

**IN AN ARBITRATION UNDER THE NORTH AMERICAN FREE TRADE
AGREEMENT AND
THE ARBITRATION RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (1976)**

**JOSHUA DEAN NELSON, IN HIS OWN RIGHT
AND ON BEHALF OF TELE FÁCIL MÉXICO, S.A. DE C.V.,**

Claimant

and

THE UNITED MEXICAN STATES

Respondent

ICSID Case No. UNCT/17/1

CLAIMANT'S RESPONSE TO RESPONDENT'S OBJECTION TO JURISDICTION

TRIBUNAL

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EXHIBITS

| Factual Exhibit | Document Description | Original Language |
|-----------------|---|-------------------|
| C-134 | <i>Libro de Registro de Acciones</i> (Tele Facil's Corporate Book) | Spanish |
| C-135 | <i>Contrato de Compra Venta de Acciones</i> (Share Agreement), March 29, 2016, CLAIMANT1624 – CLAIMANT1626 | Spanish |
| C-136 | Motion to Reopen Case and for Authority to Prosecute His Minority Interest in Tele Fácil in an Impending NAFTA Arbitration, Mar. 25, 2019 | English |
| C-137 | Order on Debtor's Motion to Reopen Case and for Determination of Entitlement to Settlement Proceeds, April 18, 2019 | English |
| C-138 | Stipulation and Settlement Agreement dated April 25, 2019 | English |
| C-139 | Order Granting Trustee's Motion to Approve Stipulation to Compromise Controversy, May 29, 2019 | English |
| C-140 | Email from Mr. Stephen Becker of Pillsbury Winthrop Shaw Pittman to Mr. Alan Bonfiglio Rios, Respondent's Counsel dated May 13, 2019 | English |
| C-141 | <i>Relación de Transferencias Enviadas Por Josh Nelson</i> , CLAIMANT0004399 | Spanish |
| C-142 | Expert Report by Melanie L. Cyganowski | English |
| C-143 | Expert Report Dr. by Oscar Vasquez Del Mercado Cordero | Spanish |

EXHIBITS

| Legal Exhibit | Document Description | Original Language |
|----------------------|---|--------------------------|
| CL-156 | <i>EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic</i> , ICSID Case No. ARB/14/14, Award (Aug. 18, 2017) | English |
| CL-157 | <i>Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador</i> , ICSID Case No. ARB/08/6, Decision on the Remaining Issues of Jurisdiction and on Liability, 12 September 2014 | English |
| CL-158 | <i>Bernhard von Pezold and others v. Republic of Zimbabwe</i> , ICSID Case No. ARB/10/15, Award, 28 July 2015 | English |
| CL-159 | <i>Aguas del Tunari, S.A. v. Republic of Bolivia</i> , ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005 | English |
| CL-160 | <i>Ley de Concurso Mercantil</i> (Bankruptcy Law), enacted on May 12, 2000 | Spanish |
| CL-161 | Hearing Before the Committee on Foreign Relations of the United States Senate on the Bilateral Investment Treaties with Argentina, Armenia, Bulgaria, Ecuador, Kazakhstan, Kyrgyzstan, Moldova, and Romania, S. Hrg. 103-292, 103rd Cong., 1st Sess., 27 (Sept. 10, 1993) | English |
| CL-162 | Kenneth Vandavelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 116 (2009) | English |
| CL-163 | <i>Ley General de Sociedades Mercantiles</i> (General Law Of Commercial Companies), enacted on Aug. 4, 1934 | Spanish |

I. INTRODUCTION

1. Respondent's Objection to Jurisdiction on the basis of Mr. Jorge Blanco's U.S. bankruptcy case is entirely unfounded. Respondent argues, without any grounding in law, that the loss of Mr. Blanco's shares in Tele Fácil Mexico, S.A. de C.V. ("Tele Fácil") in a 2011 U.S. bankruptcy proceeding automatically invalidated a 2016 transfer of company shares from Mr. Miguel Sacasa to Claimant, Mr. Joshua Nelson, which transformed Claimant into a majority shareholder. Respondent asserts that because Mr. Blanco no longer owned his shares, by operation of U.S. bankruptcy law, he was no longer a shareholder under Mexican law for purposes of approving the transfer. Thus, according to Respondent, Mr. Nelson always remained a minority shareholder and, therefore, lacks standing to claim on behalf of Tele Fácil pursuant to Article 1117 of the NAFTA.

