



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

**JOSHUA DEAN NELSON, IN HIS OWN RIGHT AND ON BEHALF OF TELE FÁCIL MÉXICO,
S.A. DE C.V., AND JORGE LUIS BLANCO
(CLAIMANT)**

v.

**MEXICAN UNITED STATES
(RESPONDENT)**

ICSID CASE No. UNCT/17/1

Objection to the Jurisdiction of the Tribunal

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INTRODUCTION

1. The Claimant in this case, Joshua Dean Nelson (“Mr. Nelson”) has submitted a claim on his own behalf under Article 1116 and on behalf of Tele Fácil, S.A. de C.V. (Tele Fácil) under Article 1117. This objection to the Tribunal’s jurisdiction concerns the latter.
2. Article 1117 establishes a set of conditions for the submission of a claim by an investor of a Party on behalf of an enterprise of another Party. *First*, the enterprise must be a “juridical person that the investor owns or controls directly or indirectly”. *Second*, the enterprise must have “incurred loss or damage by reason of, or arising out of, [the alleged] breach”. *Third*, no more than three years must have elapsed from the date on which the enterprise first acquired or should have first acquired knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.
3. This challenge concerns the first requirement. It is the Respondent’s submission that the term “control” in the context of Article 1117 means legal control of the enterprise, and Mr. Nelson did not have legal control of Tele Fácil when he submitted the claim to arbitration.
4. Until very recently, the Respondent had no reason to doubt that the then Claimants –Messrs. Nelson and Blanco– met the requirements established in Article 1117. In particular, it had no reason to doubt that Mr. Nelson had legal control of Tele Fácil on account of his alleged 60% shareholding: an allegation backed by *prima facie* valid minutes of an extraordinary shareholders meeting held on 29 March 2016 recording that fact.
5. This changed on 26 March 2019, when counsel for the Claimant informed the Tribunal that, “[i]n the course of preparing for the hearing in the matter, we discovered that Jorge Luis Blanco (“Mr. Blanco”) filed for bankruptcy in 2011” and, as a result, his shares in Tele Fácil had become the property of the bankruptcy estate as of the date of commencement of the Chapter 7 bankruptcy proceeding.
6. Mr. Blanco’s loss of his shares in 2011 has significant implications in this case. Put simply, once Mr. Blanco ceased to be a shareholder of Tele Fácil, he no longer had the right to attend Tele Fácil’s shareholders meetings and therefore to vote. Hence, under the company’s by-laws and Mexican law, the corporate restructuring that purportedly took place during the extraordinary shareholders meeting of 29 March 2016 is null and of no legal effect. As a result, Mr. Nelson’s shareholding did *not* increase from 40% to 60% on 29 March 2016 and he lacks the standing to assert a claim on behalf of Tele Fácil under Article 1117 of the NAFTA.

7. This pleading is divided in two parts:

- Part I addresses the relevant facts for the purposes of this objection to jurisdiction including: Mr. Blanco's bankruptcy; the Memorandum of Understanding between Tele Fácil's shareholders, the original ownership structure of the company; and the failed attempt to restructure Tele Fácil's ownership in 2016; and
- Part II contains the Respondent's legal arguments including its position on the proper interpretation of the terms "ownership" and "control" in the context of Article 1117.

I. THE MATERIAL FACTS

A. The bankruptcy of Jorge Blanco

8. By correspondence dated 26 March 2019, the Claimant's counsel informed the Respondent and the Tribunal that Mr. Blanco filed for Bankruptcy in 2011 under Chapter 7 of the U.S. Bankruptcy Code.¹

9. That correspondence went on to confirm that:

- Upon the commencement of a Chapter 7 bankruptcy, a bankruptcy estate is created, and all legal and equitable interests of the debtor, whether disclosed or not, become the property of the bankruptcy estate until administered by the Trustee or abandoned back to the debtor at the conclusion of the process;
- Mr. Blanco failed to disclose his interests in Tele Fácil during the bankruptcy proceeding;
- Non-disclosed property cannot be administered or abandoned, and as such remains the property of the bankruptcy estate even after the case closes; and
- Mr. Blanco is not presently the owner of his original shareholdings in Tele Fácil.

10. By correspondence dated 29 March 2019, the Claimant's counsel provided the following additional information:²

- Mr. Blanco did not identify his shares in Tele Fácil as an asset in his bankruptcy petition which was filed in August 2011; and
- Mr. Blanco's independent bankruptcy counsel and the Claimant's counsel both concluded that under U.S. bankruptcy law, the failure to list the Tele Fácil shares as an asset in the bankruptcy petition resulted in those shares not being administered or abandoned by the trustee. As a result, Mr. Blanco's

¹ Exhibit R-86, Claimant's Correspondence to Tribunal dated 26 March 2019.

² Exhibit R-87, Claimant's Correspondence dated 29 March 2019.

shares in Tele Fácil continue to be an asset of the bankruptcy estate.

11. The Respondent accepts the conclusion by Claimant's counsel that Mr. Blanco's shares became the property of the bankruptcy trust in August 2011 when he initiated bankruptcy proceedings. The Respondent also accepts that he is currently not the owner of his Tele Fácil shares, and that as a result of his failure to list the shares as an asset in the 2011 bankruptcy petition, those shares continue to be an asset of the bankruptcy estate.

B. The Memorandum of Understanding

12. On July 20, 2009, Mr. Blanco, Mr. Nelson and Miguel Sacasa ("Mr. Sacasa") executed a Memorandum of Understanding ("MOU").³

13. The MOU proposed that the ownership of Tele Fácil would be as follows:

- Mr. Nelson: 60%
- Mr. Sacasa: 20%
- Mr. Blanco: 20%.⁴

14. The Respondent directs the Tribunal's attention to the fact that the MOU does not provide any of the shareholders with the unilateral ability to: (i) control the company through the appointment of the Board of Directors, (ii) transfer shares, (iii) modify by-laws of the company, or (iv) dissolve and liquidate the company. Further, and as detailed below, Tele Fácil was incorporated with a different share structure than the one contemplated in the MOU.

15. The MOU also set out the scope of responsibilities for Messrs. Nelson, Sacasa and Blanco. With respect to Mr. Nelson, the MOU provides as follows:

- Initial funding will be provided by Josh Nelson and as the Project is able to be self-funding it will transition to internal funding.
- Josh Nelson commits to, in good faith, *provide* the level of funding required as laid out in the Business Plan (developed by the Partners) and the project plan (developed by the attorney).
- Josh Nelson will provide the technical and engineering support required either directly or provide the resources to hire said support.
- Josh Nelson will provide the Conference Calling Technology and System that will be the cornerstone of the Project plan initially.
- Josh Nelson or his assignee will be responsible for and have authority over all accounts payable always recognizing that there are payments that will need to be made locally and

³ Exhibit C-013, Memorandum of Understanding by and between Jorge Blanco, Josh Nelson, and Miguel Sacasa (20 July 2009), ("MOU").

⁴ *Id.*, p.1.

that there will need to be Capital available in Mexico. Nelson will always have access to all funds whether in Mexico or the USA, including any bank accounts in Mexico.⁵

16. The Respondent submits that Mr. Nelson's responsibilities were limited to providing initial funding to the company, providing technical and engineering support (either directly or by hiring the necessary resources) and providing the Conference Calling Technology and System. Mr. Nelson's responsibilities do not support a finding that he maintained *de facto* control over the company.

17. To the extent that managerial control of the enterprise is relevant to a *de facto* control argument –and the Respondent's position is that it is not– the Respondent submits that form of control appears to have been in the hands of Mr. Sacasa as opposed to Mr. Nelson. The MOU describes Mr. Sacasa's scope of responsibilities as follows:

- Miguel Sacasa will be responsible for day to day management as well as normal interactions with the attorney, any and all regulatory bodies, and normal trade practices for our industry which includes Vendors, Employees, Contractors, and any and all sundry contacts.
- Miguel Sacasa will report to the Board of Directors of the Company and receive a Salary as an employee with the title of, "Director General". This Salary will start when the Licenses and Permits have been granted and the Company is nearing its start-up date. The exact date and amount will be decided on by the Board of Directors.
- Once the Project is established and the Company is doing business, Sacasa will stay in the position of Director General responsible for the management of the Company and report to the Board of Directors and the Partners.⁶

18. With respect to Mr. Blanco, the MOU provides that:

- Jorge Blanco will be responsible for the facilitation of communication between all parties.
- He will also be responsible along with the Partners for the Project Development and ongoing management of the company. He will periodically visit Mexico and support Sacasa and the Project as needed.
- He will also take the lead in negotiations with the interconnects of other Carriers both in Mexico and outside the country.
- Jorge Blanco will report to the Board of Directors of the Company and receive a salary as an employee, exact date and amount to be decided by the Board of Directors but not to precede startup of company and generation of revenue with the title (to be decided).⁷

19. The MOU goes on to identify the following joint responsibilities for Messrs. Sacasa and Blanco:

Miguel Sacasa and Jorge Blanco's joint contribution includes the original development of the project, the relationship to the attorney from previous projects and the relationship to Conatel [*sic*] the Mexican Federal Regulatory Body which runs the Mexican economic and regulatory climate.

Miguel and Jorge will develop the Business Plan which will be the basis of the development of the Mexican Project and Company(s) we will be creating. We will make sure that we meet all Regulatory

⁵ *Id.*

⁶ *Id.*, p.2.

⁷ *Id.*

requirements and that it is all done in a legal framework which will allow us to create a Company that operates Locally, Nationally and Internationally.

Miguel and Jorge will do a Market Study in conjunction with our Legal Advisers to find the right cities and areas of said cities to initiate operations. In this study, we will provide the following:

- The documentation for the technical, economic and marketing plans
- Determine the locales to insure approval from Conatel [*sic*]
- Investigate and advise as to where and what kind of offices to open

Miguel and Jorge will then be responsible for the following:

- Finding offices and negotiating all of the components necessary to open the offices and have them running efficiently.
- Negotiate collocations of equipment where possible.
- Contracting and delivery of local services.
- Making sure that all local laws and regulatory components are addressed.
- Negotiate all of the Interconnections required to ensure that the Company has all of the tools necessary to operate the initial Conference Calling Project and all subsequent projects.⁸

20. Mr. Nelson's limited role in the management and control of the company was addressed as follows in the MOU:

It is understood by all of the Parties that Josh Nelson has many projects in various stages of development throughout the World and does not have the time resources to personally focus on the Project and therefore will be relying on his Partners as well as any staff he may hire or appoint to work on the Project to manage the Project on a day to day basis. It is the responsibility of the Partners to Josh Nelson to keep him apprised via written and oral reports, Board Meetings, and any other means requested or required of the status of the Project.⁹

21. This limited role to be played by Mr. Nelson is further demonstrated by his lack of participation in the operations of Tele Fácil. For instance, Mr. Nelson confirmed that he did not "make or send" Tele Fácil's Concession Application. When asked at the hearing whether he reviewed the Concession Application, Mr. Nelson responded as follows:

I don't believe I actually saw this one before it was submitted.¹⁰

22. The fact that Mr. Nelson was not directly involved with the Concession Application is consistent with his limited role, as contemplated in the MOU, and is inconsistent with his claim to have exercised *de facto* control over Tele Fácil.

23. Furthermore, Mr. Nelson has confirmed that after receiving the Concession, interconnection with the

⁸ *Id.*, pp. 2-3.

⁹ *Id.*, p.3.

¹⁰ Transcript from the Hearing on the Merits ("Transcript"), Volume 2, p.330.

predominant carrier, being Telmex, would be an essential ingredient in Tele Fácil's ability to enter the market.¹¹ Despite the importance of obtaining the interconnection agreement with Telmex, Mr. Nelson did not participate in negotiations between Tele Fácil and Telmex. Those negotiations were conducted by Messrs. Sacasa and Bello.¹²

24. In addition to not participating with those negotiations, Mr. Nelson also had minimal knowledge about them. Mr. Nelson confirmed at the hearing that he did not know when:

- Tele Fácil requested that Telmex allow indirect interconnection;¹³
- Tele Fácil requested that Telmex eliminate portability charges;¹⁴
- Telmex refused to permit the use of indirect interconnection;¹⁵ or
- Telmex refused to eliminate portability charges.¹⁶

25. Mr. Nelson's limited knowledge about the negotiations between Tele Fácil and Telmex is further demonstrated by the following exchange:¹⁷

Q. Do you know whether Tele Fácil and Telmex had any negotiations on indirect interconnection or portability charges during the year of 2013?

A. Do I know if they had negotiations?

Q. Um-hmm.

A. Yes.

Q. Okay. Are you able to narrow it to when?

A. Not exactly.

I know that Carlos and Miguel had negotiations with Telmex, if that's what you're asking, back and forth.

Q. On portability and indirect interconnection?

A. No. I mean, all I know is that they had the meetings and they said, "We don't like these parts and we like this," and then Telmex responds, of course, and then all that.

Q. Okay. But you're vague on the timing in terms of the negotiations?

A. Yeah, I was not involved in the meetings, so...

Q. Okay. Do you know whether they had any negotiations on indirect interconnection or

¹¹ Exhibit C-001, Witness Statement of Joshua Dean Nelson, 2 November 2017 ("First Witness Statement of Mr. Nelson"), ¶ 46. See also Transcript, Volume 2, p. 337.

¹² Transcript, Volume 2, p.338.

¹³ *Id.* p. 342.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* pp. 343-344.

portability charge from January 1st to May 9th, 2014?

A. Again, the exact dates I don't know. I believe that their testimony has when they met with the people.

26. This level of knowledge is entirely consistent with Mr. Nelson's limited role as set out in the MOU. It is not, however, consistent with someone exercising *de facto* control over a company. What is clear is that Mr. Nelson did not exercise control over Tele Fácil.

C. The ownership structure of Tele Fácil

27. Tele Fácil was incorporated on 7 January 2010.¹⁸ At that time, Tele Fácil was incorporated with a share capital of \$50,000 (FIFTY THOUSAND PESOS M.N 00/100) represented by 100 common, nominative shares and released with the nominal value of \$500 (FIVE HUNDRED PESOS M. N 00/100), distributed as follows:

Shareholder	Shares	Amount
Sacasa	51 shares	\$25,500.00
Nelson	40 shares	\$20,000.00
Blanco	9 shares	\$4,500.00

Source: Exhibit C-014, p. 21.

28. It is worth noting that Mr. Nelson did not retain any ability to unilaterally appoint the Board of Directors. When Tele Fácil was incorporated, the Board of Directors was as follows: Mr. Sacasa, Chairman; Mr. Nelson, Vice President; Mr. Blanco, Treasurer; and Mr. Eugenio Miguel Sacasa Padilla, Secretary.¹⁹

29. Importantly, pursuant to Tele Fácil's by-laws:

- Calls for both ordinary and extraordinary shareholder meetings may be issued by the Chairman or Secretary.²⁰ Therefore, Mr. Nelson did not have the ability to unilaterally call a shareholders meeting;
- Resolutions in ordinary shareholders meetings shall be adopted by the majority vote of attending shareholders. Resolutions in extraordinary shareholders meetings will be adopted by an affirmative vote of at least 50% of total capital stock.²¹ With only 40% of the common shares, Mr. Nelson could not control approval of resolutions in either ordinary or extraordinary shareholder meetings;
- Resolutions of the Board of Directors shall be adopted with the affirmative vote of the majority of the

¹⁸ Claimant's Statement of Claim, ¶¶ 61-62. See also Exhibit C-014, Public Deed No. 16,778 that contains Tele Fácil México, S.A. de C.V.'s incorporation, (7 January 2010) ("Incorporation Deed").

¹⁹ *Id.*, p. 22

²⁰ *Id.*, Fifteenth clause.

²¹ *Id.*, Twentieth clause.

directors. Each member of the Board of directors has one vote.²² This means that Mr. Nelson, who had only 1 of 4 votes on the Board of Directors, did not have control over that Board; and

- As a minority shareholder, Mr. Nelson did not have the ability to dissolve or liquidate Tele Fácil.²³

30. At the time that Tele Fácil was incorporated, Mexican telecommunications law restricted foreign ownership in the telecommunications sector to 49%.²⁴

31. On 11 June 2013 the Mexican constitution was amended to eliminate restrictions on foreign ownership and control in the telecommunications sector.²⁵ Anytime after 11 June 2013, Mr. Nelson's shareholdings could have been increased from 40% to 60% – so long as the share transfer process was completed in accordance with Tele Fácil's by-laws and Mexican domestic law.

32. In his first Witness Statement, Mr. Nelson claims that the changes to foreign ownership rules on 11 June 2013 allowed Tele Fácil's partners to implement the terms of the MOU fully, pursuant to which, Mr. Nelson took control of Tele Fácil.²⁶ This statement is unsupported by any objective documentary evidence. Moreover, it is contradicted by the fact that throughout the fall of 2013 Mr. Nelson unsuccessfully requested that the ownership structure be reorganized in accordance with the MOU.

33. On 26 August 2013 Mr. Nelson emailed Carlos Bello ("Mr. Bello"), stating:

I would like to talk to you about Tele Facil.

This is for you and I to talk about.

I have no interest in doing business with these guys in a relationship like this.

I would like to see what I have to do to transfer my share of the 60% of the Tele Facil to my name, as I understand that we no longer have to have 51% owned by a Mexican citizen.

I am not sure where I go from here but I am not investing millions of dollars with these guys if this is how they perform.

Thanks for your time.²⁷

34. This email demonstrates that Mr. Nelson understood the importance of obtaining legal control by owning more than 50% of the shares. It also undermines the Claimant's position that Mr. Nelson had *de facto* control. If Mr. Nelson had *de facto* control he could have directed that the ownership change be made. That, however,

²² *Id.*, Twenty-Sixth and Twenty-Seventh clauses.

²³ *Id.*, Thirty-Fourth and Thirty-Fifth clauses.

²⁴ Claimant's Statement of Claim, ¶ 62.

²⁵ *Id.*, ¶ 63.

²⁶ Exhibit C-01, First Witness Statement of Mr. Nelson, ¶ 36.

²⁷ Exhibit R-88, Correspondence between Joshua Nelson and Carlos Bello, 26 August 2013.

did not happen.

35. By email dated 16 September 2013, John Zulk (“Zulk”) wrote to Mr. Bello (copying Messrs. Sacasa, Nelson and Blanco). He requested, amongst other things, that there be a corporate restructuring to “adjust the ownership” to reflect the “true ownership” of 60% to Mr. Nelson.²⁸ The Respondent submits that it is clear from the text of this email, along with others from Zulk identified below, that Zulk was acting on behalf of Mr. Nelson.

36. In an email dated 3 October 2013, Zulk wrote to Gustavo Struck (Mr. Nelson’s personal Mexican Attorney), Mr. Sacasa, Mr. Nelson and Mr. Bello. He again asked that ownership be amended so that the corporate documents “reflect the direct ownership” as 60% for Mr. Nelson, and 20% each for Messrs. Sacasa and Blanco.²⁹

37. On 6 December 2013, Zulk again asked Mr. Bello to “formalize” the 60% ownership of Mr. Nelson.³⁰

38. The Respondent submits that these emails demonstrate that throughout the fall of 2013, Mr. Nelson was requesting (either directly or through Zulk) that the ownership structure of Tele Fácil be changed so that he owned 60% instead of 40% of the company. The fact that this did not occur shortly after his multiple requests demonstrates his limited control over the operations of Tele Fácil.

39. In his first Witness Statement, Mr. Nelson asserts that they did not “formally amend” the ownership documents after changes in the law because Tele Fácil was not operational and they did not consider the formality necessary given the MOU.³¹ This is contradicted by his numerous – and unsuccessful – requests to “formally amend” the ownership structure of Tele Fácil. This further demonstrates Mr. Nelson’s lack of *de facto* control over Tele Fácil.

40. No formal steps were taken to increase Mr. Nelson’s shareholding in Tele Fácil until two and a half years later, during an Extraordinary Shareholders Meeting of Tele Fácil on 29 March 2016.³² At that meeting, there was a purported transfer of shares such that Mr. Nelson’s ownership increased from 40% to 60%, Mr. Blanco’s ownership increased from 9% to 20% and Mr. Sacasa’s ownership decreased from 51% to 20%.

²⁸ Exhibit R-89, Correspondence between John Zulk and Carlos Bello, 16 September 2013.

²⁹ Exhibit R-90, Correspondence between John Zulk and Carlos Bello, 3 October 2013.

³⁰ Exhibit R-91, Correspondence between John Zulk and Carlos Bello, 6 and 9 December 2013.

³¹ Exhibit C-001, First Witness Statement of Mr. Nelson, ¶ 38.

³² Exhibit C-072, Public Deed No. 10,911 that contains the Extraordinary Shareholders Meeting of Tele Fácil México, S.A. de C.V., (29 March 2016).

41. Prior to receiving notification of Mr. Blanco's bankruptcy, on 26 March 2019, the Respondent had no reason to question the validity of the share transfers made during the Extraordinary Shareholders Meeting. However, in light of the recently disclosed fact that Mr. Blanco was not a shareholder at that meeting, it is now clear that as a matter of Mexican domestic law, the transfer of shares that purportedly occurred on 29 March 2016 is null and of no legal effect. This is fully explained below.

42. The consequence is that at all material times, Mr. Nelson only owned 40% of the shares in Tele Fácil.

D. The 29 March 2016 transfer of shares is null and void

43. The Respondent has obtained an expert report from Rodrigo Buj ("Buj") to address whether the increase of Mr. Nelson's shares on 29 March 2016 was valid. For the reasons described in this section, and more fully described in his expert report, Buj's conclusion is that a valid transfer of shares did not occur on 29 March 2016.³³

44. In order to properly understand why the share transfer was not valid, it is important to appreciate certain requirements set out in Tele Fácil's by-laws.³⁴ In particular, the Eleventh clause of Tele Fácil's by-laws restricts the transfer of shares. Further, subparagraph A.7 of the Eleventh clause confirms that any share transmission not done in accordance with the by-law's procedures will be null and without legal effect.³⁵

45. According to the correspondence from Claimant's counsel, in 2011 Mr. Blanco filed for bankruptcy, and in accordance with the Bankruptcy Code of the United States of America, the 9 shares of Tele Fácil owned by Mr. Blanco automatically became part of the trust created by the United States government on the basis of the bankruptcy procedure that had been initiated.³⁶ Counsel for the Claimant also made it clear that, upon the commencement of the bankruptcy proceedings, "all legal and equitable interests of the debtor, whether disclosed or not, become the property of the bankruptcy estate."³⁷ As recognized by Claimant's counsel, "*non-disclosed property*, because it is unknown to the Trustee in bankruptcy, cannot be administered or abandoned,

³³ Third Expert Report prepared by Rodrigo Buj dated 11 June 2019 ("Buj's Third Report")

³⁴ Exhibit C-014, Incorporation Deed.

³⁵ *Id.*, Eleventh clause of By-Laws. See also Buj's Third Report, ¶¶ 11-12.

³⁶ Exhibit R-86, Claimant's Correspondence to Tribunal dated 26 March 2019. See also Buj's Third Report, ¶¶ 23-24.

³⁷ Exhibit R-087, Claimant's Correspondence to Tribunal dated 26 March 2019: "Upon the commencement of a Chapter 7 bankruptcy, a bankruptcy estate is created, and all legal and equitable interests of the debtor, *whether disclosed or not, become the property of the bankruptcy estate* until administered by the Trustee or abandoned back to the debtor at the conclusion of the process. *Non-disclosed property*, because it is unknown to the Trustee in bankruptcy, cannot be administered or abandoned, and as such *remains the property of the bankruptcy estate even after the case closes.*" [Emphasis added]

and as such *remains the property of the bankruptcy estate even after the case closes.*”³⁸

46. Once Mr. Blanco ceased to be a shareholder of Tele Fácil, he no longer had the right to attend the general shareholders' meetings and therefore to vote.³⁹ The person that is the present owner of the shares, and has been since Mr. Blanco’s bankruptcy, is the trust created during the bankruptcy procedure.

47. Mr. Buj confirms that the transfer of shares carried out in favour of Mr. Nelson and Mr. Blanco at the Shareholder Meeting of 29 March 2016 are null and devoid of legal effects for a number of reasons.

48. *First*, the procedure provided for in the Eleventh Clause of Tele Fácil’s by-laws establishes that shares of restricted circulation can only be transferred with the approval of the shareholders constituted in an Ordinary Meeting – otherwise the transfer is null and has no legal effect.⁴⁰

49. The Third Clause of the Contract for the Transfer of Shares shows that the approval was granted *by the Board of Directors*, when approval *by the Ordinary Shareholder Meeting*, prior to the subscription of the contract, was required. This process for the transfer of shares transgresses the procedure provided for in the Eleventh Clause Tele Fácil’s by-laws. Consequently, the transfer of shares is null and has no legal effect.⁴¹

50. *Second*, Articles 186, 187 and 188 of the General Law of Mercantile Companies (“GLMC”) require that prior to the holding of an ordinary Shareholder Meeting, a call must be published 15 days in advance unless it is a plenary meeting (all shareholders present) and therefore it is not necessary to publish the call.⁴²

51. There was no call for the Shareholder Meeting of 29 March 2016. Instead, it proceeded on the basis that all of the shareholders were present. This was factually incorrect because it assumed that Mr. Blanco still owned his 9 shares. A representative of the trust created as a result of the bankruptcy proceedings did not attend the 29 March 2016 Shareholder’s Meeting. Therefore, all shareholders were not present, and it was

³⁸ *Id.*

³⁹ Buj’s Third Report, ¶25. Under U.S. bankruptcy law, specifically at 11 U.S.C. § 541, a bankruptcy estate “is comprised of all the following property, wherever located and by whomever held: ... all legal or equitable interests of the debtor in property as of the commencement of the case”, and 11 U.S.C. § 362 provides that a bankruptcy petition “operates as a stay, applicable to all entities, of ... any act ... to exercise control over property of the estate”. A prominent treatise on U.S. bankruptcy law states “if property was not properly scheduled by the debtor, it is not automatically abandoned at the end of the case.... Even after the case is closed, the estate continues to retain its interest in unscheduled property”. Collier on Bankruptcy, 16th ed., ¶554.03, RL-022.

⁴⁰ *Id.*, ¶¶ 11, 12, 33.

⁴¹ *Id.*, ¶ 34.

⁴² *Id.*, ¶¶ 17-21.

not a plenary meeting.⁴³

52. The absence of a published call, coupled with the fact that it was not a plenary session because one shareholder was not present, results in the 29 March 2016 Shareholding Meeting being null and of no legal effect. This means that the transfer of shares purportedly approved in the Meeting of 29 March 2016, including the transfer of shares to both Mr. Nelson and Mr. Blanco are null and of no legal effect.⁴⁴

53. The consequence: Mr. Nelson's shareholdings were not increased from 40% to 60% on 29 March 2016. He continues to hold only 40% of Tele FÁCil's shares. He did not have legal control of Tele FÁCil.

II. THE LAW

A. Introduction

54. Section B of Chapter Eleven permits international claims to be made in certain defined circumstances. Consistent with long-standing rules of customary international law, it does not allow a company of a Party to submit an international claim against its own State. Article 1117(4) states in this regard that: "An investment may not make a claim under this Section".⁴⁵

55. Article 1117(1) permits a derivative claim to be brought in the name of an enterprise that is a "juridical person" of the respondent State in certain defined circumstances. Specifically:

- The investor must own or control the enterprise directly or indirectly; and
- Both the investor and the enterprise must consent to the NAFTA arbitration and waive their right to pursue claims for damages before other tribunals or dispute settlement mechanisms.

56. The provisions governing claims made under Article 1117 recognize the fact that in all three NAFTA Parties (and universally) ownership or control gives the owner or controlling shareholder very broad powers over it. It gives it the authority to modify or liquidate the enterprise, to appoint officers and directors, modify its governing bylaws and thereby control the policy and management affairs of the corporation. Mr. Nelson, as a minority shareholder with only 40% of the shares, did not and does not have the ability to control Tele FÁCil in these ways.

57. Mr. Nelson's minority shareholding grants him the right to be notified of assembly meetings, to vote

⁴³ *Id.*, ¶ 21.

⁴⁴ *Id.*, ¶ 31.

⁴⁵ North American Free Trade Agreement, Article 1117 (4).

according to the shares it owns, and to participate with respect to profit earned. However, as a minority shareholder he is not allowed to act in representation of the company, and only has the rights conferred by the company bylaws or by domestic law.

58. The NAFTA does not grant rights to bring a claim on behalf of an enterprise to shareholders that do not demonstrate the ownership or control of the enterprise. Such shareholders can only file a claim under Article 1116 for alleged violations of the provisions in Section A that directly affect their rights *qua* shareholders.

59. In this proceeding, until 26 March 2019, the Respondent relied upon representations by the Claimant that at the time this arbitration was commenced Mr. Nelson owned 60% of Tele Fácil's shares. Those representations, however, were not accurate. As a minority shareholder with only 40% of Tele Fácil's shares, Mr. Nelson does not exercise legal control.

60. Moreover, the Claimants have failed to establish that Mr. Nelson exercised *de facto* control. Mr. Nelson's lack of involvement in Tele Fácil's day-to-day management, which is consistent with the scope of responsibilities confirmed in the MOU, coupled with his inability to unilaterally control or direct Tele Fácil under the company's by-laws, contradicts the Claimants' position that Mr. Nelson had *de facto* control of Tele Fácil. There is no evidence in the record that suggests that Mr. Nelson was consulted or approved any major decisions by Tele Fácil.

61. In short, the Claimant has failed to establish that Mr. Nelson directly or indirectly owned or controlled Tele Fácil and, therefore, that he has standing to bring claims on its behalf under Article 1117. At most, Mr. Nelson holds a non-controlling stake in Tele Fácil. On this basis, he is limited at law to submitting a claim on his own behalf under Article 1116 for alleged treaty violations as a shareholder.

B. Ownership and control

62. The general rule of interpretation embodied in Article 31 of the VCLT states that "a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".⁴⁶ The context for the purpose of interpretation includes the text of the treaty, including its preamble and annexes. The VCLT also prescribes that "a special meaning shall be given to a term if it is established that the parties so intended".

63. Article 1117 provides in the relevant part as follows:

Article 1117: Claim by an Investor of Party on Behalf of an Enterprise

⁴⁶ VCLT, Article 31.

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 a claim to arbitration under this Section a claim that the other Party has breached an obligation under: [...] [Emphasis added]

64. The terms “ownership” and “control” are not defined in the NAFTA. For that reason, the analysis must begin with the ordinary meaning of the terms.

65. The Oxford defines “ownership” as:

The act, state, or right of possessing something.⁴⁷

66. The *Diccionario de la lengua española*, defines “*propiedad*” as:

1. f. *Derecho o facultad de poseer alguien algo y poder disponer de ello dentro de los límites legales.*⁴⁸

– o –

1. f. Right or faculty of someone to possess something and to dispose of it within the legal limits. [Translated by the Respondent]

67. The Respondent submits that in line with this definition and the fact that the term appears unqualified in Article 1117, the word “owns” refers to full ownership of the enterprise. With 40% of Tele Fácil’s shares it is clear that Mr. Nelson does *not* own Tele Fácil. He *owns* 40% of its shares, nothing more.

68. It is further submitted that for cases involving less than full ownership, Article 1117 requires the investor to establish that he/she/it has direct or indirect “control” of the enterprise in order to bring a claim on its behalf. However, as pointed out earlier in this submission, the NAFTA does not define the term “control”. Because of the context in which it appears, it is plain to see that the term “control” in Article 1117 refers to “corporate control” (*i.e.*, control of the enterprise). The Black’s Law Dictionary defines “corporate control” as:

1. Ownership of more than 50% of the shares in a corporation – Also termed effective control; working control.

2. The power to vote enough of the shares in a corporation to determine the outcome of matters that the shareholders vote on.⁴⁹

69. The Oxford Dictionary defines “control” as:

1 [mass noun] The power to influence or direct people's behaviour or the course of events.⁵⁰

70. The *Diccionario de la lengua española*, defines “*control*” as:

2. m. *Dominio, mando, preponderancia.*

– o –

⁴⁷ <https://www.lexico.com/en/definition/ownership>

⁴⁸ *Diccionario de la lengua española*. <http://dle.rae.es/?id=UNs0WGg>

⁴⁹ Exhibit R-92, Black’s Law Dictionary, 10th Edition for the iPhone and iPad, version 1.4; Thomson Reuters (2014).

⁵⁰ <https://www.lexico.com/en/definition/control>

2. m. Dominance, command, preponderance⁵¹ [Translated by the Respondent]

71. Under either of these definitions, the term “control” in Article 1117 must be interpreted to mean legal corporate control of a company under the *lex situs* (i.e., Mexican law in this case). It is a reference to the investor’s power to decide on substantive matters, such as: the appointment and removal of the company’s directors and officers, the approval and amendment of the company’s by-laws, the transfer of shares or admission of new partners, or the dissolution of the company.

72. As noted by a well-respected scholar and arbitrator in the subject of investment claims:

The question is then how to define ‘control’ for the purposes of satisfying the requisite nexus between the claimant and the investment. In giving effect to the ordinary meaning of the word ‘control’ or the implicit requirement that mirrors it, reference must be had to general principles of property law and company law. An assertion that the meaning of control in the investment treaty context is *sui generis* and thus can be tailored by a tribunal to meet the exigencies of a particular case must be treated with skepticism. The majority of investment treaties say nothing about the indices of control and international law in general does not purport to regulate the relationship between an individual or legal entity and its assets. Moreover, such an approach undermines the role of the investment treaty as an instrument for the encouragement of investment because the critical issue of whether the investment of the putative investor is covered in the treaty will be incapable of resolution at the investment planning stage.⁵² [Emphasis added]

73. The same author concludes that the question of whether an investor of another Party exercises control over an enterprise of a Party is a question of domestic law:

This discussion of the relationship between an individual or legal entity (the claimant) and its investment (property or assets) reveals that the question of control is a question of law. It would be meaningless for a claimant to assert that it is the *de facto* owner of the land that constitutes its investments or has some other form of *de facto* control in respect thereof. Either the claimant has a power to control that property that is recognized by the *lex situs* or it does not.⁵³

74. Tele Fácil is an *anonymous corporation* (i.e., a “*sociedad anónima*”) constituted under Mexican law and, Pursuant to Article 178 of the GLMC, legal control of an *anonymous corporation* resides in the General Shareholders Meeting (“*Asamblea General de Accionistas*”):

Article 178.- The General Shareholders Meeting is the Supreme Organ of the Society; it may agree to and ratify all acts and operations of the [Society] and its resolutions shall be implemented by its appointee or, absent such an appointment, by the Administrator or the Board of Directors.

[...] ⁵⁴

75. Hence, whoever controls the General Shareholders Meeting has legal control of the company. As a

⁵¹ Diccionario de la lengua española. <https://dle.rae.es/?id=AeYZ09V>

⁵² RL-020, Douglas, Zachary; *The International Law of Investment Claims*; Cambridge University Press, 2009, ¶ 556.

⁵³ *Id.*, ¶ 558.

⁵⁴ RL-021, The General Law of Mercantile Companies, Article 178. The original text in Spanish reads: “*Artículo 178.- La Asamblea General de Accionistas es el Órgano Supremo de la Sociedad; podrá acordar y ratificar todos los actos y operaciones de ésta y sus resoluciones serán cumplidas por la persona que ella misma designe, o a falta de designación, por el Administrador o por el Consejo de Administración*”

minority shareholder with only 40% of the shares, Mr. Nelson *did not* control Tele Fácil’s General Shareholders Meeting at all material times. Hence, under Mexican law and Tele Fácil’s by-laws, Mr. Nelson did not have the ability to unilaterally exercise any of the powers associated with corporate control of an enterprise. In particular, Mr. Nelson did not have the power to unilaterally:

- appoint or remove directors;
- amend the by-laws;
- transfer shares; or
- dissolve and liquidate the company.

76. Even assuming that managerial control over the company suffices to establish “control” under Article 1117 of the NAFTA –and the Respondent maintains that it does not– the Respondent submits that Mr. Nelson did not have such control. As noted earlier in this pleading, pursuant to the by-laws, decisions by the Board of Directors are taken by majority vote.⁵⁵ Having only 1 of 4 votes, Mr. Nelson was incapable of compelling decisions by the Board of Directors. It is also worth noting that it was Mr. Sacasa and not Mr. Nelson who chaired the Board of Directors, and it was Mr. Sacasa and not Mr. Nelson who was appointed Director General of Tele Fácil.

77. Mr. Nelson’s lack of *de facto* control is further highlighted by his inability to compel the increase of his shareholding from 40% to 60% in the fall of 2013.

78. In light of the above, the Claimant’s reliance on *International Thunderbird v. Mexico* (“Thunderbird”) in its correspondence of 5 April 2019, comes as no surprise.⁵⁶

79. The question in *Thunderbird* was “whether ‘control’ must be established in the legal sense, or whether *de facto* control can suffice for the purposes of Chapter Eleven of the NAFTA.”⁵⁷ The tribunal held that “a showing of effective or ‘*de facto*’ control was sufficient for the purposes of Article 1117 of the NAFTA”.⁵⁸

80. Mexico strongly disagrees with this aspect of the award. The concept of *de facto* control is subjective and thus, injects uncertainty and ambiguity where none should exist. Opening the interpretation of “control” to

⁵⁵ Exhibit C-014, Incorporation Deed, Thirty-Fourth and Thirty-Fifth clauses.

⁵⁶ Exhibit CL-049, *International Thunderbird Gaming Corp. v. United Mexican States* (“Thunderbird”), UNICITRAL (NAFTA), Award (26 January 2006).

⁵⁷ *Id.*, ¶ 105.

⁵⁸ North American Free Trade Agreement, Article 1117 (4).

other subjective factors, such as the ability to exercise substantial influence over the management and operation of the investment, would only lead to questionable subjective and inconsistent outcomes. Most importantly, it would undermine the very purpose of the treaty by casting doubts on the fundamental question of which investments are covered by the treaty and which are not.

81. But even if this Tribunal were to accept that *de facto* control suffices for the purposes of Article 1117 of NAFTA, the Respondent will observe that:

- 1) The *Thunderbird* tribunal made its determination that the claimant had *de facto* control over the Mexican entities on the basis of the record as a whole and the facts upon which *de facto* control was found in *Thunderbird* are absent from this case; and
- 2) The requisite evidentiary threshold is extremely high. As the Tribunal wrote in *Thunderbird*, “[i]n the absence of legal control however, the Tribunal is of the opinion that *de facto* control must be established beyond any reasonable doubt.”⁵⁹ The evidence required to establish beyond a reasonable doubt that Mr. Nelson exercised *de facto* control over Tele Fácil does not exist.

82. In relation to the first point, the Tribunal in *Thunderbird* determined that the claimant party exercised *de facto* control over the EDM based on the following:

107. Despite *Thunderbird* having less than 50% ownership of the Minority EDM Entities, the Tribunal has found sufficient evidence on the record establishing an unquestionable pattern of *de facto* control exercised by *Thunderbird* over the EDM entities. *Thunderbird* had the ability to exercise a significant influence on the decision-making of EDM and was, through its actions, officers, resources, and expertise, the consistent driving force behind EDM’s business endeavour in Mexico.

[...]

109. In the present case, having regard to the record as a whole, the Tribunal finds that without *Thunderbird*’s key involvement and decision-making during the relevant time frame, i.e., during the planning of the business activities in Mexico, the initial expenditures and capital, the hiring of the machine suppliers, the consultations with SEGOB, and the official closure of the EDM facilities, EDM’s business affairs in Mexico could not have been pursued. Namely, the key officers of *Thunderbird* and the Minority EDM Entities were one and the same (see *Dramatis Personae* of 26 April 2004: Mr. Jack Mitchell was President and CEO of *Thunderbird* and the EDM entities; Mr. Peter Watson, counsel to *Thunderbird*, was shareholder in *Thunderbird* and the EDM entities). The initial expenditures, the know-how of the machines, the selection of the suppliers, and the expected return on the investment were provided or determined by *Thunderbird*. Likewise, legal advice regarding the operation of the EDM machines in Mexico was addressed to *Thunderbird* (see Mr. de Ruiz de Velasco’s legal opinion of 25 August 2000 at Exh. R-112).⁶⁰

83. The factual matrix in which the *Thunderbird* Tribunal relied to determine that *Thunderbird* exercised *de facto* control over the EDM companies is not present in this case. Mr. Nelson’s participation appears to have been limited to providing the initial funding and offering know-how for the implementation of DID services. This is insufficient to establish *de facto* control beyond a reasonable doubt or otherwise. To paraphrase

⁵⁹ Exhibit CL-049, *Thunderbird*, ¶ 106.

⁶⁰ *Id.*, ¶¶ 107, 109.

Thunderbird: Mr. Nelson was not the driving force behind Tele Fácil's endeavor in Mexico.

84. Moreover, the following facts demonstrate that Mr. Nelson did not exercise *de facto* control:

- Mr. Nelson unsuccessfully tried to have his ownership in Tele Fácil increased in the fall of 2013;
- The MOU confirms that Mr. Nelson “does not have the time to personally focus on the Project and therefore will be relying on his Partners as well as any staff he may hire or appoint to work on the Project to manage the Project on a day to day basis”⁶¹;
- Mr. Nelson did not prepare or review Tele Fácil's Concession Application;
- Mr. Nelson did not participate in negotiations with Telmex;
- Mr. Nelson demonstrated minimal knowledge about the negotiations between Tele Fácil and Telmex⁶²;
- The Memorandum of Understanding between Tele Fácil and Future Telecom dated 13 June 2014 was executed by Mr. Sacasa. The Tribunal will recall that this agreement established what, according to the Claimant, would have been Tele Fácil's most profitable line of business (international termination)⁶³;
- The Master Telecommunications Services Agreement executed by and between Metro Net S.A.P.I de C.V. and Tele Fácil dated 28 January 2014 was signed by Mr. Sacasa on behalf of Tele Fácil⁶⁴;
- The proposal from Global Convergence Solutions, Inc to Tele Fácil for the GCS Dynamic Management Solution dated 19 August 2014, was addressed to Mr. Blanco⁶⁵; and
- The Alliance Agreement by and between Tele Fácil México and MobileTalk-Q, S.L. on 1 October 2013 was executed by Mr. Blanco on behalf of Tele Fácil.⁶⁶

85. For the foregoing reasons, the Respondent submits that the Claimant has failed to establish an evidentiary basis for this Tribunal to conclude, beyond a reasonable doubt, that Mr. Nelson possessed *de facto* control over Tele Fácil.

⁶¹ Exhibit C-013, Memorandum of Understanding by and between Jorge Blanco, Josh Nelson, and Miguel Sacasa dated 20 July 2009 (“MOU”), p. 3.

⁶² Transcript, Volume 2, pp.338-344. See also *supra*, ¶¶ 24-25.

⁶³ Exhibit C-020, Memorandum of Understanding between Tele Fácil Mexico S.A de C.V. and Future Telecom L.L.C. (14 June 2013), p. 8.

⁶⁴ Exhibit C-023, Master Telecommunications Services Agreement executed by and between Metro Net S.A.P.I. de C.V. and Tele Fácil México, S.A. de C.V. (28 January 2014) (“RedIT Agreement”), p. 6.

⁶⁵ Exhibit C-026, Global Convergence Solutions, Inc. Proposal to Tele Fácil Mexico S.A. de C.V. for The GCS Dynamic Management Solution (19 August 2014; accepted 10 December 2014), p.3.

⁶⁶ Exhibit C-102, Alliance Agreement by and between Tele Fácil México, S.A. de C.V. and MobileTalk-Q, S.L. (1 October 2013), p. 4.

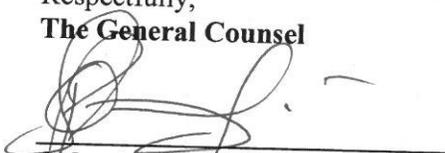
C. Conclusion

86. The Respondent submits that Mr. Nelson lacks the requisite standing to assert any claim under the NAFTA pursuant to Article 1117, and as such, said claim must be dismissed with submissions on costs to follow.

87. Mexico reserves the right to request leave from the Tribunal to address any new evidence filed by the Claimant in response to this submission.

88. All of which is respectfully submitted this 13th day of June 2019.

Respectfully,
The General Counsel



Orlando Pérez Gárate