IN AN ARBITRATION UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE ICSID ADDITIONAL FACILITY RULES

B-Mex, LLC and others

v.

United Mexican States

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

FINAL AWARD

Members of the Tribunal

Prof. Gary Born, Arbitrator
Prof. Raúl Emilio Vinuesa, Arbitrator
Gaëtan Verhoosel KC, President

Secretary of the Tribunal

Ms. Natalí Sequeira, ICSID

21 June 2024

TABLE OF CONTENTS

I. THE PARTIES AND THEIR REPRESENTATION

1. The complete list of the Claimants can be found in the Glossary to the Partial Award dated 19 July 2019. In this phase of the proceedings, all but one of the Claimants (the ***QEU&S Claimants***) are represented by:

> Mr. David M. Orta
> Mr. Daniel Salinas-Serrano
> Ms. Dawn Yamane Hewett
> Ms. Julianne Jaquith
> Mr. José Pereyó
> Mr. Gregg Badichek
> Ms. Sara Clark
> Ms. Ana Paula Luna Pino
> Mr. Woo Yong Chung
> Mr. Edward Thorn
> Quinn Emanuel Urquhart & Sullivan, LLP
> Washington DC, USA; and
>
> Mr. Julio Gutiérrez Morales
> Ríos-Ferrer, Guillén-Llarena, Treviño y Rivera S.C.
> Mexico City, Mexico
>
> The QEU&S Claimants instructed Reed Smith as conflicts counsel in light of Claimant Taylor's withdrawal from the joint representation of the Claimants:
>
> Mr. Daniel Ávila II
> Reed Smith
> Houston, Texas, USA

2. One of the Claimants, Mr. Randall Taylor (***Claimant Taylor***), informed the Tribunal on 28 September 2020 that he would be representing himself in these proceedings.

3. The Respondent is represented in these proceedings by:

> Mr. Alan Bonfiglio Ríos
> Director General de Consultoría Jurídica de Comercio Internacional
> *(as of 16 January 2023)*
> Mr. Geovanni Hernández Salvador
> Ms. Rosalinda Toxqui Tlaxcalteca
> Mr. Luis Fernando Muñoz Rodríguez
> Ms. Alicia Monserrat Islas Martínez
> Ms. Erin Mireille Castro Cruz
> Ms. Rosa María Baltazares Gómez
> Dirección General de Consultoría Jurídica de Comercio Internacional
> Secretaría de Economía;

Mr. Cameron Mowatt
Mr. Vincent DeRose
Ms. Jennifer Radford
Ms. Ximena Iturriaga
Mr. Alejandro Barragán
Tereposky & DeRose LLP
Ottawa, Canada; and

Mr. Stephan E. Becker
Pillsbury Winthrop Shaw Pittman LLP
Washington DC, USA.

II. THE PROCEEDING

4. This proceeding was bifurcated. For the procedural history of the first phase of the proceeding, the Tribunal refers to Section II of the Partial Award dated 19 July 2019, which forms part of this Final Award. In the course of this second phase, the Tribunal issued Procedural Orders No. 8 to No. 23, which are available on the ICSID website. In this Section, the Tribunal summarises the key procedural developments since the Partial Award.

5. On 21 April 2020, the Claimants submitted their Memorial on the Merits.

6. On 28 September 2020, Mr. Taylor informed the Tribunal that he was no longer represented by QEU&S and would be representing himself in the proceedings going forward.

7. On 4 December 2020, the Respondent submitted its Counter-Memorial on the Merits.

8. On 31 December 2020, the Parties exchanged their requests for production of documents.

9. On 27 January 2021, the QEU&S Claimants sought urgent interim relief from the Tribunal, requesting that the Tribunal order (1) the Respondent to not review any documents produced by Claimant Taylor on 29 January 2021, if any, until QEU&S had had an opportunity to review the documents and make any objections on the grounds of privilege, confidentiality and/or responsiveness; and (2) Claimant Taylor to not produce any documents to the Respondent until the 16 April 2021 deadline for production of documents, and until QEU&S had an opportunity to review the documents and make any objections to them on grounds of privilege, confidentiality and/or responsiveness.

10. Claimant Taylor and the Respondent responded to the QEU&S Claimants' application on 29 January 2021; the QEU&S Claimants made further submissions on 2 February 2021; and Claimant Taylor and the Respondent made further responsive submissions on 4 February 2021.

11. On 7 February 2021, the Tribunal issued Procedural Order No. 9 and ruled on the QEU&S Claimants' interim relief application. The Tribunal ordered *inter alia* a timetable in which (i) the QEU&S Claimants and Claimant Taylor were required to produce to the Respondent a single privilege/confidentiality log listing all the

documents which either the QEU&S Claimants or Claimant Taylor claimed can be withheld on the grounds of privilege or confidentiality; (ii) the Respondent was required to produce to the Claimants a privilege/confidentiality log; and (iii) the Parties would then proceed to enter their challenges (if any) to the claims of privilege/confidentiality in the relevant log and provide the completed logs to the Tribunal.

12. On 26 February 2021, the Parties filed their respective requests for the Tribunal to decide their outstanding document production requests to which objections were made on grounds other than privilege or confidentiality.

13. On 26 March 2021, the Tribunal issued Procedural Order No. 10, setting out its rulings on the Parties' document production requests to which objections were made on grounds other than privilege or confidentiality.

14. On 5 April 2021, the Tribunal issued Procedural Order No. 11 concerning Claimant Taylor's application to clarify Procedural Order No. 9. The Tribunal granted the application in part.

15. On 30 April 2021, the Parties submitted their respective privilege logs to the Tribunal for determination of the contested claims of privilege or confidentiality.

16. On 26 May 2021 and 28 May 2021, the Tribunal issued Procedural Orders No. 12 and No. 13 ruling on the contested claims of privilege or confidentiality in the Respondent's and the Claimants' privilege logs respectively.

17. The Tribunal explained in Procedural Order No. 13 that it was not able to resolve a number of the Claimants' contested privilege or confidentiality claims (the ***Outstanding Privilege Claims***) due to the conflicting descriptions or characterisations by the QEU&S Claimants and Claimant Taylor of the documents in question. The Tribunal therefore decided to appoint a privilege expert, as provided for in Article 3(8) of the IBA Rules on the Taking of Evidence in International Arbitration, and that the privilege expert would report to the Tribunal upon review of the documents in question. The proposed terms of reference were set out in Annex C to Procedural Order No. 13. The Tribunal further directed the Parties to confer and agree on the name of the privilege expert.

18. On 5 June 2021, the Parties informed the Tribunal that they jointly proposed Mr. Jeremy Sharpe to act as the privilege expert.

19. On 10 June 2021, the Tribunal issued Procedural Order No. 14 addressing the Procedural Timetable, privilege expert process and terms of reference.

20. On 17 June 2021 the parties confirmed the appointment of Mr. Jeremy Sharpe as the privilege expert (the ***Privilege Expert***).

21. On 7 July 2021 the Tribunal issued Procedural Order No. 15 amending the Procedural Timetable.

22. On 23 July 2021, the QEU&S Claimants sent to the Respondent a second privilege/confidentiality log in respect of further documents that Claimant Taylor had proposed to disclose to the Respondent.

23. On 13 August 2021, following exchanges between the Parties, the QEU&S Claimants submitted their second privilege log to the Tribunal for determination of the contested claims of privilege or confidentiality.

24. On 15 September 2021, the Tribunal issued Procedural Order No. 16 ruling on the contested claims of privilege or confidentiality in the Claimants' second privilege log. The Tribunal was not able to resolve a number of the Claimants' contested privilege or confidentiality claims either because the QEU&S Claimants and Claimant Taylor provided conflicting descriptions or characterisations of certain documents or because there appeared to be inconsistent descriptions within the QEU&S Claimants' entries. Consistent with its rulings in respect of the Claimants' first privilege log, and for the same reasons, the Tribunal requested that the Privilege Expert review and report on these documents.

25. On 22 October 2021, the Privilege Expert submitted his privilege expert report to the Tribunal. On 29 October 2021, the Privilege Expert submitted an updated report to the Tribunal.

26. On 9 November 2021, the Tribunal issued Procedural Order No. 17. The Tribunal, having examined the Privilege Expert's report and being satisfied that the observations and findings set out in the report were clear and warranted no further inquiries of the Privilege Expert by the Tribunal, ruled on all the document production requests and proposed redactions that had been referred to the Privilege Expert.

27. On 6 December 2021, the QEU&S Claimants submitted their Reply on the Merits and Claimant Taylor submitted his Reply on the Merits.

28. On the same day, the Respondent wrote to the Tribunal challenging the QEU&S Claimants' decision not to produce in whole or in part 20 separate documents. On 15 December 2021, the Tribunal noted that the Respondent's challenges arose out of the QEU&S Claimants' failure to identify certain documents as duplicates and certain discrepancies in the observations made by the Privilege Expert, leaving the Tribunal with no means to independently determine the existence of the discrepancies. The Tribunal invited the Privilege Expert to clarify his observations in respect of the challenged documents. On 23 December 2021, the Privilege Expert provided his clarifications.

29. On 7 January 2022, the Tribunal issued Procedural Order No. 19. The Tribunal, having reviewed the updated Privilege Expert report and the clarifications provided by the Privilege Expert, issued its revised rulings in respect of certain privilege claims in the Claimants' second privilege/confidentiality log.

30. On 23 May 2022, the Respondent submitted its Rejoinder on the Merits.

31. By letter of 6 June 2022, the QEU&S Claimants sought the introduction of two new exhibits into the record, i.e., an audio recording and a copy of a website. The Respondent provided its comments by letter on 10 June 2022. On 17 June 2022, the Tribunal issued Procedural Order No. 22, admitting only the copy of the website into the record.

32. On 13 June 2022, the United States of America and Canada submitted Non-Disputing Party submissions. Each Party filed their respective observations on the Non-Disputing Parties' submissions on 24 June 2022.

33. From 5 to 14 July 2022, the Tribunal held a hearing on the merits in Washington, D.C. Present at the hearing in-person or remotely were:

    a. For the Tribunal: Gaëtan Verhoosel KC, Professor Gary Born, Professor Raúl Vinuesa, and Ms. Natalí Sequeira, Secretary to the Tribunal.

    b. For the Claimants: Mr. David M. Orta, Mr. Daniel Salinas-Serrano, Ms. Dawn Yamane Hewett, Ms. Julianne Jaquith, Mr. José Pereyó, Ms. Margarita Sánchez, Mr. Gregg Badichek, Ms. Sara Clark, Ms. Ana Paula Luna Pino, Mr. Woo Yong Chung, Mr. Edward Thorn, Ms. Janice Yoon and Mr. Casey Adams (all from Quinn Emanuel Urquhart & Sullivan, LLP, Washington DC, USA); Ms. Cristina

Cárdenas (from Reed Smith, Florida, USA); Mr. Julio Gutiérrez Morales (from Ríos-Ferrer, Guillén-Llarena, Treviño y Rivera S.C., Mexico City, Mexico); and Mr. Randall Taylor (pro se).

c. For the Respondent: Mr. Orlando Pérez Gárate, Ms. Rosalinda Toxqui Tlaxcalteca, Mr. Geovanni Hernández Salvador, Mr. Ignacio Alberto Sandoval Félix, Mr. Luis Fernando Muñoz Rodríguez, Ms. Alicia Monserrat Islas Martínez, Ms. Lizeth Guadalupe Moreno Márquez, Ms. Erin Mireille Castro Cruz and Ms. Rosa María Baltazares Gómez (all from Dirección General de Consultoría Jurídica de Comercio Internacional); Mr. J. Cameron Mowatt, Ms. Jennifer Radford, Mr. Vincent DeRose, Mr. Alejandro Barragán, Ms. Ximena Iturriaga and Mr. Alberto Cepeda (all from Tereposky & DeRose LLP, Ottawa, Canada); and Mr. Stephan E. Becker (from Pillsbury Winthrop Shaw Pittman LLP, Washington DC, USA).

d. Also attending were Mr. YiKang Zhang (observer, authorised by the Parties), Mr. Federico Salon-Kajganich (ICSID Paralegal) and Ms. Kiara Bazán (ICSID Intern).

34. At the hearing, the following witnesses or experts were examined:

Claimants' witnesses
Gordon Burr
Erin Burr
Neil Ayervais
John Conley (remotely)
Randall Taylor
Daniel Rudden (remotely)
Julio Gutiérrez Morales
Patricio Gerardo Chávez Nuño
José Ramón Moreno Quijano
Miguel Romero Cano
Avi Yanus (remotely)

Claimants' experts
Luis Omar Guerrero Rodríguez
Ezequiel González Matus
Santiago Dellepiane and Andrea Cardani (Berkeley Research Group)

Respondent's witnesses
Marcela González Salas y Petricioli

José Raúl Landgrave Fuentes
Marcos Eulogio García Hernández
Carlos Véjar Borrego
Mauricio Rodrigo Ayala Rosique
Alfonso Benigno Pérez Lizaur

Respondent's experts
Javier Mijangos y González
Alfredo Germán Lazcano
Markus Anton Kritzler Ring and Eduardo Rosendo Pacheco Villagrán (Rión M&A)

35. On 14 November 2022, the Parties submitted their Post-Hearing Briefs.

36. On 10 February 2023, the Parties submitted their statement of costs in relation to the second phase of the proceedings. On 29 May 2024 the proceeding was declared closed in accordance with Article 44(1) of the Arbitration (Additional Facility) Rules.

III. THE PARTIES AND NON-DISPUTING PARTIES' SUBMISSIONS

37. The Tribunal has reviewed all of the Parties' extensive submissions, as well as the submissions by the Non-Disputing Parties.[1] As with the Partial Award, rather than attempt to produce lengthy summaries of those submissions, which would almost certainly fail to do justice to them, the Tribunal hereby incorporates them in their entirety by reference into this Section of the Final Award.

[1] The submissions by the Parties are available online. *See* https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB(AF)/16/3.

IV. THE FACTUAL MATRIX RELEVANT TO THE TRIBUNAL'S FINDINGS AND CONCLUSIONS

38. The fabric of this case has been enriched with narratives that occasionally verge on the sensational, from the Claimants' allegation that a justice of the Supreme Court and the President of the Republic engaged in a corrupt conspiracy, to the Respondent's (and Claimant Taylor's) allegation that the Claimants habitually engaged in illicit business practices. The factual matrix that most directly sustains the Tribunal's conclusions, however, is altogether (albeit not always) more prosaic and set out in summary form below.

39. At the heart of the case is a casino business developed by the Claimants in various parts of Mexico. The Claimants, through various Mexican companies known as the Juegos Companies, operated five such casinos (as well as a temporary facility) until they were closed down by the Secretaría de Gobernación (***SEGOB***) in April 2014. Initially, the casinos were operated on the basis of contractual arrangements with third parties with the relevant permits or authorisations. After E-Games, another Mexican company controlled by certain of the Claimants, obtained its own permit in 2012, the casinos were operated on the basis of the rights conferred by that permit.

    a. In 2005-2006, the Claimants' Juegos Companies entered into joint venture agreements with a Mexican company, JEV Monterrey, pursuant to which they started investing in the development of five casinos, which were then confined to games of skill as opposed to games of chance. In November 2008, E-Games entered into an operating agreement with another Mexican company, Entretenimiento de Mexico (***E-Mex***), which held a valid permit for the operation of dual-function casinos.[2] Pursuant to that operating agreement, E-Games acquired a contractual right to operate seven casinos under E-Mex's permit, including the five casinos which it already operated and which could now also offer games of chance. That contractual right of E-Games was recognised via a SEGOB resolution.[3]

    b. When E-Games became concerned about E-Mex's inability to service its debt and its own rapidly deteriorating relationship with E-Mex, E-Games applied for,

---

2 Operating Agreement (Nov. 01, 2008), **C-7**.

3 SEGOB Resolution No. DGAJS/SCEV/00619/2008 (Dec. 09, 2008), **C-8**.

and on 27 May 2009 obtained, another resolution from SEGOB (the ***2009 Permit***), which recognised E-Games' "acquired right" to the "legal exploitation of [E-Mex's permit], subject only to the conditions imposed by the Regulations to the Federal Gaming and Lottery Law, and the same general provisions of the [E-Mex] permit, without causing the quality of operator to remain at the discretion of [E-Mex], but rather forming part of the legal assets of [E-Games] …".[4] The Claimants submit that this resolution granted E-Games "independent operator" status, a concept, however, which the Mexican courts would conclude in 2013 is not recognised by Mexican law.

c. When by 2011 E-Mex was unable to service its debt and faced the prospect of imminent bankruptcy and the resultant revocation of its gaming permit, E-Games applied to SEGOB for its own independent permit so as to ensure the continuity of its five casino operations in case E-Mex's permit was indeed revoked.[5] SEGOB initially advised E-Games that it could not grant such an independent permit until and unless E-Mex's bankruptcy had been confirmed and its permit had been revoked. This was due to the Federal Government's contemporaneous policy not to increase the total number of casino permits in circulation.[6]

d. When these conditions of SEGOB were subsequently met in March 2012 (i.e., E-Mex's bankruptcy had been confirmed and its permit was on the cusp of being revoked), E-Games renewed its request for its own permit in June 2012. On 16 November 2012 (after a first resolution in August 2012 that E-Games regarded as unsatisfactory[7]), SEGOB issued a resolution granting E-Games its own independent permit (the ***2012 Permit***).[8] Pursuant to this 2012 Permit, E-Games could henceforth run the five casinos (and open two more) in its own

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

5 E-Games Permit Application (Feb. 22, 2011), **C-14**.

6 Tr. (ENG), Day 4, 1030:2-1030:5 (M. Salas).

7 SEGOB Resolution No. DGJS/SCEV/0827/2012 (Aug. 15, 2012), **C-254**.

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

permitholder capacity, rather than as the operator ("independent" or otherwise) of E-Mex's permit.

e. As mentioned above, the purpose of the 2012 Permit was to safeguard the continuity of E-Games' casinos despite the revocation of E-Mex's permit. This was clearly stated in the terms of the 2012 Permit, which emphasised "the importance of preserving the conservation and viability of enterprises, safeguarding the public interest, protecting the sources of employment and the generation of jobs so necessary for the country's stability, public security and social interaction as well as the generation of important and far-reaching tax revenue for the country".[9]

f. After confirming that E-Games independently satisfied all the requirements of the applicable legislation for the award of its own independent permit, SEGOB further emphasised in the 2012 Permit that: (i) it issued the permit so as to provide "legal certainty" to E-Games; (ii) the rights conferred by it "cannot be violated, regardless of any previous contractual relationship or precedent with [E-Mex]"; and (iii) "the rights acquired [by E-Games] can be exercised without legal connection whatsoever with those derived from [E-Mex's permit] …"[10]

40. Meanwhile, however, two major developments unfolded that would come to define the fate of the 2012 Permit and the Claimants' casinos.

41. First, at the end of 2012, following the defeat of the ruling Partido Acción Nacional (***PAN***) party in national elections and within weeks from the issuance by SEGOB of the 2012 Permit, the Partido Revolucionario Institucional (***PRI***) party returned to power. A longtime PRI mandatary, Ms. Marcela González Salas y Petricioli (***Ms. Salas***), was appointed as the new head of SEGOB. In January 2013, within weeks from taking up office, Ms. Salas gave press interviews in her new capacity as the head of SEGOB in which she stated that the 2012 Permit was "irregular" and lacked "legal foundation".[11] Ms Salas made those press statements without first hearing E-Games

---

9 SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), p. 5, **C-16**.

10 SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), pp. 5, 6, 7, **C-16**.

11 Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón (Jan. 27, 2013), **C-17**.

or reviewing any of the relevant SEGOB resolutions, including the 2012 Permit itself.[12]

42. Second, E-Mex, which was the subject of bankruptcy proceedings, filed two separate *amparo* proceedings in the Mexican courts against SEGOB. It is these *amparo* proceedings that reside at the heart of the Respondent's defence.

    a. In *Amparo 1151*, E-Mex directly challenged the 2012 Permit of E-Games as unconstitutional. In October 2013, this challenge was dismissed on the basis that it was time-barred. It is undisputed that, under Mexican law, E-Mex was as a result deemed to have tacitly consented to the constitutionality of the 2012 Permit.[13]

    b. In *Amparo 1668*, where E-Mex initially challenged neither the 2009 Permit nor the 2012 Permit, E-Mex eventually obtained leave to add the 2009 Permit to its challenge. In its January 2013 judgment regarding that challenge (the ***Amparo Judgment***), the 16th District Court (the ***Amparo Judge***) agreed with E-Mex that the 2009 Permit was unconstitutional and therefore ordered SEGOB to revoke the 2009 Permit.[14]

43. SEGOB duly complied with the Amparo Judgment by revoking the 2009 Permit. This had no impact on E-Games' operations, however, as E-Games by now held its own 2012 Permit. The Amparo Judge did not order the revocation of that permit, which had not been included by E-Mex in its Amparo 1668 claim, either initially or via an amendment.

44. E-Mex, however, then filed a motion with the Amparo Judge claiming that SEGOB had failed to properly comply with the Amparo Judgment.[15] The argument by E-Mex was that, in order to comply with the Amparo Judgment, SEGOB was required not

---

12 Tr. (ENG), Day 4, 1051:14-1051:18 (M. Salas).

13 Order of the *Primer Tribunal Colegiado en Materia Administrativa del Cuarto Circuito* (Oct. 17, 2013), **C-295**.

14 Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 30, 2013), **C-18**.

15 E-Mex Motion to Rescind (Aug. 22, 2013), **C-21**.

only to revoke the 2009 Permit but also all the resolutions which it had issued "as a consequence of" the 2009 Permit.

45. The Amparo Judge agreed with E-Mex and, on 26 August 2013, ordered SEGOB to revoke all resolutions issued "as a consequence of" the 2009 Permit.[16] Exactly which resolutions were caught by that language was foreseeably a matter pregnant with controversy. The Amparo Judge made no mention of the 2012 Permit.

46. Presented with these directions, which SEGOB itself would subsequently denounce as unacceptably unclear, SEGOB had the right under Article 193 of the Amparo Law[17] to seek clarification from the Amparo Judge and to ask whether or not it should revoke a permit it had issued less than a year earlier for the stated purpose of providing "legal certainty" to E-Games by conferring rights that could "[]not be violated, regardless of any previous contractual relationship or precedent with [E-Mex]" and "be exercised without legal connection whatsoever with those derived from [E-Mex's permit] …"[18]

47. SEGOB did not seek this judicial clarification. Instead, within forty-eight hours of the 26 August 2013 directions by the Amparo Judge, SEGOB revoked the 2012 Permit, thereby foreseeably placing the Claimants' going concern in jeopardy following years of trading.[19]

48. E-Games took two steps in response to SEGOB's revocation of the 2012 Permit. First, it immediately sought and on 2 September 2013 obtained a court injunction prohibiting SEGOB from interfering with the operation of the casinos while the Amparo 1668 proceedings remained ongoing.[20] Second, E-Games challenged the SEGOB resolution revoking the 2012 Permit before the Amparo Judge on the basis that it went beyond what had been ordered in the Amparo Judgment ("excessive compliance" in the relevant terminology).

---

16 Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Aug. 26, 2013), **C-23**.

17 New Amparo Law, Article 193, Alfredo German Lazcano Sámano First Expert Report, 25 November 2020, Annex 10, **RER-2**.

18 SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), pp. 5, 6, 7, **C-16**.

19 SEGOB Resolution (Aug. 28, 2013), **C-289**.

20 Injunctive Relief (Sept. 2, 2013), **C-299**.

49. On 14 October 2013, the Amparo Judge agreed with E-Games and held that the 2012 Permit was not issued as a consequence of the 2009 Permit and should therefore not have been revoked.[21] A few days later, on 17 October 2013, the appellate court hearing Amparo 1151 also dismissed E-Mex's challenge of the 2012 Permit on the basis that the challenge was time-barred and that E-Mex therefore should be deemed to have consented to its constitutionality.[22]

50. The Amparo Judge in Amparo 1668 went on to launch an enforcement proceeding against SEGOB (*incidente de inejecución* in the relevant terminology, henceforth the ***Enforcement Proceeding***), which referred SEGOB's non-compliance to an appellate court, the 7th Collegiate Tribunal (the ***Enforcement Court***), for confirmation of SEGOB's non-compliance.

51. Presented with this decision by the Amparo Judge in Amparo 1668 that the 2012 Permit should not have been revoked (which was followed a few days later by the dismissal of the challenge of the 2012 Permit in Amparo 1151), the head of SEGOB, Ms. Salas, says she directed her team to comply with the decision of the Amparo Judge.[23] However, as will be further developed later in this Award, SEGOB did not do so and, instead, in December 2013, filed a submission with the Enforcement Court defending its revocation of the 2012 Permit.[24]

52. In February 2014, the Enforcement Court sided with SEGOB, finding that, contrary to the determination by the Amparo Judge who had rendered the relevant opinion, the 2012 Permit had been issued as a consequence of the 2009 Permit.[25] By operation of judicial hierarchy, the Amparo Judge was required to adhere to that decision in March 2014.

---

21 Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24**.

22 Order of the *Primer Tribunal Colegiado en Materia Administrativa del Cuarto Circuito* (Oct. 17, 2013), **C-295**.

23 Tr. (ENG), Day 4, 1100:15-1103:16; 1103:19-1105:13; 1105:16-1111:16 (M. Salas); Tr. (ENG), Day 5, 1199:20-1204:20 (M. Salas).

24 SEGOB Motion Before the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Dec. 3, 2013), **C-298**.

25 Order of the Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito (Feb. 19, 2014), **C-290**.

53. E-Games sought leave from the Supreme Court to appeal those decisions.[26] In addition, on 4 April 2014, it filed applications with SEGOB for fresh permits for each of the seven dual-function facilities authorised by the—now revoked—2012 Permit.

54. Three weeks later, on 24 April 2014, without awaiting the outcome of E-Games' application to the Supreme Court and while the 2 September 2013 injunction proscribing SEGOB's interference with the operation of the casinos was still in place, SEGOB, accompanied by armed law enforcement personnel, proceeded to the immediate closure of the Claimants' five casinos for lack of a permit. In August 2014, SEGOB denied E-Games' fresh permit applications on grounds that will be examined later in this Award.[27]

55. In September 2014, the Supreme Court declined to consider the merits of E-Games' appeal and referred the matter back to the same Enforcement Court for a final decision.[28] The Enforcement Court, after hearing E-Games, affirmed its decision and the Amparo Judge was again required to adhere to that decision.[29]

56. The Claimants in the meantime had been planning for the launch of two additional casinos, in Cabo and Cancun, as well as an online casino (together, the ***Expansion Projects***). The Claimants say that, but for the Respondent's conduct, those Expansion Projects would have come to lucrative fruition. The Respondent says that the Expansion Projects never went beyond the preliminary planning stage and were abandoned by the Claimants prior to, and for reasons unrelated to, the closure of the five casinos.

---

26 E-Games *Recurso de Inconformidad* (Mar. 31, 2014), **C-296**.

27 SEGOB's denial of E-Games' requests (Aug. 15, 2014), **C-27** to **C-33**.

28 Mexican Supreme Court Order (Sept. 3, 2014), **C-26**.

29 Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Jan. 29, 2015), **C-297**.

V. THE TRIBUNAL'S FINDINGS AND CONCLUSIONS ON JURISDICTION

57. In its Counter-Memorial, the Respondent raised a new jurisdictional objection (not asserted or argued in the first phase of the arbitration) that the Expansion Projects do not qualify as protected investments under the Treaty.[30] The Claimants responded that the objection was inadmissible (whether precluded by *res judicata* or by belatedness) and in any event meritless.[31] The Tribunal will first address the Claimants' inadmissibility argument, then the merits of the Respondent's objection.

A. WHETHER THE RESPONDENT'S OBJECTION IS INADMISSIBLE

58. The Claimants object that the Tribunal already disposed of any and all jurisdictional objections in the Partial Award, which has the force of *res judicata*, and that the Respondent's new objection must therefore be denied.[32]

59. The Tribunal disagrees. When the Tribunal held in its Partial Award that it decided "*accordingly* that it has jurisdiction over the claims by the Claimants on their own behalf under Article 1116 of the Treaty and on behalf of the Juegos Companies and E-Games under Article 1117 of the Treaty, and that those claims are admissible",[33] it was only ruling on those preliminary issues that the Parties had agreed should be addressed in the first phase of a bifurcated proceeding ("In this first phase the Tribunal shall decide the following three preliminary issues …"[34]).

60. This is also clear from the use of "accordingly" in the dispositif, which refers back to earlier paragraphs where the Tribunal "[d]ismisse[d] the Respondent's objection *based on Article 1121 of the Treaty* in respect of the Claimants and the Mexican Companies";[35] "[d]ismisse[d] the Respondent's objections *based on Articles 1119 and 1122 of the Treaty* in respect of the Additional Claimants and Operadora Pesa";[36] "[g]rant[ed] the Respondent's objection *based on Article 1117 of the Treaty* in respect

---

30 Counter-Memorial on Merits, Section III(A).

31 QEU&S Claimants' Reply on the Merits, 6 December 2021 (***QEU&S Reply***), Section III(A).

32 QEU&S Reply, ¶¶ 532-535.

33 Partial Award, ¶ 273(e).

34 Partial Award, ¶ 41.

35 Partial Award, ¶ 273(a).

36 Partial Award, ¶ 273(b).

of Operadora Pesa";[37] and "[d]ismisse[d] the Respondent's objection *based on Article 1117 of the Treaty* in respect of the Mexican Companies other than Operadora Pesa".[38] Thus, the Tribunal was simply affirming jurisdiction and admissibility insofar as it had denied those specific objections as had been identified by the Parties for preliminary disposition at that time.

61. The Claimants also submit that the Respondent's objection is in any event time-barred and should have been raised during the first phase.[39] The Tribunal disagrees. Pursuant to Article 45 of the ICSID Arbitration Additional Facility Rules, a jurisdictional objection must be raised no later than the Counter-Memorial, which was the case here. The Tribunal also accepts the Respondent's contention that it could not be reasonably expected to identify this objection until it saw the Memorial on the Merits and its more granular presentation of the claim as regards the Expansion Projects.[40]

B. WHETHER THE EXPANSION PROJECTS CONSTITUTE A PROTECTED INVESTMENT

62. In addressing the merits of the Respondent's objection, the Tribunal distinguishes between (i) the right of E-Games under the 2012 Permit to establish and operate two further dual-function casinos and an online casino, on the one hand; and (ii) the various equity and debt investments that certain Claimants are alleged to have made in connection with that right, on the other.

63. It is undisputed that E-Games had the right under the 2012 Permit to establish and operate two further dual-function casinos and an online casino, in addition to the five casinos it operated.[41] The 2012 Permit formed an indivisible and integral part of the Claimants' investments in their casino business in Mexico. The indirect interest held by certain of the Claimants in the 2012 Permit is also one that arose "from the commitment of capital or other resources in the territory of a Party to economic activity in such territory", within the meaning of Article 1139(h) of the Treaty. Indeed, by its own terms, the 2012 Permit was granted because, among other things, E-Games had

---

37 Partial Award, ¶ 273(c).

38 Partial Award, ¶ 273(d).

39 QEU&S Reply, ¶¶ 532-535.

40 Rejoinder, ¶ 527.

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

lawfully capitalised, developed and operated five casinos for several years.[42] Insofar as certain of the Claimants indirectly held an interest in the 2012 Permit, that interest thus attracts the protection of Chapter 11 of the Treaty.

64. By contrast, save for one exception, none of the equity and debt that certain of the Claimants are alleged to have invested in the development of two further dual-function casinos in Cabo and Cancún and an online casino qualify separately as protected investments under the Treaty.

65. First, the Claimants assert that Claimant B-Mex II "invested" US$2.5 million in "licenses" for planned casinos in Cabo and Cancun.[43] The Tribunal, however, finds that they have not established that US$2.5 million was indeed "invested" in the planned Cabo and Cancún Projects. In its 2006 partnership tax return, under "other assets", B-Mex II reported US$2.5 million in "licenses—inactive".[44] In November 2008, E-Games and E-Mex entered into their operating agreement, whereby E-Games acquired the right and obligation to operate seven dual-function gaming facilities under E-Mex's permit.[45] The Claimants say they obtained the right to operate two of those seven dual-function gaming facilities "in recognition of" the US$2.5 million in "unused equity" sitting on B-Mex II's books.[46] However, the fact that a U.S. partnership had US$2.5 million in "unused equity" on its books does not equate to US$2.5 million having been "invested" in those projects in Mexico. At the hearing, the Claimants' experts, Berkeley Research Group (***BRG***), who had referred to this US$2.5 million "investment" in their reports, admitted they were "not sure what this is".[47]

---

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

43 Erin Burr First Witness Statement dated 25 July 2017 (***E. Burr First Statement***), ¶ 52, **CWS-2** ("B-Mex II invested US$ 2.5 million of equity in relation to gaming licenses intended for the expansion projects in Los Cabos and Cancún. In 2006, B-Mex II had acquired rights for the operation of gaming machines, which allowed for the operation of 500 machines per each location. Since our Puebla and DF locations (which are capitalized by B-Mex II, LLC) only had 250 machines, part of B-Mex II's investment, amounting to US$2.5 million of equity, was unused. When we moved under E-Mex's permit, we negotiated and received the right to open two additional gaming facilities in recognition of the unused equity".)

44 B-Mex II, LLC Tax Filings (2006), p. 24 (PDF), **C-487**.

45 Operating Agreement (Nov. 01, 2008), **C-7**.

46 E. Burr First Statement, ¶ 52, **CWS-2**.

47 Tr. (ENG), Day 8, 2250:17-2250:18 (S. Dellepiane).

66. Second, the Claimants assert that Claimant B-Cabo LLC invested in the Cabo Project by providing a loan of US$600,000 to Médano Beach,[48] a Mexican company, to enable it to purchase an interest in Inversiones Médano, another Mexican company, which owned the land for the planned Cabo Project. The record shows that: (i) US$500,000 of the US$600,000 were loaned to B-Cabo LLC by Claimant Taylor;[49] (ii) US$515,000 was returned to B-Cabo LLC by October 2013;[50] (iii) of those US$515,000, US$415,000 was then returned to Claimant Taylor ($15,000 via Claimant B-Mex II);[51] and (iv) the loan was guaranteed by two U.S. nationals.[52] Thus, at the time of the alleged breach, Claimant B-Cabo LLC had a residual US$85,000 debt interest in Medano Beach, and Claimant Taylor had a residual US$85,000 debt interest in B-Cabo LLC. As far as the Treaty protection of these two debt interests are concerned, the Tribunal finds that:

a. Claimant Taylor's US$85,000 debt interest in Claimant B-Cabo LLC is not a protected investment under the Treaty because it is not an investment within the territory of Mexico.

b. Claimant B-Cabo LLC's US$85,000 debt interest in Medano Beach, a Mexican company, is a protected investment under the Treaty. However, as explained below, the Tribunal awards no damages relief in respect of that debt interest.

67. Finally, the Claimants assert that Colorado Cancun LLC purchased a right of first refusal to a dual-function licence from Claimant B-Mex II for US$250,000.[53] Claimant Taylor wired the full sum to B-Mex II as a loan to Claimants Burr and B-Cabo LLC.[54] He then demanded repayment, upon which Claimant Burr arranged for

---

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

49 $500,000 wire transfer, Taylor to B-Cabo LLC (Mar. 21, 2013), **CRT- 17**.

50 Burr to Taylor email listing all B-Cabo repayments (Jun. 18, 2016), **CRT- 21**.

51 Burr to Taylor email listing all B-Cabo repayments (Jun. 18, 2016), **CRT- 21**.

52 Randall Taylor Second Witness Statement, 6 December 2021 (***Taylor Second Statement***), ¶ 27, **CRTWS-1**.

53 Memorial on Merits, ¶ 65; Right of First Refusal Agreement between Colorado Cancun, LLC and B-Mex II, LLC (Apr. 27, 2011), **C-88**.

54 Taylor Reply, ¶ 20; $250,000 Wire Transfer, Taylor to B-Mex II and repayment wires (Apr. 27, 2021), **CRT-16**.

Claimant B-Mex II to repurchase the right of first refusal and to make three payments to Claimant Taylor for a total of US$75,000.[55] Claimant Taylor then obtained an arbitral award for the outstanding balance against Claimant B-Mex II.[56] None of these transactions among U.S. nationals or U.S. entities constitutes the making of an investment in the territory of Mexico for purposes of the Treaty. The Tribunal therefore concludes that they are not protected investments under the Treaty.

68. The Tribunal accordingly concludes that the Expansion Projects are protected investments insofar as they include (i) the right of E-Games under the 2012 Permit to establish and operate two further dual-function casinos and an online casino; and (ii) Claimant B-Cabo LLC's US$85,000 debt interest in Medano Beach.

---

55 Taylor Reply, ¶ 41.

56 Taylor Reply, ¶ 61; Final Award, AAA Arbitration, Case No. 01-19-0001-3949, B-Mex, B-Mex II v. Ponto and Taylor (Mar. 19, 2020), **CRT-26**.

VI. THE TRIBUNAL'S FINDINGS AND CONCLUSIONS ON LIABILITY

A. THE MAJORITY'S CONCLUSION AND PROFESSOR VINUESA'S DISSENT

69. An important part of the Claimants' case is that the Respondent failed to accord fair and equitable treatment (***FET***) as required by Article 1105 of the Treaty.[57] As set out in this section, the Tribunal concludes that the Respondent has breached its obligations under that FET standard of Article 1105. While the Tribunal dismisses the Claimants' claim that the decisions of the Respondent's courts inflicted a denial of justice on their investments, the Tribunal finds that the treatment accorded by SEGOB to the Claimants' investments fell below the FET standard of Article 1105, and that the absence of a denial of justice does not absolve the Respondent of international responsibility for that breach.

70. The Tribunal makes that finding by majority. Professor Vinuesa takes the view that he too would have found the Respondent to have breached the FET standard of Article 1105. However, he would have done so on a different basis than the Majority (specifically, that SEGOB fell short of the FET standard when it issued the 2009 and 2012 Permits in circumstances where, in his view, it had no proper legal basis to do so); and, where the Claimants did not put their Article 1105 case on the grounds identified by him, he concludes that he is precluded from finding a breach on that basis, as doing so would be *ultra petita*. Professor Vinuesa elaborates on his reasoning in a Dissenting Opinion, which he prepared after the finalisation and transmittal to him of this Final Award by the Majority.

71. The Tribunal has decided to exercise adjudicative economy in respect of the other claims advanced by the Claimants under Articles 1102, 1103, 1105 and 1110 of the Treaty. As other tribunals in investment treaty arbitrations have held, this is the appropriate course where, as here (i) the relief sought for each of those other claims is identical to the relief sought for the successful claim and their adjudication would therefore add nothing to the resolution of the dispute, and (ii) time and costs can be saved by exercising adjudicative economy.[58]

---

57 Memorial on Merits, Section V(C); QEU&S Reply, Sections IV(B)-(E), (F).

58 *See, e.g.*, *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, ¶ 493, www.italaw.com/sites/default/files/case-documents/italaw10075.pdf. ("Above, the Tribunal

72. In the next five sections, the Tribunal will:

a. identify the FET standard against which it has tested the record evidence (Section B);

b. set out its analysis of how the record evidence sustains its conclusion that the treatment accorded by SEGOB to the Claimants' investments breached that FET standard (Section C);

c. set out its analysis of how the record evidence does not sustain the Claimants' claim that the treatment accorded by the Respondent's courts to the Claimants' investments gave rise to a denial of justice in breach of that FET standard (Section D);

d. explain why, in the circumstances of this case, it rejects the Respondent's argument that it cannot be held in breach of Article 1105 absent a finding of denial of justice (Section E); and

e. address two evidential controversies that arose in the course of the arbitration (Section F).

B. THE FET STANDARD OF ARTICLE 1105

73. Before setting out its assessment of the evidence sustaining its finding of breach of the FET standard of Article 1105, the Tribunal should briefly address the contours of that

---

has concluded that Respondent has breached Art. 5(2) and is, thus, liable. Therefore, if the Tribunal were to find that Respondent also breached Art. 3 of the BIT, it would not lead to any damages in excess of those which result from the breach of Art. 5(2). In the interest of procedural efficiency, therefore, the Tribunal considers that it need not examine whether Respondent also would be liable for a breach of Art. 3."); *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, ¶ 712, https://www.italaw.com/sites/default/files/case-documents/italaw16219.pdf. ("For reasons of judicial economy, it can be left open whether these pre-existing rights were in addition subject to an expropriation. Indeed, even in the affirmative, no greater harm could be caused than the one generated by the FET breach."); *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, ¶ 238, https://www.italaw.com/sites/default/files/case-documents/ita1051.pdf; *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014, ¶ 290, https://www.italaw.com/sites/default/files/case-documents/italaw4101.pdf; *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶¶ 213-215, https://www.italaw.com/sites/default/files/case-documents/ita0248_0.pdf.

standard. It is a standard that has been the subject of extensive debate in this arbitration as it has been elsewhere.

74. The Respondent, the United States and Canada have all reminded the Tribunal of the 31 July 2001 Free Trade Commission's Notes of Interpretation—a document whose text is well-trodden by now.[59] On the strength of that document, the Respondent submits that "[t]he FET obligation under NAFTA Article 1105(1) *is not the same thing as an autonomous FET obligation* unburdened by reference to the MST under customary international law".[60]

75. To define the contours of the FET standard as it appears in Article 1105, the Respondent approvingly quotes, among others, the following passage from the award in *Cargill v. Mexico*, which, in the Respondent's words, "ruled that the threshold for establishing a violation of the [minimum standard of treatment] is high":[61]

> In summation, the Tribunal finds that the obligations in Article 1105(1) of the NAFTA are to be understood by reference to the customary international law minimum standard of treatment of aliens. The requirement of fair and equitable treatment is one aspect of this minimum standard. To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.

76. The Tribunal agrees with the Respondent that this definition of the FET standard as it appears in Article 1105 is "high". The Tribunal also sees scope for debate as to whether other types of State conduct may come within the reach of that standard, as the Claimants have advocated. However, where it is uncontroversial between the Parties that *at least* conduct of the nature described in the *Cargill* articulation of the FET standard in Article 1105 will fall below that standard, the efficient course for the Tribunal is to:

---

59 *See e.g.*, Counter-Memorial on Merits, ¶¶ 548–549; Third Submission of the Government of Canada pursuant to NAFTA Article 1128, 13 June 2022, ¶ 28; Fourth Submission of the United States of America pursuant to NAFTA Article 1128, 13 June 2022, ¶ 20.

60 Rejoinder, ¶ 673 (original emphasis).

61 Counter-Memorial on Merits, ¶ 555.

a. first test the evidence relating to SEGOB's treatment of the Claimants' investments against the *Cargill* articulation of the Article 1105 FET standard favoured by the Respondent; and

b. only if it finds that the treatment in question does not fall below that articulation of the Article 1105 FET standard, determine whether that standard is, as the Claimants contend, more expansive than that articulation and proscribes a wider range of State conduct.

77. As set out in the next section, based on its careful review of the record evidence, the Tribunal has concluded that the treatment accorded by SEGOB to the Claimants' investments does indeed fall short of the bar set by *Cargill*. Having reached that conclusion, the Tribunal discerns no value in adding to the existing plethora of disquisitions on whether the FET standard of Article 1105 does or does not proscribe a wider array of State conduct. The Tribunal therefore will not further address that question.

C. THE TREATMENT ACCORDED BY SEGOB TO THE CLAIMANTS' INVESTMENTS FELL BELOW THE FET STANDARD OF ARTICLE 1105

78. Turning to the Tribunal's assessment of the record evidence sustaining its conclusion of breach, the relevant record is vast but the relevant substance for present purposes is this: SEGOB, within two months from granting an assurances-clad permit (crucial for the continuity of a business that had been trading for several years) turned against that same permit (and the business it permitted) for no discernible reason other than a change of political leadership, and subsequently terminated the permitted business when it had ample opportunity to preserve it and had identified no public or regulatory policy concerns preventing its continuity.

79. That SEGOB did not close the casinos because of any public or regulatory policy concerns is evident from the Respondent's representation that, but for the Enforcement Court's decisions, SEGOB would in fact have been content to leave the 2012 Permit undisturbed, and thus to allow the continued operation of the Claimants' casinos.[62] As will be detailed below, that representation is consistent with the evidence of Ms. Salas,

[62] *See, e.g.*, Rejoinder, ¶ 379 ("It is reasonable to assume that if E-Mex had not filed the amparo proceeding 1668/2011 that culminated in the non-subsistence of the Official Letter 2009-BIS, as well as all the acts derived from it, said permit would continue to be in force.").

SEGOB's chief since January 2013, who testified that SEGOB only revoked the 2012 Permit and closed the casinos because, she averred, the Enforcement Court's decision had left it with no choice.

80. Critically, however, the Tribunal has found that the Enforcement Court's decision in fact did not prevent SEGOB from preserving the Claimants' casino business. In those circumstances, where SEGOB could have preserved the Claimants' going concern but its new political leadership decided instead to terminate that going concern, the Tribunal cannot but conclude that the resultant treatment of the Claimants' investments was "grossly unfair" and "arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure", and thus in breach of the FET standard as defined by *Cargill*.

* * *

81. The relevant record evidence can be organised around five pivotal moments:

a. the decision by SEGOB's previous PAN-affiliated chief in November 2012 to grant E-Games the 2012 Permit (clad with emphatic assurances of legality, legal security, and independence of the E-Mex permit), which ensured (and was stated to be intended to ensure) the continuity of the Claimants' going concern following several years of trading;[63]

b. the decision by SEGOB's newly appointed PRI-affiliated chief in January 2013 (within weeks from taking over from her PAN-affiliated predecessor) to publicly denounce that same two-month-old 2012 Permit as "irregular" without first hearing E-Games, meaningfully investigating the matter or even reviewing the 2012 Permit;[64]

c. the decision by SEGOB in August 2013 to revoke the 2012 Permit within 48 hours of the Amparo Judge's direction that permits issued "as a consequence of" the 2009 Permit should be revoked where SEGOB itself considered those directions unclear, the terms of the 2012 Permit militated against revocation, and SEGOB could have sought, at no cost or risk, an *ex ante* clarification from the

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

64 Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón (Jan. 27, 2013), **C-17**.

Amparo Judge under Article 193 of the Amparo Law regarding the proper interpretation of the Amparo Judgment (which the Amparo Judge subsequently held did not permit the revocation of the 2012 Permit).[65]

d. the decision by SEGOB in late 2013—after the Amparo Judge had ruled that the revocation of the 2012 Permit did not comply with the Amparo Judgment and the Collegiate Tribunal hearing Amparo 1151 had deemed E-Mex to have consented to the constitutionality of the 2012 Permit—not to extemporaneously comply with the Amparo Judgment by reinstating the 2012 Permit (as permitted by the Amparo Law), but instead to insist before the Enforcement Court that it had to be revoked;[66] and

e. the decisions by SEGOB, in April and August 2014 respectively, to: (i) close down the casinos without allowing the legal process to run its full course and while an injunction remained pending; and (ii) to deny E-Games' application for fresh permits on grounds that, in the circumstances, can only be seen as pretextual.[67]

82. The Tribunal sets out below its evidential findings relating to these pivotal moments.

* * *

83. The Tribunal recalls that the award of the 2012 Permit only came after the Claimants had already been developing their business for a number of years through different contractual arrangements.

84. The Claimants initially developed and operated the five casinos with only "games of skill" machines starting in 2005.[68] They did so pursuant to joint venture agreements with a Mexican company called JEV Monterrey, which was authorised to operate such facilities pursuant to a SEGOB resolution known as the ***Monterrey Resolution***.[69] In

---

65 SEGOB Resolution (Aug. 28, 2013), **C-289**.

66 SEGOB Motion Before the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Dec. 3, 2013), **C-298**.

67 SEGOB's denial of E-Games' requests (Aug. 15, 2014), **C-27** to **C-33**.

68 Memorial on Merits, ¶ 18; SEGOB Resolution No. UG/211/0295/2005 (Mar. 10, 2005), **C-94**.

69 The Respondent has alleged that the five casinos operated on that basis were in fact not always limited to games of skill but also included games of chance, which were not permitted under

December 2008, however, E-Games entered into an operating agreement with E-Mex, pursuant to which it acquired a contractual right (recognised by SEGOB resolution) to operate its casinos under E-Mex's permit, which allowed for games of chance in addition to games of skill.[70]

85. When E-Games became concerned about E-Mex's inability to service its debt and its own rapidly deteriorating relationship with E-Mex, E-Games applied for and obtained the 2009 Permit, which recognised E-Games' "acquired right" to the "legal exploitation of [E-Mex's permit], subject only to the conditions imposed by the Regulations to the Federal Gaming and Lottery Law, and the same general provisions of the [E-Mex] permit, without causing the quality of operator to remain at the discretion of [E-Mex], but rather forming part of the legal assets of [E-Games] …".[71]

86. Considerable ink was spent by the Parties on whether or not SEGOB traversed uncharted legal terrain when it issued this 2009 Permit on the basis of the acquired rights doctrine. The Claimants point to a 2008 resolution by SEGOB, which they claim set a precedent by similarly granting "independent operator" status on the basis of acquired rights to a company called Petolof.[72] The Respondent has dismissed the relevance of the so-called Petolof resolution on the basis that the rights acquired by Petolof were limited and did not extend to the ownership of a permit, and that the circumstances of Petolof were different.[73]

87. In the Tribunal's opinion, the Petolof debate as it relates to the 2009 Permit does not bear on the present inquiry. It is uncontroversial that: (i) SEGOB allowed E-Games to operate its casino business for several years under that 2009 Permit; (ii) after the

---

the terms of the Monterrey Resolution. Having examined the record evidence, however, the Tribunal has found no conclusive evidence to support that allegation, and the Claimants' evidence that SEGOB itself made no such findings following contemporaneous inspection of the casinos stands unrefuted. *See* Gutiérrez Fourth Statement, ¶ 11, **CWS-52**; Naucalpan verification (Dec. 8, 2005), **C-346**. SEGOB itself expressly recorded in the 2012 Permit that the Claimants' casinos had at all times been operated in compliance with applicable law. SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), **C-16**.

70 Operating Agreement (Nov. 01, 2008), **C-7**. The Respondent has questioned the wisdom of that transaction, a point which the Tribunal will address below in the contributory fault section.

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

72 Memorial on Merits, ¶ 118; SEGOB Resolution Granting Petolof Independent Operator Status (Oct. 28, 2008), **C-253**.

73 Counter-Memorial on Merits, Section II(T).

Amparo Judge held in 2013 that the 2009 Permit was unconstitutional, SEGOB revoked the 2009 Permit as ordered; and (iii) SEGOB's revocation of the 2009 Permit did not affect the Claimants' operations because SEGOB had by then granted E-Games the 2012 Permit.[74] To the Tribunal's mind, it was therefore this last decision by SEGOB to grant E-Games its own 2012 Permit, after verifying that it had independently met all the applicable statutory and regulatory requirements for the grant of that permit, that constitutes the pertinent watershed against which SEGOB's subsequent conduct must be examined.

88. As mentioned earlier, SEGOB issued the 2012 Permit because E-Mex's permit was about to be revoked due to its bankruptcy proceedings.[75] In doing so, SEGOB was able to ensure the continuity of a going concern upon which employment and tax revenue depended (as noted above, a point emphasised in the 2012 Permit itself[76]), while still abiding by the Federal Government's policy of not increasing the total number of casino permits in circulation.

89. In the 2012 Permit, SEGOB specifically and expressly assured E-Games that:

    a. E-Games had independently satisfied all the requirements of the applicable legislation and regulation for the grant of its own permit;

    b. SEGOB issued the permit so as to provide "legal certainty" to E-Games;

    c. the rights conferred by the permit "c[ould] not be violated, regardless of any prior contractual relationship or precedent with [E-Mex]"; and

    d. "the rights acquired by [E-Games] c[ould] be exercised without legal connection whatsoever with those derived from [E-Mex's permit] …"[77]

90. However, after granting the 2012 Permit with these comprehensive assurances so as to preserve the Claimants' business, SEGOB just two months later turned against that

---

74 *See above*, ¶¶ 39.b, 42-43.

75 *See above*, ¶ 39.c-d.

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

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

very same permit and eventually revoked it, closed down the casinos, and declined to grant the Claimants' fresh permit applications.

91. The Respondent says that: (i) absent the courts' intervention, SEGOB would have been content to leave the 2012 Permit—and thus the Claimants' business—undisturbed; but (ii) SEGOB had to terminate the Claimants' business because the courts had tied its hands.[78]

92. In this regard, the Tribunal finds that the record evidence (i) confirms that SEGOB did not terminate the Claimants' business because of any public or regulatory policy concerns it had identified; but (ii) does not show that SEGOB had to terminate the Claimants' business because its hands were tied by the courts (**Sub-section 2**). Rather, the record shows that, in terminating the Claimants' business, SEGOB acted on the predisposition of its new political leadership, which took office in January 2013 after the PRI's electoral win in 2012 (**Sub-section 1**).

1. SEGOB's conduct was driven by the predisposition of its new political leadership rather than public or regulatory policy concerns

93. At the end of January 2013—i.e., just ten weeks after SEGOB had granted the 2012 Permit with comprehensive assurances—the head of SEGOB went to the press and denounced the 2012 Permit as "irregular" and lacking "legal foundation".[79] As set out below, it is clear from the record evidence that this extraordinary change of heart was the result of a change of political leadership at the top of that agency.

94. In December 2012, weeks after the issuance of the 2012 Permit, the PRI defeated the PAN in the national elections, and, in January 2013, the incoming PRI administration appointed a longtime PRI mandatary, Ms. Salas, as the new head of SEGOB. On or before 27 January 2013, within weeks from taking up her new office, Ms. Salas gave press interviews in which she levelled the aforementioned charge against the 2012 Permit.[80]

---

78 *See e.g.*, Rejoinder, ¶ 379 ("It is reasonable to assume that if E-Mex had not filed the amparo proceeding 1668/2011 that culminated in the non-subsistence of the Official Letter 2009-BIS, as well as all the acts derived from it, said permit would continue to be in force.").

79 Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón (Jan. 27, 2013), **C-17**.

80 Ilegal, la resolución que otorgó dos permisos para casinos al final del sexenio de Calderón (Jan. 27, 2013), **C-17**.

95. Ms. Salas never gave E-Games notice of her intent to do so or invited them to address the "irregularity" charge before she used the pulpit of her high office to divulge that charge in public.[81] Nor was Ms. Salas's "irregularity" charge informed by any meaningful examination of the facts or the law.

96. Ms. Salas's evidence on this point is unequivocal: she confirmed that she did not read the 2012 Permit (or any of the preceding SEGOB resolutions) before so swiftly and publicly denouncing it.[82] In her evidence, Ms. Salas did not seek to ground the charges she had levelled against the 2012 Permit in concerns of public or regulatory policy: she denied having claimed that the permit was "illegal";[83] confirmed that she saw no "defect" with the permit;[84] and deemed the 2012 Permit (and that of one other company, Producciones Móviles (***ProMov***)) "irregular" only "because they transformed two operators into two permit holders".[85] The latter observation does not explain why it was problematic for an existing operator with a proven track record to obtain its own permit after the third party permit it had been operating was revoked. It also does not explain why, as elaborated below, one of those permit holders was subsequently allowed to continue trading while the other was not.

97. This dearth of meaningful analysis sustaining the "irregularity" charge against the 2012 Permit was best exemplified by a phrase to which Ms. Salas would return countless times in both her written and oral evidence: that the 2012 Permit "*simplemente, llamaba la atención*"—it simply drew one's attention. [86] While the inference that phrase sought to elicit remains unclear—there is no allegation that the 2012 Permit was procured through impropriety—it does not assist in evincing a meaningful examination of the relevant facts and law.[87]

---

81 Tr. (ENG), Day 4, 1050:22-1051:18 (M. Salas).

82 Tr. (ENG), Day 4, 1050:22-1051:18 (M. Salas).

83 Tr. (ENG), Day 4, 1054:3 (M. Salas).

84 Tr. (ENG), Day 4, 1039:21-1040:5 (M. Salas).

85 Tr. (ENG), Day 4, 1061:19-1062:8 (M. Salas).

86 *See e.g.*, Tr. (ESP), Day 4, 1073:1-1073:2; 1093:3-1093:6 (M. Salas).

87 This is echoed in the notes of a meeting with Ms. Salas on or before 22 February 2013 taken by a lawyer at the Ministry for Economic Affairs (Email from C. Rayo Zapata re: Meeting and Notes with M. Salas re: E-Games (Feb. 22, 2013), **C-401**). The statements recorded in the notes are not attributed to any one person, but the Respondent has described them as "notes from the internal memory of Ms. Rayo of February 2013". The notes appear to record a statement which

98. The same is true for Ms. Salas's evidence that her predecessor—the same person who signed the 2012 Permit on behalf of SEGOB—would have suggested on his way out that "she look into" the 2012 Permit.[88] While it seems rather incongruous that the outgoing agency head who had signed the 2012 Permit two months earlier would also have casually cast suspicion on it, this evidence similarly does not give the Tribunal any comfort that Ms. Salas engaged in a meaningful examination or process before publicly denouncing the 2012 Permit as "irregular".

99. The Tribunal's conclusion that SEGOB's conduct from January 2013 onwards was driven by the predisposition of its new political leadership rather than any considerations of public or regulatory policy also finds support in two further findings of fact: (i) SEGOB's disparate treatment of the identically "irregular" permit granted to another casino operator, ProMov; and (ii) the events relating to the closure of the casinos in April 2014.[89]

(i) acknowledged that E-Games had met all the requirements for operating the casinos, yet (ii) at the same time anticipated in February 2013 that SEGOB would revoke the 2012 Permit if it was declared "irregular" by the courts, even though the 2012 Permit was not mentioned in the Amparo Judgment rendered a few weeks prior: "*Exciting [Games] is in process before court, if it declares that they [its permits] were given irregularly they will be revoked. They meet the requirements to operate the casinos*". The internal memorandum prepared by the Secretariat of Economy (Memo E-Games, **C-261**) does not add anything. It was prepared after the issuance of the Notice of Intent on 24 May 2014 and simply records that, in response to the Secretariat's enquiries about the dispute, the DGJS informed the Secretariat that the 2012 Permit was "*was cancelled because that permit had been granted at the end of the previous administration on an irregular basis*".

88 Tr. (ENG), Day 4, 1004:13-1006:1 (M. Salas).

89 The Claimants have also pointed to SEGOB's decision within weeks from Ms. Salas's press interviews to incorrectly designate the 2012 Permit on its website as "suspended". The Tribunal notes in this regard that it is undisputed that SEGOB, at the directions of Ms. Salas, made changes to its website during February 2013—shortly after the press statements by Ms. Salas—to designate the 2012 Permit as "suspended". Memorial on Merits, ¶ 429; Counter-Memorial on Merits, ¶ 206; Tr. (ENG), Day 4, 880:14-882:3 (J. Gutiérrez). The Respondent says that SEGOB did so in compliance with an injunction in the Amparo 1151 proceeding. However, in the Tribunal's view, that injunction in terms did not authorise, let alone require, this designation. E-Games Brief regarding SEGOB Web Page Modification (Jun. 18, 2013), C-357. Rather, the injunction simply required the preservation of the status quo until the Amparo 1551 court ruled on the merits of E-Mex's challenge against the 2012 Permit (which challenge was subsequently dismissed as time-barred). E-Games Brief regarding SEGOB Web Page Modification (Jun. 18, 2013), C-357. The Tribunal agrees that the fact that it took several months and a court order before SEGOB finally removed the "suspended" designation from its website is difficult to reconcile with an innocent mistake. Tr. (ENG), Day 4, 880:14-882:3 (J. Gutiérrez); E-Games Brief regarding SEGOB Web Page Modification (Jun. 18, 2013), C-357. Having said this, the Tribunal does not consider this incident to merit the same weight as SEGOB's conduct in connection with ProMov and the closure of the casinos.

100. First, Ms. Salas confirmed in testimony that, in January 2013, she formulated her charge of "irregularity" not only in respect of the 2012 Permit, but also in respect of the ProMov permit.[90] But notwithstanding their early determination that both permits were "irregular", Ms Salas and her colleagues at SEGOB afforded ProMov strikingly different treatment as compared to E-Games.

a. It is undisputed that ProMov was Mexican-owned. It has been alleged by one of the Claimants' witnesses[91] that ProMov was at least part-owned by [redacted], the owner o [redacted] but no documentary evidence on record corroborates that allegation. Like E-Games, ProMov was initially the operator of an E-Mex permit. Like E-Games, ProMov applied for and received an independent permit in identical terms and just days apart from E-Games' 2012 Permit.[92]

b. Yet, unlike the 2012 Permit, ProMov's independent permit was never revoked by SEGOB.[93] The evidence of Ms. Salas is that ProMov, after suffering temporary closures of its facilities, was able subsequently to continue the operation of its casinos.[94] The Respondent's defence of this disparate treatment is that, in the case of E-Games, SEGOB was given no choice by the courts.[95] But, as explained below, the record evidence disproves that contention.

c. In addition, if ProMov's permit was equally "irregular" from the outset, then the Claimants' expert evidence, which the Tribunal has found persuasive on this point, is that SEGOB could have initiated one of several proceedings to seek also its cancellation.[96] But rather than doing so, Ms. Salas testified that, in 2014 and 2015, SEGOB instead sought to "regularise" the situation of ProMov.[97]

---

90 Tr. (ENG), Day 4, 1061:22-1062:8 (M. Salas).

91 Tr. (ENG), Day 2, 575:1-575:6 (G. Burr).

92 Tr. (ENG), Day 5, 1177:18-1177:21 (M. Salas).

93 Tr. (ENG), Day 5, 1179:14-1180:5 (M. Salas).

94 Tr. (ENG), Day 5, 1179:14-1180:5 (M. Salas).

95 Tr. (ENG), Day 5, 1181:9-1183:8 (M. Salas).

96 Tr. (ENG), Day 7, 1962:13-1965:18 (E. Matus).

97 Tr. (ENG), Day 5, 1206:6-1206:8; 1209:19-1210:1 (M. Salas).

101. Second, in April 2014, as soon as the Amparo Judge in March 2014 adhered to the Enforcement Court's February 2014 decision, SEGOB immediately proceeded to the closure of the casinos.[98] It did so even though E-Games' appeal to the Supreme Court against those decisions was still pending and E-Games had obtained the 2 September 2013 court injunction directing SEGOB to refrain from interfering with the operation of the casinos pending the final resolution of the Amparo 1668.[99] SEGOB only applied for a lifting of that injunction in May 2014, after closing the casinos, and obtained that lifting order in September 2014.[100] Whichever of the Parties is right as to the precise legal effects of that injunction (which is disputed), the evidence certainly does not support the proposition that SEGOB was *precluded* from allowing the legal process to run its full course. Indeed, Ms. Salas testified that she was unaware of this injunction at the time but that she *would have* ensured compliance with the injunction if she had been aware of it.[101] Mr. Sánchez, on the other hand, testified that when he showed the injunction to the SEGOB inspectors upon their arrival to the casinos to close them down, it was to no avail.[102]

102. The manner in which the casinos were closed by SEGOB is also inconsistent with the Respondent's portrayal of the process as a run-of-the-mill "inspection" unburdened by any predetermination to close them down. Instead, the evidence suggests that the closure was a pre-ordained outcome. SEGOB inspectors were accompanied to the casinos by a large number of armed law enforcement personnel, and they were provided in advance with very specific instructions drafted by the legal department of SEGOB on how to proceed with the closure of the five casinos.[103] Ms. Salas said that she understood similar instructions to be given for all casino inspections and that this

---

98 Memorial on Merits, ¶ 438; SEGOB's denial of E-Games' requests (Aug. 15, 2014), **C-27** to **C-33**.

99 Injunctive Relief (Sept. 2, 2013), **C-299**.

100 Injunctive Relief (Sept. 2, 2013), **C-299**; Revocación de la Medida Cautelar del 22 de septiembre 2014, **R-61**; Oficio de SEGOB número UGAJ/DGC/433/2014 de fecha 14 de mayo de 2014 por el que solicita modificación a la Medida Cautelar, **R-63**; Second Expert Report of Ezequiel González Matus on Adminstrative Law Regarding Gambling and Raffles, 6 December 2021 (***Matus Second Report***), Annexes HH and II, **CER-6**.

101 Tr. (ENG), Day 5, 1142:15-1143:12 (M. Salas).

102 Tr. (ENG), Day 5, 1220:9-1224:6 (P. Chavez).

103 SEGOB Internal Document: Steps to Follow by SEGOB Officials for Closing Down Claimants' Casinos, Case File AJP-0067-2014-VII, San Jerónimo, Mexico City Casino, **C-403**.

was not custom-made for E-Games.[104] However, another of the Respondent's witnesses, Mr. Garcia (who served in a senior position at SEGOB under Ms. Salas at the time and subsequently remained in her team when she was appointed to a different role) squarely contradicted that testimony: "We never drafted a document of this sort to provide instructions".[105]

2. SEGOB chose to terminate the Claimants' business when it could have preserved it

103. As set out below, the Tribunal has found that SEGOB subsequently acted on its new leadership's predisposition when in 2013 and 2014 it chose to terminate the Claimants' business when it could have preserved it. There were at least three instances in the sequence of events where SEGOB could have done so, reasonably, lawfully and unconstrained by any court decisions.

104. First, after the Amparo Judge in August 2013 held that the Amparo Judgment should be understood to include within its scope any SEGOB resolutions issued "as a consequence of" the 2009 Permit,[106] SEGOB took just 48 hours to conclude that this included the 2012 Permit and immediately revoked the 2012 Permit, with the foreseeably pernicious consequences for the Claimants' investments. The record evidence, however, shows that alternatives were available to SEGOB and that, despite those alternatives, SEGOB chose the one course that would place the Claimants' business in great jeopardy.

105. As a preliminary matter, it is confounding that SEGOB concluded within 48 hours that the 2012 Permit was issued as a consequence of the 2009 Permit.

a. First, the express terms of that 2012 Permit—crafted by SEGOB itself just ten months earlier—militated rather forcefully against that conclusion. To recall, in the 2012 Permit, SEGOB had expressly confirmed that: (i) E-Games had independently satisfied all the requirements of the applicable legislation and regulation for the grant of its own permit; (ii) the rights conferred by the permit "[could not] be violated, *regardless of any previous contractual relationship or*

---

104 Tr. (ENG), Day 5, 1154:12-1154:16 (M. Salas).

105 Tr. (ENG), Day 6, 1616:6-1616:7 (M. Garcia Hernandez).

106 Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Aug. 26, 2013), **C-23**.

precedent with [E-Mex]"; and (iii) "the rights acquired [by E-Games] [could] be exercised *without legal connection whatsoever with those derived from* [E-Mex's permit] …".[107] While the permit also refers to the conferral of "rights and obligations in the same terms as [E-Mex's permit]",[108] this can be read rather naturally as simply defining by cross-reference the scope of the 2012 Permit (e.g., the seven dual-use casinos, the permit's initial term,[109] etc.), as opposed to a contradictory statement that the 2012 Permit somehow was tethered to the E-Mex permit (or the 2009 Permit). As the Amparo Judge's subsequent decision in October 2013 shows, his position was that the 2012 Permit was not issued as a consequence of the 2009 Permit.[110]

b. Second, SEGOB's own submission to the Enforcement Court in December 2013 evinces its understanding that, at the very least, the Amparo Judge's directions of August 2013 could have been reasonably interpreted as not requiring the revocation of the 2012 Permit. SEGOB complained in that submission about the "great legal insecurity to the parties" generated by the "unacceptable" situation of "trial and error" created by the "unclear" directions by the Amparo Judge as to the scope of the Amparo Judgment.[111] Yet, presented with this acknowledged lack of clarity, SEGOB did not hesitate to take the fork in the road that would place the Claimants' business in jeopardy.

106. Having said that, in the Tribunal's opinion, the more salient and problematic point is that, if SEGOB in fact harboured any such doubts as to the correct interpretation of the Amparo Judge's opinion regarding the scope of the Amparo Judgment, SEGOB did not have to venture any interpretation itself, nor was it required to swiftly throw the 2012 Permit under the bus. Instead, it is undisputed that SEGOB could have

---

107 SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), pp. 5, 7, **C-16**. Emphasis added.

108 SEGOB Resolution No. DGJS/SCEV/1426/2012 (Nov. 16, 2012), pp. 5, 7, **C-16**.

109 The term was 25 years. As the Tribunal concludes below, the term of the November 2012 Permit ran from the date of its issuance (*see below*, ¶¶ 223-226).

110 Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24**.

111 SEGOB Motion Before the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Dec. 3, 2013), **C-298**.

simply sought a clarification from the Amparo Judge under Article 193 of the Amparo Law[112] as to whether the 2012 Permit was within the restated scope of the Amparo Judgment.[113] Again, as the Amparo Judge's subsequent decision in October 2013 shows, he would have advised SEGOB that it was not.[114] Presented with the alternative of jeopardising a going concern that had been trading for several years, it is exceedingly difficult to comprehend why SEGOB chose not to pursue that prudent, zero-risk option.

107. Instead, as mentioned, within 48 hours of the Amparo Judge's August 2013 directions, SEGOB issued a resolution revoking the 2012 Permit.[115] According to Mr. Landgrave, a government lawyer who was involved in the drafting of that resolution, SEGOB was able to issue it so swiftly because they had started drafting the document some time before the Amparo Judge issued his directions.[116] SEGOB must have known that, in doing so, it exposed the Claimants' business to an existential risk that it could have sought to avoid simply by filing a document with the Amparo Judge seeking his confirmation that it should not revoke the 2012 Permit.

* * *

108. A second opportunity to preserve the Claimants' going concern presented itself to SEGOB after the Amparo Judge, on 14 October 2013, found SEGOB not to have complied with the Amparo Judgment (for having revoked the 2012 Permit), and the Collegiate Tribunal in Amparo 1151, on 17 October 2013, rejected E-Mex's challenge of the 2012 Permit as time-barred. At that juncture, SEGOB could have pursued late ("extemporaneous" in the relevant terminology) compliance with the Amparo Judgment by reinstating the 2012 Permit pursuant to Article 195 of the Amparo Law.

---

112 In April 2013, the old Amparo Law was abrogated and replaced with a new Amparo Law. It is common ground that the enforcement-related provisions of the new Amparo Law apply to amparo proceedings initiated prior to the entry into force of the new Amparo Law. First Expert Report on Mexican Law by Luis Omar Guerrero Rodríguez, 21 April 2020, ¶ 29, **CER-2**; First Expert Report of Dr. Javier Mijangos Y González, November 2020, ¶ 213, RER-1

113 New Amparo Law, Article 193, Alfredo German Lazcano Sámano first Expert Report, 25 November 2020, Annex 10, **RER-2**.

114 Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24**.

115 SEGOB Resolution (Aug. 28, 2013), **C-289**.

116 Tr. (ENG), Day 6, 1463:20-1465:11 (J. Landgrave).

109. The Parties' experts disagreed at the hearing on whether this statutory option of late compliance was only available to SEGOB in a situation of "total" non-compliance, as opposed to "excessive" compliance, and whether SEGOB could exercise this option and reinstate the 2012 Permit absent an express order to that effect from the Amparo Judge.

110. Having reviewed the record evidence in this regard, the Tribunal is persuaded that SEGOB, after the Amparo Judge declared it in breach of the Amparo Judgment, had the ability to exercise this option of late compliance by reinstating the 2012 Permit.

a. First, there is no basis in the text of Article 195 of the Amparo Law[117] for the proposition that it only applies to instances of "total" as opposed to "excessive" compliance, and no authority has been adduced in support of that non-textual interpretation.

b. Second, the evidence of Ms. Salas and Mr. Landgrave militates against that conclusion. While Mr. Landgrave expressed the view that SEGOB could not have reinstated the 2012 Permit absent an express court order on top of the Amparo Judge's declaration of non-compliance (for which view he cited no authority),[118] that proposition stands in direct tension with his evidence elsewhere that SEGOB would have done so if they had received an instruction from Ms. Salas to that effect (which Ms. Salas said she had given but Mr. Landgrave said he had not received).[119] The latter logically implies that Mr. Landgrave believed that SEGOB could have done so if it had wanted to do so.

c. That conclusion is corroborated by the evidence of Ms. Salas, who testified repeatedly and emphatically that she did give the instruction to reinstate the 2012 Permit after the Amparo Judge found SEGOB in breach, but that her instruction was ultimately not acted upon for reasons unrelated to any legal or procedural inability to reinstate the 2012 Permit.[120] As Ms. Salas put it, when "*[l]a*

---

117 New Amparo Law, Article 195, Alfredo German Lazcano Sámano first Expert Report, 25 November 2020, Annex 10, **RER-2**.

118 Tr. (ENG), Day 6, 1414:5-1415:1 (J. Landgrave).

119 Tr. (ENG), Day 6, 1498:9-1499:13 (J. Landgrave).

120 Tr. (ENG), Day 4, 1100:15-1103:6, 1103:19-1105:13, 1105:16-1111:16 (M. Salas); Tr. (ENG), Day 5, 1199:20-1204:20 (M. Salas).

secretaria se quedó por la mitad"[121] it was simply "*porque [el Permiso de 2012] estaba viciado de origen*".[122] Thus, when SEGOB decided not to reinstate the 2012 Permit, it was because its leadership considered the permit irregular from the outset, but not because it could not do so under Article 195 of the Amparo Law.

111. Rather than reinstate the 2012 Permit, SEGOB decided to insist before the Enforcement Court that the 2012 Permit had to be revoked.[123] Had SEGOB reinstated the 2012 Permit, the record shows that E-Mex would not have challenged that decision: in early October 2013 (shortly before the Amparo Judge issued his decision confirming that the 2012 Permit was not to be revoked), E-Mex and E-Games had entered into a settlement agreement pursuant to which E-Mex had undertaken to cease and desist from any further litigation against the 2012 Permit.[124] Reinstatement of the 2012 Permit would thus have brought the litigation relating to Amparo 1668 to an end.

* * *

112. A third opportunity to preserve the Claimants' business came after the final decision of the Enforcement Court of 29 January 2015 confirming that the 2012 Permit was within the scope of the Amparo Judgment,[125] when SEGOB was presented with an application for fresh permits for which E-Games had applied shortly after that decision.[126] In the Tribunal's opinion, the manner in which, and the grounds on which, SEGOB denied these fresh permit applications show that SEGOB was determined to deny E-Games any opportunity to continue trading.

---

121 Tr. (ESP), Day 5, 1260:4 (M. Salas).

122 Tr. (ESP), Day 5, 1264:17-1264:18 (M. Salas).

123 SEGOB Motion Before the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Dec. 3, 2013), **C-298**. In that submission to the Enforcement Court, SEGOB also chose not to disclose the fact that the judgment rendered in the Amparo 1151 proceeding had by then already found that E-Mex had tacitly consented to the 2012 Permit by failing to pursue a timely amparo challenge against it. While the Parties disagree on the extent to which that decision legally bound the Enforcement Court such that it precluded the decision ultimately rendered by that court, the Tribunal sees no merit in the Respondent's submission that it would have been inappropriate for SEGOB to make the disclosure.

124 Memorial on Merits, ¶ 307.

125 Gutierrez Fourth Statement, ¶¶ 102-103, **CWS-52**.

126 Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Jan. 29, 2015), **C-297**.

113. E-Games filed applications for seven fresh permits (one for each dual-function facility) on 4 April 2014, i.e., three weeks before SEGOB closed down the five casinos for lack of a permit on 24 April 2014.[127] On 15 August 2014, a few months after the closure of the casinos, SEGOB denied E-Games' fresh applications in decisions signed by Ms. Salas.[128]

114. In denying the applications, SEGOB did not refer to any impediment arising from the Amparo Judgment, nor did it express any reservations from a public or regulatory policy perspective. Instead, SEGOB grounded its rejection of the applications in three discrete requirements of Article 22 of the Gaming Regulation, which it said the applications had failed to satisfy: (i) "legal possession" of the facility in which the proposed casino will be operated, on the basis that the facilities in question had been closed down by SEGOB on 24 April 2014 for lack of a permit; (ii) a current favourable opinion by the competent local authority with the relevant seal; and (iii) an indication in the investment program of the source of the funds to be invested.[129] The Tribunal will address each ground in turn.

115. The first ground argued by SEGOB was that E-Games had failed to provide evidence that it had legal possession of the casino facility because the facility in question had been closed down by SEGOB due to lack of a permit. The full extent of SEGOB's stated reasoning was this:

> said location is CLOSED DOWN, dated April 24, 2014, after the verification ordered by order DGJS/704/2014 by the General Directorate of Games and Draws, reason why said premises may not perform or carry out any type of cross bet or draw.[130]

116. As the Claimants' legal expert has argued, it is difficult not to be struck by the circular quality of that argument: taken to its logical conclusion, it implies that E-Games could never be granted a new permit.[131] The Respondent sought to address that concern by adding the following nuance in its Rejoinder: "*la clausura es una sanción que, como*

---

127 Gutiérrez Fourth Statement, ¶ 73, **CWS-52**; Gordon Burr Third Witness Statement, 21 April 2020, ¶ 126, **CWS-50**.

128 SEGOB's denial of E-Games' requests (Aug. 15, 2014), **C-27** to **C-33**.

129 SEGOB's denial of E-Games' requests (Aug. 15, 2014), **C-27** to **C-33**.

130 SEGOB's denial of E-Games' requests (Aug. 15, 2014), **C-27** to **C-33**.

131 Ezequiel González Matus First Expert Report on Administrative Law Regarding Gambling and Raffles, 21 April 2020 (***Matus First Report***), ¶¶ 196–198, **CER-3**.

tal, su revocación debió darse a través de una resolución en el procedimiento sancionador correspondiente … Por tanto, no era posible para la SEGOB haber otorgado de manera automática los nuevos permisos que solicitó E-Games para revocar las clausuras, sino que esto tuvo que haber sido ordenado, en su caso, en la resolución del Procedimiento Sancionador correspondiente".[132] Thus, the argument (for which the Respondent's expert cited no authority[133]) is that SEGOB could not "automatically" grant the fresh permits upon E-Games' application because that had to be done by SEGOB within the administrative sanction procedure that was ongoing at the time. The Tribunal does not find that argument any more convincing.

a. First, the argument cannot be found in the SEGOB resolutions denying the new permit applications. As indicated above, there SEGOB limited itself to simply stating that, because the facilities had been closed down, they could not house a casino operation.[134] SEGOB did not say that, because on 7 July 2014 it had initiated an administrative sanction procedure in which it would hear E-Games regarding the legality of the casino closures, it was unable to award a new permit until that procedure had run its course. (SEGOB ended that procedure with resolutions in February and March 2015 confirming the closures and imposing a fine.[135])

b. The Claimants' expert, Mr. Gonzalez Matus, who is a former Deputy Director-General of SEGOB, rejects the legal soundness of the Respondent's argument. He argues that SEGOB could have removed the cause for the administrative sanction procedure by granting the fresh permit applications and that it therefore was not constrained to first bring that procedure to an end.[136] The Tribunal finds his evidence on this point more persuasive than that of the Respondent's expert. SEGOB was the competent authority to decide both on the fresh permit applications and the closure administrative process. The conduct of both administrative procedures was thus entirely and exclusively within SEGOB's

---

132 Rejoinder (ESP), ¶¶ 304–305.

133 Alfredo German Lazcano Samano Second Expert Report, 20 May 2022, ¶ 181, **RER-5**.

134 SEGOB's denial of E-Games' requests (Aug. 15, 2014), **C-27** to **C-33**.

135 Memorial on Merits, ¶ 411; Final Resolutions of Administrative Procedures (Feb. 26, 2015, and Mar. 3, 2015), **C-361**.

136 Matus First Report, ¶¶ 193-195, **CER-3**.

control. It stands to reason that SEGOB, if it had wanted to, could have organised and resolved both procedures in such a manner that one would not stand in the way of the other.

c. Finally, the Respondent's argument is difficult to square with the evidence of Ms. Salas that, but for the decisions of the Enforcement Court, she would have sought to "regularise" the permit of E-Games, just as she did for ProMov.[137] E-Games' fresh permit applications offered her the opportunity to do that: neither she nor the Respondent has suggested that there was at that time any Mexican court decision that stood in her way. Instead, however, Ms. Salas signed the SEGOB resolutions that denied the fresh permit applications and grounded that denial primarily in the very same casino closures she had ordered.

117. The second and third grounds given by SEGOB in its decisions denying the fresh permit applications are similarly unconvincing. Even if SEGOB could ask for a favourable local authority opinion with a more current date and the right seal and for the missing information regarding source of funds in the investment program submitted by E-Games, this did not entitle SEGOB under Mexican law to deny the applications without affording E-Games an opportunity to cure those technical defects.

a. First, the Tribunal is persuaded by the evidence of the Claimant's expert that SEGOB was required by Article 17A of the Ley Federal de Procedimiento Administrativo (***LFPA***) to give E-Games an opportunity to cure those technical defects within a certain period of time.[138] The Respondent's (and its expert's) only response to that evidence is that "this requirement [of Article 17A of the LFPA] only applies to the written request and not [to] the documentation that is attached to the said request".[139] As a matter of interpretation, the Tribunal is not persuaded that Article 17A can be given so restrictive a reading, which would allow the administration to vary the scope of its obligations under that provision by deciding which information should go in the application itself and which information should go in an annex.

---

137 Tr. (ENG), Day 5, 1204:21-1205:18 (M. Salas).

138 Matus Second Report, ¶¶ 250-251, **CER-6**.

139 Rejoinder, ¶ 308.

b. Second, however, and this disposes of the point, SEGOB's own conduct prior to the change of its leadership shows that SEGOB itself did not adopt this restrictive reading of Article 17A. The record evidence shows that, under its previous leadership, SEGOB applied Article 17A not only to the application itself but also to the documents annexed to it. In 2011, for example, in the context of E-Games' application for the 2012 Permit, SEGOB expressly applied Article 17A to give E-Games the opportunity to cure a defect in its application by providing certain financial statements that should have been annexed to its application pursuant to Article 22 of the Gaming Regulation.[140]

118. Presented with this record, the Tribunal struggles to see a plausible narrative where SEGOB's decision to deny the fresh permit applications was not the product of the same predisposition that drove much of its decisions following the change of political leadership in January 2013. If SEGOB had wanted to "regularise" the situation of E-Games, as Ms. Salas said she did, it could have done so by granting the fresh permit applications for a business the operation of which it had previously permitted for years —both in the administrative law and common meaning of that term. Instead, SEGOB deprived the Claimants' investments of any chance of survival.

* * *

119. In light of the foregoing findings, the Tribunal concludes that SEGOB's decision to bring about the termination of the Claimants' business, driven as it was found to be by political predisposition rather than considerations of public or regulatory policy, was "grossly unfair" and "arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure", and thus in breach of the FET standard of Article 1105 of the Treaty.

D. THE TREATMENT ACCORDED BY THE RESPONDENT'S COURTS TO THE CLAIMANTS' INVESTMENTS DID NOT CONSTITUTE A DENIAL OF JUSTICE

120. The Claimants have also claimed that their investments suffered a denial of justice at the hands of the Respondent's judiciary.[141] Having carefully reviewed the record evidence, the Tribunal has concluded that the Claimants have not carried their burden

140 SEGOB Resolution regarding E-Games Request (Nov. 18, 2011), p. 1, **C-352**.

141 Memorial on Merits, Section V(D).

of proving judicial misconduct or procedural aberration of the kind required for a denial of justice.[142]

121. First, the Claimants submit that the Amparo Judge and the 7th Collegiate Tribunal both gravely erred when allowing E-Mex to amend its *Amparo 1668* claim to include the 2009 Permit.[143] According to the Claimants, the amendment was manifestly time-barred and should have been denied as inadmissible on that basis. Whether this is correct turns on whether the belatedness of the amendment was a "manifest and unquestionable" ground for inadmissibility ("*motivo manifiesto e indudable de improcedencia*"). The Claimants submit that this is the case because E-Mex could be presumed to have received a copy of the 2009 Permit on four separate occasions prior to May 2012, when it sought to amend its *amparo* claim. The evidence regarding the date by which E-Mex could be said with certainty to have received a copy of the 2009 Permit is disputed. Ultimately, however, even if there was a good argument that E-Mex should have been deemed to have received a copy of the 2009 Permit prior to May 2012, that would not sustain a denial of justice claim. It is trite law that a simple judicial error is not enough and the evidential record regarding the third amendment does not reveal judicial misconduct or procedural aberration of the kind required for a denial of justice.

122. Second, the Claimants submit that the Amparo Judge should not have clarified the scope of the Amparo Judgment in his 26 August 2013 opinion because the Amparo Judgment was already clear and precise in identifying only the 2009 Permit as

---

142 *Loewen Group, Inc. and Raymond L. Loewen v. United States of Amercia,* ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 , ¶ 132, **CL-67** (denial of justice may occur if there is "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety"); *Lion Mexico Consolidated LP v. Mexico* ("*Lion*"), ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021, ¶ 299, **CL-295** ("[D]enial of justice requires a finding of an improper and egregious procedural conduct by the local courts (whether intentional or not), which does not meet the basic internationally accepted standards of administration of justice and due process, and which shocks or surprises the sense of judicial propriety"); *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010, ¶ 279, **CL-175** (there may be denial of justice if "the court system fundamentally failed", for example, if there are "major procedural errors such as lack of due process"); *Rupert Joseph Binder v. The Czech Republic*, UNCITRAL, Final Award (Redacted), 15 July 2011, ¶ 448, **CL-144** ("If the courts are unable to give effect to the law in an impartial and fair manner, the investor may find himself in a situation of denial of justice which is clearly incompatible with the notion of fair and equitable treatment.").

143 Memorial on Merits, ¶ 672(i).

unconstitutional.[144] Because the Amparo Judge made this clarification of the Amparo Judgment only at the enforcement stage of the Amparo 1668 proceeding, they argue that this decision "thus had the effect of depriving E-Games and Claimants of any appellate recourse against SEGOB's rescission of all subsequent resolutions involving E-Games".[145] The Tribunal shares the Claimants' surprise that a third party's permit can be revoked as a result of a clarification of an amparo judgement. Having said that, E-Games was not left helpless. As noted above, after SEGOB revoked the 2012 Permit in response to the 26 August 2013 opinion, E-Games then did successfully instigate the Amparo Judge's October 2013 order declaring excessive compliance and breach of the Amparo Judgment by SEGOB and launching the Enforcement Proceedings.[146] In those circumstances, the Tribunal cannot discern judicial misconduct or procedural aberration of the kind required for a denial of justice.

123. Third, the Claimants have complained that, in that October 2013 decision, "the Amparo judge curiously took the circuitous, unnecessary and less efficient route of initiating another type of enforcement proceedings (known in Mexico as an *incidente de inejecución*) against SEGOB",[147] and that "[t]he two options available to the [Amparo] Judge instead of initiating the *incidente de inejecución*, which would have not only been more efficient, but which would also have resulted in a better administration of justice, were (i) to issue an order specifying the scope of the amparo and require SEGOB to comply with the amparo judgment; and (ii) to initiate what is known in Mexico as an *incidente de aclaración oficiosa*, a motion directed at specifying, defining or clarifying the terms of fulfilment of a judgment".[148] These allegations, however, even if correct, cannot suffice: on their face, complaints about a court not pursuing a more *efficient* procedural alternative cannot substantiate a denial of justice claim.

124. Fourth, the Claimants criticise the February 2014 decision of the Enforcement Court for: (i) its misinterpretation of the Amparo Judge's observations regarding the

144 Memorial on Merits, ¶ 332.

145 Memorial on Merits, ¶¶ 307, 672(iv).

146 Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), **C-24**.

147 Memorial on Merits, ¶ 330.

148 Memorial on Merits, ¶ 331.

constitutionality of the principle of acquired rights; (ii) its finding that the 2012 Permit was issued as a consequence of the 2009 Permit; (iii) its finding that SEGOB's revocation of the 2012 Permit was compliant with the Amparo Judgment (as clarified on 26 August 2013) without affording E-Games the procedural rights and guarantees of a trial; (iv) its implied conclusion that the 2012 Permit was unconstitutional despite the Amparo Judgment being clear and precise in only identifying the May 2009 permit; and (v) its failure to take into account E-Mex's deemed "tacit consent" to the 2012 Permit resulting from its failure to challenge its constitutionality within the applicable time limit in Amparo 1151.[149]

125. As regards (i), the Enforcement Court disagreed with the Amparo Judge that the 2012 Permit had not been issued "as a consequence of" the 2009 Permit on the basis that the Amparo Judge had declared the doctrine of acquired rights unconstitutional.[150] The Tribunal agrees with the Claimants that the language of neither the Amparo Judgment nor the October 2013 decision indicates that the Amparo Judge had ruled the doctrine of acquired rights unconstitutional. The latter decision in fact stated expressly the opposite: "En efecto, en la sentencia de amparo, *se declaró inconstitucional el oficio DGAJS/SCEV/0260/2009-BIS*, de veinte siete de mayo de dos mil nueve *y no la figura jurídica de los derechos adquiridos*, por lo que al declararse insubsistentes actos administrativos con base en ésta, y no como se precisó en la sentencia, resulta indudable la existencia de un exceso en el cumplimiento".[151]

126. Indeed, the Amparo Judgment made no such finding. Instead, the Amparo Judge noted in the Amparo Judgment that "*the Regulation of the Federal Gambling and Lottery Law does not contemplate the figure* of the autonomous agent of a permit or that *of the agent that obtained the legal exploitation of the permit by acquired rights* and without the intervention of the concessionaire, because the only reading of the aforementioned legal provisions is sufficient to notice that only the agent can obtain such capacity

---

149 QEU&S Reply, ¶¶ 967-972.

150 Order of the Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito (Feb. 19, 2014), p. 100, **C-290** ("no debe perderse de vista que, si en uno se reconoció como "operador autónomo" y en otros como "permiso independiente", lo cierto es que ambas designaciones se realizaron con apoyo en la figura de derechos adquiridos, figura que declaró inconstitucional el juez en la sentencia").

151 Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa* (Oct. 14, 2013), p. 64 (PDF), **C-24** (emphasis added).

through a duly completed application by the concessionaire …".[152] However, even if the Enforcement Court erred in its understanding of the Amparo Judge's findings, such a misreading of the Amparo Judge's decisions cannot, by itself, sustain a denial of justice claim.

127. As regards (ii), the Tribunal has already explained that, in its view, the express terms of the 2012 Permit supported the conclusion by the Amparo Judge that the 2012 Permit was *not* issued as a consequence of the 2009 Permit. However, to the extent the Enforcement Court disagreed in this respect and provided its reasons for doing so (which it did), that mere disagreement cannot sustain a denial of justice claim.

128. As regards (iii) and (iv), it strikes the Tribunal as elementary that no person should be deprived of a permit essential for the conduct of their business without all the procedural rights and guarantees of an administrative trial. It considers that the manner in which the 2012 Permit came to be revoked is somewhat uncanny. The 2012 Permit was not identified by the Amparo Judge in the Amparo Judgment; it was not identified by the Amparo Judge in the August 2013 "clarification" of the Amparo Judgment; it was positively excluded by the Amparo Judge from the scope of the Amparo Judgment in October 2013; and it was only held to be within the scope of the Amparo Judgment by the Enforcement Court in February 2014, in a decision which declined to address E-Games' submission and against which leave to appeal was, in effect, denied by the Supreme Court, who instead remanded the matter to the same Enforcement Court for final determination.

129. The Respondent says that the Enforcement Court "took into consideration the arguments made by all parties, *including the Claimants*",[153] and its expert similarly says that "la decisión en última instancia sobre la precisión de los efectos de la sentencia derivó de lo resuelto por dicho Tribunal Colegiado, en el incidente de inejecución de sentencia 82/2013, *fase en la cual, Exciting Games pudo presentar alegatos y hacer valer sus derechos para que fueran tomados en consideración*".[154] At least insofar as these representations purport to characterise what the Enforcement

---

152 Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* (Jan. 30, 2013), p. 99 (PDF), **C-18** (emphasis added).

153 Counter-Memorial on Merits, ¶ 280 (emphasis added).

154 First Expert Report of Dr. Javier Mijangos Y González, November 2020, ¶ 219, **RER-1** (emphasis added).

Court did in its February 2014 decision, the Tribunal finds no support for them in the record. In fact, that decision specifically records that the court *declined* to consider E-Games' submission in that proceeding on the basis that the sole purpose of that proceeding was to secure compliance with the Amparo Judgment:

> Asimismo, *por lo que hace a las argumentaciones de la tercera interesada Exciting Games*, sociedad de responsabilidad limitada de capital variable, *contenidas en el escrito presentado en la oficialía de partes de este Tribunal Colegiado el dieciocho de febrero de dos mil catorce*, en las que señala que es su interés pronunciarse sobre las manifestaciones expuestas por la responsable, relacionadas con su emplazamiento al incidente de inejecución y que aquellas deben declararse inoperantes o en su defecto infundadas, es dable sostener que la materia del incidente de inejecución previsto en los artículos 192 a 198 de la Ley de Amparo, es el auto emitido por el juez del conocimiento y los razonamientos en este plasmados, en relación con las constancias que hacen al expediente de amparo. *De ahí que no es legal atribuir calificativa alguna a los planteamientos que pudieran realizar las partes en el juicio, menos aún a petición de los contrarios, porque el incidente de inejecución no tiene otro objetivo que lograr el cumplimiento de la sentencia de amparo, conforme a los principios de congruencia y de exhaustividad, que obligan a dirimir el recurso en el contexto de lo resuelto en el juicio de amparo*".[155]

130. If this had been the last word on the matter, the Tribunal would have found the Respondent's judicial system to have sailed close to the wind. However, the Tribunal accepts that, upon remand from the Supreme Court, E-Games *was* subsequently heard by the Enforcement Court before it issued its second and final decision. As recorded in that final decision, the Enforcement Court addressed in some detail all the arguments made by E-Games against the revocation of the 2012 Permit, and it did so expressly for the purpose of ensuring that E-Games was not left in a "state of defencelessness".[156]

131. The Claimants argue that this was an exercise in futility because the Enforcement Court was never going to reconsider its previous decision.[157] The Tribunal agrees that, depending on the circumstances, it may prove more difficult to move a court to reconsider a point on which it has previously taken a view. However, the Tribunal cannot presume a dishonest unwillingness on the part of the court to reconsider its

---

155 Order of the Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito (Feb. 19, 2014), p. 112 (PDF), **C-290** (emphasis added).

156 Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* (Jan. 29, 2015), p. 54 (PDF), **C-297**.

157 Memorial on Merits, ¶ 355; QEU&S Reply, ¶ 240.

position. Absent evidence that the Enforcement Court lacked any measure of sincere willingness to reconsider its position after having heard E-Games' arguments (for example by summarily dismissing those arguments without any reasoning), its decision rejecting those arguments is not enough to take the treatment received by E-Games into the realm of a denial of justice.

132. As to (v), the Tribunal accepts the Claimants' contention that, even when SEGOB failed to bring the outcome of *Amparo 1151* to the Enforcement Court's attention (a fact addressed above), the court itself could have apprised itself of that outcome: the *Amparo 1151* proceeding was mentioned in the October 2013 order of the Amparo Judge that initiated the *incidente de inejecución 82/2013*.[158] However, the Tribunal also accepts that it is far from clear that this should have moved the Enforcement Court to adopt a different decision. When SEGOB revoked the 2012 Permit on 28 August 2012, the other Collegiate Tribunal had not yet dismissed E-Mex challenge of the 2012 Permit in *Amparo 1151*. If SEGOB's compliance was to be assessed as of that date, it is not clear whether the Enforcement Court could have found SEGOB to be non-compliant on the basis of the subsequent development in *Amparo 1151*. In those circumstances, the Tribunal cannot discern in the Enforcement Court's omission of a reference to *Amparo 1151* judicial misconduct or procedural aberrations of the kind that could sustain a claim of denial of justice.

133. Fifth, the Claimants assert that the September 2014 decision of the Supreme Court declining to hear the merits of E-Games' appeal was the product of direct interference by the office of President Peña Nieto. They summarised the alleged events in their post-hearing brief as follows:

> Over the following four months, Mr. Gutiérrez met with Justice Pérez Dayán and/or his law clerk various times to discuss the merits and the substance of the appeal, as is common in Mexico. However, on one visit to the Supreme Court, Mr. Gutiérrez and his law partner, Mr. Ricardo Ríos Ferrer, encountered Mr. Humberto Castillejos, President Peña Nieto's head lawyer, outside of Justice Pérez Dayán's chambers. Messrs. Gutiérrez and Ríos Ferrer noticed that Mr. Castillejos had the case file for E-Games' recurso de inconformidad. When Messrs. Gutiérrez and Ríos Ferrer then entered Justice Pérez Dayán's chambers to discuss the appeal, as they had regularly done for four months, *Justice Pérez Dayán appeared nervous and was evasive, suggesting quite clearly that Mr. Castillejos—who had just left the Justice's chamber with the case file in hand—had discussed the appeal with him.*

[158] Order of the *Primer Tribunal Colegiado en Materia Administrativa del Cuarto Circuito* (Oct. 17, 2013), **C-295**.

> Approximately one week later, the Supreme Court astonishingly dismissed E-Games' appeal on procedural grounds and remanded the case to the very same Collegiate Tribunal that had made the irregular February 19, 2014 ruling.[159]

134. The only evidence adduced in support of those allegations against Mr. Castillejos and Justice Perez Dayan is the testimony of Mr. Gutiérrez. Under examination, Mr. Gutiérrez testified the following on his meeting with Justice Pérez Dayan:

> It appeared—he seemed distracted. He wasn't paying much attention. He seemed a little worried as well. He didn't say anything about the matter at hand. He just let us talk.[160]

135. The Tribunal can give the Claimants' claim of a corrupt collusion between President Peña Nieto and Justice Pérez Dayán short shrift. Mr. Gutiérrez's testimony is, self-evidently, insufficient to prove the impropriety of which Justice Pérez Dayan and Mr. Castillejos have been accused. The Tribunal does not doubt the sincerity with which Mr. Gutiérrez has articulated his subjective impressions of his meeting with Justice Pérez Dayán, but it is an impossible, and unacceptable, leap for the Claimants to go from those subjective (and, frankly, unremarkable) impressions—that he "seemed distracted", "wasn't paying much attention" and "seemed a little worried"—to an allegation that casts aspersion on his integrity and accuses him of impropriety (and, most likely, illegality). The Tribunal accordingly finds that the Claimants have failed to establish that the Supreme Court's decision not to hear the merits of E-Games' appeal perpetrated a denial of justice.

136. In light of the foregoing considerations, the Tribunal is unable to accept the Claimants' claim of breach of Article 1105 insofar as that claim is predicated on an alleged denial of justice.

E. THE ABSENCE OF A DENIAL OF JUSTICE DOES NOT ABSOLVE THE RESPONDENT OF INTERNATIONAL RESPONSIBILITY FOR SEGOB'S CONDUCT IN BREACH OF THE FET STANDARD

137. Contrary to the Respondent's contention, however, the Tribunal's conclusion that the Claimants have not proven a denial of justice does not absolve the Respondent of international responsibility for SEGOB's conduct in breach of the FET standard.

---

159 QEU&S Claimants' Post-Hearing Brief, 14 November 2022 (***QEU&S PHB***), p. 16 (PDF) (emphasis added).

160 Tr. (ENG), Day 4, 890:7-890:10 (J. Gutiérrez).

138. The Respondent has relied on *Azinian* and its progeny[161] to advance the argument that, because SEGOB's hands were allegedly tied by the Enforcement Court's decisions and the Tribunal cannot sit in appeal from those judicial decisions, the Claimants were left with only their denial of justice claim.[162] This argument, however, fails for three distinct reasons.

139. First, as explained above, the Respondent has not proven the central factual predicate of its *Azinian* defence—that it was the Mexican court decisions that forced SEGOB to shut down the Claimants' business and left it with no alternative course of conduct.[163]

a. On the contrary, the Tribunal has found that: (i) if SEGOB had wanted to preserve the 2012 Permit, it could have done so following the Amparo Court's clarification of the Amparo Judgment; (ii) if SEGOB had wanted to reinstate the 2012 Permit after the Amparo Judge declared its revocation in breach of the Amparo Judgment, it could have done so before the Enforcement Court issued its first decision; and (iii) if SEGOB had wanted to grant E-Games' fresh permit applications after the Enforcement Court reversed the Amparo Judge's opinion, it could have done so unconstrained.

b. In none of these instances was SEGOB constrained by a court decision to proceed as it did; in fact, in one instance (the Amparo Judge's October 2013 decision declaring SEGOB's non-compliance), SEGOB went directly against that decision. As a result, the Tribunal need not (and does not) either sit in appeal from the Enforcement Court's decisions or reject those decisions as flawed in order to reach its conclusion that SEGOB's conduct fell short of the FET standard of Article 1105. Both before and after the Enforcement Court's decisions, SEGOB could have reasonably and lawfully chosen not to cause the

---

161 *See Robert Azinian, Kenneth Davitian, & Ellen Baca v. Mexico*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, **CL-192**; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, **CL-17**; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, **RL-041**; *Waste Management, Inc. v. Mexico II*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, **CL-36**; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (Redacted), 12 January 2011, **CL-213**; *Eli Lilly and Company v. The Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017, **CL-112**.

162 Counter-Memorial on Merits, ¶¶ 628–645.

163 *See above*, ¶¶ 100-116.

demise of the Claimants' business. This failure by the Respondent to prove the factual predicate of its *Azinian* defence alone is dispositive of that defence.

140. Second, even if a disagreement with the Enforcement Court's decisions had been a prerequisite to the Tribunal's conclusion regarding the international wrongfulness of SEGOB's conduct—it is not—the Respondent's *Azinian* defence would still have failed. *Azinian* and its progeny have no application where, as here, the Enforcement Court disagreed with the Amparo Judge, not on any point of *Mexican law* but rather on a discrete question of *fact*.

a. *Azinian* and its progeny stand for the proposition that, beyond the narrow exception of a denial of justice, treaty tribunals must not second-guess the correctness of domestic courts' *interpretations of domestic law*. As the United States puts it, "as a matter of customary international law, international tribunals will defer to *domestic courts interpreting matters of domestic law* unless there is a denial of justice".[164] Or as Canada puts it, "[i]t is well settled that absent a denial of justice, *judgments of national courts interpreting domestic law* cannot be challenged as a violation of international law".[165] In *Azinian* itself, the tribunal was called upon to consider a Mexican court decision on such a point of domestic law, i.e., whether "the Ayuntamiento's decision to nullify the Concession Contract was *consistent with the Mexican law governing the validity of public service concessions*".[166]

b. By the same token, however, it is a matter of first principles that treaty tribunals cannot avoid discharging their duty of finding the *facts* of the case and weighing the *evidence* on the record by reflexively and without critical inquiry adopting whatever findings of fact and assessments of evidence a domestic court may have made. In the present case, the Enforcement Court disagreed with the Amparo Judge, not on the interpretation of a question of Mexican law, but on a

---

164 Fourth Submission of the United States of America pursuant to NAFTA Article 1128, 13 June 2022, ¶ 32 (emphasis added).

165 Third Submission of the Government of Canada pursuant to NAFTA Article 1128, 13 June 2022, ¶ 38 (emphasis added).

166 *Robert Azinian, Kenneth Davitian, & Ellen Baca v. México*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, ¶ 97, **CL-192** (emphasis added).

discrete question of fact—i.e., whether or not the 2012 Permit was issued by SEGOB "as a consequence of" the 2009 Permit.

c. As the Respondent put it, "the difference in the criteria of the [Amparo Judge] and the [Enforcement Court] did not address the issue of whether the acts derived from the [2009 Permit] should be declared null and void, on their own merits, but rather whether they had been issued as a consequence of [the 2009 Permit]".[167] While, as noted above, the Enforcement Court appears to have misinterpreted what the Amparo Judgment had said about the constitutionality of the acquired rights doctrine, it did not itself declare that doctrine unconstitutional. As the Respondent explained, "the [Enforcement Court] did not declare the concept of 'acquired rights' unconstitutional".[168] Similarly, the Respondent's legal expert testified at the hearing that "the idea of acquired rights was not declared unconstitutional.".[169]

141. Third, and in any event, while *Azinian* and its progeny require a treaty tribunal (absent a denial of justice) to defer to domestic courts as regards their interpretation of domestic law, it is a trite but no less relevant observation that this principle neither can nor does operate so as to prevent that treaty tribunal from hearing claims of treaty breach in respect of State conduct that was not judicially reviewed by those courts. Here, for example, the Claimants have alleged (and proven) as part of their Article 1105 claim that SEGOB's new political leadership acted on a hostile predisposition against the 2012 Permit and that it unjustifiably accorded more favourable treatment to ProMov. Where the Enforcement Court never pronounced itself on those allegations, *Azinian* and its progeny do not inoculate the Respondent against a claim of Treaty breach predicated on those facts.

F. EVIDENTIAL MATTERS: THE BLACK CUBE EVIDENCE AND ADVERSE INFERENCES

142. Two evidential controversies arose in the proceeding. First, the Respondent objected to the admissibility of recordings procured by the Claimants using the intelligence-gathering firm Black Cube. Second, the Claimants sought extensive adverse

167 Rejoinder, ¶¶ 168.

168 Counter-Memorial on Merits, ¶ 277.

169 Tr. (ENG), Day 7, 1856:22-1857:3 (Z. Aslan).

inferences against the Respondent based on the latter's alleged failings in connection with the document disclosure process.

1. Black Cube Evidence

143. The Claimants submitted and relied on evidence obtained by Black Cube (the ***Black Cube Evidence***), in the form of recordings of several conversations between Black Cube agents and Mr. Ávila Mayo (Undersecretary of Government at SEGOB between November 2011 and December 2012) and Mr. Kevin Rosenberg (Director of Business Development since 2012 at PlayCity, one of the major gambling companies in Mexico owned by Televisa, a large media company in the Spanish-speaking world).[170] The Respondent contends that the Black Cube Evidence should not be admitted because it was obtained in violation of the Federal Law for the Protection of Personal Data in the Possession of Private Individuals (the ***Data Protection Law***).[171]

144. Article 6 of the Data Protection Law provides that private individuals who process personal data must comply with the principles of "*licitud*" (legality) and "*consentimiento*" (consent). Article 7 elaborates that the principle of legality means that the personal data must have been legally collected and processed and must not have been obtained through deceptive or fraudulent means. Articles 8-9 provide that, in order for a private individual to process personal data, the owner of the data must give consent (and in some cases, written consent).

145. On the face of these statutory provisions, there appears to be a colourable basis for the Respondent's assertion that the Black Cube Evidence was obtained and processed in violation of the Data Protection Law, insofar as the Black Cube Evidence was obtained by its agents based on the false representation that they were "investors that want to invest in the gambling market in Mexico"[172] and personal data were processed without the individuals' consent.[173]

146. However, given the limited briefing and lack of expert evidence on how the relevant statutory provisions should be interpreted and applied, the Tribunal is not in a position to determine with the requisite level of confidence whether the Black Cube Evidence

---

170 Counter-Memorial on Merits, ¶ 461; QEU&S Reply, ¶ 501.

171 Respondent's Post-Hearing Brief, 14 November 2022 (***Respondent PHB***), pp. 6-7.

172 Tr. (ENG), Day 6, 1357:15-1357:20 (A. Yanus).

173 Tr. (ENG), Day 6, 1359:18-1360:2 (A. Yanus).

was procured and introduced into the record of this proceeding in violation of that statute. The Tribunal further notes that, even if it had been able to make a finding to that effect, it would still have had discretion under the applicable rules of evidence in this proceeding to admit the evidence.[174] The Tribunal therefore declines to declare the Black Cube Evidence inadmissible.

147. That being said, the inadmissibility question is, as a practical matter, inconsequential where, as will already be apparent from the previous sections, the Tribunal has placed no reliance whatsoever on the Black Cube Evidence in reaching its findings and conclusions in this Award. Whether or not the Black Cube Evidence is in the record, the Tribunal did not place any reliance on that evidence because it has found the substance of it to be uninformative and of no probative value. The Tribunal was unable to discern anything in that evidence that could support, undermine or qualify in any way the findings and conclusions set out in what precedes or follows this section of the Award.

2. Requests for adverse inferences

148. In the Reply, the QEU&S Claimants made 61 requests for the Tribunal to draw adverse inferences arising out of the Respondent's alleged failure to produce documents as ordered, as consolidated in Appendix A to the QEU&S Reply.[175] The Respondent denies that there has been any failure to produce responsive documents that were located following a reasonable search.[176]

149. The Tribunal found some of the evidence regarding SEGOB's stated working practices and document retention policy surprising. For example, Ms. Salas testified that *aide memoires* are "never" prepared for meetings at SEGOB.[177] Ms. Salas also testified that, while video recordings would be made of meetings, they would only be kept for

---

174 The 2020 edition of the IBA Rules on the Taking of Evidence indicates that illegality does not necessarily equate to inadmissibility: the newly added provision of Article 9(3) provides that the tribunal "may, at the request of a Party or on its own motion, exclude evidence obtained illegally". The commentaries provide the example that "if the law of a country where a recording of a conversation was made prohibits recording conversations without permission of those involved, such recording may be considered to have been obtained illegally and therefore the tribunal may exclude it from the evidence" (emphasis added).

175 QEU&S Reply, Appendix A.

176 Respondent PHB, pp. 10-11.

177 Tr. (ENG), Day 5, 1171:1-1171:21 (M. Salas).

a month[178]; and SEGOB would not have kept the records of her official meetings in her position as Director General of SEGOB for more than five years.[179] Mr. Landgrave further testified that, when he was reviewing drafts prepared by his team, these drafts would have been physically passed to him via a USB drive rather than via email.[180]

150. Having said that, the Claimants have not identified any document that the record suggests likely still exists today but has not been produced by the Respondent. Instead, the record shows that responsive documents did exist at one point but, under the Respondent's retention policies, were not preserved. Absent a reliable basis for finding that the Respondent is withholding documents presently still in existence, the Tribunal cannot draw any adverse inferences from its failure to produce them, and it declines to do so. In any event, the Tribunal notes that each of the Claimants' requested inferences pertain to whether the Respondent breached its obligations under the Treaty. The Tribunal has held that the Respondent did breach its obligations under Article 1105 of the Treaty, without drawing any of the adverse inferences sought.

178 Tr. (ENG), Day 5, 1170:12-1170:22 (M. Salas).

179 Tr. (ENG), Day 5, 1175:10-1176:6 (M. Salas).

180 Tr. (ENG), Day 6, 1517:5-1520:10 (J. Landgrave).

VII. THE TRIBUNAL'S FINDINGS AND CONCLUSIONS ON CAUSATION

A. WHETHER THE TREATY BREACH CAUSED THE LOSS OF THE EXPANSION PROJECTS

151. The QEU&S Claimants claim that, but for the closure by SEGOB of the five casinos, they would have launched the Expansion Projections soon after that date.[181] The Respondent (and Claimant Taylor) argue that each of the Expansion Projects had petered out for reasons unrelated and prior to the closure of the five casinos.[182] As set out below, the Tribunal finds that the Respondent is correct as regards the Cabo and Cancun Projects but not the online casino project.

1. Cabo

152. The Tribunal finds that the Cabo Project sputtered to its demise between July and October 2013, due to a complete breakdown in the relationship between Claimant B-Cabo LLC and its business partners in the project. In a 6 January 2014 letter, Claimant Ayervais, acting as counsel to Claimant B-Cabo LLC in the matter, summarised the deep-running strands of the disagreement leading to that breakdown as follows:

> Parenthetically, you do not understand my client's frustration. This matter is less material than other improprieties. At every turn in this project, your clients have given assurances that they have not fulfilled; made representations that proved to be inaccurate; kept material information from Mr. Erickson whose cooperation is critical to the project; and otherwise acted inappropriately. My client has continued to negotiate, lost other opportunities and relied on your clients' statements and assurances regarding numerous matters, all to its detriment. As set forth in the Letter Agreement, my client and its affiliates were promised up to a 40% interest in Medano Beach, but your clients ultimately kept attempting to renegotiate that term.[183]

153. One of the various reasons why the relationship between Claimant B-Cabo LLC and its partners had soured by then was the latter's failure to procure the favourable opinion from the local authority required by Article 22(IX) of the Gaming Regulation for the opening of a casino. As Claimant Ayervais put it in a letter of 8 August 2013 to the Cabo partners, "we have continued to discuss the hotel venture despite the abject failure of your representatives to obtain assurances that we can construct and operate

---

181 QEU&S PHB, pp. 41-42.

182 Respondent PHB, pp. 58-62; Claimant Taylor Post-Hearing Brief, 14 November 2022 (***Taylor PHB***), pp. 6-7.

183 Ayervais Letter to Jon Sawyer re B-CABO demand for repayment, copy to Taylor (Jan. 6, 2014), p. 2, **CRT-23.**

a casino in the hotel".[184] Claimant Ayervais confirmed under examination that by "assurances" he was referring to the requisite favourable opinion from the local authorities.[185] In that same letter, he demanded "the immediate return of the remaining US$500,000 advanced by" Claimant B-Cabo LLC.[186]

154. Subsequently, Claimant B-Cabo LLC did recover US$500,000 out of a total of US$600,000 it had loaned to the Cabo business partners, but the balance of US$100,000 remained outstanding by January 2014.[187] On 21 January 2014, Claimant B-Cabo LLC filed a lawsuit against its business partners in a district court in Colorado to recover that balance.[188] In its complaint, it summarised the sequence of events for the court as follows:

> On July, 26, 2013, by email from counsel to B-Cabo, B-Cabo advised Defendants and Medano Beach that the parties transaction was terminated and that, pursuant to the Guarantee Agreement, Defendants had thirty days to repay all funds then advanced but unpaid. … Nonetheless, based on assurances from Defendants that an Investment Agreement would be forthcoming, B-Cabo withdrew that demand and transmitted another version of the proposed Investment Agreement which Ferdosi promised to review with Mr. Erikson and provide a prompt response. … When a response from Ferdosi did not occur, by letter dated August 8, 2013, B-Cabo again terminated all transactions and demanded repayment of all loans still outstanding. … By email from Gordon Burr, dated August 26, 2013, B-Cabo then afforded Defendants and Medano Beach yet another opportunity to finalize the Investment Agreement. … However, Defendants responded with pretextual concerns that could have been asserted at any time during the months of previous negotiations. As a result, by e-mail dated October 3, 2013, Mr. Burr terminated all negotiations and enforced B-Cabo's rights under the Guarantee Agreement and demanded repayment of all outstanding funds.[189]

155. This documentary evidence is consistent with the testimony of Claimant Taylor, who testified that, when B-Cabo LLC filed the Colorado lawsuit, he "was informed by Gordon [Burr] that the deal with [the Cabo business partners] was dead and they were suing to get Taylor his money back".[190]

---

184 Neil Ayervais Letter to Fedrosi (Aug. 8, 2013), p. 1, **R-135**.

185 Tr. (ENG), Day 3, 718:9-720:12 (N. Ayervais).

186 Neil Ayervais Letter to Fedrosi (Aug. 8, 2013), p. 2, **R-135**.

187 QEU&S Reply, ¶ 610.

188 Case Caption B-Cabo LLC v. Brasel, Timothy, et al, **CRT-24**.

189 Case Caption B-Cabo LLC v. Brasel, Timothy, et al, ¶¶ 28-33, **CRT-24**.

190 Taylor Second Statement, ¶ 28, **CRTWS-1**.

156. By contrast, the Claimants have not proven their allegation that there was a renewed negotiation with the Cabo business partners in February 2014 (after the Colorado lawsuit was withdrawn) which, but for the casino closures, would have yielded a signed contractual agreement.

a. Claimant Ayervais testified that he had been working on a draft side letter to revive the draft investment agreement produced in 2013, but admitted under examination that he neither shared any such draft with anyone nor produced it in this proceeding.[191]

b. There is no documentary evidence of any other kind reflecting either any such renewed effort or attributing its failure to the closure of the casinos: no notes, memos, emails, texts, or letters.

c. The Claimants (save for Claimant Taylor) attribute that complete lack of documentary evidence to the fire in the Naucalpan casino and the loss of email records after "it became unfeasible" for the Claimants to continue paying for server capacity.[192] The Tribunal has found their evidence on this latter point unconvincing. Leaving to one side the wisdom of the Claimants' decision to let the relatively modest cost of email storage space outweigh the importance of retaining records when arbitration was already in contemplation, the hearing evidence undermines that allegation: under examination, Claimant Ayervais—who acted as counsel in the Cabo negotiations—confirmed that he had his own business email account and he did not claim that any of the emails sent to/from that account had been lost;[193] and Claimant Erin Burr admitted that she continued to have access to her emails for more than a year after the closure,[194] and that she kept a back-up of her emails.[195]

157. The Tribunal thus concludes that the specific Cabo project contemplated by the Claimants did not fail because of either the revocation of the 2012 Permit or the closure

191 Tr. (ENG), Day 3, 695:2-695:17 (N. Ayervais).

192 QEU&S Reply, ¶ 564.

193 Tr. (ENG), Day 3, 694:9-694:11 (N. Ayervais).

194 Tr. (ENG), Day 3, 629:9-629:20 (E. Burr).

195 Tr. (ENG), Day 3, 640:3-640:5 (E. Burr).

of the casinos. This conclusion, however, does not detract from the fact that, as the Tribunal has found, the Respondent, acting through SEGOB, breached the FET standard. Insofar as that breach caused the loss of the right granted by the 2012 Permit to develop a sixth casino in Cabo or elsewhere, the Claimants are entitled to seek compensation for any quantifiable market value that such right may have had as at the date of valuation. The Tribunal will address this further in the quantum section.

2. Cancún

158. The record evidence similarly shows that the Cancún Project had ceased to make any meaningful progress long before the closure of the five casinos and for reasons unrelated thereto.

159. The Claimants engaged in discussions with the Marcos family in the course of 2011. However, no agreement was ever signed; no funds were ever committed. After 2011, there is very limited documentary evidence of any meaningful engagement with the Marcos family. The discussions simply appear to have lost all momentum after 2011. The most recent email (and the only one in 2013) to or from the Marcos family is an email from the Marcos family's representative dated 19 March 2013 to Mr. José Ramón Moreno, which attaches "the presentation they [presumably representatives of the Claimants] made a couple of years ago" and asks for confirmation "whether these forecasts remain realistic and achievable or whether you think they have changed".[196] The most recent email referencing the Marcos family is dated 1 August 2013, from Mr. Ferdosi (one of the hoped-for partners in the Cabo Project) to the Burrs ("Received your voice mail regarding the meeting with Marcos Family. Great news."),[197] but that email appears to have been in response to an email dated 16 July 2013, where Claimant Gordon Burr tells Mr. Ferdosi that he will contact the Marcos family "to see if there's a deal that works for everyone"—in the Cabo Project.[198]

160. This lack of documentary evidence of any meaningful progress with the Marcos family after 2011 is consistent with the evidence of Claimant Taylor, who had loaned Claimant Gordon Burr US$250,000 to enable Claimant Colorado Cancun LLC to

---

196 Email from F. Carstens to J. R. Moreno re: Cancun Project financial projections (Mar. 19, 2013), **C-493**.

197 Email from F. Ferdosi to G. Burr re: Call re: Marcos Family (Aug. 1, 2013), **C-474**.

198 Email from G. Burr to F. Ferdosi et al. re: Investment Agreement (July 13, 2013), **C-465**.

procure a right of first refusal from Claimant B-Mex II to develop a casino in Cancún under the 2012 Permit. His evidence was that:

a. "the reports got progressively bleaker, and Gordon eventually indicated that no deal was likely, and the Marcos Family were realistically not interested";[199] and

b. towards the end of 2013 he asked for his money back because he had concluded from his conversations with Claimant Gordon Burr that "the deal was dead".[200]

161. That evidence is also consistent with a pleading filed by Claimants B-Mex and B-Mex II in 2019 in a AAA arbitration against, among others, Claimant Taylor,[201] where they stated that "[t]owards the end of 2013, Taylor told Burr that he needed funds for other projects he was pursuing", and that "Burr mentioned that there was no longer a need to tie up the license" to develop the Cancun casino.[202] The "license"—the right of first refusal for which Claimant Taylor had funded the purchase—was then indeed repurchased by B-Mex II before the closure of the casinos in April 2014.[203] Claimant Taylor has given compelling evidence that, rather than insisting on the repayment of his loan, he would have converted his loan to a 25% equity stake in the Cancún casino (as Claimant Gordon Burr had offered) if there had been any prospect of that actually happening in the foreseeable future.[204]

162. The Tribunal's observations regarding the Claimants' explanations for the lack of documentary evidence (the Naucalpan fire and decision not to pay for email storage capacity) apply here *mutatis mutandis*.

163. The Tribunal thus concludes that the Cancun Project as it was then contemplated by the Claimants failed well before the revocation of the 2012 Permit and the closure of the casinos and for reasons unrelated thereto. This conclusion, however, does not

---

199 Second Taylor Statement, ¶ 46, **CRTWS-1**.

200 Second Taylor Statement, ¶ 28, **CRTWS-1**.

201 Claimants Statement of More Definite Claim (Redacted), AAA Arbitration 01-19-0001-3949, **CRT-12**.

202 Claimants Statement of More Definite Claim (Redacted), AAA Arbitration 0l-19-0001-3949, ¶ 19, **CRT-12**.

203 Claimants Statement of More Definite Claim (Redacted), AAA Arbitration 0l-19-0001-3949, ¶ 19, **CRT-12**.

204 Tr. (ENG), Day 1, 226:3-235:5 (R. Taylor).

detract from the fact that, as the Tribunal has found, the Respondent, acting through SEGOB, breached the FET standard. Insofar as that breach caused the loss of the right granted by the 2012 Permit to develop a seventh casino in Cancún or elsewhere, the Claimants are entitled to seek compensation for any quantifiable market value that such right may have had as at the date of valuation. The Tribunal will address this further in the quantum section.

3. Online

164. Like the other Expansion Projects, the online casino project had not yet reached the stage of any signed contractual agreements with the Claimants' business partners. A draft contract was negotiated with Bally by July 2013,[205] but never executed. With PokerStars, the Claimants had not yet negotiated a draft contract by the time the casinos were closed; the record only contains a February 2014 memo outlining potential structures and terms.[206] The Claimants by that time had also not yet made any of the "initial investments" contemplated in their business plan, including the purchase of the servers that would host the online operation.[207]

165. In addition, there is no evidence to suggest that the Claimants had already prepared and filed the relevant paperwork with SEGOB. The most recent version of the progress chart shows only little progress in only the first of the five phases leading to the launch.[208] Mr. Moreno testified—for the first time at the hearing—that Bally had control of the document and had not properly updated it to reflect actual progress made.[209] The Respondent calls this explanation "*vulgar*"; the Tribunal views its belated proffer expedient.[210] Mr. Moreno testified that Bally sent an email after the closure of the casinos informing the Claimants that it was pulling out, but the email was not produced.[211]

---

205 Draft Online Gaming Contract between Bally and Exciting Games (July 2013), **C-555**.

206 Transaction Structure Memorandum Between Exciting Games and Rational Group (Feb. 23, 2014), **C-339**.

207 Online Gaming Investment Project, **C-338**.

208 Exciting Games Project Plan with Bally (Mar. 10, 2014), **C-479**.

209 Tr. (ENG), Day 5, 1274:4-1274:8 (J. Moreno).

210 Respondent PHB, p. 70.

211 Tr. (ENG), Day 5, 1276:10-1276:21 (J. Moreno).

166. The record thus shows that the online casino project still had a very long distance to travel before it could be launched. However, on the question of causation, there is no evidence to suggest that the Claimants abandoned this project for reasons other than the revocation of the 2012 Permit and the closure of their five casinos. The Tribunal therefore finds that the Respondent's breach did cause the demise of the online casino project, as it then was.

B. WHETHER THE CLAIMANTS' ALLEGED ILLICIT BUSINESS PRACTICES BREAKS THE CAUSAL LINK BETWEEN THE TREATY BREACH AND THE LOSS CLAIMED

167. The Respondent has argued that there are three sets of allegedly illicit conduct by the Claimants in the operation of their casinos that would have broken the causal link between the Respondent's breach and the loss that the Claimants claim to have suffered as a result:

a. they allegedly operated machines that offered games of chance without a permit during the period in which they operated under the Monterrey Resolution;

b. they allegedly marketed rights conferred by the 2012 Permit in violation of Article 31 of the RLFJS; and

c. they allegedly failed to comply with their tax obligations.[212]

168. The Respondent argues that in the counterfactual scenario where the Respondent did not breach the Treaty, the Respondent "*would have* detected sooner or later the illegalities committed by the Claimants, which *would have* given rise to sanctions such as the loss of their permit".[213] This, according to the Respondent, breaks the causal link between the wrongful act and the loss suffered by the Claimants.

169. The Tribunal rejects the Respondent's submission. As a matter of first principles, conjecture about events that might or might not have occurred in the counterfactual scenario cannot break the chain of causation. As the tribunal in *Lemire v Ukraine* stated, the chain of causation is broken by showing that "*the effect was caused – either partially or totally – not by the wrongful acts, but rather by intervening causes*, such as factors attributable to the victim, to a third party or for which no one can be made

212 Rejoinder, ¶ 857.

213 Rejoinder, ¶¶ 861-862; Respondent PHB, p. 56 (emphasis added).

responsible (like force majeure)".[214] Hypothetical events that might or might not have occurred could not have "caused" the losses suffered by the Claimants.

170. In addition, the Tribunal does not find conclusive evidence sustaining the merits of the Respondent's first and second allegations. The Tribunal has previously found that there is no conclusive evidence to support the allegation that the Claimants operated machines that offered games of chance during the period in which they operated under the Monterrey Resolution. As to the second allegation, while the draft subscription agreement for the Cabo Project *envisaged* the purchase of a "license" from B-Mex II,[215] Colorado Cancun at one point acquired an exclusive *option* or *right of first refusal* to purchase a gaming "license" for their Cancun Project,[216] and the business plan for the online casino *contemplated* the purchase of a license,[217] it is undisputed that none of these transactions in fact occurred. The Respondent also contends that the third parties owning the Huixquilucan casino "entered into some kind of agreement (possibly illegal) to operate the casino under the E-Games permit".[218] However, the exact nature of this agreement (and whether it involves an assignment or transfer) has not been shown.[219]

171. As to the third allegation, it is undisputed that, in February 2014, the Servicio de Administración Tributaria (***SAT***) imposed a tax liability of approximately MXN$170.5 million on E-Games and that this liability remained unpaid two months later, when SEGOB closed down the casinos.[220] However, there is no evidence before the Tribunal suggesting that any aspect of SEGOB's conduct that the Tribunal has found to be in breach of Article 1105 was in any way *caused* by E-Games' failure to satisfy the liability by April 2014. Nothing in the contemporaneous record suggests that SEGOB revoked the 2012 Permit, closed the casinos or denied the fresh permit

---

214 *Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/18, Award, 28 March 2011, ¶ 163, **CL-233** (emphasis added).

215 Draft Subscription Agreement between B-Cabo LLC and Médano Beach Hotel, S. de R.L. de C.V. (Apr. 16, 2013), **C-466**.

216 Right of First Refusal Agreement between Colorado Cancun, LLC and B-Mex II, LLC (Apr. 27, 2011), **C-88**.

217 Online Gaming Investment Project, **C-338**.

218 Rejoinder, ¶¶ 433-434.

219 Rejoinder, ¶¶ 431-434.

220 Respondent's PHB, pp. 50-51.

applications because of the February 2014 SAT resolution confirming the tax liability. Indeed, as the Tribunal's findings on liability make clear, this tax issue played no role whatsoever in those decisions by SEGOB.

C. WHETHER THE CLAIMANTS HAVE CONTRIBUTED TO THE LOSS CLAIMED

172. It is settled international law that, in assessing damages, the Tribunal must take into account contribution to the injury by wilful or negligent action or omission of the party seeking damages.[221] A wilful or negligent action or omission is one "which manifest[s] a lack of due care on the part of the victim of the breach for his or her own property rights".[222] The relevant action or omission must also have "materially contributed" to the damage to trigger a deduction to the damages awarded.[223]

173. The Respondent contends that the Claimants contributed to the losses they are claiming in this arbitration, in three ways: (i) the Claimants started their casino business without a permit even though they knew it was required to operate casinos in Mexico; (ii) the Claimants entered into business with Mr. Rojas Cardona even though they knew of Mr. Rojas Cardona's questionable background; and (iii) the Claimants continued to operate their casinos after the revocation of the 2012 Permit.[224] The Claimants argue that the Respondent has failed to establish any fault by the Claimants and, even if they did, such fault did not contribute to the Claimants' losses in this case.[225]

174. The Tribunal finds that the Respondent has not established that the Claimants materially contributed to their losses by negligent or wilful conduct.

175. As to the first allegation, the Respondent contends that "this arbitration would not have arisen if the Claimants had applied for their own permit in 2004-2005 in accordance

---

221 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries (2001) (***ILC Articles (with commentaries)***), Article 39, **CL-94**.

222 ILC Articles (with commentaries), Article 39, ¶ 5, **CL-94**.

223 ILC Articles (with commentaries), Article 39, ¶ 1, **CL-94**.

224 Respondent PHB, p. 39.

225 QEU&S PHB, pp. 36-37.

with the applicable regulations, instead of attempting to circumvent the Regulations through legal devices such as the Monterrey Resolution".[226]

176. This contention does not support an argument that the Claimants wilfully or negligently contributed to their losses claimed in this arbitration. The Tribunal has already found that there is no conclusive evidence to support the Respondent's allegation that the five casinos operated by the Claimants under the Monterrey Resolution improperly included games of chance. In addition, the losses suffered by the Claimants were caused by the Respondent's revocation of the 2012 Permit, closure of the casinos, and refusal to grant fresh permits. Consequently, any conduct by the Claimants under the Monterrey Resolution could not have contributed to their losses claimed in this arbitration.

177. As to the second allegation, the Respondent contends that the "Claimants' decision to continue doing business with Mr. Rojas Cardona and become an operator of E-Mex was made with full knowledge of the significant risks involved" and these were "[r]isks that no prudent investor would have assumed and which ultimately resulted in the loss of [the Claimants'] investment".[227] According to the Respondent, it was this decision that "forced" the Claimants to seek an alternative to operate their casinos by applying to SEGOB for the 2012 Permit. The Claimants concede that there were risks associated with doing business with Mr. Rojas Cardona and that their decision to apply for the 2012 Permit was part of a plan to "separate from Mr. Rojas cautiously".[228] The Claimants contend that they moved forward with the transaction with Blue Crest and Advent to acquire E-Mex's permit with the expectation that Mr. Rojas Cardona would not be involved in the new company. Ultimately, after the Claimants had already moved their operations under the E-Mex permit, the Blue Crest/Advent transaction did not come to fruition.[229]

178. As the Claimants themselves acknowledge, it is clear that Mr. Rojas Cardona was not the most attractive of partners, even if the plan was to separate from him at the earliest

---

226 Respondent PHB, p. 39.

227 Respondent PHB, pp. 39, 44

228 QEU&S PHB, p. 36.

229 Tr. (ENG), Day 2, 577:6-578:17; 579:5-580:22 (G. Burr); Tr. (ENG), Day 3, 673:15-674:19; 675:2-675:7 (E. Burr); Tr. (ENG), Day 3, 711:15-711:18 (N Ayervais); QEU&S PHB, p. 36.

opportunity upon consummating the marriage. However, it is equally clear that their decision to move their operations to E-Mex's permit did not materially contribute to the losses they are claiming in this arbitration. Those losses were caused solely by SEGOB's decision to revoke the 2012 Permit, close the casinos and deny fresh permit applications,[230] and those actions were driven by the predisposition of SEGOB's new leadership against the 2012 Permit, as opposed to any public or regulatory policy concerns.[231]

179. There is nothing in the evidence to suggest that SEGOB revoked the 2012 Permit, closed the casinos or denied fresh permits because the Claimants had had business dealings with Mr. Rojas Cardona. Indeed, when the Respondent represents that it can be reasonably assumed that SEGOB would have allowed the casinos to still operate today but for the Enforcement Court's decisions, that precludes the argument that it did any of those things because of any misgivings about the Claimants' dealings with Mr. Rojas Cardona. While the Claimants' choice to move their operations under the E-Mex permit certainly enabled the *amparo* proceedings and the Enforcement Court's decisions, the Tribunal has already found that SEGOB could have chosen to preserve the Claimants' business notwithstanding those decisions.

180. As to the third allegation, the Respondent contends that "[d]espite the fact that the Sixteenth Court upheld the revocation of the permit on March 10, 2014, the Claimants decided to continue operating their casinos. Operating a casino without a valid permit is illegal and was what ultimately triggered the closure of their Casinos by the authority on April 24, 2014".[232] The Tribunal also rejects this contention. The 2 September 2013 court injunction directed SEGOB in terms to refrain from interfering with the operation of the casinos pending the final resolution of the *Amparo 1668*. It is unsurprising that the Claimants continued to operate the casinos with that injunction still in place, and doing so did not manifest a lack of due care on their part. The Tribunal has also found that the closure of the casinos by SEGOB in April 2014 was a pre-ordained outcome, and not the result of a run of the mill inspection by SEGOB during which it discovered that the casinos were operating without a valid permit.

---

230 *See above*, Section VI.C.2.

231 *See above*, Section VI.C.1.

232 Respondent PHB, p. 44.

181. In sum, the Tribunal finds that the Claimants did not contribute to the losses they suffered.

VIII. THE TRIBUNAL'S FINDINGS AND CONCLUSIONS ON QUANTUM

182. The Claimants sought damages relief in the aggregate amount of US$317.3 million plus US$260.1 million in interest (as of 5 July 2022), for a total aggregate amount of US$577.3 million.[233] For the reasons set out below, the Tribunal awards, in the aggregate, US$80.8 million plus interest.

A. DAMAGES UNDER ARTICLE 1117 OF THE TREATY FOR LOSSES SUFFERED BY THE MEXICAN COMPANIES

183. The Respondent has criticised the Claimants for not having presented a separate quantum case for their claims under Article 1116 relating to the losses suffered by the Claimants—as opposed to their claims under Article 1117 relating to the losses suffered by the Mexican Companies.[234] It points out that the two quantum assessments are bound to be different because: (i) the Claimants can only claim the loss suffered in connection with their shareholding interests in the Mexican Companies;[235] and (ii) there may be creditors of the Mexican Companies who may have a claim on any award in favour of the Mexican Companies. The Respondent requests that any award of damages is made only under Article 1117 to the Juegos Companies.[236]

184. The Claimants submit in their post-hearing brief that: "it would be senseless and redundant to require the Tribunal to issue a ruling separating out the damages owed to Claimants under Article 1116 where the Tribunal has issued an award of full

---

233 Presentation at the hearing by BRG, 13 July 2022 (***BRG Presentation***), slide 5.

234 Counter-Memorial on Merits, ¶¶ 902 ("el VJM de las inversiones de las Demandantes, es decir, de E-Games y cada una de las cinco Empresas Juegos dueñas de los Casinos"). To recall, the Mexican Companies are E-Games and the Juegos Companies, where the Juegos Companies are Juegos de Video y Entretenimiento de México, S. de R.L. de C.V., Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V., Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V., Juegos y Video de México, S. de R.L de C.V., and Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. *See* Partial Award, p. 5.

235 Counter-Memorial on Merits, ¶ 901.

236 Respondent PHB, pp. 76 ("si el Tribunal determinara, por ejemplo, que México expropió los casinos existentes y dicha reclamación se presentó al amparo del artículo 1117, el laudo debe ordenar que el monto se pague a las Empresas Juegos porque ellas eran las dueñas de los casinos."); 78 ("La Demandada solicita, por lo tanto, que el Tribunal determine que la reclamación asociada al valor de los casinos existentes se presentó a nombre de las Empresas Juegos y cualquier monto a pagar por una posible violación al Tratado se les liquide a dichas empresas.").

compensation to the enterprise under Article 1117";[237] "[t]he NAFTA only requires that the Tribunal award full reparation to investors whose qualified investments have been harmed by state measures that breach the NAFTA's substantive protections, and this is achieved when the Tribunal awards full reparation to the enterprises under Article 1117";[238] "[g]iven that BRG's damages assessment already measures the full value of Claimants' Casino business that Mexico completely destroyed through its unlawful measures in violation of the NAFTA, it is neither required nor necessary for Claimants to further specify the damages they claim on their own behalf under Article 1116";[239] and "[g]iven the Tribunal's ruling that NAFTA Article 1117 entitles the Claimants to claim for the damage that Respondent inflicted on the Mexican Enterprises, nothing within the NAFTA text requires Claimants to further identify the damages they claim on their own behalf pursuant to Article 1116".[240]

185. The Tribunal agrees with the Respondent that the quantum of an Article 1116 claim can, and often will be, different from the quantum of an Article 1117 claim. In addition, under Article 1135(2) of the Treaty, there are practical implications to an award under Article 1117: "Subject to paragraph 1, where a claim is made under Article 1117(1): … (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and (c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law". The Tribunal further notes that (i) the Parties' agree that the quantum case presented by the Claimants pertains only to the losses of the Mexican Companies under Article 1117; [241] (ii) the Claimants seek no damages separate from or in addition to those quantified by BRG for the Article 1117 claim;[242] and (iii) the Respondent requests that any award for damages be made on that basis.[243]

---

237 QEU&S PHB, p. 58 (PDF).

238 QEU&S PHB, p. 58 (PDF).

239 QEU&S PHB, p. 58 (PDF) (emphasis omitted).

240 QEU&S PHB, p. 59 (PDF).

241 Rejoinder, ¶ 775; QEU&S PHB, p. 59 (PDF).

242 Memorial on Merits, ¶ 793.

243 Respondent PHB, pp. 76, 78.

186. The Tribunal therefore only can and will make an award for damages on the basis of the losses claimed on behalf of the Mexican Companies under Article 1117, and, consistent with Article 1135(2), its award will provide that it is to "be paid to the enterprise[s]" and will be "made without prejudice to any right that any person may have in the relief under applicable domestic law".

B. QUANTUM OF COMPENSATION FOR THE FIVE EXISTING CASINOS

187. While a deep gorge divides the Parties' valuations of the existing casinos (US$162.4 million[244] versus US$11.86 million[245]), the Parties do agree on a limited number of points going to quantum:

a. As to the applicable standard of proof for the quantum of loss, the Claimants speak of "reasonable confidence"[246] and the Respondent speaks of "reasonable certainty".[247] The Tribunal accepts that both phrases correctly denote the applicable standard and that there is no meaningful daylight between them.

b. The Parties agree on the applicable standard of compensation: in implementation of the *Chorzow* standard of full reparation, the fair market value (***FMV***) of the investment immediately prior to the valuation date.[248] As the Respondent noted in its Rejoinder, "there does not appear to be any dispute as to how to determine damages in this case".[249]

---

244 Second Damages Assessment Report of BRG, 6 December 2021 (***Second BRG Report***), Table 1, **CER-7**.

245 Presentation at the hearing by Rión M&A (***Rión Presentation***), 13 July 2022, slide 47.

246 QEU&S Claimants' Reply, ¶ 1241.

247 Counter-Memorial on Merits, Section IV(G).

248 Counter-Memorial on Merits, ¶¶ 886, 1005.

249 The Tribunal notes that, in its Counter-Memorial, the Respondent argued that the Claimants had failed to quantify the compensation owed for any breach of Article 1105. In its Rejoinder, the Respondent accepted that "the full reparation standard was applicable to determine damages arising from a violation of the … minimum standard of treatment (article 1105)" but maintained its request for relief that the Tribunal "[d]ismiss the claim for violation of Article[] 1105 because Claimants have failed to quantify the damages associated with such violation[]". The Tribunal has no hesitation in rejecting the Respondent's contention insofar as it is being maintained. The Respondent accepts that the full reparation standard applies equally to a breach of Article 1105 as it does to a breach of Article 1110. It is uncontroversial that, here, the Claimants lost their entire investment and that the quantum of their loss is therefore the same, regardless of whether that loss was caused by a breach of Article 1105 or by a breach of Article 1110. The Tribunal

c. The Parties agree on the date of valuation, which the Claimants have fixed as 23 April 2014, when the five casinos were closed by SEGOB.[250]

d. The Parties agree that a Discounted Cash Flow (***DCF***) is an appropriate valuation method to determine the FMV of ongoing concerns like the five existing casinos, even if they disagree on the appropriate inputs into that DCF.[251]

188. The Tribunal will address the various DCF inputs that the Claimants' expert, BRG, proposes and that the Respondent's expert, Rión, contests: (i) cash flows; (ii) terminal value; (iii) discount rate and currency; and (iv) liquidity discount.

1. Cash flows

(i) Revenue projections

189. In terms of its impact on quantum, the most significant disagreement between the experts pertains to the growth rate of future revenue that a willing buyer would assume:

a. BRG distinguished in this regard between the period 2014-2019 and the period 2020-2052.[252] According to BRG, for 2014-2019 the willing buyer would assume that "the Net Gaming Revenue for each of the Casinos would grow with the expected growth of Mexico's GDP";[253] and for 2020-2052 the willing buyer would assume that the "Net Gaming Revenue, in USD, would grow according to long-term U.S. inflation expectations",[254] i.e., growth in nominal terms but not in real terms.

---

has found that SEGOB's conduct in breach of Article 1105 caused the Claimants' loss. The Tribunal notes that the Respondent did not press the point in its post-hearing brief.

250 Counter-Memorial on Merits, ¶¶ 970–971.

251 Memorial on Merits, ¶ 812; Counter-Memorial on Merits, ¶ 950.

252 First BRG Expert Report, 21 April 2020, (***First BRG Report***), ¶ 92, **CER-4**.

253 First BRG Report, ¶ 92(a), **CER-4**.

254 First BRG Report, ¶ 92(b), **CER-4**.

b. Rión makes no such distinction. According to Rión, the willing buyer would assume growth from day one in line with U.S. inflation expectations for the entire period 2014-2052.[255]

190. Intertwined with that debate is the experts' disagreement on what, if any, adjustments should be made to the historical revenues of the Mexico City casino, which between 2011 and 2013 suffered various instances of operational disruption. As the experts apply their preferred revenue growth rate to the historical revenue base of the five casinos so as to project future revenues, the Tribunal will address this issue first.

* * *

191. The Claimants identified the following operational disruptions to the Mexico City casino:

a. Last four months of 2011: 73 gaming machines were seized by inspectors;[256]

b. November 2012: closure of the casino by the SAT for 16 days;[257] and

c. June 2013: closure of the casino by municipal authorities for 34 days.[258]

192. The Claimants allege that the disruptions were part of the Respondent's campaign specifically against their casinos and that adjustments to the historical revenues to correct for those disruptions are therefore appropriate.[259] The Respondent rejects that allegation and explains that the entire casino industry in Mexico came under very close scrutiny by the authorities in the aftermath of the horrific attack in August 2011 on the Casino Royale in Monterrey, where 52 people died.[260] The Respondent therefore submits that no adjustments are called for.[261] Alternatively, if any adjustments are

---

255 First Rión Expert Report, 21 December 2020 (***First Rión Report***), ¶ 63(c), **RER-3**.

256 Memorial on Merits, ¶ 189.

257 Memorial on Merits, ¶ 193.

258 Memorial on Merits, ¶ 195.

259 Memorial on Merits, ¶¶ 189, 828.

260 Counter-Memorial on Merits, ¶¶ 192–193.

261 Counter-Memorial on Merits, ¶ 983.

called for, Rión argues that they should be significantly less than what BRG propose.[262]

193. If the disruptions were shown to be in breach of the Respondent's Treaty obligations, there is no doubt that, under international law, the Tribunal should correct for their quantum impact by adjusting the historical revenues. However, the Tribunal does not find that this is the case here. The record evidence does not show that the operational disruptions of the Mexico City casino were the result of a concerted campaign targeting the Claimants, let alone gave rise to a Treaty breach.

194. Rather, as the Respondent has persuasively explained and supported with evidence, it was the Casino Royale tragedy in 2011 that triggered a government clamp-down on illegal activity across the industry, resulting in more inspections, seizures and closures of casinos. Insofar as most of the disruptions occurred before the PRI came to power at the end of 2012, the Claimants' allegation also sits uncomfortably with their case theory—on which they did prevail—that the revocation of the 2012 Permit and the 2014 closure of all their casinos were the result of a hostile predisposition by the incoming PRI mandatories at SEGOB following the PRI's electoral win.

195. In addition, the Claimants and BRG posit the following justification for making upward adjustments to the historical revenues of the Mexico City casino for 2011-2013:

> As BRG explains, "[a]cademic literature advises that a cash flow assessment should account for *the risks expected to be incurred* through either the discount rate or a direct adjustment to cash flows." BRG in fact does rely on a discount rate that accounts for *risks specific to the gaming industry*, and BRG also includes Country Risk Premium ("CRP") specific for Mexico in its discount rate. As such, failing to make the adjustments that BRG made regarding historical revenues of the Mexico City Casino would result in *the market and industry risks* incorporated into BRG's but-for cash flow forecast, thereby double counting these risks already captured by BRG's discount rate.[263] [emphasis added]

196. Insofar as this argument characterises the operational disruptions as the expected occurrence of "market and industry risks", it appears to stand in contradiction to the notion that the operational disruptions were the result of a concerted, targeted, and

---

262 Counter-Memorial on Merits, ¶ 985.

263 QEU&S Reply, ¶ 1157 (emphasis added).

discriminatory campaign against the Claimants. In any event, and more importantly, the Tribunal disagrees that any double-counting of risk would result from not adjusting the *historical* revenues for the occurrence of such market and industry risk while reflecting that market and industry risk in the discount rate applied to *future* revenues.

197. A willing buyer would understand that (i) the past performance of a business (as reflected in historical cash flows) will have been subject to expected market and industry risks; and (ii) the future performance of a business (as reflected in either future cash flow projections or the discount rate) will continue to be subject to such risks going forward. A willing buyer would not assume away the former because they assume the latter. A willing buyer would not assume away past occurrence of market and industry risks so as to inflate the historical revenues of the business on the basis that the business will continue to be exposed to such risks in the future.

198. The Tribunal therefore determines that no adjustments to the historical revenues of the Mexico City casino are warranted.

* * *

199. The Tribunal now turns to the revenue projections proposed by BRG in its DCF. As indicated above, BRG and Rión agree on the principle that a willing buyer would assume post-2019 revenues that show nominal growth in line with U.S. inflation (i.e., no growth in real terms), but they disagree on the growth rate that a willing buyer would assume for 2014-2019. BRG argues that those revenues should be assumed to grow in line with Mexican Gross Domestic Product (***GDP***).[264] Rión argues that it should be the same as for post-2019 revenues.[265]

200. In the Tribunal's view, when formulating a view on the plausibility of future revenue projections, a willing buyer is likely to give due consideration to: (i) the historical performance of the Claimants' five casinos; (ii) the historical performance of the Mexican casino industry as compared to the Mexican economy as a whole; and (iii) the future outlook for the Mexican casino sector. The Tribunal will address each in turn.

---

264 First BRG Report, ¶ 92(a), **CER-4**.

265 First Rión Report, ¶ 63(c), **RER-3**.

201. First, as regards the aggregate historical revenues of the five casinos, the Tribunal considers that a willing buyer would place particular weight on the period 2010-2013. Not only are these the last full four years of operation prior to the willing buyer's transaction, but the Claimants' operations during those years are also most representative of the business the willing buyer would be acquiring. On the Claimants' evidence, until they became the operator of the E-Mex permit, they were running a different type of business (games of skill only; no games of chance): one such facility (Naucalpan) operated its first full tax year in 2006,[266] two more (Villahermosa and Puebla) in 2007,[267] and two more (Cuernavaca and Mexico City) in 2008.[268] It was only in May 2009 that the Claimants were able to expand their business to games of chance. 2010 was thus the first full tax year when the Claimants were operating five facilities offering games of chance. In the Tribunal's view, a willing buyer would therefore place less weight on the highly fluctuating aggregate revenue figures for the prior years, which showed real growth in 2007 and 2010, a real fall in 2008, and nominal stagnancy in 2009.

202. Based on the annual financial statements of E-Games, a willing buyer would have observed that the casinos' total "net gaming revenue", which is equal to the total amount wagered in a game (the "handle" or "drop") minus redemptions or prizes paid to customers, showed a year-on-year nominal growth rate of +6.85% and +8.54% from 2010 to 2012 (MXN$482 million (2010), 515 million (2011), 559 million (2012)), and a negative growth rate of -0.89% in 2013 (to MXN$554 million).[269] A willing buyer would also have observed that inflation in Mexico during those years hovered roughly around 4%.[270] The Tribunal does not consider that a willing buyer would have favoured the numbers presented by either BRG or Rión in support of their respective analyses.

---

266 Memorial on Merits, ¶ 41.

267 Memorial on Merits, ¶¶ 42–43.

268 Memorial on Merits, ¶¶ 44–45.

269 BRG has explained, and Rión has not contested, that the revenue figures in E-Games' financial statements are reported net of the *impuesto especial de productos y servicios* (***IEPS***), which they (and the notes to the financial statements) describe as "a 30% tax on a casino's revenue, net of prizes and returns." *See* First BRG Report, ¶ 100(a), **CER-4**.

270 *See* Excel Spreadsheet, **BRG-165**, "OPEX-MXN" tab.

a. On the one hand, in their second report and during their presentation at the hearing, BRG referenced a bar chart titled "Historical Net Gaming Revenue" and "historical financial performance", respectively,[271] purporting to show annual net gaming revenue of the casinos expressed in USD. These numbers showed different growth rates from 2010 to 2012, most importantly an increase rather than a drop from 2012 to 2013: USD 38.2 million (2010), 41.4 million (2011), 42.4 million (2012) and 43.4 million (2013).[272] From its review of the revenues tab in the underlying workbook prepared by BRG (BRG-165),[273] however, the Tribunal understands that this difference is due to the fact that BRG used its "adjusted" revenue figures for the Mexico City casino translated into USD rather than the "historical" figures for that casino reported in the audited financial statements of E-Games. The Tribunal has already determined that a willing buyer would not make these adjustments to the historical revenues.

b. On the other hand, in their second report and at the hearing, Rión produced a bar chart showing negative growth not only from 2011 to 2012 but also from 2010 to 2011: MXN$615 million (2010), 591 million (2011), 611 million (2012) and 593 million (2013).[274] It is unclear however how these figures were computed. The chart is described as showing "the growth of *gross income [ingreso bruto*] after taxes on the gambling of the Casinos".[275] The chart's title is "gross casino income (millions of MXN, *net from taxes*".[276] The subtitle is "all casinos: *gross profit* (pesos) *with out [sic] taxes*".[277] When Rión reproduced the chart in its presentation at the hearing, they added a footnote stating: "'with out taxes' se refiere *a ingreso antes de impuestos al ingreso*"—income *before income tax*.[278]

---

271 Second BRG Expert Report, 6 December 2021 (***Second BRG Report***), p. 29 (PDF), Figure 1, **CER-7**; BRG Presentation, slide 8.

272 Second BRG Report, p. 29 (PDF), Figure 1, **CER-7**.

273 Excel Spreadsheet, **BRG-165**.

274 Second Rión Expert Report, 6 December 2021 (***Second Rión Report***), p. 28 (PDF), Illustration 4, **RER-6**.

275 Second Rión Report, ¶ 101, **RER-6** (emphasis added).

276 Second Rión Report, p. 28 (PDF), Illustration 4, **RER-6** (emphasis added).

277 Second Rión Report, p. 28 (PDF), Illustration 4, **RER-6** (emphasis added).

278 Rión Presentation, slide 16 (emphasis added).

A footnote to the title in their second report references the "Rión tables" tab in Rión's updated workbook, RMA-012.[279] However, the Tribunal has not been able to identify in that tab any explanation of how these figures were computed or what they represent. Despite the rather confusing use of both "gross income" and "gross profit" and of both "net of tax" and "before income tax", it is clear from the E-Games financial statements that the numbers cannot show "gross profit" but must refer to a measure of gross revenue. Given the reference to "taxes *on the gambling of the Casinos*", it is possible that these numbers reflect a gross-up by Rión to include the payment of IEPS, of which the revenue top line in E-Games' financial statements is already netted. Even then, however, it is still unclear how that gross-up for a "30% tax on a casino's revenue, net of prizes and returns" can yield the numbers in Rión's presentation. In any event, the Tribunal believes that a willing buyer, when assessing the trend in revenue performance, would focus on the revenue data reported in the financial statements.

203. When examining the financial statements, a willing buyer would have observed a slight revenue fall in nominal terms in 2013, but it would also be aware of the closure of the Mexico City casino for 34 days during that year. But for that closure, the casinos' 2013 revenues would show minor nominal growth even on Rión's calculations (albeit still no real growth).[280] While (as discussed above) a willing buyer would not adjust the *historical revenue base* before applying a growth rate to that base (as BRG has proposed), a willing buyer would not ignore the 2013 closure when determining an appropriate *growth rate* assumption for the future. Having observed steady growth in both nominal and real terms in 2011 and 2012, a willing buyer would understand that in 2013 the casinos would still have achieved nominal growth absent the Mexico City closure. It is reasonable to assume that the willing buyer presented with those data would have felt comfortable projecting *some* growth in real terms for the years immediately following the transaction.[281]

---

279 Second Rión Report, p. 28 (PDF), Illustration 4, footnote 62, **RER-6**.

280 Second Rión Report, ¶ 82, **RER-6**.

281 Rión's observation that the compound annual growth rate in active players in the Claimants' casinos between 2010 and 2013 was -1.5% does not detract from that conclusion. First, as with

204. Second, a willing buyer would have observed some measure of correlation between Mexican real GDP growth and Mexican casino real GDP growth. It is clear however that the correlation coefficient is not 1, as BRG has assumed in its DCF.

a. For 2004-2013, BRG shows an average annual growth rate of 2.3% for Mexican real GDP and 1.5% for Mexican casino real GDP—i.e., 65% of the Mexican real GDP growth rate.[282]

b. Two studies referred to by BRG pertain to the U.S. markets of Las Vegas, Atlantic City and Boulder and calculate correlation with local—as opposed to national—GDP growth.[283] Even assuming they are relevant evidence, these studies only show a correlation with local GDP of between 0.63% and 0.7%.

c. BRG has pointed out that the compound growth rates of real Mexican casino GDP and real Mexican GDP for 2004-2014 are closely correlated (1.9% and 2%, respectively).[284] However, that is naturally a function of the selection of the 2004-2014 time series. The correlation coefficient will vary considerably for any other time series and there is no principled basis for the proposition that a willing buyer would limit the analysis to 2004-2014.

d. As Rión has pointed out, the willing buyer would observe that, between 2004 and 2007, the Mexican casino real GDP compound growth rate of +6.5% outperformed the Mexican real GDP compound growth rate of +2.98%, but that, between 2007 and 2014, the Mexican casino real GDP compound growth rate of -0.33% underperformed the Mexican real GDP compound growth rate of +1.56%.[285] However, a willing buyer in April 2014 would not have the information regarding the 2014 tax year and would observe that between 2007

BRG's selection of the 2004-2014 time series to demonstrate correlation between real Mexican casino GDP and real Mexican GDP, the active players compound annual growth rate is a direct function of the time series selected by Rión. For example, the rate turns +3.4% if 2009 is added to the time series. Second, the compound rate for that period is only negative because of a drop in 2011, which can in part be ascribed to the operational disruptions at the Mexico City casino that year. The number of players grew again in each of 2012 and 2013.

282 Second BRG Report, ¶ 88, **CER-7**.

283 Second BRG Report, ¶ 89, **CER-7**

284 Second BRG Report, ¶ 87, Table 2, **CER-7**.

285 First Rión Report, ¶ 129, Table 3, **RER-3**.

and 2013, the actual year-on year growth rate only materially diverged in 2011, which was the only year during that period when nominal Mexican casino GDP growth was negative. Under examination, Rión accepted that the negative growth that year could be explained (at least in part) by the horrific events relating to Casino Royale in 2011.[286]

205. Third, the Tribunal sees some merit in Rión's argument that a willing buyer in April 2014 would have adopted a cautious outlook for the Mexican casino industry. Rión showed that the growth in real Mexican casino GDP during that period did not track the growth in the number of operating casinos, suggesting that increased competition was putting pressure on casino revenues.[287] For example, while a willing buyer would have observed annual growth in real Mexican casino GDP of 4.4% in 2013, that was on the back of a 21.7% expansion in the number of casinos operating in the country during 2012, from 281 to 342.[288] In response, BRG refers to an EY report, which states that "[s]ome analysts in the industry list Mexico and South America among the few remaining markets in the world *with strong potential for future gaming industry development*".[289] But the 2013 annual report of Televisa, a major player in the Mexican casino market, which BRG also references, explains that "despite a complicated environment, our gaming and raffles operations continue to grow at a *moderate but stable* rate".[290]

---

286 Tr. (ENG), Day 9, 2463:10-2465:21 (M. Kritzler).

287 Second Rión Report, ¶ 103, **RER-6**.

288 Second Rión Report, p. 27 (PDF), Table 9, **RER-6**.

289 EY, Global Hospitality Insights, Top Thoughts for 2014, p.4 (PDF), **BRG-19** (emphasis added). Rión has referred to three exhibits which it claims "did not express an optimistic outlook in terms of industry growth". It is correct that the first one, a 2006 article in a legal journal, "did not express an optimistic outlook", but neither did it express a pessimistic outlook: in truth, it expressed no outlook at all. In any event, it is obvious that a willing buyer in April 2014 would have placed little weight on a 2006 legal journal article. The second and third, both 2013 Forbes news articles, describe a legislative initiative to enhance legal security in the sector, but do not express a view on the sector's economic outlook.

290 Televisa, 2013 Annual Report, p.26 (PDF), **BRG-20** (emphasis added). BRG also refers to the 2013 annual report of CIRSA, another competitor, which according to BRG "held a positive outlook on the market, as it continued to invest in Mexico and planned to open or acquire one or two new gaming halls per year". The Tribunal found no reference in the document to any plan "to open or acquire one or two new gaming halls per year", but it did find a statement that "we made significant investments in our bingo halls in Mexico in order to remodel and expand our facilities and implement the new "Casino Life" concept".

206. Seeking to place itself into the shoes of a willing buyer presented with all of the foregoing data and information, the Tribunal determines that such a willing buyer would reasonably project modest revenue growth during 2014-2019, at a nominal rate of 3.5%.

(ii) SEGOB Participaciones

207. The Parties' experts disagree on how this tax is to be calculated. BRG calculates an average effective rate as a percentage of historical Net Gaming Revenue and applies that average effective rate to projected Net Gaming Revenue.[291] Rión argues (only in its rebuttal report) that this average effective rate is too low.[292] At the hearing, Rión accepted that: their calculation was not based on "any document in particular"; they did not "have any support for reaching this"; it was "based solely on the E-Mex permit"; and when they asked the Ministry of Economy of Mexico how the tax had be calculated, it did not give a "concrete answer" as to how it should be done.[293] The record further shows that the Claimants declared the amounts of SEGOB *Participaciones* paid to SEGOB for at least some quarters in 2011 and 2012 and that SEGOB made no objection.[294] On the basis of this evidence, the Tribunal finds that BRG's approach is to be preferred over Rión's for the purposes of forecasting future cash flows.

(iii) Operating Expenditure assumptions

208. The Parties disagree on four assumptions as regards the Operating Expenditure (***OPEX***) forecasts:

a. first, whether payroll expenses should be treated as a variable expense (i.e., increasing year-on-year by the same percentage as income) or as a fixed expense (i.e., increasing in line with inflation);

---

291 BRG Second Report, ¶ 126(c), **CER-7**.

292 Rión Second Report, ¶ 133, **RER-6**.

293 Tr. (ENG), Day 9, 2425:6-2431:10 (M. Kritzler).

294 Edo Resultados 2011 Q2, **RMA-2224**; Edo Resultados 2011 Q3, **RMA-2226**; Edo Resultados 2011 Q4, **RMA-2228**; Edo Resultados 2012 Q2, **RMA-2232**; Edo Resultados 2012 Q3, **RMA-2234**.

b. second, whether a 10% downward adjustment should be applied to the payroll expenses in 2014 because Mr. Alfredo Moreno Quijano, Jr. and a full-time construction team would allegedly not have been employed going forward;

c. third, whether security expenses should be reduced by 25% in 2014 because certain additional security was allegedly not expected to be necessary after 2013; and

d. fourth, whether certain downward adjustments should be made for the alleged fact that two members of the U.S. management team would no longer be with the group by the end of 2014.

209. As to the first disagreement, the Respondent contends that it is unrealistic to treat labour costs as a fixed cost because increased activity in casinos would necessarily lead to higher operating expenses and it is unreasonable to expect that a larger number of customers can be served without increasing the number of employees.[295] According to the Respondent, treating labour costs as a variable expense also results in EBITDA[296] margins more in line with those historically observed.[297] The Claimants contend that short-term growth does not require additional personnel and Net Gaming Revenues are driven largely by GDP per capita growth and not by increase in number of players.[298] Further, the Claimants note that Rión accepted that a casino can also increase its revenue without necessarily attracting more customers to the facility.[299]

210. On the evidence, the Tribunal finds that, faced with the two diametrically opposite alternatives presented by the Parties, it is more realistic that labour costs are treated as a variable expense that increases in line with income, rather than as a fixed expense that increases in line with inflation. It is unrealistic to assume that labour costs will increase only in line with inflation even though the casinos are expected to serve more customers (and even if there may not be a perfect correlation between income growth and payroll costs). Indeed, even the Claimants appear to accept that labour costs can

295 Respondent PHB, p. 86.

296 Earnings before Interest, Taxes, Depreciation and Amortisation.

297 Respondent PHB, p. 86.

298 BRG Presentation, slide 42.

299 QEU&S PHB, p. 66.

only be treated as a fixed cost in the "short-term". Accordingly, the Tribunal will apply labour costs as a variable expense.

211. As to the second disagreement, the Claimants rely on the evidence of Ms. Burr, who described the resignation of Mr. Moreno in July 2013 and the fact that a construction team was no longer required as of 2014.[300] Ms. Burr was not cross-examined on this evidence at the hearing. The Respondent contends that the adjustments should not be made because they are based "solely" on Ms. Burr's view and in fact there is no evidence whatsoever that these savings were possible or that they were planned in advance of the Respondent's breaches.[301] There is also no evidence that these roles could be dispensed with and, if they were, there would have been termination costs to be incurred. As to the construction team, the Respondent also alleges that construction work was completed by 2012, so there is no evidence that they were even on the payroll in 2013.[302]

212. The Tribunal notes that it is uncontested that Mr. Moreno had left the business in July 2013 and that his salary and bonus were approximately [redacted] a year. The Respondent also has not challenged Ms. Burr's evidence that the company would not have needed to hire a replacement as "[h]is responsibilities were transitioned to other executives and managers".[303] This adjustment should therefore be made. As to the construction team, the Tribunal notes that it is common ground that all major renovations had been completed by 2012.[304] If the construction team had remained on the payroll in 2013 (for whatever reason), then there is no evidence sufficient to conclude that the situation would have changed in 2014. If it had not, then no further adjustments are required to be made to the 2014 figures. The Tribunal therefore concludes that no adjustment is justified.

213. As to the third disagreement, the Claimants contend that after settling their dispute with E-Mex in October 2013, their security concerns would have decreased to a certain

---

300 Erin Burr Third Witness Statement, 21 April 2020 (***E. Burr Third Statement***), ¶ 87, **CWS-51**.

301 Respondent PHB, pp. 86-87.

302 Respondent PHB, p. 87.

303 E. Burr Third Statement, ¶ 87, **CWS-51**.

304 E. Burr Third Statement, ¶ 88, **CWS-51**.

extent, resulting in a 25% decrease in security-related expense.[305] The Respondent contends that this deduction, representing a saving of MXN$84,303 in 2014, is not material and in any event it cannot be determined whether these savings were achievable without an impact on operations.[306]

214. The Tribunal finds that there is insufficient evidence to conclude that there would have been savings on security-related costs in 2014 and, if there were such savings, that they would have been in the amount of 25% of such costs.

215. As to the fourth disagreement, the Claimants claim that there would have been a $^1/_3$ deduction in their U.S. expenditure, including salaries, because John Conley and Beth Conley "were to transition outside of our group by the end of 2014".[307] According to Ms. Burr, John Conley's salary decreased from [redacted] to [redacted] in 2014 but there was an increased healthcare payment of [redacted].[308] Further, it was "contemplated" that Ms. Conley, whose salary was [redacted], would leave the group at the end of 2014.[309]

216. The Tribunal finds that the evidence supports a deduction of US$345,709.88 from the 2014 expenses due to Mr. Conley's departure from the group. Ms. Burr's evidence confirms that Ms. Conley would only have left the group at the end of 2014; no adjustment is therefore justified on that basis. The other supposed savings in expenses resulting from their departure is unparticularised and thus are also not substantiated.

(iv) Machine lease expenses

217. Rión contended for the first time in their second report that there is a significant difference between the spending reported by E-Games on rental of gaming machines and the revenue received by the Juegos Companies for the rental of gaming machines, and that the Claimants did not reconcile these figures when preparing the consolidated group financial statements. According to Rión, this means that the Claimants have excluded nearly MXN$29.7 million in expenses for E-Games in 2012 and MXN$38.5

305 E. Burr Third Statement, ¶ 93, **CWS-51**.

306 Rión Second Report, ¶ 128, **RER-6**.

307 E. Burr Third Statement, ¶¶ 89-92, **CWS-51**.

308 E. Burr Third Statement, ¶ 89, **CWS-51**.

309 E. Burr Third Statement, ¶ 91, **CWS-51**.

million in expenses for E-Games in 2013.[310] Rión argued that these expenses should not be excluded because they are legitimate expenses of E-Games.

218. BRG argued in its presentation at the hearing that Rión was "incorrect" because, on a going forward basis, the Claimants were planning to replace certain underperforming machines subject to lease arrangement by purchasing and acquiring new gaming machines and by utilizing the 225 operational gaming machines that the Claimants had in their warehouse. BRG argued on that basis that it would be appropriate to adjust the future cash flow projections to account for the replacement of gaming machines subject to lease arrangements with a partial increase in lease expenses (short-term OPEX) and an increase in Capital Expenditure (***CAPEX***).[311]

219. The Tribunal notes that it has received only limited input from the Parties and their experts on this issue of significant quantum. However, the Tribunal is able to make the following findings on the basis of the record before it.

a. It is undisputed that a determination of the FMV of the casinos must account for, as BRG put it at the hearing, "operating the[] permit via the structure that existed which was E-Games and a bunch of Juegos Companies",[312] and "the relationship with E-Games … whose permits they're exploiting".[313] A willing buyer seeking to ascertain the FMV of the casinos would therefore have to account for all of the OPEX incurred by E-Games.

b. Neither the Claimants nor BRG have provided any clarification on the identity of the third parties outside this "valuation perimeter", as Rión called it, that leased machines to E-Games. Nor did they contest that E-Games spent the additional OPEX amounts on third-party machine leases in 2012 and 2013. The starting point, therefore, is that a willing buyer would also account for the third-party machine lease expenses in the offer price.

---

310 Rión Second Report, ¶¶ 37-41, **RER-6**.

311 BRG Presentation, slides 15 and 39-40. QEU&S PHB, pp. 66-67. The Claimants introduced a new exhibit, **BRG-208**, in support of BRG's calculations.

312 Tr. (ENG), Day 8, 2200:1-2200:8 (S. Dellepiane).

313 Tr. (ENG), Day 8, 2201:15-2201:21 (S. Dellepiane).

c. The only question is how those third-party machine lease expenses should be forecast on a forward-going basis. The Tribunal considers that a willing buyer, presented with the same information as the Tribunal, would have assumed this OPEX component to continue going forward. The Tribunal will accordingly project for 2014 a third-party machine lease expense amount equal to the average for 2012-2013, and then (conservatively) assume nominal growth on that amount only, tracking projected Mexican inflation rates. The Tribunal is not persuaded that the willing buyer would adopt the new theory presented by BRG at the hearing in this regard, which was factually predicated in its entirety on limited testimony elicited from Mr. and Ms. Burr at the hearing about what their "plans" would have been for the machines but for the closure of the casinos. The Tribunal has not been convinced that this limited testimony, which is light on granularity and devoid of documentary corroboration, would have sufficed to compel a willing buyer to accept so substantial an increase in their offer price.

(v) Other cash flow components

220. The Parties disagree on three further adjustments to the cash flow forecasts: (i) depreciation; (ii) CAPEX; and (iii) net working capital.

221. On depreciation, the Respondent contends that BRG erred when it decided to recalculate annual depreciation based on 2010-2011 information and an estimated life cycle of assets. In particular, the Respondent alleged that the Claimants do not use depreciation data for 2012-2013 even though it is available.[314] The Claimants respond that they did use the historical depreciation rates observed in the financial statements of the Juegos Companies, save for depreciation for periodic renovations.[315] The Tribunal has confirmed the Claimants' approach by reviewing the 2013 financial statements of four of the Juegos Companies which were available.[316] The Tribunal therefore adopts the Claimants' approach in relation to depreciation.

---

314 Rión Second Report, ¶¶ 27, 151, **RER-6**.

315 BRG Presentation, slide 43.

316 *See* Juegos de Video y Entretenimiento de México, S. de R.L. de C.V., Audited Financial Statement, December 31, 2013, **BRG-115**; Juegos de Video y Entretenimiento de Sureste, S. de R.L. de C.V., Audited Financial Statement, December 31, 2013, **BRG-120**; Juegos de Video y Entretenimiento de Centro, S. de R.L. de C.V., Audited Financial Statement, December 31, 2013, **BRG-125**; Juegos de Video y Entretenimiento del D.F., Audited Financial Statement, December 31, 2013, **BRG-134**.

222. On CAPEX, the Respondent contends that the undercounted depreciation would lead to underestimated CAPEX.[317] The Claimants respond that BRG's CAPEX forecast does not rely on the calculated depreciation and therefore it has no impact on the reliability of projections.[318] This is not challenged by the Respondent in its post-hearing brief. Accordingly, the Tribunal accepts that the Claimants' depreciation calculation does not require further adjustments to its CAPEX forecast.

223. On net working capital, the Respondent has adopted the working capital maintained by the group in 2013—equivalent to 17.7 days.[319] The Claimants contend that net working capital should be excluded from the valuation, as the historical ratios are too volatile to form any reliable projection.[320] The Tribunal agrees with the Respondent that the cash flow projections should take into account the net working capital of the group. The Tribunal adopts the figure of working capital equivalent to 17.7 days provided by the Respondent.

2. Term of 2012 Permit and terminal value

224. The Parties dispute when the initial 25-year term of the 2012 Permit would come to an end. The Claimants submit that the 25-year term should run from 2012, when the permit was issued, until 2037.[321] The Respondent submits that the 25-year term should run from 2005, when the E-Mex permit was issued, until 2030.[322]

225. The Tribunal agrees with the Claimants. Not only is the 2037 date consistent with the terms of the 2012 Permit, which provided that its rights would be exercised independently of any rights derived from the E-Mex permit, but it is also supported by two contemporaneous documents produced by SEGOB: its website[323] and an internal document titled "General Diagnosis of Casinos",[324] both of which specifically identify

---

317 Rión Second Report, ¶¶ 27, 151, **RER-6**.

318 BRG Presentation, slide 43.

319 Respondent PHB, p. 88.

320 QEU&S PHB, p. 69.

321 QEU&S Reply, ¶ 84.

322 Rejoinder, ¶ 127.

323 Information on Duration of Exciting Games, SEGOB Website (Dec. 3, 2012), Figure 1, **C-391**.

324 Maria Marcela González Salas y Petricioli Statement, 20 November 2020 (***Salas Statement***), Annex 1, "*Diagnóstico General de los Casinos*", **RWS-1**.

2037 as the end of the term of the 2012 Permit. As the Tribunal has previously observed,[325] the 2012 Permit's reference to the conferral of "rights and obligations in the same terms as [E-Mex's permit]" is most naturally read as defining by cross-reference the contents of the terms and conditions of the E-Mex permit, including the validity term of 25 years that had applied to E-Mex's permit. The Tribunal does not construe that language as conferring a permit with a term of only 18 years, i.e., the balance left on the E-Mex permit when the 2012 Permit was issued.

226. The Claimants have also assumed that the 2012 Permit would have been extended for 15 years, first in 2037 and then subsequently. This is possible under Article 33 of the Gaming Regulation, which provides that "[t]he permits referred to in Section I may be extended for subsequent periods of up to 15 years, provided that the permit holders are in compliance of all their obligations" (emphasis on plural added).[326] The Claimants have also adduced evidence proving that this is what SEGOB has done for other permitholders.[327]

227. While the Tribunal understands that Article 33 leaves some margin of discretion to SEGOB ("may"), the Tribunal accepts that it would have been reasonable for a willing buyer to assume that the 2012 Permit would have been extended for subsequent periods of 15 years as long as its operations remained compliant. The contrary view requires the Tribunal to assume regulatory interference already captured by the country risk element of the discount rate.

3. Discount rate and currency

228. While BRG and Rión have criticised alleged flaws in each other's discount rate computation, they eventually (after Rión accepted much of BRG's critique of the 11.61% discount rate proposed in Rión's first report) landed at striking distance of one another (as Rión put it at the hearing, "pretty close" and "quite similar"):[328] BRG computes a discount rate of 8.16% and Rión 8.7%. Rión's principal critique of BRG's approach relates to currency: BRG estimates the 2014-2019 cash flows in Pesos and translate those amounts into USD at estimated exchange rates, and then estimates post-

325 *See above*, ¶ 105(a).

326 2004 Gaming Regulation, Article 33, **CL-72** (emphasis added).

327 Salas Statement, Annex 1, p. 7, "*Diagnóstico General de los Casinos*", **RWS-1**.

328 Tr. (ENG), Day 9, 2378:15-2378:19 (Rión).

2019 cash flows using the 2019 USD amount as a basis.[329] Rión says this introduces an unnecessary element of speculation. The Tribunal however considers BRG's approach to be commercially reasonable and therefore adopts the discount rate of 8.16% and BRG's approach on currency conversion.

4. Illiquidity discount

229. Rión argues that a 20% illiquidity discount should be applied to the Net Present Value (***NPV***) of the casinos to account for the greater returns that a willing buyer would demand for the acquisition of a privately owned business.[330] They cite a number of studies supporting their position.[331]

230. BRG rejects the application of an illiquidity discount, essentially for four reasons:

a. In the context of determining the FMV or intrinsic value of the Claimants' casinos, it would be inappropriate to reduce the NPV of the Claimants' Casinos future cash flows by assuming that Claimants would sell their shares.[332]

b. Rión's position implies that a willing buyer would request a higher return because their degree of assurance regarding the company's information would be lower than in the case of a publicly traded company, which contradicts the FMV standard that assumes no information asymmetries between the willing buyer and the willing seller.[333]

c. Rion's arguments regarding issues of alleged concentration of shareholder control and decision-making stand unsupported by any analysis or documents.[334]

d. Rion ignores the academic literature showing that the relationship between illiquidity and returns does not hold in markets other than the U.S.[335]

---

329 Tr. (ENG), Day 9, 2380:20-2381:2 (Rión).

330 First Rión Report, ¶ 251, **RER-3**.

331 First Rión Report, ¶ 253, **RER-3**.

332 Second BRG Report, ¶ 60(a), **CER-7**.

333 Second BRG Report, ¶ 60(b), **CER-7**.

334 Second BRG Report, ¶ 60(c), **CER-7**.

335 Second BRG Report, ¶ 60(d), **CER-7**.

231. The Tribunal does not find BRG's last three arguments on the inapplicability of an illiquidity discount convincing:

a. Applying an illiquidity discount is not assuming information asymmetry. An illiquidity discount stems from a willing buyer's observation that a public company is subject to stricter requirements in terms of the quality, quantity and frequency of information disclosed to investors, which increases the perception of risk and thus the demand for a greater return.

b. The applicability of an illiquidity discount is not predicated on the specific examples cited by the studies relied upon by Rión.

c. The study cited by BRG in fact states that "evidence from *other markets* suggest that investors demand a premium for illiquidity", and not only the U.S.

232. The Tribunal, however, does see merit in BRG's first argument, at least insofar as that argument is understood as saying that the Claimants, as willing sellers, cannot be assumed to accept a 20% discount on the NPV of the business because they have no choice but to sell to a *private* willing buyer.

233. Rión cites a paper by Professor Damodaran, where he notes a "rule of thumb" that "[the] illiquidity discount for a private firm is between 20-30% and does not vary across private firms" (a rough-grained observation which he goes on to distil into considerably much more nuance).[336] However, Rión does not point out that he makes this observation solely in regard to the scenario where the willing buyer is a *privately held* company ("private to private transactions" as he refers to them).[337]

234. Elsewhere in his paper, Professor Damodaran expresses the view that, where the willing buyer is a *publicly traded* company, "there should be no illiquidity discount to a public buyer, since investors in the buyer can sell their holdings in a market".[338] Rión's proposal of a 20% illiquidity discount in effect requires the Tribunal to presume that the Claimants would be under a compulsion to sell at a 20% discount because they could only sell to a privately held buyer. The Tribunal finds no evidential support in

336 First Rión Report, ¶ 255, **RER-3**; AD PvtFirm, p.20 (PDF), **RMA-307**.

337 AD PvtFirm, p. 7 (PDF), **RMA-307**.

338 AD PvtFirm, p. 28 (PDF), **RMA-307**.

the record to make that restrictive presumption. It concludes accordingly that the appropriateness of an illiquidity discount in the circumstances of this case has not been established.

C. QUANTUM OF COMPENSATION FOR THE EXPANSION PROJECTS

235. The Parties disagree fundamentally on whether the losses claimed in connection with the Expansion Projects are "reasonably certain" or can be ascertained with "reasonable confidence", such that their quantum can also be determined using a DCF. The Respondent submits that a DCF is inappropriate because of the enormous uncertainty engendered by the very early stage of development of those projects.[339]

1. Cabo and Cancun

236. The Tribunal has already established that the Respondent's breach did not cause the loss of the particular Cabo and Cancun Projects for which the Claimants presented a DCF-based valuation. Those specific projects expired well before the Respondent's breach and for reasons unrelated thereto, including a complete breakdown in the relationship with the relevant business partners and a failure to secure a favourable opinion from the competent local authority in the case of Cabo, and a complete lack of traction with the hoped-for business partners in the case of Cancun. The Tribunal cannot award damages for the demise of two attempted projects that came to their demise due to no fault of the Respondent, on the basis of DCFs that are predicated on cash flow projections and risk factors specific to those failed projects.

237. This leaves the question of whether the Claimants can be awarded compensation for the *loss of a chance or opportunity* to develop two additional physical casinos somewhere in Mexico, as they had the right to do under the 2012 Permit. The Tribunal has already held that the 2012 Permit was an indivisible and integral part of the Claimants' investment, and that the Respondent's breach caused the loss of that 2012 Permit. In this regard, the Tribunal credits the Claimants' submission at the hearing that "it is not supported by record evidence that Claimants simply would have thrown their hands up and said, you know what, these particular discussions didn't go the way we planned, let's scrap Cabo and Cancún, especially when the Cabo and Cancún

339 Counter-Memorial on Merits, ¶ 965.

markets remained untapped …".[340] It stands to reason, and it is undisputed by the Respondent, that, even if these specific Cabo and Cancun projects attempted by the Claimants did not succeed, a willing buyer looking at the 2012 Permit would have taken into account the *opportunity* to make a fresh attempt there or elsewhere in Mexico and therefore would have assigned *some* value to that opportunity.[341] The question then is: *how* is the FMV of that permitted right and the associated opportunity to be determined?

238. There is precedent for assessing damages in investment arbitration on the basis of a loss of a chance, typically consisting of the application of a probability percentage to the NPV of the profits that the opportunity could hypothetically have yielded. The *Gemplus* award (to which both Parties have referred, albeit not in relation to the award's observations regarding a loss of a chance) is one example.[342] After rejecting both the DCF approach of the claimants and the book value approach of the respondent, that tribunal proceeded to determine, "in the exercise of its arbitral discretion",[343] a value for the claimants' shares in the concessionaire. The tribunal did not explain how it arrived at the chosen value (which it fixed somewhere in between the parties' competing valuations) but emphasised it was not acting *ex aequo et bono*.

239. Here, the Tribunal is unable to replicate the *Gemplus* approach. In *Gemplus*, the tribunal found that the respondent's breach did cause the loss of the concession for which the claimants had presented a DCF-based valuation.[344] The tribunal was therefore able to rely on that evidence when assessing damages for the loss of a chance. The same is not true here. The Respondent's breach did not cause the demise of the Cabo and Cancun projects: they had failed of their own accord prior to the valuation date and for reasons unrelated to the breach. As a result, the DCF-based valuations of those particular projects, predicated on cash flow projections and risk factors specific to those failed projects, also offer no basis from which the Tribunal could reliably

---

340 Tr. (ENG), Day 1, 189:9-189:14 (QEU&S Claimants' opening submission, D. Salinas)

341 Respondent PHB, p. 63.

342 *Gemplus S.A. and others v. United Mexican States* and *Talsud S.A. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010, **CL-232**.

343 *Ibid.*, ¶ 13-100.

344 *Ibid.*, ¶ 15.13.

derive loss of a chance damages (for example by applying a probability factor to those valuations).

240. There is no other evidence from the Claimants upon which the Tribunal can rely for the purpose of assessing the value of the lost opportunity. The Claimants took the strategic decision not to plead an alternative damages case based on the loss of a chance and, accordingly, not to tender any evidence of the value of the right in the 2012 Permit to develop two further casinos. In response to questions from the Tribunal, they confirmed that theirs was "a different quantum scenario"[345] and that, even assuming the Tribunal found against them on causation, theirs was "something else" from a loss of a chance case.[346] In other words, the Claimants decided not to hedge their bet and instead relied solely on their valuations of the failed Cabo and Cancun Projects.

241. The Respondent, on the other hand, did present a valuation of the loss of the opportunity associated with the Claimants' right to develop two further casinos. The Respondent's expert, Rión, assigns a value of US$1,425,000 to the right to develop one additional casino.[347] Rión derives that value from the purchase price of US$28,500,000 that the Claimants agreed to pay for the permit of Eventos Festivos (***EV***) in 2008, through the acquisition of EV. EV's permit conferred the right to develop and operate 20 dual-function casinos. Rión's valuation is simple arithmetic: 5% of US$28,500,000 is US$1,425,000. Rión says that this is "in the upper range" of the FMV of the right to open a casino.[348]

242. The Claimants and BRG criticise Rión's reliance on the EV transaction on the basis that: (i) a DCF approach is the more appropriate methodology; (ii) the EV "offer does not in fact reflect a market transaction as no money was exchanged nor any agreements signed"; (iii) Rión did not present any analysis why the EV transaction should be

345 Tr. (ENG), Day 1, 191:10 (QEU&S Claimants' opening submission, D. Salinas)

346 Tr. (ENG), Day 1, 191:19-192:5 (QEU&S Claimants' opening submission, D. Salinas)

347 First Rión Expert Report, ¶ 187, **RER-3**; Second Rión Expert Report, ¶ 202, **RER-6**.

348 Second Rión Report, ¶ 202, **RER-6**.

considered a FMV offer; and (iv) the EV transaction predates the valuation date by six years.[349]

243. As explained above, point (i) is inconsequential where the DCF presented by BRG pertains to two specific projects that failed of their own accord. Point (ii) is incorrect: a Share Purchase Agreement (***SPA***) was in fact signed (albeit not closed) and money (a deposit of US$1 million that the Claimants paid and subsequently forfeited) was exchanged. However, the Tribunal does see merit in point (iii). For example, at the time of the EV SPA there was an element of uncertainty as to whether SEGOB would lift the geographical restrictions of the EV permit for new casinos.[350] In the Tribunal's view, that uncertainty can be reasonably argued to have placed downward pressure on the price the Claimants were willing to pay for the EV permit. The Tribunal also sees merit in point (iv): what a willing buyer may have offered for the EV permit in 2008 is likely to be different from what the buyer would have offered in 2014, as market conditions are bound to change over a period of six years. Rión counters this by arguing that the value would have been higher in 2008 as the market was less mature than in 2014.[351]

244. The Tribunal has no doubt that the Rión approach based on the EV transaction is rough-grained, not in the least due to its temporal distance from the valuation date. However, the Tribunal also notes in this regard that the Claimants themselves, in the April 2013 draft subscription agreement for the Cabo project, provided that "the Mexican subsidiary will purchase the license (the "License") for the operation of the Casino from B-Mex II, LLC, a Colorado limited liability company managed by the principals of the Company and Exciting Games, for USD $1.5 million."[352] Assuming that intended purchase would have been at arm's length, it suggests a FMV of US$1,500,000—broadly consistent with the US$1,425,000 suggested by Rión.

245. The Tribunal further notes that, while BRG rightly criticises certain aspects of Rión's approach, they have not provided the Tribunal with evidence that can support an

---

349 Second BRG Report, ¶ 155, **CER-7**.

350 E. Burr Third Statement, ¶ 40, **CWS-51**; Eventos Festivos Share Purchase Agreement (Feb. 21, 2008), clause 3(e), **C-250**.

351 Second Rión Report, ¶ 195, **RER-6**.

352 Draft Subscription Agreement between B-Cabo LLC and Medano Beach Hotel, S. de R.L. de C.V. (Apr. 16, 2013), p. 15, **C-466**.

alternative loss of opportunity valuation. In their second report, BRG stated the following:

> Rión's use of the cost approach fails to capture the intrinsic value of these licenses. For example, even the average value of Claimants' Casinos from the start of their operations, which is approximately USD 58.7 million for two licenses, provides an indicator of the intrinsic value of these licenses in the hands of Claimants.[353]

246. In the accompanying footnote, BRG added the following:

> This value is calculated as follows: (i) we update the estimated historical cash flows of each of Claimants' Casinos to the Date of Valuation using inflation; (ii) we add the updated historical cash flows to the NPV of the forecasted cash flows as of the Date of Valuation; and (iii) we calculate the average and multiple by 2 to reflect the two licenses for Cabo and Cancun. It is important to note that this is a simplified analysis that could be overestimating or underestimating the initial CAPEX required to open a casino with similar characteristics to those of Claimants' Casinos. See BRG Updated Damage Calculations for Claimants' Casinos, sheet "NPV License Alternative Value" (Ex. BRG-165).[354]

247. In their oral presentation, BRG referred to this US$29.3 million as "a reference point".[355] It is unclear whether BRG intended this to be taken as evidence of the value of the lost opportunity (BRG's slide deck presented at the hearing did state "[w]e provided *an alternative value per license* based on the average value of each of the five active casinos"[356]), or whether it was intended only as a credibility challenge of the Rión valuation. Whichever it is, however, the Tribunal does not accept that even a reliable "indicator" or "reference point" for the value of the opportunity to invest in the development of a new casino in a different location can be derived by (i) adding updated historical cash flows to BRG's projected NPVs for each of the five existing casinos; (ii) adding up the five figures thus arrived at; and (iii) dividing them by five.

248. A willing buyer of the 2012 Permit would not look at the existing Villahermosa casino, for example, add US$5.8 million in updated historical cash flows to that casino's FMV of US$22.3 million, and conclude that the price they should therefore pay for the opportunity to invest in the development of a future casino in a different market is

---

353 Second BRG Report, ¶ 154, **CER-7**.

354 Second BRG Report, ¶ 154, footnote 324, **CER-7**.

355 Tr. (ENG), Day 8, 2188:15-2188:20 (S. Dellepiane).

356 BRG Presentation, slide 34 (emphasis added).

US$28.2 million—i.e., almost *25% more* than the price to be paid for the up-and-running Villahermosa casino. While that is not BRG's suggestion, it is BRG's suggestion that the willing buyer would go on to repeat that same exercise for the four other existing casinos, divide the total by five, and conclude that the average of US$29.3 million is the price they should pay for the opportunity to invest in the development of a new casino in a different market.[357] This strikes the Tribunal as implausible. On BRG's valuation, the total FMV of the five casinos is US$162.4 million;[358] one fifth of that is US$32.5 million. According to BRG's suggestion, a willing buyer would agree to pay *90%* of the average price of the five existing casinos, and *more* than the value of the majority of those existing casinos, simply to have the opportunity to develop from scratch another casino elsewhere. That suggestion meets with a logical challenge and, to the Tribunal's mind, does not advance the analysis.

249. The Tribunal cannot value the right of the 2012 Permit to open two additional casinos in Mexico in an evidential vacuum or on an *ex aequo et bono* basis. The only evidence valuing the lost opportunity to launch two further casinos indicates a range of US$1,425,000-1,500,000 per casino. On that basis, the Tribunal values that opportunity at US$1,500,000 per casino.

250. The Tribunal rejects the Respondent's argument that the Claimants should be compensated for only one "unused license" rather than two because on the date of valuation they operated a temporary facility in a sixth location (Huixquilucan). The Tribunal accepts the Claimants' evidence in this regard that they operated the temporary location in Huixquilucan only because of a proposed legislative bill that would have "cancelled unused licenses under permits for locations that were not being opened according to the buildout schedule associated with the permit" and that the goal of the temporary facilities was "not to risk their cancellation".[359] A willing buyer looking at the 2012 Permit, which imposed no geographical restrictions, would therefore have assumed that the buyer would be able to close that temporary facility and open a new casino elsewhere. The Tribunal notes in passing that the record does

---

357 BRG presentation, slide 34.

358 BRG presentation, slide 9.

359 Erin Burr Fourth Witness Statement, 6 December 2021 (***E. Burr Fourth Statement***), ¶ 45, **CWS-60**.

not evince the outcome of this legislative bill and that no Party has suggested that it might have impacted the willing buyer's valuation of the 2012 Permit.

251. In light of all of the foregoing, the Tribunal determines the FMV of the 2012 Permit right to open two further casinos at US$3,000,000.[360]

2. Online casino

252. BRG has proposed (using exclusively the DCF method) a FMV of US$35.7 million for the online project, as of the date of valuation.[361] As set out above, the Tribunal has found that the Claimants only abandoned this specific project because of the Respondent's breach. Therefore, unlike with the failed Cabo and Cancun Projects, a willing buyer must be assumed to consider the value of this specific project in setting its offer price.

253. The Tribunal disagrees with the Claimants, however, that the FMV of the online casino project can be established with a reasonable level of confidence using a DCF, especially without performing any cross-checks using alternative valuation methodologies.[362] The willing buyer would have seen a project that remained little more than a business plan at the time of the hypothetical transaction:

a. The Claimants had no prior experience whatsoever in online casinos, and most of the income in online casinos is derived from sports betting, which accounted for a very small fraction of the Claimants' operations in their physical casinos.

b. The project had not yet reached the stage of any signed contractual agreements with the Claimants' hoped-for business partners: a draft contract was negotiated with Bally by July 2013 but then was never executed, and the Claimants had not yet even negotiated a draft contract with PokerStars by the time the casinos were

---

360 The Tribunal has already found that, contrary to what the Claimants have alleged, there is no evidence that they "invested" US$2,500,000 of equity in the Cabo and Cancun Projects, and that none of the alleged debt investments by certain Claimants in those projects constitutes a protected investment, save for Claimant B-Cabo LLC's residual US$85,000 debt interest in Medano Beach. The Tribunal notes that the Claimants' quantum case regarding the Expansion Projects seeks no specific relief in respect of that debt interest of B-Cabo LLC and, based on its finding that the Respondent's breach did not cause the loss of the failed Cabo and Cancun Projects, concludes in any event that the Claimants have failed to establish a right of B-Cabo LLC to damages for the loss of that debt interest.

361 Second BRG Report, p. 85 (PDF), Figure 20, **CER-7**.

362 Tr. (ENG), Day 9, 2542:4-2547:6 (E. Pacheco).

closed (the record only contains a February 2014 memo outlining potential transaction structures and terms).

c. The Claimants by that time had also not yet made *any* of the "initial investments" contemplated in their business plan, including the purchase of the servers that would host the online operation.

d. The most recent version of the progress chart shows only little progress in only the first of the five phases leading to the launch (the Tribunal does not give credence to Mr. Moreno's explanation, first offered at the hearing, that this was only because "Bally was the one who took charge of filling in these spaces"[363] and they had failed to update the project schedule).

e. There is no evidence to suggest that the Claimants had prepared and filed any of the relevant paperwork with SEGOB.

f. The evidence suggests that the deal offered by Bally was a "white label" product which it could make available at any time to any of E-Games' competitors in Mexico.

254. The Tribunal therefore declines to award the Claimants compensation on the basis of the DCF-based valuation presented by BRG. Again, however, the Tribunal also accepts that a willing buyer would place some value on the permit right to develop an online casino. The record contains evidence of the value that the Claimants themselves ascribed to that right. The business plan for the online casino contains a table titled "initial investment".[364] The first row in that table is titled "permits" and it lists "EG | 1,500,000". The Tribunal agrees with the Respondent that this is a reference to the USD cost fixed by the Claimants to acquire the right to launch the online casino from E-Games.[365] Absent any evidence placing a different valuation on that right, the Tribunal is content to fix its value at US$1,500,000.

---

363 Tr. (ENG), Day 5, 1273:20-1273:21 (J. Moreno).

364 Online Gaming Investment Project, **C-338**, p. 6 (PDF).

365 Respondent PHB, p. 49 (PDF).

D. TAX ADJUSTMENTS

255. There are two distinct tax issues that the Claimants have raised: (i) whether a MXN $170,475,625 claim for back taxes against E-Games by the Respondent's federal tax agency, the SAT, partially resolved by the Mexican courts in the SAT's favour, should be reflected in the amount of compensation owed for the existing casinos, and (ii) whether the Respondent can tax any damages award in the Claimants' favour.[366]

256. As regards issue (i), the Tribunal considers that a willing buyer would have accounted for this liability when negotiating the hypothetical transaction. The Claimants acknowledge the existence of this liability, but they argue that it should not affect the amount of compensation owed because the liability is the result of an unlawful conspiracy implicating the SAT.[367] The Tribunal, however, has found that this allegation has not been proven.

257. The Tribunal has previously rejected the allegation that the Claimants were the victim of a multi-agency conspiracy that included the President of the Republic, senior members of the judiciary and municipal authorities. The Tribunal similarly finds no support in the record for the thesis that the SAT was part of any such conspiracy. The liability was imposed in February 2014 as a result of an audit that was initiated in 2012,[368] i.e., before the PAN came to power and appointed Ms. Salas to head up SEGOB. The SAT's finding regarding this liability was challenged unsuccessfully by E-Games in the Mexican court system, up to the Supreme Court, which dismissed E-Games' *recurso de revisión* in April 2018.[369] The evidential record does not evince procedural aberrations or judicial misconduct of the kind that would sustain a denial of justice. Mr. Gutiérrez's hearsay evidence, that "[d]uring the follow-up talks I had with the tax lawyers, they told me they had been informed by various judicial officers that this matter had strong political implications and that many people would come to ask about its status",[370] offers no convincing proof in this regard. Even if the courts

366 QEU&S PHB, pp. 75-76.

367 QEU&S Reply, ¶ 850.

368 E. Burr Third Statement, ¶ 139, **CWS-51**.

369 Gutiérrez Fourth Statement, ¶ 107, **CWS-52**.

370 Gutiérrez Fourth Statement, ¶ 107, **CWS-52**.

had erred in their interpretation of Mexican tax law, that would not render their decisions internationally unlawful.

258. The question then is how this tax liability should be accounted for in the quantum of compensation owed to the Mexican Companies. The Respondent submits that the taxes owed are "a liability that any potential buyer would have discounted from the value of the acquisition in a market transaction and, therefore, it must be discounted from the compensation amount".[371] The Tribunal agrees. The Tribunal considers that the willing buyer would have negotiated either (i) a price adjustment reflecting the additional tax payment in 2014; or (ii) an indemnity for the amount of that price adjustment (for the scenario where a judicial recourse was pursued but failed, as in fact occurred). In either case, the Claimants would have seen the Mexican Companies' proceeds from the hypothetical sale reduced by the price adjustment. The Tribunal has accordingly reduced the compensation owed the Mexican Companies by MXN$170,475,625.

259. As regards issue (ii), the compensation owed by the Respondent to the Mexican Companies under this Award already reflects payment of all Mexican taxes applicable to the projected cash flows. The Tribunal agrees with the Claimants that any further taxation of the compensation owed would therefore result in double taxation, which is inconsistent with the *Chorzow* principle of full reparation, and notes that the Respondent does so as well: "we understand that the claim was submitted under Article 1117 and any award against Mexico would be paid to the Juegos Companies/E-Games", in which case "the only thing that should be discounted is the [MXN$170,475,625] tax credit mentioned before".[372] The Respondent shall therefore ensure that the Mexican Companies are paid the amounts ordered in this Award net of any and all further taxation in Mexico.

371 Respondent PHB, p. 92.

372 Respondent PHB, p. 92.

E. COMPUTATION OF THE FMV OF THE EXISTING CASINOS AND THE EXPANSION PROJECTS

260. In order to compute the FMV of the existing casino businesses, the Tribunal has used BRG's DCF in BRG-165 as a basis and made the following changes to the workbook:

a. Assume a nominal revenue growth rate of 3.5% for 2014-2019;

b. Assume that labour costs will increase in line with revenue;

c. Reverse BRG's 25% reduction in security-related expenses in 2014;

d. Reverse the adjustments relating to Ms. Conley's departure and unparticularised savings;

e. Project for 2014 a third-party machine lease expense amount equal to the average for 2012-2013 and assume nominal growth on that amount tracking projected Mexican inflation rates;

f. Assume net working capital equivalent of 17.7 days; and

g. Deduct from the NPV of the existing casino businesses, on a pro rata basis, the additional tax payment of NPV MXN$170,475,625 on account of back taxes owed to SAT in 2014.

261. Based on these adjustments, the Tribunal fixes the FMV of the existing casino businesses as follows:

a. Naucalpan Casino: US$19,426,520

b. Villahermosa Casino: US$8,692,410

c. Puebla Casino: US$13,358,000

d. Cuernavaca Casino: US$21,598,200

e. DF Casino: US$13,292,040

262. The aggregate of these amounts, US$80,867,200, compares to the Claimants' aggregate valuation of US$162.4 million and the Respondent's aggregate valuation of US$11.86 million

263. As previously indicated, the Tribunal agrees with the Respondent that, in accordance with Article 1135(2) of the Treaty, this compensation must be paid to the respective Juegos Companies,[373] i.e., Juegos de Video y Entretenimiento de México, S. de R.L. de C.V. (Naucalpan Casino), Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (Villahermosa Casino), Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. (Puebla Casino), Juegos y Video de México, S. de R.L de C.V. (Cuernavaca Casino), and Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. (DF Casino).

264. The Tribunal has already fixed the FMV of the right to launch, develop and operate two further casinos and an on-line casino at US$4.5 million. This compensation amount compares to US$155 million proposed by the Claimants and US$1,425,000 proposed by the Respondent for the Expansion Projects.

265. This amount must be paid to E-Games, the owner of the 2012 Permit conferring that right.

F. PRE- AND POST-AWARD INTEREST

266. In the context of a lawful expropriation, Article 1110(4) of the Treaty requires payment of interest at a "commercially reasonable rate". The Tribunal agrees with the Parties that the same is true in the case of compensation for breach of the Treaty.

267. The Parties have not proposed different rates pre- and post-award. The Respondent and Rión have proposed the U.S. prime rate (as at April 2014) of 3.25%[374] As to the Claimants and BRG, there has been a slight shift in emphasis over the course of the proceeding. In their Reply, the Claimants argued for a "commercially reasonable interest rate (that is, 4.57%, or, in the alternative, 7.57%)".[375] In the second BRG report accompanying the Reply, BRG "conclude[d] that the appropriate rate for pre-award interest is at least 4.57%, or equal to the cost of debt Claimants would have

---

373 Respondent PHB, pp. 76 ("si el Tribunal determinara, por ejemplo, que México expropió los casinos existentes y dicha reclamación se presentó al amparo del artículo 1117, el laudo debe ordenar que el monto se pague a las Empresas Juegos porque ellas eran las dueñas de los casinos."); 78 ("La Demandada solicita, por lo tanto, que el Tribunal determine que la reclamación asociada al valor de los casinos existentes se presentó a nombre de las Empresas Juegos y cualquier monto a pagar por una posible violación al Tratado se les liquide a dichas empresas."). Similarly, in its post-hearing brief, the Respondent recorded its understanding that "any award against Mexico would be paid to the Juegos Companies/E-Games". Respondent PHB, p. 92.

374 Respondent PHB, p. 93; Second Rión Report, ¶ 9, **RER-6**.

375 QEU&S Reply, ¶ 1250.

faced but for the measures (7.57%)". At the hearing, however, BRG headlined its interest slide with "Claimants' cost of debt (7.57%) is the appropriate rate" and computed interest on that basis.[376] In their post-hearing brief, the Claimants similarly state that "BRG's proposed pre- and post-Award interest rate is 7.57%, which represents Claimants' cost of borrowing", and that "[i]n any event, the applicable interest rate should never fall below Mexico's own cost of debt (i.e., 4.57%)".[377]

268. The Tribunal agrees with BRG that the U.S. prime rate does not ensure full reparation. It implicitly (and unrealistically) assumes that the Claimants can borrow at the U.S. prime rate, which the Respondent accepts is only available to the "most creditworthy customers" of U.S. commercial banks.[378] It also perversely places a lower cost on non-payment of the Award than what the Respondent must pay for its USD-denominated debt. The Tribunal is aware that some tribunals in expropriation cases have awarded interest at a rate reflecting the investor's cost of debt, on the basis that doing so compensates them "for the cost for having to borrow the amount of money that should have been, but was not, made available to Claimant" at the time of the expropriation.[379]

269. In the circumstances of this case, the Tribunal considers that the alternative rate of 4.57% proposed by BRG is commercially reasonable. The Parties agree that interest should be compounded annually,[380] and the Tribunal is content to adopt that agreement.

---

376 BRG Presentation, slide 36.

377 QEU&S PHB, p. 76.

378 Rejoinder, ¶ 921.

379 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1792, **RL-092**.

380 QEU&S Reply, ¶ 1251(ii); Rejoinder, ¶ 926.

IX. COSTS

270. The Parties submitted the following statements on costs:

a. The QEU&S Claimants:[381]

QEU&S CLAIMANTS' COSTS AND FEES (USD)	
ATTORNEYS' FEES	
Quinn Emanuel	$18,977,206.50
Ríos-Ferrer	$353,723.60
Mr. Ayervais	$112,818.75
Reed Smith	$269,038.50
TOTAL ATTORNEYS' FEES	
Total	$19,712,787.35
EXPERT FEES AND DISBURSEMENTS	
Luis Omar Guerrero Rodríguez	$417,287.79
Ezequiel González Matus	$174,095.00
Claudio Jiménez de León	$21,545.00
Michael Soll	$74,757.50
Berkeley Research Group	$909,884.35
TOTAL EXPERT FEES AND DISBURSEMENTS	
Total	$1,597,569.64
SHARE OF ADVANCE ON ARBITRATION COSTS	
Third Advance Payment	$150,000.00
Fourth Advance Payment	$243,421.00
Fifth Advance Payment	$146,053.00
TOTAL SHARE OF ICSID'S CASE DEPOSIT	
Total	$539,474.00
OTHER COSTS – ADDITIONAL ARBITRATION-RELATED EXPENSES	
Black Cube Investigation	$487,924.19
Harris, Wiltshire & Grannis LLP	$8,655.00
Travel and Lodging Costs	$142,900.81
Meals	$53,090.06
Online Research and Hosting Services	$20,291.53
Translation Services	$110,290.83
Trial Graphics Consultants	$55,488.99
Document Reproduction Services and Word Processing	$102,175.24
Postage, Express Mail, and Courier Services	$6,242.86
Teleconference Services	$56.45
Miscellaneous Costs	$191,185.10
TOTAL OTHER COSTS	
Total	$1,178,301.06
TOTAL FEES AND COSTS	
$23,028,132.05	

381 QEU&S Claimants' Statement on Costs, 10 February 2023, Annex A.

b. Claimant Taylor:[382]

CLAIMANT TAYLOR'S COSTS AND FEES (USD)	
Attorney Fees (Consultant on Retainer, 18 months @$1000)	$18,000.00
Share of Advance Arbitration Costs	$10,556.00
Expert Fees	$0.00
OTHER ASSOCIATED COSTS	
Translation Costs (for the Two Taylor filings)	$5,545.00
Shipping/FedEx	$1,171.52
Copies, Binders, Office Supplies	$2,422.39
HEARING EXPENSES	
Airfare (San Antonio, TX to Washington DC and return)	$613.72
Hotel (16 nights)	$3,181.84
Meals ($60 per day x 16)	$960.00
Miscellaneous (Taxi fares, covid tests, dry cleaning)	$254.14
TOTAL FEES AND COSTS	
$42,704.61	

c. The Respondent:[383]

RESPONDENT'S COSTS AND FEES (USD)		
CONCEPTO	**PERSONA/ENTIDAD**	**MONTO TOTAL**
Pagos de Administración	CIADI	$400,000.00
Representantes Legales	Secretaría de Economía	$21,537.61
Consultores Jurídicos Externos	Tereposky & DeRose LLP	$1,856,938.50
	Pillsbury Winthrop Shaw Pittman LLP	$9,052.00
Expertos	Lazcano Sámano, S.C	$19,708.74
	Javier Mijangos y Gonzalez	$56,310.68
	Rión M&A, S.C	$298,446.60
	Bufete Díaz Mirón y Asociados, S.C	$7,281.55
Viáticos de los Representantes Legales.	Secretaría de Economía	$28,596.47
Viáticos de Testigos		$17,784.04
TOTAL FEES AND COSTS		
$2,715,656.19		

382 Claimant Taylor's Statement of Costs, 10 February 2023.

383 Respondent's Statement of Costs, 10 February 2023, pp. 1-2.

271. The arbitration costs, including (i) the fees and expenses of the Tribunal, (ii) ICSID's administrative fees and (iii) any other direct expenses relating to the administration of the proceeding (the ***Arbitration Costs***) amount to (in US$):

Arbitrators' fees and expenses	
Gaëtan Verhoosel	513,393.85
Gary Born	261,821.09
Raúl Vinuesa	472,025.34
Independent Expert (Jeremy Sharpe)	36,487.50
ICSID's administrative fees	336,000.00
Direct expenses	379,648.95
Total arbitration costs	**1,999,376.73**

272. The Arbitration Costs have been paid out of the advances made by the Parties.[384] The total amount of the advance payments received from the parties will be reflected in ICSID's final financial statement. The Tribunal notes that in paragraph 266 of the Partial Award it had deferred its decision regarding the Arbitration Costs in connection with the first phase of this arbitration.

273. The Tribunal has wide discretion under Article 58 of the Arbitration (Additional Facility) Rules to allocate all costs, including attorney fees, expenses and the Arbitration Costs, as it deems appropriate. The Tribunal considers that, absent contrary agreement by the parties, the guiding principle should be that costs follow the event.

274. Here, the "event" does not set a single direction of travel:

    a. *Liability*. The Claimants have prevailed on their claim that SEGOB's conduct engaged the Respondent's international responsibility under Article 1105, but they have not prevailed on their claim that the conduct of the Respondent's courts engaged the Respondent's international responsibility under Article 1105.

[384] The remaining balance in the case account will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

b. *Causation*. The Claimants prevailed on the questions of contributory negligence and illicit business practices, but they failed to establish that the Respondent's breach caused the loss of the Cabo and Cancun Projects.

c. *Quantum*. The Respondent has prevailed on its case that the quantum of compensation should be significantly less than what was claimed by the QEU&S Claimants (47% for the existing casinos and 2.9% for the Expansion Projects), but the quantum awarded for the existing casinos is still higher than what the Respondent had argued for (~x7).

275. The Tribunal considers that, on this basis, costs will follow the event where the Respondent is ordered to pay 50% of the QEU&S Claimants' reasonable costs. Given the unusual procedural posture of Claimant Taylor, the Tribunal addresses his cost claim separately below.

276. As to which of the costs claimed by the QEU&S Claimants can be considered reasonable, the Tribunal considers it appropriate to make a number of adjustments:

a. *Delta between the Parties' counsel fees.* There is a substantial discrepancy between the counsel fees claimed by the QEU&S Claimants (~$20 million) versus those claimed by the Respondent (~$1.9 million): a ratio of approximately 1 to 10. While the Tribunal understands that this delta is due, in part, to the fact that part of the Respondent's counsel team consisted of in-house counsel and that considerable variation can be observed in the legal services market as regards the cost of high-quality representation in investment arbitration, an assessment of reasonableness cannot be blind to so significant a delta where both counsel teams acted with the same measure of competency, effectiveness, integrity and courtesy. The Tribunal accordingly considers it reasonable to reduce the counsel fees of the QEU&S Claimants to be apportioned by 40%. The contingent nature of these fees does not affect their eligibility for a cost award where QEU&S have represented that they correspond to 22,231.5 recorded hours of fee-earner work, at a blended rate of US$853.6.

b. *Conflicts counsel fees.* The QEU&S Claimants instructed Reed Smith as conflicts counsel in light of Claimant Taylor's withdrawal from the joint representation of the Claimants and his illegality allegations against some of the

QEU&S Claimants. The Tribunal considers that no portion of these fees should be awarded against the Respondent, as they were caused by disagreements between the Claimants. The same is true for the fees of Harris, Wiltshire & Grannis LLP.

c. *Black Cube fees.* The Tribunal having found that the Black Cube Evidence was of no assistance to the Tribunal, it considers that no portion of those fees should be awarded against the Respondent.

277. Based on the foregoing, the Tribunal awards the QEU&S Claimants a total of US$6,972,783.90 in costs (excluding their share of the advances on the Arbitration Costs for this phase) out of US$22,488,658.05 claimed:

Cost item	**Claimed (US$)**	**Awarded (US$)**
Attorney fees	19,712,787.35	5,833,124.64
Expert fees and disbursements	1,597,569.64	798,798.32
Other arbitration-related costs	1,178,301.06	340,860.94
TOTAL	**22,488,658.05**	**6,972,783.90**

278. As regards the Arbitration Costs, the Tribunal orders the Respondent to pay the QEU&S Claimants 25% of the total Arbitration Costs paid out of the advances received by the Centre from the Parties (as detailed in paragraph 271 above) for an amount of US$ 499,844.18.

279. Turning to the cost claim by Claimant Taylor, an unusual procedural incident occurred in this phase of the proceeding after Claimant Taylor decided to leave the group of the QEU&S Claimants.

280. In his Reply submission, Claimant Taylor submitted that his "claims that the Casinos were shut down illegally and/or subject to confiscation are virtually identical to the claims made by the other Claimants"[385] and did not make any submissions regarding those claims.

281. However, he strenuously argued (and proffered evidence) that (i) the Cabo and Cancun casino projects were "dead" prior to and for reasons unrelated to the closure of the existing casinos by SEGOB;[386] and (ii) some of the QEU&S Claimants engaged in

385 Taylor Reply, ¶ 4.

386 Taylor Reply, ¶ 37.

illegal conduct in the operation of the casinos.[387] While the Tribunal found assistance in Claimant Taylor's evidence regarding (i), the same does not apply to (ii): the evidence elicited by Claimant Taylor regarding those allegations in witness examinations that took up considerable hearing time ultimately proved inconsequential to the outcome.

282. The Tribunal is further mindful that (i) Claimant Taylor insisted on producing a large number of documents to the Respondent notwithstanding protestations by the QEU&S Claimants that many of them were privileged and/or confidential to them; (ii) as a result, the document production process required the appointment of the Privilege Expert and became particularly protracted and costly; and (iii) the Tribunal ultimately upheld the vast majority of the QEU&S Claimants' privilege claims.

283. Weighing all of the foregoing factors, the Tribunal awards Claimant Taylor no costs.

[387] Taylor Reply, ¶¶ 46, 47, 56, 62.

X. DISPOSITIF

284. For the reasons set out above, the Tribunal, by unanimity in respect of (a) below and by majority in respect of (b) to (e) below:

a. Declares that the Expansion Projects are protected investments under the Treaty insofar as they include (i) the right of E-Games under the 2012 Permit to establish and operate two further dual-function casinos and an online casino and (ii) Claimant B-Cabo LLC's US$85,000 debt interest in Medano Beach;

b. Declares that the treatment accorded by SEGOB to the Claimants' investments breached the Respondent's obligations under Article 1105 of the Treaty;

c. Orders the Respondent to pay compensation, net of any and all further taxation by the Respondent but without prejudice to any right that any person may have in the relief under applicable domestic law, in the amount of:

(i) US$4,500,000 to E-Games;

(ii) US$19,426,520 to Juegos de Video y Entretenimiento de México, S. de R.L. de C.V.;

(iii) US$8,692,410 to Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V.;

(iv) US$13,358,000 to Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V.;

(v) US$21,598,200 to Juegos y Video de México, S. de R.L de C.V.; and

(vi) US$13,292,040 to Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V.

d. Orders the Respondent to pay interest on the amounts specified in paragraph 284(c) above at a rate of 4.57%, compounded annually, until such time as that amount of compensation has been paid in full; and

e. Orders the Respondent to pay the QEU&S Claimants (i) US$6,972,783.90 in partial reimbursement of their costs incurred in connection with this phase of the

arbitration and (ii)US$ US$ 499,844.18 corresponding to Arbitration Costs paid out of the advances received by the Centre.

Seat of arbitration: Toronto, Canada

Prof. Gary Born
Arbitrator
Date 10 JUNE 2024

Prof. Raúl Emilio Vinuesa
Arbitrator
Subject to the partial dissenting opinion attached
Date:

Dr. Gaëtan Verhoosel
President of the Tribunal
Date:

Prof. Gary Born
Arbitrator
Date

Prof. Raúl Emilio Vinuesa
Arbitrator
Subject to the partial dissenting opinion attached
Date: JUN 14 2024

Dr. Gaëtan Verhoosel
President of the Tribunal
Date:

Prof. Gary Born
Arbitrator
Date

Prof. Raúl Emilio Vinuesa
Arbitrator
Subject to the partial dissenting opinion attached
Date:

Dr. Gaëtan Verhoosel
President of the Tribunal
Date: 21 June 2024

IN AN ARBITRATION UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE ICSID ADDITIONAL FACILITY RULES

B-Mex, LLC and others

v.

United Mexican States

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

PARTIAL DISSENT ON THE MERITS BY PROFESSOR RAÚL E. VINUESA

TABLE OF CONTENTS

I dissent from the majority's conclusion that the treatment accorded by SEGOB to the Claimants' investment falls below the Fair and Equitable Treatment (FET) standard required under NAFTA Article 1105 (Award, ¶¶ 78 *et seq*). Consequently, I dissent from the majority's conclusions as to the existence of a compensable damage and the lack of causation in order to determine its quantum (Award, ¶¶ 182 *et seq*).

I also dissent from the majority's assertion that the termination of Claimants' permits is based on the change of political leadership in the Mexican Government (Award, ¶¶ 93 *et seq*).

I dissent from the majority's presumption that SEGOB should have implemented other alternatives available to it so as not to terminate the permits and, thus, preserve the continuity of the investments (Award, ¶¶ 103 *et seq*).

I fully agree with the Award's decision whereby the treatment accorded by the Respondent's domestic courts to the Claimants' investments does not constitute a denial of justice under international law (Award, ¶¶ 120 *et seq*). However, I dissent from the majority's determination whereby the absence of a denial of justice does not absolve the Respondent of international responsibility for SEGOB's conduct in breach of the FET standard (Award, ¶¶ 137 *et seq*).

Even though I share the Award's conclusions as to the irrelevance of the evidence obtained by Black Cube, I dissent from the majority's assertion in paragraph 146 of the Award that the mere interpretation and application of Mexican law on Data Protection shows that such evidence was procured and introduced into the record of this proceeding in violation of that law. In the understanding that such evidence was obtained in violation of applicable law, I readily dissent from the majority's finding that the *Black Cube* Evidence is admissible.

As a consequence of the foregoing, I disagree with the majority's decision on the allocation of the costs of the proceeding and the allocation of fees and other costs of the Parties, in the understanding that the costs of the proceeding should be equally shared and that fees and other costs should be borne by the Party that incurred them.

Lastly, I consider that the evidentiary record made it possible to claim the Respondent's international responsibility for the grant to *E-Games* of the 2009 and 2012 Permits in breach of the Mexican law in force and effect on the regulation of activities regarding gambling and raffles.

It is worth pointing out that the majority states its own interpretation of this dissent in paragraph 70 of the Award. It is also worth clarifying that, as to the decisions heralded in the Award as adopted "by the Tribunal", only the decisions contained in the paragraphs in which, in accordance with this submission, I do not state my dissent should be understood as such.

Now, I proceed to state the reasons for my partial dissent.

I. THE ACTIONS AND OMISSIONS ATTRIBUTABLE TO SEGOB IN RELATION TO THE TERMINATION OF THE PERMITS WERE NOT IN BREACH OF THE FET OBLIGATION UNDER NAFTA ARTICLE 1105

1. I dissent from the majority's conclusion that the treatment accorded by SEGOB to the Claimants' investments falls below the Fair and Equitable Treatment (FET) standard under NAFTA Article 1105.[1]

2. I also dissent from the majority's assertion that "… SEGOB's revocation of the 2009 Permit did not affect the Claimants' operations because SEGOB had by then granted *E-Games* the 2012 Permit. To the Tribunal's mind, it was therefore this last decision by SEGOB to grant *E-Games* its own 2012 Permit…" that ensured the continuity of the Claimant's business.[2]

3. This assertion by the majority ignores not only the express contents of the SEGOB order of November 2012, but also disregards the text of the court decision that declared the non-subsistence of the Permit granted by such order. Moreover, it runs afoul of this Tribunal's unanimous decision as to the legality of the non-subsistence of such permit given the absence of a denial of justice in the proceeding concerning Amparo 1668/2011.

4. The majority fails to analyze the contradictions existing in both the whereas clauses and the *dispositif* of the SEGOB order granting the permit in November 2012. It simply transcribes the whereas clauses ensuring the independence of the *E-Games* permit from that previously granted to *B-Mex* without confronting its effects with the whereas clauses evidencing the direct relationship and continuity between one permit and the other.[3] Furthermore, the majority ignores, and thus disregards, that the 2012 Permit was declared unconstitutional by the Mexican courts and that this Tribunal unanimously confirmed the legality of the decision adopted by the Mexican courts in the Amparo proceeding, including the recognition of the non-subsistence of the 2012 Permit.

5. In sum, the majority ignores that the Mexican courts decided that the Claimants' permits be declared unconstitutional and, thus, non-subsistent. The majority, following the Claimants, starts from the presumption that the permits are valid, in disregard of the legal considerations that the Mexican courts themselves stated as basis of the outcome of the procedural saga of Amparo 1668/2011.

6. The Award fails to analyze whether SEGOB breached the law in force by granting the permits in 2009 and 2012. It only purports to define the validity of such permits through the whereas

[1] Award, Item C, ¶¶ 78 *et seq*.

[2] Award, ¶ 87.

[3] Award, ¶ 105.

clauses stated in their texts, without noting the serious contradictions and ambiguities in such whereas clauses.

7. The Award disregards the fact that the permit granted in November 2012 was declared invalid, and, therefore, the guarantees set forth in the text of such official letter cannot remedy the effects of the non-subsistence declared by the courts. It should be borne in mind that the official letter granting an independent permit to Claimants contains a series of inaccuracies and irregularities that converge on serious contradictions affecting its legality.

8. The majority starts from the wrong understanding that the terms of the November 2012 Permit ensured the Claimants a right based on applicable law, i.e., the Federal Law Regarding Gambling and Raffles (*Ley Federal de Juegos y Sorteos*) (LFJS, for its Spanish acronym) and its regulations. But, as stated above, the Award does not notice, or even second-guess, the inconsistencies and contradictions arising from the terms of the official letters at issue in Amparo 1668/2011. Nor can the Award go as far as describing as unlawful the court decisions that finally determined the scope of Amparo 1668/2011.

9. The text of the November 2012 Independent Permit shows that it was issued under the same terms and conditions as that granted in August 2012 (Permitholder Official Letter) and under the same terms and conditions as those granted to *E-Mex*. The basis on which the permit was granted to *E-Games* concerned the notion of "acquired rights". Consequently, *E-Games*, in its capacity as operator of *E-Mex*, could not have acquired other rights than those granted to *E-Mex*.[4]

10. It should be borne in mind that it was E-Games that requested to be granted permitholder capacity "under the same conditions as the Permit which is currently Operator, which is identified as Number DGAJS/SCEVF/P-6/2005." Hence, the November 2012 Official Letter does not concern a request for an "independent permit" by *E-Games*, but the latter requested a permit to operate its facilities under the same terms and conditions as the *E-Mex* permit under which it operated its casinos.[5]

11. The allegedly independent permit granted to *E-Games* was not a permit granted under Article 32 of the LFJS Regulations, but a permit acknowledging the change from operator to

[4] Exhibit C-16, pp. 6-7: The November 2012 Official Letter states that "they must be issued a permit to be granted the same rights and obligations under identical conditions in which it had been operating along with modifications made thereto, i.e., authorizing it to continue performing their activity in the same terms, conditions, legal scope and materials of permit number DGAJS/SCEVF/P-06/2005 and the modifications it holds."

[5] As per Exhibit C-14, *E-Games* Submission of 22 February 2011.

permitholder or concessionaire under the same terms and conditions as the permit under which *E-Games* operated its casinos in compliance with Permit No. DGAJS/SCEVF/P-6/2005.

12. Furthermore, the commencement of SEGOB Official Letter DGJS/SCEV/1426/2012 makes express reference to Permit No. DGJS/SCEVF/P-06/2005-BIS. In accordance with its Whereas Clause 1, *E-Games* requested a permit "for the opening, operation and installation of remote gambling centers and lottery rooms it currently runs as an operator, granting the capacity as Concessionaire under the same conditions as the Permit which is currently Operator, which is identified as Number DGAJS/SCEVF/P-06/2005 of May 25, 2005 and its amendments".[6] Whereas Clause 6 recognizes that *E-Games* invoked compliance with the precedent condition (Declaration of Bankruptcy proceedings for *E-Mex*), to request a definitive resolution of the change of status or legal condition of the concessionaire as operator.[7]

13. Whereas Clause II acknowledges that "[t]his case, as mentioned above is a unique and extraordinary case, since the Concessionaire Entretenimiento de México S.A. de C.V. is facing a case of revocation of its permit [...]."[8] [Emphasis added]

14. Although, under Whereas Clause V, SEGOB clarifies that "this authority resolves the case exercising its interpretation and application of the Federal Law on Gaming and Lotteries and its Regulations provided for in article 2, first paragraph of this legal system," it cannot be claimed that granting a permit without demanding compliance of the requirements laid down by law stems from an "interpretation of the law." Under the same whereas clause, SEGOB also mentions its powers as Authority to resolve factual situations not covered by the law and regulations in order to pronounce on the requests made.[9]

15. It is worth highlighting that SEGOB's authority to interpret and apply the law in force does not empower it to resolve at its discretion situations expressly covered by the law and regulations, such as the grant of permits subject to the requirements specifically provided by such law and regulations.

16. On the other hand, the Award fails to consider the scope and effects of the Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa de Distrito Federal* of 31 January 2013 issued in the Amparo proceeding, as well as the Order of the *Séptimo Tribunal* of 10 March 2014.

---

[6] Exhibit C-16, p. 2.
[7] Exhibit C-16, p. 2.
[8] Exhibit C-16, p. 4.
[9] Exhibit C-16, p. 4.

17. It should be borne in mind that the *Juzgado Decimosexto* stated in its January 2013 Order that:

> "In view of the foregoing it is concluded that the arguments advanced by the claimant are mainly based to demonstrate the unconstitutionality of order DGAJS/0260/2009-BIS […], that ruled lawful the authorization to Exciting Games […] as direct agent of federal permit DGAJS/SCEVF/P-06/2005 […] because there are no grounds under the Federal Gambling and Lottery Law to grant such authorization."[10]
>
> "In fact, from the provisions cited by the responsible authority in the challenged order, there is neither evidence of the concept of a direct agent of a permit nor of the acquisition of rights for exploitation of a permit without intervention of the concessionaire, by complying with the obligations under article 29 of the Federal Gambling and Lottery Law."[11]
>
> […] "In view of the above, it can be easily noted that the Regulation of the Federal Gambling and Lottery Law does not contemplate the figure of the autonomous agent of a permit or that of the agent that obtained the legal exploitation of the permit by acquired rights and without the intervention of the concessionaire […]."[12]
>
> […] "In the aforementioned conditions, the violation of the legal guarantee is evident before the claimant, because the authority recognized the legal acquisition for the exploitation of a permit, without legal basis, but just pointing out that it is a result of acquired rights, by complying with the obligations of the agent set forth by the Federal Gambling and Lottery Law and its Regulation, without precisely indicating the legal provisions applicable to this case and without reconciliation between the reasons given and the applicable regulations, reflecting incorrect substantiation and justification of the challenged order."[13]

18. The Majority's Award also disregards the scope and effects of the *recurso de inconformidad* (Procedure VIII) of Amparo 1668/2011, as well as the relevant Order issued by the *Juez Decimosexto de Distrito en Materia Administrativa de Distrito Federal*, on 26 August 2013.

19. First, the Judge seized of the *recurso de inconformidad* held that, "[…] given that the fulfillment of the judgments pertains to public order in accordance with article 214 of the Amparo Law, which states that no lawsuit may be filed without the judgment being fully

[10] Exhibit C-18, p. 98.

[11] Such assertion by the Judge is based on Article 3 of the Regulations and Article 30 of the LFJS. Exhibit C-18, p. 98.

[12] Exhibit C-18, p. 99.

[13] "Consequently, considering the proposed arguments are well founded, the Nation's Supreme Court of Justice Support and Protect Entretenimiento de México, S.A. De C.V., against order DGAJS/0260/2009-BIS dated May 27, 2009, to the effect of declaring it groundless and issue a new one to rule, in a founded and justified manner, on the matter requested on May 18, 2009:" Exhibit C-18, p. 100.

served wherein the harmed party has been rendered full constitutional protection; based on court records, a ruling is thus issued insofar as the protective ruling has been met or not."[14]

20. Lastly, the Judge considered, first, that, to demonstrate the foregoing assertion, one had to bear in mind that the representative of the complainant (B-Mex) had presented a document where it made known their disagreement with fulfillment of the judgment, on the basis that the Head of the Government Agency of the Ministry of Interior (*Unidad de Gobierno de la Secretaría de Gobernación* SEGOB), expressed in official letter UG/211/1103/2013 that there are no records on file of the original official letter UG/211/149/2006, from 1 February 2006. Second, it noted that in the file there is record of a certified copy of official letter UG/211/149/2006, from 1 February 2006, as well as diverse official letters which are reported as precedent for the modification of the federal permit, for which it is difficult to believe the fact that such order does not appear among the files and that there should only be a simple copy, which alone lacks evidentiary value, which results insufficient for fulfilling the judgment.[15]

21. Consequently, the Judge ruled that, "[o]n the other hand, the judgment cannot be considered as fulfilled with respect to the order DGAJS/SCEV/260/2009-BIS dated May twenty-seven of two thousand nine, rendered ineffective, in which the harmed third party, Exciting Games, variable capital corporation, is acknowledged as the independent operator of the federal permit related to gaming and lottery number DGAJS/SCEVF/P-06/2005, since the responsible authority must not forget that by ruling said permit as unsubstantiated, it is also obligated to render ineffective all other act or acts that have been issued as its consequence, on the understanding that it should evaluate if in its records appear various orders based on said permit, and that being the case, proceed to declare their lack of substantiation."[16] [Emphasis added]

22. The Judge finally decided as follows:

> "[…] Along these same lines, based on the third temporary article and 192, second paragraph of the current Amparo Law, the authorities shall hereby be required, in what will hereby be identified that within three days, from the notification of this order, to inform this Federal Court of the acts carried out for the effective fulfillment of the Amparo judgment, in the following terms:
>
> General Director of Gaming and Lottery of the Government Agency of the Ministry of Interior (SEGOB).

[14] Exhibit C-23, p. 1.

[15] Exhibit C-23, pp. 4-5.

[16] Exhibit C-23, p. 5.

> Send the evidentiary materials rendering ineffective order DGAJS/SCEV/0260/2009-BIS, dated May twenty-seven, two thousand nine, as well as the diverse acts which are substantiated by the same.
>
> Having been notified that by not carrying out said acts, in accordance with article 258 of the Amparo Law, a fine will be imposed valued at one hundred days of the current minimum wage in the Federal District and will continue with the proceedings established in article 193 of the same regulation."[17]

23. In conclusion, the cause and reason of the SEGOB orders that terminated the Claimants' permits were based on a court decision (Amparo 1668/2011) which determined the unconstitutionality and, thus, non-subsistence of such permits. In this regard, the revocation of the permits is nothing less than the direct implementation by the Federal Government's enforcement and control authorities of the principle of legality governing the Mexican legal system.

24. The Majority's assertion that the record evidence "…confirms that SEGOB did not terminate the Claimants' business because of any public or regulatory policy…," but on the basis of an arbitrary predisposition of the Government in breach of the FET standard under Article 1105, is definitely wrong and has no factual or legal basis.

II. THE CLAIMANTS FAILED TO SHOW THAT SEGOB'S ACTIONS WERE BASED ON ARBITRARY POLITICAL INTENT CONTRARY TO THEIR INTERESTS.

25. I disagree with the majority's statement that SEGOB's conduct was driven by the adverse political predisposition of the new administration.[18] The majority fails, both in fact and in law, to establish that the Claimants showed that termination by SEGOB of their permits was driven by an arbitrary decision of the new political administration in Mexico.

26. The majority relies exclusively on the witness statements of Ms. Salas, SEGOB's head since January 2013. Against this background, the majority cites the statement made by Ms. Salas to the press on the irregularities in the November 2012 permit, just two months after it was granted,[19] only to later maintain that such permit "*simplemente, llamaba la atención*"—it simply drew one's attention.[20] The majority gathers from said statement that "[w]hile the inference that phrase sought to elicit remains unclear […] it does not assist in evincing a meaningful examination of the relevant facts and law."[21]

---

[17] Exhibit C-23, pp. 5-6.

[18] Award, ¶¶ 93 *et seq*.

[19] Award, ¶ 81.b.

[20] Award, ¶ 97.

[21] Award, ¶ 97.

27. It is evident that Ms. Salas did not engage in an in-depth examination before publicly denouncing that the 2012 permit had been granted with irregularities. However, Mexican courts ultimately acknowledged in Amparo 1668/2011 that such permit was unconstitutional, thus confirming Ms. Salas's mere—ungrounded—intuition.

28. Amongst Ms. Sala's misleading and sometimes uninformed statements, the majority cites her as testifying "…that SEGOB only revoked the 2012 Permit and closed the casinos because, she averred, the Enforcement Court's decision had left it with no choice."[22] Nonetheless, it should be noted that the decisions in the Amparo proceeding confirmed the understanding invoked by Ms. Salas.[23]

29. In addition, the statement by Ms. Salas regarding her intention to "regularise" the situation of *E-Games* is merely a subjective expression of a desire (or probably an excuse) that is inconsistent with the strict application of Mexican applicable law for the granting of permits under the LFJS and its regulations.

30. The inferences drawn in the Award from Ms. Salas' vague and sometimes inconsistent statements are not sufficient to prove an adverse political motivation in SEGOB's actions with respect to the Claimants. Nor are they effective in changing the legal consequences resulting from SEGOB's conduct regarding the Amparo proceeding and its effects. In sum, the Award fails to support or justify on the basis of facts its merely subjective conclusions on the vague and even inconsistent statements of SEGOB's head Ms. Salas.

31. As to the Claimants' allegation concerning arbitrariness due to the disparate treatment afforded by SEGOB to the Claimants' investments in relation to a similar—and also allegedly irregular—permit granted to *ProMov*, the Respondent contended that, in that case, after temporary closure of its casinos, it was able to continue its operations since there was no court order for closure in place.[24] Accordingly, Ms. Salas testified that SEGOB ultimately regularized the situation of *ProMov* in 2014 and 2015.

32. While such statement by Ms. Salas is not convincing, one would be expected to infer in principle, as the majority does,[25] that SEGOB should have initiated one of the several existing proceedings to seek its cancellation. However, SEGOB's failure to take action to sanction the

[22] Award, ¶ 79.

[23] Pursuant to Order of the *Séptimo Tribunal Colegiado en Materia Administrativa del Primer Circuito* dated 19 February 2014, Exhibit C-290, and Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal* dated 10 March 2014, Exhibit C-291, p. 1.

[24] Award, ¶ 100.b, fn. 93; Tr. (ENG) Day 5, 1179:14-1180:5 (M. Salas).

[25] Award, ¶ 100.c.

alleged irregularity in the granting of *ProMov*'s permit does not warrant demanding "equitable treatment" on the basis of a failure by the government rendering it illegal.

33. The Claimants cannot rely on such conduct by the Respondent to claim equitable treatment that revolves around a potential illegal act. The mere infringement or nonfulfillment of an obligation owed to a concessionaire such as *ProMov* by SEGOB neither creates nor warrants a right to demand equitable treatment that is based on the breach of an applicable rule. The Tribunal lacks jurisdiction to determine the consequences of the alleged violations by SEGOB not directly affecting the Claimants. The Claimants cannot invoke the grant by the Respondent of a benefit to a third party that is based on a breach of applicable law. In other words, the Claimants cannot invoke "equitable treatment as that accorded to such third party" [Translation by the Dissenting Arbitrator] benefitting from illegal conduct attributable to a government authority.

34. I also differ from the majority's view in the Award that the manner in which, and the grounds on which, SEGOB denied *E-Games* a fresh permit in 2005 show that SEGOB was determined to terminate the Claimants' investments.[26]

35. It arises from the evidentiary record that SEGOB rejected the new permit application on the grounds that the requirements set forth in the applicable regulations, *i.e.*, Article 22 of the Law Regarding Gambling and Raffles and Article 17A of the Ley Federal de Procedimiento Administrativo, were not met. SEGOB argued that, pursuant to the regulations in force, with a closure order imposed as a sanction in place, SEGOB could not automatically grant the new permits without first having a resolution ordering the lifting of that sanction.[27]

36. The majority finds this argument uncompelling on the basis of the Claimants' expert statement—which it deems "more persuasive"— had SEGOB so wanted, it could have removed the closure order by granting the fresh permit.[28] [Emphasis added] But the Claimants' expert has no authority to make conjectures or assumptions that can validly replace the State in its sole and exclusive role of governing control activities in the specific area of gambling and raffles. Accordingly, the fact that "[t]he Tribunal finds his evidence on this point more persuasive than that of the Respondent's expert"[29] falls within the realm of sheer speculation.

[26] Award, ¶ 112.

[27] Rejoinder (ENG), ¶¶ 304-305.

[28] Matus First Report, ¶¶ 193-195, CER-3.

[29] Award, ¶ 116.b.

37. As to the content of Article 17A of the *Ley Federal de Procedimiento Administrativo*, the majority states that it is persuaded that this Article cannot be interpreted narrowly.[30] Nevertheless, from a plain reading of this Article, it is clear that the interpretation made by SEGOB's new administration is based on the ordinary meaning of the terms used in the text and context of such Law, this criterion being part of the basic criteria for interpreting laws within the Mexican legal system.

38. The majority's finding that if SEGOB had wanted to regularize the situation of *E-Games*, it could have done so by granting a fresh permit to the latter is based on an assumption which disregards the compliance of the requirements required by law to grant such permit.

39. Notably, in furtherance of the implementation of restrictive policies regarding gambling and raffles activities, Mexico had discretionary power to grant new permits. There is no acquired right for an automatic granting of a permit for such activities. The statement in the Award that the grounds for denying the permit, analyzed in their context, can only be seen as pretextual,[31] is not supported by a showing that SEGOB acted arbitrarily in rejecting the permit requested.

40. Again, the majority endeavors to determine what SEGOB should have done: "if it had wanted to, could have organised and resolved both procedures in such a manner that one would not stand in the way of the other."[32] The majority insists on attempting to base its position on a mere second-guess approach, encroaching upon the specific functions of a government authority.

41. In accordance with Mexican law, the closure of the Claimants' premises should have been lifted first for the assessment of a fresh permit application to proceed. SEGOB exercised its discretionary power in the assessment of the Claimants' application, noting that the existence of a procedure and a closure sanction prevented the processing of new requests before resolution thereof. On the basis of the evidence introduced into the record, the Claimants failed to show and the majority cannot warrant that SEGOB's actions were based on the mere change of political leadership starting in January 2013. What Ms. Salas has declared or what the Claimants may have inferred from her statements do not change the effects of SEGOB's conduct.

42. Contrary to the majority's statement,[33] I believe that the denial of the fresh permit applied for by the Claimants did not amount to arbitrary conduct by SEGOB, nor did it breach the

[30] Award, ¶ 117 a.
[31] Award, ¶ 81.e.
[32] Award, ¶ 116.b.
[33] Award, ¶ 107.

Respondent's obligation to accord fair and equitable treatment to their investments. To conclude, it is my opinion that there is no sufficient evidence on the record supporting the statement in the Award[34] that SEGOB's new political leadership acted on a hostile manner against the Claimants' permit granted in November 2012 and that it unjustifiably accorded more favourable treatment to *ProMov*.

43. In view of the foregoing, I dissent from the majority's statements in paragraph 119 of the Award. The majority failed to establish that the termination of the 2012 Permit or that the denial of *E-Games*'s new permit application were the necessary and obvious result of an adverse political predisposition by the new Mexican administration. As already stated, all the acts and omissions by SEGOB directly or indirectly related to the procedural saga in Amparo 1668/2011 bear no factual or legal relevance to justify a violation of the fair and equitable treatment standard as enshrined in Article 1105.1 of the NAFTA. Instead, all such acts and omissions were framed pursuant to the applicable law within the implementation of public policies that demand compliance with the principle of legality in the actions.

III. THE CLAIMANTS FAILED TO SHOW THAT SEGOB WAS REQUIRED TO PRESERVE THE CLAIMANTS' ALLEGED RIGHTS TO CONTINUE THEIR BUSINESS.

44. I disagree with the majority's statement in the Award that SEGOB chose to terminate the Claimants' business when it could have preserved it. For the majority, there were various instances where "SEGOB could have done so, reasonably, lawfully and unconstrained by any court decisions."[35] [Emphasis added]

45. Throughout that section, the majority uses idiomatic expressions that refer to what SEGOB "could" or "could have done," but at no point does the majority refer to the existence of any legal obligation or the inobservance of any legal mandate to deem the acts or omissions attributable to SEGOB in the context of its acts or omissions related to Amparo 1668/2011 in violation of Article 1105 of the NAFTA.

46. The majority holds that when the judge held in August 2013 that the Amparo decision should be understood to include within its scope any other resolutions issued as a consequence of the 2009 Permit, SEGOB immediately revoked the November 2012 Permit. The majority states that the record shows that alternatives other than revocation were available, and that, despite

[34] Award, ¶ 141.

[35] Award, ¶¶ 103 *et seq*.

those alternatives, SEGOB "…chose the one course that would place the Claimants' business in great jeopardy."[36]

47. The majority also contests that although in its submission to the Enforcement Court in December 2013 SEGOB referred to the lack of clarity regarding the scope of the Amparo Judge's August 2013 decision, it still chose to pursue a course of action that would ultimately be harmful to the Claimants.[37] For the majority, with other alternatives available, "…it is undisputed that SEGOB could have simply sought a clarification from the Amparo Judge."[38] And it adds: "Presented with the alternative of jeopardising a going concern that had been trading for several years, it is exceedingly difficult to comprehend why SEGOB chose not to pursue that prudent, zero-risk option."[39] The majority goes on to point out that "[h]aving reviewed the record evidence in this regard, the Tribunal is persuaded that SEGOB, after the Amparo Judge declared it in breach of the Amparo Judgment, had the ability to exercise this option of late compliance by reinstating the 2012 Permit."[40] [Emphasis added]

48. The majority insists on arguing that, rather than reinstate the 2012 permit, SEGOB decided to resort to the enforcement court to have such permit revoked. Accordingly, and in fertile ground for sheer speculation, the majority opines that "[h]ad SEGOB reinstated the 2012 Permit, the record shows that E-Mex would not have challenged that decision…."[41]

49. Likewise, such statement of the majority evinces a clear expression of a desire that lacks any legal basis. Put simply, the Award purports to replace the margin of discretion enjoyed by any government authority in the exercise of their functions as framed in the applicable rules themselves. Neither the Claimants nor the Tribunal are permitted to second-guess and infer the illegality of any government conduct.

50. In relation to SEGOB's refusal to grant a new permit as requested by *E-Games*, the majority held that if SEGOB had wanted to regularise the situation of the Claimants, it could have done so by granting a fresh permit to the Claimants. As already mentioned *supra*, the majority's statement attempts to suggest what, in the majority's view, should have been "a better option" by exercising a non-existent entitlement to propose a second-guess approach, even in breach of the requirements under applicable law.

---

[36] Award, ¶ 104.
[37] Award, ¶ 105.b.
[38] Award, ¶ 106.
[39] Award, ¶ 106.
[40] Award, ¶ 110.
[41] Award, ¶ 111.

51. What is more, the Award seeks to establish as compulsory the courses of action that alternatively could have been taken by SEGOB. The Award admits, as already stated, that SEGOB chose to terminate the Claimants' business when it could have preserved it,[42] without even noting that the August 2013 Decision rendered by the Federal Court indubitably required SEGOB to comply promptly with what was decided in Amparo 1668/2011.

52. Similarly, the majority again attempts to impose its deliberate second-guess approach with respect to the acts and/or omissions that SEGOB should have taken or incurred throughout the proceeding concerning Amparo 1668/2011. According to the Award, "[a] second opportunity to preserve the Claimants' going concern presented itself to SEGOB […] [It] could have pursued late ("extemporaneous" in the relevant terminology) compliance with the Amparo Judgment by reinstating the 2012 Permit pursuant to Article 195 of the Amparo Law."[43]

53. Accordingly, I dissent from the majority's view that SEGOB, after the Amparo Judge found it had failed to comply with the Amparo decision, "… could have pursued late ("extemporaneous" in the relevant terminology) compliance with the Amparo Judgment by reinstating the 2012 Permit."[44] This conduct could be considered an option, but it is certainly not an obligation for SEGOB.

54. To sum up, the Award ignores that the "independent operator" and "independent permit holder" official letters were found to be non-subsistent by Mexican courts. Requiring SEGOB to act as an internal lobbyist for the Claimants is irrational. Neither the Claimants and even less the Tribunal can suggest as being more reasonable, and even compulsory, the actions sought to be imposed on SEGOB as desired by the Claimants.

55. In conclusion, I believe that para. 119 of the Award is a compilation of assertions based solely on the majority's subjective assessment or second-guess approach concerning the various alternatives available to SEGOB with respect to the Amparo proceeding filed by a third party. It follows from the applicable regulations that SEGOB was not required to implement any of those options. Further, it is gathered from an analysis of the different instances of the Amparo proceeding that SEGOB's conduct fell within the scope of legality as defined by both Mexican domestic law and international law. Indeed, this is acknowledged by the Majority's Award, which in finding the absence of a denial of justice, inexorably recognized the illegality of the permits granted by SEGOB in 2012.

[42] Award, ¶ 103.
[43] Award, ¶ 108.
[44] Award, ¶ 108.

IV. THE EFFECTS OF THE DECISION ON THE ABSENCE OF A DENIAL OF JUSTICE ON THE ALLEGED BREACH OF ARTICLE 1105.

56. I dissent from the assertion made in the Award[45] that, in the instant case, the absence of a denial of justice does not absolve the Respondent of international responsibility for SEGOB's conduct in breach of the FET standard.

57. Even though, in certain circumstances, it may be asserted that the absence of a denial of justice does not absolve the respondent of its international responsibility for its conduct in breach of fair and equitable treatment, this is not the case in this arbitration.

58. There is no question that an arbitral tribunal can and must hear claims on treaty breaches regarding a State's conduct that was not subject to judicial review. However, in the case at issue, court decisions support and confirm the non-subsistence of the 2009 and 2012 official letters, and, thus, SEGOB's procedural and substantive actions and omissions are framed within the realm of legality of Amparo proceedings.

59. The majority errs in finding that the Respondent, when relying upon the *Azinian* case, did not manage to prove that the Mexican courts forced SEGOB to terminate the Claimants' investments,[46] contending that: (i) if SEGOB had wanted to preserve the 2012 Permit, it could have done so seeking clarification of the Amparo decision; (ii) if SEGOB had wanted to reinstate the 2012 Permit after the Amparo Judge declared its revocation in breach of the Amparo decision, it could have done so before the Enforcement Court issued its first decision; and (iii) if SEGOB had wanted to grant *E-Games* a fresh permit, it could have done so.[47] [Emphasis added] As already explained in the foregoing chapter, the majority could not prove the existence of an obligation by SEGOB to act as the Claimants wanted. A nonexistent obligation cannot be breached.

60. In this context, it is at least surprising that the majority, in order to justify that the *Azinian* case does not apply to the instant case, states that, "…in one instance (the Amparo Judge's October 2013 decision declaring SEGOB non-compliance), SEGOB went directly against that decision […] Both before and after the Enforcement Court's decisions, SEGOB could have reasonably and lawfully chosen not to cause the demise of the Claimants' business…"[48] [Emphasis added]. It is evident that SEGOB, when exercising its powers to determine whether or not to challenge a judicial measure, is not breaching any rule of the legal system to which it is subject.

[45] Award, Item E., ¶¶ 137 *et seq*.
[46] Award, ¶ 139.
[47] Award, ¶ 139.a.
[48] Award, ¶ 139.b.

61. Firstly, I consider that the reading of the *Azinian* case in the Award is wrong. Within the reasoning of the *Azinian* case, there is no reference to a domestic or an international law rule whereby a denial of justice is subject to the nonexistence of alternative conducts, which, being compliant with law, should have been assumed by a State agency. Contrary to the majority's assertion, the *Azinian* tribunal held that:

> "[…] A governmental authority surely cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level. As the Mexican courts found that the Ayuntamiento's decision to nullify the Concession Contract was consistent with the Mexican law governing the validity of public service concessions, the question is whether the Mexican court decisions themselves breached Mexico's obligations under Chapter Eleven."[49]

62. By adjusting the text of paragraph 97 of *Azinian* to the circumstances of this case, it would be confirmed that:

> "[…] A governmental authority surely cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level. As the Mexican courts found that the [SEGOB's] ~~Ayuntamiento's~~ decision [*to terminate the Permits]* ~~to nullify the Concession Contract~~ was consistent with the Mexican law governing the validity of [activities regarding gambling and raffles] ~~public service concessions~~, the question is whether the Mexican court decisions themselves breached Mexico's obligations under Chapter Eleven."

63. It is worth recalling that the *Azinian* tribunal's decision was based on the conclusion stated in paragraph 99 of such award whereby:

> "The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. *What must be shown is that the court decision itself constitutes a violation of the treaty.* Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not *per se* be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end."[50]

[49] *Azinian*, ¶ 97 (emphasis omitted).

[50] *Azinian,* ¶ 99.

64. It can be validly assumed that, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice.[51]

65. The interpretation of NAFTA State Parties of the existence or nonexistence of an alleged denial of justice becomes relevant in order to determine whether there was a breach of Article 1105. In this regard, the United States contended that, "[i]n this connection, it is well-established that international tribunals such as NAFTA Chapter Eleven tribunals are not empowered to be supranational courts of appeal on a court's application of domestic law. Thus, an investor's claim challenging judicial measures under Article 1105(1) is limited to a claim for denial of justice under the customary international law minimum standard of treatment. *Afortiori*, domestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law"[52]

66. Consequently, in the case at issue, the majority ignored the effects of the unconstitutionality of the 2012 Permit decided by the Mexican courts, which, in turn, were unanimously recognized by this Tribunal when deciding on the absence of a denial of justice in accordance with paragraphs 120 to 136 of this Award.

67. I also dissent from the majority's assertion in support of the inapplicability of paragraph 97 of the *Azinian* decision, by stating that, "[i]n the present case, the Enforcement Court disagreed with the Amparo Judge, not on the interpretation of a question of Mexican law, but on a discrete question of fact—i.e., whether or not the 2012 Permit was issued by SEGOB 'as a consequence of' the 2009 Permit."[53] [Emphasis added]

68. First, in the absence of a legal reasoning on the foregoing assertion, the majority' proposition is sheer speculation,[54] although it may be inferred that the majority seeks to find support in the submissions of the United States whereby "as a matter of customary international law,

[51] "Indeed, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice" [Emphasis added]. Fourth Submission of the United States of America, ¶ 32, 13 June 2022.

[52] Fourth Submission of the United States of America, ¶ 33, 13 June 2022.

[53] Award, ¶ 140 b.

[54] The majority fails to support its assertion that "[i]n the present case, the Enforcement Court disagreed with the Amparo Judge, not on the interpretation of a question of Mexican Law, but on a discrete question of fact- ie., whether or not the 2012 Permit was issued by SEGOB 'as a consequence of the 2009 Permit'": Award, ¶ 140 b.

international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice."[55]

69. The terminology used in the relevant paragraphs of the submissions of the United States and Canada cited in the Award neither shows nor can provide any basis to infer that the decisions adopted by domestic courts, which, through the application and interpretation of domestic law, resolve a question of fact or a question of law, should be given special treatment. The majority cites no conventional or customary rule, whether under Mexican domestic law or international law, in support of such contention.

70. Moreover, the Award unsuccessfully attempts to create law instead of applying and/or interpreting the applicable law. Therefore, if the Award intended to justify the existence of such rule by interpreting arbitral case law, it should have identified the case law proving the existence of such (conventional or customary) rule including States' consent or showing the repeated practice and *opinio iuris* of the States involved.[56]

71. The indispensable requirement for the identification of a rule of customary international law is that both a general practice and acceptance of such practice as law be ascertained.[57] Thus, a formulation of a purported rule of customary international law based entirely on a supposed arbitral precedent and lacking an examination of State practice and *opinio juris* fails to establish a rule of customary international law as incorporated by Article 1105(1).[58] Once a rule of customary international law has been established, the claimant must then show that the respondent State has engaged in conduct that violates that rule.

72. Furthermore, a determination of a breach of the minimum standard of treatment must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. Chapter Eleven tribunals do not have an open-ended mandate to second-guess government decision-making.[59] Therefore, on the understanding that every arbitral tribunal must apply, not infer —much less create,—law, I dissent from what was stated in the Award at ¶¶ 137 to 141.

---

[55] Award, ¶ 140 a., footnote 164; likewise, Canada maintained that "[i]t is well settled that absent a denial of justice, judgments of national courts interpreting domestic law cannot be challenged as a violation of international law:" Award, ¶ 140, footnote 165.

[56] Fourth Submission of the United States of America, ¶ 22, 13 June 2022. In this regard, it should be borne in mind that customary international law stems from States' general and consistent practice followed as compulsory: State practice and the existence of an *opinio iuris* are the fundamental elements for international custom to arise. The citations in this partial dissent to the submissions of NAFTA Non-Disputing Parties do not create law, but confirm its compulsory nature for the disputing Parties.

[57] Fourth Submission of the United States of America, ¶ 23, 13 June 2022.

[58] Fourth Submission of the United States of America, ¶ 26, 13 June 2022.

[59] Fourth Submission of the United States of America, ¶ 28, 13 June 2022.

73. But even if the majority's decision were viable, it runs counter to the decision rendered by the Seventh District Court,[60] which certainly shows that the judge grounded its determination to extend the scope of the 2009 Permit to all resolutions and orders that were issued as a consequence of such permit, in strict interpretation of and compliance with Mexican law.

74. Thus, the Award errs when assuming that the Enforcement Court disagreed with the Amparo Judge, not on the interpretation of a question of Mexican law, but on a "discrete question of fact." In this regard, it is noteworthy that, from a plain reading of the Seventh Court's decision, spanning 117 pages, the Court makes a comprehensive interpretation of all the regulations related to the Permits granted by SEGOB from 2005 onwards to eventually conclude that official letter DGAJS/SCEV/1426/2012 "[…] derives and is fully concatenated with the DGAJS/SCEV/0260/2009-BIS […] resolution."[61] It thus clearly follows that the Court referred to the fact that the petitioner had alleged and proved that its claim regarding the non-subsistence of the 2009 official letter was in conformity with Mexican law, and therefore extended to all its legal effects.

75. The Seventh Court upheld SEGOB's resolution when requiring the application of the general principle of law that the accessory follows the fate of the principal (*accessorium principale sequitur*). Through the agreement of July nineteen of two thousand thirteen resolution DGAJS/SCV/260/2009-BIS was left without effect, and also each one of the acts issued subsequently and as a consequence of the acts described in the aforementioned letter. It is for this reason that this administrative authority, in order to fully comply with the final judgment authorized the thirty first January of two thousand thirteen, from the judgment of Amparo 1668/2011, after a search of the records of this administrative unit, it is considered pertinent to leave unsubstantiated the permits granted as a consequence thereof.[62]

76. Similarly, the Court held that:

> "In the wording itself, the approach taken […] is rejected […], since the judgment made it is clear that the character of an independent permit holder by acquired rights was not applicable, in addition to the DGAJS/SCVEF/P-06/2005-BIS permit, it is clearly a consequence of the act claimed, whose declaration of unconstitutionality deprives of effectiveness every potential

[60] *Séptimo Tribunal Colegiado en materia Administrativa del Primer Circuito*, Exhibit C-290, *Incidente de Inejecución* No. 82/2013 dated 19 February 2014.

[61] Exhibit C-290, p. 100.

[62] Exhibit C-290, pp. 103 to 106.

effects and constitutes legal truth (res judicata) that cannot be disturbed, under risk of transgressing its strength and immutability."[63] [Emphasis added]

77. The Seventh Court finally ruled that, in consideration of the analysis of the applicable regulations and in accordance with Articles 192, 193, 195 and 196 of the Amparo Law, the proceeding of non-enforcement of judgment proposed by the Sixteenth District Judge in Administrative Matters in indirect Amparo 1668/2011, brought by E-Mex was UNFOUNDED.[64]

78. The Seventh Court returned the file to the District Judge to provide the conducive.[65] In compliance with the Seventh Court's decision, the Sixteenth Judge held on 10 March 2014 that "[b]ased on the foregoing, it is considered that compliance with the final judgement is fulfilled, therefore, pursuant to Articles 77, sections I, 192 and 214 of the Amparo Law, THE JUDGMENT HAS BEEN COMPLIED WITH."[66]

79. The Seventh Court did not merely determine the existence of a fact as the majority attempts to assert, but rather, as evidenced by a reading of the whereas clauses in the Seventh Court's decision, its decision was based on strict application of Mexican law.

V. SEGOB'S LIABILITY FOR GRANTING THE 2009 AND 2012 PERMITS IN BREACH OF APPLICABLE LAW.

80. In my view, it follows from the record the possibility for the Claimants to allege that SEGOB is liable for granting an independent Operator permit in 2009 (Official Letter DGAJSSCEV/02600) and then for granting permit holder status on 15 November 2012 (Official Letter DGJS/SCEV/1426/2012) to *E-Games*, in breach of applicable law.

81. The fact that such permits were ultimately declared non-subsistent by the courts of the Respondent through Amparo 1668/2011 confirms that the mere issuance thereof amounts to illegal conduct by SEGOB, attributable to the Respondent.

82. The granting of the permits in violation of applicable law raises the question of whether the beneficiaries, namely, the Claimants, knew or should have known about the irregularities

[63] Exhibit C-290, p. 99. The Court found that "[i]n such a way, the collegiate court considers that the DGAJS/SCEV/0827/2012 resolution was based on the declared unconstitutional (DGAJS/SCEV/0260/2009-BIS, of May 27 two thousand nine), and on the basis of it, the various DGAJS/SCEV/1426/2012, of November sixteen two thousand twelve, was issued and permit DGAJS/SCVEF/P-06/2005-BIS was granted to operate seven remote betting centers and seven raffles rooms, derives from a procedural sequel, that is, from acts concatenated together involving the application of the resolution DGAJS/SCEV/0260/2009-BIS, of May twenty-seven of two thousand nine, declared unconstitutional in the judgment to be completed." Award; Exhibit C-290, p. 93.

[64] Exhibit C-290, p. 111-112.

[65] Exhibit C-290, p. 112.

[66] Exhibit C-291, p. 3.

affecting them. The inconsistencies in the whereas clauses of the November 2012 Permit Holder BIS official letter could not be ignored or disregarded both by SEGOB and *E-Games*.

83. The Claimants failed to show or even justify the existence of any assessment and analysis of applicable law allowing them to avoid liability for their failure. However, the Claimants' purported liability for failure to exercise due diligence does not invalidate or release the Respondent from liability under the NAFTA. Such alleged failure could somehow be considered as a mitigating factor in the compensation for damages caused by the grant of flawed permits by the Respondent.

84. As gathered from the decisions regarding Amparo 1668/2011, and as demonstrated through the analysis of the applicable law that was in force at the time such permits were issued (Federal Law Regarding Gambling and Raffles and its Regulations), it was established that both the Operator BIS (Independent Operator) official letter of 27 May 2009 and the Permit Holder official letter of 15 August 2012, as well as the Permit Holder BIS (Independent Permit Holder) official letter of 15 November 2012, were declared invalid (non-subsistent) by Mexican courts for being contrary to law.

85. It was also shown in the record that only two legal concepts are envisaged in the LFJS and its Regulations for any individual or company to carry out, upon prior authorization, gambling and raffles activities in the Mexican territory. These are: i) Operator (Article 30) and ii) Permit Holder (Article 3, Section XVI). In addition, within Mexico's federal regulatory context, the laws on tax and prevention of money laundering only recognize, within the framework of gambling and raffles, the notions of Operator and Permit Holder.

86. Furthermore, SEGOB had no powers to make laws and, therefore, had no authority at all to grant rights beyond those the law expressly authorized it to apply.

87. The status of independent operator and later that of independent permit holder were not granted based on the Federal Law Regarding Gambling and Raffles and, therefore, they are in breach of the applicable law by which SEGOB was bound. This was what the Mexican courts held when deciding the effects of an Amparo action brought by a particular aggrieved company against another company. This was also confirmed by this Tribunal when determining the absence of a denial of justice, thus acknowledging the illegality of the Permits as breaching the legal rules in force.

88. SEGOB's violation of the LFJS when granting the status of independent Operator in 2009 and later that of independent Permit Holder to *E-Games* is sufficient to allege a breach of Article 1005(1) of the NAFTA. However, in the present case, the Claimants have ignored this legal

situation by wrongly and baselessly making a one-sided interpretation of the facts, in disregard of both the whereas clauses and the decision in Amparo 1668/2011.

89. The majority systematically ignores that the independent permit granted to *E-Games* by SEGOB in November 2012 was invalid, as ultimately established by the courts when declaring its non-subsistence. SEGOB's liability would arise from the grant of such permit in breach of applicable law. The Claimants do not claim for such breach but wrongly and baselessly assume that such permit was and still is valid. The consequences and effects of the 2012 permit non-subsistence cannot be rectified on the basis of a second-guess approach imposing alternative options that, according with the Claimants' subjective interests, SEGOB should have inextricably chosen.

90. Therefore, and in the absence of allegations or claims by the Claimants regarding the violation of applicable law for the granting of the Permits, this Tribunal must refrain from ruling on the potential consequences of SEGOB's violation with respect to both domestic and international laws in force at the time the referred 2009 and 2012 Permits were issued. In conclusion, the Tribunal must refrain from hearing and addressing issues not before it: Otherwise, there would be an abuse of authority by the Tribunal in purporting to decide *ultra petita*.

Based on the foregoing considerations, it is my opinion that the Tribunal should:

a) Declare that the treatment accorded by SEGOB to the Claimants' investments did not breach its obligations under Article 1105 of the Treaty;

b) Reject all the amounts claimed by the Claimants;

c) Order the Parties to bear the costs of the proceeding in equal shares and order that each Party bear its own costs and fees as incurred thereby.

Prof. Raúl Emilio Vinuesa
Arbitrator
Date:
JUN 14 2024

IN AN ARBITRATION UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE ICISID ADDITIONAL FACILITY RULES

B-Mex, LLC and others

v.

United Mexican States

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

PARTIAL AWARD

Members of the Tribunal

Prof. Gary Born, Arbitrator
Prof. Raúl Emilio Vinuesa, Arbitrator
Dr. Gaëtan Verhoosel, President

Secretary of the Tribunal

Ms. Natalí Sequeira, ICSID

19 July 2019

TABLE OF CONTENTS

GLOSSARY

2009 Resolution	Resolution DGAJS/SCEV/0260/2009-BIS issued by SEGOB on 27 May 2009
2012 Resolution	Resolution DGJS/SCEV/1426/2012 issued by SEGOB on 16 November 2012
Additional Claimants	– Neil Ayervais – Deana Anthone – Douglas Black – Howard Burns – Mark Burr – David Figueiredo – Louis Fohn – Deborah Lombardi – P. Scott Lowery – Thomas Malley – Ralph Pittman – Daniel Rudden – Marjorie “Peg” Rudden – Robert E. Sawdon – Randall Taylor – James H. Watson, Jr. – Caddis Capital, LLC – Diamond Financial Group, Inc. – Family Vacation Spending, LLC – Financial Visions, Inc. – J. Johnson Consulting, LLC – J. Paul Consulting – LAS KDL, LLC – Mathis Family Partners, Ltd. – Palmas Holdings, Inc. – Trude Fund II, LLC – Trude Fund III, LLC – Victory Fund, LLC – B-Cabo, LLC

	– Colorado Cancún, LLC
Amended Notice	Amended Notice of Intent filed by the Claimants on 2 September 2016
Claimants	The Original Claimants and the Additional Claimants
E-Mex	Entretenimiento de Mexico, S.A. de C.V.
GATS	General Agreement on Trade in Services
Grand Odyssey	Grand Odyssey S.A. de C.V.
ICSID or the Centre	International Centre for the Settlement of Investment Disputes
Juegos Companies	– Juegos de Video y Entretenimiento de México, S. de R.L. de C.V. (***JVE Mexico***) which owned the casino at Naucalpan (***Naucalpan***) – Juegos de Video y Entretenimiento del Sureste, S. de R.L. de C.V. (***JVE Sureste***) which owned the casino at Villahermosa (***Villahermosa***) – Juegos de Video y Entretenimiento del Centro, S. de R.L. de C.V. (***JVE Centro***) which owned the casino at Puebla (***Puebla***) – Juegos y Video de México, S. de R.L de C.V. (***JyV Mexico***) which owned the casino at Cuernavaca (***Cuernavaca***) – Juegos de Video y Entretenimiento del D.F., S. de R.L. de C.V. (***JVE DF***) which owned the casino at Mexico City (***Mexico City***)
Mexican Companies	– Juegos Companies – Exciting Games, S. de R.L. de C.V. (***E-Games***) – Operadora Pesa, S. de R.L. de C.V. (***Operadora Pesa***)
MIGA Convention	Convention Establishing the Multilateral Investment Guarantee Agency (MIGA)
NAFTA or Treaty	North American Free Trade Agreement
Notice	Notice of Intent submitted by the Claimants on 23 May 2014

OECD Declaration	OECD Declaration on International Investment and Multinational Enterprises
Original Claimants	– B-Mex, LLC – B-Mex II, LLC – Palmas South, LLC – Gordon G. Burr – Erin J. Burr – John Conley – Oaxaca Investments, LLC (***Oaxaca***) – Santa Fe Mexico Investments, LLC
Original Mexican Companies	– Juegos Companies – E-Games
POA	Power of Attorney
Respondent	The United Mexican States
Request	Request for Arbitration filed by the Claimants on 15 June 2016
SEGOB	Secretaría de Gobernación, a Ministry of the Government of Mexico
SPA	Share Purchase Agreement
VCLT	Vienna Convention on the Law of Treaties

I. THE PARTIES AND THEIR REPRESENTATION

1. The Request was filed by 39 Claimants. All the Claimants are U.S. nationals.[1] After the filing of the Request, one Claimant—EMI Consulting, LLC—notified the Tribunal that it withdrew from the arbitration.[2] The Claimants pursue claims both under Article 1116 of the Treaty and, on behalf of seven Mexican Companies,[3] under Article 1117 of the Treaty.

2. The Claimants are represented in these proceedings by:

> Mr. David M. Orta
> Mr. Daniel Salinas-Serrano
> Ms. Julianne Jaquith
> Mr. Kristopher Yue
> Ms. Ana Paula Luna Pino
> *Quinn Emanuel Urquhart & Sullivan, LLP*
> Washington DC, USA; and
>
> Mr. Julio Gutiérrez Morales
> *Ríos-Ferrer Guillén-Llarena, Treviño y Rivera S.C.*
> Mexico City, Mexico.

3. The Respondent is represented in these proceedings by:

> Mr. Orlando Pérez Gárate
> Mr. Hugo Romero Martínez
> Mr. Geovanni Hernández Salvador
> Ms. Blanca del Carmen Martínez Mendoza
> *Dirección General de Consultoría Jurídica de Comercio Internacional*;
>
> Mr. James Cameron Mowatt
> Mr. Alejandro Barragán
> Ms. Ximena Iturriaga
> *Tereposky & DeRose LLP*
> Ottawa, Canada; and
>
> Mr. Stephan E. Becker
> *Pillsbury Winthrop Shaw Pittman LLP*
> Washington DC, USA.

---

1 Request, ¶ 3.
2 Transcript (ENG), Hearing on Jurisdiction, Day 4, 909:12-910:2.
3 Originally there were nine. In their Counter-Memorial, the Claimants withdrew their claims on behalf of two Mexican Companies—Metrojuegos, S. de R.L. de C.V. and Merca Gaming, S. de R.L. de C.V. *See* Counter-Memorial on Jurisdictional Objections, 25 July 2017 (***Counter-Memorial***), ¶ 278, fn. 452.

II. THE PROCEEDING

4. On 23 May 2014, the Claimants submitted the Notice. The Notice, in a section titled "Identification of the Disputing Investors", identified the eight Original Claimants and the six Original Mexican Companies. It set out the factual basis of the claim, identified the provisions of the Treaty that were alleged to have been breached, and specified the relief requested.

5. On 15 June 2016, the Claimants filed the Request with the Centre. On 23 June 2016, the Centre acknowledged receipt of the Request.

6. On 27 June 2016, the Respondent objected to the registration of the Request, claiming, *inter alia*, the (i) failure by the 31 Additional Claimants to provide a notice of intent at least 90 days prior to the submission to arbitration as required by NAFTA Article 1119 and Article 1122; (ii) failure by the Claimants to identify in the Notice three of the then nine Mexican Companies on whose behalf they intended to pursue a claim under Article 1117; and (iii) failure by the Claimants and the Mexican Companies to consent to arbitration as required by Article 1121.

7. On 6 July 2016, the Centre sent a questionnaire to the Claimants requesting, *inter alia*, (i) copies of the written waivers issued by each of the Mexican Companies; (ii) copies of each of the Mexican Companies' written consent to arbitration; and (iii) an explanation as to how each Claimant and each Mexican Company meets the requirements of Article 1119.

8. On 21 July 2016, the Claimants submitted a written response to the Centre's questionnaire and to the Respondent's objections of 27 June 2016. Attached to the written response were POAs and waivers by four of the then nine Mexican Companies. The Claimants argued that "consents and waivers" from the five Juegos Companies were not required because the Respondent had deprived the Claimants of control of the Juegos Companies, and therefore the exception in NAFTA Article 1121(4) applied.

9. On 26 July 2016, the Respondent responded to the Claimants' letter of 21 July 2016.

10. On 2 August 2016, the Centre informed the Claimants that it could not approve access to the Additional Facility or register the Request unless the consents of the Juegos Companies were provided as required by Article 1121(2)(a) NAFTA. ICSID asked

the Claimants to respond by 5 August 2016 and inform the Centre of whether they wished to: (i) suspend the approval and registration of the claim until the Request had been supplemented with the necessary consents, or (ii) withdraw the claims made on behalf of the Juegos Companies under Article 1117 of the Treaty.

11. On 5 August 2016, the Claimants responded to the Centre, attaching the POAs and waivers by the Juegos Companies.

12. On 11 August 2016, ICSID registered the Request pursuant to Article 4 of the ICSID Arbitration (Additional Facility) Rules.

13. On 2 September 2016, the Claimants sent the Amended Notice to the Respondent.

14. By letter of 9 September 2016, the Claimants appointed Professor Gary Born, a U.S. national, as arbitrator. Professor Born accepted his appointment on 14 September 2016.

15. By letter of 26 September 2016, the Respondent appointed Professor Raúl Vinuesa, an Argentine national, as arbitrator. Professor Vinuesa accepted his appointment on 4 October 2016.

16. On 31 October 2016, the Claimants wrote to the Centre to request that the Secretary-General of ICSID appoint the presiding arbitrator pursuant to Article 1124 of the Treaty, as the parties had been unable to reach agreement on the designation of the presiding arbitrator.

17. By letter of 13 January 2017, the Secretary-General of ICSID appointed Dr. Gaëtan Verhoosel, a Belgian national, as the presiding arbitrator. Dr. Verhoosel accepted his appointment on 13 February 2017.

18. On 14 February 2017, the Centre notified the parties that the Tribunal had been constituted pursuant to ICSID Arbitration (Additional Facility) Rules.

19. On 28 March 2017, the Tribunal held its first session by telephone conference. The parties agreed to bifurcate the proceeding, with a first phase limited to the preliminary objections raised by the Respondent. On 4 April 2017, the Tribunal issued Procedural Order No. 1, which included a procedural timetable reflecting the parties' agreement.

20. On 30 May 2017, the Respondent filed its Memorial on Jurisdictional Objections. On 25 July 2017, the Claimants filed their Counter-Memorial on Jurisdictional Objections. On 1 December 2017, the Respondent filed its Reply on Jurisdictional Objections. On 8 January 2018, the Claimants filed their Rejoinder on Jurisdictional Objections. Attached to the Claimants' Rejoinder were 43 additional Witness Statements.

21. On 22 March 2018, new evidence was tendered by the Claimants with leave of the Tribunal. On 25 April 2018, the Respondent filed its Rebuttal Submission in Response to New Evidence, responding to the new evidence exhibited with the Claimants' Rejoinder and the new evidence tendered by the Claimants on 22 March 2018.

22. From 21 May 2018 to 25 May 2018, the Tribunal held a hearing on jurisdiction in Washington DC. Present at the hearing were, for the Tribunal: Dr. Gaëtan Verhoosel, Professor Gary Born, Professor Raúl Vinuesa, and Ms. Natalí Sequeira, Secretary to the Tribunal. For the Claimants: Mr. David Orta, Mr. Daniel Salinas, Ms. Julianne Jaquith, Mr. Kristopher Yue, Ms. Ana Paula Luna Pino, Ms. Dominique Lambert, Mr. Milton Segarra (all from Quinn Emanuel Urquhart & Sullivan, LLP, Washington DC, USA), and Mr. Julio Gutiérrez Morales (from Ríos-Ferrer Guillén-Llarena, Treviño y Rivera S.C., Mexico City, Mexico). For the Respondent: Ms. Samantha Atayde Arellano, Ms. Ximena Iturriaga, Mr. Geovanni Hernández Salvador, Ms. Blanca del Carmen Martínez Mendoza (all from Dirección General de Consultoría Jurídica de Comercio Internacional), Mr. James Cameron Mowatt, Mr. Alejandro Barragán, Ms. Jennifer Radford, Mr. Greg Tereposky, Ms. Yuri Perez (all from Tereposky & DeRose LLP, Ottawa, Canada), and Mr. Stephan E. Becker (from Pillsbury Winthrop Shaw Pittman LLP, Washington DC, USA).

23. At the hearing, the following witnesses or experts were examined:

Mr. Neil Ayervais
Mr. Gordon Burr
Ms. Erin Burr
Mr. Julio Gutiérrez Morales
Mr. José Ramón Moreno
Mr. John Conley

Mr. Benjamín Chow
Mr. René Irra Ibarra
Ms. Ana Carla Martínez Gamba
Mr. Moisés Opatowski
Mr. Luc Pelchat
Mr. José Luis Segura Cárdenas
Mr. Rodrigo Zamora

24. On 17 August 2018, both parties submitted their Post-Hearing Briefs.

25. On 1 October 2018, both parties submitted their statements of costs in relation to this phase.

26. On 23 November 2018, the Tribunal invited the parties and the Non-Disputing Parties, if they so wished, to file submissions addressing the question of whether there are any relevant rules of international law applicable in the relations between the NAFTA Parties within the meaning of Article 31(3)(c) of the VCLT of which the Tribunal should take account in interpreting "own[] or control[]" in Article 1117 of the Treaty. All such responsive submissions were received by 21 December 2018.

27. In the course of the proceeding, the Tribunal issued seven procedural orders, addressing a variety of procedural issues and incidents and presenting questions to the parties for their post-hearing briefs. All procedural orders are available on the ICSID website and therefore need not be summarized here.

III. FACTUAL BACKGROUND

28. The Tribunal sets out below a very brief summary of the factual background insofar as relevant to this preliminary phase. This summary reflects only what has been alleged by the Claimants, and not any findings of fact by the Tribunal. The Tribunal need not, and does not, make any factual findings in this Award other than to the extent indicated in Part V below, "The Tribunal's Findings and Conclusions". Therefore, since it would be fastidious to insert "allegedly" before each alleged fact in the summary below, it is to be understood as being expressly qualified as such *in toto*.

A. THE EXISTING CASINO BUSINESS

29. The Mexican Companies were involved in the operation of casino businesses.[4] From 1 April 2008 to 27 May 2009, the casinos were operated under a casino operation permit held by E-Mex, a Mexican company.[5] On 27 May 2009, SEGOB issued a resolution granting E-Games permission to operate the casinos under the same permit but autonomously from E-Mex, based on the doctrine of "acquired rights" (the ***2009 Resolution***).[6]

30. On 16 November 2012, SEGOB issued a resolution granting E-Games an independent casino operation permit with its distinct permit number (the ***2012 Resolution***).[7] This meant that E-Games was no longer operating under E-Mex's permit, whether autonomously or otherwise. The permit was to remain valid until 2030 and the Claimants would have the right to operate up to fourteen gaming establishments (7 remote gambling centres and 7 lottery number rooms), or up to 7 dual-function gaming establishments.[8]

31. The Mexican Companies performed the following functions in the business:

a. Each of the five Juegos Companies owned a casino and related assets.[9]

---

4 Counter-Memorial, ¶ 178.
5 Request, ¶ 27.
6 SEGOB Resolution No. DGAJS/SCEV/0260/2009-BIS, 27 May 2009, **C-11**. *See also* Request, ¶ 37.
7 SEGOB Resolution No. DGJS/SCEV/1426/2012, 16 November 2012, **C-16**.
8 SEGOB Resolution No. DGJS/SCEV/1426/2012, 16 November 2012, p. 5, **C-16**; Request, ¶ 46.
9 Counter-Memorial, ¶ 178.

b. From 16 November 2012, E-Games held the casino operation permit and operated the five dual-function casinos.[10] E-Games also leased casino machines from each of the Juegos Companies.[11]

c. Operadora Pesa provided management and administrative services (such as coordinating with food and beverage vendors) for the five casinos through a services agreement between Operadora Pesa and E-Games.[12]

32. Each of the Claimants, with the exception of B-Cabo, LLC and Colorado Cancúun LLC, are shareholders in at least one of the Juegos Companies.[13] Two of the Original Claimants—John Conley and Oaxaca—also are shareholders in E-Games.[14]

33. Further, some of the Claimants provided loans to the Juegos Companies:

a. Palmas South, LLC provided a loan to JVE Sureste, with US$ 130,000 of the principal outstanding, and a loan to JVE Centro, with US$ 400,000 of the principal outstanding.[15]

b. Gordon Burr made a loan to JVE DF, with US$ 110,000 of the principal outstanding.[16]

c. After the casinos were shut down in April 2014, some of the Claimants also made unspecified loans to B-Mex, LLC, which in turn invested the funds to finance upkeep obligations of the various Mexican Companies.[17]

B. THE LOS CABOS AND CANCÚN PROJECTS

34. The Claimants were also in the process of developing two other casino ventures in Mexico, in Los Cabos and Cancún. These casinos were to be the two remaining dual-function casinos that E-Games was allowed to operate under its casino operation

---

10 Counter-Memorial, ¶¶ 57, 178; Tr. (ENG), Day 2, 424:14-18.
11 Counter-Memorial, ¶ 246. The Claimants have produced the Machine Lease Agreements between each of the Juegos Companies and E-Games, *see* **C-52** to **C-56**.
12 Counter-Memorial, ¶ 178; Contract of Services between Operadora Pesa, S. de R.L. de C.V. and Exciting Games, S. de R.L. de C.V., 10 December 2008, **C-126**.
13 Counter-Memorial, ¶ 209.
14 Counter-Memorial, ¶ 240.
15 Counter-Memorial, ¶ 269.
16 Counter-Memorial, ¶ 269.
17 Counter-Memorial, ¶ 269; Erin Burr First Witness Statement dated 25 July 2017 (***E. Burr First WS***), ¶ 88, **CWS-2**.

permit.[18] Two Claimants—B-Cabo, LLC and Colorado Cancún, LLC—were set up in connection with this plan.[19] These two Claimants are only asserting claims on their own behalf under Article 1116.[20]

35. B-Mex II, LLC invested US$ 2.5 million to obtain licenses for the operation of gaming machines in 2006, some of which were intended to be used in the Los Cabos and Cancún projects.[21]

36. Colorado Cancún, LLC invested US$ 250,000 in entering into an option to purchase a gaming license from B-Mex II, LLC.[22]

37. B-Cabo, LLC invested US$ 600,000 through loans to Medano Beach, S. de R.L. de C.V., a Mexican company, for the purchase of property for the B-Cabo hotel and casino.[23] B-Cabo, LLC was also in the process of acquiring a gaming license from B-Mex II, LLC when E-Games's casino permit was revoked by the Respondent.[24]

C. ALLEGED WRONGFUL CONDUCT BY THE RESPONDENT

38. On 30 December 2011, E-Mex filed a constitutional challenge—known as an *amparo* proceeding—against SEGOB, challenging, *inter alia*, the 2009 Resolution.[25] On 30 January 2013, the *amparo* judge ruled that the 2009 Resolution was unconstitutional and ordered its rescission.[26] This ruling was affirmed by the appellate court on 10 July 2013.[27] On 19 July 2013, SEGOB complied with the judgment and rescinded the 2009 Resolution.[28]

39. The Claimants claim that the Respondent breached Articles 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment), 1105 (Minimum Standard of

---

18 Counter-Memorial, ¶¶ 271-272.
19 Counter-Memorial, ¶¶ 272-273; E. Burr First WS, ¶ 52, **CWS-2**.
20 Counter Memorial, ¶ 167, fn. 272.
21 Counter-Memorial, ¶ 274; E. Burr First WS, ¶ 52, **CWS-2**.
22 Counter-Memorial, ¶ 275; Right of First Refusal Agreement between Colorado Cancún, LLC and B-Mex II, LLC, 27 April 2011, **C-88**.
23 Counter-Memorial, ¶ 276; Investment/Loan Agreement between B-Cabo, LLC and Medano Beach Hotel, 5 April 2013, **C-65**,
24 Counter-Memorial, ¶ 276.
25 Request, ¶ 51.
26 Request, ¶ 52; Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa en el Distrito Federal*, 30 January 2013, **C-18**.
27 Request, ¶ 53; Order of the *Séptimo Tribunal Colegiado en Materia Administrativa*, 10 July 2013, **C-20**.
28 Request, ¶ 54.

Treatment) and 1110 (Expropriation and Compensation) of the Treaty by taking the following measures against the Mexican Companies:[29]

a. On 19 June 2013, the Respondent temporarily and illegally closed the Mexico City casino.[30]

b. On 22 August 2013, the *amparo* judge improperly re-opened proceedings upon E-Mex's request.[31] On 26 August 2013, the judge issued another judgment ordering SEGOB to rescind all resolutions based on or derived from the 2009 Resolution, and not just the 2009 Resolution.[32]

c. On 28 August 2013, SEGOB, apparently in compliance with the *amparo* judge's order of 26 August 2013, rescinded several resolutions, including the 2012 Resolution.[33] On 14 October 2013, however, the *amparo* judge ruled that SEGOB had exceeded the enforcement of the 26 August 2013 *amparo* order in revoking the 2012 Resolution.[34]

d. After making this ruling on 14 October 2013, however, the *amparo* judge chose not to issue an order confirming that the 2012 Resolution should not have been rescinded.[35] Instead, the judge sent the matter to the appellate court to decide whether to sanction SEGOB for exceeding its authority.[36]

e. On 19 February 2014, the appellate court, instead of deciding the issue of whether to sanction SEGOB, instead reinterpreted the *amparo* judge's decision. The appellate court determined that SEGOB had not exceeded its powers when rescinding the 2012 Resolution.[37] The Claimants claim that this decision was "politically motivated and influenced".[38] On remand, on 10 March 2014, the

---

29 Request, Part V.
30 Notice, ¶ 11; Request, ¶ 11.
31 Request, ¶¶ 56-58.
32 Request, ¶ 58; Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa*, 26 August 2013, **C-23**.
33 Request, ¶ 59.
34 Request, ¶ 64; Order of the *Juzgado Decimosexto de Distrito en Materia Administrativa*, 14 October 2013, **C-24**.
35 Request, ¶ 65.
36 Request, ¶ 65.
37 Request, ¶ 67.
38 Request, ¶ 67.

amparo judge complied with the appellate court's ruling.[39] According to the Claimants, E-Games was deprived of its due process rights during the course of these judicial proceedings described in Paragraphs 39b to 39e.[40]

f. On 23 April 2014, E-Games filed a writ to the Mexican Supreme Court—known as a *recurso de inconformidad*—attacking the appellate court's ruling of 19 February 2014, and the *amparo* judge's compliance on 10 March 2014.[41]

g. On 3 September 2014, the Supreme Court dismissed the appeal on procedural grounds and remanded the case to the same appellate court that had made the 19 February 2014 decision that was being appealed.[42] This meant that the appellate court was reviewing its own decision, and the Claimants allege that they were thus "effectively and practically denied an appeal".[43] On 29 January 2015, the appellate court upheld its own prior decision that affirmed SEGOB's rescission of, *inter alia*, the 2012 Resolution.[44]

h. The Claimants allege that the Mexican Government may have unlawfully intervened in these Supreme Court and appellate court proceedings by threatening certain judges.[45]

i. The Claimants further allege that a Mexican company, Producciones Móviles, S.A. de C.V., was allowed to continue operating its casinos despite obtaining its casino permit under circumstances that were materially identical to how E-Games obtained its independent casino permit under the 2012 Resolution.[46]

j. On 24 April 2014, the day after E-Games had filed its *recurso de inconformidad*, SEGOB, aided by the federal police, closed down all of the Claimants' casinos. The federal police entered the casinos while armed, blocked all entrances and

---

39 Request, ¶ 68.
40 Request, ¶¶ 62, 65, 68.
41 Request, ¶ 69.
42 Request, ¶ 73; Order of the *Suprema Corte de Justicia de la Nación*, 3 September 2014, **C-26**.
43 Request, ¶ 73.
44 Request, ¶ 75.
45 Request, ¶¶ 72, 74.
46 Request, ¶ 77.

exits, and confined employees to the offices.[47] SEGOB also refused to provide a copy of the closure order.[48]

k. After the casinos' closure on 24 April 2014, SEGOB blocked any attempts by the Claimants to mitigate their losses. On three occasions around mid-2014, the Claimants approached SEGOB about the possibility of working with a partner to re-open the casinos. SEGOB objected on each occasion.[49] On one occasion, SEGOB informed one of the Claimants' prospective partners, Grand Odyssey, that the casinos could not be reopened "if the 'gringos' remained involved".[50]

l. On 4 April 2014, E-Games made an application to obtain a new independent casino operation permit. On 15 August 2014, SEGOB denied the request, according to the Claimants on purely technical grounds and without affording E-Games the opportunity to correct the errors.[51] SEGOB, during this time, granted casino operation permits to mostly Mexican companies.[52]

m. In September 2012, the Mexican tax authorities commenced a tax audit in relation to E-Games's 2009 operations.[53] After a change of government on 1 December 2012, the authorities on 28 February 2014 issued a resolution finding that E-Games had not complied with its reporting obligations and ordering it to pay more than 170 million Mexican Pesos in back taxes.[54] The Claimants claim that this was improper as they had always filed E-Games's taxes in the same manner, and a separate audit had found its 2011 filings to be compliant with tax legislation.[55]

n. Mexican prosecutors also brought criminal charges against E-Games's representatives. These charges were based on E-Games's illegal operation of the

47 Notice, ¶¶ 12-13; Request, ¶ 70.
48 Notice, ¶¶ 12-13; Request, ¶ 70.
49 Request, ¶¶ 81-83.
50 Request, ¶ 83.
51 Request, ¶ 86; SEGOB Resolution No. DGJS/2738/2014, 5 August 2014, **C-27**; SEGOB Resolution No. DGJS/2739/2014, 15 August 2014, **C-28**; SEGOB Resolution No. DGJS/2740/2014, 15 August 2014, **C-29**; SEGOB Resolution No. DGJS/2741/2014, 15 August 2014, **C-30**; SEGOB Resolution No. DGJS/2742/2014, 15 August 2014, **C-31**; SEGOB Resolution No. DGJS/2743/2014, 15 August 2014, **C-32**; SEGOB Resolution No. DGJS/2744/2014, 15 August 2014, **C-33**.
52 Request, ¶ 99.
53 Request, ¶ 91.
54 Request, ¶ 91.
55 Request, ¶¶ 90-91.

casinos between 26 August 2013 (when the *amparo* judge issued an order to rescind all resolutions derived from the 2009 Resolution), until 24 April 2014 (when the Respondent closed the casinos).[56]

[56] Request, ¶ 92.

IV. THE PARTIES' SUBMISSIONS

40. The Tribunal has carefully reviewed all of the parties' submissions in this arbitration. Those submissions are available on the ICSID website at https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB(AF)/16/3. Therefore, rather than attempting to produce summaries of those pleadings, which would almost certainly fail to do justice to them, the Tribunal hereby incorporates the parties' submissions in their entirety by reference into this section of the Award.

V. THE TRIBUNAL'S FINDINGS AND CONCLUSIONS

41. In this first phase the Tribunal shall decide the following three preliminary issues (the ***Issues***):

a. **Issue 1**: Articles 1121(1) and 1121(2) of the Treaty require that the Claimants and the Mexican Companies, respectively, consent to "arbitration in accordance with the procedures set out in [the Treaty]". Article 1121(3) requires the Claimants and the Mexican Companies to give that consent "in writing"; to "deliver[] [it] to the disputing Party"; and to "include[] [it] in the submission of a claim to arbitration". The Respondent's case is that the Claimants' acceptance in the Request of the Respondent's arbitration offer in Article 1122 of the Treaty and the POAs granted by the Claimants and the Mexican Companies to their counsel are incapable of satisfying these requirements; and that this deprives the Tribunal of jurisdiction.[57]

b. **Issue 2**: Article 1119 provides that a "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 …". Article 1122(1) of the Treaty provides that the Respondent consents to the submission of a claim to "arbitration in accordance with the procedures set out in [the Treaty]". The Respondent submits that "[i]n order to submit their claims to arbitration, the 31 Additional Claimants needed to first deliver a notice of intent under Article 1119 and wait at least 90 days. Failure to do so rendered their purported submission to arbitration void *ab initio*. They also failed to engage the Respondent's consent to arbitration 'in accordance with the procedures set out in [the NAFTA]' under Article 1122".[58]

c. **Issue 3**: Article 1117 of the Treaty provides that an investor may submit a claim to arbitration on behalf of an enterprise of another Party that the investor owns or controls directly or indirectly. The Respondent's case is that at the relevant times the Claimants did not own or control directly or indirectly the Mexican

---

57 Reply on Jurisdictional Objections, 1 December 2017 (***Reply***), ¶ 83.
58 Reply, ¶ 75.

Companies on whose behalf they have submitted a claim.[59] Closely intertwined with this objection is the Respondent's objection that the Claimants have failed to prove that they owned any particular number and type of shares in the Mexican Companies at the relevant times.[60]

42. The Tribunal will first address the first two of these Issues insofar as they apply to the claims under Article 1116 on behalf of *the Claimants*. The Tribunal will next address each of these Issues insofar as they apply to the claims under Article 1117 on behalf of *the Mexican Companies*.

A. THE CLAIMANTS' CLAIMS UNDER ARTICLE 1116

1. Article 1121: consent by the Claimants

43. In addressing this objection, the Tribunal starts by noting that Article 1121 is not a monolith. Instead, it contains three paragraphs, two of which are relevant for current purposes:

a. Paragraph (1) 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 this Agreement" and waives the right to pursue other proceedings relating to the same measures.

b. Paragraph (3) provides that such consent and waiver shall "be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration".

44. The Tribunal discerns in paragraphs (1) and (3) of Article 1121 two distinct sets of requirements. They are not to be conflated; each must be given meaning.

a. On the one hand, paragraph (1) sets out two substantive *conditions precedent* that an investor must satisfy before it can pursue a claim in arbitration: consent and waiver. It is clear from the terms of the provision ("may submit a claim … only if") that a NAFTA Party cannot be compelled to arbitrate where those conditions are not met.

---

[59] Reply, ¶ 194.
[60] Reply, ¶ 217.

b. On the other hand, paragraph (3) sets out *the manner in which* satisfaction of those two conditions precedent—consent and waiver—is to be *conveyed* to the Respondent.

45. Paragraphs (1) and (3) thus elicit separate enquiries, and the Tribunal will pursue each in turn.

a. Article 1121(1): have the Claimants given consent?

46. Arbitration being a creature of consent, lack of consent equates lack of jurisdiction. Where any Claimant has in fact not consented to arbitrate with the Respondent as required by Article 1121(1), the Tribunal has no jurisdiction in respect of that Claimant. The Tribunal must determine whether, as the Respondent submits, that is the case here.

47. In paragraph 114 of the Request, the Claimants referred to the Respondent's offer to arbitrate in Article 1122 of the Treaty and stated that "[b]y this Request for Arbitration, Claimants accept Mexico's offer, and hereby submit the present dispute to arbitration under the Additional Facility Rules of ICSID".[61] This acceptance was given in a document reviewed and agreed to by the Claimants,[62] and signed by the Claimants' counsel pursuant to POAs by the Claimants authorizing counsel to "take any steps required for the initiation of, and to represent [Claimants] and act on [their] behalf against the United Mexican States in, arbitration proceedings under the [Treaty]".[63]

48. The Respondent submits on the basis of this record that the Claimants have not consented. According to the Respondent, the POAs "[a]t most … suggests that the Claimants would have been willing to consent to arbitration if asked …";[64] and the Claimants' consent as conveyed in paragraph 114 of the Request was only "implied or constructive".[65]

49. The Tribunal disagrees. Leaving aside the counterintuitive nature of the Respondent's position—that the Claimants would have spent millions of dollars on an arbitration to

---

61 Request, ¶ 114.
62 Tr. (ENG), Day 2, 448:21-449:4, 450:18-451:10 (G. Burr); 482:15-484:4 (E. Burr).
63 Counter-Memorial, ¶ 12; Claimants' Waivers and Powers of Attorney, 19 May 2016 – 1 June 2016, **C-4**.
64 Respondent's Post-Hearing Brief, 17 August 2018 (***Respondent's PHB***), ¶ 15.
65 Respondent's PHB, ¶¶ 21, 24.

which they did not consent—the record permits no other conclusion than that the Claimants did in fact consent:

a. The Claimants, who have all confirmed in testimony that they did consent,[66] conveyed that consent in paragraph 114 of the Request when expressly accepting the Respondent's offer in Article 1122. Nothing in that paragraph needs to be implied or construed to enable the conclusion that the Claimants did consent.

b. It is true that the Claimants provided their consent through counsel. That is also irrelevant. Where, as here, there is no suggestion that Quinn Emanuel was not duly authorized or that it acted *ultra vires* in issuing the Request conveying the Claimants' consent, there is no question that all statements in the Request are attributable to and bind the principals of Quinn Emanuel—the Claimants. Nothing in the Treaty precludes investors from acting through duly authorized legal counsel.

50. While the Respondent elsewhere concedes that "[c]learly the Claimants authorized Quinn Emmanuel to 'file the arbitration' and to that end consented to the firm doing so", the Respondent suggests "[t]hat is not the point".[67] The point, according to the Respondent, is "[w]hat the Claimants did not do in the [POAs] they signed": "to declare in writing—for the benefit of the Respondent—that they 'consent to arbitration in accordance with the procedures set out in [the Treaty]'".[68] The argument, therefore,

---

66 Each Claimant has submitted evidence stating in these terms, or in materially identical terms: "I understand that Mexico alleges that I have not provided my consent to the submission of my claims in this arbitration in accordance with the ICSID Additional Facility Rules. This is simply not true; my consent has been unequivocal at all times. I at all times have expressly consented to the filing of the Request for Arbitration on my behalf, to the execution of the powers of attorney in favor of Quinn Emanuel through which I intended to consent and in fact expressly consented to arbitration in accordance with the procedures set out in the NAFTA, as well as the ICSID Additional Facility Rules. I hereby affirm, once again, that I have consented, and continue to consent, to arbitration in accordance with the procedures set out in the NAFTA, in compliance with NAFTA Article 1121". *See* Further 32 Claimants' Witness Statements dated 8 January 2018 (***Further 32 Claimants' WS***), Part III, **CWS-16** to **CWS-47**; B-Cabo, LLC Witness Statement dated 8 January 2018 (***B-Cabo WS***), Part II, **CWS-48**; Colorado Cancun, LLC Witness Statement dated 8 January 2018 (***Colorado Cancun WS***), Part II, **CWS-49**; Gordon Burr First Witness Statement dated 25 July 2017 (***G. Burr First WS***), ¶ 69, **CWS-1**; Erin Burr Second Witness Statement dated 8 January 2018 (***E. Burr Second WS***), Part V, **CWS-8**; Neil Ayervais Witness Statement dated 8 January 2017 (***Ayervais WS***), Part III, **CWS-12**; John Conley Witness Statement dated 8 January 2017 (***Conley WS***), Part IV, **CWS-13**. *See also* Tr. (ENG), Day 2: 487:13-489:1 (E. Burr).

67 Reply, ¶ 99.

68 Reply, ¶ 99.

is that a verbatim recitation by the Claimants of the phrase "arbitration in accordance with the procedures set out in" the Treaty is required to satisfy Article 1121(1).[69]

51. The Tribunal disagrees. The Request refers to the Respondent's offer in Article 1122 and states that the Claimants "accept Mexico's offer" as set forth in that provision. As further discussed below, Article 1122 in terms already expressly confines the Respondent's offer to "arbitration in accordance with the procedures set out in this Agreement". Accordingly, the only offer to which the Claimants could give their consent in paragraph 114 of the Request was necessarily and already limited to "arbitration in accordance with the procedures set out in this Agreement". A verbatim recitation of that phrase in the Request or in the POAs would not have added anything: the limitation on consent introduced by that phrase is hard-wired into the Respondent's offer. The Claimants could not accept an offer not made in Article 1122.

52. The Tribunal is not aware of any arbitral authority requiring any particular formulation for giving consent under Article 1121(1). None of the decisions cited by the Respondent, including *Methanex*, *Canfor*, *Merrill and Ring*, *Cargill*, *Detroit International Bridge*, *Bilcon*, *Resolute Forest,* and *Mercer*, suggests that a claimant can only validly give consent under Article 1121(1) by verbatim reciting Article 1122 or using any other particular phraseology.[70]

53. In sum, the Claimants did give consent as required by Article 1121(1). The only question is whether that consent was conveyed in the manner prescribed by Article 1121(3). The Tribunal turns to this next.

---

69 Respondent's PHB, ¶ 26.

70 *See, e.g.*, Reply, ¶¶ 131-136 and Respondent's PHB, ¶¶ 44-45, citing *Methanex Corporation v. United States of America,* UNCITRAL, Partial Award, 7 August 2002 (***Methanex***), **CL-26**; *Canfor Corporation v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006 (***Canfor***), **CL-29**; *Merrill and Ring Forestry L.P. v. Government of Canada*, UNCITRAL, ICSID Administered, Decision on a Motion to Add a New Party, 31 January 2008 (***Merrill and Ring***), **CL-28**; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (***Cargill***), **RL-016**; *Detroit International Bridge Company v. Government of Canada*, UNCITRAL, PCA Case No. 2012-25, Award on Jurisdiction, 2 April 2015 (***Detroit International Bridge***), **CL-3**; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 (***Bilcon***), **RL-010**; *Resolute Forest Products Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 (***Resolute Forest***), **RL-037**; *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018 (***Mercer***), **RL-038**.

b. Have the Claimants conveyed their consent in the manner prescribed by Article 1121(3)?

54. Article 1121(3) required the Claimants to give their consent "in writing", to "deliver[] [it] to" the Respondent, and to "include[] [it] in the submission of a claim to arbitration".

55. The Respondent submits that the Claimants' acceptance of the Respondent's offer in paragraph 114 of the Request, filed on their behalf by Quinn Emanuel, failed to satisfy the three requirements of Article 1121(3).[71]

56. It is true that the Claimants did not issue to the Respondent a separate letter affirming their consent to arbitration. That is also irrelevant: nothing in Article 1121(3) required them to do so. All it required was that the consent be (i) "in writing", (ii) "delivered to" the Respondent, and (iii) "included in the submission of a claim to arbitration".

57. That was done here. To wit, the Request (i) *is* a written document; (ii) *was* delivered to the Respondent; and (iii) *was* included in the submission of the claim to arbitration (which pursuant to Article 1137 of the Treaty occurs when the Request was received by the Secretary-General of ICSID).

58. The text of Article 1121(3) imposes no other requirements. Its context also militates against implying any. Under Article 1122(2), "the requirement of … the Additional Facility Rules for *written consent* of the parties" is satisfied by "[t]he consent given by [Article 1122(1)] and the submission by a disputing investor of a claim to arbitration". It would have been surprising if a claimant then could not satisfy Article 1121(3) by doing exactly that.

59. The cases cited by the Respondent also do not suggest otherwise. None of them have imposed additional requirements as to the manner of conveying consent beyond those already contained in Article 1121(3).[72]

60. In any event, even if the Respondent's interpretation of Article 1121(3) were right, that would not then have affected the Tribunal's jurisdiction. While there can be no

---

71 Respondent's PHB, ¶¶ 13-14.

72 *See, e.g.*, Reply, ¶¶ 131-136 and Respondent's PHB, ¶¶ 44-45, citing *Methanex*, **CL-26**; *Canfor*, **CL-29**; *Merrill and Ring*, **CL-28**; *Cargill*, **RL-016**; *Detroit International Bridge*, **CL-3**; *Bilcon*, **RL-010**, *Resolute Forest*, **RL-037** and *Mercer*, **RL-038**.

jurisdiction absent the Claimants' consent (both as a matter of first principles and pursuant to the express terms of Article 1121(1)), the requirements of Article 1121(3) as to the manner in which that consent is to be conveyed to the Respondent do not bear on the Tribunal's jurisdiction. Rather, failure to meet those requirements may affect the claim's admissibility and can be cured.[73]

2. Articles 1122(1) and 1119(a): the Notice and the Respondent's consent

61. Article 1119 requires that, at least 90 days prior to commencing arbitration, the investor submit a notice of intent specifying: "(a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise; (b) the provisions [of NAFTA] alleged to have been breached …; (c) the issues and the factual basis for the claim; and (d) the relief sought and the approximate amount of damages claimed."

62. Article 1122(1) provides that the Respondent consents to "the submission of a claim to arbitration in accordance with the procedures set out in this Agreement".

63. The Respondent contends that (i) the failure by the Additional Claimants "to [submit a notice of intent] rendered their purported submission to arbitration void ab initio" and (ii) "[t]hey also failed to engage the Respondent's consent to arbitration 'in accordance with the procedures set out in [the NAFTA]' under Article 1122".[74]

---

73 *See, e.g.*, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 January 2006 (***International Thunderbird***), ¶ 117 ("The Tribunal considers indeed that the requirement to include the waivers in the submission of the claim is purely formal, and that a failure to meet such requirement cannot suffice to invalidate the submission of a claim if the so-called failure is remedied at a later stage of the proceedings"). When other tribunals have referred to the conditions precedent of Article 1121 as bearing on their jurisdiction, the Tribunal does not read those decisions as referring to the form requirements of *Article 1121(3)*. See the cases cited at Memorial on Jurisdictional Objections, 30 May 2017 (***Memorial***), ¶¶ 82-83; Reply, ¶¶ 131-136; Respondent's PHB, ¶¶ 17-19. As stated above, the Tribunal agrees with those tribunals insofar as they identified the conditions precedent of *Article 1121(1)* as bearing on their jurisdiction.

74 Reply, ¶ 75.

a. The undisputed defect in the Notice

64. The Notice submitted on 23 May 2014 alleged that there had been breaches of Articles 1102, 1103, 1105 and 1110 of the Treaty;[75] set out the factual background to the claims;[76] and estimated the damages relief sought "in the range of US$ 100 million".[77]

65. In a section titled "Identification of the Disputing Investors", it provided the names and addresses of eight investors (who are now eight of the 38 Claimants) and the names of six Mexican companies[78] (who are now six of the seven Mexican Companies).[79] The Notice, however, did not provide the names and addresses of the remaining 31 Additional Claimants or of Operadora Pesa.[80]

66. It is not in dispute that, if the Claimants' contentions as regards their shareholding in the Mexican Companies are found to be correct, the aggregate shareholding held by the Additional Claimants in each of the Juegos Companies and E-Games was at all times smaller than the aggregate shareholding held by the Original Claimants, yet by no means insignificant.

67. It is also common ground that the only defect in the Notice relates to this failure to identify the Additional Claimants and Operadora Pesa as required under Article 1119(a). The Respondent has not complained about the summary of facts, the identification of the Treaty provisions allegedly breached, or the estimate of damages set out in the Notice.

68. It remains unclear what led to the omission of the Additional Claimants and Operadora Pesa from the Notice. The Claimants' evidence at the hearing was that they relied on the advice of their specialised arbitration counsel (at that time a different firm from their counsel of record in this arbitration).[81] There was a suggestion that the omission

---

75 Notice, Part III.
76 Notice, Part II.
77 Notice, Part IV.
78 The Respondent has stated that it does not "take[] issue" with the omission of the addresses of the six Mexican companies mentioned in the NOI. Reply, ¶ 38.
79 Notice, Part I.
80 Notice, Part I. *See also* Tr. (ENG), Day 2, 375:5-15 (G. Burr).
81 Tr. (ENG), Day 2, 353:13-354:5, 376:3-376:8 (G. Burr).

was insignificant because the Original Claimants allegedly were the controlling shareholders whereas the Additional Claimants were all "passive investors".[82]

69. The Tribunal need not resolve this here. For purposes of interpreting Articles 1119 and 1122, it is irrelevant why the information was omitted. All the Tribunal must determine is whether that omission has the consequences as argued by the Respondent.

b. A matter of jurisdiction or admissibility

70. The Respondent's case is that the claims by the Additional Claimants should be dismissed because their omission from the notice vitiates its consent ("They … failed to engage the Respondent's consent to arbitration 'in accordance with the procedures set out in [the NAFTA]' under Article 1122")[83] and because the defect renders their submission to arbitration void ("Failure to do so rendered their purported submission to arbitration void *ab initio*").[84] The Respondent contests that this Issue is properly characterized as going to admissibility rather than jurisdiction, but that the Additional Claimants' claims should be dismissed even if it were a matter of admissibility.[85]

71. The Claimants, on the other hand, contend that: the defective Notice does not preclude jurisdiction over the Additional Claimants;[86] the Notice was in fact filed on behalf of the Additional Claimants as well;[87] and the matter is one of admissibility and the claims should be admitted because the defect caused the Respondent no prejudice and would not have changed the course of any settlement effort.[88]

72. For the Respondent's objection to succeed, the Tribunal must find that the omission of the Additional Claimants from the Notice either (i) deprives the Tribunal of *jurisdiction* over the Additional Claimants or (ii) renders the claims by the Additional Claimants *inadmissible*. The Respondent's objections must necessarily come within the purview of that taxonomy. If the Tribunal has jurisdiction and declares the claims in question admissible, there is no other basis to dismiss the claims at this stage.

---

82 Tr. (ENG), Day 2, 509:15-510:8; 512:2-7 (G. Burr), 557:9-18 (E. Burr).
83 Reply, ¶ 75.
84 Reply, ¶ 75.
85 Reply, ¶¶ 143-144.
86 Rejoinder on Jurisdictional Objections, 8 January 2018 (***Rejoinder***), ¶ 205.
87 Rejoinder, ¶ 203.
88 Rejoinder, ¶ 206.

73. Jurisdiction pertains to whether a tribunal *has* the power to adjudicate a particular dispute, whereas admissibility pertains to whether a tribunal—which does have that adjudicative power—should *exercise* that power over a particular claim. Commentators have emphasized the practical relevance of the distinction: whereas findings pertaining to jurisdiction are subject to set-aside review in most jurisdictions, findings pertaining to admissibility are not.[89]

74. The Tribunal must necessarily examine this Issue, and the parties' related submissions, within the confines of that legal framework:

a. The Tribunal understands that the Respondent's objection on at least one iteration ("They … failed to engage the Respondent's consent to arbitration 'in accordance with the procedures set out in [the NAFTA]' under Article 1122")[90] raises an objection to the Tribunal's jurisdiction: the Respondent says it simply did not consent to arbitrate with the Additional Claimants where their names were omitted from the Notice.

b. It is less clear whether the other iteration of the Respondent's objection ("Failure to do so rendered their purported submission to arbitration void *ab initio*")[91] is aimed at the Tribunal's jurisdiction or at the claim's admissibility. To say that the defect rendered the submission to arbitration "void *ab initio*" is tantamount to saying that the current submission to arbitration cannot be given any effect. This will be the case both where the Tribunal finds that it has no jurisdiction over the Additional Claimants and where it dismisses their claims as inadmissible. The Tribunal's findings as regards jurisdiction and admissibility will thus necessarily dispose of this iteration as well.

c. The Claimants' case is that the defect in the Notice only gives rise to an issue of admissibility that does not require dismissal.[92] That being so, their contention that the Notice was understood by the Additional Claimants to be sent on their behalf as well, even if proven, is neither here nor there: the information required by Article 1119(a) to be included in the Notice would still be missing; and the

89 Z. Douglas, *The International Law of Investment Claims* (2009), ¶ 291, **RL-030**.
90 Reply, ¶ 75.
91 Reply, ¶ 75.
92 Rejoinder, ¶ 205.

question would still remain whether this defect affects the Tribunal's jurisdiction or the claims' admissibility.

75. Against this backdrop, the Tribunal will first examine whether the defect in the Notice precludes the Tribunal's *jurisdiction* over the Additional Claimants. Should it find that it does not, it will then examine whether the claims should nonetheless be dismissed as *inadmissible*.

c. Does the Tribunal have jurisdiction over the Additional Claimants?

(i) The relevant test for jurisdiction

76. Whether their omission from the Notice deprives the Tribunal of jurisdiction over the Additional Claimants is a question of *consent*. To wit, the question is whether the consent given by the Respondent in Article 1122(1) was made *conditional upon* satisfaction of Article 1119(a).

77. This question is binary and automatic. If satisfaction of Article 1119(a) is a condition to which the Respondent has tethered its consent, the Tribunal cannot have jurisdiction where that condition is not satisfied. By the same token, if satisfaction of Article 1119 is not a condition to which the Respondent has tethered its consent, then a defect in a notice of intent cannot vitiate the Respondent's consent and the Tribunal does have jurisdiction. Siren songs of pragmatism and doomsday warnings of floodgates are alien to this analysis.

78. To resolve this question, the Tribunal must interpret the Treaty as judiciously and thoughtfully as it can, in accordance with the principles of treaty interpretation as codified in Articles 31 and following of the VCLT. Accordingly, the Tribunal will parse the terms of Articles 1119 and 1122, considered in their context and in light of the Treaty's object and purpose.

79. As set out below, the Tribunal finds that Article 1119 does not condition the Respondent's consent to arbitration in Article 1122 and that the Additional Claimants' failure to issue a notice of intent therefore does not deprive the Tribunal of jurisdiction over them.

(ii) The ordinary meaning of the text of Articles 1119 and 1122(1)

80. The Tribunal first examines Article 1119; then Article 1122(1).

81. First, Article 1119 is stated in mandatory terms: "shall". However, it is entirely silent on the *consequences* of a failure to include all the required information in the notice of intent. Article 1119 does not in terms refer to Article 1122(1); does not provide that satisfaction of the requirements of Article 1119 is a condition precedent to a NAFTA Party's consent; and does not state that failure to satisfy those requirements will vitiate a NAFTA Party's consent. The text of Article 1119 alone therefore does not compel the conclusion that a failure to include all the required information in the notice of intent vitiates a NAFTA Party's consent under Article 1122(1).

82. Article 1122(1) also does not in terms refer back to either Article 1119 or the notice of intent. However, Article 1122(1) does provide, in the English version of the Treaty, that "[e]ach Party consents to the submission of a claim to *arbitration in accordance with the procedures set out in this Agreement*" (emphasis added). In the French and Spanish versions of the Treaty, the italicised terms appear as "*l'arbitrage conformément aux modalités établies dans le présent accord*" and "*arbitraje con apego a los procedimientos establecidos en este Tratado"*, respectively.

83. In the Treaty's English and French versions, the exact same language is used in Article 1121(1)(a): "*arbitration in accordance with the procedures set out in this Agreement*" and "*l'arbitrage conformément aux modalités établies dans le présent accord*". While slightly different language is used in the Spanish version ("*arbitraje en los términos de los procedimientos establecidos en este Tratado*"), the parties agree that the phrase as it appears in both Articles 1121 and 1122 must be given the same meaning.[93]

84. The Tribunal must accordingly resolve two questions of interpretation:

a. Does "in accordance with the procedures set out in this Agreement" in Article 1122(1) modify "arbitration"?

[93] Respondent's PHB, ¶ 47; Claimants' Post-Hearing Brief on Jurisdiction, 17 August 2018 (***Claimants' PHB***), ¶¶ 30-32.

b. If it does, do "the procedures" with which the "arbitration" must accord include the requirements of Article 1119?

85. The Tribunal will address each question in turn.

(a) Does "in accordance with the procedures set out in this Agreement" modify "arbitration"?

86. The parties agree that the phrase "in accordance with the procedures set out in this Agreement" should be understood to modify "arbitration".[94] The Tribunal agrees with the parties.

87. This is of some import. If, on the one hand, "in accordance with the procedures set out in this Agreement" had modified "consents" in Article 1122(1), then the provision would have to be construed as requiring that the parties *consent* in accordance with the procedures set out in the Treaty. In other words, the procedures referred to would pertain to the procedures by which *consent* is to be given.

88. If, on the other hand, "in accordance with the procedures set out in this Agreement" had modified "submission of a claim", then the procedures referred to in Article 1122(1) would pertain to the procedures by which *a claim was to be submitted*.

89. But where "in accordance with the procedures set out in this Agreement" modifies "arbitration", the provisions must be construed as providing that the parties' consent is limited to *arbitration* in accordance with the procedures set out in the Treaty. On that reading, the procedures referred to pertain to the procedures with which the *arbitration* itself must accord.

90. This interpretation, subscribed to by both parties, gives meaning to Article 1122(1): the NAFTA Parties did not provide their *ex ante* consent to just *any* arbitration: they only consented to an arbitration *which accords with the procedures set out in the Treaty*.

---

94 *Ibid.*

(b) Do "the procedures" with which the "arbitration" must accord include the requirements of Article 1119?

91. The question is which provisions of the Treaty can be said to contain the "procedures" with which the "arbitration" must accord. On this point, the parties disagree.

92. The Claimants' position on this point appears to have evolved.[95] In their post-hearing brief, they submitted, in response to questions from the Tribunal, that the "procedures" pertaining to arbitration are those set out in Articles 1123-1138 of the Treaty, which contain the specific rules in accordance with which a Chapter 11 arbitration is to be conducted.[96]

93. The Respondent, on the other hand, argues that "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";[97] and similarly, in respect of Article 1122, that "the 'procedures' in respect of the arbitration itself include the procedures for a *valid* submission of a claim to arbitration".[98]

94. The relevance of the point is clear: on the Respondent's case, the "procedures" would also include the requirements for a notice of intent under Article 1119: the "requirement [of a Notice of Intent containing all the information set out in Article 1119], together with those established in Articles 1120 and 1121 (*inter alia*) establish the 'procedure' for the submission of a claim to arbitration which … marks the commencement of an arbitral proceeding".[99]

95. The Tribunal does not find support for the Respondent's interpretation in the ordinary meaning of the terms of Article 1122(1).

96. It is axiomatic that the "arbitration" to which the Respondent gives consent in Article 1122(1) does not commence or come into existence until the submission of a claim

---

95 The Claimants initially suggested that the consent of either party to arbitrate is not conditioned on "strict and literal compliance" with every procedural detail in Chapter 11. *See* Counter-Memorial, ¶¶ 337-338; Rejoinder, ¶¶ 300-301.

96 Claimants' PHB, ¶ 35.

97 Respondent's PHB, ¶ 39 (emphasis added).

98 Respondent's PHB, ¶ 46 (emphasis added).

99 Respondent's PHB, ¶ 50.

through the filing of a notice of arbitration.[100] Issuing a notice of intent neither commences the "arbitration" nor legally commits an investor to commencing "arbitration". Only the issuance of the notice of arbitration does. After issuing a notice of intent and until the filing of a notice of arbitration, an investor remains entirely free not to commence "arbitration" at all.

97. The natural and ordinary meaning of "arbitration" is therefore the procedures commenced *by*, and to be followed *upon*, the submission of a claim. Filing a notice of intent is, put at its highest, a "procedure" to be followed *prior to* an arbitration, if any; it is not a procedure with which the subsequent *arbitration* itself, if any, must accord. As further explained below—when the Tribunal addresses the context of Articles 1119 and 1122(1)—Articles 1123 to 1136 set out precisely those procedures in some detail.

98. The Respondent counters with the argument that "the 'procedures' in respect of *the arbitration itself* include the procedures for a *valid* submission of a claim to arbitration".[101] But that argument is circular. To add the qualifier "valid" before "submission of a claim" is to simply assume the very point in issue. The question precisely is whether satisfaction of Article 1119 is or is not required to "validly" submit a claim to arbitration. Simply asserting that it is, as the Respondent's argument does, does not address the question whether in fact it is.

99. The drafters of the Treaty certainly did not so provide in terms. On the contrary, while Articles 1120 ("Submission of a Claim to Arbitration") and 1121(1) ("Conditions Precedent to Submission of a Claim to Arbitration") do expressly provide that certain conditions must be met before a claim can be "validly" submitted to arbitration, satisfaction of Article 1119 is *not* stated to be one of them. Nothing in those provisions can be said to condition the "validity" of the submission of a claim to arbitration on the satisfaction of Article 1119.

---

100 Pursuant to Article 1137(1) of the Treaty, "[a] claim is submitted to arbitration under this Section when … (b) the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules has been received by the Secretary-General".

101 Respondent's PHB, ¶ 46 (emphasis added).

100. The Tribunal now turns to the import of these other provisions, which are part of the context of Articles 1119 and 1122(1) that the Tribunal must consider.

(iii) The context provided by the provisions immediately preceding and following Article 1122

101. Article 31 of the VCLT requires that the text of a treaty provision be interpreted in context. Where the terms of Articles 1119 and 1122(1) do not provide that a failure to satisfy Article 1119 vitiates the Respondent's consent in Article 1122, the Tribunal would need to *imply* this consequence from the context of those provisions.

102. Under the applicable principles of treaty interpretation, it is possible in certain circumstances to imply terms from a provision's context. The difficulty here, however, is that the context strongly militates *against* reading such an implied term into the Treaty. It does so in two ways:

a. First, in nearly all the provisions of Section B of Chapter 11 immediately *following* Article 1122, the Treaty sets out detailed "procedures" with which an "arbitration" under Chapter 11 must accord.

b. Second, in nearly all the provisions of Section B of Chapter 11 immediately *preceding* Article 1122, the NAFTA Parties showed that, whenever they wanted to condition access to Treaty arbitration on the investor's satisfaction of certain requirements, they expressly did so.

103. The Tribunal will address each point in turn.

(a) Articles 1123 to 1136

104. The fourteen provisions immediately following Articles 1121 and 1122—Articles 1123-1136—set out detailed procedures to be followed in any arbitration pursuant to the Treaty.

105. They include, among other things, rules regarding the number of arbitrators and the method of their appointment; the appointment of a presiding arbitrator; consolidation; participation by a non-disputing NAFTA party; the place of arbitration; governing law; expert reports; interim measures; and the final award.

106. The "procedures" with which any "arbitration" under Chapter 11 must accord pursuant to Article 1122 most naturally refer to these detailed procedures for the conduct of the arbitration set out in Articles 1123-1136. The NAFTA Parties did not consent in Article 1122 to just any generic arbitral process; they agreed to the specific arbitral process as organised and regulated by Articles 1123-1136.

(b) Articles 1116 to 1121

107. On the other hand, the provisions preceding Article 1122 show that, whenever the drafters of the Treaty wished to condition access to Treaty arbitration on the investor's satisfaction of certain requirements, they specifically and expressly did so.

108. *Article 1116* provides that "[a]n investor *may not make a claim if* more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage".[102] *Article 1117* contains mirroring provisions for claims on behalf of an enterprise. Neither Article 1119 nor any other provision of the Treaty similarly provides that an investor "may not make a claim" if the notice of intent omits some of the information specified in that provision. That choice by the Treaty's drafters cannot be ignored.

109. *Article 1120*, styled "Submission of a Claim to Arbitration", provides that an investor may submit the claim to arbitration "*provided that* six months have elapsed since the events giving rise to a claim" and subject to the exclusions of Annex 1120.1.[103] Article 1120 does not similarly add "and provided that a notice of intent was served containing all the information specified in Article 1119". That choice by the Treaty's drafters cannot be ignored.

110. *Article 1121(1)(a)*, styled "Conditions Precedent to Submission of a Claim to Arbitration", provides that "a disputing investor *may submit a claim ... to arbitration only if*"[104] the investor consents provides the requisite consent and waiver. Article 1121(a) does not similarly add "and only if the disputing investor has served a notice of intent in the manner prescribed by Article 1119". Nor is Article 1119 similarly

---

102 (Emphasis added).
103 (Emphasis added).
104 (Emphasis added).

styled a "Condition Precedent to Submission of a Claim to Arbitration". That choice by the Treaty's drafters cannot be ignored.

111. Respondent's interpretation of Article 1122 would also lead to a strained interpretation of Article 1121(1)(a), where—and on this the parties do agree[105]—the phrase "arbitration in accordance with …" is to be given the same meaning. On the Respondent's interpretation, at the time an investor submits a claim to arbitration, it would be required by Article 1121(1)(a) to give its "consent" not only to the arbitration that it proposes to commence but also to a pre-arbitral step of its own that lies in the past. It strikes the Tribunal as more natural to read the requirement of giving consent in Article 1121(1)(a) as being prospective in nature, pertaining to a process that lies ahead.

112. *Article 1118* exhorts ("should") the parties to settle a claim through consultation or negotiation. At least one important objective of Article 1119—and on this the parties appear to agree[106]—is to enable the Respondent to assess whether it can resolve the claim through settlement discussions, as envisaged by Article 1118, and thus avoid international arbitration. That is also apparent from the Free Trade Commission's statement on notices of intent to submit a claim to arbitration (the ***FTC Statement***). After referring to both Articles 1118 and 1119, the FTC states "[t]he notice of intent naturally serves as the basis for consultations or negotiations between the disputing investor and the competent authorities of a Party".[107]

113. It is common ground that a failure to pursue such settlement discussions however is no bar to Treaty arbitration.[108] That being so, the Respondent's reading of Article 1119 presents a logical challenge. On the Respondent's case, a claimant who fails to include certain information in a notice of intent would forfeit the right to Treaty arbitration. Yet a claimant who fails altogether to pursue the settlement effort that the notice of intent is intended to facilitate, would retain that right undiminished. If failing to pursue settlement discussions does not bar access to Treaty arbitration, then at least bald logic—and at this juncture the Tribunal would not put it higher than that—

---

105 Respondent's PHB, ¶¶ 39, 47; Claimants' PHB, ¶¶ 30-32.
106 *See* Reply, ¶ 42; Rejoinder, ¶ 237.
107 Statement of the Free Trade Commission on notice of intent to submit a claim to arbitration, 7 October 2003, p. 1, **CL-13**.
108 Reply, ¶ 25; Counter-Memorial, ¶ 329.

suggests that neither should a failure to comply with a step designed to facilitate such settlement discussions.

(iv) The Treaty's object and purpose

114. The Treaty's object and purpose lend further support to the textual and contextual analysis set out above.

115. In Article 102, styled "Objectives", the NAFTA Parties recorded in paragraph 1(e) that one such objective was to "create *effective procedures* for … the resolution of disputes".[109] In addition, in Article 1115, styled "Purpose", the NAFTA Parties recorded that one purpose of the dispute resolution provisions of Chapter 11 was to "establish[] a mechanism for the settlement of investment disputes that assures … *equal treatment among investors* of the Parties …".[110]

116. This suggests that access to Chapter 11 arbitration was intended to (i) provide investors access to a dispute resolution mechanism that is successful in producing the intended result of resolving investment disputes (ii) without distinction between well and ill-resourced claimants, corporate or natural persons, or more and less sophisticated investors.

117. It strikes the Tribunal as a difficult proposition that these objectives could be furthered by barring access to that dispute resolution mechanism on the basis that the names of certain investors were omitted from the notice of intent.

(v) Decisions of other tribunals

118. The Respondent submits that there is a "*jurisprudence constante* to the effect that 'all pre-conditions and formalities under Articles 1118-1121' must be satisfied by the disputing investor in order to establish a disputing Party's consent under Article 1122".[111]

119. There are three independent reasons why, to the Tribunal's mind, that contention does not advance the Respondent's case.

---

109 (Emphasis added).
110 (Emphasis added).
111 Reply, ¶ 140.

a. First, the Tribunal's mandate is to find the terms of the Treaty as they are and to interpret them in accordance with the VCLT. If other tribunals have arrived at a different interpretation of the same provision, that does not change that mandate.

b. Second, the Tribunal is not persuaded that the decisions cited by the Respondent do form a *jurisprudence constante*. Other tribunals cited by the Claimants, such as those in in *ADF* and *Chemtura*, for example, have dismissed the proposition that a failure to satisfy the requirements of Article 1119 "must result in the loss of jurisdiction".[112] The Tribunal therefore does not break new ground by finding that consent in Article 1122 is not tethered to satisfaction of Article 1119.

c. Third, it is not even clear whether any of the decisions cited by the Respondent actually did purport to construe Article 1119 as containing a condition precedent to consent: none of them reveals any attempt to construe Article 1119 at all.[113] To the extent that those decisions are cited for the proposition that Articles 1120 and 1121(1) impose conditions that must be met for an investor to have access to Treaty arbitration, the Tribunal does unreservedly agree with them, as explained above.

120. Based on the foregoing, the Tribunal concludes that the Respondent's consent in Article 1122 is not conditioned upon the satisfaction of the requirement of Article 1119(a) to identify the Additional Claimants in the Notice. The Tribunal accordingly finds that it has jurisdiction over the Additional Claimants and dismisses the Respondent's objection insofar as it resisted the Tribunal's jurisdiction over the Additional Claimants.

---

112 *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003 (***ADF***), ¶ 134, **CL-18**. *See also Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, 2 August 2010, ¶ 102, **CL-21** (quoting *ADF* with approval).

113 *See, e.g.*, Memorial, ¶¶ 56-58, Reply, ¶¶ 131-136, Respondent's PHB, ¶¶ 34, 44-45, citing *Methanex*, ¶ 108, **CL-26** (addressing jurisdictional challenges under Article 1101, 1116-1117 and 1121 but not Article 1119); *Merrill and Ring*, ¶¶ 27-28, **CL-28** (considering only previous NAFTA decisions in discussion of Article 1119 without construing the text of the Treaty); *Canfor*, ¶ 138, **CL-29** (addressing jurisdictional challenge under Article 1901); *Cargill*, ¶ 183, **RL-016** (dismissing jurisdictional challenge on the basis that the requirements of Article 1119 had been fulfilled); *Resolute Forest*, ¶ 87, **RL-037** (addressing jurisdictional challenges under, *inter alia*, Articles 1116-1117); *Mercer*, ¶ 6.1, **RL-038** (addressing jurisdictional challenges under Articles 1116-1117, 1108 and 1503).

d. Are the claims by the Additional Claimants admissible?

121. As stated earlier, where the Tribunal finds that it has jurisdiction notwithstanding the Additional Claimants' failure to satisfy Article 1119(a), it must next examine whether it is appropriate to *exercise* that jurisdiction over them—or put differently, whether their claims are admissible.

(i) The relevant test for admissibility

122. Article 1119 imposes an obligation on the investor, but the existence of an obligation says nothing about the consequences of a failure to meet that obligation.

123. The Treaty does not in terms require a sanction of dismissal. As seen above, unlike the provisions of Articles 1116, 1117, 1120 and 1121(1), neither Article 1119 nor any other provision of the Treaty provides that a claim can be submitted to arbitration "only if" or "provided that" the requirements of Article 1119 have been met. Similarly, the FTC Statement does not provide that non-compliance with Article 1119 must result in dismissal of the claim. Absent any language in the treaty so mandating, the Tribunal cannot imply a *right* to dismissal of the claim merely because to some it might seem desirable to do so.[114]

124. Where the object and purpose of the Treaty includes the "creat[ion] [of] *effective procedures* for … the resolution of disputes",[115] it is also difficult to see how reading Article 1119 as *necessarily* and *automatically* implying a sanction of dismissal could be consistent with that object and purpose.

125. Decisions by other treaty tribunals exhibit no uniformity in their approaches to these issues. Other tribunals have not always drawn a clear distinction between jurisdiction and admissibility, and whenever in substance they addressed a preliminary objection

---

114 This trite point requires no authority but by way of illustration, see *South West Africa Cases (Liberia v. South Africa/Ethiopia v. South Africa)*, Judgment (Second Phase), 1966 ICJ Rep., p. 6, at ¶ 91: "It may be urged that the Court is entitled to engage in a process of 'filling in the gaps', in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes. The Court need not here enquire into the scope of a principle the exact bearing of which is highly controversial, for it is clear that it can have no application in circumstances in which the Court would have to go beyond what can reasonably be regarded as being a process of interpretation, and would have to engage in a process of rectification or revision. *Rights cannot be presumed to exist merely because it might seem desirable that they should*" (emphasis added).

115 Treaty, Article 102.

that the investor had failed to satisfy a pre-arbitral step, they have exhibited a diversity of approaches.

126. While some treaty tribunals have dismissed claims and required a refiling upon the defect being cured,[116] others have admitted the claims when doing so best served the interests of justice, considering factors such as futility, efficiency, due process, prejudice and a balancing of the parties' interests.[117]

---

116 See, for example, *Western NIS Enterprise Fund v. Ukraine,* ICSID Case No. ARB/04/2, Order, 16 March 2002, **CL-33**.

117 For other NAFTA decisions, see *ADF*, ¶¶ 134, 138, **CL-18** ("Turning back to Article 1119(b), we observe that the notice of intention to submit to arbitration should specify not only 'the provisions of [NAFTA] alleged to have been breached' but also 'any other relevant provisions [of NAFTA].' Which provisions of NAFTA may be regarded as also 'relevant' would depend on, among other things, what arguments are subsequently developed to sustain the legal claims made. We find it difficult to conclude that failure on the part of the investor to set out an exhaustive list of 'other relevant provisions' in its Notice of *Intention* to Submit a Claim to Arbitration must result in the loss of jurisdiction to consider and rely upon any unlisted but pertinent NAFTA provision in the process of resolving the dispute. … Finally, we observe that the Respondent has not shown that it has sustained any prejudice by virtue of the non-specification of Article 1103 as one of the provisions allegedly breached by the Respondent. Although the Investor first specified its claim concerning Article 1103 in its Reply to the Respondent's Counter-Memorial, the Respondent had ample opportunity to address and meet, and did address and meet, that claim and the Investor's supporting arguments, in its Rejoinder"); *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Decision on Harmac Motion, 24 February 2000, ¶ 18, **CL-6** ("The requirement in Article 1121(3) that a waiver required by Article 1121 shall be included in the submission of a claim to arbitration does not necessarily entail that such a requirement is a necessary prerequisite before a claim can competently be made. Rather it is a requirement that before the Tribunal entertain the claim the waiver shall have been effected. That has now been done. Canada has sustained no prejudice in this respect."); *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award Concerning the Motion by Government of Canada Respecting the Claim Based Upon Imposition of the "Super Fee", 7 August 2000, ¶ 26, **CL-19** ("That objective, found in Article 1115, is to provide a mechanism for the settlement of investment disputes that assures 'due process' before an impartial tribunal. Lading that process with a long list of mandatory preconditions, applicable without consideration of their context, would defeat that objective, particularly if employed with draconian zeal"); *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 86, **CL-17** ("Having regard to the distinctions drawn between claims brought under Articles 1116 and 1117, a NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor. There are various ways of achieving this, most simply by treating such a claim as in truth brought under Article 1117, provided there has been clear disclosure in the Article 1119 notice of the substance of the claim, compliance with Article 1121 and no prejudice to the Respondent State or third parties. International law does not place emphasis on merely formal considerations, nor does it require new proceedings to be commenced where a merely procedural defect is involved"). For other treaty decisions, see, *Philip Morris Brands et al v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, ¶¶ 145, 147, **CL-12** ("As held by the ICJ, 'it is not apparent why the arguments based on the sound administration of justice, which underpin the *Mavrommatis* case jurisprudence, cannot also have a bearing in a case such as the present one. It would not be in the interest of justice to oblige the Applicant, if it wishes to pursue its claims, to initiate fresh proceedings. It is preferable except in special circumstances, to conclude that the condition has, from that point on, been fully met'. In the *Mavrommatis* case the Permanent Court of International Justice had found that jurisdictional requirements which were not satisfied at the time of instituting legal proceedings could be met subsequently. The Court stated: 'Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of

form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications'. The Tribunal agrees with and accepts this reasoning. It also notes that the same reasoning applies regardless how Article 10(2)'s domestic litigation requirement is characterized. Whether regarded as jurisdictional, admissibility or procedural, the considerations identified in the *Mavrommatis* case apply fully. … Nor does the Tribunal have to decide between the position taken by the International Court in *Croatia v Serbia* and the position taken by Judge Abraham, dissenting, in that case. In *Croatia v Serbia*, Judge Abraham expressed the view that the *Mavrommatis* principle cannot be applied if it is no longer possible to recommence the proceedings (because of supervening changes in jurisdictional provisions, for example) at the time when the decision is taken. In the present case, the BIT remains in force and it would be perfectly possible for the Claimants to commence these same proceedings on the day after a decision by this Tribunal is handed down, a situation where dismissal of the Claimants' claims would merely multiply costs and procedures to no use" (footnotes omitted)); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 343-346, **CL-22** ("The Republic's objection depends upon the characterisation of the six-month period in Article 8(3) of the BIT as a condition precedent to the Arbitral Tribunal's jurisdiction, or the admissibility of BGT's claims. In the Arbitral Tribunal's view, however, properly construed, this six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. Its underlying purpose is to facilitate opportunities for amicable settlement. Its purpose is not to impede or obstruct arbitration proceedings, where such settlement is not possible. Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding. If it did so, the provision would have curious effects …. In the Arbitral Tribunal's view, such consequences would not have been contemplated in the framing of Article 8(3), and nothing in the text of this provision requires such, as a matter of treaty interpretation. Equally, this is not to render the relevant wording in Article 8(3) superfluous (as was suggested, *e.g.*, in *Generation Ukraine v. Ukraine*). Treaties often contain hortatory language, and there is an obvious advantage in a provision that specifically encourages parties to attempt to settle their disputes. There is no reason, however, why such a direction need be a strict jurisdictional condition. Although there are different approaches to this issue, in part depending upon the particular treaty provisions in question, the Arbitral Tribunal notes that its analysis is in line with that adopted in many previous arbitral awards, in respect of equivalent provisions (as cited by BGT)"); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶¶ 100, 102, **CL-23** ("The Tribunal agrees with the view that the notice requirement does not constitute a prerequisite to jurisdiction. Contrary to Pakistan's position, the non-fulfilment of this requirement is not 'fatal to the case of the claimant' (Tr. J., 222:34). As Bayindir pointed out, to require a formal notice would simply mean that Bayindir would have to file a new request for arbitration and restart the whole proceeding, which would be to no-one's advantage (Tr. J., 184:18 *et seq.*). … The Tribunal further notes that Pakistan made no proposal to engage in negotiations with Bayindir following Bayindir's notification of 4 April 2002, which made an explicit reference to the failure of the efforts to negotiate. In the Tribunal's view, if Pakistan had been willing to engage in negotiations with Bayindir, in the spirit of Article VII of the BIT, it would have had many opportunities to do so during the six months following the notification of 4 April 2002. Along the lines of the award rendered in *Lauder v. The Czech Republic*, the Tribunal is prepared to find that preventing the commencement of the arbitration proceedings until six months after the 4 April 2002 notification would, in the circumstances of this case, amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties and hold[s] 'that the six-month waiting period in [the BIT] does not preclude it from having jurisdiction in the present proceedings'"(footnotes omitted)); *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award, 14 April 2014, ¶ 321, **CL-58** ("With these cumulative explanatory factors, the Tribunal considers that it would not be right to construe the terms of Article 8 of the Treaty as barring absolutely the Claimant's claims in this arbitration as a matter of jurisdiction; nor, for the same reason and on the facts of this case, to consider such claims inadmissible as regards the exercise of jurisdiction by this Tribunal. Having regard to the object and purpose of Article 8 under Article 31 of the Vienna Convention on the Law of Treaties, given also the context of the Treaty intended (by its preamble) expressly to encourage and protect foreign investments in Poland, the Tribunal decides that the over-strict meaning, for which the Respondent contends, is too semantic in its approach and unduly harsh in its result. This is particularly so where the Claimant's non-compliance is only formalistic and where the Respondent has suffered no prejudice which could not be compensated by an appropriate order by this Tribunal for legal and arbitration costs unnecessarily incurred or wasted by reason of the Claimant's undue

127. If a common denominator can be derived from these diverging approaches, it is that there is no automaticity between the existence of an admissibility defect and the dismissal of the claim. Instead, the question of whether to admit the claim notwithstanding the defect is one that involves a margin of judicial appreciation by the tribunal.

128. This is the approach that the Tribunal will adopt here.[118] In exercising judgment as to whether the Additional Claimants' claims should be admitted, the Tribunal must do what best serves the interests of justice. To that end, the Tribunal considers that it must give particular weight to whether the defect has caused the Respondent any prejudice and which course is favoured by an efficient administration of justice.

129. As explained in the next section, in the specific circumstances of this case, the foregoing considerations militate against a dismissal of the Additional Claimants' claims.

(ii) Whether the claims by the Additional Claimants are admissible

130. As seen earlier, the FTC Statement indicates that the purpose of a notice of intent is to provide a NAFTA Party with the information it needs to assess amicable settlement opportunities as contemplated in Article 1118. It is possible for that purpose to be fulfilled even where the notice of intent fails to include all of the requisite information.

---

haste in commencing this arbitration."); *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 584, **CL-38** ("This conclusion derives more from a weighting of the specific interests at stake rather than from the application of the general principle of futility: It is not about whether the 18 months litigation requirement may be considered futile; it is about determining whether Argentina's interest in being able to address the specific claims through its domestic legal system would justify depriving Claimants of their interests of being able to submit it to arbitration").

[118] The Tribunal notes that other tribunals have sometimes gone further, considering they had a margin of judicial appreciation even where a pre-arbitral step is an express condition on a party's consent to arbitration. The Tribunal does not (and does not need to) follow that approach. *See, e.g., Philip Morris Brands et al v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, ¶ 144, **CL-12** ("*[E]ven if the [domestic litigation] requirement were regarded as jurisdictional*, the Tribunal concludes that it could be, and was, satisfied by actions occurring after the date the arbitration was instituted. The Tribunal notes that the ICJ's decisions show that the rule that events subsequent to the institution of legal proceedings are to be disregarded for jurisdictional purposes has not prevented that Court from accepting jurisdiction where requirements for jurisdiction that were not met at the time of instituting the proceedings were met subsequently (at least where they occurred before the date on which a decision on jurisdiction is to be taken)") (emphasis added).

131. In the same vein, the Respondent acknowledges that Article 1119 may need to be approached with some flexibility when it observes that "there may be room to argue that a notice of intent containing minor flaws—such as a misspelled name or an incorrect postal code—is *sufficiently* compliant with Article 1119".[119] One could think of other examples, such as the estimation of damages required by Article 1119(d): how many notices can be said in hindsight to have included a truly accurate estimate? NAFTA case law may in that sense well be rife with technically inaccurate Article 1119 notices. Yet nobody would suggest that this should have barred those claims.

132. While the Tribunal takes the Respondent's point that the omission of the names of the Additional Claimants is not a "minor flaw" akin to a misspelling of their names, the fact remains that the addition of those names would not have expanded on the notice given to the Respondent as regards the nature of the dispute. The claims by the Additional Claimants being co-extensive with those asserted by the Original Claimants in the Notice, the Notice still provided the Respondent with sufficient information regarding the dispute to enable a meaningful settlement effort.

133. This is therefore not a situation where a respondent State has been ambushed, hearing about the dispute as such for the first time upon receipt of the request for arbitration. Where the purpose of the Notice was to facilitate settlement discussions pursuant to Article 1118, the Notice here did serve that purpose.

134. The Respondent submits that the claims by the Additional Claimants should nonetheless be dismissed because they failed to cure the defect by doing one of two things:

> First, the Claimants as a group could have asked the ICSID to suspend registration of the claim during the 57 days that registration was pending. They would then file a fresh notice of intent naming all of the disputing investors, wait 90 days and then refile the RFA. …
>
> The second potential course of action would have been for the Additional Claimants to file their own notice of intent, wait 90 days and then file a request for arbitration in a separate proceeding …

[119] Reply, ¶ 39 (emphasis added).

> and apply later to have the two cases consolidated under NAFTA Article 1126.[120]

135. The Claimants did indeed neither of those things. Instead, they served an Amended Notice (including the names of all the Additional Claimants) after the registration of the Request, on 2 September 2016, and they did not refile the Request. The Tribunal was constituted more than five months later, on 14 February 2017.

136. The Tribunal accepts that the Amended Notice did not allow any renewed settlement effort to take place *prior to* arbitration, as envisaged—albeit in exhortatory terms only—by Article 1118. In the circumstances of this case, however, the Tribunal cannot see how dismissal on that basis can be either reconciled with the precept of an efficient administration of justice or warranted by the existence of prejudice.

137. First, where, as here, the Notice did in fact contain information sufficient to enable meaningful settlement discussions *prior to* the arbitration, there is no discernible prejudice to the Respondent. Second, even if that had not been the case, where the parties then still had more than five months before the constitution of the Tribunal to pursue settlement efforts, the appropriate sanction would not have been dismissal.

138. Instead, in that case the Respondent would have been entitled to compensation for any resultant financial wastage.[121] Where an investor impairs the ability of the NAFTA Party to pursue settlement prior to arbitration, it is well within the powers of a NAFTA tribunal to allocate responsibility for any resultant wastage to the investor. Failure to comply with Article 1119 may in that sense come at considerable financial cost to the investor, and there is no risk of Article 1119 being rendered nugatory.

139. Based on the foregoing considerations, the Tribunal dismisses the Respondent's objection insofar as it sought the dismissal of the Additional Claimants' claims as inadmissible. The Tribunal emphasizes that it reaches that conclusion in light of the circumstances specific to this case—what best serves the interests of the

---

120 Reply, ¶¶ 79-80.

121 Conceptually this is not novel. The Tribunal notes that in the domestic legal context, where a contract requires a notice of dispute prior to commencement of arbitration for the same purpose of enabling settlement discussions, a failure to issue a compliant notice of dispute is treated in some jurisdictions in the same manner as any breach of contract: where that breach of contract can be shown to have caused financial loss to the other party, the applicable remedy in those systems is to award damages; not to decline arbitral jurisdiction. See G. Born and M. Scekic, *Pre-Arbitration Procedural Requirements*, in D. Caron *et al.* (eds.), *Practising Virtue: Inside International Arbitration* (2015), p. 249.

administration of justice will necessarily yield different conclusions in different circumstances.

B. THE CLAIMANTS' CLAIM UNDER ARTICLE 1117 ON BEHALF OF THE MEXICAN COMPANIES

140. The Respondent has raised all three Issues in respect of the claims under Article 1117 on behalf of the Mexican Companies: consent by the Mexican Companies (Article 1121); consent by the Respondent (Articles 1119/1122); and ownership or control (Article 1117).

141. The Tribunal can readily dispose of the second of those objections. As with the Additional Claimants, the failure to identify Operadora Pesa in the original Notice does not vitiate the Respondent's consent under Article 1122. All the reasoning set out in Section V.A.2 above applies *mutatis mutandis* to the Respondent's objection insofar as it pertains to Operadora Pesa.

142. The Tribunal will address the two remaining objections in this order: first the objection giving rise to Issue 3 (ownership or control), and then the objection giving rise to Issue 1 (consent by the Mexican Companies).

1. Article 1117: did the Claimants own or control the Mexican Companies at the relevant time(s)?

143. For the Claimants to be able to pursue claims on behalf of the Mexican Companies under Article 1117, they must establish that they owned or controlled those companies at the relevant time(s). To resolve the Respondent's objection that the Claimants have failed to do so, the Tribunal must answer each of the following questions:

a. What is or are the relevant time(s) at which the Claimants must be able to demonstrate ownership or control?

b. What number and type of shares did the Claimants own at such time(s)?

c. Based on the foregoing, did the Claimants "own" the Mexican Companies at such time(s)?

d. Based on the foregoing, did the Claimants "control" the Mexican Companies at such time(s)?

144. The Tribunal will address each question in turn.

a. What is or are the relevant time(s) at which the Claimants must be able to demonstrate ownership or control?

145. The parties agree that the Claimants must establish that they owned or controlled the Mexican Companies *at the time of the treaty breaches*.[122] At least one other NAFTA tribunal to have confronted this issue has so held,[123] and this Tribunal agrees.

146. The parties disagree, however, as to whether the Claimants must also establish that they owned or controlled the Mexican Companies *at the time of the submission of the claim*. The Claimants submit that they must not.[124] The Respondent submits that they must.[125]

147. The Tribunal agrees with the Respondent.

148. This is clear from the terms of Article 1117 itself, which uses the present tense: an investor may make a claim "on behalf of an enterprise of another Party that is a juridical person that the investor *owns or controls* directly or indirectly".[126] Thus, the investor must own or control the enterprise at the time it submits a claim on the enterprise's behalf. The drafters of the Treaty could have said an enterprise "that the investor owned or controlled at the time of the alleged breach". They chose not to.

149. Similarly, Article 1121(1)(b) requires that an investor submitting a claim to arbitration "and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person *that the investor owns or controls* directly or indirectly, the enterprise",[127] waive their right to initiate or continue proceedings before any domestic forums. Again, the Treaty clearly envisages that the investor own or control the enterprise at the time arbitration is commenced. The drafters of the Treaty could have used the past tense; they chose not to.

---

122 Respondent's PHB, ¶ 110; Claimants' PHB, ¶ 93.

123 *Vito G. Gallo v. Government of Canada*, UNCITRAL, Award, 15 September 2011 (***Gallo***), ¶ 332, **RL-32**.

124 Claimants' PHB, ¶¶ 94-95.

125 Respondent's PHB, ¶ 110.

126 (Emphasis added).

127 (Emphasis added).

150. These textual points alone are, in the Tribunal's mind, dispositive: disregarding that unequivocal direction in the text of the Treaty would offend the principles of interpretation of the VCLT that the Tribunal must apply.

151. The Tribunal observes that the fact that Article 1117 requires the investor to own or control the enterprise at the time it submits a claim on that enterprise's behalf does not deprive an investor of Treaty protection where a NAFTA Party expropriates, otherwise causes the loss of, or destroys the value of, its investment.

152. In those circumstances, the investor's claims under Article 1116 will survive undiminished. Article 1116 does not require subsistence of the investment at the time a claim is submitted. Indeed, unlawful expropriation being the textbook example of wrongful conduct against which the Treaty seeks to protect, any other interpretation would eviscerate the protections of Chapter 11. However, where the investor no longer owns or controls the enterprise at the time of submission of the claim, it can no longer pursue an Article 1117 claim "on behalf of" that enterprise.

153. The authorities cited by the Claimants on this point[128] are inapposite. None of them addressed the question of whether ownership or control for purposes of Article 1117 must be established at the time of submission of the claim. The Claimants themselves admit that the tribunal in *Mondev* "did not specifically address ownership/control under Article 1117".[129] In *Gallo*, as the Respondent rightly points out,[130] the issue was whether a claimant had to own or control the enterprise *at the time of the breach* in order to bring an Article 1117 claim.[131] Further, *Daimler* and *EnCana* are not NAFTA cases and do not shed any light on this point of interpretation of Article 1117. To the extent that any of these cases suggest that a claimant does not need to own or control its investment at the time of submission of the claim, these cases were in the context of an investor bringing claims on its own behalf, similar to claims under

---

128 Claimants' PHB, ¶ 94.

129 Claimants' PHB, ¶ 94(i). *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 80, **CL-17** (making a finding as to the definition of an investor under Article 1116 and 1117, but not ownership or control).

130 Respondent's PHB, ¶ 114, fn. 103.

131 *Gallo*, ¶¶ 321-330, **RL-32**.

Article 1116.[132] As already explained, the Tribunal agrees that Article 1116 does not require subsistence of the investment at the time of the claim.

b. What number and type of shares did the Claimants own in the Juegos Companies at the relevant times?

154. One would have thought that this question would be the least controversial part of the case. Unfortunately it was not. There are three reasons for that:

a. Controversy has arisen as to whether in November 2014 the Claimants transferred their shares in the Juegos Companies to a third party—which the Tribunal will refer to as the ***Grand Odyssey Controversy***.

b. Evidentiary difficulties have arisen from the fact that the Claimants have been unable to produce most of the relevant shareholder registries and capital variation books for the Juegos Companies.

c. Controversy has arisen as to whether *asambleas* conducted for the Juegos Companies in January 2018 could validly and retroactively approve certain share transfers allegedly made prior to 2014.

155. The Tribunal will address each point in turn.

(i) The Grand Odyssey controversy

156. The Respondent alleges that, pursuant to resolutions adopted at *asambleas* held in 7 November 2014 for four of the Juegos Companies—all except JVE Mexico—the Claimants transferred their shares in those Juegos Companies to a third party, Grand Odyssey.[133]

---

132 *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶ 90, **CL-63** (finding that the claimant was exercising a "direct right of action" that was "independent[] from those of the corporation concerned"); *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, UNCITRAL, Award, 3 February 2006, ¶ 126, **CL-65** ("EnCana is not acting 'on behalf of an enterprise which the investor owns or controls directly or indirectly…'. Rather it is bringing a claim on its own behalf, alleging loss or damage to itself arising out of the Respondent's measures").

133 Reply, ¶¶ 219-220; Respondent's PHB, ¶¶ 102, 168.

157. The Claimants contend that no such transfer occurred,[134] that they called *asambleas* in early 2018 to declare the *asambleas* held on 7 November 2014, and the resolutions adopted during those *asambleas* in favour of Grand Odyssey, to be void *ab initio*.[135]

158. The Tribunal has carefully reviewed the record relating to this matter. On that basis, the Tribunal finds that no transfer of shares to Grand Odyssey occurred, whether prior to, during, or after the November 2014 *asambleas*. The Tribunal sets out below its findings leading to that conclusion.

159. Some time prior to August 2014, an individual named Benjamin Chow contacted Gordon Burr, offering to assist the Claimants in reopening the casinos. Chow proposed a plan which involved, amongst other things, giving control of the Boards of the Juegos Companies to Chow and his associates (including an individual named Luc Pelchat), and the transfer of the Claimants' shares in the Juegos Companies to Grand Odyssey.[136]

160. On 29 August 2014, the five Juegos Companies each held an *asamblea* in which the shareholders: (i) granted control of the Boards to Chow, Pelchat and another of their associates;[137] and (ii) in the case of four of the Juegos Companies—all except JVE Mexico—*authorised* the Claimants to execute a transfer of their shares to Grand

---

134 Rejoinder, ¶ 142; Claimants' PHB, ¶¶ 124-127.

135 Notarised Minutes of the General Shareholders' Meeting of JVE Sureste on 5 January 2018 (notarised on 2 April 2018), p. 14, **C-225**; Notarised Minutes of the General Shareholders' Meeting of JVE Centro on 5 January 2018 (notarised on 2 April 2018), p. 21, **C-226**; Notarised Minutes of the General Shareholders' Meeting of JVE DF on 5 January 2018 (notarised on 2 April 2018), p. 13, **C-227**; Notarised Minutes of the General Shareholders' Meeting of JyV Mexico on 5 January 2018 (notarised on 2 April 2018), p. 13, **C-228**; Notarised Minutes of the General Shareholders' Meeting of JVE Mexico on 5 January 2018 (notarised on 2 April 2018), pp. 12-13, **C-229**. *See also* Further 32 Claimants' WS, Part V, **CWS-16** to **CWS-47**; Gordon Burr Second Witness Statement dated 8 January 2018 (***G. Burr Second WS***), ¶ 34, **CWS-7**; E. Burr Second WS, ¶ 45, **CWS-8**; Ayervais WS, ¶ 31, **CWS-12**; Conley WS, ¶ 29, **CWS-13**.

136 G. Burr First WS, ¶ 52, **CWS-1**; Julio Gutierrez Morales First Witness Statement dated 25 July 2017 (***Gutierrez First WS***), ¶¶ 28-30, **CWS-3**; Benjamin Chow Witness Statement dated 8 January 2018 (***Chow WS***), ¶¶ 14-15, **CWS-11**.

137 Notarised Minutes of the General Shareholders Meeting of JVE Sureste held on 29 August 2014 (notarised on 10 September 2014), p. 32, **C-36**; Notarised Minutes of the General Shareholders Meeting of JVE Centro held on 29 August 2014 (notarised on 10 September 2014), p. 32, **C-37**; Notarised Minutes of the General Shareholders Meeting of JVE DF held on 29 August 2014 (notarised on 10 September 2014), p. 33, **C-38**; Notarised Minutes of the General Shareholders Meeting of JVE Mexico held on 29 August 2014 (notarised on 10 September 2014), p. 31, **C-39**; Notarised Minutes of the General Shareholders Meeting of JyV Mexico on 29 August 2014 (notarised on 4 September 2014), p. 32, **C-40**; G. Burr First WS, ¶ 54, **CWS-1**; Chow WS, ¶ 15, **CWS-11**; Luc Pelchat Witness Statement dated 8 January 2018 (***Pelchat WS***), ¶ 10, **CWS-4**; Gutierrez First WS, ¶ 30, **CWS-3**.

Odyssey while noting that such transfers would still have to be formalised.[138] Subsequently, the Claimants continued negotiating a Share Purchase Agreement with Chow in respect of the transfer of shares to Grand Odyssey.[139]

161. On 7 November 2014, Chow called another *asamblea* for each of the four Juegos Companies (except JVE Mexico). At the *asambleas*, Chow purported to *approve* a transfer of shares from the Claimants to Grand Odyssey[140] and represented that he had secured proxies from the Claimants to do so.[141]

162. However, the evidence on record shows clearly that Chow did not have the proxies and that there was no quorum at the November 2014 *asambleas*.[142] Instead, the record shows that the Claimants, who did not attend the *asambleas*, had expressly refused to give their proxies to Chow when he asked;[143] and that they gave their proxies to their Mexican counsel, Mr. Julio Gutierrez, and his firm, Rios Ferrer.[144] The record further shows that, upon hearing Chow's representations, Gutierrez and his associates: immediately objected to the transfer of any shares;[145] refused to sign the meeting minutes;[146] refused to deliver the proxies (without which there was an insufficient quorum to hold a shareholders vote);[147] and then left the meeting.[148] The Tribunal

---

138 Notarised Minutes of the General Shareholders Meeting of JVE Sureste on 29 August 2014, 10 September 2014, p. 32, **C-36**; Notarised Minutes of the General Shareholders Meeting of JVE Centro on 29 August 2014, 10 September 2014, p. 31, **C-37**; Notarised Minutes of the General Shareholders Meeting of JVE DF on 29 August 2014, 10 September 2014, p. 32, **C-38**; Notarised Minutes of the General Shareholders Meeting of JVE Mexico on 29 August 2014, 10 September 2014, pp. 29-30, **C-39**.

139 Tr. (ENG), Day 2, 401:18-20, 415:16-22 (G. Burr); Day 4, 887:14-888:14 (Ayervais).

140 Notarised Minutes of the Asamblea held on 7 November 2014 of JVE Sureste (notarised on 10 November 2014), **R-011**; Notarised Minutes of the Asamblea held on 7 November 2014 of JVE Centro (notarised on 10 November 2014), **R-012**; Notarised Minutes of the Asamblea held on 7 November 2014 of JVE DF (notarised on 10 November 2014), **R-013**; Notarised Minutes of the Asamblea held on 7 November 2014 of JyV Mexico (notarised on 10 November 2014), **R-014**.

141 Chow WS, ¶¶ 19-21, **CWS-11**; Gutierrez First WS, ¶ 33, **CWS-3**.

142 Gutierrez First WS, ¶¶ 32-34, **CWS-3**; G. Burr First WS, ¶¶ 55-56, **CWS-1**; Ayervais WS, ¶¶ 20-22, **CWS-12**.

143 Tr. (ENG), Day 2, 358: 10-16 (G. Burr).

144 Chow WS, ¶ 22, **CWS-11**; Gutierrez First WS, ¶ 32, **CWS-3**; G. Burr First WS, ¶ 55, **CWS-1**; Ayervais WS, ¶ 20, **CWS-12**; Tr. (ENG), Day 2, 358:17-21 (G. Burr), 572:13-18 (J. Gutierrez); Day 3, 631:14-16 (J. Gutierrez).

145 Chow WS, ¶ 22, **CWS-11**; Gutierrez First WS, ¶ 34, **CWS-3**; G. Burr First WS, ¶ 56, **CWS-1**; Ayervais WS, ¶ 21, **CWS-12**.

146 Gutierrez First WS, ¶ 34, **CWS-3**; G. Burr First WS, ¶ 56, **CWS-1**.

147 Gutierrez First WS, ¶ 34, **CWS-3**; G. Burr First WS, ¶ 56, **CWS-1**.

148 Chow WS, ¶ 22, **CWS-11**; Gutierrez First WS, ¶ 34, **CWS-3**; G. Burr First WS, ¶ 56, **CWS-1**; Ayervais WS, ¶ 21, **CWS-12**.

accordingly finds that the resolutions purportedly passed by Chow at the November 2014 *asambleas* were manifestly infected with irregularity.

163. It is also difficult to see what share transfers those *asambleas* could have approved: it was not until 15 January 2015 and 3 February 2015 that the Claimants entered into two SPAs with Grand Odyssey.[149] It is abundantly cler from the terms of these SPAs themselves that, as of the date of their execution, there was no transfer of shares:

a. The SPAs provided that, until Closing, the shareholders of the Juegos Companies "shall own and control ownership of the [shares in the Juegos Companies]".[150]

b. In the SPAs, each of the shareholders warranted that they had "all the requisite power and authority to enter into" the SPAs.[151]

c. The SPAs provided that *asambleas* would be called to declare the November 2014 resolutions "void and of no effect" and to recognize that no share transfer would occur "until Closing under this Agreement".[152]

d. The parties subjected that Closing to the condition precedent that "the Facilities are open and operating under the Grand Odyssey License or such other license as may be obtained by Grand Odyssey in substantially the same manner as prior to

---

149 Executed Stock Purchase Agreement, 15 January 2015 (***January 2015 SPA***), **C-134**; Executed Stock Purchase Agreement, 3 February 2015 (***February 2015 SPA***), **C-135**.

150 January 2015 SPA, Clause 1.3, **C-134**; February 2015 SPA, Clause 1.3, **C-135** ("*Consideration for the Kash Shares*. … Until Closing, the Shareholders shall own and control ownership of the Kash Shares and shall vote such Kash Shares as is required for approval and fulfilment of the transactions required and contemplated by this Agreement") (emphasis added). The "Kash Shares" are defined as "all or substantially all of the issued and outstanding shares of stock of the Companies." The "Shareholders" are defined as "the individuals and entities who own shares of stock in [the Companies]". *See* January 2015 SPA, p. 1, **C-134**; February 2015 SPA, p. 1, **C-135**. The "Companies" are the Juegos Companies, Operadora Pesa, Mercagaming, S. de R.L. de C.V. and Metrojuegos S. de R.L. de C.V. *See* January 2015 SPA, pp. 44-45, **C-134**; February 2015 SPA, pp. 47-48, **C-135**.

151 January 2015 SPA, Clause 2.1, **C-134**; February 2015 SPA, Clause 2.1, **C-135** ("Each Shareholder, severally and not jointly, represents and warrants to Grand Odyssey and to Boomer, and acknowledges that each of Grand Odyssey and Boomer are relying on such representations and warranties in entering into this Agreement, as follows: … (a) *Authority*. Each Shareholder has all the requisite power and authority to enter into this Agreement and the agreements and documents contemplated hereby and to consummate the transactions contemplated hereby …") (emphasis added).

152 *Id*., Clause 7.2 ("*Casino Companies Obligation*. Within thirty (30) days after execution of this Agreement, the Casino Companies shall call and conduct an assemblea of the Shareholders of each of the Casino Companies in which actions taken at assembleas conducted on November 7, 2014 which approved a transfer of shares of Class B shareholders of the Casino Companies to Grand Odyssey, and which was later formalized (protocolized) with a Mexican Notary Public are declared void and of no effect and recognizing that such transfer will not occur until Closing under this Agreement") (emphasis added).

their closure and there existing no proceedings to terminate or cease the operations of any Facility"—an event which, it is undisputed, never came to pass.[153]

e. The parties agreed that the SPAs could be terminated "if the Closing Date shall not have occurred on or before June 30, 2015".[154]

164. Consistent with these provisions of the SPAs, on 2 June 2015 Ayervais sent an email to Chow asking him to, *inter alia*, "[c]all for an *asamblea* to approve the new deal, reverse the stock transfers that occurred in November, approve the financials, change the board of directors until the new deal is completed and deal with the Beiruti situation."[155] When read in context, the Tribunal understands Ayervais's reference to "reverse the stock transfers" to be a shorthand paraphrasing of the aforementioned requirement of the SPAs that "actions taken at *asambleas* conducted on November 7, 2014 which approved a transfer of shares of Class B shareholders of the Casino Companies to Grand Odyssey … are [to be] declared void and of no effect …".[156] On 1 July 2015, Ayervais sent an email to the parties to the SPAs notifying them of the termination of the SPAs pursuant to Clause 10.1(f).[157] On 6 July 2015, Ayervais followed up with a letter to the parties to the SPAs stating the same.[158]

165. In early 2016, there was a phone meeting between Ayervais, Gordon Burr, Gutierrez, Chow and Pelchat in which Ayervais and Burr requested that Chow and Pelchat return Board control to them, and properly document that the 7 November 2014 *asambleas* minutes were invalid and that no share transfer to Grand Odyssey had occurred. Chow and Pelchat refused and demanded "millions of dollars" for alleged expenses.[159] On

---

153 *Id.*, Clause 8.1 ("*Closing*. … At Closing, the Kash Shares shall be transferred to Grand Odyssey in exchange for payment of the [Consideration]…." Clause 8.2: "*Mutual Conditions Precedent*. The obligation of the parties to complete the transactions contemplated hereunder are subject to the satisfaction of all parties, on or before the Closing Date, of the following conditions precedent, each of which may only be waived with the mutual consent of all of the parties: … (e) the Facilities are open and operating under the Grand Odyssey License or such other license as may be obtained by Grand Odyssey in substantially the same manner as prior to their closure and there existing no proceedings to terminate or cease the operations of any Facility") (emphasis added).

154 *Id.*, Clause 10.1 ("*Termination.* This Agreement may be terminated and all transactions abandoned upon the following events: ... (f) [b]y the Companies on their own behalf and on behalf of the Shareholders by written notice to the other parties if the Closing Date shall not have occurred on or before June 30, 2015 …") (emphasis added).

155 Email from Benjamin Chow to Neil Ayervais, 2 June 2015, **R-015**.

156 January 2015 SPA, Clause 7.2, **C-134**; February 2015 SPA, Clause 7.2, **C-135**

157 Email from Neil Ayervais to Benjamin Chow, *et al.*, 1 July 2015, **C-143**.

158 Letter from Neil Ayervais to Benjamin Chow, *et al.*, 6 July 2015, **C-144**.

159 G. Burr First WS, ¶ 59, **CWS-1**; Gutierrez First WS, ¶ 36, **CWS-3**. *See also* Chow WS, ¶ 26, **CWS-11**.

6 June 2016, the Claimants eventually filed a Federal Racketeering Influenced and Corrupt Organizations Act (RICO) claim against Chow and Pelchat in the District Court of Colorado in order to recover Board control.[160] The Claimants testified that they went down the RICO litigation route for lack of confidence in the Mexican court system.[161] The Claimants eventually reached a settlement agreement with Pelchat and Chow in April 2017[162] and August 2017[163] respectively.

166. Based on this evidence, it is clear that the condition precedent in Clause 8.2(e) of the SPAs was not met; that the SPAs were terminated; and that the share transfer envisaged in those SPAs never occurred. It is also clear from the SPAs—which were executed between, *inter alia*, some of the Claimants and Chow (as President of the Board of Grand Odyssey)—that the parties to those instruments understood and recognized that the November 2014 *asambleas* did not result in a transfer of shares. Not to put too fine a point on it but they would not have entered into SPAs providing for the transfer of those shares if those shares had already been transferred.

167. This disposes of the point. The Tribunal notes that, in their evidence given to the Tribunal, Chow and Pelchat both also testified that no share transfer had occurred.[164] The Tribunal would have reached its conclusion without that evidence, to which it assigns weight commensurate with the credibility of those witnesses. The Tribunal also need not place reliance on the 5 January 2018 *asambleas* declaring the November 2014 *asambleas* resolutions to be void *ab initio*. While those *asambleas* are confirmatory of the Tribunal's findings, it would have made those findings regardless.

(ii) Evidentiary issues arising from the destruction of evidence

168. The Claimants contend, and have submitted witness evidence affirming, that many of the corporate documents that would have evidenced the extent of their shareholdings

160 G. Burr First WS, ¶ 61, **CWS-1**; Ayervais WS, ¶ 29, **CWS-12**.
161 Tr. (ENG), Day 2, 461:20-462:5 (G. Burr).
162 G. Burr First WS, ¶ 61, **CWS-1** (states 26 April); G. Burr Second WS, ¶ 20, **CWS-7** (states 10 April); Ayervais WS, ¶ 30, **CWS-12** (states 10 April).
163 Chow WS, ¶ 28, **CWS-11**; G. Burr Second WS, ¶ 20, **CWS-7**; Ayervais WS, ¶ 30, **CWS-12**.
164 Tr. (ENG), Day 3, 714:6-715:19 (Chow), 790:8-17 (Pelchat).

in the Mexican Companies were either destroyed in a May 2017 fire at the Naucalpan casino or were ransacked from the office of their lawyer, Mr. Jose Miguel Ramirez.[165]

169. The Respondent does not dispute that the fire at the Naucalpan casino or the ransacking occurred. The Respondent argues, however, that no matter what reasons the Claimants have provided for their failure to provide certain corporate documents, the Claimants have ultimately failed to put forward sufficient evidence to meet their burden of showing ownership of shares in the Mexican Companies.[166]

170. The Tribunal discerns nothing in the record that casts doubt on the Claimants' evidence as to how the documentary evidence came to be lost. The witness evidence on this point also stands unchallenged.[167] As a matter of first principles, the Claimants should therefore be afforded a fair opportunity to adduce evidence of their shareholding through other means.

171. The manner in which that evidence was eventually marshalled by the Claimants, however, was less than ideal:

a. First, with its Counter-Memorial, the Claimants only introduced the 2006-2008 capitalisation *asambleas* and tables in Erin Burr's witness statement purporting to lay out the Claimants' shareholding in the Mexican Companies from 19 June 2013 to 25 July 2017 (i.e. when her witness statement was submitted).[168]

b. In its Reply Memorial, the Respondent objected that this evidence was insufficient. The Respondent argued that the minutes of the 2006-2008 *asambleas* were, "at best, evidence of the Claimants' shareholding in the Mexican [Companies] as of the date of the respective *asamblea*."[169] The Respondent submitted that the Claimants had to do more than that:

> There is no testimony or documentary evidence of any kind from any of the Additional Claimants, the very parties that allegedly make up the voting control of the Juegos companies. Surely, in the absence of corporate records that are alleged to have been lost in a fire, and the

---

165 Claimant's Response to the Tribunal's Decision on Respondent's Request for Documents, 31 October 2017, p. 2; Rejoinder, ¶¶ 98-99; Julio Gutierrez Morales Third Witness Statement dated 8 January 2018 (***Gutierrez Third WS***), ¶¶ 10, 31 **CWS-9**.

166 Reply, ¶¶ 214-217; Respondent's PHB, ¶¶ 87-89, 159-160.

167 Reply, ¶¶ 70, 215, 271; Respondent's PHB, ¶¶ 87, 159.

168 E. Burr First WS, Annex B and C, **CWS-2**.

169 Reply, ¶ 218.

> failure to produce copies of such records from secondary sources such as lawyers and accountants, the best evidence of each investor's shareholding, including the identity of the company invested in, the date of acquisition and disposal (if any), the class of shares acquired and the amount paid would be a witness statement from each investor, with supporting documentation, such as lawyers' or notaries' reporting letters, copies of share certificates, cancelled cheques and/or receipts, and dividend statements.[170] (emphasis in original)

c. With their Rejoinder, the Claimants then "called the Respondent's bluff",[171] as they put it, and produced witness statements by each of the Claimants attesting to their respective shareholdings as of 2006-2008 and from June 2013 through the present.[172] The Claimants also adduced additional documentary evidence to prove their share ownership during that period using a combination of the following:

   i. Schedule K-1s (Form 8865), which are US tax documents used to report a partner's share of partnership income, deductions, credits, etc. of a foreign partnership.[173] The forms reflect every partner's percentage interest in the partnership income at the start and end of the year for which the form is filed. US investors who receive this form from the companies have to file it with their annual income tax returns. For all the Juegos Companies, the forms filed at the end of 2013 and 2014 reflect the Series A shareholding from the beginning of 2013 to the end of 2014. Further, for JVE Sureste and JVE Mexico, the forms filed reflect the Series B shareholding in those companies at that time.

   ii. Transfer request forms authorising the payment of dividends or the return of premiums to shareholders, pro rata their interest in the company.[174] For all the Juegos Companies except JVE Centro, there were payments to Series

---

170 Reply, ¶ 215.

171 Letter from the Claimants to the Tribunal, 6 March 2018, p. 2.

172 G. Burr Second WS, Part I, **CWS-7**; E. Burr Second WS, Part I, **CWS-8**; Ayervais WS, Part I, **CWS-12**; Conley WS, Part I, **CWS-13**; Further 32 Claimants' WS, Part I, **CWS-16** to **CWS-47**.

173 *See* Schedule K-1 (Form 8865) of JyV Mexico (Year 2013), **C-183**; Schedule K-1 (Form 8865) of JyV Mexico (Year 2014), **C-184**; Schedule K-1 (Form 8865) of JVE DF (Year 2013), **C-185**; Schedule K-1 (Form 8865) of JVE DF (Year 2014), **C-186**; Schedule K-1 (Form 8865) of JVE Mexico (Year 2013), **C-187**; Schedule K-1 (Form 8865) of JVE Mexico (Year 2014), **C-188**; Schedule K-1 (Form 8865) of JVE Centro (Year 2013), **C-189**; Schedule K-1 (Form 8865) of JVE Centro (Year 2014), **C-190**; Schedule K-1 (Form 8865) of JVE Sureste (Year 2013), **C-191**; Schedule K-1 (Form 8865) of JVE Sureste (Year 2014), **C-192**.

174 Transfer Requests for the Juegos Companies, 3 January 2013 – 26 March 2014, **C-169**.

A shareholders at various times between 2013 to 2014 that reflect the Series A shareholding. Further, for JVE Sureste and JVE Mexico, there were also payments to Series B shareholders during this period that reflect the Series B shareholding.

iii. An internal worksheet, maintained by the legal departments of the Juegos Companies, depicting the complete shareholding in each company (the ***2014 Shareholding Worksheet***).[175] This 2014 Shareholding Worksheet functioned as an internal business record.[176] The version submitted into evidence by the Claimants is current as of March 2014.[177] It was attached to an email sent from Erin Burr to José Ramón Moreno on 11 March 2014 in response to his request to have a complete and updated list of shareholdings for the Juegos Companies.[178]

d. Finally, the Claimants introduced notarized minutes of *asambleas* of the Juegos Companies held in January 2018 that purported to retroactively approve a list of undated share transfers that had occurred between 2009 and June 2013 (with a handful that occurred between June 2013 and January 2014), and to certify share ownership since those transfers occurred.[179]

e. The Respondent was afforded the opportunity to respond to that evidence, including with evidence of its own; and to test the evidence of any number of the Claimant-witnesses through examination at the hearing (and the testimony of any Claimant-witnesses examined at the hearing is in the record).

172. It is the Tribunal's view that the Claimants' approach to corporate formality (which has been at times cavalier—for example, they failed to convene the required annual

---

175 Shareholding Worksheet, 2014, **C-180**; E. Burr Second WS, ¶ 21, **CWS-8**; Tr. (ENG), Day 2, 527:19-528:5.

176 E. Burr Second WS, ¶ 21, **CWS-8**.

177 E. Burr Second WS, ¶ 40, **CWS-8**.

178 E. Burr Second WS, ¶ 36, **CWS-8**; Email chain between Erin Burr and Jose Ramon Moreno, 11 March 2014, **C-179**.

179 Notarised Minutes of the General Shareholders Meeting of JVE Mexico held on 29 January 2018 (notarised on 3 April 2018), p. 13, **C-230**; Notarised Minutes of the General Shareholders Meeting of JVE Sureste held on 29 January 2018 (notarised on 3 April 2018), pp. 19-20, **C-231**; Notarised Minutes of the General Shareholders Meeting of JVE Centro held on 29 January 2018 (notarised on 3 April 2018), p. 27, **C-232**; Notarised Minutes of the General Shareholders Meeting of JyV Mexico held on 29 January 2018 (notarised on 3 April 2018), pp. 16-17, **C-233**; Notarised Minutes of the General Shareholders Meeting of JVE DF held on 29 January 2018 (notarised on 3 April 2018), pp. 15-16, **C-234**.

asambleas at the Juegos Companies, the minutes of which could have recorded how the shares were held at such times) and their drip-feeding of important evidence into the record have made this proceeding more cumbersome than it could have been. That, however, is an observation relevant only to costs, and the Tribunal returns to this in due course. The question for present purposes is what the aggregate of the evidence thus marshalled and placed on the record proves to the Tribunal's satisfaction. The Tribunal turns to this next.

(iii) The Claimants' share ownership in the Juegos Companies and the January 2018 *asambleas*

173. The evidentiary record regarding the Claimants' shareholding in the Juegos Companies is bookended on either side by *asambleas*. Minutes of those *asambleas* were taken and notarized. As a result, these minutes are a matter of public record.

174. The notarized minutes record what the shareholding was in the Juegos Companies during the period 2006-2008 (i.e., at the time of their capitalization) and as at January 2018. The Tribunal is satisfied that the Claimants' share ownership in the Juegos Companies *as at those times* was as recorded in those *asamblea* minutes.[180] Table 1 below reproduces the share ownership in each of the Juegos Companies on either date.

JVE Mexico						
Date	**Shareholding**					**Evidence**
27 February 2006		A Shares	B Shares	C Shares	Total Shares	
	Total shares owned by Claimants	42,000	9,000	0.000	51,000	**C-89**, pp. 69-60; **C-154**, pp. 2-5.[181]

[180] The Respondent has suggested that there may not have been a quorum at the 2018 *asambleas*. The Tribunal is satisfied, on the preponderance of the evidence, that there was a quorum, including the fact that: (i) the Scrutineer, Mr. Gutierrez, testified at the hearing that there was a quorum; (ii) the minutes themselves refer to the existence of a quorum; (iii) the Mexican notary public stated in the notarised *asamblea* minutes that he or she saw the list of attendance; (iv) the Claimants' expert, Mr. Zamora, stated in his expert report that he saw the list of attendance; and (v) no shareholder has challenged the validity of these *asambleas*. *See* Tr. (ENG), Day 2, 579:11-582:3 (Gutierrez); Notarised Minutes of the General Shareholders Meeting of the Juegos Companies held on 5 January 2018 (notarised on 2 April 2018): **C-225**, pp. 11, 25; **C-226**, pp. 15, 43; **C-227**, pp. 10, 23; **C-228**, pp. 10, 25; **C-229**, pp. 10, 22. Notarised Minutes of the General Shareholders Meeting of the Juegos Companies held on 29 January 2018 (notarised on 3 April 2018): **C-230**, pp. 10, 15; **C-231**, pp. 13, 24; **C-232**, pp. 15, 30; **C-233**, pp. 10, 19; **C-234**, pp. 10, 18. R. Zamora Expert Report, ¶¶ 111-112; Tr. (ENG) Day 5, 1040:1-9 (Zamora). *See also* Tr. (ENG) Day 5, 979:22-980:3, 987:7-987:19, 990:2-12, 992:2-9, 994:15-995:6 (Irra Ibarra).

[181] Notarised Minutes of the General Shareholders' Meeting of JVE Mexico held on 27 February 2006 (notarised on 23 March 2006), pp. 69-70, **C-89**; Shareholder Registry for JVE Mexico, 4 June 2005, **C-154**, pp. 2-5.

	Total outstanding shares of each type	50,000	9,000	3,000	62,000	
	Percentage owned by Claimants	**84.0%**	**100.0%**	**0.0%**	**82.3%**	
29 January 2018		A Shares	B Shares	C Shares	Total Shares	
	Total shares owned by Claimants	42,000	9,000	0.000	51,000	**C-229**, pp. 15-16; **C-230**, pp. 13-14.[182]
	Total outstanding shares of each type	50,000	9,000	3,000	62,000	
	Percentage owned by Claimants	**84.0%**	**100.0%**	**0.0%**	**82.3%**	

JVE Sureste							
Date	**Shareholding**					**Evidence**	
28 February 2007		A1 Shares	A2 Shares	B Shares	Total Shares		
	Total shares owned by Claimants	0.000	13,000	24,175	37,175	**C-90**, pp. 78-86; **C-155**, pp. 3-8.[183]	
	Total outstanding shares of each type	6,500	13,000	39,000	58,500		
	Percentage owned by Claimants	**0.0%**	**100.0%**	**62.0%**	**63.5%**		
29 January 2018		A1 Shares	A2 Shares	B Shares	Fixed Shares [184]	Total Shares	
	Total shares owned by Claimants	0.000	13,000	20,175	0.000	33,175	**C-225**, pp. 17-19; **C-231**, pp. 20-23.[185]
	Total outstanding	6,500	13,000	38,800	3,000	61,300	

182 Notarised Minutes of the General Shareholders' Meeting of JVE Mexico held on 5 January 2018 (notarised on 2 April 2018), pp. 15-16, **C-229**; Notarised Minutes of the General Shareholders' Meeting of JVE Mexico held on 29 January 2018 (notarised on 3 April 2018), pp. 13-14, **C-230**.

183 Notarised Minutes of the General Shareholders' Meeting of JVE Sureste held on 28 February 2007 (notarised on 25 April 2007), pp. 78-86, **C-90**; Shareholders' Registry for JVE Sureste, pp. 3-8, **C-155**.

184 The Tribunal notes later in Table 3 that at a 2009 *asamblea*, JVE Sureste's total issued shares included fixed shares. This is also consistent with the 2014 Shareholding Worksheet and the 29 January 2018 *asamblea* minutes. The Tribunal therefore finds that the 29 January 2018 minutes accurately reflects the total issued shares, and the types of issued shares, in JVE Sureste.

185 Notarised Minutes of the General Shareholders' Meeting of JVE Sureste held on 5 January 2018 (notarised on 2 April 2018), pp. 17-19, **C-225**; Notarised minutes of the General Shareholders' Meeting of JVE Sureste held on 29 January 2018 (notarised on 3 April 2018), pp. 20-23, **C-231**.

	shares of each type						
	Percentage owned by Claimants	**0.0%**	**100.0%**	**52.0%**	**0.0%**	**54.1%**	
JVE Centro							
Date	**Shareholding**					**Evidence**	
31 December 2007		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0.000	20,651	34,298	41,000	96,449	**C-91**, pp. 63-65.[186]
	Total outstanding shares of each type	6,000	20,651	53,308	50,000	129,959	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**64.3%**	**82.0%**	**74.2%**	
29 January 2018		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0.000	20,651	34,433	41,000	96,084	**C-226**, pp. 27-31; **C-232**, pp. 21-25.[187]
	Total outstanding shares of each type	6,000	20,651	52,933	50,000	129,584	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**65.1%**	**82.0%**	**74.1%**	
JyV Mexico							
Date	**Shareholding**						**Evidence**
31 May 2008		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0.000	22,667	34,438	0.000	57,105	**C-92**, pp. 56-58.[188]
	Total outstanding shares of each type	4,000	22,667	52,588	3,000	82,255	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**65.5%**	**0.0%**	**69.4%**	

186 Notarised Minutes of the General Shareholders' Meeting of JVE Centro held on 31 December 2007 (notarised on 10 January 2011), pp. 63-65, **C-91**.

187 Notarised Minutes of the General Shareholders' Meeting of JVE Centro held on 5 January 2018 (notarised on 2 April 2018), pp. 27-31, **C-226**; Notarised Minutes of the General Shareholders' Meeting of JVE Centro held on 29 January 2018 (notarised on 3 April 2018), pp. 21-25, **C-232**.

188 Notarised minutes of the General Shareholders' Meeting of JyV Mexico held on 31 May 2008 (notarised on 10 January 2011), pp. 56-58, **C-92**.

29 January 2018		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	4,000	22,667	36,963	0.000	63,630	**C-233**, pp. 16-19.[189]
	Total outstanding shares of each type	8,000	22,667	54,963	3,000	88,630	
	Percentage owned by Claimants	**50.0%**	**100.0%**	**67.3%**	**0.0%**	**71.8%**	
JVE DF							
Date	**Shareholding**						**Evidence**
2 September 2008		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0.000	28,669	37,462	0.000	66,131	**C-93**, pp. 62-65.[190]
	Total outstanding shares of each type	4,000	28,669	65,337	3,000	101,006	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**57.3%**	**0.0%**	**65.5%**	
29 January 2018		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0.000	28,669	37,962	0.000	66,631	**C-234**, pp. 16-17.[191]
	Total outstanding shares of each type	4,000	28,669	64,962	3,000	100,631	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**58.4%**	**0.0%**	**66.2%**	

Table 1: The Claimants' shareholding in 2006-2006 and January 2018

175. As these tables show, both at the time of the Juegos Companies' capitalization and in January 2018, the Claimants held more than 50% of the Series B shares and more than 50% of the outstanding stock in each of the Juegos Companies. The question however is what the Claimants' share ownership was in between those two bookends, and

189 Notarised minutes of the General Shareholders' Meeting of JyV Mexico held on 29 January 2018 (notarised on 3 April 2018), pp. 16-19, **C-233**.

190 Notarised Minutes of the General Shareholders' Meeting held on 2 September 2008 (notarised on 10 January 2011), pp. 62-65, **C-93**.

191 Notarised Minutes of the General Shareholders' Meeting of JVE DF held on 5 January 2018 (notarised on 2 April 2018), pp. 16-18, **C-227**; Notarised Minutes of the General Shareholders' Meeting of JVE DF held on 29 January 2018 (notarised on 3 April 2018), pp. 16-17, **C-234**.

specifically between June 2013 (the first instance of allegedly wrongful conduct) and June 2016 (the submission of the claim to arbitration). As noted above, these are the relevant points in time at which ownership or control must be established.

176. The Claimants contend that the 2014 Shareholding Worksheet accurately represents the Claimants' share ownership from June 2013 through the present. To the extent there are discrepancies between the 2006-2008 *asamblea* resolutions and the 2014 Shareholding Worksheet, they submit that those are due to certain share transfers prior to 2014 that were not duly approved by *asambleas* at the time, as required by the By-Laws of the Juegos Companies.

177. According to the Claimants, that lack of requisite *asamblea* approval is inconsequential for two reasons. First, they contend, as a matter of Mexican law, the share transfers were valid and effective as of the date of their execution, regardless of *asamblea* approval.[192] Second, even if *asamblea* approval were necessary to give effect to the share transfers, the January 2018 *asambleas* could and did retroactively give them effect.[193]

178. The Respondent submits that, as a matter of Mexican law, the share transfers did not come into existence until they were approved by an *asamblea*, i.e., in January 2018, and that the January 2018 *asambleas* could not retroactively approve the share transfers.[194] As a result, the Respondent contends, there is still no conclusive evidence of share ownership between 2006-2008 and January 2018.[195]

179. Both parties presented expert evidence on Mexican law in support of their positions. The examination of both experts revealed a considerable body of agreement between them. The experts agreed that: (i) under Mexican law, the validity *inter se* of a contract

---

192 Claimants' PHB, ¶ 135.

193 Claimants' PHB, ¶ 137; Gutierrez Third WS, ¶ 21, **CWS-9**; Notarised Minutes of the General Shareholders Meeting of JVE Mexico held on 29 January 2018 (notarised on 3 April 2018), p. 13, **C-230**; Notarised Minutes of the General Shareholders Meeting of JVE Sureste held on 29 January 2018 (notarised on 3 April 2018), p. 20, **C-231**; Notarised Minutes of the General Shareholders Meeting of JVE Centro held on 29 January 2018 (notarised on 3 April 2018), p. 27, **C-232**; Notarised Minutes of the General Shareholders Meeting of JyV Mexico held on 29 January 2018 (notarised on 3 April 2018), p. 17, **C-233**; Notarised Minutes of the General Shareholders Meeting of JVE DF held on 29 January 2018 (notarised on 3 April 2018), pp. 15-16, **C-234**.

194 Rebuttal Submission in Response to New Evidence, 25 April 2018 (***Rebuttal Submission***), ¶¶ 52-54.

195 Rebuttal Submission, ¶ 91.

for the transfer of shares does not depend on approval by the company;[196] but (ii) approval by the company is still necessary for the transferee to be recognised as a shareholder and to be able to exercise its rights as one *vis-à-vis* the company, i.e. receive dividends and exercise any voting rights associated with the shares.[197]

180. They maintained their disagreement, however, as to whether the company can retroactively recognise such shareholder status by retroactively approving a share transfer. The Claimants' expert insisted that it can because lack of contemporaneous approval infects the transfer only with relative nullity which can be cured retroactively;[198] the Respondent's expert, while agreeing that legal acts infected with relative nullity can be retroactively ratified,[199] contended the opposite because here it is the company's approval of the transfer that is simply non-existent.[200] The Claimants' expert also accepted that there can be no retroactivity even for cases of relative nullity where this causes prejudice to third parties with acquired rights.[201]

181. In the Tribunal's view, much of the experts' debate, scholarly and helpful as it was, has limited practical relevance for purposes of this phase, for two reasons.

182. First, and on this point the experts' examination at the hearing was elucidating, it is now undisputed that the share transfers were valid and effective *inter partes* as at the time they occurred. It is therefore uncontested that the shares were in fact owned by the transferee shareholders as at that time.

183. The only point in dispute is whether the transferee shareholders were also recognized as such by the Juegos Companies and could exercise the rights to receive dividends and to vote attached to those shares. In this respect, the record is conclusive that indeed they could and did.

184. None of the Juegos Companies or any third party has *ever* contested the validity of the share transfers or denied the transferee shareholders the right to receive dividends or

196 Tr. (ENG), Day 5, 1030:18-21; 1031:8-1033:6 (Zamora); Tr. (ENG), Day 5, 934:6-935:18, 968:15-969:6 (Irra Ibarra).
197 Tr. (ENG), Day 5, 926:4-927:18; 935:4-935:18 (Irra Ibarra); Tr. (ENG), Day 5, 1030:18-1031:7, 1032:9-1033:2 (Zamora).
198 Tr. (ENG), Day 5, 1033:19-1035:13 (Zamora).
199 Tr. (ENG), Day 5, 960:4-960:10, 960:17-961:17 (Irra Ibarra).
200 Tr. (ENG), Day 5, 927:12-928:4, 1010:13-20 (Irra Ibarra).
201 Tr. (ENG), Day 5, 1077:19-1078:9 (Zamora).

to vote associated with those shares on the basis that the transfers had not been formally approved. On the contrary, the record shows that the Juegos Companies issued dividends *consistent with* the share transfers, and that those dividend payments were regularly reported for US tax purposes.

185. On that record, the Tribunal finds that (i) as a matter of Mexican law the transferee shareholders did own the shares upon the transfer of those shares to them, and (ii) as a matter of fact, the transferee shareholders have been able to exercise the rights attached to the shares since the date of their transfer.

186. Second, even if the Tribunal gave no probative value to the (largely uncontested) witness and documentary evidence evidencing this ownership and *de facto recognition* and found that the Claimants' share ownership between June 2013 and June 2016 was instead as recorded in the 2006-2008 *asambleas*, the Claimants would still have owned more than 50% of the Series B shares (or, in the case of JVE Mexico, 50% of the combined Series B and C shares, and at least 50% each of the Series A and B shares), which, as explained below, the parties agree is the relevant threshold for proving the legal capacity to control the Juegos Companies under Article 1117.

187. Put differently, the share movements between 2006 and 2014 were always insufficient to ever reduce the Claimants' Series B shareholding below that threshold and they therefore do not bear on the Tribunal's determination whether the Claimants controlled the Juegos Companies for purposes of Article 1117 between June 2013 and June 2016.

188. In light of the foregoing, and based on the evidentiary record as a whole, the Tribunal finds that the Claimants' share ownership between June 2013 and June 2016 was as represented in Tables 2 to 6 below.

(a) JVE Mexico

189. The Claimants collectively held at all relevant times at least 84.0% of the A shares, 100.0% of the B shares, 75% of the combined B and C shares and 82.3% of the total outstanding stock of JVE Mexico.

Date	Shareholding					Evidence
Beginning 2013		A Shares	B Shares	C Shares	Total Shares	
	Total shares owned by Claimants	42,000	9,000	-	-	**C-187**; **CWS-8**, Annex E, Table 1.[202]
	Total outstanding shares of each type	50,000	9,000	-	-	
	Percentage owned by Claimants	**84.0%**	**100.0%**	-	-	
19 June 2013		A Shares	B Shares	C Shares	Total Shares	
	Total shares owned by Claimants	42,000	9,000	0.000	51,000	**CWS-2**, Annex C; **CWS-16**, ¶ 2.[203]
	Total outstanding shares of each type	50,000	9,000	3,000	62,000	
	Percentage owned by Claimants	**84.0%**	**100.0%**	**0.0%**	**82.3%**	
End 2013		A Shares	B Shares	C Shares	Total Shares	
	Total shares owned by Claimants	42,000	9,000	-	-	**C-187**; **CWS-8**, Annex E, Table 1.[204]
	Total outstanding shares of each type	50,000	9,000	-	-	
	Percentage owned by Claimants	**84.0%**	**100.0%**	-	-	
Beginning 2014		A Shares	B Shares	C Shares	Total Shares	
	Total shares owned by Claimants	42,000	9,000	-	-	**C-188**; **CWS-8**, Annex E, Table 1.[205]
	Total outstanding shares of each type	50,000	9,000	-	-	

202 Schedule K-1 (Form 8865) of JVE Mexico (Year 2013), **C-187**; E. Burr Second WS, Annex E, Table 1, **CWS-8**.

203 E. Burr First WS, Annex C, **CWS-2**; B-Mex, LLC Witness Statement, ¶ 2, **CWS-16**.

204 Schedule K-1 (Form 8865) of JVE Mexico (Year 2013), **C-187**; E. Burr Second WS, Annex E, Table 1, **CWS-8**.

205 Schedule K-1 (Form 8865) of JVE Mexico (Year 2014), **C-188**; E. Burr Second WS, Annex E, Table 1, **CWS-8**.

	Percentage owned by Claimants	**84.0%**	**100.0%**	-	-	
11 March 2014		A Shares	B Shares	C Shares	Total Shares	
	Total shares owned by Claimants	42,000	9,000	0,000	51,000	**C-180**, p. 3.[206]
	Total outstanding shares of each type	50,000	9,000	3,000	62,000	
	Percentage owned by Claimants	**84.0%**	**100.0%**	**0.0%**	**82.3%**	
End 2014-Present		A Shares	B Shares	C Shares	Total Shares	
	Total shares owned by Claimants	42,000	9,000	-	-	**C-188**; **CWS-8**, Annex E, Table 1.[207]
	Total outstanding shares of each type	50,000	9,000	-	-	
	Percentage owned by Claimants	**84.0%**	**100.0%**	-	-	

Table 2: Claimants' shareholding in JVE Mexico

190. Claimants' ownership of 84.0% of the Series A shares in JVE Mexico from 7 January 2013 to 9 April 2014 is also evidenced by the transfer requests for the company, which have been omitted from Table 1 above to avoid repetition.[208]

(b) JVE Sureste

191. The Claimants collectively held at all relevant times at least 100.0% of the A2 Shares, 50.4% of the B shares and 54.1% of the total outstanding stock of JVE Sureste.

206 Shareholding Worksheet, 2014, p. 3, **C-180**.

207 Schedule K-1 (Form 8865) of JVE Mexico (Year 2014), **C-188**; E. Burr Second WS, Annex E, Table 1, **CWS-8**.

208 *See* Transfer Requests for the Juegos Companies, 3 January 2013 – 26 March 2014, **C-169**. The requests show that Claimants owned 84% of the Series A shares in JVE Mexico on 7 January 2013 (p. 3), 28 March 2013 (p. 9), 2 May 2013 (p. 16), 31 May 2013 (p. 21), 9 August 2013 (p. 26), 6 September 2013 (p. 30), 10 March 2014 (p. 37) and 9 April 2014 (p. 43).

Date	Shareholding						Evidence
19 October 2009		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0.000	13,000	19,675	0,000	32,675	**C-168**, pp. 4-5; **CWS-8**, ¶ 18.[209]
	Total outstanding shares of each type	6,500	13,000	36,000	3,000	58,500	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**54.7%**	**0.0%**	**55.9%**	
Beginning 2013		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	13,000	19,675	-	-	**C-191**; **CWS-8**, Annex E, Table 2.[210]
	Total outstanding shares of each type	6,500	13,000	39,000	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**50.4%**	-	-	
3 January / 14 March / 12 April / 23 May 2013		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	13,000	19,675	-	-	**C-169**, pp. 4-6, 10-15, 22-24; **CWS-8**, ¶¶ 22-23, 26.[211]
	Total outstanding shares of each type	6,500	13,000	39,000	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**50.4%**	-	-	
19 June 2013		A1 Shares	A2 Shares	B Shares	Total Shares		
	Total shares owned by Claimants	0.000	13,000	19,675	32,675		**CWS-2**, Annex C; **CWS-7**, Part I; **CWS-8**, Part I;
	Total outstanding shares of each type	6,500	13,000	38,800	58,300		

209 Notarised Minutes of the General Shareholders' Meeting of JVE Sureste held on 15 October 2009 (notarised on 19 December 2009), pp. 4-5, **C-168**; E. Burr Second WS, ¶ 18, **CWS-8**.

210 Schedule K-1 (Form 8865) for JVE Sureste (Year 2013), **C-191**; E. Burr Second WS, Annex E, Table 2, **CWS-8**.

211 Transfer Requests for the Juegos Companies, 3 January 2013 to 26 March 2014, pp. 4-6, 10-15, 22-24, **C-169**; E. Burr Second WS, ¶¶ 22-23, 26, **CWS-8**.

	Percentage owned by Claimants	**0.0%**	**100.0%**	**50.7%**	**56.0%**[213]		**CWS-12**, Part I; **CWS-13**, Part I; **CWS-16** to **CWS-47**, Part I.[212]
6 August / 30 August 2013		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0.000	13,000	19,675	-	-	**C-169**, pp. 27-29, 31-33; **CWS-8**, ¶¶ 22-23, 26.[214]
	Total outstanding shares of each type	6,500	13,000	39,000	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**50.4%**[215]	-	-	
End 2013		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	13,000	19,675	-	-	**C-191**; **CWS-8**, Annex E, Table 2.[216]
	Total outstanding shares of each type	6,500	13,000	38,800	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**50.7%**	-	-	
Beginning 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	13,000	19,675	-	-	**C-192**; **CWS-8**,

213 The Tribunal notes that, unlike the 2014 Shareholding Worksheet and the January 2018 *asamblea* minutes, the figures in Erin Burr's witness statement failed to take into account the existence of fixed shares in the company.

212 E. Burr First WS, Annex C, **CWS-2**; G. Burr Second WS, Part I, **CWS-7**; E. Burr Second WS, Part I, **CWS-8**; Ayervais WS, Part I, **CWS-12**; Conley WS, Part I, **CWS-13**; Further 32 Claimants' WS, Part I, **CWS-16** to **CWS-47**.

214 Transfer Requests for the Juegos Companies, 3 January 2013 to 26 March 2014, pp. 27-29, 31-33, **C-169**; E. Burr Second WS, ¶¶ 22-23, 26, **CWS-8**.

215 The Tribunal notes the discrepancy between Erin Burr's second witness statement detailing the shareholding in June 2013 and the transfer request forms detailing the shareholding in August 2013. Erin Burr's witness statement suggests that by June 2013 the total number of Series B shares issued by the company had decreased by 0.200 shares to 38,800 as a result of a non-Claimant's bankruptcy. *See* E. Burr Second WS, ¶ 41, **CWS-8**. By contrast, the transfer request forms show that this shareholder continued to receive dividend payments, and thus held shares in the company, until the end of 2013. *See* Transfer Requests for the Juegos Companies, 3 January 2013 to 26 March 2014, pp. 27-29, 31-33, **C-169**.

216 Schedule K-1 (Form 8865) for JVE Sureste (Year 2013), **C-191**; E. Burr Second WS, Annex E, Table 2, **CWS-8**.

	Total outstanding shares of each type	6,500	13,000	38,800	-	-	Annex E, Table 2.[217]
	Percentage owned by Claimants	**0.0%**	**100.0%**	**50.7%**	-	-	
1 January 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	13,000	20,175	-	-	**CWS-8**, ¶¶ 38-39; **CWS-45**, ¶ 2; **CWS-30**, ¶ 2; **CWS-40,** ¶ 2; **CWS-24**, ¶ 2.[218]
	Total outstanding shares of each type	6,500	13,000	38,800	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**52.0%** [219]	-	-	
5 March 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	13,000	20,175	-	-	**C-169**, pp. 38-40; **CWS-8**, ¶¶ 22-23, 26, 38-39.[220]
	Total outstanding shares of each type	6,500	13,000	38,800	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**52.0%**	-	-	
11 March 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	13,000	20,175	0,000	33,175	**C-180**, pp. 1-2.[221]
	Total outstanding shares of each type	6,500	13,000	38,800	3,000	61,300	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**52.0%**	**0.0%**	**54.1%**	

217 Schedule K-1 (Form 8865) for JVE Sureste (Year 2014), **C-192**; E. Burr Second WS, Annex E, Table 2, **CWS-8**.

218 E. Burr Second WS, ¶¶ 38-39, **CWS-8**; Victory Fund, LLC Witness Statement (***Victory Fund WS***), ¶ 2, **CWS-45**; Louis Fohn Witness Statement (***Fohn WS***), ¶ 2, **CWS-30**; Daniel Rudden Witness Statement, ¶ 2, **CWS-40**; Mark Burr Witness Statement, ¶ 2, **CWS-24**.

219 The Tribunal notes that Claimants' tables in Annex 1 of their post-hearing brief are inconsistent with the witness evidence. The table in the post-hearing brief suggests that Claimants Victory Fund, LLC and Louis Fohn have been shareholders in JVE Sureste since June 2013. By contrast, the evidence of Victory Fund, LLC's and Louis Fohn show that the transfers of shares to them were only completed on 1 January 2014. Victory Fund WS, ¶ 2, **CWS-45**; Fohn WS, ¶ 2, **CWS-30**. The Tribunal's findings reflect Victory Fund, LLC's and Fohn's evidence.

220 Transfer Requests for the Juegos Companies, 3 January 2013 to 26 March 2014, pp. 38-40, **C-169**; E. Burr Second WS, ¶¶ 22-23, 26, 38-39, **CWS-8**.

221 Shareholding Worksheet, 2014, pp. 1-2, **C-180**.

26 March 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	13,000	20,175	-	-	**C-169**, pp. 44-46; **CWS-8**, ¶¶ 22-23, 26, 38-39.[222]
	Total outstanding shares of each type	6,500	13,000	38,800	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**52.0%**	-	-	
End 2014-Present		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0.000	13,000	20,175	-	-	**C-192**; **CWS-8**, Annex E, Table 2.[223]
	Total outstanding shares of each type	6,500	13,000	38,800	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**52.0%**	-	-	

Table 3: Claimants' shareholding in JVE Sureste

(c) JVE Centro

192. The Claimants collectively held at all relevant times at least 100.0% of the A2 shares, 65.1% of the B shares, and 69.2% of the total outstanding stock of JVE Centro.

Date	Shareholding						Evidence
Beginning 2013		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	20,651	-	-	-	**C-189**; **CWS-8**, Annex E, Table 3.[224]
	Total outstanding shares of each type	6.000	20,651	-	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	-	-	-	

222 Transfer Requests for the Juegos Companies, 3 January 2013 to 26 March 2014, pp. 44-46, **C-169**; E. Burr Second WS, ¶¶ 22-23, 26, 38-39, **CWS-8**.

223 Schedule K-1 (Form 8865) for JVE Sureste (Year 2014), **C-192**; E. Burr Second WS, ¶¶ 24-25, and Annex E, Table 2, **CWS-8**.

224 Schedule K-1 (Form 8865) for JVE Centro (Year 2013), **C-189**; E. Burr Second WS, Annex E, Table 3, **CWS-8**.

19 June 2013		A1 Shares	A2 Shares	B Shares	Total Shares		
	Total shares owned by Claimants	0.000	20,651	34,433	55,084		**CWS-2**, Annex C; **CWS-7**, Part I; **CWS-8**, Part I; **CWS-12**, Part I; **CWS-13**, Part I; **CWS-16** to **CWS-47**, Part I.[225]
	Total outstanding shares of each type	6,000	20,651	52,933	79,584		
	Percentage owned by Claimants	**0.0%**	**100.0%**	**65.1%**	**69.2%**[226]		
End 2013		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	20,651	-	-	-	**C-189**; **CWS-8**, Annex E, Table 3.[227]
	Total outstanding shares of each type	6,000	20,651	-	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	-	-	-	
Beginning 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	20,651	-	-	-	**C-190**; **CWS-8**, Annex E, Table 3.[228]
	Total outstanding shares of each type	6,000	20,651	-	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	-	-	-	
11 March 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	20,651	34,433	41,000	96,084	**C-180**, pp. 6-7.[229]

225 E. Burr First WS, Annex C, **CWS-2**; G. Burr Second WS, Part I, **CWS-7**; E. Burr Second WS, Part I, **CWS-8**; Ayervais WS, Part I, **CWS-12**; Conley WS, Part I, **CWS-13**; Further 32 Claimants' WS, Part I, **CWS-16** to **CWS-47**.

226 The Tribunal notes that, unlike the capitalisation *asamblea* minutes, the 2014 Shareholding Worksheet and the January 2018 *asamblea* minutes, the figures in Erin Burr's witness statement failed to take into account the existence of fixed shares in the company.

227 Schedule K-1 (Form 8865) for JVE Centro (Year 2013), **C-189**; E. Burr Second WS, Annex E, Table 3, **CWS-8**.

228 Schedule K-1 (Form 8865) for JVE Centro (Year 2014), **C-190**; E. Burr Second WS, Annex E, Table 3, **CWS-8**.

229 Shareholding Worksheet, 2014, pp. 6-7, **C-180**.

	Total outstanding shares of each type	6,000	20,651	52,933	50,000	129,584	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**65.1%**	**82.0%**	**74.1%**	
End 2014-Present		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	20,651	-	-	-	**C-190**; **CWS-8**, Annex E, Table 3.[230]
	Total outstanding shares of each type	6,000	20,651	-	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	-	-	-	

Table 4: Claimants' shareholding in JVE Centro

(d) JyV Mexico

193. The Claimants collectively held at all relevant times at least 44.4% of the A1 shares, 100.0% of the A2 shares, 66.6% of the B shares, and 70.6% of the total outstanding stock of JyV Mexico.

Date	Shareholding						Evidence
End 2012		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	4,000	22,667	36,963	0,000	63,630	**C-79**; **C-80**; **C-81**; **CWS-8**, ¶ 37; **CWS-26**, ¶ 2; **CWS-36**, ¶ 2; **CWS-47**, ¶ 2; **CWS-22**, ¶ 5; **CWS-29**, ¶ 3; **CWS**-7, ¶ 9; **CWS-13**, ¶ 7; **CWS-25**, ¶ 4; **CWS-8**, ¶ 37.[231]
	Total outstanding shares of each type	9,000	22,667	55,838	3,000	90,505	
	Percentage owned by Claimants	**44.4%**	**100.0%**	**66.2%**	**0.0%**	**70.3%**	

230 Schedule K-1 (Form 8865) for JVE Centro (Year 2014), **C-190**; E. Burr Second WS, Annex E, Table 3, **CWS-8**.

231 Subscription Agreement between Randall Taylor and JyV Mexico, 1 July 2011, **C-79**; Subscription Agreement between Thomas Malley and JyV Mexico, 14 July 2011, **C-80**; Subscription Agreement between Diamond Financial Group and JyV Mexico, 22 July 2011, **C-81**; E. Burr Second WS, ¶ 37,

Beginning 2013		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	4,000	22,667	-	-	-	**C-183**; **CWS-8**, Annex E, Table 4.[232]
	Total outstanding shares of each type	9,000	22,667	-	-	-	
	Percentage owned by Claimants	**44.4%**	**100.0%**	-	-	-	
19 June 2013		A1 Shares	A2 Shares	B Shares	Total Shares		
	Total shares owned by Claimants	4,000	22,667	36,963	63,630		**CWS-2**, Annex C; **CWS-7**, Part I; **CWS-8**, Part I; **CWS-12**, Part I; **CWS-13**, Part I; **CWS-16** to **CWS-47**, Part I.[233]
	Total outstanding shares of each type	9,000	22,667	55,463	87,130		
	Percentage owned by Claimants	**44.4%**	**100.0%**	**66.6%**	**73.0%**[234]		
End 2013		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	4,000	22,667	-	-	-	**C-183**; **CWS-8**, Annex E, Table 4.[235]
	Total outstanding shares of each type	9.000	22.667	-	-	-	
	Percentage owned by Claimants	**44.4%**	**100.0%**	-	-	-	

CWS-8, ¶ 37; Diamond Financial Group Witness Statement, ¶ 2, **CWS-26**; Thomas Malley Witness Statement, ¶ 2, **CWS-36**; Randall Taylor Witness Statement, ¶ 2, **CWS-47**; Douglas Black Witness Statement, ¶ 5, **CWS-22**; Financial Visions Inc. Witness Statement, ¶ 3, **CWS-29**; G. Burr Second WS, ¶ 9, **CWS**-7; Conley WS, ¶ 7, **CWS-13**; Caddis Capital, LLC Witness Statement (***Caddis Capital WS***), ¶ 4, **CWS-25**; E. Burr Second WS, ¶ 37, **CWS-8**.

232 Schedule K-1 (Form 8865) of JyV Mexico (Year 2013), **C-183**; E. Burr Second WS, Annex E, Table 4, **CWS-8**.

233 E. Burr First WS, Annex C, **CWS-2**; G. Burr Second WS, Part I, **CWS-7**; E. Burr Second WS, Part I, **CWS-8**; Ayervais WS, Part I, **CWS-12**; Conley WS, Part I, **CWS-13**; Further 32 Claimants' WS, Part I, **CWS-16** to **CWS-47**.

234 The Tribunal notes that, unlike the capitalisation *asamblea* minutes, the 2014 Shareholding Worksheet and the January 2018 *asamblea* minutes, the figures in Erin Burr's witness statement failed to take into account the existence of fixed shares in the company.

235 Schedule K-1 (Form 8865) of JyV Mexico (Year 2013), **C-183**; E. Burr Second WS, Annex E, Table 4, **CWS-8**.

Beginning 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	4.000	22.667	-	-	-	**C-184**; **CWS-8**, Annex E, Table 4.[236]
	Total outstanding shares of each type	9.000	22.667	-	-	-	
	Percentage owned by Claimants	**44.4%**	**100.0%**	-	-	-	
11 March 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	4.000	22.667	36.963	0,000	63.630	**C-180**, pp. 4-5.[237]
	Total outstanding shares of each type	9.000	22.667	55.463	3.000	90.130	
	Percentage owned by Claimants	**44.4%**	**100.0%**	**66.6%**	**0.0%**	**70.6%**	
End 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	4.000	22.667	-	-	-	**C-184**; **CWS-8**, Annex E, Table 4.[238]
	Total outstanding shares of each type	9.000	22.667	-	-	-	
	Percentage owned by Claimants	**44.4%**	**100.0%**	-	-	-	
5 January 2018		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	4.000	22.667	36.963	0,000	63.630	**C-228**, pp. 16-19.[239]
	Total outstanding shares of each type	9.000	22.667	55.463	3.000	90.130	

236 Schedule K-1 (Form 8865) of JyV Mexico (Year 2014), **C-184**; E. Burr Second WS, Annex E, Table 4, **CWS-8**.

237 Shareholding Worksheet, 2014, pp. 4-5, **C-180**.

238 Schedule K-1 (Form 8865) of JyV Mexico (Year 2014), **C-184**; E. Burr Second WS, Annex E, Table 4, **CWS-8**.

239 Notarised Minutes of the General Shareholders' Meeting of JyV Mexico held on 5 January 2018 (notarised on 2 April 2018), pp. 16-19, **C-228**.

	Percentage owned by Claimants	**44.4%**	**100.0%**	**66.6%**	**0.0%**	**70.6%**	

Table 5: Claimants' shareholding in JyV Mexico

(e) JVE DF

194. The Claimants collectively held at all relevant times 100.0% of the A2 shares, and at least 58.4% of the B shares and 66.2% of the total outstanding stock of JVE DF.

Date	Shareholding						Evidence
End 2012		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0.000	28,669	37,962	0,000	66,631	**CWS-8**, ¶ 37; **CWS-19**, ¶ 5; **CWS-25**, ¶ 5; **CWS-13**, ¶ 8.[240]
	Total outstanding shares of each type	4,000	28,669	65,337	3,000	101,006	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**58.1%**	**0.0%**	**66.0%**	
Beginning 2013		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	28,669	-	-	-	**C-185**; **CWS-8**, Annex E, Table 5.[241]
	Total outstanding shares of each type	4,000	28,669	-	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	-	-	-	
19 June 2013		A1 Shares	A2 Shares	B Shares	Total Shares		
	Total shares owned by Claimants	0,000	28,669	37,962	66,631		**CWS-2**, Annex C; **CWS-7**, Part I; **CWS-8**, Part I; **CWS-12**,
	Total outstanding shares of each type	4,000	28,669	64,962	97,631		

240 Erin Burr Second WS, ¶ 37, **CWS-8**; Oaxaca Witness Statement (***Oaxaca WS***), ¶ 5, **CWS-19**; Caddis Capital WS, ¶ 5, **CWS-25**; Conley WS, ¶ 8, **CWS-13**.

241 Schedule K-1 (Form 8865) of JVE DF (Year 2013), **C-185**; E. Burr Second WS, **CWS-8**, Annex E, Table 5.

	Percentage owned by Claimants	**0.0%**	**100.0%**	**58.4%**	**68.2%**[243]		Part I; **CWS-13**, Part I; **CWS-16** to **CWS-47**, Part I.[242]
End 2013		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	28,669	-	-	-	**C-185**; **CWS-8**, Annex E, Table 5.[244]
	Total outstanding shares of each type	4,000	28,669	-	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	-	-	-	
Beginning 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	28,669	-	-	-	**C-186**; **CWS-8**, Annex E, Table 5.[245]
	Total outstanding shares of each type	4,000	28,669	-	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	-	-	-	
11 March 2014		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	28,669	37,962	0,000	66,631	**C-180,** pp. 8-9; **CWS-8**, ¶ 41.[246]
	Total outstanding shares of each type	4,000	28,669	64,962	3,000	100,631	
	Percentage owned by Claimants	**0.0%**	**100.0%**	**58.4%**	**0.0%**	**66.2%**	

243 The Tribunal notes that, unlike the capitalisation asamblea minutes, the 2014 Shareholding Worksheet and the January 2018 asamblea minutes, the figures in Erin Burr's witness statement failed to take into account the existence of fixed shares in the company.

242 E. Burr First WS, Annex C, **CWS-2**; G. Burr Second WS, Part I, **CWS-7**; E. Burr Second WS, Part I, **CWS-8**; Ayervais WS, Part I, **CWS-12**; Conley WS, Part I, **CWS-13**; Further 32 Claimants' WS, Part I, **CWS-16** to **CWS-47**.

244 Schedule K-1 (Form 8865) of JVE DF (Year 2013), **C-185**; E. Burr Second WS, Annex E, Table 5, **CWS-8**.

245 Schedule K-1 (Form 8865) of JVE DF (Year 2014), **C-186**; E. Burr Second WS, Annex E, Table 5, **CWS-8**.

246 Shareholding Worksheet, 2014, pp. 8-9, **C-180**; E. Burr Second WS, ¶ 41, **CWS-8**.

End 2014-Present		A1 Shares	A2 Shares	B Shares	Fixed Shares	Total Shares	
	Total shares owned by Claimants	0,000	28,669	-	-	-	**C-186**; **CWS-8**, Annex E, Table 5.[247]
	Total outstanding shares of each type	4,000	28,669	-	-	-	
	Percentage owned by Claimants	**0.0%**	**100.0%**	-	-	-	

Table 6: Claimants' shareholding in JVE DF

(iv) The Claimants' share ownership in E-Games and Operadora Pesa

(a) E-Games

195. The Claimants have introduced the minutes of *asambleas* held on 6 March 2013, 16 July 2013 and 23 July 2013,[248] all recording the Claimants' share ownership in E-Games. This evidence has not been contested by the Respondent.[249]

196. From 7 June 2011 to 16 July 2013, the Claimants collectively held 43.33% of the total outstanding stock in E-Games. John Conley further held an option during that period to purchase another 13.33% of the total outstanding stock pursuant to an option agreement with Mr. Alfredo Moreno Quijano.[250] Since 16 July 2013, Claimants have held 66.66% of the total outstanding stock in E-Games.

Date	Shareholder	Shareholding	Evidence
17 February 2006	Alfredo Moreno Quijano	50.00%	**C-117**, p. 38.[251]
	Antonio Moreno Quijano	50.00%	
	Percentage owned by Claimants	**0.00%**	
9 July 2009	Oaxaca Investments LLC	28.33%	
	John Conley	28.34%	

247 Schedule K-1 (Form 8865) of JVE DF (Year 2014), **C-186**; E. Burr Second WS, Annex E, Table 5, **CWS-8**.

248 Notarised Minutes of the General Shareholders' Meeting of E-Games held on 6 March 2013, 16 July 2013 and 23 July 2013 (notarised on 7 March 2013, 7 October 2013 and 21 February 2014), pp. 36-39, 39-40, 44-47, **C-63**.

249 Reply, ¶ 234.

250 Option Agreement (unexecuted), undated, **C-83**; Conley WS, ¶¶ 11-22, **CWS-13**.

251 Notarised Articles of Incorporation of E-Games for 17 February 2006 (notarised on 22 February 2006), p. 38, **C-117**.

	Alfredo Moreno Quijano	15.00%	**C-63**, pp. 31-32; **CWS-19**, ¶ 6; **CWS-13**, ¶ 9.[252]
	Tomás Fernando Ruíz Ramírez	28.33%	
	Percentage owned by Claimants	**56.70%**	
7 June 2011	Oaxaca Investments LLC	28.33%	**C-63**, p. 33; **C-83**; **CWS-13**, ¶¶ 11-22; **CWS-19**, ¶ 6; **C-139**, pp. 1, 3.[253]
	John Conley	15.00%	
	Alfredo Moreno Quijano	28.34%	
	Tomás Fernando Ruíz Ramírez	28.33%	
	Total Shares Owned by Claimants	**43.33%**	
4 July 2011	Oaxaca Investments LLC	28.33%	**C-63**, p. 34.[254]
	John Conley	15.00%	
	Alfredo Moreno Quijano	28.34%	
	José Ramón Moreno Quijano	28.33%	
	Total Shares Owned by Claimants	**43.33%**	
1 March 2012	Oaxaca Investments LLC	28.33%	**C-63**, p. 36.[255]
	John Conley	15.00%	
	Alfredo Moreno Quijano	28.33%	
	José Ramón Moreno Quijano	14.17%	
	Jorge Armando Guerrero Ortiz	14.17%	
	Total Shares Owned by Claimants	**43.33%**	
19 June 2013	Oaxaca Investments LLC	28.33%	**CWS-2**, Annex B[256]
	John Conley	15.00%	
	Alfredo Moreno Quijano	28.33%	
	José Ramón Moreno Quijano	14.17%	
	Jorge Armando Guerrero Ortiz	14.17%	

252 Notarised Minutes of the General Shareholders' Meeting of E-Games held on 9 July 2009 (notarised on 6 October 2009), pp. 31-32, **C-63**; Oaxaca WS, ¶ 6, **CWS-19**; Conley WS, ¶ 9, **CWS-13**.

253 Notarised Minutes of the General Shareholders' Meeting of E-Games held on 9 June 2011 (notarised on 7 July 2011), p. 33, **C-63**; Option Agreement (unexecuted), undated, **C-83**; Conley WS, ¶¶ 11-22, **CWS-13**; Oaxaca WS, ¶ 6, **CWS-19**; Consent to Action in Lieu of Meeting of the Managers of E-Games, 7 June 2011, pp. 1, 3, **C-139**.

254 Notarised Minutes of the General Shareholders' Meeting of E-Games held on 4 July 2011 (notarised on 12 August 2011), p. 34, **C-63**.

255 Notarised Minutes of the General Shareholders' Meeting of E-Games held on 6 March 2011 (notarised on 7 March 2011), p. 36, **C-63**.

256 E. Burr First WS, Annex B, **CWS-2**.

	Total Shares Owned by Claimants	**43.33%**	
16 July 2013-Present	Oaxaca Investments, LLC	33.32%	**C-63**, p. 40; **CWS-19**, ¶ 6; **CWS-13**, ¶¶ 9, 19-21; **CWS-2**, Annex B; **CWS-1**, ¶ 18; **CWS-7**, ¶ 25.[257]
	John Conley	33.34%	
	José Ramón Moreno Quijano	16.67%	
	Jorge Armando Guerrero Ortiz	16.67%	
	Total Shares Owned by Claimants	**66.66%**	

Table 7: Claimants' shareholding in E-Games

(b) Operadora Pesa

197. The Claimants do not own, and have never owned, any shares in Operadora Pesa.[258]

c. Did the Claimants "own" the Mexican Companies at the relevant times?

198. The Respondent submits that the Claimants do not own the Mexican Companies because ownership requires "full ownership or virtually full ownership of the company".[259] The Claimants submit that they do because majority ownership (50% + 1) of the company's shares is sufficient to "own" the company.[260]

199. The Tribunal agrees with the Respondent. To reach that conclusion, the Tribunal has considered the ordinary meaning of the terms of Article 1117, read in context.

200. First, Article 1117 refers to owning "an enterprise". It does not refer to owning "equity securities of an enterprise". That choice of words should be given due weight. Elsewhere in Chapter 11, when defining "investment", the drafters of the Treaty took care to distinguish between "(a) an enterprise" and "(b) *an equity security of* an enterprise".[261] If the drafters of the Treaty would have wanted to equate ownership of

---

257 Notarised Minutes of the General Shareholders' Meeting of E-Games held on 16 July 2013 (notarised on 7 October 2013), p. 40, **C-63**; Oaxaca WS, ¶ 6, **CWS-19**; Conley WS, ¶¶ 9, 19-21, **CWS-13**; E. Burr First WS, Annex B, **CWS-2**; G. Burr First WS, ¶ 18, **CWS-1**; G. Burr Second WS, ¶ 25, **CWS-7**. *See also* Tr. (ENG), Day 2, 487:10-14 (E. Burr).

258 *See* Claimants' PHB, Annex 3; Notarised Articles of Organization of Operadora Pesa dated 29 February 2008 (notarised on 7 March 2008), p. 17, **C-109**.

259 Reply, ¶ 200.

260 Rejoinder, ¶ 39.

261 NAFTA, Article 1139 (emphasis added).

an "enterprise" with ownership of a certain number of the "equity securities of an enterprise", this suggests they knew how to do so, and that they would have done so.

201. Second, Article 1117 does not refer to any share ownership threshold that, on the Claimants' case, must be reached to "own" the enterprise. The Claimants suggest that it is 50% + 1. But it would have been easy for the drafters of the Treaty to say that if that is what they had in mind. In fact, in another multilateral treaty to which all NAFTA Parties are also parties, that is what was done. Article XXVIII(n) of the GATS specifies that a company is "'owned' by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member".[262] In the Treaty, the NAFTA Parties chose not to so define ownership of an enterprise.

202. Third, while Article 1117 does not specify an ownership threshold, its context indicates that the NAFTA Parties envisaged a shareholding threshold that must *always*, regardless of applicable law or bylaws, be sufficient to confer the legal capacity to control the enterprise:

a. Article 1117(3) addresses the situation where an investor pursues claims under Article 1117 and either the investor "or a *non-controlling* investor in the enterprise" pursues parallel claims under Article 1116. This paragraph thus assumes that the only investor who can pursue an Article 1117 claim on behalf of an enterprise will be a *controlling* investor, because a "non-controlling" investor is deemed limited to the pursuit of an Article 1116 claim. It follows that the "ownership" of an enterprise in paragraph 1 of Article 1117 must *always* be sufficient to give the investor the legal capacity to control.

b. Article 1121(2) requires the enterprise to consent and provide a waiver as a condition precedent to the submission of an Article 1117 claim on its behalf by an investor. This again suggests that the investor has an equity holding that always confers on it the legal capacity to control the enterprise. If it has not, it cannot be presumed capable of procuring the consent and waiver from the enterprise. Article 1121(4) further confirms this when it provides that the waiver

262 General Agreement on Trade in Services, **CL-72**.

from the enterprise is not required when the NAFTA Party has deprived the investor of control.

c. Article 1113 contains the so-called denial of benefits clause. It allows a NAFTA Party to deny the benefits of the Treaty to an investor of another NAFTA Party that is an enterprise of that NAFTA Party when investors from non-NAFTA parties "own or control the enterprise and the enterprise has no substantial business activities in the territory of [that NAFTA Party]." The purpose is to avoid an obligation to extend Treaty benefits to a "sham" company set up by an investor from a non-NAFTA party. It is intrinsic to the notion of a sham company that its shareholders can control it so as to gain access to Treaty benefits. That is also how Canada interpreted this provision in its Statement of Implementation, where it stated "[u]nder [A]rticle 1113, a Party may deny the benefits of this chapter in the case that investors of a non-Party *control* the investment and the denying Party does not maintain diplomatic relations with the non-Party or the denying Party has prohibited transactions with enterprises of the non-Party which could be circumvented if the NAFTA applied. A Party may also deny benefits in the case of 'sham' investments (i.e., where there are no substantial business activities in a NAFTA country)."[263] Thus, again, the requisite ownership threshold is assumed to be one that always confers the legal capacity to control.

203. As the facts of this case show, the requisite share ownership that confers the legal capacity to control is not necessarily 50% + 1 of the outstanding stock. What that threshold is will vary for each enterprise, depending on what its by laws and/or the governing law provide for. The only equity holding that will *always*, independently of the circumstances, confer the legal capacity to control is ownership of *all* or virtually all of the outstanding stock. Contextual analysis therefore suggests that by "ownership" of an enterprise, the NAFTA Parties contemplated ownership of all the outstanding shares of that enterprise.

---

263 Canadian Statement on Implementation of the NAFTA, Canada Gazette, 1 January 1994, Part I, p. 147, at p. 8, **CL-47** (emphasis added). The Claimants have relied on this document where it refers to "majority-owned" companies in support of their position that to own an enterprise means to majority-own an enterprise. *See,* Rejoinder, ¶ 44. However, the passage cited by the Claimants is a summary of the Treaty's definition of investment—which clearly does protect majority shareholding—and not Article 1117.

204. The Tribunal also did not find "any relevant rules of international law applicable in the relations between the parties" within the meaning of Article 31(3)(c) of the VCLT that would affect this plain reading of "ownership" in Article 1117. The definitions of "ownership" in GATS Article XXVIII(n) and Article 13(a)(ii) of the MIGA Convention[264] are of limited import because, as argued by the Respondent, the NAFTA Parties' choice not to further define "ownership" under Article 1117 must be respected.[265] The Claimants' reference to Mexico's notification under the OECD Declaration as to the definition of "owned or controlled directly or indirectly" in that instrument is also inapplicable because it is not a rule applicable in the relations between all the NAFTA Parties. In performing an analysis under Article 31(3)(c) of the VCLT, the Tribunal will not "rewrite" or "substitute a plain reading"[266] of Article 1117.

205. This interpretation of "own" also gives meaning to "or control" in Article 1117. As discussed in the next section, "control" can mean both the legal capacity to control and *de facto* control. Article 1117 thus applies whenever the investor:

a. owns all of the outstanding shares in an enterprise (an enterprise that the investor "owns");

b. owns a lesser number of shares that is still sufficient in the specific circumstances to confer the legal capacity to control (an enterprise that the investor "controls"); or

c. does not own a number of shares sufficient to confer the legal capacity to control but is otherwise able to exercise *de facto* control (also an enterprise that the investor "controls").

---

264 Claimants' Additional Submission on the interpretation of NAFTA Article 1117, 21 December 2018, (***Claimants' PO7 Submission***), ¶¶ 18, 30.

265 Respondent's Supplemental Submission Under Procedural Order 7, 21 December 2018 (***Respondent's PO7 Submission***), ¶ 10.

266 *Vattenfall AB and others v. Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, ¶ 154 (as cited in Claimants' PO7 Submission, ¶ 7 and Respondent's PO7 Submission, ¶ 6).

206. If, as the Claimants contend, "ownership" extended to scenario (b), then "control" would only be relevant to scenario (c). Yet, as explained below, the ordinary meaning of "control" encompasses both scenarios (b) and (c).

207. Based on the foregoing, the Tribunal finds that the Claimants did not "own" the Juegos Companies or E-Games at the relevant times for purposes of Article 1117. As they never owned any shares in Operadora Pesa, they naturally did not "own" that company either.

d. Did the Claimants "control" the Mexican Companies at the relevant times?

208. To answer this question, the Tribunal must answer the following questions:

a. Does "control" mean legal capacity to control, *de facto* control, or both?

b. To have the legal capacity to control, must the Claimants be contractually bound to vote as a block?

c. To have the legal capacity to control, what percentage of which class of shares in the Mexican Companies must the Claimants have owned at the relevant times?

d. On the evidence before the Tribunal, did the Claimants thus "control" the Mexican Companies at the relevant times?

(i) Does "control" mean legal capacity to control, de facto control, or both?

209. The Respondent submits that "control" can only mean legal capacity to control.[267] The Claimants submit that "control" can mean both legal capacity to control and *de facto* control.[268]

210. In the Tribunal's view, the ordinary meaning of "control" favours the Claimants' position.

211. The Merriam-Webster dictionary defines "control" to mean:

> a: to exercise restraining or directing influence over

---

267 Reply, ¶ 203.
268 Rejoinder, ¶ 47.

> b: to have power over
>
> c: to reduce the incidence or severity of especially to innocuous levels".[269]

212. In the context of Article 1117, any ability to "exercise restraining or directing influence over" or to "have power over" a company would satisfy the ordinary meaning of control. There is no specific manner or form that "control" must take.

213. The tribunal in *Thunderbird* determined that this indeed is the ordinary meaning of control:

> The Tribunal does not follow Mexico's proposition that Article 1117 of the NAFTA requires a showing of legal control. The term "control" is not defined in the NAFTA. Interpreted in accordance with its ordinary meaning, control can be exercised in various manners. Therefore, a showing of effective or "*de facto*" control is, in the Tribunal's view, sufficient for the purposes of Article 1117 of the NAFTA.[270]

214. The tribunal in that case further observed:

> It is quite common in the international corporate world to control a business activity without owning the majority voting rights in shareholders meetings. Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, access to capital, know how, and authoritative reputation. Ownership and legal control may assure that the owner or legally controlling party has the ultimate right to determine key decisions. However, if in practice a person exercises that position with an expectation to receive an economic return for its efforts and eventually be held responsible for improper decisions, one can conceive the existence of a genuine link yielding the control of the enterprise to that person.[271]

215. The parties have given less airtime to the Tribunal's decision in *Aguas del Tunari*. That may be so because that tribunal was called upon to interpret control in the context of another investment treaty. The Tribunal finds the opinion by its preeminent

---

269 Merriam-Webster Dictionary, "Definition of *control*", https://www.merriam-webster.com/dictionary/control (last accessed 25 March 2019).

270 *International Thunderbird*, ¶ 106 (emphasis in original), **CL-7**.

271 *Id.*, ¶ 108, **CL-7**.

majority (consisting of the late Professor David Caron and Mr. Henri Alvarez QC) to nonetheless provide a helpful disquisition on the subject.

216. The majority first observed that "the ordinary meaning of 'control' would seemingly encompass both actual exercise of powers or direction and the rights arising from the ownership of shares".[272] After an extensive analysis deploying the interpretation tools available under the VCLT, the majority concluded that "control", as used in the treaty under examination in that case, did include the legal capacity to control:

> the phrase 'controlled directly or indirectly' means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity. Subject to evidence of particular restrictions on the exercise of voting rights, such legal capacity is to be ascertained with reference to the percentage of shares held.[273]

217. Unlike the Respondent's submissions in this case, the respondent in that case had argued that "control" meant only *de facto* control—and not the legal capacity to control. The majority rejected that proposition:

> In the Tribunal's view, the BIT *does not require* actual day-to-day or ultimate control as part of the 'controlled directly or indirectly' requirement …. The Tribunal observes that it is not charged with determining all forms which control might take. It is the Tribunal's conclusion, by majority, that, in the circumstances of this case, where an entity has both majority shareholdings and ownership of a majority of the voting rights, control as embodied in the operative phrase 'controlled directly or indirectly' exists" (emphasis added).[274]

218. While the majority only opined that a showing of *de facto* control was not *required*—and thus left open the possibility of establishing control in that manner—it also expressed apprehension about the definitional and evidentiary challenges of a *de facto* control standard:

> Respondent's argument that 'control' can be satisfied by only a certain level of actual control has not been defined by the Respondent with sufficient particularity. Rather, the concept is sufficiently vague as to be unmanageable. … Once one admits of

---

272 *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 (***AdT v. Bolivia***), ¶ 227, **RL-031**.

273 *AdT v. Bolivia*, ¶ 264, **RL-031**.

274 *AdT v. Bolivia*, ¶ 264, **RL-031**.

> the possibility of several controllers, then the definition of what constitutes sufficient 'actual' control for any particular controller, particularly when an entity may delegate such actual control, becomes problematic. This becomes apparent with Respondent's difficulty in offering the Tribunal the details of its 'actual' control test. … Moreover, the many dimensions of actual control of a corporate entity range from day to day operations up to strategic decision-making. … The difficulty in articulating a test in the Tribunal's view reflects not only the fact that the Respondent did not provide such a test, but also the possibility that it is not practicable to do so and that, as discussed in the next paragraph, the resultant uncertainty would directly frustrate the object and purpose of the BIT.[275]

219. This evidentiary challenge of proving *de facto* control also appears to have been on the mind of the *Thunderbird* tribunal:

> In the absence of legal control however, the Tribunal is of the opinion that de facto control must be established beyond any reasonable doubt.[276]

220. The Tribunal is unclear as to whether the *Thunderbird* tribunal intended to set a different standard of proof for *de facto* control and, if so, on what basis. What is clear, however, is the dual consonance of the *Thunderbird* and *Aguas del Tunari* opinions. To wit, both tribunals considered that: (i) there is nothing in the ordinary meaning of control that precludes either prong of control—legal capacity or *de facto*; and (ii) *de facto* control will typically, and logically, present a greater evidentiary challenge.

221. This reading of "control" is not affected by "any relevant rules of international law applicable in the relations between the parties" within the meaning of Article 31(3)(c) of the VCLT. As with the meaning of "ownership",[277] the definitions of "control" in GATS Article XXVIII(n) and Mexico's reservation to the OECD Declaration are not "relevant rules" for purposes of interpreting Article 1117; and even if they were, the Tribunal would take them into account by concluding that, had the NAFTA Parties wished to apply those definitions to Article 1117, they would have done so in the Treaty. The Tribunal therefore finds that "control" in Article 1117, in accordance with its ordinary meaning, means both legal capacity to control and *de facto* control.

---

275 *AdT v. Bolivia*, ¶ 246, **RL-031**.
276 *International Thunderbird*, ¶ 106, **CL-7**.
277 *See* above, ¶ 196.

(ii) To have the legal capacity to control, must the Claimants be contractually bound to vote as a block?

222. The Respondent submits that a binding agreement among shareholders is required to establish that they collectively control the company.[278] The Claimants submit that no such binding agreement is required among shareholders to establish that they collectively control the company.[279]

223. The Tribunal agrees with the Claimants. Where they can show that their collective shareholding and voting rights confer upon them the *legal capacity* to control the Mexican Companies by aligning their votes, there is no further requirement that they are legally *bound* to do so.

224. If there were, multiple shareholders in an enterprise would never be able to pursue an Article 1117 claim on behalf of the enterprise absent a binding agreement among them requiring them to vote as a block. Nothing in the text or context of Article 1117 suggests that this was the intention of the drafters of the Treaty.

225. When the issue has arisen in other treaty arbitrations, it has proven uncontroversial.

a. In *Micula*, the two individual claimants each held 50% of shares in two of the corporate claimants, and each held 46.72% of shares in the third corporate claimant.[280] The tribunal held that it had jurisdiction over the corporate claimants as they were "effectively controlled" by the two Swedish citizens collectively.[281] There was no discussion of any binding instrument between the shareholders or the need for it.

b. In *von Pezold*, eight family members owned indirectly 86.49% of the corporate claimants.[282] Again, the tribunal found that it had jurisdiction over the corporate claimants because they were "effectively controlled" by these eight individuals

278 Respondent's PHB, ¶ 101.
279 Claimants' PHB, ¶¶ 90-91.
280 *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, ¶¶ 112-113, **CL-61**.
281 *Id.*, ¶¶ 109, 115, **CL-61**.
282 *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 127, **CL-59**.

together.[283] There was no discussion of any binding instrument between the shareholders or the need for it.

c. In *Perenco*, the tribunal held that four individuals who each owned 25% of the parent company of the claimant had, collectively, control over that company and its subsidiaries.[284] There was no discussion of any binding instrument between the shareholders or the need for it.

d. In *Azinian*, three claimants asserted a claim on behalf of a company of which they allegedly "collectively 'own[ed] and control[led] 74%'."[285] There was no discussion of any binding instrument between the shareholders or the need for it.

(iii) To have the legal capacity to control, which percentage of which class of shares must the Claimants have owned at the relevant times?

226. The Tribunal will address this question first for the Juegos Companies and then for E-Games.

(a) The Juegos Companies

227. The Respondent submits that "in order to demonstrate 'control' of the Juegos Companies, the Claimants would need to demonstrate that they held a majority of the Series B shares at all relevant times".[286]

228. The Tribunal agrees that a simple majority of the Series B shares suffices to confer the legal capacity to control for the Juegos Companies:

a. The bylaws of the JVE Sureste, JVE Centro, JyV Mexico and JVE DF are broadly similar. Generally, resolutions at a shareholders meeting can be adopted with a simple majority of the Series B shares. A shareholder with more than 50% of the Series B shares can also appoint three out of five members of the Board.[287] Only

---

283 *Id.,* ¶ 226, **CL-59**.

284 *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on the Remaining Issues of Jurisdiction and on Liability, 12 September 2014, ¶¶ 465, 529, **CL-50**.

285 *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Interim Decision Concerning Respondent's Motion for Directions, 22 January 1998, ¶ 16.

286 Reply, ¶ 255.

287 Notarised Minutes of the General Shareholders Meeting of JVE Sureste held on 28 February 2007 (notarised on 25 April 2007), p. 65, **C-90**; Notarised Minutes of the General Shareholders Meeting of

a closed list of five decisions, including dissolution of the company or sale of substantially all its assets, requires a 75% vote of all shareholders. A further closed list of four decisions, including acquisition of a debt over US$ 5 million and increasing the capital stock, requires the vote of 75% of the Series B shares.[288] Thus, a shareholder owning a majority of the Series B shares would have the power to (i) appoint a majority on the Board; (ii) adopt shareholder resolutions for most of the company's affairs, and (iii) veto all but a limited number of resolutions.

b. The bylaws of JVE Mexico differ slightly. Shareholder resolutions are generally adopted through a majority vote of the combined Series B and C shares in the company.[289] Only a closed list of five major decisions, including dissolution of the company or sale of substantially all its assets, requires a 75% vote of all shareholders. A further closed list of four decisions, including acquisition of a debt over US$ 5 million and increasing the capital stock, require the vote of 75% of the Series B and C shares.[290] This means that a shareholder owning 50% of the combined B and C shares will be able to (i) adopt most shareholder resolutions; and (ii) veto all but a limited number of shareholder decisions. Further, a shareholder owning more than 50% of Series A shares and 50% of Series B shares will have power to appoint a majority of the Board of JVE Mexico.[291]

JVE Centro held on 31 December 2007 (notarised on 10 January 2011), p. 50, **C-91**; Notarised Minutes of the General Shareholders Meeting of JyV Mexico held on 31 May 2008 (notarised on 10 January 2011), pp. 45-46, **C-92**; Notarised Minutes of the General Shareholders Meeting of JVE DF held on 2 September 2008 (notarised on 10 January 2011), p. 49, **C-93**.

288 Notarised Minutes of the General Shareholders Meeting of JVE Sureste held on 28 February 2007 (notarised on 25 April 2007), pp. 62-63, **C-90**; Notarised Minutes of the General Shareholders Meeting of JVE Centro held on 31 December 2007 (notarised on 10 January 2011), pp. 47-48, **C-91**; Notarised Minutes of the General Shareholders Meeting of JyV Mexico held on 31 May 2008 (notarised on 10 January 2011), pp. 43-44, **C-92**; Notarised Minutes of the General Shareholders Meeting of JVE DF held on 2 September 2008 (notarised on 10 January 2011), pp. 46-47, **C-93**.

289 Notarised Minutes of the General Shareholders Meeting of JVE Mexico held on 27 February 2006 (notarised on 23 March 2006, p. 54, **C-89**.

290 Notarised Minutes of the General Shareholders Meeting of JVE Mexico held on 27 February 2006 (notarised on 23 March 2006), pp. 53-54, **C-89**.

291 Notarised Minutes of the General Shareholders Meeting of JVE Mexico held on 27 February 2006 (notarised on 23 March 2006, p. 56, **C-89**.

(b) E-Games

229. From 7 June 2011 to 16 July 2013, the by-laws of E-Games required a 75% of the vote of the shareholders to adopt any resolution.[292] After 16 July 2013, E-Games's bylaws require a 70% shareholding to adopt most resolutions, including the election of members to the Board.[293] Only a closed list of 8 major decisions, including acquisition of a debt over US$ 5 million, amendment of the bylaws, dissolution of the company or a sale of substantially all its assets, require 85% of the votes.[294]

230. The Claimants must therefore—both parties agree—own 75% or 70% of the shares (as the case may be) in order to prove their legal capacity to control E-Games.[295]

(iv) On the evidence before the Tribunal, did the Claimants thus "control" the Mexican Companies at the relevant times?

231. The Tribunal will answer the question first for the Juegos Companies, then for E-Games.

(a) The Juegos Companies

232. Having found that the Claimants at all relevant times owned at least 50% of the Series B shares in each of JVE Sureste, JVE Centro, JyV Mexico and JVE DF, the Tribunal concludes that they had at all relevant times the legal capacity to control those companies. Further, having found that the Claimants at all relevant times owned at least 50% of each of the Series A and Series B shares, and at least 50% of the combined Series B and C shares, of JVE Mexico, the Tribunal also concludes that they had at all relevant times the legal capacity to control JVE Mexico. The Tribunal therefore concludes, on that basis, that the Claimants at all relevant times "controlled" the Juegos Companies for purposes of Article 1117.

233. The Tribunal also finds that the Claimants were unable to exercise *de facto* control over the Juegos Companies (other than JVE Mexico) between, at least, September

---

292 Claimants' PHB, ¶ 147; Consent to Action in Lieu of Organizational Meeting of the Directors of E-Games, 7 June 2011, p. 3, **C-64**.

293 Notarised Minutes of the General Shareholders' Meeting of E-Games held on 16 July 2013 (notarised on 10 October 2013), p. 41, **C-63**.

294 Notarised Minutes of the General Shareholders' Meeting of E-Games held on 16 July 2013 (notarised on 10 October 2013), pp. 41-42, **C-63**.

295 Reply, ¶ 276; Rejoinder, ¶ 160.

2014 and July 2016, as a result of the August 2014 *asambleas* and their subsequent dispute with Chow and Pelchat. The Claimants squarely conceded as much when on 21 July 2015 they advised ICSID that they "do not have board control of the Juegos Companies".[296]

234. The Tribunal, however, has already established that an investor can be said to "control" an enterprise *either* if it has the legal capacity to control (and regardless of whether it *de facto* exercises control) *or* if it exercises *de facto* control (and regardless of whether it has the legal capacity to control). In this case, the Claimants at all times retained the share ownership necessary to confer the legal capacity to control and, shortly after the Request was filed, recovered their ability to exercise *de facto* control.

235. The Claimants' temporary loss of *de facto* control does therefore not detract from the Tribunal's finding that the Claimants did, at all relevant times, "control" the Juegos Companies for purposes of Article 1117.

(b) E-Games

236. It is uncontroversial that the Claimants never held 70% of the shares in E-Games. They therefore did not have the legal capacity either to appoint all members of the Board or to push through proposed shareholder resolutions.

237. They did, however, at all times have sufficient shares (more than 25% or 30%) to veto any proposed shareholder resolutions. In addition, the quorum required for a valid shareholder meeting being 85% of the capital stock on a first call and 70% of the capital stock on second call or later calls, the Claimants had the ability to prevent a quorum from ever being reached for any Board meeting.[297] That already gave them a considerable degree of *de facto* control.

238. Further, the evidence on record establishes to the Tribunal's satisfaction that the two Original Claimants that are shareholders in E-Games—Oaxaca and John Conley—exercised *de facto* control over E-Games.

---

296 Letter from the Claimants to ICSID, 21 July 2016, p. 13.

297 Notarised Minutes of the General Shareholders' Meeting of E-Games held on 16 July 2013 (notarised on 10 October 2013), pp. 41-42, **C-63**.

239. The framework within which the Tribunal has assessed the evidence of *de facto* control is the one set out by the *Thunderbird* tribunal, which the Tribunal considered persuasive. The *Thunderbird* tribunal found that the "ability to exercise significant influence on the decision-making" and being the "driving force" in the company would be significant evidence of *de facto* control.[298] Beyond influence on decision-making, the *Thunderbird* tribunal also took into account other factors such as (i) being exposed to the economic consequences of decisions in the company[299] and (ii) having expertise and involvement in the capitalisation and operation of the business.[300] To the Tribunal's mind, these are examples of relevant factors, although by no means the only ones.

240. The record shows that the Claimants wielded pervasive influence over the decision-making in E-Games:

a. *Board control*. Prior to 16 July 2013, Jose Ramon Moreno testified that he and his brother, Alfredo Moreno, as Directors on the Board of E-Games "always" acted subject to the instructions of the Claimants, and the "reality" was that "in no case" did he act without the knowledge of Gordon Burr.[301] Further, Claimant Gordon Burr has been the President of the Board of E-Games since 16 July 2013 to the present,[302] and Claimant John Conley has been a director on the Board since 16 July 2013 to the present.[303] This latter point is accepted by the Respondent.[304]

b. *Shareholder voting control*. The Claimants were able to always align the votes of the non-Claimant shareholders:

i José Ramón Moreno, who has been a shareholder in E-Games since 4 July 2011, testified that, while he "always had freedom" in making voting

298 *Thunderbird*, ¶ 107, **CL-7**.
299 *Thunderbird*, ¶ 108, **CL-7** (if a person made key decisions with an "expectation to receive an economic return for its efforts and eventually be held responsible for improper decisions", one could conceive "the existence of a genuine link yielding the control of that enterprise" to that person).
300 *Thunderbird*, ¶ 109, **CL-7** (focusing on "[t]he initial expenditures, the know-how …, the selection of the suppliers, and the [determination of] expected return on the investment" as evidence of *de facto* control).
301 J.R. Moreno WS, ¶ 9, **CWS-15**; Tr. (ENG) Day 3, 666:13-666:1 (J.R. Moreno).
302 Notarised Minutes of the General Shareholders Meeting of E-Games held on 16 July 2013 (notarised on 10 October 2013), p. 43, **C-63**.
303 Notarised Minutes of the General Shareholders Meeting of E-Games held on 16 July 2013 (notarised on 10 October 2013), p. 43, **C-63**.
304 Reply, ¶ 286.

decisions,[305] he has always voted—and would have continued to vote[306]—with the Claimants on decisions related to the casinos' operations, without exception.[307]

ii Alfredo Moreno followed Mr. Conley's vote on "all key issues".[308] Further, from June 2011 until 16 July 2013, Alfredo Moreno was contractually prevented under an option agreement from voting 13.34% of his shares in a manner inconsistent with Mr. Conley's views without first providing Conley with the right to purchase those shares at a prearranged price.[309]

c. *Control over incorporation*. In 2006, Gordon Burr and Conley instructed José Ramón Moreno and Alfredo Moreno to incorporate E-Games to hold casino assets.[310] It was a decision taken by the Claimants "despite [the fact that Jose Ramon Moreno and Alfredo Moreno] are listed in [the] paperwork."[311] The Claimants also provided a "significant majority" of the capital used to incorporate the company.[312]

d. *Control over direction and purpose of E-Games*. The Claimants have continued to hold decision-making power over the direction and purpose of E-Games after incorporation. In 2008, Claimants Conley, Gordon Burr and Erin Burr decided to "repurpose" E-Games as the permit holder for the casino business.[313] Gordon Burr also testified that he had power to "replace[]" employees of E-Games.[314]

e. *Economic exposure to the business*. Gordon Burr testified that E-Games never paid out any dividends.[315] Instead, at the end of every month, E-Games would transfer all its net profits to each of the Juegos Companies, pursuant to the

---

305 Tr. (ENG) Day 3, 688:22 (J.R. Moreno).
306 José Ramón Moreno Quijano Witness Statement (***J.R. Moreno WS***), ¶ 20, **CWS-15**.
307 J.R. Moreno WS, ¶¶ 19-21, **CWS-15**; Tr. (ENG) Day 3, 688:22-689:22 (J.R. Moreno). *See also* G. Burr First WS, ¶ 18, **CWS-1**.
308 G. Burr First WS, ¶ 18, **CWS-1**; Conley WS. ¶ 15, **CWS-13**.
309 Option Agreement between Alfredo Moreno and John Conley, 2 June 2011, ¶ 6(c), **C-83**; Conley WS, ¶ 15, **CWS-13**; G. Burr Second WS, ¶ 25, **CWS-7**; G. Burr First WS, ¶ 19, **CWS-1**.
310 G. Burr Second WS, ¶ 23, **CWS-7**; Tr. (ENG) Day 2, 434:13-435:1 (G. Burr).
311 G. Burr Second WS, ¶ 24, **CWS-7**.
312 G. Burr Second WS, ¶ 23, **CWS-7**.
313 G. Burr Second WS, ¶ 24, **CWS-7**.
314 Tr. (ENG) Day 2, 435:7-435:20 (G. Burr).
315 Tr. (ENG) Day 2, 424:3-10 (G. Burr).

Machine Lease Agreements[316] between E-Games and those companies.[317] As a result, the Claimants were exposed to the performance of E-Games through their majority shareholding in the Juegos Companies.

241. Based on the foregoing, the Tribunal is satisfied, on the preponderance of the evidence, that the Claimants *de facto* controlled E-Games at all relevant times.

(c) Operadora Pesa

242. The Claimants own no shares in Operadora Pesa. The Respondent submits that, even if the Claimants did at all relevant times control Operadora Pesa (which it does not concede), the Tribunal would still have no jurisdiction over an Article 1117 claim on its behalf because the Claimants have made no investment in Operadora Pesa.[318]

243. The Tribunal agrees with the Respondent.

244. Article 1101 of the Treaty provides that it "applies to measures adopted or maintained by a Party relating to … (a) *investors* of another Party; [and] (b) *investments of investors* of another Party in the territory of the Party …" Article 1117 requires that the enterprise be owned or controlled by an "*investor*". Article 1139 in turn defines "investor of a Party" as "… a national or an enterprise of such Party, *that seeks to make, is making or has made an investment*."

245. Reading these provisions together, the Claimants must establish that they are "investors" in Operadora Pesa for the Treaty to apply to measures allegedly adopted against Operadora Pesa. For the Claimants to be "investors" in Operadora Pesa, they must show that they seek to make, are making or have made an investment in that company. It is undisputed that they have not. The mere fact that the Claimants may control Operadora Pesa—a point the Tribunal need not decide—would still not make Operadora Pesa an "investment of" the Claimants.

---

316 Machine Lease Agreement between E-Games and JyV Mexico, 9 December 2009, Clause 3, **C-52**; Machine Lease Agreement between E-Games and JVE Centro, 10 December 2009, Clause 3, **C-53**; Machine Lease Agreement between E-Games and JVE Sureste, 9 December 2009, Clause 3, **C-54**; Machine Lease Agreement between E-Games and JVE Mexico, 9 December 2009, Clause 3, **C-55**; Machine Lease Agreement between E-Games and JVE DF, 9 December 2009, Clause 3, **C-56**.

317 E. Burr First WS, ¶ 40, **CWS-2**.

318 Reply, ¶¶ 240-243.

246. Article 1117 cannot be read as allowing the nationals of one NAFTA Party to pursue Treaty claims on behalf of an enterprise of another NAFTA Party if they cannot show to have an investment in that enterprise. If the Claimants were right, it might be possible, for example, for a Mexican company to appoint a US national as its sole director and for that director then to pursue claims under the Treaty on behalf of the Mexican company against Mexico, claiming that she need not be an "investor" herself to pursue such Treaty claim if she exercises *de facto* control. That proposition runs counter not only to the terms of Chapter 11, but also to its fundamental object and purpose, which is the protection of investments by investors of another NAFTA Party.

247. For the foregoing reasons, the Tribunal dismisses the Claimants' claim under Article 1117 insofar as it pertains to Operadora Pesa.

2. Article 1121: have the Mexican Companies given consent in accordance with Article 1121?

248. Article 1121(2) requires that the Mexican Companies have consented to Treaty arbitration and waived the right to pursue domestic proceedings. As explained above, Article 1121(3) required their consent to be conveyed in a certain manner.

249. The Respondent objects that: (i) the Juegos Companies did not consent, or at least did not consent until 5 August 2016, when the relevant POAs were submitted by Quinn Emanuel;[319] and (ii) there is insufficient proof of consent by E-Games where the Respondent received on 24 October 2014 a letter purportedly sent on behalf of E-Games stating that it was "desisting from" the Notice (referred to as the ***desistimiento***).[320]

250. The Claimants submit that: (i) the Juegos Companies validly consented as the consents were signed by a member of the Board, Pelchat, who had full authority to execute such waivers;[321] (ii) the submission of the Juegos Companies' consents on 5 August 2016 did not change the date of the submission of the claim to arbitration—15 June 2016—

319 Memorial, ¶ 131.
320 Memorial, ¶ 130.
321 Counter-Memorial, ¶ 462.

as it was a matter of admissibility that could be subsequently cured;[322] and (iii) the *desistimiento* had no effect on the validity of E-Games's consent.[323]

251. The Tribunal will address the objection first as it pertains to the Juegos Companies; then as it pertains to E-Games.

(a) The Juegos Companies

252. The chronology surrounding the submission of the POAs of the Juegos Companies is undisputed. On 6 July 2016, the Centre wrote to the Claimants, requesting "copies of the Mexican Companies' written consent to arbitration" and "copies of the waivers issued by the Mexican Companies".[324] The Claimants then admitted, in a reply letter to the Centre on 21 July 2016, that "because Claimants do not have board control of the Juegos Companies, they are not at moment in a position to provide the requested affirmation."[325] As Claimants explained then, this was because Chow and Pelchat, who had been elected to the Boards of the Juegos Companies on 29 August 2014,[326] still refused to step down at the time of the filing of the Request.[327]

253. Eventually, on 5 August 2016, the Claimants sent a letter to the Centre, attaching POAs from the Juegos Companies signed by Pelchat, who was then a member of the Board of the Juegos Companies, albeit one who had overstayed his welcome. Nonetheless, Pelchat had the power to "submit [the company] to arbitration" pursuant to POAs granted by the shareholders of each of the Juegos Companies when Pelchat was elected to their Boards.[328]

---

322 Counter-Memorial, ¶ 468.

323 Counter-Memorial, ¶¶ 472-490.

324 Letter from ICSID to the Claimants, 6 July 2016, p. 2.

325 Letter from the Claimants to ICSID, 21 July 2016, p. 13.

326 Notarised Minutes of the General Shareholders Meeting of JVE Sureste held on 29 August 2014 (notarised on 10 September 2014), p. 32, **C-36**; Notarised Minutes of the General Shareholders Meeting of JVE Centro held on 29 August 2014 (notarised on 10 September 2014), p. 32, **C-37**; Notarised Minutes of the General Shareholders Meeting of JVE DF held on 29 August 2014 (notarised on 10 September 2014), p. 33, **C-38**; Notarised Minutes of the General Shareholders Meeting of JVE Mexico held on 29 August 2014 (notarised on 10 September 2014), p. 31, **C-39**; Notarised Minutes of the General Shareholders Meeting of JyV Mexico on 29 August 2014 (notarised on 4 September 2014), p. 32, **C-40**; G. Burr First WS, ¶¶ 52-54, **CWS-1**; Chow WS, ¶ 15, **CWS-11**; Pelchat WS, ¶ 10, **CWS-4**; Gutierrez First WS, ¶ 30, **CWS-3**.

327 Letter from the Claimants to ICSID, 21 July 2016, p. 9. *See also* Pelchat WS, ¶ 16, **CWS-4**; Chow WS, ¶ 27, **CWS-11**.

328 Notarised Minutes of the General Shareholders Meeting of JVE Sureste held on 29 August 2014 (notarised on 10 September 2014), p. 33, **C-36**; Notarised Minutes of the General Shareholders Meeting

254. It is clear from the foregoing that, at the time the Request was filed with the Centre, the Claimants did not have *de facto* control over the Juegos Companies and that this was the reason why they were unable to procure POAs from the Juegos Companies at that time. It is equally clear that when on 5 August 2016 the POAs were submitted, the Claimants had recovered that *de facto* control.

255. The POAs for the Juegos Companies are not only prospective in nature. They also ratify all steps taken previously by Quinn Emanuel on the Juegos Companies' behalf in connection with this arbitration, including the filing of the Request.[329] No suggestion has been made, and certainly no evidence has been presented to establish, that, as a matter of Mexican (or any other applicable) law, the Juegos Companies could not so ratify all prior actions by their agent, including the acceptance of the Respondent's offer to arbitrate; or that such ratification could not produce its effects *ex tunc*, as at the time of the ratified act.

256. The Tribunal therefore concludes that the Juegos Companies have consented to arbitration as required by Article 1121(2) and that their consent was effective as of the date the Request was filed.

257. While the POAs were submitted some 7 weeks after the Request was filed and were therefore not "included in the submission of a claim to arbitration" as required by Article 1121(3), the Tribunal has already observed that that requirement goes to admissibility and that a defect in this regard can be cured—as indeed here it was.

---

of JVE Centro held on 29 August 2014 (notarised on 10 September 2014), p. 32, **C-37**; Notarised Minutes of the General Shareholders Meeting of JVE DF held on 29 August 2014 (notarised on 10 September 2014), p. 34, **C-38**; Notarised Minutes of the General Shareholders Meeting of JVE Mexico held on 29 August 2014 (notarised on 10 September 2014), p. 31, **C-39**; Notarised Minutes of the General Shareholders Meeting of JyV Mexico on 29 August 2014 (notarised on 4 September 2014), p. 32, **C-40**. *See also* Counter-Memorial, ¶ 458.

329 Letter from the Claimants to ICSID, 5 August 2016, Annex A, pp. 2, 6, 10, 14, 18 ("This Power of Attorney extends to all actions taken before the date of this Power of Attorney by Messers. Orta, Urquhart, Salinas-Serrano, and Bennett to initiate and represent the Company in an arbitration pursuant to the NAFTA against the United Mexican States, including, without limitation, the filing of a certain Application for Access to the Additional Facility and Request for Arbitration, filed before the International Centre for Settlement of Investment Disputes on June 15, 2016") and pp. 3, 7, 11, 15, 19 ("This Waiver is effective as of June 15, 2016, the date on which the Company filed a certain Application for Access to the Additional Facility and Request for Arbitration before the International Centre for Settlement of Investment Disputes and shall remain in full force and effect from that date forward".)

(b) E-Games

258. The Respondent's objection as regards consent by E-Games is not based on the belatedness of the relevant POA.[330] Rather, the Respondent alleged in its Memorial that E-Games purportedly withdrew "as an enterprise on whose behalf a claim would be brought under the [Notice]", thus casting doubt on whether it ever consented.[331] The Respondent based this contention on a document, the *desistimiento*, signed by a Mr. José Luis Cárdenas Segura (***Segura***).[332] The Respondent has not pressed the point, never returning to it in any of its pleadings after its initial memorial, save for a brief mention in the Reply in a different context—as evidence that the Claimants refused to participate in negotiation discussions.[333]

259. The Claimants contend in response that Segura manifestly did not have the authority to sign the *desistimiento*; it was done unbeknownst to the Claimants; it was the result of a fraud perpetrated against them; and those circumstances render the *desistimiento* a document without any legal effect.[334] The Claimants also argue that E-Games does not have "standing as an investor under NAFTA to pursue claims on its own behalf" and therefore has no "authority to withdraw or desist from claims advanced on its behalf by the Claimants" under Article 1117.[335]

260. The Tribunal has carefully reviewed the record relating to this matter. It finds that, on the preponderance of the evidence, the following facts have been established.

a. Segura started working at E-Games in 2009 in his first job as a lawyer.[336] In May 2014, Segura was asked to leave E-Games after the closure of the casinos in April 2014.[337] On 10 October 2014, after Mexico initiated investigations against the Claimants for alleged illegal gambling activities (the ***PGR Investigation***), Chow met with Gutiérrez to discuss their legal strategy. Chow asked Gutiérrez to hire

---

330 In the case of E-Games, the relevant POA was submitted slightly late, on 21 July 2016. It is uncontroversial however that this was the result of mere oversight. To the extent this was technically inconsistent with the requirement of Article 1121(3), the Tribunal is satisfied that the resultant ground for inadmissibility was properly cured.

331 Memorial, ¶ 130.

332 *Desistimiento* letter, 24 October 2014, **R-005**.

333 Reply, ¶ 44.

334 Counter-Memorial, ¶¶ 473-491.

335 Claimants' PHB, ¶ 140.

336 Tr. (ENG) Day 4, 823:10-13 (Segura).

337 Tr. (ENG) Day 4, 819:14-820:7 (Segura).

Segura to assist with the defence against these investigations.[338] Gutiérrez asked Chow to confirm this discussion in writing.[339] At this time, Segura apparently continued to hold a valid power of attorney by E-Games that authorized him to act on their behalf in respect of certain limited matters despite no longer working for E-Games.[340]

b. On 12 October 2014, Chow sent an email to Gutiérrez, copying Gordon Burr, confirming their discussion regarding the hiring of Segura.[341] That same day or the following day, Gutierrez spoke with Burr on the phone. Burr, as President of the Board of E-Games, approved the hiring of Segura to assist with the PGR Investigation. Gordon Burr did not give Segura any other authorisation or instruction.[342]

c. Shortly after, in mid-October 2014, a lawyer by the name of Noriega, called Segura and asked for his help in ongoing efforts to reopen the casinos.[343] Segura had only had limited previous interactions with Noriega but knew Noriega as a lawyer who "occasionally" provided advice to E-Games.[344] Noriega asked Segura to work with Chow's attorney, a man named Ramírez, in these efforts to reopen the casinos.[345] Noriega also told Segura that the Claimants were aware of these efforts.[346]

d. Two or three days after the call, Noriega met with Segura. Present at the meeting were Noriega, Ramírez, a man by the name of Santillán, and another person whose name Segura could not recall.[347] Santillán was allegedly a "former SEGOB official … who owns a company in the casino business in Mexico called Producciones Móviles."[348] Producciones Móviles allegedly received a gaming permit under virtually identical circumstances as E-Games: "first as an

338 Gutierrez First WS, ¶¶ 40-41, **CWS-3**.
339 Gutierrez First WS, ¶ 42, **CWS-3**.
340 Tr. (ENG) Day 4, 831:2-15 (Segura).
341 Gutierrez First WS, ¶ 42, **CWS-3**.
342 G. Burr First WS, ¶¶ 64-65, **CWS-1**; Gutiérrez First WS, ¶ 42, **CWS-3**.
343 Jose Luis Cardenas Segura Witness Statement (***Segura WS***), ¶ 9, **CWS-5**; Tr. (ENG) Day 4, 814:14-815:21 (Segura).
344 Segura WS, ¶ 9, **CWS-5**; Tr. (ENG) Day 4, 822:21-823:9 (Segura).
345 Segura WS, ¶ 9, **CWS-5**.
346 Segura WS, ¶ 9, **CWS-5**; Tr. (ENG) Day 4, 834:13-835:2 (Segura).
347 Segura WS, ¶ 11, **CWS-5**.
348 Gutierrez First WS, ¶ 49, **CWS-3**.

independent operator under E-Mex's permit, then as an independent permit holder pursuant to a SEGOB resolution in late 2012."[349]

e. At the meeting, Noriega made representations that new shareholders might buy out the US shareholders in the Juegos Companies in order to allow the casinos to reopen, and asked for Segura's help in this regard.[350] He also represented that "all those involved" knew of these efforts, which Segura assumed included the Claimants.[351] Ramírez called Gutiérrez and put him on the phone with Segura, and Gutiérrez and Segura briefly discussed the PGR Investigation, but not the NAFTA claim.[352] This phone call further led Segura to believe that the Claimants knew of these apparent efforts to reopen the casinos since Gutiérrez was the Claimants' attorney.[353] The meeting ended with Noriega telling Segura that he would have to sign some documents necessary for the reopening of the casinos at the next meeting. Noriega showed him one such document, where E-Games purported to accept SEGOB's declaration of the invalidity of E-Games' independent gaming permit (the ***allanamiento***).[354]

f. On 24 October 2014, Noriega asked to meet Segura again to sign the documents. Noriega did not tell Segura about the contents of the documents, only that they were necessary for the reopening of the casinos.[355] When Segura arrived at the meeting at Santillán's offices, Alfredo Moreno, who used to be Segura's "boss" at E-Games, was in the waiting room.[356] However, they did not have a conversation other than an exchange of greetings.[357] The secretary ushered Segura into a meeting room, and asked Segura to sign several documents.[358] One of them turned out later to be the *allanamiento* and the other turned out to be the *desistimiento*.

---

349 Gutierrez First WS, ¶ 49, **CWS-3**; Counter-Memorial, ¶ 103.
350 Segura WS, ¶ 12, **CWS-5**; Tr. (ENG) Day 4, 822:7-16.
351 Tr. (ENG) Day 4, 834:13-835:2 (Segura); Segura WS, ¶ 13-14, **CWS-5**.
352 Segura WS, ¶¶ 15-16, **CWS-5**; Gutierrez First WS, ¶¶ 43-44, **CWS-3**.
353 Segura WS, ¶ 15, **CWS-5**; Tr. (ENG) Day 4, 816:18-817:2 (Segura).
354 Segura WS, ¶ 17, **CWS-5**.
355 Segura WS, ¶¶ 18-19, **CWS-5**; Tr. (ENG) Day 4, 842:19-843:3 (Segura).
356 Segura WS, ¶ 20, **CWS-5**.
357 Tr. (ENG) Day 4, 836:19-837:3, 845:14-846:13 (Segura).
358 Segura WS, ¶ 20, **CWS-5**.

g. Segura testified at the hearing that while he was working at E-Games "it was quite common to sign a lot of documents very rapidly" and that he "often signed [] documents without reading them or reviewing them."[359] Segura further testified that he signed the documents as he "trusted" Noriega.[360] In relation to the *desistimiento*, Segura testified that he was not able to read the contents of the document because the secretary did not let go of it.[361] He was only able to see that it was for the Ministry of Economy.[362] After signing the documents, Segura was not given a copy of the documents, nor did he submit it to the Ministry of Economy.[363] The Ministry also never contacted Segura regarding this document, whether to acknowledge receipt or to ratify it.[364] Segura, suspicious of the pressure he was being subjected to sign the documents without review, testified that he deliberately altered his normal signature in the event this issue came back to haunt him.[365] Segura further testified that Noriega did not contact him again after this.[366]

h. On the same day, i.e. 24 October 2014, both the Claimants and the Respondent agree, the Ministry of Economy received the *desistimiento* signed by Mr. Segura.[367] Ms. Martínez testified that, at the time, she "most likely [] was thinking that this was something related to the litigation with the [casino operation] permit" and "saw this [as something] separate from the arbitration".[368] On 5 November 2014, Ms. Martínez sent an email to Ms. Menaker, a partner at White & Case, following up on the "NOI Questionnaire" sent on 24 July 2014.[369] Her email made no mention of the *desistimiento*. On 18 November 2014, Ms. Menaker responded to Ms. Martínez, stating "I don't have any additional information to

359 Tr. (ENG) Day 4, 844:6-15 (Segura).
360 Tr. (ENG) Day 4, 825:15-21 (Segura).
361 Tr. (ENG) Day 4, 850:5-851:5 (Segura).
362 Segura WS, ¶ 24, **CWS-5**.
363 Segura WS, ¶ 25, **CWS-5**, Tr. (ENG) Day 4, 843:4-10 (Segura).
364 Segura WS, ¶ 25, **CWS-5**; Tr. (ENG) Day 4, 844:16-20 (Segura).
365 Segura WS, ¶¶ 28-29, **CWS-5**.
366 Tr. (ENG) Day 4, 826:3-11 (Segura).
367 Counter-Memorial, ¶ 106; Memorial, ¶ 22.
368 Tr. (ENG) Day 1, 280:14-282:9, 283:1-3 (Martinez).
369 Email exchange between Ms. Menaker and Ms. Martinez, **R-004**.

provide right now. If the client decides to pursue the claim, I will get in touch with you."[370]

i. In April 2015, after regaining access to SEGOB's files, Gutiérrez discovered several unauthorized documents with Segura's signature, including the *allanamiento* and *desistimiento*.[371] Neither Burr nor Gutiérrez knew of these documents, so they approached Segura. Segura explained the facts surrounding the signing of the documents, including the *desistimiento*, to Burr and Gutiérrez.[372] Segura testified at the hearing that this was the first time he had spoken to anyone from E-Games about the signing of the documents.[373]

j. On 13 July 2016, Gutiérrez met with Vejar (Director of Consulting and Negotiations) from the Ministry of Economy. According to Gutierrez, Vejar told him that the Ministry doubted the validity of the *desistimiento*, which is why they did not respond to it nor did they issue an official resolution acknowledging its receipt.[374]

261. This record suggests that the provenance of the *desistimiento* was dubious and that Segura may have been used as a pawn in a scheme to which the Claimants were not privy. Whether those circumstances would prevent the *desistimiento* from having legal effect vis-à-vis the Respondent as a matter of Mexican law remains an open question. No evidence of the relevant Mexican law on this point was proffered.

262. The Tribunal, however, need not resolve that question to dispose of the Respondent's objection. That objection fails on the terms of the *desistimiento* and the terms of the Treaty—even if it is assumed that it did have legal effect under Mexican law:

a. First, E-Games is not a party to this proceeding. It could not withdraw a claim it did not submit to arbitration. Only the Claimants could do so. Therefore, the effect of the *desistimiento* could not be the withdrawal of the Article 1117 claim.

370 Email from Ms. Menaker to Ms. Martinez, 18 November 2014, **R-004**.
371 Gutierrez First WS, ¶ 48, **CWS-3**; G. Burr First WS, ¶ 66, **CWS-1**.
372 Gutierrez First WS, ¶ 49, **CWS-3**; G. Burr First WS, ¶ 68, **CWS-1**.
373 Tr. (ENG) Day 4, 826:12-16 (Segura).
374 Gutiérrez First WS, ¶ 50, **CWS-3**.

b. Second, the stated object of the *desistimiento* is *not* the withdrawal of the Article 1117 claim—the claim had not yet been submitted at the time of the *desistimiento*. Rather, the *desistimiento* purports to inform the Respondent that E-Games is "desisting" from the *Notice*—the notice of intent—issued on its behalf. Accordingly, E-Games would, at most, have "desisted" from the Notice.

c. But third, E-Games could not even do that because it did not issue the Notice. At most, in the *desistimiento* E-Games would have informed the Respondent that it did not, in fact, *intend to* consent to the submission of an Article 1117 claim on its behalf.

263. This is also how the Respondent appears to have deployed the *desistimiento* in this proceeding: as evidence of E-Games's refusal to consent to arbitration. But that proposition cannot prosper. The Claimants have produced a POA for E-Games that confirms its consent to this arbitration. Even if the effect of the earlier *desistimiento* were that the Notice should be read to exclude E-Games from its scope (because E-Games "desisted" from that Notice), that could not undo the subsequent confirmation by E-Games of its consent under Article 1121(2) to the submission of the Article 1117 claim on its behalf.

264. Instead, put at its highest, the *desistimiento* would give rise to a defect under Article 1119: effectively the Notice would not have been sent on behalf of E-Games, even though later a claim was submitted on its behalf. The Tribunal would dispose of that defect as it did in respect of the Additional Claimants.

VI. COSTS

265. On 1 October 2018 the parties submitted their statements of costs incurred in connection with this phase of the proceeding. Pursuant to Procedural Order No. 4, the parties' statements were divided into four categories: (a) attorney fees; (b) expert fees; (c) share of each party's advance requested by ICSID to cover the arbitration costs;[375] and (d) any other arbitration-related disbursements incurred in connection with this phase. The Claimants claim a total of US$ 8,453,600.11. The Respondent claims a total of US$ 1,699,362.40.

266. The Tribunal defers its decision regarding category (c) above—arbitration costs incurred in connection with this phase—to the final award in this proceeding. Below the Tribunal proceeds to apportion categories (a), (b) and (d) above—legal costs incurred in connection with this phase.

267. The Tribunal has wide discretion under the Additional Facility Rules to apportion legal costs. Absent contrary agreement by the parties, the guiding principle should be that costs follow the event.

268. At first blush, application of that principle in this case should favour the Claimants: they did defeat the Respondent's objections save insofar as Operadora Pesa is concerned.

269. There are a number of reasons, however, why application of the principle in this case does not warrant an award of all—or even the majority—of the Claimants' legal costs.

270. First, the Tribunal observes that the Claimants' legal costs are more than 580% of the Respondent's legal costs, even though the Respondent's legal team displayed the same level of professional competence, effectiveness, integrity and courtesy as the Claimants' legal team. Part of that discrepancy may be explained by the fact that the Respondent's legal team was hybrid in composition, including both in-house counsel

---

375 The arbitration costs include the (i) fees and expenses of the Tribunal, (ii) the Centre's administrative fees, and (iii) any other direct expenses of the proceeding. As of the date of the parties' statements on costs (i.e. 1 October 2018), the two advance payments requested by the Centre to cover the arbitration costs amounted to US$300,000 per party. The Centre requested a third advance payment of US$150,000 per party on 30 April 2019. The Centre received Claimants' share of the third advance payment on 28 May 2019. The Respondent's payment was received on 5 July 2019. The third advance payment requested by the Centre is not reflected in the parties' statements on costs.

from the Government and external lawyers from Mr. Mowatt's firm. To fix a benchmark for reasonable legal costs that can be awarded relating to this phase, the Tribunal will therefore take the amount of legal costs incurred by the Respondent and multiply it by two, to US$ 2,798,724.8.

271. Second, a number of factors militate against an award of 100% of that reasonable amount of legal costs:

a. First, the Respondent was successful in its Article 1117 objection regarding Operadora Pesa.

b. Second, the Tribunal recognises that the Respondent's objections were not frivolous. Issues 2 and 3 in particular raised questions of law that remain largely unsettled.

c. Third, while they were ultimately largely victorious, the Claimants could have avoided all debate for some of these objections and much of the debate for others, if they had: served a fully compliant Notice; observed all applicable corporate formalities at the Juegos Companies, such as holding annual *asambleas* as required by law and the by laws of those companies;[376] and adduced from the outset all of the requisite evidence to prove their control of the Mexican Companies.

d. Fourth, the Tribunal places particular weight on the Claimants' failure to file a fully compliant Notice, not only because it would have avoided the Respondent's objection under Article 1119 but it could have significantly narrowed the issues in dispute relating to the Respondent's Article 1122 objection: had the Additional Claimants been included in the Notice, the Claimants would not have been required, as they were, to hedge their Article 1117 defence by trying a difficult case that the Original Claimants had, in June 2016, *de facto* control over the Juegos Companies.[377]

376 Tr. (ENG) Day 3, 614:17-21 (Gutierrez); Day 4, 895:19-896:10 (Ayervais).
377 Counter-Memorial, ¶¶ 170, 230; Rejoinder, ¶ 74.

272. Based on the foregoing, the Tribunal awards the Claimants 50% of US$ 2,798,724.8, i.e., US$ 1,399,362.40, in connection with the legal costs they incurred in this phase.

VII. DISPOSITIF

273. For the reasons set out above, the Tribunal:

a. Dismisses the Respondent's objection based on Article 1121 of the Treaty in respect of the Claimants and the Mexican Companies;

b. Dismisses the Respondent's objections based on Articles 1119 and 1122 of the Treaty in respect of the Additional Claimants and Operadora Pesa;

c. Grants the Respondent's objection based on Article 1117 of the Treaty in respect of Operadora Pesa;

d. Dismisses the Respondent's objection based on Article 1117 of the Treaty in respect of the Mexican Companies other than Operadora Pesa;

e. Decides accordingly that it has jurisdiction over the claims by the Claimants on their own behalf under Article 1116 of the Treaty and on behalf of the Juegos Companies and E-Games under Article 1117 of the Treaty, and that those claims are admissible;

f. Awards the Claimants US$ 1,399,362.40 in legal costs, payable by the Respondent within sixty (60) days from the date of this Partial Award; and

g. Directs the Parties to confer regarding a procedural timetable for the merits phase and to report to the Tribunal regarding the same by 15 August 2019.

Seat of arbitration: Toronto, Canada

Prof. Gary Born
Arbitrator
Date 2 JULY 2019

Prof. Raúl Emilio Vinuesa
Arbitrator
Subject to the partial dissenting opinion attached
Date 6 JULY 2019

Dr. Gaëtan Verhoosel
President of the Tribunal
Date: 28 JUNE 2019

Partial Dissenting Opinion
Arbitrator Raúl E. Vinuesa

I partially dissent from the Majority on its interpretation of the NAFTA text which finds for the Tribunal's jurisdiction in the present case. It is my understanding that the Tribunal lacks jurisdiction over the claims submitted by the so-called Additional Claimants and lacks jurisdiction over their claims on behalf of all the so-called Mexican Companies. I understand the Tribunal has jurisdiction over the claims submitted by the Original Claimants and over their claims submitted on behalf of the Mexican Companies JVE Mexico and E-Games.

It appears from the Parties' submissions that the so-called "Original Claimants" are those identified as Claimants in the Notice of Intent of 23 May 2014, and in the Request for Arbitration, of 15 June 2016. The so-called "Additional Claimants" are those who, despite not being identified in the Notice of Intent, were included in the Request for Arbitration. The so-called Mexican Companies, on whose behalf both the Original and the Additional Claimants claim include at the time of the Partial Award on Jurisdiction, the Juegos Companies, E-Games and Operadora Pesa.

OBJECTIONS TO JURISDICTION REGARDING NAFTA ARTICLES 1119, 1121, 1122 (1) AND 1117

1. I disagree with the sequence proposed by the Majority of the Tribunal to deal with what the Partial Award considers as the first two of the three preliminary issues on which the Tribunal is to decide.[1]

2. I agree with dealing separately and lastly with **Issue 3** regarding the objections related to the interpretation and application of NAFTA Article 1117. Nevertheless, I understand that the objections related to Articles 1119 and 1122(1) must be addressed before the objections raised with reference to Article 1121, so as to avoid prejudging whether the Additional Claimants have legal standing.

[1] Partial Award, ¶ 41 *et seq*.

I.A. Objections regarding the breach of: a) Article 1121 by the Original Claimants and the Additional Claimants; and b) Articles 1119 and 1122(1) by the Additional Claimants

I.A.1. Scope of Article 1121 with respect to Articles 1119 and 1122(1)

3. The Majority addresses the questions defined as **Issue 1,** without addressing the Respondent's main objection that the disputing investors and companies had to comply with the prerequisite of the Notice of Intent under NAFTA Article 1119.

4. The Majority states - at para. 41(a) of the Partial Award - that "Articles 1121(1) and 1121(2) of the Treaty require that the Claimants and the Mexican Companies, respectively, consent to 'arbitration in accordance with the procedures set out in [the Treaty].'" However, when the Majority decided on whether Claimants had conveyed their consent under Article 1121(1), it failed to consider whether such purported consent had been given or not, in accordance "with the procedures set out in the Treaty."[2]

5. The Respondent contended that "…the Claimants failed to engage the consent of the United Mexican States under NAFTA Article 1122 by their failures of compliance with Articles 1119 and 1121. There being no consent to arbitration by either disputing party, this Tribunal lacks competence to decide this claim on its merits."[3]

6. The Majority fails to answer, thus ignores, the objection raised by the Respondent regarding the lack of consent of all of the Claimants pursuant to Article 1121(1). The Majority focuses on answering the Respondent's objection to the breach of the formal requirements set forth by Article 1121(3) without distinguishing between the Original Claimants and the Additional Claimants.

7. Concerning the objections to the breach of Article 1121(3) requirements, the Majority holds that all of the Claimants observed those requirements, and, therefore, there was no breach of Article 1121.

8. In this way, the Majority assumes that all of the Claimants, in their Request for Arbitration, had conveyed the consent required by Article 1121(1)[4] without even assessing whether that consent had been given "in accordance with the procedures set out in the Treaty."

---

[2] *Id.,* ¶¶ 46-53.
[3] Reply on Jurisdictional Objections, ¶ 146.
[4] Partial Award, ¶ 53.

9. In conclusion, without previously dealing with the Respondent's objection on whether the breach of Article 1119 affected the Additional Claimants' consent, the Majority seems to prejudge and accept as valid, without further ado, consent by all of the Claimants mentioned in the Request for Arbitration—both Original and Additional Claimants.

10. It is established that the Majority should have focused, first, on determining the Respondent's jurisdictional objections relating to Articles 1119 and 1122(1), in order to later determine whether all, some, or none of the Claimant Parties mentioned in the Request for Arbitration had standing to consent to arbitration in accordance with the procedures set out in NAFTA.

11. Concerning the objection as to whether the Claimants had conveyed their consent in the manner prescribed by Article 1121(3),[5] I agree with the Majority's considerations expounded at paragraphs 54 to 60 of the Partial Award, but only with respect to the Original Claimants.

12. As stated below, the Additional Claimants had no standing to convey their consent under Article 1121(1) because they had breached Article 1119. Accordingly, the Respondent's consent was not triggered, with respect to the Additional Claimants, in accordance with the provisions set out in Article 1122(1).

13. In conclusion, the Original Claimants having been the only ones who had consented to submit a claim to arbitration under Article 1121, the Tribunal has jurisdiction to hear the claims submitted by the Original Claimants, but lacks jurisdiction to hear the claims submitted by the Additional Claimants. The reasons why the Tribunal lacks jurisdiction over the Additional Claimants are explained in detail below.

I.A.2. Scope of Article 1119: the notice of intent and its relation to Article 1122(1) on the consent by the Respondent Party

14. The Respondent contends the Additional Claimants' failure to comply with their obligation to notify their intent to submit a claim to arbitration precludes the Tribunal from exercising its jurisdiction. Such non-compliance also affects the Tribunal's jurisdiction because consent by the respondent Contracting Party is, under Article 1122(1), tethered to compliance with the procedures set out in the Treaty. The Respondent, thus, maintains that the claims submitted by the Additional Claimants should be dismissed since the inexistence of a Notice of Intent identifying

[5] *Id*., ¶¶ 54-60.

those Additional Claimants vitiates their consent. The Respondent considers its objection is focused on the Tribunal's jurisdiction. Although it disputes that it is a matter of admissibility, the Respondent argues that the claims should be dismissed even if they were considered a matter of admissibility.[6]

15. In turn, the Claimants allege that the Notice of Intent was actually submitted on behalf of the Additional Claimants as well and that the issue raised is simply a matter of admissibility. They contend that the claims should be admitted because the Notice defect does not prejudice the Respondent and does not change the course of any settlement effort.[7]

16. Therefore, the matter the Tribunal is to adjudicate relates to the definition and scope of "Jurisdiction" and "Admissibility."

17. On this particular matter, I agree with the Majority on the basic meaning of "jurisdiction" and "admissibility" as expressed in the first part of paragraph 73 of the Partial Award.

18. Conceptually, "Jurisdiction" refers to the tribunal's power to hear and adjudicate a claim, whereas "admissibility" refers to whether it is appropriate or not for the tribunal to hear that claim.

19. The arbitral tribunal's jurisdiction is founded on the parties' consensus. If the respondent State imposed conditions on its consent to arbitration, those conditions must be satisfied. Otherwise, there is no consent, and consequently, no jurisdiction . Should the tribunal determine that it lacks jurisdiction, the tribunal will not be able to decide on the admissibility of a claim over which it lacks jurisdiction.

20. Only if the tribunal determines that it has jurisdiction may the tribunal hear a prospective admissibility claim by applying the rules needed to conduct the proceedings with equity and efficiency.

21. I partially agree with what has been stated by the Majority at paragraph 72 of the Partial Award, making clear that, when the Majority asserts *in fine* that "[i]f the Tribunal has jurisdiction and declares the claims in question admissible, there is no other basis to dismiss the claims at this stage," it should have also asserted that, *should the Tribunal lack jurisdiction, the Tribunal will not be able to adjudicate matters concerning the admissibility of the claims.*

---

[6] Reply, ¶¶ 74, 143 and 144.

[7] Counter-Memorial on Jurisdictional Objections, 8 January 2018, ¶¶ 280, 282, 283 and 284.

22. Likewise, the Majority avers that "[it] will first examine whether the defect in the Notice precludes the Tribunal's jurisdiction over the Additional Claimants. Should it find that it does not, it will then examine whether the claims should nonetheless be dismissed as *inadmissible*;"[8] it should have also asserted that, *should the Tribunal find it lacks jurisdiction, it will not be able to examine the admissibility of the claims in any way whatsoever.*

23. The Tribunal must decide on the Respondent's jurisdictional objection as a matter of consent. The dispute between the parties refers to whether the consent conveyed by the Respondent under Article 1122(1) was tethered to compliance with Article 1119.

24. I fully agree with the Majority on the fact that the matter thus raised must be solved through interpretation of NAFTA Articles 1119 and 1122 in accordance with the interpretation principles codified in Article 31 *et seq*. of the Vienna Convention on the Law of Treaties (hereinafter "VCLT"). Nevertheless, I dissent from the Majority's conclusion that Article 1119 does not condition the Respondent's consent to arbitration in Article 1122(1) and that the Additional Claimants' failure to issue a notice of intent therefore does not deprive the Tribunal of jurisdiction over them.[9] The reasons for this dissent are set forth in the following Sections.

I.A.2.a. The content and scope of the Notice of Intent of 23 May 2014

25. It is an undisputed fact that the Notice of Intent of 23 May 2014 states that "[t]his Notice is submitted by the U.S. Investors"[10] and subsequently identifies only eight investors.[11]

26. These eight investors are those identified in these proceedings as the Original Claimants. Nowhere in the text of the Notice is there any reference to any other investor(s) that may potentially be considered as disputing investors.

27. The "U.S. Investors'" reservation at paragraph 18 of the Notice is exclusively restricted to the right to amend it for purposes of including additional claims as may be warranted and permitted by NAFTA. Evidently, the reservation's text does not permit extension to potential investors not identified in the aforementioned Notice.

---

[8] Partial Award, ¶ 75.

[9] *Id*., ¶ 79.

[10] C-34-001, Section I. 1. *Identification of the Disputing Investors*, page 1.

[11] *Id.*; Section I. 5, page 5. "Through their ownership interest in five Mexican companies (the "Mexican Enterprises") the U.S. Investors own and/or have invested in gaming facilities…. In addition, the U.S. Investors… are assisted through their ownership interest in Mexican company Exciting Games…"

28. The Majority understands that the lack of identification of other disputing investors in the Notice of Intent is the "only defect"[12] or an "omission".[13] I disagree with this assertion since this lack of identification implies the non-existence of (an)other disputing investor(s) and, consequently, results in non-compliance with a prerequisite mandatory to trigger arbitration under NAFTA.

29. The Majority holds that it "remains unclear" what led to the omission of the Additional Claimants in the Notice's text.[14] The Majority makes reference to the fact that the Claimants' evidence at the Hearing was that they had relied on the advice of their specialized arbitration counsel. The Majority also mentions that there was a suggestion that the omission was insignificant because the Original Claimants were the controlling shareholders.

30. None of these allegations create any degree of credibility. The law firm that advised the Original Claimants at the time of submitting their Notice—having extensive experience in the subject—cannot be presumed, without any evidence, to be the creator of a potential professional negligence. Furthermore, if failure to identify the Additional Claimants were insignificant, there would be no reasonable legal basis for attempting to include them after completion of the term set for the Notice.

31. I share the Majority's opinion that what the Tribunal must determine is whether the aforementioned "omission" leads to the consequences alleged by the Respondent. However, I dissent from the Majority when it holds that "it is irrelevant why the information was omitted."[15] It is apparent that the reasons why the Additional Claimants are absent from the Notice are relevant not only to determine good faith in their actions, but also to evidence the grounds that would enable the Tribunal to eventually hear potential admissibility claims.

32. The first question the Tribunal must consider is whether the Notice of Intent constituted an obligation necessary to determine its jurisdiction.

I.A.2.b. Interpretation of Article 1119 under International Law

33. The General Rule of Interpretation contained in 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

[12] Partial Award, ¶ 67.

[13] *Id.*, ¶ 68

[14] *Id.*

[15] *Id.*, ¶ 69.

to the terms of the treaty in their context and in the light of its object and purpose."

34. Any good faith interpretation of a treaty rule starts with the analysis of the ordinary meaning to be given to the terms thereof. Against this background, it is relevant to interpret the ordinary meaning given to the term "shall deliver […] [a] notice" and to its Spanish equivalent "*notificará.*"

35. The ordinary meaning of "shall deliver […] [a] notice" ("*notificará*" in Spanish) expresses a "requirement" or "mandate" that has a clearly defined meaning in the context of Article 1119. Therefore, the term "shall deliver […] [a] notice" ("*notificará*" in Spanish) expresses the imposition of an enforceable obligation.

36. NAFTA Article 1119 requires the existence of a "disputing investor," who "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 …" In this way, it imposes on the disputing investor the obligation to notify its intention to submit its claim to arbitration requiring that any such notice be written and at least 90 days before the claim is submitted.

37. The notice of intent shall specify: "a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise; b) the provisions of this Agreement alleged to have been breached and any other relevant provisions; c) the issues and the factual basis for the claim; and d) the relief sought and the approximate amount of damages claimed."

38. It arises from the NAFTA text itself that the notice of intent to submit a claim to arbitration is an enforceable requirement. This condition stems from the ordinary meaning of the term "shall deliver […] [a] notice" ("*notificará*" in Spanish) used by the Contracting Parties. The term "shall deliver […] [a] notice" undoubtedly conveys the existence of an obligation that must be complied with by anyone who wishes to be considered a "disputing investor." That very same "disputing investor" will be the one who is able to submit a claim to arbitration under Article 1121.

39. Furthermore, if a disputing investor has delivered to the disputing party a written notice of intent, but the information that should have been included therein is deficient or contains excusable errors, the tribunal may, in light of the case-specific circumstances, analyze the admissibility of that notice once the deficiencies or excusable errors have been cured.

40. In order for this Tribunal to exercise its discretion for the purpose of curing deficiencies in the information contained in the notice of intent, it must have first inexorably

determined that it had jurisdiction. Such jurisdiction depends on the requirements imposed by the Contracting Parties in the NAFTA.

41. Case law is categorical in the sense that the term "shall" denotes an obligation or mandate that must be inexorably complied with. In Article 1119, that obligation implies the identification of all the claimants and their respective claims.

42. In *Philip Morris,* the tribunal, concerning the exhaustion of local remedies as a step prior to arbitration, held as follows: "The sequence of steps to be followed by the Claimants under Articles 10(1) and (2) before resorting to international arbitration is of importance for the purpose of this analysis. Each such step is clearly indicated as part of a binding sequence, as evidenced by the word "shall" before each step as follows…"[16] It added that "[t]he ordinary meaning of the terms used for the two steps (i) and (ii), which are preliminary to the institution of international arbitration, is clearly indicative of the binding character of each step in the sequence. That is apparent from the use of the term "shall" which is unmistakably mandatory and from the obvious intention of Switzerland and Uruguay that these procedures be complied with, not ignored."[17]

43. The International Court of Justice (hereinafter "ICJ") as well as the Permanent Court of International Justice (hereinafter "PCIJ") have specified the legal nature of the procedural conditions and prerequisites imposed on the parties in order to exercise their jurisdiction based on what was agreed upon in the international instruments enabling their jurisdiction. The ICJ asserted that, "[t]o the extent that the procedural requirements of [a dispute resolution clause] may be conditions, they must be conditions precedent to the seisin of the Court even when the term is not qualified by a temporal element."[18]

44. Furthermore, the ICJ clearly determined that the limits to its jurisdiction were conditioned by the Contracting Parties' consent. In this sense, it asserted the following: "…The jurisdiction [of the Court] is based on the consent of the parties and is confined to the extent accepted by them… When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon.

---

[16] *Philip Morris Brands SÀRL et al v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, ¶ 139.

[17] *Id.,* ¶ 140.

[18] *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation*) ICJ Reports, Preliminary Objections - Judgment of 1 April 2011, ¶ 130.

The Court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application …"[19]

45. The Majority, ignoring the ordinary meaning of the term "shall deliver […] [a] notice" of Article 1119, is of the opinion that such Article "… is entirely silent on the consequences of a failure to include all the required information in the notice of intent. Article 1119 does not in terms refer to Article 1122(1); does not provide that satisfaction of the requirements of Article 1119 is a condition precedent to a NAFTA Party's consent; and does not state that failure to satisfy those requirements will vitiate a NAFTA Party's consent."[20]

46. The Majority holds, in turn, that "[t[he text of Article 1119 alone therefore does not compel the conclusion that a failure to include all the required information in the notice of intent vitiates a NAFTA Party's consent under Article 1122(1)."[21] I disagree with all those assertions.

47. On this particular issue, the scope and consequences of the obligations imposed by Article 1119 and by Article 1122(1) must be complemented (as subsequently stated) in good faith, in their context, and in the light of their object and purpose.

48. I also disagree with the Majority's purported inferences whereby Article 1122(1) also does not in terms refer back to either Article 1119 or to the Notice of Intent.[22] Once again, I restate my understanding of the necessary interpretation of the text of both articles "in their context and in the light of [their] object and purpose."

49. Conversely, the question, as raised by the Respondent is not the failure to "include all the required information," but the breach of the treaty obligation by the Additional Claimants to submit a Notice of Intent identifying them as disputing investors.[23] Actually, the question is not a simple omission of certain Claimants' names in a certain notice submission, but, more precisely, the lack of compliance with a requirement to which any potential investor is bound, within a peremptory term.

---

[19] *Case Concerning Armed Activities on the Territory of The Congo (New Application: 2002) (Democratic Republic of The Congo v. Rwanda*) ICJ Reports, Judgment of 3 February 2006; ¶ 88.

[20] Partial Award, ¶ 81.

[21] *Id.*

[22] *Id.,* ¶ 82.

[23] *See* Reply on Jurisdictional Objections, 1 December 2017, ¶ 107.

I.A.2.c. Interpretation of Article 1122(1) under International Law

50. I disagree with the Majority on its purported interpretation of the expression "in accordance with the procedures set out in this Agreement" contained in Article 1122(1).

51. Such expression makes reference to each Party "consent[ing] to the submission of a claim to arbitration" and imposes that condition thereon. A good-faith reading of such text "in accordance with the ordinary meaning to be given to the terms of the treaty" does not allow us to depart from that expression in order to suggest that the duty to act in accordance with the procedures set out in this Agreement only refers to either "submitting a claim" or "arbitration." Through a simple reading, the expression "consents to the submission of a claim to arbitration" may only be interpreted as a consistent and compact, *i.e.*, clearly monolithic, expression. Consequently, I believe that all of the assertions by the Majority on whether the expression "in accordance with the procedures set out in this Agreement" only modifies the term "arbitration" are nothing but groundless speculations.

52. The Majority's interpretation concerning the scope of Article 1122(1) text terms is still speculative, despite presuming that such interpretation was accepted by both parties to the dispute. As stated below, the conclusion reached by the Majority at paragraph 90 of the Partial Award is unsupported by case law and unanimously rejected by the NAFTA Contracting Parties.

53. Therefore, I differ on how the Majority prejudges whether "'the procedures' with which the 'arbitration' must accord include the requirements of Article 1119."[24] Of course, I differ on the direct consequence of such prejudgment: when stating that "[t]he natural and ordinary meaning of 'arbitration' is therefore the procedures commenced by, and to be followed upon, the submission of a claim," the Majority fails to stick to the literal text it purports to interpret, which undoubtedly refers not only to "arbitration," but also to "consents to the submission of a claim to arbitration."[25]

54. Clearly, the submission of a notice of intent neither commences an arbitration nor compels a disputing investor to commence an arbitration. The direct consequence of fulfilling the duty imposed in Article 1119 is to trigger recourse to an arbitral tribunal. In this regard, within the framework of the procedural steps defined in Chapter XI of the NAFTA, the Notice of Intent is a

[24] Partial Award, title (A)(2)V. c.(ii)(b).

[25] *Id*., ¶ 97.

jurisdictional prerequisite that triggers recourse to arbitration, should the disputing investor so decide and once all jurisdictional requirements have been met.

55. When stating that nothing in those provisions can condition the "validity" of the submission of a claim to arbitration on satisfaction of Article 1119,[26] it thus fails to acknowledge that the text of that Article does not claim to be merely declarative, let alone that its content is non-binding for the Parties. Once again, the Majority avoids making reference to the *effet uttile* to be attributed to any rule subject to an interpretation process in accordance with the rules of international law.

56. The Majority contends that the procedures mentioned in Article 1122(1) "most naturally"[27] refer to the procedures for the conduct of the arbitration set out in Articles 1223-1336. The expression "most naturally" seems to be the only reason stated by the Majority to assert that "[t]he NAFTA Parties did not consent in Article 1122 to just any generic arbitral process; they agreed to the specific arbitral process as organised and regulated by Articles 1123-1136."[28]

57. The fact that Articles 1123-1236 follow Article 1122 is not a serious ground to support its assertion.[29] Nor is the Majority assisted by the fact that the Contracting Parties have made no reference in the text of Article 1122(1) to an alleged and exclusive relationship with the "procedures" set forth in Articles 1223-1236.

58. I disagree with the Majority on the purported scope of the terms used in Articles 1116-1121 so as to conclude that the drafters of the Treaty intentionally deprived the agreement set out in Article 1119 of legal consequences. The Majority's catchphrase that "[t]hat choice [of the terms used] by the Treaty's drafters cannot be ignored"[30] contradicts the context in which the terms of a treaty are to be interpreted.

59. In turn, paragraphs (1) and (2) of Article 1121 provide that a disputing investor may submit a claim under Article 1116 or 1117 to arbitration only if the investor consents to arbitration in accordance with the procedures set out in this Agreement. The temporal sequence of the steps that the disputing investor must take pursuant to Articles 1116-1121 forms the context within which

---

[26] *Id.*, ¶ 99.

[27] *Id.,* ¶ 106.

[28] *Id.*

[29] *Id.*, ¶ 102.

[30] *Id.*, ¶¶108, 109, 110.

the terms of Article 1119 are to be construed.

60. It is thus surprising that it strikes the Majority as "more natural" to read the consent requirement in Article 1121(1) as being prospective "in nature," pertaining to a process that lies ahead.[31]

61. Even though one of the objectives of Article 1119 is to allow the parties to settle a claim through consultation or negotiation, it is neither the only nor the primary one. The Notice of Intent also enables the Respondent to understand the complexity of the alleged dispute as well as to organize its defense within a reasonable time period. The NAFTA Contracting Parties have recognized and assured the different purposes contained in Article 1119.[32]

62. This has been confirmed by case law. In this sense, the failure to comply with the requirements and formalities under Articles 1118-1121 has been deemed hardly compatible with the requirements of good faith under international law and might even have an adverse effect on the right of the Respondent to a proper defense.[33]

63. The Majority states that, for the Respondent, "a claimant who fails to include certain information in a notice of intent"[34] (emphasis added) would forfeit the right to Treaty arbitration. Yet a claimant who has delivered a Notice but fails altogether to pursue a settlement effort would retain that right undiminished. The Majority concludes that, if failing to pursue settlement discussions does not bar access to arbitration, then at least bald logic suggests that neither should a failure to comply with a step designed to facilitate such settlement discussions.[35]

64. The Majority's narrative ignores the fact that the Notice is not intended to facilitate settlement discussions only. Moreover, when the Majority refers to "a claimant who fails to include certain information in a notice,"[36] the Majority cannot, by bald logic, be referring to a claimant "unidentified in the Notice" (as it occurs with the Additional Claimants in this case.) In this regard, according to the Majority's narrative, "a claimant who fails to include certain information" would

---

[31] *Id*., ¶ 111.

[32] *See* the Contracting Parties' positions in *Waste Management* (2009); *Pope & Talbot* (2002); *Methanex* (2000-2001); *Mondev* (2001); *ADF* (2001); *Bayview* (2006); *Merrill Ring* (2008); *Mesa Power* (2012); *KBR* (2014); *Resolute Forest Products* (2017), see Exhibit R-008.

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

[34] Partial Award, ¶ 113.

[35] *Id*.

[36] *Id*.

necessarily be the one who submitted the Notice and would necessarily be identified. The claimant who submitted a Notice may not cure the breaches and negligence attributable to the unidentified investor. It is just as simple, and as complex, as that.

65. NAFTA's objective regarding the creation of effective procedures for the resolution of disputes (Article 102) is supplemented by Article 1115, which proclaims that establishing "a mechanism" for the settlement of investment disputes is the Purpose of Section B.

66. Such mechanism is defined by each article of that Section of the NAFTA. Therefore, "the procedures set out in this Agreement" under Articles 1121 and 1122 are necessarily included in the "mechanism" established for Section B on the Settlement of Disputes between a Party and an Investor of Another Party in its entirety.

67. Consequently, one cannot ignore the fact that Article 1119 is an integral part of the mechanism for the settlement of investment disputes which, pursuant to Article 1115, assures "both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal." (Emphasis added).

68. Every legal proceeding assumes the existence of rules that condition the parties' behavior on a series of enforceable obligations. There is no legal proceeding absent a mandatory set of applicable rules. The general rule under Article 31.1 of the VCLT requires that the terms of a treaty be interpreted in accordance with their ordinary meaning.

69. The Notice of Intent under Article 1119 is a duty that conditions not only the possibility that a disputing investor consents to submit a claim to arbitration, but also the other disputing Party's consent to submit a claim to arbitration. The context in which the duty to deliver a Notice under Article 1119 is stated, relates to the prerequisites agreed-upon by the Contracting Parties in order to consent to submit a claim to arbitration. Such literal reading obviously takes into account its object and purpose, which is no other than to assure "due process before an impartial tribunal."

70. Article 1115 then assures due process within the mechanism for the settlement of disputes established in Section B on the "Settlement of Disputes between a Party and an Investor of Another Party."

71. It strikes the Majority as a difficult proposition that the objectives of Article 1115 could be furthered by barring access to arbitration on the basis that the names of certain investors

were omitted from the notice of intent.[37]

72. The instant case is not merely about "omitted names." It is about the failure to satisfy a treaty prerequisite to be met by any disputing investor who may intend, at a given opportunity, accept the Respondent's consent to arbitration.

73. The legality of the due process inexorably entails the existence of a regulatory framework comprising both rights and obligations. The primary objective of Article 1115 may not be distorted so as to justify a failure to observe the basic rules of the legality of due process.

74. Therefore, the Respondent's consent pursuant to Article 1122(1) is contingent on the satisfaction of the prerequisite under Article 1119 concerning the necessary identification of any potential claimant as a "disputing investor" in the Notice of Intent.

75. In sum, on the basis of an interpretation in accordance with the ordinary meaning of the text of Articles 1119 and 1122(1), in their context and in the light of the NAFTA's object and purpose, the Tribunal lacks jurisdiction over the Additional Claimants or their claims. Only the disputing investors identified in this case, such as the Original Claimants, may submit their claims to arbitration under Chapter XI of the NAFTA.

76. As explained below, the foregoing conclusions are supported by NAFTA arbitration case law, as well as the positions adopted by all the NAFTA Contracting Parties in the exercise of their rights established in Article 1128.

I.A.3. Relevance of other tribunals' decisions

77. I agree with the criterion whereby every tribunal is the judge of its own competence. Every tribunal must determine its jurisdiction regardless of other tribunals' decisions. This Tribunal is not bound to decide in accordance with other tribunals' decisions. Every award or judgment creates law for the parties only. However, the iteration of certain interpretation rules on a given text under analysis may help another tribunal understand the meaning of the rule to be applied thereby.[38] In connection with the issues raised in this case, NAFTA arbitral decisions evidence a clear trend towards requiring that the disputing investor be identified as such in a notice of intent.

78. Apart from NAFTA decisions, the case law of other tribunals cited by the Majority

[37] *Id*., ¶ 117.

[38] Tribunals are not bound by previous decisions of NAFTA or other international tribunals (*See Chemtura*, ¶102). At the same time, due regard should be paid to earlier decisions on comparable issues, but subject of course to the specifics of each case (*See Chemtura,* ¶109; *see ADF*, ¶136).

is absolutely irrelevant in that it concerns rules and facts different from those to be taken into consideration by this Tribunal.

79. By way of example, the tribunal's findings in *Philip Morris* do not apply to the case at hand. The tribunal held that "[t]he domestic litigation requirement had not been satisfied at the time this arbitration was instituted…Nonetheless, even if the requirement were regarded as jurisdictional, the Tribunal concludes that it could be, and was, satisfied by actions occurring after the date the arbitration was instituted…"[39]

80. Clearly, in the instant case, the requirement whereby a disputing investor must notify the respondent Party at least 90 days prior to the formal submission of the claim may not be satisfied "by actions occurring after the date the arbitration was instituted." The duty to deliver the notice of intent to submit the claim to arbitration is a requirement that must be inexorably satisfied prior to submitting the claim and, thus, may not be "satisfied by actions occurring after the date the arbitration was instituted."

81. Moreover, the tribunal in *Philip Morris* errs in contending that "[i]n the *Mavrommatis* case the Permanent Court of International Justice had found that jurisdictional requirements which were not satisfied at the time of instituting legal proceedings could be met subsequently…"[40]

82. Contrary to the determinations by the *Philip Morris* tribunal, the PCIJ maintained that it had jurisdiction based on Article 26 of the Mandate for Palestine. At no time did the Court describe as a jurisdictional requirement, the ratification of Protocol XII at the time when Greece submitted its claim,.[41]

83. In turn, the NAFTA decisions which mention the rules to be applied by this Tribunal become relevant when it comes to understand the meaning and scope according to which those very rules have been interpreted and applied before.

84. In this context, in *Methanex*, the tribunal ruled that, in order to establish consent to

---

[39] *Philip Morris Brands SÀRL et al v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, ¶ 144.
[40] *Id*., ¶ 145.

[41] "It must in the first place be remembered that at the time when the opposing views of the two governments took definitive shape (April 1924) and at the time when proceedings were instituted, the Mandate for Palestine was in force. The Court is of the opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment. In the present case, this interpretation appears to be indicated by the terms of Article 26 itself where it is laid down that 'any dispute whatsoever… which may arise' shall be submitted to the Court…," *Mavrommatis*, p. 35.

arbitration, it is sufficient to show that Chapter XI applies in the first place, that a claim has been brought by an investor in accordance with Articles 1116 and 1117, and that all pre-conditions and formalities required under Articles 1118 -1121 are satisfied.[42]

85. In *Canfor*, the tribunal asserted that arbitral tribunals hearing objections to jurisdiction under Chapter XI shall ensure that all conditions and formalities under Articles 1118-1121 have been satisfied.[43]

86. In *Merrill & Ring,* the tribunal, in accordance with *Methanex* and as opposed to *Ethyl*[44] and *Mondev,*[45] held that consent to NAFTA arbitration requires that the Claimant not only meet the requirements laid down in Articles 1101, 1116 and 1117, but also satisfy all of the prerequisites and formalities under Articles 1118-1121.[46]

87. In *Cargill*, the tribunal ruled that a claimant must also provide preliminary notice pursuant to Article 1119 and satisfy the conditions precedent via consent.[47]

88. In *Bilcon*, the tribunal found that the protection given to investors must be interpreted and applied in a manner that respects the limits that the Contracting Parties put in place as integral

---

[42] "In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and NAFTA Party's consent to arbitration is established." *Methanex Corporation v. United States of America*; Partial Award, 7 August 2002, ¶ 120.

[43] "The above decisions make clear four points that a Chapter Eleven tribunal needs to address if and to the extent that a respondent State Party raises an objection to jurisdiction under NAFTA: […] – Second, in making that determination, the tribunal is required to interpret and apply the jurisdictional provisions, including procedural provisions of the NAFTA relating thereto, i.e., whether the requirements of Article 1101 are met; whether a claim has been brought by a claimant investor in accordance with Article 1116 or 1117; and whether all pre-conditions and formalities under Articles 1118-1121 are satisfied;" *Canfor Corporation v. United States of America,* UNCITRAL, Decision on Preliminary Question, 6 June 2006, ¶ 171.

[44] *Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998.

[45] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002.

[46] "The Tribunal has no doubt about the importance of the safeguards noted and finds that they cannot be regarded as merely procedural niceties. They perform a substantial function which, if not complied with, would deprive the Respondent of the right to be informed beforehand of the grievance against its measures and from pursuing any attempt to defuse the claim announced. This would be hardly compatible with the requirements of good faith under international law and might even have an adverse effect on the right of the Respondent to a proper defence." *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL, ICSID Administered Case, Decision on Motion to Add a New Party, 31 January 2008, ¶¶ 28 and 29.

[47] "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." *Cargill, Incorporated v. United States of America*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 160.

aspects of their consent.[48]

89. As opposed to the foregoing case law, the Majority finds support in the decisions adopted in *Chemtura* and *ADF*. Still, neither of these decisions makes reference to the failure to identify a claimant in the notice of intent. Thus, they exert no impact on the trend set by NAFTA arbitration tribunals.

90. The tribunal in *ADF*, under the special circumstances of the case, proceeds to interpret the text of Article 1119 (b) within the narrow framework of its own discretion in order to make the information requirements for the notice of intent more flexible. The tribunal starts out from the *sine qua non* condition that the notice of intent identify the disputing investor.[49] Therefore, the identification of the investor in the notice of intent is undisputed.

91. The tribunal in *Chemtura* only refers to the "form and content of a notice of intent," thus starts out from the basic assumption that a notice of intent has been submitted by a clearly identified disputing investor. Under each case-specific circumstance a tribunal may deem the conditions met by the disputing investor in the notice of intent as admissible if satisfied following submission of such notice. The tribunal in *Chemtura*, when citing the *ADF* award, reaffirmed the need for a notice of intent to exist as an implied condition to cure any defects in the content or form

---

[48] "In international arbitration, it is for the applicant to establish that a Tribunal has jurisdiction to hear and decide a matter. A Chapter Eleven tribunal only has authority to the extent that is provided by Chapter Eleven itself […] The heightened protection given to investors from other NAFTA Parties under Chapter Eleven of the Agreement must be interpreted and applied in a manner that respects the limits that NAFTA Parties put in place as integral aspects of their consent, in Chapter Eleven, to an overall enhancement of their exposure to remedial actions by investors. The Parties to NAFTA chose to go as far, but only as far, as they stipulate in Chapter Eleven towards enhancing the international legal rights of investors;" *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.

[49] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, ¶135: "Turning back to Article 1119(b), we observe that the notice of intention to submit to arbitration should specify not only 'the provisions of [NAFTA] alleged to have been breached' but also '*any other relevant procedures [of NAFTA].*' Which provisions of NAFTA may be regarded as also 'relevant' would depend on, among other things, what arguments are *subsequently* developed to sustain the legal claims made. We find it difficult to conclude that failure on the part of the investor to set out an exhaustive list of 'other relevant provisions' in its Notice of Intention to Submit a Claim to Arbitration must result in the loss of jurisdiction to consider and relay upon any unlisted but pertinent NAFTA provision in the process of resolving the dispute," ADF Group Inc. v. United States of America, Case No. ARB(AF)00/1, Award, 9 January 2003, ¶ 134; "It is also instructive to note that the notice to be given by claimant "wishing to institute arbitration proceedings" under ICSID Arbitration (Additional Facility) Rules is required merely to "contain information concerning the issue in dispute and an indication of the amount involved, if any." (Article 3[1] [d], ICSID Arbitration (Additional Facility Rules) The generality and flexibility of this requirement do not suggest that failure to be absolutely precise and complete in setting out that "information" must necessarily result in diminution of jurisdiction on the part of the Tribunal…"

thereof.[50]

92. In conclusion, there must be a notice of intent evidencing the very existence of a claimant investor. This is an essential requirement so as to identify not only the claimant, but also the alleged dispute itself. The mere existence of a timely notice presumes jurisdiction of a NAFTA tribunal. Only errors or defects in the information contained in a notice may be cured following submission thereof. This is the substance of decisions allowing defects or errors in a notice of intent to be cured. Both *Chemtura* and *ADF* tribunals decide on the admissibility of defects or errors in the notice of intent delivered by a claimant investor. In no way do they purport to allow defects in the content of a nonexistent notice to be cured with regard to an investor it has failed to identify. The existence of a notice of intent by the investor is vital for the Tribunal to have jurisdiction.

93. Throughout this proceeding, no case in which access to arbitration was given to an investor who had not been identified in a notice of intent has been cited. The cases cited by the Majority so as to prove the absence of a *jurisprudence constante* (*ADF* and *Chemtura*) actually confirm that, in both cases, all claimants had submitted their respective notices of intent. For jurisdiction to exist, every claimant must be identified by means of a notice of intent. Under the specific circumstances of each case, involuntary errors or remediable defects in the Notice are subject to the discretion of the Tribunal, in the equitable and efficient conduct of the proceeding, provided that the conditions necessary to establish the Respondent's consent have been satisfied.[51]

94. In view of the categorical assertion in NAFTA decisions on the scope and binding effects of Article 1119, the Majority may not dispute the relevance of such acknowledgment, in order to justify its violation by the Additional Claimants.[52] In the same vein, the failure to follow the procedures set out in Article 1122(1) do not evince the Respondent's consent with regard to those Claimants.

I.A.4. Scope of the NAFTA Parties' interpretations under Article 1128

95. Pursuant to Article 1128, NAFTA Contracting Parties may make submissions to a tribunal on a question of interpretation of that Treaty. It is apparent that, contrary to the

---

[50] *Chemtura Corporation v. Government of Canada*, Ad Hoc NAFTA Arbitration under UNCITRAL Rules, Award, 2 August 2010, ¶ 102.

[51] Reply on Jurisdictional Objections, 1 December 2017, ¶ 107.

[52] Partial Award, ¶ 119c.

interpretations by the Free Trade Commission, the Contracting Parties' interpretations contained in the submissions made to a tribunal are not mandatory therefor. Neither does it arise from Article 1128 that those interpretations are of a recommendatory nature. Nevertheless, those interpretations will help a tribunal confirm or not the meaning the Parties gave, or sought to give, to the rules subject to interpretation.

96. The Tribunal cannot ignore the submissions made by the Contracting Parties, especially when they reassert and unanimously confirm a recurrent trend to understand that the prerequisites set out in Articles 1119, 1121 and 1122(1) are enforceable and condition the Claimants' consent as well as the Respondent Party's consent.[53]

97. The Contracting State Parties, in their recurring interpretative submissions on these same articles, have remained silent on the effects of the waivers the Respondent States may accept regarding compliance with mere formal requirements or remediable errors which, despite being mandatory, would be liable to be excused.

98. On this particular issue, it is worth highlighting that the Respondent referred to the possibility that minor errors and defects in the information the Notice of Intent was supposed to contain could be regarded as not affecting a Tribunal's jurisdiction.[54] However, this condonation does not extend to the lack of identification of the "disputing investor" who failed to submit a Notice of Intent and who could not establish the existence of a dispute with the Respondent State either.

99. In conclusion, I understand that the positions assumed by the Contracting Parties in the exercise of their rights under Article 1128 do not impose, but simply confirm, the interpretations of Articles 1119, 1121 and 1122 that support and substantiate this dissenting opinion.

100. For all the reasons stated above, I consider that:

- The Tribunal lacks jurisdiction over the claims by the Additional Claimants.

---

[53] Submission of the Government of Canada pursuant to NAFTA Article 1128, February 28, 2018: "… Articles 1116 to 1121 mandate that a claimant satisfy several requirements in order to perfect the consent of a NAFTA Party to arbitrate an investment…" ¶ **II**. 3; Submission of the United States of America pursuant to Article 1128, August 17, 2018: "… the United States has long maintained, that the "procedures set out in this Agreement", required to engage the NAFTA Parties' consent and form the agreement to arbitrate necessarily include Articles 1116-1121. All three NAFTA Parties agree that their consent to the submission of any claim to arbitration is conditioned upon de satisfaction of the relevant procedural requirements. Their common, concordant, and consistent views form a subsequent practice "that shall be taken into account," ¶ 16.

[54] "While an element of delay, condonation or acquiescence by the disputing Party can be seen in certain decisions and awards that have excused the disputing investor's alleged failure of compliance, that is not the case here. Mexico made its objections at the earliest possible opportunity and has steadfastly maintained them;" Reply on Jurisdictional Objections, 1 December 2017, ¶ 107.

- The Tribunal, lacking jurisdiction over the Additional Claimants, is precluded from hearing any admissibility claim by those Additional Claimants.

I.B. Jurisdictional objection regarding the Claimants' claims on behalf of the Mexican Companies under Articles 1117, 1119, 1121 and 1122(1).

101. The Respondent challenges the existence of its consent pursuant to Article 1122(1); the validity of the Mexican Companies' consent pursuant to Article 1121; and the Mexican Companies' ownership or control by the Claimants pursuant to Article 1117.

I.B.1. The Respondent's consent under Article 1122(1)

102. As regards the objection related to the Respondent's lack of consent pursuant to Article 1122(1), I disagree with the Majority due to the fact that, as stated above, failure to comply with the conditions imposed by that Article precludes the Tribunal from exercising its jurisdiction over the claims by the so-called Additional Claimants. The rationale and conclusions set out in **Section I.A**. extend, *mutatis mutandis*, to any Mexican company not identified in the Notice of Intent.

I.B.2. The Mexican Companies' consent under Article 1121

I.B.2.a. The Juegos Companies' consent.

103. The Respondent challenges the consent conveyed by the Juegos Companies pursuant to Article 1117(2) and (3).

104. Article 1121, on the Conditions Precedent to Submission of a Claim to Arbitration, in its sub-article 2, states that "[a] disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise: (a) consent to arbitration in accordance with the procedures set out in this Agreement; and (b) waive their right to initiate or continue […] any proceedings with respect to the measure [adopted by] the disputing Party…;" in its sub-article 3, it states 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."

105. All the Juegos Companies that had been identified in the Notice of Intent, which, in turn, were identified in the Request for Arbitration, proved compliance with the conditions set out by Articles 1119 and 1122(1). Therefore, these companies were enabled to give their consent pursuant to Article 1117(2).

106. The seven-week delay in the consent provision by the Juegos Companies, through the powers of attorney the Original Claimants had vested in their counsel, could be cured by the Tribunal in the exercise of its discretion in the efficient administration of the proceedings and respecting procedural equity between the Parties.

107. The Respondent acknowledged in its Reply the Tribunal's ability to cure minor deficiencies in the proceedings;[55] therefore, the Tribunal may and must consider valid the consent conveyed by the Juegos Companies identified in the Notice of Intent.

108. The Tribunal's acceptance of the belated consents by the Juegos Companies cannot be extended to the consents by the Additional Claimants that failed to comply with the prerequisite of Article 1119. In this sense, Article 1121(1)(a) y (2)(a)) requires that both the investor and the enterprise "consent to arbitration in accordance with the procedures set out in this Agreement," *inter alia*, the prerequisites of Article 1119.

109. An enterprise's consent, in compliance with Article 1121(2), does not prejudge the ownership or the direct or indirect control the disputing investor of a Party seeks to have over an enterprise of the other Party for the purposes of Article 1117(1).

110. Accordingly, the Respondent's objection regarding the lack of consent by the Juegos Companies, that was duly identified in the Notice of Intent, is dismissed. Consequently, as in the case of the Original Claimants, it is established that the Juegos Companies, identified in the Notice of Intent, complied with the provisions set out by Article 1121(2) and (3). The aforementioned consent does not prejudge the ownership or control the Original Claimants had, at the relevant critical dates, over those enterprises—and on whose behalf the Original Claimants claimed.

I.B.2.b. The withdrawal by E-Games.

111. The Respondent alleges that E-Games lacks standing to submit a claim to arbitration, because its withdrawal from the Notice of Intent, by letter dated 24 October 2014, affected the right thereof to consent to arbitration.

112. I agree with the Majority on the assertion that E-Games is not a party to these proceedings. E-Games could have never withdrawn from the Notice of Intent because the Notice of Intent was not submitted by E-Games, but by the Original Claimants. Neither could it have desisted

[55] Reply, ¶ 107.

from the remedy provided for in Article 1117 because such remedy had not been pursued as of the submission date of the alleged withdrawal.

113. I disagree with the Majority's conclusion that, in any case, were the *desistimiento* to give rise to a defect under Article 1119, the Tribunal would dispose of that defect as it did in respect of the Additional Claimants.[56]

114. In conclusion, I consider that the Tribunal has jurisdiction over the claims by the Original Claimants on behalf of E-Games, on the grounds that it was duly identified in the Notice of Intent and that, in compliance with Articles 1119 and 1122(1), it was authorized to convey its consent pursuant to Article 1121(2) and (3). Once again, an enterprise's consent, in compliance with Article 1121(2), does not prejudge the ownership or the direct or indirect control the disputing investor of a Party seeks to have over an enterprise of the other Party for the purposes of Article 1117(1).

I.B.2.c. The consent by Operadora Pesa

115. It is a fact that Operadora Pesa was not identified in the Notice of Intent. Accordingly, the conditions set out by Articles 1119 and 1122(1) were not complied with. Therefore, Operadora Pesa is not authorized to give its consent pursuant to Article 1117(2).

I.C. The Claimants' ownership or control over the Mexican Companies

I.C.1. Value of the evidence produced

116. I agree with the Majority that the Claimants are the ones that should prove whether they owned or controlled the Mexican Companies both at the time of the alleged breach of the Treaty and at the time of the submission of the Request for Arbitration.[57]

117. I agree with the Majority that the Claimants did not manage to transfer their shares in the Juegos Companies to a third party (Grand Odissey)[58] in November 2014.

118. In light of the apparent recurrent negligence and constant irregularities in the Mexican Companies' management; along with the failure to comply with their by-laws and, thus,

[56] Partial Award, ¶ 264.

[57] *Id.*, ¶¶ 147-148.

[58] *Id.*, ¶¶ 166-167.

with Mexican law; and in light of the inefficiency proven in the production of the evidence necessary to support their arguments, I disagree with the Majority's findings that all of these situations attributable to the Claimants are only relevant to the allocation of the costs of the proceedings.[59]

119. I also disagree with the Majority's view that the constant flaws and irregularities of the Claimants in the production of evidence of their shares in the Juegos Companies may satisfy the minimum probative demands the Tribunal should make.[60]

120. Against this background, the notarized minutes of the 2006 and 2018 Shareholders' Meetings (*asambleas)* may satisfy the Tribunal's demands for evidence of the shareholding in the Juegos Companies as of those dates only. Nevertheless, the Tribunal must decide what shares the Claimants held at the date of the first alleged breach (June 2013) and at the date of submission of the Request for Arbitration (June 2016).

121. The Claimants allege that their 2014 Shareholding Worksheet details exactly what the Claimants position as shareholders was from June 2013 to date. They justify the discrepancies between the notarized minutes of the 2006-2008 Shareholders' Meetings and the 2014 Shareholding Worksheet in the fact that certain share transfers prior to 2014 were not duly approved by the Shareholders' Meeting at the time, as required by the by-laws of the Juegos Companies.

122. The Claimants contend that, under Mexican law, share transfers are valid and effective as from execution thereof, irrespective of the approval by the Shareholders' Meeting. Should approval from the shareholders' meeting had been necessary, in any case, the 2018 Shareholders' Meeting granted retroactive effect thereto.

123. For the Respondent, Mexican Law provides that share transfers have direct effects *inter partes* but such effects are nonexistent vis-à-vis the company until they are approved by the shareholders' meeting beforehand. Therefore, they produce no effect whatsoever regarding the recognition of the shareholder and exercise of his/her rights at the company. The transfers which have not been approved by the shareholders' meeting are nonexistent. Therefore, the 2018 Shareholders' Meetings have no retroactive effects.

124. I disagree with the Majority regarding the limited practical relevance attributed to the positions assumed by the legal experts on Mexican law,[61] which applies to the matters of fact and

[59] *Id.,* ¶¶ 171-172.

[60] *Id.* ¶¶ 173 *et seq.*

[61] *Id.*, ¶ 181.

of law alleged by the Parties. The Tribunal cannot fail to acknowledge that it lacks 'expertise' in the respondent Party's domestic law. The debate between the experts evinces that both of them recognize that there are two legal acts: on the one hand, the share transfer between parties, which only produces legal effects as between them; and, on the other hand, the Shareholder Meeting's approval, which produces legal effects *vis-à-vis* the company.[62] Without the Shareholder Meeting's prior approval of a share transfer, that transfer does not exist vis-à-vis the company or third parties.[63] Contrary to the Majority's assertion,[64] there is no evidence on record of alleged rights attached to such unauthorized transfers, but those rights are only exercised through those who still own them.[65]

125. It is apparent that the result of the debate does not support the Majority. In lieu thereof, it contends, first, that, under Mexican law, the shareholders who were transferred the shares have owned them since the date of their transfer; and, second, that, as a matter of fact, the transferee shareholders have been able to exercise the rights attached to those shares since the date of their transfer.[66] In my opinion, the Majority cites no provision under Mexican law in support of its conclusion, simply because it cannot find any. The Majority attempts to ignore the legal effects that the bylaws attribute to the Shareholder Meeting's prior approval of any share transfer. What is more, in fact, such lack of authorization is a nonexistent legal act under Mexican law.

126. Under Mexican law, Section 2224 of the Federal Civil Code provides that "a legal act, nonexistent due to lack of consent or a material component, will not produce any legal effect. It may not be rendered valid by way of confirmation or prescription; its nonexistence can be invoked by any interested party." [Free Translation.] Accordingly, under Mexican Law, the lack of timely approval of a transfer does not constitute grounds for finding a *nulidad relativa* (relative nullity) that may be cured as a matter of fact, as the Majority contends, or retroactively, as Claimants maintained when interpreting the effects of the Minutes of the Shareholder Meetings held in January

---

[62] Transcript (Spanish version), Hearing on Jurisdiction, Day 5, Statement by Respondent's Expert René Irra Ibarra, page 921 *et seq*; Statement by Claimants' Expert Rodrigo Zamora Etcharre,1061: 6-22; 1062: 1-5; 1087: 10-22; 1088: 1-2, 1091; 16-22; 1092: 1-5.

[63] *Conf.* Article Thirteen, common to the By-laws of the Juegos Companies states as follows: "The Shareholders may transmit, convey, sell, encumber or otherwise dispose of their shares in accordance with this article, provided that it has previous authorization of the majority of the members of the Board of Managers, as well as the authorization of the *Asamblea de Socios* with the majority vote of the of series B shares."

[64] Partial Award, ¶ 183.

[65] Transcript (Spanish version), Hearing on Jurisdiction, Day 5, Statement by Claimants' Expert Rodrigo Zamora Etcharre, 1091: 16-22; 1092: 1-5.

[66] Partial Award, ¶ 185.

2018. Therefore, under Mexican law, the share transfer without prior authorization by the shareholders' meeting is a nonexistent act vis-à-vis the company that cannot be amended or perfected by any act whatsoever.

127. Consequently, the Majority does not ground its assertions in applicable law, altering in turn the legal effects Mexican law attributes to nonexistent acts.

128. Moreover, the Majority holds that if the Tribunal gave no probative value to the *de facto* share ownership and found that the Claimants' share ownership between June 2013 and June 2016 was instead as recorded in the 2006-2008 *asambleas*, the Claimants would have still owned more than 50% of the shares –the relevant threshold for proving the legal capacity to control the Juegos Companies under Article 1117.[67]

129. The Majority fails to distinguish the shareholding percentages between the Original Claimants and the Additional Claimants, as at the critical date of the first alleged breach of NAFTA as well as at the critical date of the Request for Arbitration.

130. Despite not taking into account that the share transfers prior to 2004 were not previously approved by the Shareholders' Meetings, the Majority is not able to prove the Original Claimants' legal capacity to control, as of the critical date of the Request for Arbitration.

131. Concerning JVE Mexico, the Majority only relies on 2006, 2013, 2014 and 2018 data; for JVE Sureste, it only relies on 2007, 2009, 2013, 2014 and 2018 data; for JVE Centro, it only relies on , 2008, 2013, 2014 and 2018 data; for J y V, it only relies on 2008, 2012, 2013, 2014 and 2018 data; and for JVE DF, it only relies on 2008, 2012, 2013, 2014 and 2018 data.[68] Consequently, the Majority does not have sufficient evidence to establish that, as of the date on which the Request for Arbitration was filed, the Original Claimants controlled the Juegos Companies.

132. However, the Tribunal does have information provided by the Claimants on their version of the Original Claimants' and the Additional Claimants' shareholdings.

133. In this context, the Tribunal requested the parties to identify the share percentages of each of the Mexican Companies; distinguishing between Original Claimant shareholders, Additional Claimant shareholders, and other shareholders.

---

[67] *Id.,* ¶ 186.

[68] *Id.,* Tables at ¶¶ 174, 189, 191, 192, 193 and 194.

134. As required by the Tribunal, the Claimants supplied in the tables and charts included in their Post-Hearing Brief relevant information that evinces their acknowledgment that the Original Claimants lacked the shares necessary to control each of the Mexican companies, with the exception of JVE Mexico.[69]

135. In view of the defects in the production of evidence and the inconsistencies of the evidence produced by the Claimants, I disagree with the Majority's position that mere inferences may make up for the burden, absence, or inconsistencies of proof.

I.C.2. Claimants' ownership and control of the Mexican Companies

136. Article 1117 on the Claim by an Investor of a Party on Behalf of an Enterprise provides: "1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation…"

137. The parties disagree on the requirements imposed by Article 1117 whereby the investor must "own[ ]" or "control[ ] [the enterprise] directly or indirectly." The parties' differences raise a question about the scope and the effects of that rule. This question must be resolved through international law rules on interpretation.

138. I agree with the Majority that the term "ownership" in the text and context of Article 1117 means holding all the shares in a company. Since the Claimants have failed to demonstrate that they owned the Juegos Companies, E-Games or Operadora Pesa at the critical dates established by the NAFTA, they may not claim to be the owners for the purposes of Article 1117.

139. The ordinary meaning of the term "control" implies the exercise of power, decisive influence or discretionary management over something. Control means to have and exercise an exclusive power to the exclusion of any other power or influence. Article 1117 draws a distinction between direct or indirect control only. The categories of "legal control" and "*de facto* control" are not provided for therein, and thus were not intended by the NAFTA Contracting Parties.

140. Still, the distinction between "legal control" and "*de facto* control" has been used by both disputing parties and some arbitral tribunals. Such distinction may help, and has indeed helped, to characterize the different forms of control that a Party's investor may exercise over the other

[69] Claimants' Post-Hearing Brief, 17 August 2018, Annex 1.

Party's enterprise. Nevertheless, such distinction may not alter the very substance of the term "control" in the ordinary meaning to be given thereto as the manifestation and exercise of an exclusive power to the exclusion of any other power or control.[70]

141. Article 1117 only refers to "control." That control may be exercised either by the one who is entitled thereto under the bylaws and actually exercises it or else by the one who actually exercises such control.

142. In *Thunderbird*, the tribunal held that the owner or legally controlling party has the ultimate right to determine key decisions. However, if in practice a person exercises that position, there is a genuine link yielding the control to that person.[71]

143. Hence, it contended that the term "control" interpreted in accordance with its ordinary meaning can be exercised in various manners, and, therefore, a showing of effective or "*de facto*" control is, in the tribunal's view, sufficient for the purposes of Article 1117 of the NAFTA.[72] In this regard, although within the framework of non-NAFTA cases, the notion that any "control" must be effective is also confirmed by decisions rendered by ICSID tribunals.[73]

144. In conclusion, the term "control" may be classified as legal control or *de facto* control, but this characterization does not alter the content and scope of the term "control," *i.e.*, the exercise of exclusive power in the management of an enterprise to the exclusion of any other power. Control must be contextualized in time. Only the investor exercising "effective control" at any given time may resort to arbitration pursuant to Article 1117(1).

I.C.2.a. The Original Claimants' control over the Juegos Companies

145. The Original Claimants were unable to provide sufficient evidence that, at the

---

[70] "Ownership and legal control may assure that the owner or legally controlling party has the ultimate right to determine key decisions. However, if in practice a person exercises that position… one can conceive the existence of a genuine link yielding the control of the enterprise to that person;" *International Thunderbird Gaming Corporation v. United Mexican States,* Award, 26 November 2006, ¶ 108.

[71] *Id*., ¶ 108.

[72] *Id.* ¶ 106: "The Tribunal does not follow Mexico's proposition that Article 1117 of the NAFTA requires a showing of legal control. The term "control" is not defined in NAFTA. Interpreted in accordance with the ordinary meaning, control can be exercised in various manners. Therefore, a showing of effective or "de facto" control is, in the Tribunal's view, sufficient for the purposes of Article 1117 of the NAFTA."

[73] *Ioan Micula, v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, ¶¶ 119, 115; *Bernard von Pezol and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 127.

relevant dates (June 2013 and June 2016), they jointly owned most Class B shares in the Juegos Companies, with the exception of JVE Mexico.[74]

146. When filing the Request for Arbitration to ICSID, the Original Claimants were also unable to show that they had effective or *de facto* control over the Juegos Companies, not only due to the lack of sufficient evidence, but also in view of the text of Claimants' letter dated 21 July 2016 in which, in response to a letter from the Centre, they admitted that, "because Claimants do not have board control of the Juegos Companies, they [we]re not at [that] moment in a position to provide the requested affirmation."[75]

147. In conclusion, the Original Claimants neither owned nor exercised effective control over the Juegos Companies at the dates relevant to determining the Tribunal's jurisdiction under Article 1117(2).

I.C.2.b. The Original Claimants' control over E-Games

148. It was established that the Original Claimants did not hold the shares necessary to control E-Games, neither at the time of alleged breaches nor upon the filing of the Request for Arbitration.[76] It was also demonstrated that the Original Claimants exercised effective control over E-Games at the relevant dates.[77]

149. In conclusion, the Original Claimants did not own, but did prove to have exercised effective control, over E-Games on the dates relevant to determining the Tribunal's jurisdiction under Article 1117(2).

I.C.2.c. The Original Claimants' control over Operadora Pesa

150. It is a proven fact that the Original Claimants were not investors in Operadora Pesa at the dates relevant to determining the Tribunal's jurisdiction under Article 1117(2).[78]

---

[74] Claimants' Post-Hearing Brief, 17 August 2018, Annex 1.

[75] Claimants' letter to ICSID dated 21 July 2016, p. 13. [Arbitrator's Translation]

[76] Partial Award, ¶236.

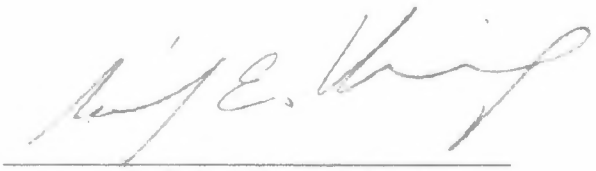
[77] *Id.,* ¶¶ 237 *et seq*. *Conf.* Claimants' Post-Hearing Brief, 17 August 2018, Annex 2.

[78] Claimants' Post-Hearing Brief, 17 August 2018, Annex 3.

CONCLUSION

151. In view of the foregoing considerations, I partially dissent from the Majority's Decision. Therefore, in my opinion:

- The Tribunal should have granted the Respondent's Jurisdictional Objection based on Article 1121 of the Treaty with respect to the Additional Claimants and Operadora Pesa;
- The Tribunal should have granted the Respondent's Jurisdictional Objection based on Articles 1119 and 1122(1) of the Treaty with respect to the Additional Claimants and Operadora Pesa;
- The Tribunal should have granted the Respondent's Jurisdictional Objection based on Article 1117 of the Treaty with respect to Operadora Pesa and the Juegos Companies, with the exception of JVE Mexico;
- Consequently, the Tribunal has jurisdiction over the claims submitted by the Original Claimants on their own behalf under Article 1116 of the Treaty and on behalf of JVE Mexico and E-Games under Article 1117 of the Treaty.
- The costs of the proceeding should be equally borne by the Parties, and each Party should bear the costs and expenses incurred thereby in the context of the proceeding.



Prof. Raúl Emilio Vinuesa
Arbitrator
Date: 6 JULY 2019