2. Respondent's Objection fails on many levels. First, Respondent has failed to demonstrate how the results of a U.S. bankruptcy action would immediately take effect in the Mexican legal system without any implementation through the required recognition action in Mexico. Second, Respondent has failed to show that Mr. Blanco's status as a shareholder of Tele Fácil ever changed, as a matter of Mexican law, for purposes of conducting the company's internal business. Third, in any event, a U.S. bankruptcy court has restored Mr. Blanco's ownership rights to his shares *nunc pro tunc*, thus negating any possibility that his U.S. bankruptcy could have invalidated the share transfer to Mr. Nelson. Fourth, and finally, even if Mr. Nelson did not have legal control of Tele Fácil, he had *de facto* control by virtue of his dominant influence over the direction of Tele Fácil's course.

3. In sum, Claimant's standing to claim under Article 1117 is unassailable.

II. FACTUAL BACKGROUND

4. The facts regarding the shareholdings in Tele Fácil have been well established in Claimant's prior pleadings. Suffice it to say here, on January 7, 2010, Tele Fácil was established with the following corporate shareholdings: Mr. Sacasa at 51%; Mr. Nelson at 20%; and Mr. Blanco at 9%.¹ On March 29, 2016, Tele Fácil's shareholdings were restructured as follows: Mr. Nelson at 60%; Mr. Sacasa at 20%; and Mr. Blanco at 20%.²

5. As explained below, between the time Tele Fácil was established and restructured, Mr. Blanco filed for bankruptcy in 2011 in the State of Florida in the United States.³ During those proceedings, he inadvertently failed to list his Tele Fácil shares as an asset to be administered by the bankruptcy trustee. This fact was disclosed to the Tribunal and Respondent soon after counsel became aware of this fact, and Mr. Blanco withdrew as a claimant in this arbitration in good faith and in order to avoid any disruption to the arbitral proceedings.

A. Claimant Disclosed Mr. Blanco's Bankruptcy Problem In Good Faith

6. On March 26, 2019, Claimant's counsel on behalf of Claimant and Mr. Blanco informed the Tribunal and Respondent that they had recently discovered that Mr. Blanco had filed for bankruptcy in 2011 and had "inadvertently failed to disclose his interests at the time in Tele Fácil Mexico, SA de C.V."⁴ Claimant's counsel explained that, as a consequence of Mr.

¹ *Escritura Pública No. 16,778 que contiene la constitución de Tele Fácil México, S.A. de C.V.* (Public Deed No. 16,778 that contains Tele Fácil México, S.A. de C.V.'s incorporation) (January 7, 2010) (hereinafter "Incorporation Deed"), **C-014**.

² *Escritura Pública No. 10,911 que contiene la Asamblea Extraordinaria de Accionistas de Tele Fácil México, S.A. de C.V.* (Public Deed No. 10,911 that contains the Extraordinary Shareholders Meeting of Tele Fácil México, S.A. de C.V.) (March 29, 2016) (hereinafter "Transfer of Shares"), **C-072**; *Libro de Registro de Acciones* (Tele Fácil's Corporate Book), **CL-134**.

³ *In re Jorge Blanco Jr. aka Jorge Luis Blanco Jr.*, Case No. 11-33664-RAM Chapter 7, U.S. Bankruptcy Court for the Southern District of Florida.

⁴ Claimant's letter to the Tribunal dated March 26, 2019, at 1.

Blanco's error, his shares had not been administered by the bankruptcy and, thus, had not been abandoned back to him, pursuant to U.S. bankruptcy law.⁵

7. As a consequence, Claimant's counsel indicated that Mr. Blanco would withdraw as a claimant in the proceedings:

... Mr. Blanco is not presently the owner of his original shareholdings in Tele Fácil. Because Mr. Blanco has determined, in consultation with his bankruptcy counsel, that the steps required to remedy the situation cannot be completed during the time available before the hearing, he does not want to unnecessarily delay or complicate the arbitration. As a result, he has instructed us to withdraw him as a claimant in this action. He will, however, continue to participate as a fact witness on behalf of Josh Nelson and Tele Fácil. Consequently, we wish to hereby notify you of his withdrawal as a claimant, and request that ICSID take appropriate administrative steps to reflect this change.⁶

Claimant's counsel indicated its regret about the late notice about this development, "but trust[ed] that his decisive action will not disturb the schedule of the proceedings."⁷

8. On March 27, 2019, Respondent posed various questions to Claimant regarding Mr. Blanco's bankruptcy, including when Claimant's attorneys became aware of the past action, when the bankruptcy case was initiated and concluded, and who served as bankruptcy trustee.⁸

9. On March 29, 2019, Claimant responded by providing, among other, the following information: the date of Mr. Blanco's bankruptcy case was opened ("August 25, 2011"); the nature of the action ("Chapter 7"); the responsible bankruptcy court ("U.S. Bankruptcy Court for the Southern District of Florida"); the name of the bankruptcy trustee ("Marcia T. Dunn"); the date the original bankruptcy case was closed ("December 2, 2011"); and

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Respondent's letter to the Tribunal dated March 27, 2019, at 1-2.

the reopening of Mr. Blanco's case ("In the new bankruptcy action, Mr. Blanco has disclosed his involvement in the NAFTA arbitration").⁹

10. Claimant's letter also indicated: "Consistent with counsels' local rules regarding ethical duties as attorneys, Claimant's counsel promptly disclosed the information regarding Mr. Blanco's bankruptcy to the Tribunal, as well as Mr. Blanco's determination that he did not want the process that will be required for him to regain ownership of the shares to become an impediment to the scheduled hearing and, therefore, was withdrawing as a claimant."¹⁰

11. On April 3, 2019, Respondent indicated that it would likely request the Tribunal's authorization to amend its Statement of Defense to present new jurisdictional objections in light of the recent revelation regarding Mr. Blanco's bankruptcy.¹¹ Namely, Respondent took the position that the loss of Mr. Blanco's ownership of his Tele Fácil shares invalidated the transfer of shares to Mr. Nelson from Mr. Sacasa on March 29, 2016, which transformed Mr. Nelson into a majority shareholder.¹² Respondent added that "[i]f Claimants challenge the invalidity of the shareholders' meeting of March 29, 2016, Respondent may be in need to request to the national courts of Mexico for a decision declaring the nullity of said meeting."¹³ Respondent stated that its expert, Mr. Rodrigo Buj, had indicated that this judicial process can take two years.¹⁴

12. On April 5, 2019, Claimant refuted the basis for any jurisdictional objection, arguing that under Tele Fácil's bylaws and Mexican corporate law, Mr. Blanco remained a shareholder in Tele Fácil for purposes of the company's internal business and that, in any event, Mr. Nelson had *de facto* control over Tele Fácil. Thus, Mr. Blanco's bankruptcy did not affect

⁹ Claimant's letter to the Tribunal dated March 29, 2019, at 1-2.

¹⁰ *Id.* at 1.

¹¹ Respondent's letter to the Tribunal dated April 3, 2019, at 1.

¹² See *Contrato de Compra Venta de Acciones* (Share Agreement), March 29, 2016, CLAIMANT1624 – CLAIMANT1626, C-135.

¹³ *Id.* at 2.

¹⁴ *Id.*

Mr. Nelson's standing to claim under Article 1117 of the NAFTA.¹⁵ Claimant also stated: "it should be recalled that Mr. Blanco withdrew not because he could not at some point in the future regain ownership of his shares *nunc pro tunc*, but rather because the process for doing so could not be completed in the limited time before the hearing."¹⁶

13. On April 8, 2019, Respondent reiterated its objection and requested the Tribunal's authorization to modify its Statement of Defense, with additional arguments supported by an expert report by Mr. Buj.¹⁷ Respondent acknowledged that its objection would only impact Mr. Nelson's standing to claim under Article 1117, not Article 1116.¹⁸ With regard to next steps, Respondent proposed that the Tribunal order either supplemental briefing after the hearing or a postponement of the hearing.¹⁹

14. On April 9, 2019, Claimant agreed that the hearing should not be postponed and requested that the Tribunal's determination regarding subsequent briefing could be made at the end of the hearing. Claimant reiterated that "Mr. Blanco withdrew as claimant in order to minimize any potential disruption to the schedule of proceedings" and "reserve[d] the right to have Mr. Blanco reinstated as a claimant if and when the bankruptcy court abandons Mr. Blanco's shares back to him."²⁰

15. On April 15, 2019, Respondent opposed Claimant's position that it reserves the right to have Mr. Blanco reinstated.

¹⁵ Claimant's letter to the Tribunal dated April 5, 2019, at 1-4.

¹⁶ *Id.* at 5.

¹⁷ Respondent's letter to the Tribunal dated April 8, 2019, at 1.

¹⁸ *Id.* at 2.

¹⁹ *Id.* at 2.

²⁰ Claimant's letter to the Tribunal dated April 9, 2019, at 1.

16. In Procedural Order No. 13, the Tribunal considered that “the withdrawal of Mr. Blanco as co-claimant is not in dispute, but rather the consequences of his withdrawal and the timing for the Parties and the Tribunal to discuss such consequences.”²¹

17. In sum, Claimant disclosed Mr. Blanco’s bankruptcy issue in a timely manner, in good faith, and consistent with his counsels’ ethical duties. In addition, on multiple occasions, Claimant made clear that Mr. Blanco would reopen his bankruptcy case to restore his ownership rights to his Tele Fácil shares, but could not do so in time for the hearing: on March 26, 2019 (“the steps required to remedy the situation cannot be completed during the time available before the hearing”); on March 29, 2019 (“In the new bankruptcy action, Mr. Blanco has disclosed his involvement in the NAFTA arbitration”; “he did not want the process that will be required for him to regain ownership of the shares to become an impediment to the scheduled hearing”); and on April 5, 2019 (“Mr. Blanco withdrew not because he could not at some point in the future regain ownership of his shares *nunc pro tunc*, but rather because the process for doing so could not be completed in the limited time before the hearing”).

B. Mr. Blanco Took Steps To Restore His Ownership Of His Shares

18. Soon after Mr. Blanco realized the consequences of his inadvertent failure to disclose his Tele Fácil shares to the bankruptcy trustee administering his case, he began a process to obtain the return of his property.

19. On March 25, 2019, Mr. Blanco filed a motion to reopen his bankruptcy case.²² On April 18, 2019, the U.S. Bankruptcy Court for the Southern District of Florida reopened his case and Mr. Blanco was “granted leave to amend his schedules to list his interest in Tele

²¹ Procedural Order No. 13, April 17, 2019, ¶ 15.

²² Motion to Reopen Case and for Authority to Prosecute His Minority Interest in Tele Fácil in an Impending NAFTA Arbitration, March 25, 2019, C-136.

Fácil.”²³ On April 18, 2019, Marcia T. Dunn was reappointed as Mr. Blanco’s Bankruptcy Trustee.²⁴ On April 25, 2019, Mr. Blanco and the Trustee entered into a Stipulation whereby Mr. Blanco would provide security for any potential remaining claims by creditors in exchange for the return of his shares on a retroactive basis as of the date of the filing of his initial bankruptcy petition.

20. The relevant terms of the Stipulation are reproduced below:
- a. The Debtor shall pay or cause to be paid one hundred percent of all allowed unsecured claims, in addition to all the Trustee’s statutory fees, and Trustee’s professionals’ fees and costs (the “Settlement Amount”). The Settlement Amount shall be paid to the Trustee as follows:
 - i. An initial payment to the Trustee of one-hundred thousand dollars (\$100,000.00) on or before April 26, 2019 (the “Initial Payment”); and
 - ii. An additional payment to the Trustee of one-hundred thousand dollars (\$100,000.00) on or before May 3, 2019 (the “Second Payment”); and
 - iii. Once the total amount of valid claims has been determined, inclusive of the Trustee’s statutory fees and costs, the Trustee’s professionals’ fees and costs, and any other valid claim (the “Total Claims Amount”), to the extent that the Total Claims Amount exceeds the sum of the Initial Payment and Second Payment, the Debtor shall make an additional payment in the amount equal to the Total Claims Amount less the previously received Initial Payment and Second Payment (the “Supplemental Payment”). The Supplemental Payment shall be due and payable to the Trustee within the thirty (30) days of the resolution of any and all objections to claims.
 - b. The Trustee will file a notice of the Supplemental Payment with the Court but will not require any additional Court approval.
 - c. The payments of the Settlement Amount, including Initial Payment, Second Payment, and Supplemental Payment shall be by cashier’s check, money order or attorney’s trust account check made payable to the order of “Marcia T. Dunn, Trustee” and mailed to the Trustee’s office at 66 West Flagler Street, Suite 400, Miami, Florida 33130. The payment instruments shall clearly state the name of the Debtor and the Debtor’s case number.

²³ Order on Debtor’s Motion to Reopen Case and for Determination of Entitlement to Settlement Proceeds, April 18, 2019, **C-137**.

²⁴ Stipulation and Settlement Agreement dated April 25, 2019, at ¶ H, **C-138**.

- d. In exchange, the Trustee hereby conveys the Estate's interest, and the Debtor repurchases his interest, in Tele Fácil, *Nunc Pro Tunc*, to the Petition Date.²⁵

21. Following the execution of the Stipulation, all known creditors were informed about the reopening of Mr. Blanco's case and a 21-day notice period began to run. During this period no additional claims against Mr. Blanco's bankruptcy estate were lodged with the Trustee.

22. Despite having been provided, on multiple occasions, full information about Mr. Blanco's original bankruptcy case and his efforts to reopen that case,²⁶ and the fact that Respondent's counsel acknowledged during the hearing at the "meet and confer" meeting with Claimant's counsel that Mr. Blanco was seeking a *nunc pro tunc* remedy, Respondent did not monitor the proceedings or choose to engage on the matter in any manner.²⁷ Nor did Respondent seek to have the Trustee or any other party initiate legal action in Mexico in relation to claims against Mr. Blanco's shares, pursuant to Mexico's *Law of Commercial Bankruptcy*.²⁸

C. The Bankruptcy Court Restored Ownership to Mr. Blanco *Nunc Pro Tunc*

23. Subsequent to the expiration of the notice period in Mr. Blanco's bankruptcy case, the Trustee filed a motion to approve the Stipulation and, on May 29, 2019, the U.S. Bankruptcy Court granted the motion.²⁹ The terms of the Stipulation were thus incorporated into the Court's order, including the operative provision: "In exchange [for Mr. Blanco's security], the Trustee hereby conveys the Estate's interest, and the Debtor repurchases his interest, in Tele Fácil, *nunc pro tunc*, to the Petition Date." Pursuant to that order, Mr. Blanco obtained ownership rights to his shares in Tele Fácil retroactively as of August 25, 2011.

²⁵ Stipulation and Settlement Agreement dated April 25, 2019, **C-138**.

²⁶ See Claimant's letter to the Tribunal dated March 26, 2019; Claimant's letter to the Tribunal dated March 29, 2019; Claimant's letter to the Tribunal dated April 5, 2019.

²⁷ See Respondent's letter to the Tribunal dated June 28, 2019.

²⁸ *Ley de Concurso Mercantil* (Bankruptcy Law), enacted on May 12, 2000, art. 292, **CL-160**.

²⁹ Order Granting Trustee's Motion to Approve Stipulation to Compromise Controversy, May 29, 2019, **C-139**.

* * *

24. In sum, as a matter of U.S. law, Mr. Blanco has owned his shares in Tele Fácil continuously since the date of Tele Fácil's incorporation, on January 7, 2010, including on March 26, 2016, when, through a share transfer from Mr. Sacasa, Mr. Nelson increased his shareholdings to 60%. He and his counsel have proceeded in good faith to disclose the temporary loss of his shares in order to limit any disruption that might have been caused by reopening Mr. Blanco's bankruptcy case. Respondent received multiple notices of Mr. Blanco's intention to restore his ownership rights, and Respondent's counsel even acknowledged that Respondent would be making the *nunc pro tunc* argument at the parties "meet and confer" meeting during the hearing. However, in response, Respondent filed a baseless Objection, which has unnecessarily drawn out the proceedings, despite Mr. Blanco's best intentions. The manifest flaws in Respondent's Objection are set forth in the following section.

III. LEGAL ARGUMENT

25. In addition to submitting a claim under Article 1116 of the NAFTA, Mr. Nelson legitimately claims "on behalf of" Tele Fácil pursuant to Article 1117. That provision 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 under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.³⁰

³⁰ NAFTA, Ch. 11 (1989), Art. 1117(1), **CL-086**.

Article 1117 thus provides two independent bases on which an investor may claim “on behalf” of a local enterprise: where the investor “owns” the local enterprise in question or where the investor “controls” it.

26. The parties agree that an investor has standing to claim under Article 1117 if he owns a majority of shares of a local enterprise, that is, he has legal control over the enterprise through his share ownership. The parties disagree whether an investor may claim under Article 1117 based on his *de facto* (non-legal) “control” of an enterprise.

27. As explained below, Mr. Nelson has independent standing to claim either on the basis of his majority ownership of Tele Fácil, which remains unaffected by Mr. Blanco’s U.S. bankruptcy, or, even if he is not deemed to be a majority shareholder, on the basis of his *de facto* control of Tele Fácil.

A. Claimant Has Standing To Claim Under Article 1117 Based On His Majority Ownership (Legal Control) Of Tele Fácil.

28. Respondent argues that the loss of Mr. Blanco’s Tele Fácil shares by way of his 2011 bankruptcy action automatically invalidated the transfer of shares from Mr. Sacasa to Mr. Nelson in 2016, which upgraded Mr. Nelson from a minority (40%) to a majority (60%) shareholder. Respondent’s argument is based on a false syllogism that, because Mr. Blanco lost ownership of his shares as a matter of U.S. law, he was no longer a shareholder of Tele Fácil, as a matter of Mexican law, for purposes of approving the increase in shares to Mr. Nelson. However, Respondent fails to take into account the effect of Mr. Blanco’s bankruptcy across two distinct legal systems, U.S. and Mexican. Namely, Respondent fails—in fact, it makes no attempt whatsoever—to demonstrate how a result in a U.S. bankruptcy could be self-executing and automatically applicable in Mexico.

29. This context is important given the current posture of the case. Mr. Blanco has withdrawn as a claimant in these proceedings. As explained, the discovery that Mr. Blanco had lost ownership of his Tele Fácil shares raised sufficient concerns then about his ability to satisfy the standing requirements under the NAFTA, until his shares were restored to him *nunc pro tunc*. At the time, it could not be argued with certainty that Mr. Blanco was a U.S. investor who had made an investment in Mexico. He withdrew to avoid disrupting the arbitration, knowing that he could not complete the necessary steps to restore his ownership in his U.S. bankruptcy case (and thus his standing in the NAFTA arbitration) before the start of the hearing. By contrast, the question now before the Tribunal is not one of standing under the NAFTA (which is moot), but rather only of the validity of the transfer of shares to Mr. Nelson in 2016 under Mexican law.

30. On that narrow issue, Respondent has failed to disprove that, *under Mexican law*, Mr. Blanco was a shareholder in Tele Fácil with authority to approve the share transfer to Mr. Nelson that established him as the company's majority shareholder. First, Respondent has not proven how the forfeiture of Mr. Blanco's shares in U.S. bankruptcy translates, across boundaries, into the automatic denial of Mr. Blanco's standing as a shareholder in Tele Fácil. Second, the share transfer was, in fact, valid under Mexican law and Tele Fácil's by-laws. Third, in any event, Mr. Blanco's share ownership was restored by order of a U.S. bankruptcy judge *nunc pro tunc* as of August 25, 2011, thus he has continually owned the shares as a matter of U.S. law. Any possible defect in Mr. Blanco's ownership therefore would be repaired and the 2016 share transfer would remain valid.

1. The results of Mr. Blanco's U.S. bankruptcy proceeding do not have automatic effect in Mexico.

31. Respondent has made no attempt to explain how a legal result in a U.S. bankruptcy proceeding could have been implemented in a foreign jurisdiction, Mexico, automatically with no implementing action.

32. As explained by Dr. Vasquez, transnational bankruptcy matters are governed by Article 292 of the Mexican *Law of Commercial Bankruptcy*. He notes:

For a bankruptcy procedure in a foreign country to have effects in Mexico, the law establishes a specific judicial procedure that must be carried out. Such procedure can only be initiated before a Mexican judge by a "Foreign Representative" with legitimate interest. In this case a Foreign Representative would be the Trustee or some representative of the foreign bankruptcy. Said procedure is recognized in the Mexican Bankruptcy Law (*Ley de Concursos Mercantiles*), in the Tenth Title. "Of cooperation with international procedures," Chapter III "Of the recognition of a foreign procedure and grantable measures."

...

...

In other words, for the bankruptcy proceedings initiated by Mr. Blanco in the United States in 2011 to have legal effects in Mexico, the Trustee as a person with legitimate interest should have requested recognition through a formal proceeding, and a competent Mexican judge should have issued a resolution that recognizes the legal effects of said procedure in Mexico.³¹

33. Undeniably, Article 292 of the *Law of Commercial Bankruptcy* sets forth very basic and well-known principles of transnational bankruptcy that Respondent and its purported bankruptcy expert, Mr. Buj, should know or should have researched before submitting arguments on the subject for the Tribunal's consideration. It is undisputed that a Foreign Representative has never initiated the required procedure under Article 292 to give effect to the result in Mr. Blanco's U.S. bankruptcy during the period in which he had lost his ownership rights in the Tele

³¹ Expert Report by Dr. Oscar Vasquez Del Mercado Cordero, ¶23, C-143.

Fácil shares. Thus, according to Dr. Vasquez, “Mr Buj’s assumption that a foreign bankruptcy proceeding takes effect automatically in Mexico is incorrect”³²

34. Thus, while Mr. Blanco may have temporarily ceded his shares to the bankruptcy estate in his U.S. bankruptcy case, that result had no bearing on his status as a shareholder in Tele Fácil as a matter of Mexican corporate law and the company’s bylaws.

35. In light of this reality, Mr. Buj’s expert report is fatally flawed. He wrongly assumes, without any analysis, that Mr. Blanco automatically lost his status as a shareholder, as a matter of Mexican law:

The starting point of the legal issue analyzed is that, in accordance with the communication dated March 26, 2019, submitted by the lawyers of Tele Fácil in this Arbitration, on August 25, 2011, Mr. Jorge Luis Blanco initiated a bankruptcy proceeding in accordance with the laws of the United States of America *and, consequently, as of that date he ceased to be the owner of the shares representing the capital stock of Tele Fácil of which he was the owner.*³³

He adds that it must be “*implied* that at the date of the approval meeting, Mr. Blanco was not a shareholder of Tele Fácil” and “*assumes as true* ... that Mr. Blanco did not have any representation regarding the 9 shares he originally subscribed to in Tele Fácil.”³⁴

36. At best, Mr. Buj’s assumption is based on statements made with respect to U.S. law. Mr. Buj cites Claimant’s letter indicating that Mr. Blanco had lost his Tele Fácil shares in his U.S. bankruptcy case as a matter of U.S. bankruptcy law.³⁵ Similarly, he indicates that he reviewed relevant analysis from Respondent’s U.S. bankruptcy counsel, Pillsbury Winthrop

³² Expert Report by Dr. Oscar Vasquez Del Mercado Cordero dated August 13, 2019 (hereinafter “Vasquez Report”), ¶ 22, C-143.

³³ Third Expert Report by Rodrigo Buj dated June 11, 2019 (hereinafter “Third Buj Report”), at ¶ 2 (emphasis added).

³⁴ *Id.* at ¶ 3, 26 (emphasis added).

³⁵ *Id.* at ¶ 24.

Shaw Pittman LLP (“Pillsbury”), regarding the consequences for Mr. Blanco under U.S. bankruptcy law.³⁶

37. However, nowhere in his report does Mr. Buj explain *how* a decision regarding Mr. Blanco’s ownership *under U.S. law* could automatically change his status as a shareholder *under Mexican law*. In fact, as explained, it cannot, without further implementation that did not occur. Thus, all of the analysis built on this false assumption is equally flawed.

2. The transfer of shares from Mr. Sacasa to Claimant was valid under Mexican law and Tele Fácil’s bylaws.

38. Because the results of Mr. Blanco’s bankruptcy were never implemented into the Mexican legal system, the question of Mr. Blanco’s status as a shareholder in Tele Fácil is governed exclusively by Mexican corporate law. As explained below, Mr. Blanco has always been a shareholder of Tele Fácil, with authority to approve company business, because he has always been listed in the company’s Shareholders’ Registry Corporate Book as a shareholder.³⁷ This has been Claimant’s consistent position since it filed the Statement of Claim, in which it asserted that Claimant and Mr. Nelson were Tele Fácil shareholders because “[u]nder Mexico’s corporate law, a person obtains the rights of a shareholder when the person acquires company shares and is registered in the Shareholders’ Registry Corporate Book.”³⁸

39. Putting aside Mr. Buj’s flawed initial assumption, the black-letter Mexican corporate law is not disputed:

- Pursuant to Article 111 of the *General Law of Commercial Companies* (“LGSM”), whoever is considered the holder of the shares in Tele Fácil

³⁶ *Id.* at ¶ 25.

³⁷ *Ley General de Sociedades Mercantiles* (General Law Of Commercial Companies), enacted on Aug. 4, 1934 (hereinafter “LGSM”), art. 129, **CL-163**.

³⁸ Statement of Claim, ¶ 365.

- possesses the economic and corporate rights corresponding to those shares in the company;³⁹
- Pursuant to Article 129 of the LGSM, the company considers the owner of the shares to be whoever is registered in the Shareholders' Registry Corporate Book;⁴⁰ (Tele Fácil's bylaws parallel Article 129 and also consider the owner of the shares to be the person registered in the Shareholders' Registry Corporate Book);⁴¹ and
 - Pursuant to Articles 186 and 187 of the LGSM, a shareholders' meeting may be convened to decide company business by publication of "a call," unless all of a company's shareholders are represented at the meeting at the time company business is decided, a situation known as a "totalitarian meeting."⁴²

40. The application of the law to the facts is clear. As explained by Dr. Vazquez, Tele Fácil's shareholders assembled in the form of a totalitarian meeting to approve the share transfer to Mr. Nelson:

On March 29, 2016, the day of the meeting, Mr. Blanco was registered as a shareholder in the company's Shareholders' Registry Corporate Book and, in accordance with Mexican law and the Tele Fácil statutes, was entitled to appear at the meeting as a shareholder.

Mr. Sacasa and Mr. Nelson also appeared. Therefore, 100% of the shares were represented. This resulted in a totalitarian meeting, falling within the exception of Article 188 of the LGSM, waiving the need to comply with the prior call requirement.

Even in the scenario that a call had been made to carry out the meeting on March 29, 2016, those summoned and those who had the right to attend and participate in the meeting would have been those who were registered in the Shareholders' Registry Corporate Book, that is, Mr. Nelson, Mr. Blanco and Mr. Sacasa, or their representatives, and no one else.⁴³

Despite Respondent's assertions to the contrary, there were thus no defects in the process by which Claimant increased his shareholding in Tele Fácil from 40% to 60%. Accordingly, the transfer was valid and Claimant rightfully became a majority shareholder in Tele Fácil.

³⁹ Third Buj Report, ¶ 6, n. 5; Vasquez Report, ¶¶ 28-29; LGSM, art. 111, **CL-163**.

⁴⁰ Third Buj Report, ¶ 6, n. 5; Vasquez Report, ¶ 30; LGSM, art. 129, **CL-163**.

⁴¹ Eight Clause, Incorporation Deed of Tele Fácil, **C-014**; LGSM, art. 129, **CL-163**.

⁴² Third Buj Report, ¶ 19; Vasquez Report, ¶ 41; LGSM, arts. 186-187, **CL-163**.

⁴³ Vasquez Report, ¶¶ 45-47, **C-143**.

41. Further, even if the Tribunal were to accept that Mr. Blanco's U.S. bankruptcy had an effect in Mexico, Respondent fails to recognize that, under Mexican law, company acts are not automatically void simply because they fail to comport with required formalities. Rather, they are voidable, until a Mexican court determines that they are void. As explained by Dr. Vazquez:

Mr. Buj misrepresents the law. According to Mexican law, in the event that a non-totalitarian meeting is held without a prior call, or the necessary formalities of the call are not met, such meeting and its resolutions will not be void, but are voidable. Under no circumstances legal acts are automatically void.

Voidable acts may be subject to absolute nullity or relative nullity, once they have been declared as such by a competent judge. In accordance with article 2226 of the Federal Civil Code: "Absolute nullity as a general rule does not prevent the act from provisionally producing its effects, ...", and likewise, article 2225 states that "Relative nullity ... always allows the act to provisionally produce its effects."

When the Tele Fácil bylaws indicate that "any transfer of shares in violation of the restriction indicated in the preceding paragraphs will be void and no legal effect will be recognized," this refers to the nullity established by law, since the will of the parties cannot impose a nullity different from that established by law. In the hypothetical case that a call for a shareholders meeting was required and it was not carried out, this does not mean that the shareholders meeting is automatically void, but rather, pursuant to the Civil Code, it would be voidable, but would continue to be effective until its nullity is declared by a competent judge.

Therefore, regardless of whether it is a relative or absolute nullity, voidable acts are effective until a judge declares the corresponding nullity. This is widely recognized by law and judicial precedents that confirm that shareholders' meetings, as well as their resolutions, even if they are voidable for any reason such as lack of prior call, "produces its effects until as long as its nullity is not declared" through a firm resolution of a competent judge.⁴⁴

42. It is undisputed that no-one has ever initiated legal action in a Mexican court to declare the share transfer to Mr. Nelson void. This remains the case even though Respondent threatened, in its letter of March 29, 2019, "[i]f Claimants challenge the invalidity of the

⁴⁴ Vasquez Report, ¶¶ 60-63 (sources omitted), C-143.

shareholders' meeting of March 29, 2016, Respondent may be in need to request to the national courts of Mexico for a decision declaring the nullity of said meeting," a process that could take two years, according to Mr. Buj.⁴⁵ In the end, however, Respondent's threat is hollow as, under Mexican law, it lacks standing to bring such a claim. As Dr. Vasquez explains:

Finally, I understand that Mexico has alleged to the Tribunal that it would be willing to initiate a procedure for a Mexican judge to declare the nullity of the Shareholders' Meeting. However, such statement lacks legal support. The Federal Government of Mexico would lack standing to initiate such action. To initiate a nullity action against the validity of a Shareholders' Meeting, the plaintiff must necessarily show legal interest in the case. To have legal interest in such a private action, the Government of Mexico would require having a direct relationship with the company and having suffered damage directly caused by the lack of a call of the shareholders' meeting. An example of a person with legitimacy would be a minority shareholder. Under Mexican Law, the legal interest is even a higher standard than the legitimate interest, where third parties with some direct interest may have legitimacy to initiate an action. In this case, there are no facts that can support the position of the Federal Government of Mexico to legally initiate such a procedure.⁴⁶

43. In sum, the transfer of Tele Fácil shares from Mr. Sacasa to Claimant, which transformed Claimant into Tele Fácil's majority shareholder, was properly approved and is valid under Mexican law as Mr. Blanco was entitled, as a shareholder, to participate in the company's totalitarian meeting on March 29, 2016. Respondent's arguments to the contrary are wrong.

3. In any event, by order of a U.S. bankruptcy judge, Mr. Blanco now owns his shares in Tele Fácil *nunc pro tunc* and thus the transfer of shares to Claimant is unassailable.

44. Even if Mr. Blanco's U.S. bankruptcy action deprived him of his status as a shareholder in Tele Fácil, which it did not, Mr. Blanco has taken steps to restore his ownership interests in the company completely and retroactively as of the date of his original bankruptcy petition. Namely, on April 25, 2019, he entered into a Stipulation with the Trustee to convey

⁴⁵ Respondent's letter to the Tribunal dated March 29, 2019, at 2.

⁴⁶ Vasquez Report, ¶ 65, C-143.

ownership of his shares back to him *nunc pro tunc* as of August 23, 2011 and, on May 29, 2019, the U.S. Bankruptcy Court for the Southern District of Florida adopted the terms of the Stipulation and ordered their execution.⁴⁷ Accordingly, whatever the implications of Mr. Blanco's temporary loss of his shares for the present arbitration, they are now moot.

45. According to Claimant's expert, the Honorable Melanie L. Cyganowski, former Chief Judge of the United States Bankruptcy Court for the Eastern District of New York, