



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

**B-MEX AND OTHERS
(CLAIMANTS)**

v.

**THE UNITED MEXICAN STATES
(RESPONDENT)**

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

Post-Hearing Brief

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I. Introduction

1. The Respondent will structure this post-hearing submission according to the directions given in paragraph 5 of Procedural Order No 4. The order makes no mention of submissions on Articles 1119 and 1120, whereas Procedural Order No. 5 directs the parties to respond to two questions 2(i) and (ii) – in connection with those Articles. The Respondent’s answers to 2(i) and (ii) will follow its submissions on Article 1122.

2. In limiting its submissions to the topics and questions stipulated by the Tribunal the Respondent is not in any way abandoning, varying or otherwise derogating from the submissions it has made in its objections to registration of the claim or in its three pleadings challenging the Tribunal’s jurisdiction to decide the claim. In brief:

- i. Each of the Additional Claimants failed to comply with Article 1119 by failing to deliver a notice of intent at least 90 days before submitting their claims to arbitration, with the result that the purported submission of their claims to arbitration was *void ab initio* and, additionally, they failed to engage Mexico’s consent to arbitration under Article 1122. This deprived the Tribunal of jurisdiction to decide their claims for two reasons: (i) their submissions to arbitration were invalid and thus non-existent from the outset, and (ii) Mexico did not consent to arbitrate claims by disputing investors who had not delivered a notice of intent at least 90 days prior to filing their claims. Mexico’s position is fully supported in the Article 1128 submissions of Canada and the United States.
- ii. Each of the Claimants and each of the Mexican Enterprises failed to comply with Article 1121 by failing to deliver and file a consent to arbitration in accordance with procedures set out in the NAFTA, with the result that each of their purported submissions to arbitration (on their own behalf and on behalf of the Mexican Enterprises) was *void ab initio* and, additionally, each of them failed to engage Mexico’s consent to arbitration under Article 1122. This deprived the Tribunal of jurisdiction to decide their claims for two reasons: (i) their submissions to arbitration were invalid and thus non-existent from the outset, and (ii) Mexico did not consent to arbitrate claims by disputing investors who had not delivered a written consent to arbitration in accordance with the procedures set

out in the NAFTA. Mexico's position that the consent to arbitration must be explicit and unambiguous is supported by the Article 1128 submission of the United States.

iii. None of the Claimants, individually or collectively, can establish that they have standing to assert a claim under Article 1117 on behalf of any of the Mexican Enterprises with the possible exception of Juegos Naucalpan for the following reasons:

- none of them individually or collectively "own", directly or indirectly, any of the Mexican Enterprises;
- they are not bound by a legal instrument to vote their shares in a way that would grant any one or more of them direct or indirect legal control over any of the Mexican Enterprises;
- even if it is not necessary to have a shareholders' agreement or like instrument to establish legal control among like-minded shareholders, the Original Claimants alone cannot establish legal control of four of the five the Juegos Companies because they do not collectively own a majority of the voting shares in those companies; and
- even if so-called '*de facto* control' suffices as 'control' under Article 1117, the Claimants lost such control of the five Juegos Companies when they surrendered board control to the Chow group in August 2014 which they did not regain until January 2018, 19 months after they purported to submit claims to arbitration on behalf of the Juegos Companies.

3. The Claimants were promptly informed of Mexico's position concerning the failure of the Additional Claimants to comply with Article 1119 and the failure of all of the Claimants and the Mexican Enterprises to comply with Article 1121. They nonetheless demanded that the Secretary-General proceed to register the claim, insisting that Article 1119 had been satisfied because it would have been 'futile' for the Additional Claimants to engage in consultations under Article 1118, and because their powers of attorney and/or counsel's act of filing the RFA amounted to sufficient compliance with Article 1121.

4. The Claimants' failures of compliance with these clearly-worded, mandatory requirements were blatant, egregious and unprecedented. This is an issue of institutional importance for the

NAFTA Parties.¹ To excuse the Claimants' lack of compliance with Article 1119 or Article 1121 would signal that these requirements are optional or discretionary, or that they can be overlooked by a sympathetic tribunal. Hence the contribution of two rounds of Article 1128 submissions by Canada and the United States.²

5. In the Claimants' opening submission, counsel energetically argued: "What they [Mexico] haven't cited is a single NAFTA or any other case in which failure to comply with the formalisms of Article 1119 resulted in a tribunal not having jurisdiction over the claims. Not a single one"³. The reason for this should be self-evident. In the more than 50 claims that have been submitted to arbitration in 24 years since NAFTA's entry into force, no claimant or group of claimants have failed to properly identify themselves in a NOI under Article 1119 or to provide a proper consent to arbitration under Article 1121. The Claimants consciously chose their course of action and cannot now complain that they are being treated harshly under clearly-worded requirements that are universally understood and followed by Chapter 11 litigants.

6. Finally, failures of compliance with Articles 1119 and 1121 are critical faults that deprive the Tribunal of jurisdiction. They are not simply questions of 'admissibility' that can somehow be remedied with retroactive effect. However, even if these failures were to be characterized as a matter of admissibility, the result would be the same – the claim would have to be dismissed.

II. Alleged failure by all Claimants to consent to arbitration in accordance with Article 1121

7. An arbitral tribunal's jurisdiction flows from an agreement to arbitrate. Such an agreement cannot exist unless both parties to the dispute consent to arbitration. The two main questions for the Tribunal are: (i) have the Claimants consented to arbitration? and (ii) has the Respondent's consent under Article 1122 been engaged? If either of these two questions is responded to in the negative, the Tribunal must conclude that no arbitral agreement exists and that it has no jurisdiction to decide this case.

¹ Respondent's Opening Statement, Transcript, Day 1, p: 4-9.

² *Id.*, Transcript, Day 1, p. 21:10-14. See also Reply on Jurisdictional Objections; ¶ 10, 28-32.

³ Claimant's Opening Statement, Transcript, Day 1, pp. 203:14-204:3.

8. This section addresses the first question, whereas the second question will be addressed in the next section under the heading “Failure to engage Respondent’s consent to arbitration under Article 1122”.

9. On the issue of consent to arbitration, there are two main questions for the Tribunal to decide: (i) is implied or constructive consent permitted by Article 1121? and (ii) can it be said that consent to arbitration is implied or was constructively given through the powers of attorney (POAs) or the Request for Arbitration (RFA)? The Respondent submits that that the answer to both questions is “no”.

10. Article 1121(3) requires disputing investors to consent to arbitration in a specific manner: it shall be in writing, it shall be provided to the disputing Party and it shall be included in the submission to arbitration. This clearly-worded requirement rules out any possibility of implicit or constructive consent.

11. The fact that Article 1121 is entitled “conditions precedent to the submission of a claim to arbitration” also makes it clear that any submission to arbitration that does not include a written consent in the form required by Article 1121(3) would be considered *void ab initio* and would deprive the Tribunal of jurisdiction to decide the claim.

12. The Claimants contend that they consented to arbitration through the POAs that each of them gave to Quinn Emmanuel lawyers and through the filing and specific language used in the RFA.⁴ Both contentions are without merit, as neither the POAs nor the RFA contain a clear and explicit expression of consent to arbitration by the Claimants or the Mexican Entities on whose behalf the claim was submitted to arbitration. As noted in previous submissions, the word “consent” is not even used in the referred documents.⁵

⁴ At ¶ 114 therein they claim: “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”. [Emphasis added]

⁵ Memorial on Jurisdiction, ¶ 7.

13. The Respondent further submits that neither the filing of the RFA nor paragraph 114 therein were ever intended as consent to arbitration. The argument is an afterthought intended to obscure an obvious defect of the submission to arbitration. The evidence on this is clear:

- *First*, paragraph 119 of the RFA states: “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”. [Emphasis added] The footnote located at the end of the quoted passage refers the reader to Exhibit C-004 (labeled “Consent Waivers”), which contains the POAs and Waivers.⁶
- *Second*, in their response to Mexico’s Objection to the Registration of the Claim, dated 21 July 2016, the Claimants explained to ICSID that: “Claimants are working diligently to regain board control of these enterprises so that they may provide the consents and waivers specified in Article 1121, but their non-submission should not be held against Claimants [...]” [Emphasis added].⁷ The statement implicitly acknowledges that the Mexican Entities *did not* consent to arbitration through the RFA.
- *Third*, on 2 August 2016 the ICSID Secretariat informed the Claimants that it would not be registering the claim on behalf of the Juegos Companies unless the Claimants were able to provide consents and waivers for these entities.⁸ The Claimants responded by submitting fresh POAs signed by Mr. Pelchat. Notably, they did not argue that consent was implied in the filing of the RFA or in paragraph 114 thereof.
- *Fourth*, during cross-examination, Mr. Pelchat confirmed that the “consents” referred to in his witness statement were the powers of attorney provided by the Claimants in response to ICSID’s communication.⁹ These powers of attorney are identical to those filed by the Claimants.

⁶ Memorial, ¶¶ 87-88.

⁷ Claimants’ Response to Mexico’s Objection dated 21 July 2016, pp. 8-9.

⁸ Letter from the ICSID Secretariat dated 2 August 2016, p. 1.

⁹ Testimony of Mr. Pelchat, Day 3, pp. 781: 14-782:22.

- *Fifth*, if the Claimants believed that they could comply with the requirements established in Article 1121 by including specific language in the RFA –as they contend they did in the case of the Claimants’ consents– it stands to reason that they would follow a similar approach in the case of their own waivers and the consents and waivers of the Mexican Entities. They did not. Each one of them submitted a POA and waiver which are included in the same document.

14. The Claimants’ own actions and statements belie their current argument that they consented to arbitration through the RFA. Hence, as noted in the Respondent’s Reply, “the question of whether there was compliance with Article 1121 ultimately turns on whether each POA amounts to “consent to arbitration in accordance with the procedures set out in [the NAFTA]”¹⁰

15. The POAs do not constitute consent under Article 1121. Granting Counsel authority to act on one’s behalf is not equivalent to consenting to arbitration. At most it suggests that the Claimants would have been willing to consent to arbitration if asked, but it does not constitute consent to arbitration as that term is used in Article 1121:

Response to Question 3(i)

Article 1121(1) and (2) in terms set out two “conditions precedent”: the investor and the enterprise must (i) “consent to arbitration in accordance with the procedures set out in this Agreement”, and (ii) “waive their right to initiate or continue” domestic proceedings. Article 1121(3) specifies that “[a]

Q. Here you're referring to certain waivers and consents signed on 5 August 2016 on behalf of the Juegos Companies; is that correct?

A. Mm hum. [...]

Q. Are these the consents and waivers that you signed?

A. Yes.

Q. Just to confirm, the documents that are headed in English with "Power of Attorney," these are the consents; is that correct?

A. Yes. [...]

Q. Did you prepare these documents or were they presented to you?

A. They were presented to me.

Q. Who presented them to you?

A. The attorneys for the U.S. people.

¹⁰ Reply on Jurisdiction at ¶ 91.

consent and waiver required by this Article shall be delivered in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration”.

It can be argued that “Conditions Precedent to Submission of a Claim to Arbitration” are requirements that condition a NAFTA Party’s consent to arbitration under Section B—and thus a tribunal’s jurisdiction. On that reading, would an investor’s/enterprise’s failure to meet the two conditions precedent not necessarily deprive a tribunal of jurisdiction?

16. The Respondent’s position, as confirmed by numerous NAFTA tribunals, is that failure to comply with the requirements of Article 1121 deprives the Tribunal of jurisdiction. Mexico made this point at ¶¶ 78-86 of its Memorial on Jurisdiction, citing *Detroit International Bridge and Cargill*:

17. In *Detroit International Bridge*:

291. NAFTA Article 1121, entitled “Conditions Precedent to Submission of a Claim to Arbitration” stipulates the conditions that a claimant must meet in order to submit a claim under NAFTA Chapter Eleven. A claimant’s failure to meet these conditions renders the NAFTA Party’s consent to arbitrate without effect.

[...]

337. Accordingly, the Tribunal does not have jurisdiction in this case, because of DIBC’s failure to comply with NAFTA Article 1121.¹¹

18. In *Cargill*:

158. Where Article 1116 is concerned, there are thus three jurisdictional questions: whether the claim was brought by an “investor of a Party”; whether the claim concerns a potential breach of a Section A obligation; and whether the claim is time barred.

159. Where Article 1117 is concerned, there is a further jurisdictional question as to whether the claim is brought on behalf of “an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly.”

160. A claimant must also provide preliminary notice pursuant to Article 1119 and satisfy the conditions precedent via consent and, where appropriate, waiver, under Article 1121. Consent of the respondent must be established pursuant to Article 1122.

[...]

¶ 183. The Tribunal must finally consider any challenges to the presence of consent by either of the Parties. Consent by the investor pursuant to Article 1121 is not disputed. Respondent, however, has challenged one element of the claim procedurally with respect to the import permit measure. As noted above, Respondent asserts that it was

¹¹ Exhibit RL-015, *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Award on Jurisdiction, 2 April 2015, ¶ 147.

not validly notified pursuant to Article 1119. Because Claimant’s capacity to initiate arbitration under Article 1122 is limited to claims “to arbitration in accordance with the procedures set out in this Agreement,” the question is then whether Claimant has failed to comply with a procedural requirement with respect to the import permit measure and if so, whether this negates consent by Respondent in respect of such a claim.¹² [Emphasis added]

19. Similar findings can be found in *Canfor*¹³, *Methanex*¹⁴, *Waste Management*¹⁵ and *Mondev*¹⁶.
20. The investor’s consent to arbitration under Article 1121 is a crucial element of the arbitral agreement, not only because it contains the consent of one of the disputing parties but also because it is a condition of the NAFTA Parties’ offer to arbitrate under article 1122. As noted in the passage from *Kinnear et. al.* quoted at ¶ 87 of the Reply:

1 Investor's Consent to Arbitration

Article 1121 provides the investor's consent to arbitration; while Article 1122 provides the State Party's consent to arbitration. In effect, NAFTA constitutes a standing offer by the State Parties to arbitrate, but only on the condition that the investor meet certain requirements. Article 1121(1)(a) provides that an investor bringing a claim under Article 1116 must consent to arbitration “in accordance with the procedures set out in this agreement;” the same consent is found in Article 1121(2)(a) with respect to investors bringing a claim under Article 1117. Because arbitration is based on consent, Article 1121 is an indispensable complement to Article 1122; only if both disputing parties have consented can the tribunal exercise jurisdiction. Article 1121(3) requires that the consent, and the accompanying waiver, be in writing, be delivered to the disputing Party, and be included in the submission of a claim to arbitration. Requiring that investor to deliver written consent satisfies the requirements of the ICSID, the

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- ¹² Exhibit RL-016 - *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶¶ 158 – 160, 183.
 - ¹³ Exhibit RL-009 - *Canfor Corporation and others v. United States of America*, UNCITRAL, Decision of Preliminary Question, 6 June 2006, ¶¶ 171 (second bullet).
 - ¹⁴ Exhibit RL-007 - *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, ¶ 120.
 - ¹⁵ Exhibit RL-019 - *Waste Management Inc. v. United Mexican States [I]*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000, ¶¶ 14.1 where it reads: “In the light of this Article, it is fulfilment of NAFTA Article 1121 conditions precedent by an aggrieved investor that entitles this Tribunal to take cognisance of any claim forming the subject of arbitration held in accordance with the dispute settlement pro-cedure established under Chapter XI of said legal text. [...]”.
 - ¹⁶ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002, ¶ 44.

