with the strict letter of the provisions. As Claimants have explained, and as Kinnear *et al*'s NAFTA Commentary points out, Article 1119

¹⁰⁴ *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award (Mar. 24, 2016), **CL-31**, ¶¶ 296-297 (emphases added).

¹⁰⁵ Article 1119 – Notice of Intent to Submit a Claim to Arbitration, in Meg N. Kinnear, Andrea K. Bjorklund, et al., *Investment Disputes under NAFTA* (Kluwer Law International 2006), **CL-15**, p. 1.

¹⁰⁶ VCLT, Article 32.

¹⁰⁷ Respondent’s Opening Statement, Eng. Tr. (Day 1), 43:20-21; *see also* Reply, ¶ 75.

¹⁰⁸ *See* Procedural Order No. 5, tribunal’s question 2(i); Rejoinder, ¶¶ 240-242.

¹⁰⁹ As explained earlier, presentation of the consents and waivers under Article 1121 goes only to admissibility, not jurisdiction, notwithstanding their characterization as “conditions precedent.” *See* sections II and III, *supra*. Accordingly, compliance with the notice of intent requirement under Article 1119 or the six-month waiting period under Article 1120 cannot be construed as jurisdictional preconditions, raising, at most, issues of admissibility.

“does not specify the consequences of failing to provide the necessary information in the notice of intent,” much less mandate a jurisdictional dismissal.¹¹⁰

73. The tribunal in *Ethyl v. Canada* addressed the effect of a claimant’s failure to comply with Articles 1119 and 1120. In *Ethyl*, Canada objected to the tribunal’s jurisdiction on the grounds that the claimant had “jumped the gun” by commencing arbitration too early, failing to comply with Articles 1119 and 1120.¹¹¹ The *Ethyl* tribunal, however, noted that compliance with Articles 1119 and 1120 would have been futile in the circumstances, as six months had passed in any event and there was no indication that Canada would have repealed or amended the disputed measure.¹¹² Accordingly, and with reference to the VCLT, the tribunal held that “neither Article 1119 nor Article 1120 should be interpreted to deprive this Tribunal of jurisdiction.”¹¹³

74. In determining the consequences of non-compliance with procedural provisions such as Articles 1119 and 1120, tribunals distinguish between technical and substantive non-compliance and resort to considerations such as prejudice, cure, and futility. Where there is merely a formal, technical defect in an investor’s compliance with a procedural requirement, tribunals either excuse the defect or allow investors an opportunity to cure them.¹¹⁴ On the other hand, an investor’s failure to comply in a substantive, material way causing provable prejudice to the respondent State or its failure to timely cure such a defect, can result in a tribunal’s refusal to admit a claim.¹¹⁵

75. In other words, a respondent Party may ask the tribunal to declare a claim inadmissible if there is substantive, uncorrected non-compliance and it can show, with concrete evidence, that it has suffered material prejudice or that compliance would not have been futile.¹¹⁶ As the record here shows, however, there has been no substantive, uncorrected noncompliance by Claimants,

¹¹⁰ Rejoinder, ¶ 239; Article 1119 – Notice of Intent to Submit a Claim to Arbitration, in Meg N. Kinnear, Andrea K. Bjorklund, et al., *Investment Disputes under NAFTA* (Kluwer Law International 2006), **CL-15**, p. 4 (“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.”) (emphasis added).

¹¹¹ *Ethyl v. Canada*, **CL-5**, ¶¶ 68, 80-81.

¹¹² *Ethyl v. Canada*, **CL-5**, ¶¶ 84-88.

¹¹³ *Ethyl v. Canada*, **CL-5**, ¶ 85, n. 34.

¹¹⁴ Counter-Memorial, ¶¶ 324-326; Rejoinder, ¶¶ 205, 282-302.

¹¹⁵ Counter-Memorial, ¶ 330.

¹¹⁶ See Procedural Order No. 5, tribunal’s question 2(ii).

Mexico did not suffer any prejudice from the alleged defects in the 2014 NOI, and requiring another notice of intent would have been an exercise in futility. This much is conclusively demonstrated by Mexico’s failure to even allege—much less prove—that it was ever interested in amicably resolving the dispute, even after Claimants delivered the Amended Notice of Intent to address Mexico’s purported concern over the omitted names and addresses.¹¹⁷

76. This approach accords with the interpretive principle of *effet utile* and the requirements of the VCLT. In distinguishing between technical and substantive defects, tribunals preserve the effect of the provision by requiring material compliance with it, while avoiding overly formalistic interpretations that would frustrate its object and purpose (and the object and purpose of the NAFTA more broadly). Once an investor cures the defect, any impediment to the admissibility of the claim would be removed, allowing the tribunal to consider the claim on its merits.

77. Investment tribunals, inside and outside the NAFTA context, consistently have rejected objections premised on alleged non-compliance with notice of intent and waiting periods in very similar factual circumstances (and in some cases, featuring non-compliances that are far more significant than Claimants’ alleged non-compliance with Article 1119 here), including:¹¹⁸

- (i) *Mondev v. USA* – the United States argued that its consent to NAFTA arbitration was not engaged as the claimant failed to reference a claim under Article 1117 in its notice of intent and omitted the address of the claimant’s subsidiary enterprise as required by Article 1119(a)—the very same provision at issue in this case.¹¹⁹ The *Mondev* tribunal treated these omissions as a technical matter and not as a jurisdictional bar, explaining that “[i]nternational law does not place emphasis on merely formal considerations, nor does it require new proceedings to be commenced where a merely procedural defect is involved.”¹²⁰
- (ii) *ADF v. USA* and *Chemtura v. Canada* – the two respondents argued to the respective tribunals that they were “bereft of jurisdiction” to consider certain claims that had been

¹¹⁷ Counter-Memorial, ¶¶ 383-395; Rejoinder, ¶¶ 248-262, 341-350.

¹¹⁸ In addition to the case law discussed here, Claimants have explained in prior submissions how other cases and authorities also support Claimants’ position. See Counter-Memorial, ¶¶ 331-349; Rejoinder, ¶¶ 280-314.

¹¹⁹ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002) (“*Mondev v. USA*”), **CL-17**, ¶¶ 42, 49.

¹²⁰ *Mondev v. USA*, **CL-17**, ¶ 86.

omitted from the investors' notices of intent.¹²¹ Both tribunals treated the omissions as procedural matters with no jurisdictional consequence, however, and noted that the respondents were not prejudiced by this technical omission.¹²²

- (iii) *Enkev Beheer v. Poland* – Article 8 of the Netherlands-Poland BIT requires investors to provide notice of their claims and then comply with a six-month waiting period before commencing arbitration. The Dutch claimant commenced arbitration *without noticing to Poland its treaty claims* and had not sought amicable settlement for those particular claims.¹²³ Before initiating arbitration, however, the claimant's Polish subsidiary and the Polish City of Łódź had attempted to amicably settle the underlying dispute, but negotiations were futile—even if the Dutch claimant had “formally become a party to such attempts at an amicable settlement (in regard to its own particular claims) under the Treaty, that also would have made no material difference to the events...”¹²⁴ The *Enkev Beheer* tribunal rejected Poland's jurisdictional objections and admitted the Dutch parent's claims, criticizing Poland for its “over-strict” and “unduly harsh” interpretation, “particularly so where the Claimant's non-compliance is only formalistic and where the Respondent has suffered no prejudice.”¹²⁵
- (iv) *Abaclat v. Argentina* – Over 60,000 Italian bondholders brought claims under the Argentina-Italy BIT, which contains an amicable consultation requirement before commencing arbitration. Although an Italian bondholders' association (“TFA”) attempted to pursue a negotiated settlement, Argentina objected that the claimants failed to satisfy the consultation requirement as it was “unclear how far TFA actually represented Claimants” and that Argentina “has no way of even knowing who such owners [of the bonds] are.”¹²⁶ However, given Argentina's failure to engage in any talks, the *Abaclat* tribunal concluded

¹²¹ *ADF v. USA*, CL-18, ¶¶ 127-139; *Chemtura v. Canada*, CL-21, ¶¶ 100-105.

¹²² *Id.*

¹²³ *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award (Apr. 14, 2014) (“*Enkev v. Poland*”), CL-58, ¶¶ 316-317.

¹²⁴ *Enkev v. Poland*, CL-58, ¶¶ 318-320.

¹²⁵ *Enkev v. Poland*, CL-58, ¶ 321.

¹²⁶ *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) (“*Abaclat v. Argentina*”), CL-38, ¶ 561, n. 187.

that “it would be futile to force the Parties to enter into a consultation exercise which is deemed to fail from the outset” and thus any non-compliance with the BIT’s consultation requirement could “not constitute a hurdle to the admissibility of Claimants’ claims.”¹²⁷ Furthermore, although new claimants were added subsequent to filing of the RFA, the *Abaclat* tribunal concluded that “the examination of ‘old’ and ‘new’ Claimants jointly did not cause any particular prejudice to Respondent.”¹²⁸ It further rejected Argentina’s argument that “the subsequent addition of Claimants ... should have been the object of separate proceedings,” and held that all Claimants’ claims were “admissible.”¹²⁹

- (v) *Bayindir v. Pakistan* – Pakistan argued that, in light of the claimant’s failure to file a BIT dispute notice, the tribunal had no jurisdiction as “the notice requirement constitutes a ‘carefully crafted’ limitation of the consent given by the parties to the [Turkey-Pakistan] BIT.”¹³⁰ The tribunal held that “the notice requirement does not constitute a prerequisite to jurisdiction,” and given Pakistan’s refusal to negotiate, requiring compliance was futile and would “amount to an unnecessary, overly formalistic approach.”¹³¹

78. Mexico has been unable to cite a single, apposite authority to contradict Claimants’ proposed interpretation of Article 1119, because no NAFTA tribunal has ever dismissed a claim based on the omission of names and addresses from a notice of intent. The Tribunal should follow this consistent jurisprudential approach and reject Mexico’s Article 1119 objections in its entirety.

E. The Amended Notice of Intent Cured Any Alleged Technical Defects

79. Claimants delivered the Amended Notice of Intent in good faith to address Mexico’s purported concern regarding the 2014 Notice.¹³² The Amended Notice of Intent included all the omitted investor names and addresses, thus curing any alleged technical non-compliance with

¹²⁷ *Abaclat v. Argentina*, CL-38, ¶¶ 563-564.

¹²⁸ *Abaclat v. Argentina*, CL-38, ¶ 609.

¹²⁹ *Abaclat v. Argentina*, CL-38, ¶¶ 610-611.

¹³⁰ *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) (“*Bayindir v. Pakistan*”), CL-23, ¶¶ 88, 97.

¹³¹ *Bayindir v. Pakistan*, CL-23, ¶¶ 100, 102.

¹³² See Counter-Memorial, ¶¶ 378-382; Rejoinder, ¶¶ 351-355.

Article 1119. As Claimants have explained and as further developed above, procedural defects can be cured even during arbitral proceedings, without affecting the Tribunal’s jurisdiction.¹³³

80. Claimants delivered the Amended Notice more than 90 days before the constitution of the Tribunal, and Mexico never contacted the Claimants—much less evidenced a genuine interest in amicably resolving the dispute—during that notice period. Accordingly, the Tribunal—were it to conclude that the initial 2014 Notice was defective—should find that the Amended Notice of Intent cured any alleged defects in Claimants’ compliance with Article 1119.

V. CLAIMANTS OWN AND CONTROL THE MEXICAN ENTERPRISES AND HAVE STANDING UNDER ARTICLE 1116 TO BRING THEIR OWN CLAIMS AND UNDER ARTICLE 1117 TO BRING CLAIMS ON BEHALF OF THE ENTERPRISES

A. Claimants Need Only Show that They Own Or Control the Mexican Enterprises; Mexico’s Attempts to Import New Standing Requirements Must Be Rejected

81. NAFTA Article 1117 grants an investor the right to sue on behalf of an enterprise that the investor “owns *or* controls directly *or* indirectly.”¹³⁴ Thus, as Claimants have argued, the NAFTA provides 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.¹³⁵ The investor only needs to establish *one* of these to bring Article 1117 claims.

82. There are no additional, hidden requirements to establish standing under Article 1117.¹³⁶ As NAFTA tribunals have repeatedly observed, Chapter Eleven provides a detailed and exhaustive set of rules and definitions for determining an investor’s standing, and in the face of this carefully-designed scheme, “there is no room for implying into the treaty additional requirements.”¹³⁷

¹³³ Counter-Memorial, ¶¶ 375-382; Rejoinder, ¶¶ 351-355; *Mondev v. USA*, CL-17, ¶ 50 (missing address required under Article 1119(a) was cured); *Philip Morris Brands et al v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013), CL-12, ¶ 144 (holding that a domestic litigation requirement was satisfied by actions occurring after the date the arbitration was instituted).

¹³⁴ NAFTA Article 1117 (emphasis added).

¹³⁵ Rejoinder, ¶¶ 34-38; Claimants’ Observations on Article 1128 Submissions, ¶¶ 39-42.

¹³⁶ Rejoinder, ¶¶ 27-33; Counter-Memorial, ¶¶ 156-159.

¹³⁷ *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), CL-36, ¶¶ 79-85 (rejecting Mexico’s attempt to import a *mens rea* requirement in the NAFTA standing rules); *see also Mondev v. USA*, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), CL-17, ¶ 79 (“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. ...

83. Notwithstanding the clear NAFTA text and consistent precedent, Mexico has attempted to graft onto the NAFTA novel, formalistic, and unduly restrictive jurisdictional requirements that are nowhere to be found in its plain text. Specifically, Mexico has argued that:

- (i) “full” or “virtually full” ownership is *required* to “own” an enterprise (contrary to the consensus that investment treaty protections are accorded to investments that are majority-owned by foreign investors);¹³⁸
- (ii) “control” of an enterprise can *only* be established as a legal matter, and cannot be established through factual forms of control (contrary to the holding of all NAFTA tribunals that have considered this issue to date, including the tribunal in *Thunderbird v. Mexico*);¹³⁹
- (iii) investors *must* hold an ownership interest in an enterprise to have standing (despite the clear terms of Article 1117 requiring only ownership *or* control);¹⁴⁰
- (iv) shareholders *must* execute a legal proxy instrument to bind their votes together in order to “control” a company (even though no NAFTA tribunal has ever required such an instrument).¹⁴¹

Each of Mexico’s newly-fashioned requirements is legally unsupported and *all of them must be rejected*.

84. The Tribunal has not asked the parties to address Mexico’s argument regarding full/virtually full ownership and the requirement that control be legal, as opposed to factual. Suffice it to say that both are unsupported by the plain text of the NAFTA and apposite jurisprudence. As Claimants have explained, the universal usage of “own” in investment treaty practice firmly supports majority ownership as the relevant benchmark, and as the Canadian Statement on Implementation of the NAFTA confirms, the Treaty adopted majority ownership as

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.”).

¹³⁸ Rejoinder, ¶¶ 39-46.

¹³⁹ Counter-Memorial, ¶¶ 160-163; Rejoinder, ¶¶ 47-64; *see also Thunderbird v. Mexico*, CL-7, ¶¶ 107-110.

¹⁴⁰ Rejoinder, ¶¶ 35-38.

¹⁴¹ Rejoinder, ¶¶ 65-67.

the relevant standard (not “full or virtually full” ownership).¹⁴² As for “control,” NAFTA tribunals have consistently held that “control” for purposes of Article 1117 is not limited to legal control, but includes managerial, voting, and other forms of factual control.¹⁴³

85. Mexico’s argument that share ownership in an enterprise is required to establish standing (point iii in the list above), on the other hand, prompted the Tribunal to ask whether “an investor [can] claim on behalf of an enterprise in which it legally holds no ownership interest at all but which it can prove it in fact controls directly or indirectly.”¹⁴⁴ As a threshold matter, Claimants note that Mexico’s argument in this regard relates only to Operadora Pesa, the only entity in which Claimants have no direct ownership stake. Claimants’ standing to bring Article 1117 claims on behalf of Operadora Pesa arises from Claimants’ “control” over the enterprise, and Claimants have never maintained that they “own” the enterprise for purposes of Article 1117.¹⁴⁵ The Tribunal’s question, however, must be answered in the affirmative.

86. Investors can establish standing under Article 1117 *either* through ownership *or* control. As the *Waste Management II* tribunal explained, “[t]he relevant provisions cover the full range of possibilities, including direct and indirect control and ownership.”¹⁴⁶ There is no reason or basis to read out the phrase “or controls” in Article 1117, as Mexico’s argument necessarily demands.

87. NAFTA case law confirms that investors are protected and can bring claims for damages to enterprises that they control—even if they hold no ownership interest in the enterprise at all. In *S.D. Myers v. Canada*, although the claimant (“SDMI”) did not own shares in the enterprise in question, the tribunal held that it was a protected “investor” and that the local Canadian enterprise was its “investment,” based on SDMI’s executive president’s “control” of managerial decisions of the Canadian enterprise.¹⁴⁷ This finding was upheld on review by the Federal Court of Canada, which noted that SDMI’s “control” was “not based on the legal ownership of shares, but on the

¹⁴² Rejoinder, ¶¶ 39-46; Canadian Statement on Implementation of the NAFTA, Canada Gazette, Part I, Jan. 1, 1994, **CL-47**, p. 147.

¹⁴³ Rejoinder, ¶¶ 47-64.

¹⁴⁴ See Procedural Order No. 5, tribunal’s question 1(ii).

¹⁴⁵ Rejoinder, ¶¶ 175-184.

¹⁴⁶ *Waste Management, Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), **CL-36**, ¶ 80.

¹⁴⁷ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (Nov. 13, 2000), **CL-30**, ¶¶ 227-231.

fact that [its executive president] controlled every decision, every investment, every move by [the local enterprise]” and that this fell within the “ordinary meaning of the word ‘controlled’.”¹⁴⁸

88. NAFTA Article 1139 is instructive on this point. As the Tribunal notes, Article 1139 defines “investment of an investor” as an “investment *owned or controlled directly or indirectly* by an investor.”¹⁴⁹ Article 1117 uses the almost identical phrase, “owns or controls directly or indirectly.” There is no reason to ascribe a different meaning to the same terms in the same treaty, and indeed, this would be contrary to a good faith interpretation of Article 1117 read in context as mandated by the VCLT. It would be incongruous and manifestly unreasonable to accept that an investor can “control” an enterprise for purposes of Article 1139 without share ownership but require share ownership for the same investor to “control” the same enterprise for purposes of Article 1117. In any event, Claimants remain entitled to claim damages to Operadora Pesa as the “investment” under Article 1139 over which they exercise “control.”¹⁵⁰ These arguments dispose of Mexico’s hyper-technical objection.

89. As with the prior point, Respondent’s argument that shareholders’ voting in connection with an enterprise may only show control if supported by an executed proxy instrument binding those votes together (point iv in the list above) prompted the Tribunal to ask the parties for “authorities addressing the question of whether a group of shareholders jointly holding a voting majority sufficient to exercise control over a company can be said to ‘control’ that company even where no contractually binding instrument requires any of them to exercise their voting rights in any particular way or as a block.”¹⁵¹

90. Investment tribunals have found that shareholders exercise “control” over a company when they jointly hold a voting majority of shares, without requiring a contractual instrument controlling the exercise of voting rights.

(i) In *von Pezold v. Zimbabwe*, the Swiss claimants’ ownership of a voting majority of shares in certain Zimbabwean enterprises led a tribunal to find that the shareholders exercised

¹⁴⁸ *Attorney General of Canada v. S.D. Myers, Inc.*, Reasons for Orders (Jan. 13, 2004), **CL-49**, ¶¶ 67-69.

¹⁴⁹ NAFTA Art. 1139 (emphasis added); *see* Procedural Order No. 5, tribunal’s question 1(ii).

¹⁵⁰ Claimants submitted to arbitration both Article 1116 claims on their own behalf and Article 1117 claims on behalf of their Mexican Enterprises. *See* Request for Arbitration, ¶ 1.

¹⁵¹ *See* Procedural Order No. 5, tribunal’s question 1(iii).

“control” over the enterprises,¹⁵² and that the enterprises consequently could claim Swiss nationality under the Swiss-Zimbabwean BIT by reason of having been “effectively controlled” by the Swiss claimants.¹⁵³ The *von Pezold* claimants voted as a block led by the principal Swiss claimant (“Elisabeth”).¹⁵⁴ Although Zimbabwe argued that part of the ownership comprising the voting majority was held by a German claimant with no Swiss nationality (“Rüdiger”), the tribunal was “satisfied” that “effective control (both factual and legal) [was] supported by the evidence” because Rüdiger “always voted” his ownership interest in the same manner as the Swiss claimants.¹⁵⁵

- Importantly, the *von Pezold* tribunal did not precondition its finding of “effective control (both factual and legal)” of the Zimbabwean companies on the existence of a contractual instrument requiring shareholders to vote in a particular way. Indeed, the Tribunal noted that the “day-to-day management” of the companies was “further evidence that they satisfy the requirements of the Swiss BIT.”¹⁵⁶
 - Furthermore, in respect of the companies in which the *von Pezold* claimants lacked a voting majority, the tribunal accepted that one of the claimant’s (“Heinrich”) management agreement gave the claimants “*de facto* control” over those companies.¹⁵⁷ Citing *Thunderbird*, the *von Pezold* tribunal held that “[c]ontrol of a company may be factual or effective (*de facto*) as well as legal.”¹⁵⁸
- (ii) In *Mcharg et al v. Iran*, four U.S. shareholders jointly holding 80% of an Iranian enterprise’s stock brought investment claims on their own behalf and also on behalf of the Iranian enterprise. The Iran-United States Claims Tribunal held that the four claimants could proceed with both types of claims, since it was “clear that American nationals held

¹⁵² *Bernhard von Pezold et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (Jul. 28, 2015) (“*von Pezold Award*”), **CL-59**, ¶ 324.

¹⁵³ *von Pezold Award*, **CL-59**, ¶ 226.

¹⁵⁴ *von Pezold Award*, **CL-59**, ¶ 221.

¹⁵⁵ *von Pezold Award*, **CL-59**, ¶¶ 221, 226.

¹⁵⁶ *von Pezold Award*, **CL-59**, ¶ 226.

¹⁵⁷ *von Pezold Award*, **CL-59**, ¶ 324.

¹⁵⁸ *von Pezold Award*, **CL-59**, ¶ 324.

sufficient ownership interests to control the corporation at the time the Claims arose.”¹⁵⁹ The Tribunal’s finding of “collective control” was made without requiring the existence of a contractual instrument to bind the U.S. shareholders’ votes together.

- (iii) In *Micula v. Romania*, the tribunal found that the Romanian local enterprises at issue were “controlled” by the Micula investors and thus should be treated as foreign enterprises for purposes of Article 25(2) of the ICSID Convention.¹⁶⁰ The Micula investors’ joint shareholding gave them majority ownership over all the Romanian enterprises at issue. There was no indication of any contractually binding instrument requiring the Micula investors to vote as a bloc, nor did the *Micula* tribunal require one.

91. In the end, what matters for purposes of Article 1117 is that the shareholders directly or indirectly “own” the enterprise through majority ownership, or alternatively, that they directly or indirectly exercise “control” over the enterprise. The existence of a legal instrument binding shareholders to vote in a certain way would be evidence that those shareholders are so bound but is not necessary to show that the investors in fact control the enterprise.

92. As described in greater detail below, Claimants here not only own each Mexican Enterprise (except for Operadora Pesa), but also control them directly and indirectly. Where, as here, a group of shareholders jointly hold a voting majority sufficient to exercise control over a company, those shareholders in fact “control” that company even where no contractually binding instrument requires any of them to exercise their voting rights in any particular way. The contrary conclusion would elevate form over function and fairness and penalize the Claimants and their meritorious claims “solely by reason of the corporate structure adopted by a claimant in order to organise the way in which it conducts its business affairs.”¹⁶¹

B. Ownership or Control of an Enterprise Is Only Relevant At the Time of the Treaty Breaches

93. The Tribunal has asked the parties to address “[w]hich is/are the relevant point(s) in time at which the investor must be able to prove ownership or control for the ownership/control

¹⁵⁹ *Ian L. Mcharg et al. v. The Islamic Republic of Iran*, IUSCT Case Nos. 10853, 10854, 10855, 10856 (282-10853/10854/10855/10856-1), Award (Dec. 17, 1986), **CL-60**, ¶ 54.

¹⁶⁰ *Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (Sept. 24, 2008), **CL-61**, ¶¶ 107-116.

¹⁶¹ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (Nov. 13, 2000), **CL-30**, ¶ 229.

requirement of Article 1117 to be met.”¹⁶² Claimants need only show ownership *or* control of their Mexican Enterprises *at the time of Mexico’s treaty breaches* to bring Article 1117 claims.

94. Several tribunals have held that the only relevant time to show ownership or control of an enterprise is at the time of the alleged treaty breaches, and that ownership/control at the commencement of arbitration is not relevant for standing purposes.

(i) The *Mondev v. USA* tribunal held that, under the NAFTA, there was no requirement for an investor to maintain its ownership/control of an investment at the time of submission to arbitration in order to have standing to bring NAFTA claims:

To require the claimant to maintain a continuing status as an investor under the law of the host State at the time the arbitration is commenced would tend to frustrate the very purpose of Chapter 11, which is to provide protection to investors against wrongful conduct including uncompensated expropriation of their investment and to do so throughout the lifetime of an investment up to the moment of its “sale or other disposition” (Article 1102(2)). On that basis, the Tribunal concludes that NAFTA should be interpreted broadly to cover any legal claims arising out of the treatment of an investment as defined in Article 1139, whether or not the investment subsists as such at the time of the treatment which is complained of.¹⁶³

Although *Mondev* did not specifically address ownership/control under Article 1117, its reasoning is directly applicable as it was addressing the claimant’s standing as an “investor” with an “investment owned or controlled directly or indirectly” under Article 1139, notwithstanding that the claimant lost its ownership of the investment when it commenced arbitration. As another tribunal observed in analyzing the *Mondev* holding, “the key factor is to have been an investor and to have suffered a wrong before the sale or disposition of its assets, without the need to remain an investor for purposes of the arbitration proceedings.”¹⁶⁴

(ii) The *Gallo v. Canada* NAFTA tribunal held that under Article 1117, “the plaintiff must prove that at the time when the alleged treaty violations occurred he or she owned or

¹⁶² See Procedural Order No. 5, tribunal’s question 1(i).

¹⁶³ *Mondev v. USA*, **CL-17**, ¶ 91; see also ¶ 80 (“In the Tribunal’s view, once an investment exists, it remains protected by NAFTA even after the enterprise in question may have failed... a person remains an investor for the purposes of Articles 1116 and 1117 even if the whole investment has been definitively expropriated, so that all that remains is a claim for compensation.”).

¹⁶⁴ *National Grid PLC v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction (Jun. 20, 2006), **CL-64**, ¶ 120.

controlled the ‘juridical person’ holding the investment.”¹⁶⁵ In discussing the “relevant time” to show ownership or control, the *Gallo* tribunal conspicuously omitted reference to the time of commencement of arbitration.¹⁶⁶

- (iii) The *Daimler v. Argentina* tribunal held that the claimant retained standing as a qualifying “investor” to bring treaty claims for damages sustained when it still owned the investment, notwithstanding the claimant’s sale of its shareholding to another entity before initiating arbitration.¹⁶⁷ The *Daimler* tribunal gave a sustained treatment of the issue, noting that many tribunals requiring ownership/control at the time of commencing arbitration were facing scenarios where a claimant sold its investment after commencement, not before, and thus were not directly addressing the question.¹⁶⁸ The *Daimler* tribunal concluded that “it should accord standing to any qualifying investor ... who suffered damages as a result of the allegedly offending governmental measures at the time that those measures were taken – provided that the investor did not otherwise relinquish its right to bring an ICSID claim.”¹⁶⁹
- (iv) The *EnCana v. Ecuador* tribunal held that ownership/control of a subsidiary enterprise at the commencement of arbitration is irrelevant for jurisdictional purposes, explaining that:

Provided loss or damage is caused to an investor by a breach of the Treaty, the cause of action is complete at that point; retention of the subsidiary (assuming it is within the investor’s power to retain it) serves no purpose as a jurisdictional requirement, though it may be relevant to questions of quantum.¹⁷⁰

95. There is thus strong support in NAFTA and other authorities for the proposition that an investor’s ownership or control of an enterprise is only relevant for jurisdictional purposes at the time the treaty breaches occurred. Some tribunals and commentators have opined that, as a general matter, a tribunal’s jurisdiction also must be ascertained at the time of commencement of

¹⁶⁵ *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award (Sept. 15, 2011) (“*Gallo v. Canada*”), **CL-37**, ¶ 332.

¹⁶⁶ *Gallo v. Canada*, **CL-37**, ¶¶ 326, 335-336.

¹⁶⁷ *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/01, Award (Aug. 22, 2012) (“*Daimler v. Argentina*”), **CL-63**, ¶ 154.

¹⁶⁸ *Daimler v. Argentina*, **CL-63**, ¶¶ 141-145.

¹⁶⁹ *Daimler v. Argentina*, **CL-63**, ¶ 145 (emphases omitted).

¹⁷⁰ *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award (Feb. 3, 2006), **CL-65**, ¶ 131; see also ¶ 132 (citing with approval the reasoning adopted by the *Mondev* tribunal).

arbitration.¹⁷¹ It bears noting, however, that the question of when jurisdiction is determined as a general matter is distinct from the question of the relevant dates to establish foreign ownership or control of an enterprise for purposes of NAFTA Article 1117, which should be answered in light of the text of the NAFTA. And nothing in the NAFTA requires that the Tribunal look to the moment when the arbitration was commenced as a relevant moment to establish ownership or control over an enterprise for purposes of Article 1117.

96. By its express terms, Article 1117 allows an investor, on behalf of an enterprise, to “submit to arbitration ... a claim that the other Party has breached an obligation ... and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.”¹⁷² The text of Article 1117 thus ties standing directly to the treaty breaches—it is ownership/control at the time the damage was caused to the enterprise that accords standing, and there is no additional requirement that ownership/control must be shown at the time of initiation of arbitration.

97. Finally, neither international law nor the NAFTA requires that investors must continue to own or control the enterprise until issuance of the arbitral award.¹⁷³ The authorities stand almost uniformly against this so-called “continuous ownership” requirement, except for the widely criticized *Loewen* case.

- (i) The *National Grid v. Argentina* tribunal held that sale of a claimant’s shares subsequent to the commencement of arbitration does not deprive an investor of its standing to bring treaty claims.¹⁷⁴
- (ii) The *El Paso v. Argentina* tribunal held that sale of an investment after the claims were registered does not “affect the Claimant’s standing and ICSID jurisdiction.”¹⁷⁵ The tribunal explained:

¹⁷¹ See, e.g., *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction (Sept. 8, 2006), **CL-62**, ¶ 159; *Daimler v. Argentina*, **CL-63**, ¶ 141, n. 248 (citing Christoph H. Schreuer, *THE ICSID CONVENTION, A COMMENTARY* (2009), p. 92); *Micula et al. v. Romania*, **CL-61**, ¶ 111.

¹⁷² NAFTA Article 1117 (emphasis added).

¹⁷³ Mexico itself previously recognized that this issue need not be decided, despite contending that such requirement exists. See Respondent’s Supplemental Submission, ¶ 83, n. 42.

¹⁷⁴ *National Grid PLC v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction (Jun. 20, 2006), **CL-64**, ¶¶ 114, 119-122.

¹⁷⁵ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (Apr. 27, 2006), **CL-66**, ¶ 131.

[T]here is no rule of continuous ownership of the investment. The reason for there not being such a rule in the ICSID/BIT context is that the issues addressed by those instruments are precisely those of confiscation, expropriation and nationalisation of foreign investments. Once the taking has occurred, there is nothing left except the possibility of using the ICSID/BIT mechanism. That purpose would be defeated if continuous ownership were required. Thus the claim continues to exist, *i.e.* the right to demand compensation for the injury suffered at the hands of the State remains – unless, of course, it can be shown that it was sold with the investment.¹⁷⁶

- (iii) Only the *Loewen v. USA* tribunal has declined jurisdiction based on the investor’s so-called failure to maintain continuous nationality after a corporate restructuring changed the investor’s nationality from Canadian to U.S.¹⁷⁷ The *Loewen* award, however, has been “the subject of intense scrutiny and criticism by international law scholars and investment arbitration practitioners,”¹⁷⁸ including by the International Law Commission, which noted that the continuous nationality rule is “unfair” as “many years might pass between the presentation of the claim and its final resolution.”¹⁷⁹

98. Just as implying a “continuous ownership” requirement into investment treaties that do not expressly provide for it would be “unfair”, implying a requirement that ownership or control be established not only at the time when the breaches occurred but also when the claim is submitted to arbitration would unjustly prejudice claimants who may have suffered harm at the hands of a respondent state years before the claim can be brought before a Tribunal. Additionally, and perhaps most importantly, such an interpretation of NAFTA Article 1117 not only would be untethered to the text of that provision but, as explained above, would run counter to it.

99. Importantly, however, the Tribunal need not reach or resolve this legal question in the instant arbitration, as Claimants owned *and* controlled their Mexican Enterprises both at the time of the breaches *and* at commencement of arbitration. As explained further below, with respect to the Juegos Companies in particular, Claimants have always maintained ownership of the

¹⁷⁶ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (Apr. 27, 2006), **CL-66**, ¶ 135.

¹⁷⁷ *Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award (Jun. 26, 2003), **CL-67**, ¶¶ 225-238.

¹⁷⁸ *Siag and Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (Jun. 1, 2009), **CL-68**, ¶ 498.

¹⁷⁹ ILC Draft Articles on Diplomatic Protection with commentaries (2006), **CL-71**, p. 32 (“the Commission was not prepared to follow the *Loewen* tribunal in adopting a blanket rule that nationality must be maintained to the date of resolution of the claim. Such a rule could be contrary to the interests of the individual, as many years might pass between the presentation of the claim and its final resolution and it could be unfair to penalize the individual for changing nationality, through marriage or naturalization, during this period.”).

companies, even after Messrs. Chow and Pelchat attempted (but failed) to transfer Claimants' shares to Grand Odyssey. This is sufficient for Article 1117 purposes. In terms of Claimants' control, Mexico at best can argue only that Claimants lost temporary board control but has been unable to disprove Claimants' abundant evidence establishing that they retained the legal right to control the enterprises at all times, including when they commenced this arbitration.

C. Mexico's Standing Objections Must Fail

100. Claimants bear the burden of proof to establish the necessary facts showing that the Tribunal has jurisdiction. The burden, however, is on the respondent to support its jurisdictional defenses. This is supported by NAFTA and other cases.¹⁸⁰

(i) As the *Gallo v. Canada* tribunal explained:

[A] claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted... But the principle *actori incumbit probatio* is a coin with two sides: the Claimant has to prove it case, and without evidence it will fail; but if the Respondent raises defences, of fraud or otherwise, the burden shifts, and the defences can only succeed if supported by evidence marshalled by the Respondent.¹⁸¹

(ii) The *von Pezold v. Zimbabwe* tribunal agreed, explaining that:

The general rule is that the party asserting the claim bears the burden of establishing it by proof. Where claims and counterclaims go to the same factual issue, each party bears the burden of proof as to its own contentions. There is no general notion of shifting of the burden of proof when jurisdictional objections are asserted. The Respondent in this case therefore bears the burden of proving its objections. Conversely, the Claimants must prove any facts asserted in response to the Respondent's objections and bear the overall burden of establishing that jurisdiction exists.¹⁸²

101. Claimants must establish the *necessary* jurisdictional facts only – thus, for the purposes of this proceeding, Claimants are not required to prove the entire shareholding history of the Juegos Companies, as Mexico has demanded. It was sufficient for Claimants to allege and provide evidence of their ownership or control of the Mexican Enterprises when the NAFTA breaches took place. Having done that in their briefing and during the Hearing, Claimants established that they (i) each have standing to bring claims on their own behalf under NAFTA Article 1116; and (ii) have standing to bring claims on behalf of all of the Mexican Enterprises (including Operadora

¹⁸⁰ See Procedural Order No. 5, tribunal's question 5.

¹⁸¹ *Gallo v. Canada*, CL-37, ¶ 277.

¹⁸² *von Pezold Award*, CL-59, ¶ 174.

Pesa for whom Claimants’ standing rests on their effective direct and indirect control of that company). Mexico then bears the burden of proving its jurisdictional objections and supporting allegations, including, for example:

- (i) that the Claimants supposedly restructured E-Games in an abusive way to gain standing for Article 1117 purposes;¹⁸³
- (ii) that the only acceptable form of proof to substantiate shareholding investments under the NAFTA are documents that have undergone certain Mexican law formalities;¹⁸⁴
- (iii) that Claimants agreed to transfer their shares in the Juegos Companies to Grand Odyssey and that such transfer of shares did in fact occur at the November 7, 2014 *asamblea*;¹⁸⁵ or
- (iv) that Claimants orchestrated with Mr. Chow a plan to deceive SEGOB officials by agreeing to allow Mr. Chow to prepare fraudulent minutes of the Juegos Companies’ November 2014 *asambleas*.¹⁸⁶

102. With respect to the standard of proof, investment tribunals generally apply a “preponderance of the evidence” or “balance of probabilities” standard.¹⁸⁷ Simply put, the case law does not support the exaggerated and progressively augmented evidentiary bar that Mexico has attempted to impose on Claimants in this proceeding.¹⁸⁸

- (i) The *Kardassopoulos v. Georgia* award described the standard of proof as follows:

[t]he Tribunal finds that the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings... does not impose on the Parties any burden of proof beyond a balance of probabilities.¹⁸⁹

- (ii) The *von Pezold v. Zimbabwe* tribunal also explained that:

¹⁸³ Respondent’s Opening Statement, Eng. Tr. (Day 1), 64:9-64:15; 71:20-71:22.

¹⁸⁴ Reply, ¶¶ 226-228; Respondent’s Supplemental Submission, ¶¶ 58-59; Respondent’s Application to Exclude New Evidence (Feb. 27, 2018), ¶¶ 19-20.

¹⁸⁵ Respondent’s Opening Statement, Eng. Tr. (Day 1), 63:18-64:1; Respondent’s Supplemental Submission, ¶ 45.

¹⁸⁶ Respondent’s Opening Statement, Eng. Tr. (Day 1), 67:13-21.

¹⁸⁷ See Procedural Order No. 5, tribunal’s question 6.

¹⁸⁸ Mexico has also imposed contradictory evidentiary demands on Claimants. Compare Reply, ¶ 215 (stating that “the best evidence of each investor’s shareholding... would be a witness statement from each investor.”) (emphasis in original) with Respondent’s Supplemental Submission, ¶ 35 (“the statements add nothing in terms of evidentiary support to the Claimants’ previous contentions regarding their alleged ownership of the Juegos Companies.”).

¹⁸⁹ *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Award (Mar. 3, 2010), **CL-69**, ¶ 229.

[i]n general, the standard of proof applied in international arbitration is that a claim must be proven on the “balance of probabilities”. There are no special circumstances that would warrant the application of a lower or higher standard of proof in the present case. ... The Tribunal does not consider there is any reason to depart from standard practice and both Parties must prove their claims on the balance of probabilities.¹⁹⁰

(iii) And the tribunal in *Unглаube v. Costa Rica* noted that:

[t]he degree to which evidence must be proven can generally be summarized as a “balance of probability,” “reasonable degree of probability” or a preponderance of the evidence. Because no single precise standard has been articulated, tribunals ultimately exercise discretion in this area.¹⁹¹

103. In this case, as explained in greater detail in the section that follows, Claimants have firmly and conclusively established their standing and the tribunal’s jurisdiction by showing their (a) ownership *and* control over the Juegos Companies; (b) ownership *and* control over E-Games; and (c) factual control over Operadora Pesa and its entire course of business operations. Particularly with respect to shareholding in the Juegos Companies, Claimants have provided at least ten categories of evidence to support their majority shareholding in the Juegos Companies.¹⁹²

104. In the face of this cumulative and consistent evidence, in order to succeed on its standing objection, Mexico must disprove Claimants’ ownership and control of their enterprises by a preponderance of the evidence. It has not done so.

D. Claimants Own and Control the Juegos Companies

1. Claimants Own the Juegos Companies

105. Claimants have conclusively demonstrated through documentary and testimonial evidence that they own a majority of the shares (including the majority of Class B shares) in all the Juegos Companies.¹⁹³ Claimants accordingly have standing to bring Article 1116 claims on their own behalf and Article 1117 claims on behalf of the Juegos Companies as they “own” each of them.

¹⁹⁰ *von Pezold and others v. Zimbabwe*, ICSID Case No. ARB/10/15, Award (Jul. 28, 2015), **CL-59**, ¶ 177.

¹⁹¹ *Marion Unглаube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award (May 16, 2012), **CL-70**, ¶ 34.

¹⁹² See footnote 194, *infra*.

¹⁹³ Counter-Memorial, Section V.A.2.d; Rejoinder, Section III.A.4; E. Burr First Witness Statement, Annex C to E. See charts attached hereto as Annex 1; Rejoinder, ¶ 129 and accompanying chart; see also Claimants’ Opening Presentation, slides 84 to 89.

106. Claimants have provided ample evidence to support their majority shareholding in the Juegos Companies.¹⁹⁴ The Juegos Companies were capitalized through the capitalization *asambleas*, which occurred on the following dates:¹⁹⁵ for JVE Mexico, the capitalization *asamblea* was held on February 23, 2006 (and protocolized on March 23, 2006);¹⁹⁶ for JVE Sureste, the capitalization *asamblea* was held on February 28, 2007 (and protocolized on April 25, 2007);¹⁹⁷ for JVE Centro, the capitalization *asamblea* was held on December 31, 2007 (and protocolized on January 10, 2011);¹⁹⁸ for JyV Mexico, the capitalization *asamblea* was held on May 31, 2008 (and protocolized on January 10, 2011);¹⁹⁹ and for JVE DF, the capitalization *asamblea* was held on September 2, 2008 (and protocolized on January 11, 2011).²⁰⁰ The identities of the investors who capitalized each of the Juegos Companies were duly recorded in the meeting minutes, with the B-Mex Companies accounting for the majority of the capitalization funds.²⁰¹ Additionally, the requested shareholding charts, attached hereto as Annex 1, reaffirm that Claimants have held a

¹⁹⁴ Claimants have submitted (1) *asamblea* minutes (**C-89 to C-93**; **C-168**; **C-225 to C-234**); (2) shareholders' registries (**C-154 to C-158**); (3) share certificates (**C-160**); (4) internal corporate worksheets (**C-180**; E. Burr Second Witness Statement, **CWS-8** ¶ 20); (5) distribution records (**C-169**; E. Burr First Witness Statement, **CWS-2**, ¶ 57; E. Burr Second Witness Statement, **CWS-8**, ¶¶ 22-23); (6) Schedule K-1 tax records (**C-183 to C-192**; E. Burr Second Witness Statement, **CWS-8**, ¶¶ 24-25, Annex E); (7) subscription and purchase agreements (**C-79 to C-81**; **C-136 to C-138**; **C-175 to C-176**); (8) contemporaneous email and letter correspondence (**C-75 to C-78**; **C-178**; **C-152**); (9) individual Claimant witness statements (Claimant Witness Statements, **CWS-16 to CWS-47**, Section I; N. Ayervais Witness Statement, **CWS-12**, Section I; J. Conley Witness Statement, **CWS-13**, Section I; G. Burr Second Witness Statement, **CWS-7**, Section I; E. Burr Second Witness Statement, **CWS-8**, Section I; E. Burr Eng. Tr. (Day 2), 487:5-22); and (10) witness testimony and shareholding charts from Ms. Erin Burr.

¹⁹⁵ See Procedural Order No. 5, tribunal's question 7(i).

¹⁹⁶ 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**.

¹⁹⁷ 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**.

¹⁹⁸ 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**.

¹⁹⁹ 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**. In July 2011, Claimants Randall Taylor, Thomas Malley, and Diamond Financial Group contributed additional capitalization funds to JyV Mexico to remodel and expand the Cuernavaca casino facility. See **CWS-8**, ¶ 19; Exhibits **C-79 to C-81**; **C-233**, pp. 13-16.

²⁰⁰ 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**.

²⁰¹ See Procedural Order No. 5, tribunal's question 7(i). For JVE Mexico, see **C-89** (Eng), pp. 65-67; for JVE Sureste, see **C-90** (Eng), pp. 74-78; for JVE Centro, see **C-91** (Eng), pp. 62-65; for JyV Mexico, see **C-92** (Eng), pp. 56-58; for JVE DF, see **C-93** (Eng), pp. 62-64.

majority of all shares in each of the Juegos Companies (including the majority of Class B shares) at all times the Tribunal has inquired about, including importantly when Mexico adopted its offending measures that caused Claimants' damages.²⁰² This alone is more than sufficient evidence to establish Claimants' standing in this case and dispose of Mexico's Article 1116 and Article 1117 objections.

107. Importantly, while Claimants maintain that all transfers of shares by and between shareholders of the Juegos Companies were valid and had effects on the date they were made, those transfers ultimately are irrelevant to the Tribunal's jurisdictional analysis in connection with the Juegos Companies, as Claimants always held a majority share in all the Juegos Companies since their capitalization.²⁰³

108. The evidence adduced at the Hearing also shows that Mexican officials were aware of the Juegos Companies' ownership and in particular that U.S. shareholders owned the majority of the investment capital in them. At a meeting with senior representatives from SEGOB and Economía in February 2013, the Claimants, through Mr. Burr and Mr. Conley, expressly made Economía and SEGOB aware of all the Mexican Enterprises' ownership.²⁰⁴ Mr. Burr told Mexican officials that he was there on behalf of a group of U.S. investors who owned and controlled the Mexican Enterprises, and he specifically discussed the percentage ownerships and U.S. holdings therein.²⁰⁵

2. Claimants Control the Juegos Companies

109. Although NAFTA Article 1117 only requires that Claimants establish ownership *or* control of the local enterprise in order to establish that the claimant investors have standing to bring claims on their behalf, Claimants have also conclusively proven that they have exercised legal and factual

²⁰² See Procedural Order No. 5, tribunal's question 7(ii) and (iii). Claimants' ownership in the five Juegos Companies has remained unchanged since June 2013. In one company, JVE Sureste, a small amount of share transfers were recognized for taxation and distribution purposes on January 1, 2014, but the relevant share purchase transactions occurred before June 2013—i.e. in December 2012 and March 2013. See E. Burr First Witness Statement, **CWS-2**, ¶ 73. The share transfers had legal effect as of those dates, when the buyer and seller agreed to its terms. See *infra*, Section V.D.4. The shareholding charts in Annex 1 have taken these transfers into account. To see how the shares in JVE Sureste were held without accounting for these transfers, see Ms. Burr's Annex C to E. Burr First Witness Statement, **CWS-2**. Under either scenario, Claimants hold the majority of outstanding shares (including the Class B shares).

²⁰³ See **C-89** to **C-93**; see also Annex 1, Juegos Companies shareholding charts.

²⁰⁴ G. Burr Eng. Tr. (Day 2), 372:12-21; 375:20-376:2; E. Burr Eng. Tr. (Day 2), 507:2-9.

²⁰⁵ G. Burr Eng. Tr. (Day 2), 373:3-8; E. Burr Eng. Tr. (Day 2), 507:2-9.

control over all the Juegos Companies.²⁰⁶ Specifically, Claimants have shown, through documentary and testimonial evidence, that they have, at all key times, held managerial control, board control, and/or voting control of the Juegos Companies.

110. The Hearing testimony reaffirms that the U.S. shareholders always held managerial control over the Juegos Companies, since the operation and administration of the companies was always subject to the decisions and instructions of the U.S. shareholders, and especially of Mr. Burr, who always managed the day-to-day operations of the companies.²⁰⁷ Mr. Burr, the driving force behind the entire casino operations, established the Casinos, ran all the Boards, and made all operational and executive decisions.²⁰⁸ Ms. Burr assisted Mr. Burr with management duties, tracking and overseeing financials, shareholder distributions, ownership and tax records, and legal compliance.²⁰⁹ Mr. Conley assisted with establishment of the Casinos, identified personnel to serve on the management team, and sat on the Boards of the Juegos Companies.²¹⁰

111. Mr. Burr and Mr. Conley spearheaded the efforts to raise funds for the capitalization and operation of the Juegos Companies.²¹¹ The overwhelming majority of the capitalization funds came from the Claimants (and in particular, the B-Mex Companies), which was largely recognized through the granting of Class A stock.²¹²

112. Mr. Burr also was assisted in his administration of the Juegos Companies by several important members of the management team, including Mr. José Ramón Moreno, who served as Director General of the Juegos Companies. In his testimony at the Hearing, Mr. Moreno confirmed that Mr. Burr was his immediate supervisor.²¹³ Mr. Moreno explained that he always acted subject

²⁰⁶ Counter-Memorial, Section V.A.2.d; Rejoinder, Section III.A.4; G. Burr First Witness Statement, **CWS-1**, Section III.A; E. Burr First Witness Statement, **CWS-2**, Section III.C; J.R. Moreno Witness Statement, **CWS-15**, Section II.

²⁰⁷ N. Ayervais Eng. Tr. (Day 4), 866:4-9. Rejoinder, ¶¶ 77-83; Counter Memorial, ¶ 33; E. Burr First Witness Statement, **CWS-2**, ¶¶ 17-19.

²⁰⁸ Rejoinder, ¶¶ 77-83; Counter-Memorial, ¶¶ 230-236; E. Burr First Witness Statement, **CWS-2**, ¶¶ 17-19.

²⁰⁹ E. Burr First Witness Statement, **CWS-2**, ¶¶ 20-21.

²¹⁰ E. Burr First Witness Statement, **CWS-2**, ¶ 21.

²¹¹ E. Burr First Witness Statement, **CWS-2**, ¶ 29; *see also* Rejoinder, ¶ 80.

²¹² E. Burr First Witness Statement, **CWS-2**, ¶ 68.

²¹³ J.R. Moreno Eng. Tr. (Day 3), 664:13-22.

to the instructions he received from the U.S. investors, especially Mr. Burr, Mr. Conley, and Ms. Burr, and that they made all the operational and administrative decisions relating to the Casinos.²¹⁴

113. Moreover, Mr. Burr was explicitly authorized to manage all aspects of the Casino operations. Through a June 2011 Employment Agreement with Video Gaming Services (the “**VGS Agreement**”), Mr. Burr was formally authorized to manage all aspects of the Casino operations, giving him sweeping managerial control over the Juegos Companies.²¹⁵ The Boards of all five Juegos Companies recognized and adopted the VGS Agreement, and through a clearly worded board resolution provided that “Gordon Burr shall take all actions, expend all funds, make all personnel decisions... and take all other actions necessary to reduce expenses, optimize revenues and otherwise preserve and enhance the value of the Company.”²¹⁶

114. Claimants also exercised indirect control over the Juegos Companies through their control of the B-Mex Boards and their managerial control over those companies.²¹⁷ The B-Mex Companies are the largest shareholders in the Juegos Companies and, through their share ownership, control the right to appoint one director on each of the Juegos Companies’ boards.²¹⁸ Mr. Burr and Mr. Conley exercised direct managerial control over the B-Mex Companies by virtue of their positions on those companies’ Boards and their authority to sign for and bind the companies as Managers.²¹⁹ Mr. Burr and Mr. Conley, as Managers, had the broad decision-making powers and the authority to perform a broad array of managerial activities, including having “exclusive and complete control over the business of the Company” and operating “the Company for the benefit of all of its Members.”²²⁰ In exercising managerial control over the B-Mex

²¹⁴ J.R. Moreno Eng. Tr. (Day 3), 665:1-18.

²¹⁵ Employment Agreement between Video Gaming Services, Inc. and Gordon G. Burr (June 1, 2011), **C-45**.

²¹⁶ Exhibits **C-47** to **C-51**, p. 2.

²¹⁷ E. Burr First Witness Statement, **CWS-2**, ¶¶ 59-67; Counter-Memorial, ¶ 234; Claimants’ Opening Presentation, slide 115.

²¹⁸ See Exhibits **C-89** to **C-93**.

²¹⁹ See, e.g., Consent to Action in Lieu of Organizational Meeting of the Members of B-Mex, LLC (Apr. 10, 2014), **C-72**; Minutes of a Special Meeting of Managers of B-Mex, LLC (Mar. 15, 2013), **C-123**; Consent Resolutions of the Board of Managers of B-Mex II, LLC (June 30, 2011), **C-124**; Minutes of a Special Meeting of Managers of Palmas South, LLC (Mar. 1, 2010), **C-125**.

²²⁰ Operating Agreement of B-Mex, LLC (May 20, 2005), Article 12, pp. 24-25, **C-69**; Operating Agreement of B-Mex II, LLC (Mar. 15, 2005), Article 12, pp. 24-25, **C-70**; Operating Agreement of Palmas South, LLC (May, 2006), Article 12, pp. 24-25, **C-73**.

Companies, Mr. Burr and Mr. Conley would, for example, make decisions concerning the hiring and firing of personnel in the Juegos Companies. For instance, on April 10, 2014, signing as Managers, Mr. Burr, Mr. Conley, and other board members issued a consent resolution to “take all actions and expend all funds required to investigate appropriate recourse for actions” against certain employees and officers of the Juegos Companies.”²²¹

115. Claimants also controlled the Boards of the Juegos Companies. Mr. Burr was, and currently is, President of all the Juegos Companies’ Boards.²²² Mr. Conley also sat on all five boards of the Juegos Companies.²²³

116. Finally, Claimants also exercised voting control over the Juegos Companies through their shareholding in those enterprises.²²⁴ Specifically, Claimants’ shareholding in the Juegos Companies gave them the authority to appoint four out of five Directors.²²⁵

117. In sum, there can be no doubt that Claimants controlled the Juegos Companies directly and indirectly through this robust (and undisputed) web of managerial, board, and voting control in those enterprises.

3. Claimants’ Attempts to Mitigate Damages Through Messrs. Chow and Pelchat Had No Impact on Claimants’ Ownership or Control of the Juegos Companies

118. After considering the parties’ extensive submissions on Messrs. Chow and Pelchat’s role in the events that followed Respondent’s breaches of the NAFTA, including hearing directly from Messrs. Chow and Pelchat as well as the Claimants who dealt directly with them, the Tribunal asked the parties to brief what the evidence on record after the Hearing shows “was the intended purpose of [Claimants’] engagement with those two gentlemen and their principals.”²²⁶ The record shows that the sole purpose for Claimants’ engagement with Messrs. Chow and Pelchat was to try to reopen the Casinos after the Mexican government closed them unlawfully.²²⁷

²²¹ Consent to Action in Lieu of Organizational Meeting of the Members of B-Mex, LLC (Apr. 10, 2014), **C-72**.

²²² Exhibit **C-150**; *see also* Exhibits **C-146** to **C-149**; *see generally* E. Burr First Witness Statement, **CWS-2**, ¶ 34.

²²³ Exhibit **C-150**; *see also* **C-146** to **C-149**; *see generally* E. Burr First Witness Statement, **CWS-2**, ¶ 34.

²²⁴ E. Burr First Witness Statement, **CWS-2**, ¶ 70; **C-89** to **C-93**.

²²⁵ E. Burr First Witness Statement, **CWS-2**, ¶¶ 76-86; **C-89** to **C-93**, Art. 24; *see also* Claimants’ Opening Presentation, slide 123.

²²⁶ *See* Procedural Order No. 5, tribunal’s question 7(iv).

²²⁷ N. Ayervais Eng. Tr. (Day 4), 892:5-10; G. Burr Eng. Tr. (Day 2), 408:13-18.

119. The record conclusively shows that, in August 2014, Mr. Chow informed Claimants that the U.S. directors on the Boards of the Juegos Companies needed to be replaced because the Mexican government wanted to ensure that the U.S. shareholders were no longer in charge of the Boards before agreeing to allow the Casinos to reopen.²²⁸ Ms. Salas did not want to deal with Mr. Burr or the U.S. shareholders and she wanted them completely removed from the Boards in order to reopen the Casinos.²²⁹ The record is clear, in fact, that Ms. Salas did not want the U.S. shareholders involved in the management or administration of the Juegos Companies at all.²³⁰

120. For months, Claimants worked with Messrs. Chow and Pelchat to structure a proposed transaction that would allow the Claimants to retain *indirect* ownership of the Juegos Companies, given the Mexican government's hostile posture towards the U.S. shareholders.²³¹ The transaction was structured in a way that, if consummated, would comply with the conditions imposed by SEGOB for the reopening of the Casinos—that the U.S. shareholders be removed as *direct* owners or managers of the Juegos Companies.²³² Testimony at the Hearing confirmed that this was the sole purpose of the transaction.²³³ Specifically, Messrs. Chow and Pelchat both testified that Ms. Salas told them that they needed to make sure that the U.S. shareholders, and all U.S. citizens, were no longer the owners of the companies.²³⁴

121. The negotiations with Messrs. Chow and Pelchat, however, did not mean that Claimants intended to abandon their claims under the NAFTA.²³⁵ On the contrary, Claimants were

²²⁸ N. Ayervais Eng. Tr. (Day 4), 892:5-14; N. Ayervais Witness Statement, **CWS-12**, ¶ 14; G. Burr First Witness Statement, **CWS-1**, ¶ 52; B. Chow Witness Statement, **CWS-11**, ¶ 14; J. Gutiérrez First Witness Statement, **CWS-3**, ¶ 29.

²²⁹ B. Chow Eng. Tr. (Day 3), 709:16-22; G. Burr Eng. Tr. (Day 2), 408:13-18; N. Ayervais Witness Statement, **CWS-12**, ¶ 14; G. Burr First Witness Statement, **CWS-1**, ¶ 52; B. Chow Witness Statement, **CWS-11**, ¶ 14; J. Gutiérrez First Witness Statement, **CWS-3**, ¶ 29.

²³⁰ B. Chow Eng. Tr. (Day 3), 769:5-14.

²³¹ B. Chow Eng. Tr. (Day 3), 742:13-743:5; G. Burr Eng. Tr. (Day 2), 408:13-18.

²³² See Counter-Memorial, Section III.F; Rejoinder, Section III.A.4.d; G. Burr Eng. Tr. (Day 2), 408:10-18; G. Burr First Witness Statement, **CWS-1**, ¶ 52; J. Gutiérrez First Witness Statement, **CWS-3**, Section III; L. Pelchat First Witness Statement, **CWS-4**, Section II; B. Chow Witness Statement, **CWS-11**, Sections II and III; N. Ayervais Witness Statement, **CWS-12**; Sections IV and V.

²³³ B. Chow Eng. Tr. (Day 3), 743:6-7; 747:4-10; L. Pelchat Eng. Tr. (Day 3), 775:2-9; G. Burr Eng. Tr. (Day 2), 408:13-18; N. Ayervais Eng. Tr. (Day 4), 892: 5-10.

²³⁴ B. Chow Eng. Tr. (Day 3), 743:6-11; L. Pelchat Eng. Tr. (Day 3), 775:2-22.

²³⁵ G. Burr Eng. Tr. (Day 2), 394:3-395:10.

intentionally preserving all possible options to protect their rights and mitigate the damages they incurred after the closures.²³⁶ Their sincere hope was that the Mexican Government would allow them to reopen the Casinos and to continue their profitable operations.²³⁷

122. Contrary to Respondent's unsupported assertions at the Hearing, Claimants did not at any time encourage or instruct Chow to misinform the Mexican government. In fact, Claimants were not aware that Mr. Chow's plan in producing fraudulent minutes of the November 2014 Juegos Companies shareholder meetings that never properly took place and falsely reflected share transfers that were never consummated was to convince the Mexican government that the U.S. investors no longer retained ownership in the Juegos Companies.²³⁸

123. As Mr. Burr, who was primarily responsible for negotiating with Mr. Chow, categorically affirmed at the Hearing, "[t]here was no attempt ever by any U.S. investor to allow Mr. Chow to misinform the Mexican government."²³⁹ The purported share transfer in November 2014 was nothing more than a unilateral attempt by Benjamin Chow to do something that he had no authority from Claimants to do—create Mexican corporate documents falsely portraying his company, Grand Odyssey, as the majority owner of the Juegos Companies.²⁴⁰

(a) *Chow's and Pelchat's involvement with the Juegos Companies had no effect on Claimants' ownership of those enterprises*

124. The record is replete with evidence that conclusively establishes that the simulated share transfers never took place, and that the Claimants have been, at all times, the rightful owners of their shares in the Juegos Companies. This record evidence includes documentary evidence and testimony from the individuals who participated in the November 2014 *asambleas*, including Messrs. Chow and Pelchat, *all confirming that no transfer of shares from the Juegos Companies to Grand Odyssey ever took place.*²⁴¹ The testimony at the Hearing also supports the extensive

²³⁶ G. Burr Eng. Tr. (Day 2), 392:14-394:3.

²³⁷ G. Burr Eng. Tr. (Day 2), 407:2-408:1.

²³⁸ G. Burr, Eng. Tr. (Day 2), 358: 22-359:3; 360:13-19; N. Ayervais Eng. Tr. (Day 4), 889:4-15.

²³⁹ G. Burr, Eng. Tr. (Day 2), 408:11-12.

²⁴⁰ G. Burr Eng. Tr. (Day 2), 360:13-22.

²⁴¹ See Counter-Memorial, Section III.F; Rejoinder, Section III.A.4.d; Claimant Witness Statements, **CWS-16** to **CWS-47**, Section IV; G. Burr First Witness Statement, **CWS-1**, Section V; J. Gutiérrez First Witness Statement, **CWS-3**, Section III; L. Pelchat First Witness Statement, **CWS-4**, Section II; B. Chow Witness

evidence in the record proving that Mr. Chow had no authorization from the U.S. shareholders to transfer shares in the Juegos Companies to Grand Odyssey and that, consequently, no share transfer could have taken place despite Mr. Chow's efforts to simulate the contrary.²⁴² Mr. Burr and Ms. Burr, in fact, refused to give Mr. Chow the U.S. shareholders' proxies when he asked for them during a meeting in Denver shortly before the November 2014 *asambleas*.²⁴³

125. Instead, Mr. and Ms. Burr gave the proxies to Mr. Julio Gutierrez, who was not present at the November 7, 2014 meeting.²⁴⁴ Without the U.S. shareholders' proxies, there was no quorum to validly take any action at the November 7, 2014 *asambleas*.²⁴⁵ Laying waste to any lingering doubt, Mr. Chow confirmed at the Hearing that he did not have the authority from the U.S. shareholders to effectuate any transfer of shares, and that no transfer ever took place.²⁴⁶

126. After the November 2014 *asambleas*, Mr. Chow repeatedly acknowledged to Claimants that no share transfer had taken place at those meetings, and that any such share transfer would only happen after the proposed transaction closed.²⁴⁷ In addition, the Stock Purchase Agreements ("SPAs") executed between Mr. Chow and the Claimants also clearly established that a transfer of shares to Grand Odyssey had not occurred and would only take place upon the SPA's closing.²⁴⁸ Before closing, the U.S. shareholders would remain the owners of the shares in the Juegos Companies.²⁴⁹ The SPAs never closed, as there were a number of contractual prerequisites—most notably, the reopening of the Casinos—that never occurred.²⁵⁰

Statement, **CWS-11**, Section IV; N. Ayervais Witness Statement, **CWS-12**, Section VI; J. Conley Witness Statement, **CWS-13**, Section V.

²⁴² L. Pelchat Eng. Tr. (Day 3), 776:20-777:8.

²⁴³ G. Burr Eng. Tr. (Day 2), 360:13-19; J. Gutiérrez Eng. Tr. (Day 3), 629:11-22.

²⁴⁴ J. Gutiérrez Eng. Tr. (Day 2), 572: 13-18; Eng. Tr. (Day 3), 629:11-22; B. Chow Eng. Tr. (Day 3), 715:14-19.

²⁴⁵ L. Pelchat Eng. Tr. (Day 3), 776:20-777:8; 791:19-21; J. Gutiérrez Eng. Tr. (Day 3), 624:20- 625:3; 648:16-650:12; B. Chow Eng. Tr. (Day 3), 714:14-715:20.

²⁴⁶ L. Pelchat Eng. Tr. (Day 3), 776:20-777:8; B. Chow Eng. Tr. (Day 3), 714:6-715:1; J. Gutiérrez Eng. Tr. (Day 3), 635:19-22.

²⁴⁷ B. Chow Eng. Tr. (Day 3), 714:6-13; 723:7-14.

²⁴⁸ N. Ayervais Eng. Tr. (Day 4), 905:5-906:4; B. Chow Eng. Tr. (Day 3), 714:12-13; **C-135**, Articles 1.3, 7.2, 8.1.

²⁴⁹ January 2015 SPA, **C-134**, Article 1.3; February 2015 SPA, **C-135**, Article 1.3.

²⁵⁰ N. Ayervais Eng. Tr. (Day 4), 897:4-7; 897:22-898:4; B. Chow Eng. Tr. (Day 3), 723:17-22.

127. Moreover, as Mr. Burr testified in respect of the November 2014 *asamblea*: “we had no indication, no inclination, that there was going to be any attempt to transfer anybody's ownership or equity. Not one U.S. citizen had any indication that that was going to happen”.²⁵¹ There was no consideration and no authority to allow the transfer to happen.²⁵² Only routine, housekeeping transfers such as those reflecting shareholder deaths were contemplated for that *asamblea*.²⁵³

128. The record is thus clear that Claimants have always maintained ownership of the companies, which is sufficient for Article 1117 purposes.

(b) Messrs. Chow's and Pelchat's involvement with the Juegos Companies did not have any jurisdictionally relevant effect on Claimants' control of those enterprises

129. In August 2014, the U.S. shareholders who sat on the boards of the Juegos Companies agreed to temporarily cede their posts on the boards to Messrs. Chow, Pelchat, and their designees in order to further their goal of reopening the casinos. The U.S. shareholders, however, retained the legal right to control the boards at all times because while they sat on the Juegos Companies boards, Messrs. Chow and Pelchat understood that they had to exercise their authority in the best interest of all the shareholders and that the shareholders ultimately controlled how they exercised their faculties as members of the boards.²⁵⁴

130. Importantly, the Hearing testimony supports the conclusions that (i) Chow and Pelchat knew they were only receiving board seats temporarily; and that (ii) Chow and Pelchat knew that they remained subject to the instructions received from the U.S. shareholders.²⁵⁵ All parties explicitly understood that if the transaction were to fail, Messrs. Chow and Pelchat would step down from the Boards of the Juegos Companies.²⁵⁶ Thus, despite temporarily ceding their board positions to Messrs. Chow and Pelchat, Claimants always retained the legal right to control the boards as shareholders, as Claimants held the majority of shares in each of the Juegos Companies.

²⁵¹ G. Burr Eng. Tr. (Day 2), 358:22-359:3.

²⁵² G. Burr Eng. Tr. (Day 2), 359:20-22; B. Chow Eng. Tr. (Day 3), 723:7-11.

²⁵³ G. Burr Eng. Tr. (Day 2), 358:2-9; J. Gutiérrez Eng. Tr. (Day 2), 573:3-8.

²⁵⁴ B. Chow Eng. Tr. (Day 3), 727:9-728:6; L. Pelchat Eng. Tr. (Day 3), 788:6-13.

²⁵⁵ *Id.*

²⁵⁶ N. Ayervais Eng. Tr. (Day 4), 895:22-897:3.

All parties to the transaction also understood that Claimants would regain their seats on the Boards if the contemplated transaction failed.²⁵⁷

131. Moreover, Messrs. Chow and Pelchat never exercised factual, *de facto* control over the Juegos Companies during their tenure on those companies' boards. Because the Casinos were closed, there were essentially no operations for Messrs. Chow and Pelchat to manage during that time.²⁵⁸ With no casino operations to manage, it is clear that the only purpose of appointing Messrs. Chow and Pelchat on the Board was to facilitate the reopening of the Casinos, but not to relinquish control of the companies to them. And whatever limited operations existed, as Mr. Chow testified, he knew that he had an obligation to act as instructed by the U.S. shareholders.²⁵⁹

132. Finally, Claimants' success in the Colorado RICO action further demonstrates their legal control over Messrs. Chow and Pelchat and, therefore, over the boards of the Juegos Companies when Messrs. Chow and Pelchat sat on them. Through the Colorado lawsuit, Claimants acted to enforce their legal rights and successfully got Messrs. Chow and Pelchat to resign from the Boards of the Juegos Companies. As Messrs. Chow and Pelchat both confirmed in their testimony, although they initially refused to resign from the boards, they always knew that they were required to do so.²⁶⁰ Instead of returning the board seats to the U.S. shareholders, however, they attempted to claim money from Claimants that they were not entitled to.²⁶¹

133. As Mr. Burr testified at the Hearing, Claimants attempted to persuade Messrs. Chow and Pelchat to act in accordance with their legal obligations, and resorted to the legal system only when they were unable to do so.²⁶² Ultimately, both Messrs. Chow and Pelchat agreed to resign from the Boards of the Juegos Companies and settled the Colorado litigation.²⁶³ The illegal, *ultra vires*

²⁵⁷ G. Burr First Witness Statement, **CWS-1**, Section V; J. Gutiérrez First Witness Statement, **CWS-3**, Section III; L. Pelchat First Witness Statement, **CWS-4**, Section II; G. Burr Second Witness Statement, **CWS-7**, Section II; L. Pelchat Second Witness Statement, **CWS-10**, Section I; B. Chow Witness Statement, **CWS-11**, Section III; N. Ayervais Witness Statement, **CWS-12**, Section IV and V; J. Conley Witness Statement, **CWS-13**, Section V.

²⁵⁸ G. Burr Eng. Tr. (Day 2), 385:8-16.

²⁵⁹ B. Chow Eng. Tr. (Day 3), 727:9-728:6; L. Pelchat Eng. Tr. (Day 3), 788:6-13.

²⁶⁰ B. Chow Eng. Tr. (Day 3), 767:11-768:5; L. Pelchat Eng. Tr. (Day 3), 785:5-786:6.

²⁶¹ *See* G. Burr First Witness Statement, **CWS-1**, Section V; L. Pelchat First Witness Statement, **CWS-4**, Section III; N. Ayervais First Witness Statement, **CWS-12**, Section VI; G. Burr Eng. Tr. (Day 2), 385; 401-402; B. Chow Eng. Tr. (Day 2), 725:13- 727:1.

²⁶² G. Burr Eng. Tr. (Day 2), 385:3-7.

²⁶³ B. Chow Eng. Tr. (Day 3), 730: 9-12; L. Pelchat Eng. Tr. (Day 3), 779:4-7.

actions by Messrs. Chow and Pelchat in refusing temporarily to act on the instructions of the Claimants does not alter that Claimants had the legal right to control Messrs. Chow and Pelchat and the other board members who sat with them on the boards of the Juegos Companies. Claimants proved this principle through the quick settlements that Claimants obtained by virtue of the Colorado RICO action and the testimonies of Messrs. Chow and Pelchat during the Hearing.

4. The Share Transfers Among Claimants Were Valid and Confirm Claimants' Majority Ownership of the Juegos Companies

134. Mexico has repeatedly contested the validity of certain share transfers that had not been formalized at shareholder's meetings prior to January 2018, notwithstanding the abundant documentary and testimonial evidence establishing that those share transfers had occurred. As explained above, Mexico's objection here is ultimately inconsequential, because even assuming *arguendo* that those share transfers did not occur, Claimants still own the majority of shares in all five Juegos Companies at all times that the Tribunal has inquired about.²⁶⁴

135. In any event, the evidence of record and the testimony presented at the Hearing make clear that Respondent's arguments regarding the share transfers are wrong as a matter of Mexican law. As Claimants' expert Rodrigo Zamora testified at the Hearing, a contract exists and is perfected under Mexican law when the parties to that contract consent to the agreement with respect to the object in question.²⁶⁵ A contract for the transfer of shares in a Mexican S. de R.L. de C.V., such as the Juegos Companies, comes into existence when the seller and the buyer consent to the transfer of the shares in question.²⁶⁶ At the Hearing, both Mr. Zamora and Mr. Ibarra agreed on this point.²⁶⁷ In other words, a transfer of the shares exists and is valid from the moment the parties to that contract (buyer and seller) agree to its terms.²⁶⁸ Once the parties agree to the contract's terms, the contract has legal effects.²⁶⁹

136. While the Juegos Companies' bylaws require the authorization of the majority of the members of the Board of Directors and of the majority of the votes of Class B shares at an

²⁶⁴ See Rejoinder, ¶ 129.

²⁶⁵ R. Zamora Eng. Tr. (Day 5), 1031:15-21; R. Zamora Expert Report, ¶¶ 21, 24; Art. 1794 Civil Code.

²⁶⁶ R. Zamora Eng. Tr. (Day 5), 1032:9-12; R. Zamora Expert Report, ¶¶ 41, 48, 46, 47(i).

²⁶⁷ R. Zamora Eng. Tr. (Day 5), 1030:11-1031:17; 1032:9-12; R. Irra Ibarra Eng. Tr. (Day 5), 968:18-969:6.

²⁶⁸ R. Zamora Eng. Tr. (Day 5), 1030:11-1031:17; 1032:9-12; R. Zamora Expert Report, ¶¶ 41, 48, 46, 47(i).

²⁶⁹ R. Zamora Eng. Tr. (Day 5), 1032:9-12; R. Zamora Expert Report, ¶¶ 41, 48, 46, 47(i).

asamblea, failure to obtain the aforementioned authorizations has no effect on the existence or validity of the transfer itself, only on the buyer's potential ability to exercise his corporate rights as shareholder vis-à-vis the company.²⁷⁰ In other words, the only potential consequence of not complying with article 13 of the Juegos Companies' bylaws is that the transfer of shares might not be recognized by the Company.²⁷¹ However, this does not affect the true ownership over the companies by the purchaser, nor the existence or the validity of the share transfers, which as both Mr. Zamora and Mr. Ibarra agreed at the Hearing, come into existence when the seller and the buyer express their consent to the transfer of shares.²⁷²

137. What is more, as Mr. Zamora has explained, Mexican law allows this defect to be cured by obtaining the required authorizations at a later time, including in a later *asamblea*.²⁷³ At worst, the failure to seek prior authorization from the Board and authorization from the *asamblea* would result in relative nullity of the share transfer agreements under Mexican law.²⁷⁴ Unlike absolute nullity, instances of relative nullity can be remedied and/or subsequently validated.²⁷⁵ Once this occurs, all prior effects of the legal act—here, the share transfer agreements—are retroactively validated.²⁷⁶ Here, the failure to obtain authorizations under article 13 of the Juegos Companies' bylaws for the transfer of shares in the Juegos Companies had no effect whatsoever on the existence or validity of the share transfers and, in any event, were retroactively validated through the January 2018 *asambleas* as of the date each share transfer contract was concluded.²⁷⁷

138. Respondent's unsupported arguments notwithstanding, the January 2018 *asambleas* were validly celebrated. There was a valid quorum, the minutes were validly protocolized and recorded in the Mexican public registry, and the attendance list and proxies were accurately incorporated as

²⁷⁰ R. Zamora Eng. Tr. (Day 5), 1056:19-1057:8; R. Irra Ibarra Eng. Tr. (Day 5), 922:18-22; 921:15-922:22; 923:5-10; R. Zamora Expert Report, ¶¶ 45, 46, 47(iv).

²⁷¹ R. Zamora Eng. Tr. (Day 5), 1056:15-1057:19; 1031:22-1033:6; R. Zamora Expert Report, ¶¶ 45.

²⁷² R. Zamora Eng. Tr. (Day 5), 1030:11-1031:17; 1032:9-12; R. Irra Ibarra Eng. Tr. (Day 5), 968:18-969:6; R. Zamora Expert Report, ¶¶ 45-46.

²⁷³ R. Zamora Expert Report, ¶¶ 45, 46, 47(iv).

²⁷⁴ R. Zamora Expert Report, ¶¶ 59, 64-65, 68, 93; Mexican Civil Code Art. 2225.

²⁷⁵ R. Zamora Expert Report, ¶¶ 59, 64-65, 68, 93; Mexican Civil Code Art. 2225.

²⁷⁶ R. Zamora Eng. Tr. (Day 5), 1035:3-13; R. Zamora Expert Report, ¶¶ 59, 64-65, 68, 93; Mexican Civil Code Art. 2225.

²⁷⁷ R. Zamora Expert Report, ¶¶ 83-89, 84-85, 95.

attachments to the minutes of the meetings.²⁷⁸ Mexico's attempt to invalidate the minutes of these *asambleas* is merely a distraction from the inescapable conclusion that Claimants are and always have been the majority, controlling shareholders of the Juegos Companies.

E. The Claimants Own and Control E-Games

139. The Claimants have standing under Article 1117 to bring claims on behalf of E-Games, as they both own *and* control the company.

140. As a threshold matter, E-Games does not have standing as an investor under NAFTA to pursue claims on its own behalf, nor does it have authority to withdraw or desist from claims advanced on its behalf by the Claimants. Yet that is precisely what Mexico claims E-Games did through the *desistimiento*. The record evidence, however, clearly demonstrates that the *desistimiento* is a fraudulent document with no legal effect, and that it could not have withdrawn the 2014 Notice of Intent on behalf of E-Games. As Mr. Segura—the individual whose signature appears on the *desistimiento*—affirmed in his written testimony and at the Hearing, he did not have authorization from any of E-Games' principal owners and controllers to sign the *desistimiento* (or any other document relating to the NAFTA proceeding), was wholly unaware of what he was asked to sign, and in fact was manipulated through false representations by third parties into signing the document.²⁷⁹ Furthermore, Economía doubted the document's legal effect and did not bother to ratify, as it routinely does with legal documents that purport to renounce legal rights and proceedings.²⁸⁰ Ms. Martínez—Respondent's sole witness in this jurisdictional phase—also doubted the *desistimiento*'s validity, not once mentioning to Claimants' counsel at White & Case that she had received a document purporting to withdraw the same NAFTA claims on behalf of E-Games that she corresponded with White & Case about.²⁸¹ In light of these factual circumstances, the Tribunal should discard the *desistimiento* as nothing more than a fraudulent document, with no

²⁷⁸ J. Gutiérrez Eng. Tr. (Day 2), 579:6-582:3; R. Zamora Expert Report, ¶¶ 111, 112; R. Zamora Eng. Tr. (Day 5), 1037:10-1040:9; Exhibits **C-225** to **C-234**.

²⁷⁹ J. Segura Eng. Tr. (Day 4), 817:6-17; 817:21-818:4; 821:22-822:20; 825:9-826:16; J. Segura Witness Statement, **CWS-5**, ¶¶ 21, 24, 26-27.

²⁸⁰ J. Gutiérrez Eng. Tr. (Day 2), 567:4-13; 586:8-12; J. Segura Eng. Tr. (Day 4), 844:16-20; J. Gutiérrez First Witness Statement, **CWS-3**, ¶ 49; Counter Memorial, ¶¶ 480.

²⁸¹ A. Martinez Eng. Tr. (Day 1), 279:17-280:19; 282:10-283:3. Ms. Martínez made no reference to the *desistimiento* in any of her emails after receiving the document on October 24, 2014. *See* Exhibit **R-004**.

effect on Claimants' standing to bring claims on behalf of E-Games. That standing is amply supported by the evidence of record and remains unrebutted.

1. The Claimants Own E-Games

141. The record of this proceeding shows conclusively that Claimants have owned a majority of E-Games' shares since at least July 2013.²⁸² Specifically, since that date, Claimants have owned 66.66% of the shares.²⁸³ Claimants thus "own" the company for Article 1117 purposes from July 2013 onwards, although, as explained below, they legally and factually controlled the company long before that date.²⁸⁴

142. At the Hearing, Mexico belatedly accused Claimants of restructuring E-Games in an abusive way to gain Article 1117 standing to sue on E-Games' behalf.²⁸⁵ While it is true that Claimants became majority owners of E-Games after Mr. Alfredo Moreno ceased being a shareholder in July 2013, Alfredo Moreno's termination had no relationship with the DF Casino Closures or with Claimants' intention to initiate a NAFTA claim.²⁸⁶ As Ms. Burr testified, Alfredo Moreno's termination "...had nothing to do with the fact that the DF facility was temporarily shut down. You know, we never ever, ever thought that we would be closed. So, no, it had nothing to do with that".²⁸⁷ The Hearing testimony further established that Alfredo Moreno was removed from the companies due to inappropriate behavior and actions as a company employee.²⁸⁸ Moreover, both U.S. and Mexican shareholders in E-Games received Alfredo's remaining shares in a pro rata manner (rather than the U.S. shareholders receiving the entirety of his shares), further undermining Mexico's diffuse and unsupported arguments of alleged abusive restructuring.²⁸⁹

²⁸² Counter-Memorial, Section V.A.2.e; Rejoinder, Section III.A.5; G. Burr First Witness Statement, **CWS-1**, Section III A; E. Burr First Witness Statement, **CWS-2**, Section III D; G Burr Second Witness Statement, **CWS-7**, Section II and III; J. Conley Witness Statement, **CWS-13**, Section II. J.R. Moreno Witness Statement, **CWS-15**, Section III.

²⁸³ Notarized Minutes of the General Shareholders Meeting of Exciting Games (Feb. 21, 2014), **C-63**.

²⁸⁴ See charts attached hereto as Annex 2, E-Games shareholding charts.

²⁸⁵ Respondent's Opening Statement, Eng. Tr. (Day 1), 64:9-15; 71:20-22.

²⁸⁶ E. Burr Eng. Tr. (Day 2), 469:13-16 ("We did not restructure the company in anticipation of filing a claim for arbitration under Chapter Eleven of the NAFTA").

²⁸⁷ E. Burr Eng. Tr. (Day 2), 478:19-22.

²⁸⁸ E. Burr Eng. Tr. (Day 2), 438:21-439:7; J.R. Moreno Eng. Tr. (Day 3), 679:9-13.

²⁸⁹ E. Burr Eng. Tr. (Day 2), 470:6-9.

2. The Claimants Control E-Games

143. Regardless of the date as of which the Claimants owned the majority of E-Games' outstanding shares, the evidence categorically establishes that Claimants controlled E-Games through voting control and other forms of *de facto* control at all times as to which the Tribunal has inquired, including during the time of each of Mexico's offending measures.²⁹⁰ Mr. Burr and Ms. Burr always have exercised managerial control over E-Games, such as by deciding that E-Games would act as the permit holder and by overseeing all payments between E-Games and the various Juegos and B-Mex Companies.²⁹¹

144. As the record evidence shows, Mr. Burr and Mr. Conley instructed Alfredo Moreno and his brother to incorporate and capitalize E-Games in 2006.²⁹² As Mr. Burr explains, "the Moreno brothers incorporated E-Games with capital that John and I provided mostly from funds we raised from investors in the United States. Again, as with the Juegos Companies, the significant majority of E-Games capital was provided by the U.S. shareholders."²⁹³ The company was initially set up to establish an additional Casino, but Claimants later decided to use the company as the Casinos' gaming permit holder.²⁹⁴

145. Claimants' managerial control of E-Games, thus, was complete and overarching. As Mr. José Ramón Moreno testified in his declaration and at the Hearing, Mr. Burr, Mr. Conley, and Ms. Burr directly controlled every aspect of E-Games' operations and, as Director General—E-Games and the Juegos Companies' highest-ranking employee—Mr. Moreno only received instructions from Mr. Burr, Mr. Conley, and Ms. Burr and understood himself bound by those instructions.²⁹⁵

146. The Claimants also had a voting bloc in E-Games, through which they controlled over 85% of the vote for that company. Although between 2011 and 2013 Mr. Conley did not own a portion of his shares outright, he controlled the voting of those shares through an Option Agreement with

²⁹⁰ Counter-Memorial, Section V.A.2.e; Rejoinder, Section III.A.5; G. Burr First Witness Statement, **CWS-1**, Section III A; E. Burr First Witness Statement, **CWS-2**, Section III D; G. Burr Second Witness Statement, **CWS-7**, Section II and III.

²⁹¹ Exhibit **C-52** to **C-56**, Articles 3 and 4; Exhibit **C-60** to **C-62**, Article 1; E. Burr First Witness Statement, **CWS-2**, ¶¶ 39-42.

²⁹² G. Burr Second Witness Statement, **CWS-7**, ¶ 23; *see* Procedural Order No. 5, tribunal's question 7(i).

²⁹³ G. Burr Second Witness Statement, **CWS-7**, ¶ 23; *see also* G. Burr Eng. Tr. (Day 2), 434:18-435:20.

²⁹⁴ G. Burr Eng. Tr. (Day 2), 424:14-18.

²⁹⁵ J.R. Moreno Eng. Tr. (Day 3), 664:15-665:9.

Alfredo Moreno that required Mr. Moreno to vote his shares as Mr. Conley instructed or else Mr. Conley could exercise his option and repurchase the shares.²⁹⁶ The E-Games Board validated and recognized the Option Agreement between Mr. Conley and Alfredo Moreno.²⁹⁷ Mr. Conley exercised the Option in July 2013.²⁹⁸ José Ramón Moreno also testified that he always voted with the U.S. shareholders in E-Games because his interests were aligned with theirs, and because he believed that the decisions taken by them were always the right decisions for the company.²⁹⁹ That Mr. Moreno testified that he had the discretion to vary his vote should he not agree with a decision that was taken by the Claimants, does not alter that, as a matter of fact, he always as a matter of consistent practice voted exactly as Mr. Gordon Burr and the other U.S. shareholders voted.³⁰⁰

147. Between Mexico's first breach (the closure of the D.F. casino facility) and July 16, 2013, Claimants' voting bloc controlled 85.84% of E-Games' voting shares, comfortably exceeding the 75% vote required to pass resolutions at the time.³⁰¹ From July 16, 2013 onwards, Claimants had voting control of 83.3% of the shares of E-Games, which exceeded the 70% voting threshold that was adopted at that *asamblea*.³⁰²

148. Furthermore, since July 16, 2013, Mr. Burr and Mr. Conley have served on the E-Games Board, with Mr. Burr in particular serving as President.³⁰³ This is *before* the arbitrary cancellation of E-Games' permit on August 28, 2013 and the closure of Claimants' Casinos in April 2014.

149. In sum, the record clearly reflects that Claimants controlled E-Games at all times that the Tribunal has inquired about and, thus, that they have standing to claim against Mexico on E-Games' behalf under NAFTA Article 1117.

²⁹⁶ J. Conley Witness Statement, **CWS-13**, ¶¶ 11, 15, 22; Option Agreement between Alfredo Moreno and John Conley (June 2, 2011), **C-83**.

²⁹⁷ Consent to Action in Lieu of Organizational Meeting of the Directors of Exciting Games (June 7, 2011), **C-64**.

²⁹⁸ Email exchange between John Conley and Alfredo Moreno (Jul. 7, 2013), **C-140**.

²⁹⁹ J.R. Moreno Eng. Tr. (Day 3), 688:22-689:7; J. R. Moreno Witness Statement, **CWS-15**, ¶¶ 19-21.

³⁰⁰ J.R. Moreno Eng. Tr. (Day 3), 688:22-689:22.

³⁰¹ Claimants' Opening Presentation, slide 172; Consent to Action in Lieu of Organizational Meeting of the Directors of Exciting Games (June 7, 2011), **C-64**, p. 3.

³⁰² Claimants' Opening Presentation, slide 180; Notarized Minutes of the General Shareholders Meeting of Exciting Games (Feb. 21, 2014), **C-63**, p. 41.

³⁰³ Notarized Minutes of the General Shareholders Meeting of Exciting Games (Feb. 21, 2014), **C-63**, p. 18.

F. The Claimants Control Operadora Pesa

150. The record evidence confirms that the Claimants have always exercised *de facto* control over Operadora Pesa, beginning from its inception, when they instructed Mr. Moisés Opatowski to form the company on their behalf in 2008.³⁰⁴ As Mr. Burr explains, he “instructed Moisés Opatowski ... and José Miguel Ramírez, two Mexican nationals, to incorporate the company in Mexico, and John and I instructed them to use capital from the different entities in our Casino enterprise that were controlled by the U.S. shareholders so that they could do so.”³⁰⁵

151. The evidence adduced at the Hearing confirms that Mr. Burr controlled all the operational decisions of Operadora Pesa, which was formed to assist with volume contracting for the Casinos and principally functioned as a food and beverage service entity for the Casinos.³⁰⁶ As Mr. Burr testified: “Operadora Pesa was a company that was established at my direction in order to take advantage of volume discounts for certain services, food, beverage, things like that. By consolidating the five entities into one purchasing power, we were able to negotiate better terms and deals”.³⁰⁷ These decisions ranged from daily sandwich offerings to beverage options in the Casinos.³⁰⁸ Indeed, “nobody could make those decisions except Gordon.”³⁰⁹ Moisés Opatowski, Operadora Pesa’s manager, confirmed Gordon’s ultimate and complete control over all such decisions,³¹⁰ confirming, in turn, that the Claimants have standing to claim against Mexico on Operadora Pesa’s behalf under NAFTA Article 1117.

VI. RELIEF SOUGHT

152. For the foregoing reasons and for the reasons set forth in Claimants’ Counter-Memorial and Rejoinder, Claimants respectfully request that the Tribunal:

- (i) reject and dismiss in their entirety all of Mexico’s objections to the Tribunal’s jurisdiction;

³⁰⁴ G. Burr Eng. Tr. (Day 2), 443:1-9; M. Opatowski Witness Statement, **CWS-14**, ¶¶ 9-10; Counter-Memorial, Section V.A.2.f; Rejoinder, Section III.A.6; G. Burr First Witness Statement, **CWS-1**, Section III.B; E. Burr First Witness Statement, **CWS-2**, Section III.E; G. Burr Second Witness Statement, **CWS-7**, Sections II and III.

³⁰⁵ G. Burr Second Witness Statement, **CWS-7**, ¶ 27; G. Burr Eng. Tr. (Day 2), 443:1-9; *see* Procedural Order No. 5, tribunal’s question 7(i). Moisés Opatowski and José Miguel Ramírez are the only two shareholders of Operadora Pesa. *See* Annex 3; Procedural Order No. 5, tribunal’s question 7(ii).

³⁰⁶ E. Burr Eng. Tr. (Day 2), 541:8-542:3.

³⁰⁷ G. Burr Eng. Tr. (Day 2), 426:14-19.

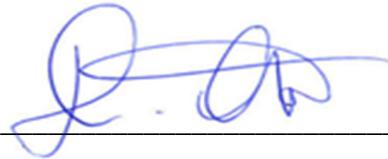
³⁰⁸ E. Burr Eng. Tr. (Day 2), 550:15-551:20.

³⁰⁹ E. Burr Eng. Tr. (Day 2), 551:18-20.

³¹⁰ M. Opatowski Witness Statement, **CWS-14**, ¶¶ 12-14.

- (ii) proceed promptly with the scheduling of the merits phase of this arbitration;
- (iii) 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
- (iv) order such other relief as the Tribunal may deem just and proper.

Respectfully submitted,



Ríos-Ferrer Guillén-Llarena, Treviño
y Rivera S.C.
Julio Gutiérrez Morales
jgutierrez@riosferrer.com.mx

Quinn Emanuel Urquhart & Sullivan LLP
David M. Orta
davidorta@quinnemanuel.com
Daniel Salinas-Serrano
danielsalinas@quinnemanuel.com
Julianne Jaquith
juliannejaquith@quinnemanuel.com
Kristopher Yue
krisyue@quinnemanuel.com
Ana Paula Luna
analuna@quinnemanuel.com

Counsel to the Claimants