ICSID Arbitration (Additional Facility) Rules, and the New York Convention that arbitration agreements be in writing to be enforceable. [...] ¹⁷ [Emphasis added]

Response to Question 3(ii)

It can be argued that an investor/enterprise who gives a power of attorney to a legal representative to take all necessary steps to submit a claim to arbitration in accordance with NAFTA is necessarily consenting to the submission of the claim to arbitration in accordance with NAFTA. Can an investor/enterprise instruct their legal representatives to commence arbitration yet be deemed not to have consented to arbitration?

21. Mexico submits that Article 1121, interpreted in good faith and in the light of the ordinary meaning of its terms in their context, requires disputing investors to provide clear, explicit consent to arbitration and does *not* permit implied or constructive consent. This interpretation is shared by the Claimants' own government.¹⁸

22. There can be no ambiguity or uncertainty surrounding the Claimants' consent because it is needed to establish the arbitral agreement. This is the reason why Article 1121(3) requires that consent to be in writing, delivered to the disputing Party and included in the submission to arbitration. Article 1121(3) would be superfluous if consent could be inferred from the investors' actions –such as instructing its legal representatives to commence arbitration– or from the filing of other documents –such as the RFA or a power of attorney.

23. A disputing investor may instruct its legal representative to commence arbitration and yet be deemed *not* to have consented to arbitration for failure to comply with Article 1121. Authorizing legal counsel to act and consenting to arbitration are two separate and distinct legal acts.

24. The POAs filed by the Claimants are not written consents to arbitration. They authorize lawyers from Quinn Emanuel to “take any steps required for the initiation of, and to represent [claimant] and act on his behalf against the United Mexican States in, arbitration proceedings under the North American Free Trade Agreement (“NAFTA”)”.¹⁹ It is not a statement by any of the

¹⁷ Exhibit RL-025, pp. 4-5.

¹⁸ See Article 1128 Submission by the United States, ¶ 11 where it reads: “[...] Additionally, the “consent” required by Article 1121 must be “clear, explicit and categorical[.]”¹⁶”.

¹⁹ Exhibit C-4, Powers of Attorney.

Claimants directed to the Respondent that he/she/it consents to arbitration in accordance with the procedures set out in the NAFTA.

25. Consent to arbitration cannot be inferred from a power of attorney any more than a wavier can. Indeed, no one could seriously argue that granting a power of attorney to legal counsel necessarily implies that the investor or enterprise has “waived its right to initiate or continue [...] any proceedings with respect to the measure [...]” Clearly, any claimant is required under Article 1121 of the NAFTA to execute a written waiver and a written consent to arbitration regardless of whether the disputing investor has instructed or authorized counsel to commence arbitration proceedings.

Response to Question 3(iii)

Assuming *arguendo* that a valid power of attorney for the submission of a claim necessarily contains the principal’s consent to such submission, when an investor/enterprise attaches a written power of attorney to their notice of arbitration, can it be argued that they are delivering their consent “in writing” “to the disputing Party” and are “includ[ing] [it] in the submission of a claim to arbitration”? Which of those requirements would not be met and why?

26. The answer to this question would depend on whether the consent “contained” in the power of attorney constitutes a clear and explicit expression of consent that is equivalent to the usual formulation: “I hereby consent to arbitration in accordance with the procedures set out in the NAFTA”. If that were the case, the Respondent would agree that including such power of attorney and consent in the submission of a claim to arbitration would satisfy the requirements of Article 1121(3).

27. To be clear, the Respondent maintains that the POAs do *not* contain a clear and explicit expression of consent. Lawyers from both common law and civil law traditions would readily recognize that a power of attorney authorizing counsel to act is no more a written consent to arbitration than a consent to arbitration is an authorization for counsel to act. These are different legal instruments that serve a different legal purpose. The Tribunal cannot hold that a power of attorney suffices as a written consent to arbitration without engaging in legal artifice.

Response to Question 3(iv)

Does Article 1122(2) bear on the foregoing when it provides that the “consent given by [Article 1122(1)] and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of ... the Additional Facility Rules for written consent of the parties”?

28. The Respondent submits that it does not. Article 1122(2) means that the consent given by the NAFTA Parties under Article 1122(1), when properly engaged, will be deemed to meet the requirements of the Additional Facility Rules for written consent of the parties.

29. Article 4(2) of the Additional Facility Rules states:

Article 4

Access to the Additional Facility in Respect of Conciliation and Arbitration Proceedings Subject to Secretary-General's Approval

[...]

(2) In the case of an application based on Article 2(a), the Secretary-General shall give his approval only if (a) he is satisfied that the requirements of that provision are fulfilled at the time, and (b) both parties give their consent to the jurisdiction of the Centre under Article 25 of the Convention (in lieu of the Additional Facility) in the event that the jurisdictional requirements *ratione personae* of that Article shall have been met at the time when proceedings are instituted.

[...] [Emphasis added]

30. Article 25 of the Convention states in the relevant part:

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally. [Emphasis added]

31. In sum, when properly engaged, the consent given by a NAFTA Party under 1122(1) will be deemed to satisfy the requirement under Article 25 of the ICSID Convention to provide written consent.

III. Failure to engage Respondent's consent to arbitration under Article 1122

32. The Respondent has consistently maintained throughout this proceeding, and more than 20 years of Chapter 11 arbitration, that a NAFTA Party's consent under Article 1122 is conditioned to the claimant's compliance with the procedures and requirements set forth in Articles 1116 through 1121. This follows from the plain language of Article 1122 which states that: “[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement”.

33. Mexico submits that the “procedures set out in this Agreement” to which Article 1122 refers include, *inter alia*:

- each disputing investor submitting a NOI at least 90 days before the claim is submitted to arbitration pursuant to Article 1119;
- each disputing investor waiting out the 6-month cooling-off period and choosing the applicable arbitration rules pursuant to Article 1120; and
- each disputing investor executing a written consent and waiver in the form required by Article 1121, delivering them to the disputing party and including them with the submission of a claim to arbitration pursuant to Article 1121.

34. Mexico has cited various NAFTA Tribunals that provide support for this interpretation, most notably, *Methanex*, *Merril & Ring*, *Canfor* and *Bilcon*.²⁰ The Respondent’s interpretation of Article 1122 is also shared by the other two NAFTA Parties, as demonstrated by their numerous Article 1128 submissions in this and other Chapter 11 arbitrations.²¹

35. The Claimants have attempted to minimize the significance of non-disputing NAFTA Party submissions stating “in cases like this where the Parties have not availed themselves of the NAFTA Free Trade Commission procedure don't really have any special weight whatsoever, and this Tribunal should not accord it any”.²² Accepting such a proposition would render Article 1128 meaningless where in fact it has played an important role in the proper interpretation and application of Chapter 11’s substantive obligations and dispute settlement provisions, as can be seen in the sea-change from the *Ethyl* tribunal’s lenient interpretation of the requirements for submitting a claim, to the recognition, in subsequent jurisprudence, that Articles 1116 to 1121 are

²⁰ Memorial on Jurisdiction, ¶ 56 citing to: Exhibit RL-007, *Methanex Corporation v. United States of America*, Partial Award, 7 August 2002, ¶ 120; Exhibit RL-008, *Merril & Ring Forestry L. P v. Government of Canada*, UNCITRAL, ICSID Administered, Decision on a Motion to Add a New Party, 31 January 2008, ¶¶ 28-29; Exhibit RL-009, *Canfor Corporation v. United States of America, Tembec Inc. et. al. v. United States of America and Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Decision of Preliminary Question, 6 June 2006, ¶ 171; Exhibit RL-010, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015, ¶¶ 228- 229.

²¹ Memorial on Jurisdiction, ¶¶ 60-63.

²² Claimants’ questions by the Tribunal, Transcript, Day 1, p. 228:14 – 231:5.

mandatory, consistent with the extensive line of Article 1128 submissions filed by non-disputing NAFTA Parties after *Ethyl*.

36. Article 1128 submissions must be given appropriate consideration and weight by any tribunal tasked with interpreting the NAFTA. It is the practice of Chapter 11 Tribunals to do precisely that and it is often the case that they expressly agree with points made by the non-disputing Parties. By way of example, the recent award in *Resolute Forest Products. v. Canada* held as follows:

85. The Tribunal does not agree with the Pope & Talbot dictum that time bar objections under NAFTA Articles 1116(2) and 1117(2) constitute an ‘affirmative defence’. The language of NAFTA treats the 3-year time limit as one among a number of requirements that a claimant under Chapter Eleven has to meet to attract jurisdiction over a claim. The Tribunal agrees with later tribunals, and with the United States and Mexico in their Article 1128 submissions, that the claimant has to establish its case on this and other points.²³

37. The recent award in *Mercer v. Canada* provides another example of the consideration given to Article 1128 submissions by contemporary NAFTA tribunals:

7.7 The Claimant added that it did not have to establish discriminatory intent on the Respondent’s part. The Respondent characterised this as a mistaken submission that nationality was wholly irrelevant. The Tribunal does not accept the Claimant’s submission, based (inter alia) on the submissions of the USA and Mexico summarized below which the Tribunal accepts.

[...]

7.13 In its submission under NAFTA Article 1128, Mexico likewise agrees that the burden remains on the Claimant throughout; and that the Claimant must establish more than a prima facie case.

7.14 The Tribunal agrees with these Article 1128 submissions. However, the Tribunal must also take account of the distinction between the legal burden of proof (which never shifts) and the evidential burden of proof (which can shift from one party to another, depending upon the state of the evidence). Moreover, every party bears the burden of proving its positive allegations, whether claimant or respondent.

[...]

7.19 The Claimant’s submissions focus on the circumstances of the investor. The Respondent contends that that is inappropriate and contrary to the plain wording of NAFTA Articles 1102 and 1103, which require the Claimant to prove that the treatment

²³ Exhibit RL-037, *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 85 (Judge James R Crawford, AC (Presiding Arbitrator), Dean Ronald A Cass, Dean Céline Lévesque).

accorded to the investor or its investments was “in like circumstances”. In its submission made under NAFTA Article 1128, Mexico agrees with the Respondent on this issue.

7.20 The Tribunal agrees with the Respondent and with Mexico. In its view, the clearest explanation of the position is found in the NAFTA award in *Cargill v Mexico* [...] ²⁴ [Emphasis added][Footnotes motted]

Response to Question 4(i)(a)

Article 1122 (“Consent to Arbitration”), first paragraph, provides in terms that “[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement”. Articles 1121(1)(a) and 1121(2)(b) requires that the investor/enterprise similarly “consent to arbitration in accordance with the procedures set out in this Agreement”. Articles 1123 through 1138 (i.e., through the end of Section B) set out detailed procedural provisions governing any arbitration pursuant to Section B.

(i) Is it appropriate to conclude that the phrase “in accordance with the procedures set out in this Agreement” modifies “arbitration” in each of Articles 1121 and 1122, considering the observations in (a) to (e) below?

a. It can be argued that the Agreement does not set out “procedures” for how an investor is to express its consent to arbitration where the only requirements imposed by Article 1121 (delivered in writing to the disputing Party and included with the notice of arbitration) can be reduced to a single (and simple) act, rather than a series of multiple consecutive steps—what can be said to be the ordinary meaning of “procedures”, especially when used in the plural.

38. The ordinary meaning of the term “procedure” is not confined to “a series of multiple consecutive steps”, but includes, “a particular way of accomplishing something or of acting”²⁵ or “an established or official way of doing something”.²⁶ Similarly, in Spanish, the term “*procedimiento*” is defined as: “method of executing certain things”.²⁷

39. The Respondent submits that the phrase “in accordance with the procedures set out in this Agreement” in Articles 1121 and 1122 modifies the term “arbitration”. However, since an arbitration commences with the submission of a claim, the phrase “in accordance with the procedures set out in this Agreement” in Article 1121 includes the procedure that must be followed to validly submit a claim to arbitration.

²⁴ Exhibit RL-038, *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, ¶¶ 7.7, 7.13-7.14, 7.19-7.20.

²⁵ See <https://www.merriam-webster.com/dictionary/procedure>

²⁶ See <https://en.oxforddictionaries.com/definition/procedure>

²⁷ See <http://dle.rae.es/?id=UErw6id>

40. The Respondent strongly disagrees that the NAFTA does not set out a “procedure” for the investor’s consent to arbitration. Article 1121(3) requires that the consent and waivers be in writing, which necessitates creating a document (or documents) that expressly states the investor’s/enterprise’s consent to arbitration in accordance with the procedures set out in the NAFTA and their agreement to waive their rights to initiate or continue any proceedings with respect to the measure alleged to be in violation of the NAFTA. *Second*, the same provision mandates that such consents and waivers be included with the submission of the claim to arbitration (*i.e.*, the Request for Arbitration) and be delivered to the respondent Party.

41. These requirements constitute “a series of consecutive steps” or “an established or official way of doing something” or “a particular way of accomplishing something or of acting” and, therefore, qualify as a “procedure”.

Response to Question 4(i)(b)

The Agreement does not set out any “procedures” for how a disputing Party is to express its consent to arbitration because Article 1122(1) records that consent.

42. The Respondent agrees that there is no “procedure” (*per se*) for how a disputing Contracting Party is to express its consent because Article 1122(1) records that consent. However, the consent offered in Article 1122(1) is to “the submission of a claim to arbitration in accordance with the procedures set out in this Agreement”, not to the submission of a claim to arbitration in accordance with the preferred procedure established by the Claimants. As noted in the 1128 Submission by the United States:

4. Article 1122 (Consent to Arbitration), paragraph (1), provides that: “Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.” Thus, the NAFTA State Parties have only consented to arbitrate investor-State disputes under Chapter 11, Section B, where an investor submits a “claim to arbitration in accordance with the procedures set out in this Agreement.” And, an agreement to arbitrate is formed upon the investor’s corresponding consent to arbitrate in accordance with those procedures. Thus, the NAFTA Parties have explicitly conditioned their consent upon satisfaction of the relevant procedural requirements. All three NAFTA Parties agree on this point.²⁸

(Footnotes omitted)

²⁸ Submission of the United States of America on Article 1128, ¶ 3.

43. The Respondent agrees with the United States that adherence to the procedure or established way of submitting a claim to arbitration must be observed by any claimant in order to engage a NAFTA Party's consent under Article 1122(1).

44. The most recent NAFTA award dealing with this issue is precisely to the same effect. The Tribunal in *Resolute Forest Products. v. Canada* considered the point to be obvious:

82. Section B of Chapter Eleven of NAFTA deals with settlement of disputes between investors and States Parties. Its central provision, jurisdictionally speaking, is section 1122 ('Consent to Arbitration'), paragraph 1 of which reads:

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

83. The clear inference is that arbitration of a claim not submitted in accordance with those procedures is not consented to and that the tribunal lacks jurisdiction. Although the time limit specified in Articles 1116(2) and 1117(2) is not itself a procedure, compliance with it is required for the bringing of a claim, which is certainly a procedure. This is enough to justify the conclusion that compliance with the time limit goes to jurisdiction.

84. Even if it did not and was to be classified (as time limits in other contexts are often classified) as a matter of admissibility, it would not necessarily follow that the onus of proof in that regard was on the respondent party. Article 24(1) of the UNCITRAL Rules, which are applicable here by virtue of Article 1120(1) of NAFTA, imposes on the relevant party 'the burden of proving the facts relied on to support [its] claim or defence'. The Tribunal does not see any reason to limit Article 24(1) to matters of substance, and the facts necessary to establish that a claim has been brought in accordance with Section B of Chapter Eleven are, in its view, facts relied on in support of the claim.²⁹ [Emphasis added]

45. Another recent example can be seen in *Mercer v. Canada* where the tribunal acknowledged that Article 1119 and 1120 form part of the "requirements" that the Claimants must meet for the tribunal to be able to decide them:

6.3 It is common ground, which the Tribunal accepts, that the Claimant's claims otherwise meet the formal requirements required for the Tribunal to decide them in this arbitration. On 26 January 2012, as required by NAFTA Article 1119, the Claimant served its Notice of Intent upon the Respondent; and on 30 April 2012, not less than 90 days after its Notice and not less than six months since the events giving rise to its claims, the Claimant served its Request for Arbitration upon the Respondent.

²⁹ Exhibit RL-037, *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶¶ 82-84.

6.17 Subject to the following point, in regard to these particular factors, the Tribunal therefore decides that it does not have jurisdiction (nor can it exercise jurisdiction) to hear the Claimant’s claims concerning the 2009 EPA brought under NAFTA by virtue of the time-bars in NAFTA Articles 1116(2) and 1117(2).³⁰

Response to Question 4(i)(c)

The Agreement does set out detailed “procedures” in respect of the arbitration itself, immediately following Article 1122, in Articles 1123-1138.

46. The Respondent submits that the “arbitration” commences with the submission of a claim. Hence, the “procedures” in respect of the arbitration itself include the procedures for a valid submission of a claim to arbitration. To avoid unnecessary repetition, the Respondent refers to its response to question 4(i)(a) above.

Response to Question 4(i)(d)

It would not be incongruent for the NAFTA negotiators to have employed an identical phrase in two consecutive provisions to modify the same term also appearing in both those provisions—“arbitration”

47. The Respondent agrees that the phrase “in accordance with the procedures set out in this agreement” modifies “arbitration” and therefore, its use in Articles 1121 and 1122 is not incongruent or inconsistent.

Response to Questions 4(i)(e)

That “procedures” in both Articles 1121 and 1122 should modify the term “arbitration” in those provisions may logically make sense: unless an investor and a disputing Party express their consent specifically to arbitration in accordance with those detailed procedures—as opposed to “arbitration”, full stop—no agreement to arbitrate in accordance with Section B could come into existence: NAFTA Parties have only extended their consent to arbitrations conducted in accordance with the detailed procedures set out in Section B.

48. The Respondent agrees with this interpretation. Article 1121 calls for a specific form of consent. This point was made at ¶ 92 of the Memorial on Jurisdiction:

92. This contention is specious. First, Articles 1121(1)(a) and 1121(2)(a) require a very specific form of consent (i.e., “consent to arbitration in accordance with the procedures set out in this Agreement”). This language or its precise equivalent must be included in the claimant’s consent. Second, it also clear from the text of Article 1121(3) that consent must be in writing and delivered to the disputing NAFTA Party. Thus, a claimant cannot implicitly or constructively consent to arbitration “by virtue of [its] submission of the

³⁰ Exhibit RL-038, *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, ¶¶ 6.3 and 6.17.

RFA to the Centre” or by “acceptance of that offer by submission of their RFA”. To permit such an interpretation of these provisions would rob them of meaning and violate the fundamental treaty interpretation principle of *effet utile*. [Emphasis added]

Response to Question 4(ii)(a)

Alternatively, can it be argued that “in accordance with the procedures set out in this Agreement modifies the “submission of a claim” in Article 1122, considering the observations in (a) to (b) below?

Article 1119 would not appear to contain such “procedures”. That provision by definition is not concerned with the submission of a claim but with the submission of a notice of intent. The distinction is legally relevant: a notice of intent does not legally commit an investor to submit a claim to arbitration—it can freely choose not to pursue arbitration after filing such notice.

49. The Respondent disagrees with the general proposition stated in question (ii) –*i.e.*, that the phrase “in accordance with the procedures set out in this Agreement” modifies the “submission of a claim”. It would make little sense to require a disputing investor to consent to arbitration “in accordance with the procedures set out in this Agreement” without a reciprocal commitment by the disputing Party.

50. With respect of observation 4(ii)(a) above, the Respondent maintains that Article 1119 contains a *sine qua non* condition for the valid submission of any claim to arbitration. This is apparent from the mandatory language used in that provision: “The disputing investor *shall* deliver to the disputing Party [...] *at least 90 days before the claim is submitted* [...]”. This requirement, together with those established in Articles 1120 and 1121 (*inter alia*) establish the “procedure” for the submission of a claim to arbitration which, as noted earlier, marks the commencement of an arbitral proceeding.

51. Mexico further submits that while it is true that a NOI does not legally commit an investor to submit a claim to arbitration, no submission to arbitration is valid without previously submitting a NOI to the respondent Party.³¹

Response to Question 4(ii)(b)

However, Article 1120—the sole provision titled “Submission of a Claim to Arbitration”—is indeed concerned with the submission of a claim and it requires the lapsing of six months, directs the investor to choose between different arbitral fora, and provides that the applicable arbitration rules shall govern save as modified by Section B. Can it be argued that Article 1122 records the disputing Party’s

³¹ See Submission of the United States of America on Article 1128, 28 February 2018, ¶¶ 6-9; Submission of Canada on Article 1128, 28 February 2018, ¶¶ 8 and 9.

consent to arbitration but only when the claim is submitted in accordance with the “procedures” of Article 1120—to wit: the lapsing of 6 months; the selection of one of the available arbitral fora; and the acceptance of the applicable arbitral rules as modified by Section B?

52. The Respondent disagrees. If the premise of the question were correct—*i.e.*, that Article 1122 records the disputing Party’s consent to arbitration but only when the claim is submitted in accordance with the “procedures” of Article 1120— then an investor could, in principle, submit a claim to arbitration, without giving prior notice, without providing beforehand any information whatsoever regarding the claim (including the identity of the intended claimants) and without making any attempt to settle the claim through consultation and negotiation. Mexico submits that a plain reading of the treaty shows that compliance with all of the requirements stipulated in Articles 1116 to 1121, inclusive, is required to validly submit a claim to arbitration.

53. The title of Article 1120 does not mean that other requirements for a valid submission of a claim established elsewhere in the Treaty can be ignored by a disputing investor.

Failure to comply with Article 1119

54. The Claimants do not dispute that the names of the Additional Claimants are not included in the NOI. Mr. Burr testified at the hearing that he fully briefed White & Case, informed it of the structure of the investments, the identity of the Claimants and the specifics of the claims and thus expected that the interests of the Additional Claimants would be covered, despite their non-inclusion in the NOI.³²

55. The Claimants nonetheless seek to excuse the failure to name the Additional Claimants in the NOI on the grounds that it would have made no difference to Mexico, as any further attempt at consultation or negotiation would have been futile.³³

³² Mr. Burr’s testimony, Transcripts, Day 2, pp. 386:5-18; pp. 375:16-376:16; pp. 377:16 - 378:16; pp. 380:10 - 381:19.

³³ Counter – Memorial on Jurisdictional Objections, ¶¶ 404, 405; Claimants’ Rejoinder on Jurisdictional Objections, ¶ 14.

56. The Respondent maintains that the requirement to give notice is mandatory and no amount of excuses or explanations – other than reliance on an express waiver by the disputing Party -- can relieve a disputing investor from that requirement.³⁴ The Respondent does not have to prove that it has been prejudiced by the Additional Claimants' failure to give notice. It is a compulsory requirement.

57. The Respondent, in any event, contests the Claimants' contention that Mexico resolutely refused to engage in consultations.

58. The Claimants continue to conflate their attempts to convince SEGOB to reopen their casinos with consultations and negotiations with the Ministry of the Economy (*Economia*) pursuant to Article 1118 of the NAFTA. In their opening statement, the Claimants referred to a number of meetings with SEGOB officials as evidence that Mexico rebuffed them at every opportunity.³⁵ There are two important considerations: (i) the vast majority of the meetings on which the Claimants rely occurred *before* the claims were notified to the Respondent on 23 May 2014, and (ii) the meetings were largely with SEGOB officials and not the authorities that are responsible for the defense of investor-state claims against Mexico, namely, *Economia*. None of these efforts can be considered as consultations and/or negotiations under Article 1118.

59. The record shows that in January 2013, upon receiving a letter from the investors' then legal counsel (White & Case), *Economia* diligently contacted SEGOB and organized a meeting with the investor and SEGOB officials to discuss the matter further. This meeting was held on February 2013.³⁶

60. It is clear from the investors' actions –*i.e.*, the White & Case letter and the subsequent submission of the NOI– that they were aware that *Economia* was responsible for all matters concerning a NAFTA claim, yet no serious attempt to follow up with *Economia* was made after

³⁴ Respondent's Rebuttal, ¶¶ 14 and 19.

³⁵ Claimants' Opening Statement, Transcript, Day 1, pp. 108:6 – 111:21.

³⁶ *Id.*, Transcript Day 1, p. 109:7-16; Memorial on Jurisdiction; ¶ 17.

the February 2013 meeting. Instead, Mr. Burr continued to focus his efforts in trying to obtain a meeting with Mrs. Gonzalez Salas, then head of the Games and Raffles Directorate at SEGOB.³⁷

61. The Claimants also attempted to portray a series of calls between Messrs. Vejar (former Director of Economia's Office of Legal Counsel) and Gutierrez (Mr. Burr's lawyer in Mexico) as evidence of further attempts at negotiations.³⁸ However, as Mr. Gutierrez admitted during cross-examination, he was not named counsel for matters concerning the NAFTA arbitration.³⁹ In fact, the NOI submitted by White & Case on behalf of the Original Claimants, specifically states "White & Case LLP is counsel of record for the U.S. Investors in this matter. All communications submitted in relation to this notice should be sent to the attention of Andrea J. Menaker at White & Case LLP at 701 Thirteenth Street, NW, Washington, D.C. 20005."⁴⁰

62. The record shows that the only real attempt to engage in consultations and negotiations *after* the submission of the NOI came from *Economia*, and it was dismissed by the Claimants as an attempt to obtain an undue advantage in preparation for this arbitration. In the words of Claimants' counsel:

And it was very reasonable for the Claimants to conclude, when they received this questionnaire, in light of all of this information and everything that had gone on up until then, that the questionnaire was not any effort by Mexico to engage in consultations. It was instead a questionnaire interpreted, just as they have told you, as an effort to mount information or obtain more information to help Mexico mount a defense to the NAFTA claim.

Nowhere in the NAFTA does it say that a Claimant, after issuing its notice, has to respond to a questionnaire in order to engage in consultations.⁴¹

63. The record also demonstrates that Ms. Martinez' communication requesting further information went unanswered for four months. Indeed, Ms. Martinez had to follow up three times with Ms. Menaker to finally get an answer, and even that left the impression that the Original

³⁷ Witness Statement of Gordon Burr (25 July 2017), CWS-1, ¶¶ 35-36.

³⁸ *Id.*, ¶ 35.

³⁹ Mr. Gutierrez testimony, Transcript, Day 2, pp. 601:18 – 602:1.

⁴⁰ Notice of Intent to Submit a Claim to Arbitration, ¶ 4.

⁴¹ Claimants' Opening Statement, Transcript Day 1, p. 121:4 – 15.

Claimants were not intending on proceeding with a claim.⁴² When confronted with the fact that the information sought through the questionnaire was needed to properly assess the case and recommend a course of action, Mr. Burr testified that if *Economia* wanted that information “they should have met with me” and that “he was under no obligation to answer a questionnaire”.⁴³

64. There is no record evidence that, after the NOI was submitted, the Claimants requested a meeting with *Economia*. To the contrary, during that time, the Claimants were preoccupied with striking a deal with Messrs. Chow and Pelchat to reopen their casinos.⁴⁴ They agreed to resign from the Boards of Managers of all of the five Juegos Companies⁴⁵ –a fact that any person attempting to establish good faith consultations under Article 1118 would have been forced to disclose to the authorities. In this case, the Respondent submits that was not possible because the Claimants wanted to allow Mr. Chow to represent to SEGOB that the U.S. investors were no longer involved in the Juegos Companies.⁴⁶

65. Under these circumstances, the investors cannot seriously complain of being rebuffed at every juncture.⁴⁷ The Claimants’ attempts to secure meetings with SEGOB officials to complain about issues predating the closure of the casinos and/or to attempt to convince SEGOB to allow

⁴² Respondent’s Opening Statement, Transcript, Day 1, pp. 30:20 - 31:19.

⁴³ Mr. Burr’s testimony, Transcript, Day 2, pp. 389:22 - 392:2.

⁴⁴ See CWS-11, Witness Statement of Mr. Chow, ¶ 8 and 12, in May 2014 Mr. Chow and Mr. Gordon met in Mexico City to discuss the Transaction with Grand Odyssey. Mr. Chow declared that “the proposed transaction structure would allow the shareholders who were US citizens to retain indirect ownership in the Juegos Companies and the Casinos that they had built in Mexico, thereby allowing them to reap the benefits of their investments, while simultaneously addressing the Mexican State desire to exclude the US shareholders of the Juegos Companies and their affiliates from the Mexico business casinos”; CWS-4, Witness Statement of Mr. Pelchat, ¶ 7, sometime in April 2014 after the Mexican government closed the casinos, Mr. Pelchat met with representatives of the Juegos Companies.

⁴⁵ *Id.*, ¶ 13, Mr. Chow traveled to Denver to meet with the Board of Directors of the Juegos Companies with whom he had been meeting in July and August of 2014. In this meeting Mr. Chow explained to the Juegos Companies’ managers that he and Mr. Pelchat would have to be appointed to the Boards of Managers of the Juegos Companies at the upcoming *asambleas*. Mr. Chow explained that this was necessary to demonstrate the Mexican Government that they were complying with their directive to diminish the involvement of the US shareholders in the Casinos. In response to Mr. Chow’s request and insistence, the US shareholders agreed.

⁴⁶ Claimants’ Opening Statement, Transcript, Day 1, p. 162:1-15.

⁴⁷ See, for example, Claimants’ Opening Statement, Transcript Day 1, pp. 116:18 – 117:2, p. 120:2-3.

their reopening before the NOI was served cannot be considered consultations and negotiations pursuant to Article 1118.

66. The Claimants also suggested at the hearing that all the information that *Economia* was seeking through the NOI Questionnaire was available from the public registry that is under *Economia*'s control. This is misleading because, as Mr. Gutierrez testified, not all the *asambleas* are protocolized and filed in the public registry.⁴⁸ In fact, under the Claimant's logic, the only thing *Economia* would have learned by consulting the public registry after the November 7, 2014 *asambleas* were filed was that the shares of the Juegos Companies were owned by Grand Odyssey.

67. Meaningful consultations or negotiations under Article 1118 cannot be conducted if the disputing Party is not afforded the opportunity to assess the claim. That assessment was not possible on the basis of the information provided with the NOI which did not name 30 of the 38⁴⁹ disputing investors, did not include any annexes indicating "who owns what" and did not include any of the supporting documentation that, pursuant to the 7 October 2003 FTC note on Notices of Intent, a disputing Investor ought to include in a NOI.⁵⁰ Moreover, when *Economia* sought to obtain the information through the NOI Questionnaire, Mr. Burr consciously decided not to provide it.⁵¹

Response to Questions 2(i) and (ii)

Articles 1119 and 1120 in terms require: (i) delivery by the investor of a written notice of intent containing the information specified in Article 1119 at least 90 days before the submission of the claim to arbitration, and (ii) the lapsing of six months between the events giving rise to a claim and the submission of the claim to arbitration.

(i) Does the principle of "effet utile" require the treaty interpreter to give meaning to the NAFTA Parties' choice to use the terms "conditions precedent" in Article 1121 and, by the same token, their choice not to use those terms in Articles 1119 and 1120? What principles of treaty interpretation as codified in the Vienna Convention on the Law of Treaties allow or require a treaty interpreter to disregard that choice?

(ii) Articles 1119 and 1120 are stated in mandatory terms ("shall" and "provided", respectively) and, in accordance with the effet utile principle, those terms too must be given meaning. Assuming

⁴⁸ Mr. Gutierrez testimony, Transcript, Day 3, p. 644:1 - 645:22.

⁴⁹ During the Hearing on Jurisdiction the Claimants withdrew EMI Consulting, LLC, reducing the total number of Claimants from 39 to 38.

⁵⁰ Respondent's Opening Statement, Transcript, Day 1, pp. 58:9 – 59:9; Testimony of Ms. Martinez Gamba, Transcript, Day 1, pp. 271:15 – 272:1.

⁵¹ Mr. Burr's testimony, Transcript, Day 2, pp. 389:22 - 392:2.

arguendo that Articles 1119 and 1120 cannot be construed to contain “conditions precedent” to a tribunal’s jurisdiction where those terms are only used in Article 1121, what then are the consequences of an investor’s/enterprise’s failure to comply with those provisions? And what are the remedies to which the disputing Party is entitled when these provisions are not complied with?

68. The fact that Article 1121 falls under the heading “conditions precedent to submission of a claim to arbitration” does not derogate from the mandatory language in Article 1119 (“shall”) or Article 1120 (“provided that”).

69. The requirements for engaging in investment treaty arbitration under Section B of Chapter 11 begin with Articles 1116 and 1117 which require the existence of an “investor of a Party” and (in the case of 1117) an investment of an investor of a Party” to make a claim within the three-year limitation period.

70. Thereafter:

- Article 1118 - Settlement of a Claim through Consultation and Negotiation --provides that the disputing parties *should* first attempt to settle a claim through consultation or negotiation.
- Article 1119 – Notice of Intent to Submit a Claim to Arbitration – provides that the disputing investor *shall* deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice *shall* specify (*inter alia*) the name and address of the disputing investor.
- Article 1120 – Submission of a Claim to Arbitration – then says “*provided that* six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under the ICSID Convention Rules (if applicable), the ICSID Additional Facility Rules (if applicable) or the UNCITRAL Rules.
- Article 1121(1) – Conditions Precedent to Submission of a Claim to Arbitration – then provides that a disputing investor may submit a claim to arbitration *only if* the investor consents to arbitration in accordance with the procedures set out in the NAFTA and waives its right to initiate or continue any proceedings with respect to the measure that

is alleged to be a breach, except for proceedings for injunctive, declaratory or other extraordinary relief.⁵²

- Article 1121 (3) provides that “a consent and waiver required by this Article *shall* be in writing, *shall* be delivered to the disputing Party and *shall* be included in the submission of a claim to arbitration.

71. It can be seen that each of these provisions (except article 1118) is drafted in mandatory terms. They follow a progression – (i) attempt to settle through consultation (ii) requirement to give notice with specific contents and wait 90 days; requirement to wait 6 months from occurrence of the impugned measures before selecting one of three sets of arbitral rules; and, finally, submission of a claim accompanied by the prescribed consent and waiver. It is a natural sequence which culminates in submission of the claim to arbitration. The fact that Article 1121 falls under the heading “conditions precedent to submission of a claim to arbitration” does not in any way diminish the mandatory effect of Article 1119 (“shall”) or Article 1120 (“provided that”).

72. Article 31(1) of the VCLT provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.⁵³ The principle of *effet utile* or effectiveness (*ut res magis valeat quam pereat*) flows directly from Article 31(1).⁵⁴ It requires an interpretation that gives meaning

⁵² Respondent’s Reply on Jurisdictional Objections, ¶¶ 10-14.

⁵³ Exhibit RL-031 *Aguas del Tunari, S.A., v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, ¶ 91.

⁵⁴ See ILC Commentaries, para. 6, page 219. See also Exhibit RL-039, Appellate Body Report, Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, pp.11-12.

and effect to all the terms of the treaty.⁵⁵ An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.⁵⁶

73. To conclude that Article 1119 and/or 1120 are not mandatory because they are not titled as “conditions precedent” would render them inutile. If not mandatory requirements, then what are they? Are they merely recommendations or statements of best practice, *i.e.*, that a disputing investor “should” or “ought to” give notice of intent and wait 6 months from the occurrence of the impugned measures before submitting a claim? And what of the three-year limitation period in Articles 1116 and 1117? Should it be considered hortatory despite stating that a disputing investor *may not* submit a claim if more than three years have elapsed? The contemporary NAFTA jurisprudence consistently holds these provisions to be mandatory requirements to establish a Tribunal’s jurisdiction under Chapter 11.⁵⁷

74. Articles 1116 to 1121 can be accorded their ordinary meaning when read in their context (in this case as a progressive sequence of requirements) without doing harm to any them. To interpret any one of Articles 1116 to 1120 (except Article 1118) as not being mandatory would render that provision inutile and would be directly at odds with the ordinary meaning of its text.

75. The failure of any intended claimant to comply with both 1119 and/or 1120 is to render the purported submission void *ab initio* and the claim must be dismissed, whether it is considered to be a question of jurisdiction or “admissibility”. There would be no valid claim for the tribunal to consider.

⁵⁵ Exhibit RL-040, Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, pp. 9-20, citing to: *Corfu Channel Case* (1949) I.C.J. Reports, p.24 (International Court of Justice); *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)* (1994) I.C.J. Reports, p. 23 (International Court of Justice); 1966 Yearbook of the International Law Commission, Vol. II at 219; Oppenheim’s *International Law* (9th ed., Jennings and Watts eds., 1992), Volume 1, 1280-1281; P. Dallier and A. Pellet, *Droit International Public*, 5è ed. (1994) para. 17.2); D. Carreau, *Droit International*, (1994) para. 369.

⁵⁶ *Id.*, pp.11-12

⁵⁷ See *Supra*, at ¶ 68.

76. The Claimants have attempted to characterize their failures of compliance with Articles 1119 and 1121 as matters of admissibility rather than jurisdiction which they say should enable the Tribunal to continue to decide the case once the failures have been cured.

77. The Respondent submits that the Claimants' failures of compliance with Articles 1119 and 1121 deprived the Tribunal of jurisdiction for two reasons: (i) it rendered the submission to arbitration void *ab initio* leaving with Tribunal will no claim to decide on the merits– or no jurisdiction *ratione materiae* – and (ii) the Claimants failed to engage Mexico's consent to arbitration under Article 1122, such that there is no agreement to arbitration to vest the Tribunal with jurisdiction.

78. However,

- *even if* the Claimants' failures of compliance were to be considered matters of admissibility, the claim would have to be dismissed on the grounds that there was no valid submission to arbitration and/or that the failures of compliance were otherwise fatal; and
- *even if* the Claimants' failures of compliance were somehow to be characterized as resulting in an imperfect or incomplete submission to arbitration, any remedial action could only perfect or complete the submission at time the such action is taken and could not operate retroactively.

79. Mexico additionally contends that purported submission of a claim without compliance with Article 1119 or 1121 – among others – fails to engage a disputing Party's consent under Article 1122, without consent there is no agreement, and that the failure to establish an agreement to arbitrate deprives the tribunal of jurisdiction.

80. The remedies available to the disputing Party are first to try to block the registration of the claim if filed in the ICSID, which Mexico did 12 days after receiving the RFA, and thereafter to assert a challenge to the Tribunal's competence, which Mexico did at the First Session of the Tribunal. The Tribunal will recall that the Claimants stridently demanded that the claim be registered, forcefully contending that the Secretary General had no discretion to consider Mexico's objections. The Claimants also stridently contended that the Additional Claimants were excused

from complying Article 1119 because further negotiations with Mexico would have been futile, and that the Claimants' POAs and counsel's act of issuing the RFA sufficed as compliance with Article 1121. The Acting Secretary General registered the claim, observing "I remind the parties that the registration of the Request for Arbitration is without prejudice to the powers and functions of the Tribunal in regard to competence and the merits".⁵⁸

81. The Claimants could have remedied their failure to provide the required consents to arbitration by doing so promptly after being challenged by Mexico. In such case their submission to arbitration would have been complete as at the date that the consents were delivered to Mexico and the ICSID. Instead they filed declarations from the Additional Claimants contending that it was always intended that they would be included as claimants in the arbitration.⁵⁹

82. The Additional Claimant's attempt to remedy their failure of compliance with Article 1119 by filing their so-called Amended Notice of Intent was unavailing.⁶⁰ In order to submit a valid claim, the Claimants (as a group) could have filed a new NOI and then, after waiting 90 days, resubmit the RFA under the ICSID Additional Facility Rules, or deliver a fresh RFA to Mexico under the UNCITRAL Rules. If the Original Claimants had wished to continue with the original RFA, the Additional Claimants could have delivered their own NOI and waited 90 days before filing their own RFA under the Additional Facility Rules or the UNCITRAL Rules and then apply to have their claim consolidated with the Original Claimants' claim under NAFTA Article 1126.

⁵⁸ Correspondence from ICSID, from the Acting Secretary-General regarding the Notice of Registration, 11 August 2016.

⁵⁹ See for example, CWS-21, Witness Statement of Deana Anthon, p. 3 says: "As I explained before, several of my co-investors, who were the principal owners and controllers of the Juegos Companies, issued the Notice of Intent in May 2014, in order to recoup the damages suffered by all of the investors and enterprises due to Mexico's actions, including me. In compliance with the North American Free Trade Agreement ("NAFTA") Article 1119, the notice was issued on behalf of all of the investors, including myself, to notify Mexico that the U.S. shareholders would be initiating a NAFTA case against Mexico if it did not remedy the damages it had caused to our investments." Identical statements can be found in CWS-12; CWS-22 to CWS-49.

⁶⁰ Amended Notice of Intent; 16 September 2016.

IV. Lack of standing to pursue claims on behalf of the Mexican Companies under Article 1117 of the NAFTA

83. This objection arose from the Claimants' failure to establish in the NOI or the RFA that any of the then 39 Claimants had standing to submit a claim under Article 1116 and/or 1117.⁶¹

84. The Respondent has referred to the NAFTA Free Trade Commission on Notices of Intent issued on October 7, 2003 which describes the type of information and supporting documentation that the NAFTA Parties expect to receive with a NOI filed under Article 1119 which includes, *inter alia*, "evidence of direct or indirect ownership or control of the enterprise by the disputing investor" and "evidence of direct or indirect ownership or control by the disputing investor, such as a copy of a title to property, a deed of incorporation of the enterprise, share certificates, a joint venture agreement", etc.⁶²

85. The NOI in this case, however, did not attach any documents and only contains general statements about the investors' "ownership interests in five Mexican companies" and their "ownership interest in Mexican company Exciting Games".⁶³ Their failure to respond to the NOI Questionnaire only compounded the problem and effectively prevented the Respondent from properly assessing the claims notified by the original Claimants.⁶⁴

86. This omission was not corrected with the filing of the RFA. On the contrary, in two separate submissions to ICSID following Mexico's objection to the registration of the claim, the Claimants cast further doubts over their alleged ownership and control of the Mexican Entities by purporting to excuse their failure to submit consents and waivers for the Juegos Companies by explaining that

⁶¹ Following the Hearing on Jurisdiction the Claimant EMI Consulting LLC withdrew its Claim, leaving 38 remaining Claimants.

⁶² Exhibit RL-001. Mexico also referred to the FTC Statement on NOIs in its opening statement. See Respondent's Opening Statement, Transcript, Day 1, pp. 58:5 – 59:14.

⁶³ Notice of Intent, ¶¶ 5 – 6.

⁶⁴ Testimony of Ms. Martinez Gamba, Transcript, Day 1, 295: 11-22; Witness Statement of Ana Carla Martinez Gamba, ¶¶ 10-11.

they had lost “board control” at the hands of Messrs. Chow and Pelchat.⁶⁵ As noted in the Memorial: “despite the receipt of the White & Case Letter, two pleadings (the Original NOI and RFA) and two submissions to the Secretary General in response to Mexico’s objection to registration of the claim, the Respondent remained uninformed as to ‘who owns what’ and other very basic information that is necessary to determine whether the Tribunal has jurisdiction *ratione personae*” over the claims made on behalf of the Mexican Enterprises.⁶⁶

87. In the Counter-Memorial the Claimants provided some evidence of their alleged ownership and control of the Mexican Entities, but it consisted mainly of the so-called “capitalization *asambleas*” which, as noted in the Reply and Mexico’s Rebuttal Submission, only proves what the Claimants’ shareholding was as of the date of the *asamblea*. Notably, the Claimants were unable to produce basic corporate records such as: the shareholders registry, the capital variations book, a complete collection of share certificates, proof of payment of their shares or a complete set of *asambleas*. The excuse this time was a fire in the Naucalpan facility and the alleged ransacking of the offices of their corporate counsel.

88. The Respondent has established that the Claimants bear the burden of proving the facts that establish the Tribunal’s jurisdiction.⁶⁷

89. The Respondent continues to maintain that the Claimants have failed to meet this burden when it comes to ownership and control of the Mexican Entities. Simply put, the evidence on the record –much of which was provided with the Rejoinder– does not conclusively prove that the Claimants own the shares they claim to own in the Juegos Companies and certainly does not prove that they had control of the companies through their alleged ownership of shares when they purported to submit this claim to arbitration.

⁶⁵ Claimants’ Response to the United Mexican States’ Objection to Claimants’ Request for Approval to Access the ICSID Additional Facility and Request for Arbitration in the matter of *BMex, LLC et al. v. United Mexican States*, and Response to ICSID’s Questionnaire dated July 6, 2016, of 21 July 2016, pp. 9-10.

⁶⁶ Rejoinder on Jurisdiction, ¶ 5.

⁶⁷ Reply on Jurisdictional Objections, ¶ 287, citing to Exhibit RL-020, *Emmis International Holding v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014.

90. Mexico is also concerned with the Claimants’ attempt to create or establish standing based on *ex-post* corporate acts with purported retroactive effects –such as the 2018 *asambleas*– and/or witness statements that are not adequately supported by corporate documents and other forms of documentary evidence –such as Ms. Burr’s witness statements and tables and the witness statements of the Additional Claimants.

91. Regardless of the sufficiency of the evidence provided by the Claimants, there are two interpretative issues for the Tribunal to decide. The first concerns the meaning of the term “owns” in Article 1117. The Claimants contend that “the ordinary meaning of the word ‘owns’ under Article 1117 refers to majority ownership”.⁶⁸ The Respondent maintains that “owns” in the context of Article 1117 means full ownership.⁶⁹ For anything less than full ownership, an investor seeking to submit a claim on behalf of an enterprise under Article 1117 must prove that he/she/it has direct or indirect “control” of that enterprise.⁷⁰

92. The ordinary meaning of “owns” requires outright ownership or title to property.⁷¹ The same is true in the context of any investment covered by Chapter 11, whether an “enterprise” or “real estate” or any other form of property. Put simply, “owns” requires complete ownership, not partial ownership, while allowing for the possibility that an enterprise otherwise owned outright by an investor could include enterprises that have “nominal qualifying shares for directors or incorporators”.⁷²

93. A person cannot say that he “owns” a house because he is registered on title for an undivided 51 percent interest, nor can he say that he “owns” a company because he holds 51 percent of the company’s shares. That is why Article 1117 also permits a claim by an investor that “controls” a company. If a simple majority interest is all that is required to prove ownership, allowing claims by investors that “control” enterprises would be redundant.

⁶⁸ Rejoinder on Jurisdiction, ¶ 5.

⁶⁹ Reply on Jurisdiction, ¶¶ 198-201.

⁷⁰ *Id.*, ¶¶ 200-209.

⁷¹ Reply on Jurisdiction, ¶¶ 197-199.

⁷² *Id.*, ¶ 200.

94. Based on this understanding, the Respondent maintains that the Claimants do not “own” any of the Mexican Entities:

- They do not own E-Games. The combined ownership of Oaxaca Investments and John Conley amounts to 66.66%. Mr. Alfredo Moreno Quijano –who is not a Claimant in this proceeding– owns the remaining 33.33%.
- They do not own any of the Juegos Companies. Their shareholdings, while substantial in some cases, does not allow them to treat these entities as property. There are other none-disputing investors whose rights and interests cannot be ignored.
- They do not own Operadora Pesa. That company does not even allow participation of foreign nationals.

95. The question of standing under Article 1117 accordingly turns on whether the Original Claimants⁷³ had control of the Juegos Companies at all material times, which brings us to the second interpretative issue: what is meant by “control”? The Claimants contend that:

5. [...] “control” under Article 1117 refers not only to legal corporate control (as universally understood, and not tied to Mexican law peculiarities), but also to factual, de facto control of an enterprise, including without limitation managerial control. [...] ⁷⁴

96. The ordinary meaning of “controls” in commercial law implies legal control⁷⁵. In the context of enterprise investment, it means the ability to control the company in a general meeting, whether through ownership of a majority of the voting shares, or pursuant to a binding legal instrument, typically a shareholders’ agreement, that enables the investor to appoint a majority of the board of directors and to hold veto power for certain decisions, such as the transfer of shares among shareholders or admission of new shareholders.⁷⁶

97. This scheme does not enable a disputing investor holding a minority interest in an enterprise to assert a claim on behalf of the enterprise (to the benefit of nationals of the host Party and/or

⁷³ Gordon Burr, Erin Burr, John Conley, Oaxaca Investments, LLC., B-Mex, LLC., B-Mex II, LLC., Santa Fe Mexico Investments, LLC., Palmas South, LLC.

⁷⁴ Rejoinder on Jurisdiction, ¶ 5.

⁷⁵ Reply on Jurisdictional Objections, ¶ 205.

⁷⁶ *Id.*, ¶ 203.

third States) simply because he or she has significant personal influence over the business affairs of the company. That would lead to absurd results and would encourage the making of contrived claims. Nor does it enable one or more individuals who have no ownership interest in a corporate entity to contend that they ‘control’ it because they have personal or financial influence over the legal owner(s) of the company.

98. In Mexican law and the bylaws of the enterprises, control resides in the *asamblea de socios*.⁷⁷ For this reason, the Respondent has consistently maintained that in order to have standing under Article 1117, the Claimants must prove that they controlled the *asambleas* at all material times. In the context of this case that means meeting the established thresholds to call an *asamblea*, to approve resolutions and to appoint a majority of the company’s Board of Managers.

99. “Directly or indirectly”, a commonly used term in investments treaties, enables a disputing investor that owns an investment through a wholly-owned subsidiary (often domiciled in a third state for tax efficiency) to assert a claim on its own behalf, or on behalf of an enterprise incorporated in the host Party that the investor owns through a subsidiary. It also enables a disputing investor that controls an investment through a subsidiary to assert a claim on its own behalf, or on behalf of an enterprise incorporated in the host Party that the investor controls through a subsidiary.

100. In addressing the three questions posed, the Tribunal must consider the clear intent of this scheme and not allow overly broad interpretations that would yield to anomalous results.

101. Accordingly:

- The Original Claimants do not control E-Games, as the bylaws require a 70% vote to approve resolutions in an *asambleas*⁷⁸ and the two Claimants who are investors in E-

⁷⁷ *Id.*, ¶¶ 204-205.

⁷⁸ Exhibit C-63, Notarization of the Minutes of the General Shareholders Meeting of Exciting Games S. de R. L. de C.V. February 21, 2014.

Games only hold 66.66%.⁷⁹ The Claimants' argument in that they control the way in which Mr. Jose Ramon Moreno votes his shares is both unconvincing and unavailing.

- The Claimants do not collectively control any of the Juegos companies because there is no legal instrument that obliges them to vote their shares in a certain way or that grants any one or more of them the power to appoint a majority of the Board of Managers or pass other resolutions in *asambleas*, such as the approval of share transfers;
- In the event that a legal instrument is not required for the Claimants to collectively assert control, the Original Claimants do not control any of the Juegos Companies (except Juegos Naucalpan) because they do not individually or collectively own a sufficient number of the Class B shares (i) to call an *asamblea* (75%)⁸⁰ or (ii) to appoint three of their five members of the Board of Managers (50%).⁸¹
- Control of Operadora Pesa is not relevant since that entity is not an “investment of an Investor of a Party” and the Claimants are not “investors of Party”. For that reason, Chapter 11 does not apply. If it did apply, none of the Claimants have any means of asserting legal control over Operadora Pesa.

102. Regardless of whether the term “control” in Article 1117 refers to *de facto* or legal control, it is undisputed that the Claimants voluntarily ceded *de facto* control over the Juegos Companies to Messrs. Chow, Pelchat and others on 29 August 2014, almost two years before the RFA was delivered to ICSID, and later acquiesced in the transfer of their shares “on paper” to Grand

⁷⁹ *Id.*, p. 17

⁸⁰ The bylaws of each of the Juegos Companies are substantially similar. For example, see Exhibit C-90, protocolized *asamblea* of Juegos Sureste, April 25, 2007, p. 16-20: to hold a valid *asamblea* it is necessary that 75% of the shareholders with Class B shares are present (or legally represented), or the majority (at least 50%) of such shareholders in a second call. According to the Protocolized *asamblea* of Juegos Sureste, October 15, 2009 (C-168), the total number of Class B shares necessary to hold an *asamblea* is 27,000 (75% of the total Class B shares). However, the Claimants -original and additional- hold only 19,675 Class B shares (54.65%). The Protocolized *asambleas* of Juegos Sureste of 2018 do not change these percentages in any significant way.

⁸¹ Exhibit C-90, Protocolized *asamblea*, April 25, 2007, p. 20. The majority of votes of shareholders with Class B shares have the right to appoint 3 members of the Board of Managers within a validly held *asamblea*.

Odyssey, preventing them from regaining their ability to appoint directors and officers until January 2018, 17 months after the RFA was delivered.

103. This is confirmed by:

- the *asambleas* of 29 August 2014, which memorialize the fact that Messrs. Burr, Conley and Rudden resigned from the Boards of Managers and their powers to act on behalf of the companies were revoked as of that date;⁸²
- the witness statements filed by the Additional Claimants, all of which acknowledge that “Claimants reluctantly agreed to temporarily cede their positions on the boards of the Juegos Companies to Mr. Chow, and others”;⁸³
- the witness statement and testimony at the hearing of Mr. Chow, that the Claimants agreed to cede control in an effort to convince SEGOB that they were no longer involved in the Juegos Companies;⁸⁴
- the emphatic testimony of Mr. Chow on redirect examination that the Claimants knew he was representing to others, including SEGOB, that the Claimants had transferred their shares to Grand Odyssey;⁸⁵
- Mr. Ayervais’ admission on cross-examination that the Claimants did not challenge Mr. Chow and/or demand rectification of the record upon learning that he had purported to

⁸² Exhibit C-36, Protocolized *asamblea* of Juegos Sureste, August 29, 2014. Equivalent resolutions can be found in the Protocolized *asambleas* of the other Juegos Companies held on the same date. See Exhibits C-37, p.11, C-38, p. 10, C-39, p. 10, and C-40, p. 11.

⁸³ CWS-12, Witness Statement of Neil Ayervais, ¶ 17 “Mr. Chow insisted that this change was necessary for the Casinos to reopen and the Transaction to proceed. He stated that if we did not agree to replace the boards, the Transaction could not proceed. Ultimately, I relented, and the U.S. shareholders reluctantly agreed to temporarily cede their seats on the boards of the Juegos Companies to Messrs. Chow, Pelchat and Mr. Chow’s appointees.”; identical declarations can be found in the witness statements CWS-21 to CWS-49.

⁸⁴ CWS-11, Witness Statement of José Benjamín Chow del Campo, ¶¶ 11-12; Testimony of Mr. Chow, Transcript, Day 3, pp. 751:2 – 752:20.

⁸⁵ Testimony of Mr. Chow, Transcript, Day 3, pp. 758:17 – 764:22.

transfer their shares to Grand Odyssey and had recorded such transfer in a protocolized *asamblea*;⁸⁶

- Mr. Ayervais admission on cross-examination that the Claimants knew when drafting the Share Purchase Agreements,⁸⁷ that these documents would be shown to the Government of Mexico;⁸⁸
- Mr. Burr's and Mr. Ayervais' admissions on cross-examination that Mr. Chow would not cooperate with them in the conduct of the affairs of the Juegos Companies and refused to call shareholders meetings at any time after his group were appointed to the Boards of Managers, despite requests by Mr. Ayervais that he do so in July 2015 and by Mr. Burr in a teleconference held in January 2016, marking the first occasion that a formal request was made to Mr. Chow to return control of the Juegos Companies and restore the Claimants as the rightful owners of record of their shares;⁸⁹
- the Claimants' allegation in the RICO action that they had been deprived of control of the Juegos Companies by Chow's unlawful transfer of their shares to Grand Odyssey, and;⁹⁰
- the Claimants' submissions to the ICSID Secretariat when Mexico objected to the registration of the claim in which they acknowledged, *inter alia*, that they had lost board control of the Juegos Companies.⁹¹

104. The Claimants have placed emphasis on the contention that Gordon Burr, Erin Burr and John Conley had *de facto* control of E-Games, the Juegos Companies and Operadora Pesa, owing to

⁸⁶ Testimony of Mr. Ayervais, Transcript, Day 4, 885:20 – 888:20.

⁸⁷ Exhibit C-134, Executed Stock Purchase Agreement – Boomer Financial, Inc., Grand Odyssey Casino, S.A. de C.V., January 15, 2015; Exhibit C-135, Executed Purchase Agreement – Boomer Financial, Inc., Grand Odyssey Casino, S.A. de C.V., February 3, 2015.

⁸⁸ Testimony of Mr. Ayervais, Transcript, Day 4, pp. 890:19 - 892:17.

⁸⁹ Testimony of Mr. Burr, Transcript, Day 2, pp. 413:14 – 415:1; testimony of Mr. Ayervais, Transcript, Day 4, pp. 897:4 – 900:7.

⁹⁰ Exhibit R-002, RICO Claim – Claimants Complaint, ¶¶ 1-2, 5, 112.

⁹¹ Claimants' response to Mexico's Objection dated 21 July 2016, pp. 8-9.

their involvement in establishing the gaming enterprise, structuring the investments of third parties in the B-Mex companies and the Juegos companies, and managing those investments, including reporting to investors and remitting dividends. They also contend that the Burrs and Mr. Conley controlled the Juegos Companies through E-games.⁹²

105. It was therefore surprising that when questioned about the financial arrangements between E-games, Operadora Pesa and the Juegos Companies, Mr. Burr claimed to be unsure and deferred to Erin Burr for a response.⁹³ It was equally surprising when Ms. Burr similarly claimed to be unsure and deferred to their Mexican legal counsel, for a response.⁹⁴ The Claimants' counsel objected to similar questions being asked of Mr. Moreno Quijano, General Director of the Juegos Companies, on the grounds that this amounted to an impermissible deposition on damages issues that were not relevant in this phase of the proceeding.⁹⁵

106. However, a review of the exhibits filed with the Claimants' Counter-Memorial but only mentioned in passing at paragraph 246⁹⁶ reveals that E-games cannot control the Juegos Companies and that it is more likely that the Juegos Companies – as lessors of gaming machines to E-games – exercised a significant degree of legal control over E-games under the leasing contracts.

107. In brief, each leasing contract provides that one of the Juegos Companies (as lessor) will supply the Hardware and Software (i.e. the gaming machines) and that E-games (as lessee) will provide (inter alia) the “Establishment” where it is authorized by federal permit to operate a

⁹² Claimants' Counter-Memorial on Jurisdiction, ¶¶ 40 and 41.

⁹³ Testimony of Mr. Burr, Day 2, Transcript, pp. 424:3 – 428:7.

⁹⁴ Testimony of Ms. Burr, Day 2, Transcript, pp. 544:9 – 552:18.

⁹⁵ Testimony of Mr. Moreno Quijano, Day 3, Transcript, pp. 673:12 – 674:19.

⁹⁶ Exhibit C-52, Machine Lease Agreement between Exciting Games and Juegos y Videos de Mexico, S. de R.L. de C.V., December 9, 2009; Exhibit C-53, Machine Lease Agreement between Exciting Games and Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V., December 10, 2009; Exhibit C-54, Machine Lease Agreement between Exciting Games and Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V., December 9, 2009; Exhibit C-55, Machine Lease Agreement between Exciting Games and Juegos de Video y Entretenimiento de Mexico, S. de R.L. de C.V., December 9, 2009; Exhibit C-56, Machine Lease Agreement between Exciting Games and Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V., December 9, 2009.

gaming parlour, and to maintain the gaming machines in good working order, keep them insured and so on.

108. Under the leasing contracts, the Juegos Companies are entitled to receive the total revenue from the gaming machines, after deduction of prizes paid and amounts returned to users, federal and state gaming taxes and monthly payments to SEGOB.⁹⁷ Importantly, each contract provides that it will terminate if timely payment is not made, if the Establishment is closed by legal process for more than 90 days, or if the federal permit for the Establishment is cancelled or revoked in whole or in part.⁹⁸

109. In these circumstances, it cannot be said that E-games exercised *de facto* control over the Juegos Companies or that Gordon Burr, Erin Burr and/or John Conley exercised *de facto* control over the Juegos Companies through E-games or by virtue of their ownership interest in E-games.

Response to Question 1(i)

Article 1117 provides in terms that an investor may submit a claim to arbitration “on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly”.

(i) Which is/are the relevant point(s) in time at which the investor must be able to prove ownership or control for the ownership/control requirement of Article 1117 to be met? Please refer to apposite authority. Please also address the application of the appropriate standard to the evidence on record.

110. The Respondent submits that there are at least two relevant points in time at which the investor must be able to prove ownership or control of an enterprise for the purposes of establishing standing under Article 1117: (i) the date(s) in which the measure(s) occurred; and (ii) the date in which the claim was submitted to arbitration.

⁹⁷ All the Juegos Companies lease agreements are substantially similar. See for example Exhibit C-52, Machine Lease Agreement between Exiting Games and Juegos y Videos de Mexico, S. de R.L. de C.V., p. 4, Third Clause.

⁹⁸ *Id.*, p. 7, Ninth Clause.

111. This point was made in the Rebuttal Submission⁹⁹ and in the Respondent's Opening Statement.¹⁰⁰

112. The first date flows from the scope and coverage of Chapter 11 as defined in Article 1101, "[t]his chapter applies to *measures* adopted or maintained by a Party relating to: (a) investors of a Party; (b) investments of investors of another Party in the territory of the Party [...]". For Chapter 11 to apply to a measure relating to an investment of an investor of another Party, the investor must own or control the enterprise at the time the measure(s) occurred, as held in *Gallo v. Canada*:

325. Art. 1117 of the NAFTA authorises "[a]n investor of a Party, on behalf of an enterprise of another Party, that is a juridical person that the investor owns or controls directly or indirectly" to submit a dispute to arbitration. And Art. 1101(1) limits the scope of Chapter 11 protection "to measures adopted or maintained" by Canada that relate to "investors of another Party" and "investments of investors of another Party". Accordingly, for Chapter 11 of the NAFTA to apply to a measure relating to an investment, that investment must be owned or controlled by an investor of another party, and ownership or control must exist at the time the measure which allegedly violates the Treaty is adopted or maintained. In a claim under Art. 1117 the investor must prove that he owned or controlled directly or indirectly the "juridical person" holding the investment, at the critical time.

[...]

328. Investment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted.

[...]

332. This general principle is reflected in Art. 1117 of the NAFTA, which requires that any claimant seeking to successfully file an arbitration on behalf of a domestic 'juridical person', must pass a first hurdle: the plaintiff must prove that at the time when the alleged treaty violations occurred he or she owned or controlled the "juridical person" holding the investment.¹⁰¹ [Emphasis added]

⁹⁹ Respondent's Rebuttal Submission, ¶¶ 81-85. The issue of timing of ownership or control of the enterprise was not specifically addressed in the first two rounds of pleadings mainly because the Claimants took the position that they had maintained *continuous* ownership and control over the Mexican Entities (See Counter-Memorial on Jurisdiction, ¶ 167). In its Reply, Mexico took the position that ownership or control had to be maintained "at all material times" (see, for example, ¶¶ 208, 217-218, 229, 276, 282).

¹⁰⁰ Respondent's Opening Statement, Transcript Day 1, p. 56:17-21.

¹⁰¹ Exhibit RL-032. *Vito G. Gallo v. Government of Canada*, PCA Case No. 55798, Award (Redacted), ¶15, September 2011, ¶¶ 325, 328, 332.

113. However, Article 1117 establishes a second condition for standing: the investor must own or control the enterprise on whose behalf the claim is being submitted to arbitration and, as noted in the Respondent’s Rebuttal Submission, Article 1117(1) speaks in the *present* tense. It allows an investor of a Party to submit a claim to arbitration on behalf of an enterprise it *owns* or *controls*, not that it *owned* or *controlled*.¹⁰²

114. To the Respondent’s knowledge, there is no NAFTA jurisprudence on whether ownership or control is required at the time of the submission of the claim to arbitration because no claimant party has ever sought to bring a claim to arbitration on behalf of a company that it no longer owned or controlled at the time of the submission of the claim to arbitration.¹⁰³

115. Mexico’s interpretation is consistent with other provisions of the treaty, such as the requirements established in Article 1121. For a claim on behalf of an enterprise under Article 1117, Article 1121 requires consents and waivers to be filed by both the disputing investor and the enterprise which, pursuant to 1121(3), “shall be included in the submission of the claim to arbitration”. Without ownership or control of the enterprise at the time of the submission of the claim to arbitration, the investor would not be able to execute or order the execution of such waivers and consents.

116. The procedural history of this case illustrates the point. The Claimants failed to submit waivers and consents for the Juegos Companies when they first submitted their Request for Arbitration and, when asked by ICSID to provide them, the Claimants argued that they were unable to do so because they had lost “board control” of the Juegos Companies.¹⁰⁴ Although the Claimants were able to provide the purported consents and waivers some 51 days after the RFA was filed,

¹⁰² Respondent’s Rebuttal Submission, ¶¶ 81-85.

¹⁰³ In *Gallo*, the issue was whether a claim could be brought under Article 1117 on behalf of an investment acquired after the measure giving rise to the claim was adopted. In *Mondev*, the issue was whether the claim was correctly brought under Article 1116.

¹⁰⁴ See Reply on Jurisdiction, ¶¶ 261-262. See also, Claimants’ response to Mexico’s Objection dated 21 July 2016, pp. 8-9.

the Respondent will observe that it was not because they regained control of the Juegos Companies, but because they were able to convince Mr. Pelchat to sign them.¹⁰⁵

117. As for non-NAFTA jurisprudence, the Respondent submits that it is of limited assistance because as pointed out by the *Mondev* tribunal “NAFTA does not adopt the device commonly used in bilateral investment treaties (“BITs”) to deal with the foreign investment interests held in local holding companies, namely, that of deeming the local company to have the nationality of the foreign investor which owns or controls it”.¹⁰⁶

118. The Tribunal in *Loewen v. United States*, which held that the Claimant had to continuously maintain its Canadian nationality until the award was rendered, observed as follows:

223. Chapter Eleven of NAFTA represents a progressive development in international law whereby the individual investor may make a claim on its own behalf and submit the claim to international arbitration, as TLGI has done in the instant case. The format of NAFTA is clearly intended to protect the investors of one Contracting Party against unfair practices occurring in one of the other Contracting Parties. It was not intended to and could not affect the rights of American investors in relation to practices of the United States that adversely affect such American investors. Claims of that nature can only be pursued under domestic law and it is inconceivable that sovereign nations would negotiate treaties to supplement or modify domestic law as it applies to their own residents. Such a collateral effect on the domestic laws of the NAFTA Parties was clearly not within their contemplation when the treaty was negotiated¹⁰⁷

119. This is analogous to the instant case, where, for a significant period of time, including the date of submission to arbitration, the four of the enterprises on whose behalf claims were purportedly brought were not owned or controlled by United States investors but were *prima facie* owned by Grand Odyssey (a Mexican entity) and other unnamed Mexican investors, and all five

¹⁰⁵ See CWS-4, Mr. Pelchat’s First Witness Statement, ¶ 16: “[...] I should note that I signed these waivers and consents during the midst of settlement discussions with the U.S. shareholders, and as a show of good faith on my part that I was willing to cooperate with them in their request so as to reach a resolution of the disputes between us, including the federal court litigation that they had filed against me and others in June of 2016. [...]”

¹⁰⁶ Exhibit RL-026, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002, ¶ 79.

¹⁰⁷ Exhibit RL-041, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3, Award, 26 June 2003, ¶ 223.

of the enterprises were controlled by persons of Mexican nationality through their Boards of Managers.

120. In January 2018, the Claimants attempted to remedy the fact that they lacked ownership or control when the claim was submitted to arbitration by holding *asambleas* to declare the November 7, 2014 resolutions *void ab initio* and to reappoint members of the Burr group to the Boards of Managers of the Juegos Companies. However, Prof. Vinuesa’s questioning of Lic. Zamora revealed that as long as a good faith third party has acquired a right during the period between the alleged transfer of shares and the confirmation of such transfer, that third party right would prevail and would not be harmed by the confirmation of the act.¹⁰⁸ Put simply, the now protocolized *asambleas* are unavailing in terms of establishing that any of the Claimants individually or collectively controlled any of the Juegos Companies when they purported to submit claims to arbitration.

121. The requirement for continuous ownership is not an issue under Article 1116 because an investor does not lose his status as “investor of a Party” because he no longer owns or controls the investment at the time a claim is submitted to arbitration. As noted earlier, Article 1139 defines “investor of a Party” as “a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making *or has made an investment.*” Hence, it will always be open to an investor to pursue a claim under Article 1116, regardless of whether it still owns or controls the investment at the time of the submission of the claim.

122. A claim on behalf of an enterprise is different because: (i) Article 1117 requires ownership and control at the time of submission, (ii) the consents and waivers that must be filed with the submission of claim to arbitration require ownership or control of the company, and (iii) any monetary damages arising from a successful claim brought under Article 1117 are paid to the enterprise. For all these reasons, ownership and control must be established at the time of submission of the claim when such claim is submitted on behalf of an enterprise.

Response to Question 1(ii)

¹⁰⁸ Testimony of Mr. Zamora, Questions from the Tribunal, Day 5, Transcript, pp. 1072:21 – 1078:15.

Can an investor 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? How, if at all, is Article 1139 relevant to this question? Article 1139 defines “investment of an investor of a Party” as “an investment owned or controlled directly or indirectly by an investor of such Party”. Does Chapter 11 of NAFTA extend its substantive protections to investments in which the “investor” holds no ownership interest but which it nonetheless controls? Is there any NAFTA or other authority directly answering the foregoing questions either in the affirmative or the negative?

123. The Respondent will respond to this question in the context of the situation surrounding Operadora Pesa.

124. Pursuant to Article 1101, for a claim to be within the scope of Chapter 11 the measure(s) at issue must “relate to”: (i) “investors of another Party” or (ii) “investment of investors of another Party”. As will be explained further below, the Claimants are not “investors of a Party” and Operadora Pesa is not an “investment of investors of another Party”.

125. Article 1139 defines “investor of a Party” as “a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.” In addition, the “investment” that the investor “seeks to make, is making or has made” must fall into at least one of the 8 categories identified in subparagraphs (a) through (h) of Article 1139.

126. None of the Claimants in these proceedings has claimed –much less proven– that he/she/it seeks to make, is making or has made an “investment” in Operadora Pesa, as defined in Article 1139. It follows that there is no investment and, consequently, none of them can be considered an “investor of a Party” *vis-à-vis* Operadora Pesa.¹⁰⁹

127. Operadora Pesa has no foreign investment whatsoever,¹¹⁰ a fact that was confirmed at the hearing by Mr. Moises Opatowski.¹¹¹

128. If none of the Claimants is an “investor of a Party”, then the only other possibility for the claim brought on behalf of Operadora Pesa to be within the scope of Chapter 11 is if Operadora

¹⁰⁹ See Reply on Jurisdiction, ¶¶ 237-243.

¹¹⁰ Exhibit R-016, bylaws of Operadora Pesa, Fifth Article.

¹¹¹ *Id.*, Transcript Day 3, p. 858:8-22.

Pesa itself qualifies an “investment of an investor of another Party”. But again, the definition of that term under Article 1139¹¹² requires an investment which, as stated earlier, the Claimants have not identified or proven.

129. It also bears noting that Article 1117 is entitled “Claim by an Investor of a Party on Behalf of an Enterprise”, which further confirms that the status of “Investor of a Party” is required in order to bring a claim under Article 1117.

130. In addition, the language used in Article 1117 also makes it clear that “control” of the enterprise is an alternative to “ownership” of the investment but not to the existence of an investment:

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration [...] [Emphasis added]

131. It is difficult to envisage a situation in which an individual or a company could be deemed to have control of an enterprise without having ownership interest of any kind. This is what led the Respondent to argue in the Reply that the term “control” in Article 1117 of the NAFTA refers to a quality of the interest that an investor has on an enterprise¹¹³:

245. Thus, the relevant question for the purposes of determining standing under Article 1117 is whether the interest held by an investor of another Party gives him/her/it control over the enterprise of a Party. Article 1117 was never intended, for example, to allow an American CEO of a Mexican company (with no stake therein) to bring a claim on behalf of the company against its own state.

132. The Respondent is not aware of *any* NAFTA case in which a claimant party sought to submit a claim on behalf of a company it claimed to control directly or indirectly despite not having made an investment therein.¹¹⁴

Response to Question 1(iii)

¹¹² Article 1139 defines investment of an investor of another Party as: “an *investment* owned or controlled directly or indirectly by an investor of such Party.” [Emphasis added] Operadora Pesa is not an “investment” as defined in Article 1139.

¹¹³ The Respondent addressed this issue at ¶¶ 237-248 of its Reply.

¹¹⁴ *Id.*, ¶ 246.

Please identify the NAFTA or other 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.

133. The Respondent is not aware of any NAFTA or non-NAFTA jurisprudence in which a group of investors has sought to establish standing to bring a claim on behalf of an enterprise based on their alleged “control” of the company as a group in the absence of a contractually binding instrument.

134. Shareholder rights are individual rights and, absent an instrument binding the shareholder to exercise those rights in a specific way, there cannot be a presumption of a controlling block. Past behavior is of no assistance, because it remains the case that a shareholder has the absolute right to vote its shares any way he/she/it sees fit, even if that implies parting ways with the majority. This was demonstrated by Professor Vinuesa’s questions of Mr. Jose Ramon Moreno:

ARBITRATOR VINUESA: Good morning, Mr. Moreno.

The purpose of my question is to understand clearly what you state in Paragraph 20 of your statement, which I think you have before you. And I will read you what I need you to help me understand.

You say--do you have it there--"My decision to vote en bloc with Mr. Burr and Conley was not only because of the relationship of trust and loyalty that we had achieved throughout the years, but also because my interests were aligned with theirs."

So this phrase "my interests were aligned with theirs," I find it difficult to understand in the light of what you say at the end.

You say, "In fact, they have always controlled my vote with the decisions they made regarding the companies because I always followed their votes."

So I just wanted to see how you're aligning interests. Because if there was something that you didn't like, did you feel that your hands were tied, or did you have freedom to vote against?

THE WITNESS: I always had freedom. However, throughout the years that we worked together and in all the decisions that they made, curiously, they always led to major opportunities and growth for the company.

So when we had to vote on something, we never had differences. Our interests were always aligned. We never had any dispute. We were always on the same page.¹¹⁵

¹¹⁵ Testimony of Mr. Jose Ramon Moreno, Transcript, Day 3, pp. 688:2 - 689:22.

135. This is especially relevant in the present case where most of the Claimants are unrelated parties. While it could be expected that Oaxaca Investments, apparently owned by Mr. Gordon Burr and Ms. Erin Burr, would vote the same way as Mr. and Ms. Burr as individual shareholders, this logic cannot be extrapolated to other unrelated Claimants. Absent a binding agreement, there cannot be a presumption of a “voting block” that controls any given company.

V. Additional questions by the Tribunal regarding matters of fact and evidence

Response to Question 5

Who has the burden of proof in matters of arbitral jurisdiction? Is it for the claimant to establish a prima facie case that jurisdiction exists and does the burden then shift to the respondent to refute the claimant’s evidence? Please refer to apposite authority.

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

137. The Respondent has cited *Emmis International Holding v. Hungary*:

173. In the context of the present case, the Claimants bear the burden of proving that they owned an investment capable of expropriation. This task lies fully within the ambit of the jurisdictional phase. This burden is to be contrasted with the need to establish on a prima facie basis at the jurisdictional phase that the Respondent breached the treaty. This question is based on whether the alleged unlawful conduct giving rise to the treaty breach—if it can be established in the merits phase—is capable of falling within the treaty provisions invoked.¹¹⁶

138. And *Philip Morris v. Uruguay*.

29. Regarding burden of proof, it is commonly accepted that at the jurisdictional stage the facts as alleged by the claimant have to be accepted when, if proven, they would constitute a breach of the relevant treaty. However, if jurisdiction rests on the satisfaction of certain conditions, such as the existence of an “investment” and of the parties’ consent, the Tribunal must apply the standard rule of onus of proof *actori*

¹¹⁶ Exhibit RL-020, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶¶ 171-173 cited in Memorial on Jurisdiction, ¶ 111 and Reply on Jurisdiction, ¶ 287.

incumbit probatio, except that any party asserting a fact shall have to prove it.
[Footnotes omitted.]¹¹⁷

139. With respect to the Claimant's claims under Article 1116, at a minimum, the Claimants were required to precisely state and prove with evidence:

- the assets that each of them purportedly acquired individually – whether in the form of shares in particular enterprises, or the making of loans, or the contribution of movable or immovable property or capital;
- the date(s) that such assets or rights purportedly were acquired and the date they were disposed of or lost; in the case of shares, the number and class of shares purportedly acquired, and any special rights associated with such shares;
- in the case of loans, the amount purportedly loaned, the identity of the borrower and the terms of the loans, including their original maturity and expiry date; and
- particulars of any other contribution purportedly amounting to an alleged investment; any agreement or arrangement purportedly entitling any of the Claimants to share in the income or profits of the Mexican Enterprises and/or the Casinos.¹¹⁸

140. With respect to the claims under Article 1117, the Claimants were required to state precisely and prove with evidence the following:

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

¹¹⁷ Exhibit CL-12, *Philip Morris Brands et al v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013), ¶ 29.

¹¹⁸ Memorial on Jurisdiction, ¶ 113.

- the precise manner in which the Claimants claim to exercise direct or indirect control of each of the Mexican Enterprises; and the terms of any shareholders’ agreement, voting proxy or any other instrument that purports to convey any shareholder’s right to any of the other Claimants, or any third party.¹¹⁹

141. The Claimants were required to do more than submit *prima facie* evidence to establish standing as under Articles 1116 and 1117. They were required to adduce sufficient evidence to convince the Tribunal of the truth of the facts alleged. As has been pointed out by the Respondent in its pleadings, the investment treaty jurisprudence consistently refers to the seminal work of Bin Cheng on this point first referenced in *Asian Agricultural Products. v. Sri Lanka*:¹²⁰

142. In *Tokios Tokeles v. Ukraine*:

121. Moreover, the burden of demonstrating the impact of the state action indisputably rests on the Claimant. The principle of *onus probandi actori incumbit* – that a claimant bears the burden of proving its claims – is widely recognized in practice before international tribunals. The significance of this burden was stated effectively by the tribunal in *Asian Agricultural Products, Ltd. v. Sri Lanka* (ARB/87/3), which noted that: [a] Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.¹²¹ [Footnotes omitted]

143. In *Marion Unlgaube v. Costa Rica*:

34. The degree or standard of proof is not as precisely defined. Whichever party bears the burden of proof on a particular issue and presents supporting evidence “must also convince the Tribunal of [its] truth, lest it be disregarded for want, or insufficiency, of proof.” The 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.¹²² [Footnotes omitted]

¹¹⁹ *Id.*, ¶ 118.

¹²⁰ Exhibit RL-033, *Asian Agricultural Products, Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, ¶ 56 citing to: 6 ICSID Rev.-FILJ 526, 549 (1991) at paragraph 56 (quoting Bin Cheng, “General Principles of Law as Applied by International Courts and Tribunals”, pp. 329-31 (1953)).

¹²¹ Exhibit RL-034; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007. ¶ 121 and footnote 117 citing *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June.

¹²² Exhibit RL-035, *Marion Unlgaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012, ¶34 and Footnote 5: See *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No.

144. And in *Ampal-American v. Egypt*:

219. The Tribunal now turns to determine whether Mr. Fischer has satisfied his jurisdictional burden. On this point, it is important to keep in mind that the burden of proof is not necessarily satisfied by simply producing evidence. As Professor Bin Cheng has neatly stated: "a party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency of proof."¹²³ [Footnotes omitted]

145. The Claimants have the sole means of proving their claims. In other words, this is not an evidentiary question that the Respondent has the means to disprove.

146. The Respondent maintains that for the purposes of Articles 1116 and 1117, the Claimants are required to demonstrate ownership and/or control of investments at least at the time of the alleged measure and at the time a claim is submitted to arbitration.

147. In assessing whether or not the burden and standard of proof has been met, the following is clearly problematic for the Claimants:

- Without the Additional Claimants, even if a shareholders' agreement or like instrument is not required, the Original Claimants could not control four of the five Juegos Companies as they did not between them hold a sufficient number of Class B shares to call *asambleas*, appoint a majority of the directors or approve transfers of shares (among other things) and
- Even if the standard applied by the Tribunal is *de facto* rather than legal control, the Claimants lost board control of the Juegos Companies for almost four years from August 2014 to January 2018 and did not have *de facto* control at the time the claim was submitted to arbitration. This leaves the Claimants unable to establish that they controlled four of the five Juegos Companies during the material period;

ARB/87/3, Award (27 June 1990), ¶ 56 (citing Bin Cheng, "General Principles of Law as Applied by International Courts and Tribunals", pp. 329-331 (1987)).

¹²³ Exhibit RL-036, *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, ¶219 and Footnote 166: 1 February 2016 Bin Cheng, "General Principles of Law as Applied by International Courts and Tribunals", p. 329 (1953).

- as observed at paragraphs 103-108 above, the Burr’s cannot reasonably claim to have exercised effective management control of the Juegos Companies through E-games.

148. Operadora Pesa cannot be considered an “investment of an investor of another Party”: there was no foreign investment in Operadora Pesa as required by Article 1139.

Response to Question 6

What is the standard of proof in matters of arbitral jurisdiction? Please refer to apposite authority.

149. On the question of the standard of proof for the notice and consent issues in this matter, the Respondent maintains that its objections regarding the failures of compliance with Articles 1119 and 1121 stand alone as questions of law for determination. They do not require the Tribunal to make evidentiary findings. In brief:

- whether or not it would have been “futile” for the Additional Claimants to engage in consultations is irrelevant in deciding whether the Additional Claimants failed to comply with the mandatory terms of Article 1119; and,
- whether or not it can be inferred that Claimants intended to consent to arbitration by providing individual powers of attorney to Quinn Emmanuel is irrelevant to determining whether they actually complied with Article 1121 by providing written consents to Mexico.

150. The Claimants also bear the burden of proof to establish that the consent of the Respondent was engaged through the proffering of their own consents to arbitration under Article 1121. As the Tribunal observed in *ICS Inspection v. Argentina*:

280. Moreover, a State’s consent to arbitration shall not be presumed in the face of ambiguity. Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties. The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.¹²⁴
[Footnotes omitted]

¹²⁴ Exhibit RL-042, *ICS Inspection v. Argentina*, PCA Case No. 2010-9, Award on Jurisdiction, ¶280.

151. The burden of proof cannot be met. The conditions precedent to the submission of a claim to arbitration of Article 1121 were not complied with. These conditions precedent are mandatory requirements. There is no ambiguity: Mexico’s consent was not engaged.

152. Moreover, the Additional Claimants cannot meet their burden of proof regarding compliance with Article 1119. They simply did not deliver a Notice of Intent to submit claims to arbitration at any time before delivery of the RFA. Failure to comply with this mandatory requirement was fatal to their claims.

153. As for the objection based on lack of standing under Article 1117, the Respondent would start by reiterating that there are two aspects to this issue. The first is a matter of treaty interpretation –*i.e.*, what do the terms “own” and “control” mean in the context of Article 1117– which does not require evidentiary findings.¹²⁵ The second is matter of fact –*i.e.*, whether the Original Claimants owned or controlled the Mexican Enterprises at all material times– which does require the Tribunal to make evidentiary findings.

154. Paragraphs 83-108 above contain the Respondents’ submissions on these issues.

Response to Question 7(i)

Please provide a summation of the evidence on record—without making new assertions unsupported by evidence on record—with relevant citations to the record regarding each of the following. Where possible please use graphical ownership charts to visualize your responses to the questions regarding the shareholding in the Mexican Companies. If the parties can submit agreed such charts, all the better.

How was each of the Mexican Companies capitalized: by whom and when?

155. The Juegos Companies were capitalized by the Claimants and other non-party investors through shareholder’s meetings that have been referred to in these proceedings as “capitalization *asambleas*”. These capitalization *asambleas* were submitted by the Claimants as Exhibits C-89 to C-93. The capitalization dates and composition of the different types of shares vary from one

¹²⁵ Reply on Jurisdictional Objections, ¶¶196-200.

company to another. Each of the following tables offers a break-down of the shareholding as of the date of the respective capitalization *asamblea* by type of investor and type of shares.

Juegos de Video y Entretenimiento del Sureste S. de R.L. de C. V. (Villahermosa)¹²⁶

Sureste Asamblea 28-02-2007	Series A1		Series A2		Series B		Total Shares	
	Units	%	Units	%	Units	%	Units	%
Original Claimants	-	-	13,000	100	19,250	53.5	32,250	58
Additional Claimants	-	-	-	-	4,925	13.7	4,925	9
Non - Parties	6,500	100	-	-	11,825	32.8	18,325	33
Total	6,500	100	13,000	100	36,000	100	55,500	100

Sureste Asamblea 15-10-2009	Series A1		Series A2		Series B		Total Shares	
	Units	%	Units	%	Units	%	Units	%
Original Claimants	-	-	13,000	100	10,993	30.5	23,993	43
Additional Claimants	-	-	-	-	8,682	24.1	8,682	16
Non - Parties	6,500	100	-	-	16,325	45.4	22,825	41
Total	6,500	100	13,000	100	36,000	100	55,500	100

Juegos de Video y Entretenimiento de México S. de R.L. de C.V. (Naucalpan)¹²⁷

Naucalpan Asamblea 28-02-2006	Series A		Series B		Series C		Total Shares	
	Units	%	Units	%	Units	%	Units	%
Original Claimants	42,000	84	9,000	100	-	-	51,000	82
Additional Claimants	-	-	-	-	-	-	-	-
Non - Parties	8,000	16	-	-	3,000	100	11,000	18
Total	50,000	100	9,000	100	3,000	100	62,000	100

Juegos y Videos de Mexico S. de R.L. de C.V (Cuernavaca)¹²⁸

Cuernavaca Asamblea 31-03-2008	Series A1		Series A2		Series B		Total Shares	
	Units	%	Units	%	Units	%	Units	%
Original Claimants	-	-	22,666	100	23,043	44.0	45,709	58
Additional Claimants	-	-	-	-	11,395	22.0	11,395	15
Non - Parties	4,000	100	-	-	18,150	34.0	22,150	27
Total	4,000	100	22,666	100	52,588	100	79,254	100

¹²⁶ Exhibit C-168, Protocolized *asamblea* of Juegos Sureste, October 15, 2009; Exhibit C-90, Protocolized *asamblea* of Juegos Sureste, April 25, 2007.

¹²⁷ Exhibit C-89, Protocolized *asamblea* of Juegos Naucalpan, March 23, 2006.

¹²⁸ Exhibit C-92, Protocolized *asamblea* of Juegos Cuernavaca, January 10, 2011.

Juegos de Video y Entretenimiento del D.F. S. de R.L. de C.V. (D.F.)¹²⁹

D.F. Asamblea 02-09-2008	Series A1		Series A2		Series B		Total Shares	
	Units	%	Units	%	Units	%	Units	%
Original Claimants	-	-	28,669	100	22,667	32.0	51,336	52
Additional Claimants	-	-	-	-	14,795	21.0	14,725	15
Non - Parties	3,999	100	-	-	33,875	47.0	37,874	32
Total	3,999	100	28,669	100	71,337	100	103,935	100

Juegos de Video y Entretenimiento del Centro S. de R.L. de C.V. (Puebla)¹³⁰

Centro Asamblea 31-12-2007	Series A1		Series A2		Series B		Total Shares	
	Units	%	Units	%	Units	%	Units	%
Original Claimants	-	-	20,551	100	23,013	43.1	43,564	55
Additional Claimants	-	-	-	-	12,035	22.5	12,035	15
Non - Parties	6,000	100	-	-	18,340	34.4	24,340	30
Total	6,000	100	20,551	100	53,388	100	79,939	100

156. The evidence in the record (Exhibit C-63) shows that E-games was incorporated and capitalized in February 2006 by Messrs. Alfredo and Antonio Moreno Quijano. Ownership of the shares evolved over eight years, as shown in the table included at paragraph 234 of the Reply on Jurisdiction which is reproduced below for the Tribunal's convenience. It is unclear to the Respondent if additional capital was injected into the company at a later date.¹³¹

	22-Feb-06	06-Oct-09	06-Jul-11	12-Aug-11	02-Mar-12	07-Oct-13
Alfredo Moreno Quijano	50%	15.00%	28.33%	56.67%	28.33%	
Antonio Moreno Quijano	50%					
José Ramón Moreno Quijano					14.17%	16.67%
Jorge Armando Guerrero Ortiz					14.17%	16.67%
Oaxaca Investments		28.33%	28.33%	28.33%	28.33%	33.32%
John Conley		28.34%	15.00%	15.00%	15.00%	33.34%
Tomás Fernando Ruíz Ramírez		28.33%	28.33%			
Total	100%	100.00%	100.00%	100.00%	100.00%	100.00%

¹²⁹ Exhibit C-93, Protocolized *asamblea* of Juegos D.F., January 10, 2011.

¹³⁰ Exhibit C-91, Protocolized *asamblea* of Juegos Centro, January 10, 2011.

¹³¹ In terms of capitalization (Exhibit C-63), E-games, never issued new shares nor increased its capital. Instead, the original owners sold a substantial part of their ownership percentage (in one case 100%) of shares to new shareholders, the Original Claimants. None of the Additional Claimants hold any shares in E-games.

157. The incorporation of Operadora Pesa S de RL de CV (O-Pesa) on March 7, 2008 arose from the partnership of Mexican nationals Moises Opatowski and Jose Miguel Ramirez Rodriguez. These individuals were the only shareholders of O-Pesa. Each of them contributed 50% of the total capital.¹³²The by-laws of O-Pesa prohibit contributions from foreign investors, either directly or indirectly made.¹³³

Response to Question 7(ii)

How (i.e., by whom: Original Claimants/Additional Claimants/Non-Parties) were the outstanding shares of each of the Mexican Companies held at (i) the time of the alleged breaches by Respondent; (ii) the time of the (original) Notice of Intent; and the time of the filing of the Notice of Arbitration with ICSID?

158. This question cannot be answered on the basis of the evidence on the record.¹³⁴ As of this date, the Claimants have been unable to provide satisfactory evidence on this crucial question. The Claimants have not put in evidence the basic corporate records such as the shareholder register, the capital variations book or a complete set of *asambleas* for any of the five Juegos Companies.

159. The January 2018 *asambleas* did nothing to rectify this lack of primary evidence. They appear to be based on Erin Burr's spreadsheets which, as demonstrated in the Reply¹³⁵ were incomplete and outdated, as they were not based on contemporaneous corporate records which the Claimants contended were lost in a fire and/or stolen from their Mexican corporate lawyers' office.¹³⁶

¹³² Exhibit C-109, Notarization of the Articles of Organization of Operadora Pesa, Sociedad de Responsabilidad Limitada de Capital Variable (Mar. 7, 2008).

¹³³ *Id.*, p. 3.

¹³⁴ This evidence consists of: the capitalization *asambleas* (Exhibits C-89 to C-93 and C-168), an incomplete set of share certificates (Exhibit C-160), an incomplete set of tax returns (Exhibits C-183 to C-192), and an incomplete set of *Libros de Registro de Socios* (Exhibits C-154 to C-158), the witness statements of the Additional Claimants, which are not supported by any documentary evidence and the witness statement of Ms. Erin Burr.

¹³⁵ Reply on Jurisdictional Objections, ¶¶ 214-231.

¹³⁶ Claimant's Rejoinder on Jurisdictional Objections, ¶¶ 97 and 98; Witness Statement of Mr. Gutierrez Morales, CWS-9, ¶¶ 7-10.

160. The Respondent is thus unable to concede that any of the Claimants holds shares of a particular kind, in a particular amount, on a particular date, in any of the Juegos Companies. However, two things are clear on the evidence as presented by the Claimants:

- i. Even if Erin Burr’s evidence on the kind and number of shares that each of the Claimants own (or owned) in the Juegos Companies is accepted, the Original Claimants alone have an insufficient number of “B” shares to collectively exercise voting control of any of those enterprises (except Naucalpan), as demonstrated in the following table from paragraph 256 of the Respondent’s Reply:

	Series B Shares (% of total)		
	Original Claimants	Additional Claimants	Total Claimants
Naucalpan	100.00	-	100.00
Villahermosa	28.33	22.38	50.71
Puebla	42.53	22.52	65.05
Cuernavaca	40.65	26.00	66.64
Mexico City	34.89	23.54	58.44

- ii. On the date of submission to arbitration, the public record, consisting of a protocolized acta de *asamblea* dated November 7, 2014, showed Grand Odyssey as the owner of the Claimants’ shares in the Juegos Companies (except Naucalpan).

Response to Question 7(iii)

How (i.e., by whom: Original Claimants/Additional Claimants/Non-Parties) were the “B shares” in each of the Mexican Companies were held at (i) the time of the alleged breaches by Respondent; (ii) the time of the (original) Notice of Intent; and (iii) the time of the filing of the Notice of Arbitration with ICSID?

161. This question cannot be answered on the basis of the evidence on the record. To avoid unnecessary repetition, please refer to response to Question 7 (ii) above.

Response to Question 7(iv)

There has been considerable debate and testimony about what Claimants had set out to achieve *vis-à-vis* SEGOB by engaging with Messrs. Chow and Pelchat and pursuing a transaction with their principals. What does the evidence on record today show was the intended purpose of their engagement with those two gentlemen and their principals?

162. In their Rejoinder on Jurisdiction Objections, the Claimants made the following contention:

After Mexico illegally closed the Casinos in April 2014, Mr. Burr began investigating possible avenues to mitigate the substantial damages that Mexico’s conduct was causing

him and his fellow investors.¹³⁷ Mr. Burr considered a number of options, and took a meeting with Jose Benjamin Chow del Campo (“**Mr. Chow**”).¹³⁸ Mr. Chow proposed a possible transaction wherein the Juegos Companies and their assets would merge into Grand Odyssey S.A. de C.V. (“**Grand Odyssey**”), and ultimately merge into a Canadian shell company.¹³⁹ Mr. Chow's proposal was especially attractive to Mr. Burr because Mr. Chow stated that he had connections high up at SEGOB who would facilitate the reopening of the Casinos.¹⁴⁰ After a meeting with Marcela Gonzales Salas (“**Ms. Salas**”), the Director General of the Games and Raffles Division at SEGOB, Mr. Chow and his colleague, Luc Pelchat (“**Mr. Pelchat**”) relayed to Gordon that the Mexican government was unequivocal: they would not allow the Casinos to reopen as long as the U.S. Shareholders remained involved in the Juegos Companies.¹⁴¹ [Footnotes included for references to evidence on record.]¹⁴²

163. The Claimants further contended that, based on what it characterized as a government “directive”, Mr. Burr and Mr. Chow structured an agreement to transfer their shares to Grand:

As a result of the Mexican government's directive, Mr. Chow and Mr. Burr structured the transaction so that all the stock in Grand Odyssey and in the Juegos Companies would be acquired by a Canadian public special purpose vehicle, and the U.S. Shareholders of the Juegos Companies would receive securities issued by the public company and cash in exchange for their shares (the “**Transaction**”).¹⁴³ The U.S. Shareholders would be compensated in part by being distributed ownership shares in the Canadian public company and also partly by receiving cash payments.¹⁴⁴

[Footnotes included for references to evidence on record.]¹⁴⁵

164. At the 29 August 2014 *asambleas*, Mr. Pelchat, a Canadian national, Mr. Chow, a Mexican national and three other Mexican nationals were appointed to the Boards of Managers of the Juegos Companies in place of Mr. Burr and his associates. The rationale for ceding of board control was

¹³⁷ Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), CWS-11, ¶ 8; Witness Statement of Neil Ayervais (Jan. 7, 2018), CWS-12, ¶ 14.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), CWS-11, ¶ 9; Witness Statement of Neil Ayervais (Jan. 7, 2018), CWS-12, ¶ 14; First Witness Statement of Luc Pelchat (Jul. 21, 2017), CWS-4, ¶ 8.

¹⁴² Rejoinder on Jurisdictional Objections, 8 January 2018, ¶ 133.

¹⁴³ Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), CWS-11, ¶ 10; Witness Statement of Neil Ayervais (Jan. 7, 2018), CWS-12, ¶ 14.

¹⁴⁴ *Id.*

¹⁴⁵ Rejoinder on Jurisdictional Objections, 8 January 2018, ¶ 134.

based on representations by. Chow and Pelchat, prior to these *asambleas*, that to “better leverage” their contacts within the Mexican government to facilitate the re-opening of the Casinos, they along with other Mexican nationals needed to be on the Boards of Managers of the Juegos Companies.¹⁴⁶

165. In his cross-examination, Mr. Chow was questioned about the rationale for the appointment of the new members to the Boards of Managers:

Q. In the same paragraph, you say that during the meeting you explained to the board members that it was necessary for you and Mr. Pelchat to be appointed to the board, and I quote, "to demonstrate to the Mexican Government that we were complying with the directive to diminish the involvement of the U.S. shareholders in the casinos."

Is this correct?

A. Yes.

Q. And the U.S. shareholders, did they accept these conditions?

*A. Yes.*¹⁴⁷

166. The Claimants were also briefed by Mr. Chow a second time, one day before the *asambleas* of 29 August 2014 about these alleged conditions to re-open the Casinos and the necessity for new members to be seated on the Board of Managers. The Respondent submits that the Claimants were aware that the purpose of ceding the Juegos Companies Boards of Managers to Messrs. Chow and Pelchat was to create the appearance that Claimants had divested their interests in the Juegos Companies, and thereby satisfy SEGOB’s alleged conditions to re-open the Casinos. According to Mr. Chow in his direct examination:

*Q. In the next paragraph, you state that on the evening before the August 29 *asamblea*, you called Mr. Ayervais to tell him that the Mexican Government also required the current members of the Boards of Managers of each of the Juegos Companies to be replaced with Mexican nationals; is that correct?*

A. Yes.

Q. Was anybody else in this phone call with Mr. Ayervais?

A. No. It was just he and I.

Q. Who told you this from SEGOB?

¹⁴⁶ Witness Statement of José Benjamín Chow del Campo (Jan. 4, 2018), CWS-11, ¶ 13; Witness Statement of Neil Ayervais (Jan. 7, 2018), CWS-12, ¶ 15.

¹⁴⁷ Testimony of Mr. Chow, Transcript Day 3; 748:16 - 749:5.

A. *That's what we understood when we were there with Ms. González.*

Q. *You're talking about the 14 July meeting?*

A. *Yes.*

Q. *And you had said that you told the U.S. shareholders immediately after that meeting that those were the conditions that SEGOB was imposing. So, why did you have to tell them again?*

A. *No particular reason.*¹⁴⁸

[Emphasis added].

167. The cross-examination of Neil Ayervais confirmed that the management group consciously decided not to object when they learned after the November 2014 *asamblea* that the transfer of the Claimants' shares to Grand Odyssey had occurred. Although "dumbfounded", rather than send a "nastygram" to Mr. Chow, they "just continued to negotiate ... because ... the only effective transfer of the shares could occur at closing".¹⁴⁹ However, on re-direct examination, Mr. Chow insisted that the Claimants knew he was planning to represent to SEGOB that the Claimants had transferred their shares to Grand Odyssey.

Q. *Did you ever inform the U.S. shareholders back in 2014/2015/2016 that you had a plan to take the November *asamblea* and, in essence, trick Ms. Marcela Salas into believing that the U.S. shareholders were out of the companies?*

A. *We were representing what we were finally doing. What we were doing is to represent what we were trying to do eventually. That is to say the operation, as we had agreed.*

Q. *So, if I understand your answer, did you tell the U.S. shareholders that what you were telling Ms. Marcela Salas was that you were trying to finalize the transaction that you were negotiating with them? Is that what you told them?*

A. *That is correct.*¹⁵⁰

– o –

Q. *And it was a very long question, so I'll try it again.*

*Did you ever enter into any agreement/ understanding with the U.S. shareholders where they agreed that you could take the November 2014 *asamblea* and go and, in essence,*

¹⁴⁸ Testimony of Mr. Chow, Day 3; 749:6 - 750:3. See also Benjamin Chow's Witness Statement ¶ 14 "[...] I told Mr. Neil Ayervais that if the U.S. shareholders did not agree to replace the boards as I had proposed, then we could not satisfy Mexico's condition and as such, the Transaction could not proceed. Ultimately, the U.S. shareholders' representatives agreed to the replacement of the boards, because I insisted that this was the only way that the Mexican government would ever approve the reopening of the Casinos and the only way we could proceed with the Transaction".

¹⁴⁹ Testimony of Mr. Ayervais, Day 4, Transcript, pp. 886:15-888:20.

¹⁵⁰ Testimony of Mr. Chow, Day 3, Transcript, pp 759:3 – 17.

trick Ms. Marcela Salas into believing that the U.S. shareholders were no longer shareholders of the Juegos Companies?

A. I told them what my intention was, why I was doing what I was doing. It was not the intention was not to take their possession away. We continued to negotiate the contract.

Q. Right. But that was not my question. My question is: Did you have a conversation with Mr. Burr or any of the Claimants wherein you said, "I'm going to take these asamblea minutes from November 2014, and I'm going to go over to Ms. Marcela Salas, and I'm going to tell her 'We're now the new owners'"?

And they were in agreement that you could go basically make that false representation to her? That's my question.

*A. Yes, I did tell them that I was going to present it that way.*¹⁵¹

– o –

Q. I'll restate the question. And this is an important point. Are you telling this Tribunal that Mr. Burr, Mr. Conley, or anyone else on the Claimants' side of this case had some agreement with you that you could take the November asamblea and represent falsely to Ms. Marcela Salas that they were no longer the owners, that you were the owners? Did you have such an agreement or understanding with any of the Claimants?

*A. I told them when we did it why I was doing it.*¹⁵² [Emphasis added]

168. The transfer to Grand Odyssey and ceding of board control to Mr. Chow prevented the Claimants from re-establishing control of the Juegos Companies. Mr. Chow neglected or refused to hold annual meetings and the Claimants were unable to compel him to do so.¹⁵³ It was not until January 2016 that a formal demand was made during a teleconference between Messrs. Burr and Ayervais and Messrs. Chow and Pelchat that resulted in a demand for compensation by Mr. Chow.¹⁵⁴ The Claimants eventually initiated the RICO action in June 2016,¹⁵⁵ the same month the RFA was submitted to the ICSID. The Claimants had lacked any control of the Juego's Companies since August 2014, a problem that was exacerbated by their apparent acquiescence in the allegedly unauthorized transfer of their shares to Grand Odyssey.

¹⁵¹ *Id.*, pp. 760:6 – 761:6.

¹⁵² *Id.*, pp. 761:22 – 762:8.

¹⁵³ Testimony of Mr. Ayervais, Day 4, Transcript, pp. 895:7- 899:7

¹⁵⁴ *Id.*, pp. 899:8-901:2; Testimony of Mr. Burr, Day 2, Transcript, pp. 414:2-415:1

¹⁵⁵ Exhibit R-002, RICO Claim – Claimants Complaint.

VI. Concluding Remarks

169. The Tribunal cannot place reliance on the witness statements provided by the Additional Claimants with the Rejoinder. As counsel acknowledged at the hearing, they contain precisely the same wording because they are “form statements”.¹⁵⁶ They should be accorded little if any weight if the Tribunal is of the view that any matter they purport to aver to is relevant to the Tribunal’s jurisdiction.

170. The Tribunal cannot excuse the Additional Claimants’ failure to comply with Article 1119 without ignoring the text of the treaty, the applicable jurisprudence and 20 years of consistent submissions of the NAFTA Parties on the mandatory nature of Article 1119 (among others). Neither can it hold that a power of attorney suffices as a written consent to arbitration without ignoring the text of the treaty or engaging in legal artifice. While the result may seem harsh from the Claimants’ perspective, allowing their claims to proceed would gravely impair the NAFTA Parties’ ability to predictably engage in Chapter 11 dispute settlement and would create unforeseeable problems with the future interpretation and application of the treaty as a whole.

171. It is said that “hard facts make bad law”. The Tribunal should avoid temptation to succumb to the sympathies one could have for the Claimants in this case, for the inevitable result would be the making of bad NAFTA law.

172. The Respondent reiterates its request for relief in paragraphs 186-187 and 303-304 of the Reply on Jurisdiction and will make submissions on costs within 45 days hereof as directed by Procedural Order No. 4.

August 17, 2018

Respectfully submitted,



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¹⁵⁶ Claimants’ Opening Statement, Day 1, Transcript, Day 1, p. 208:1-10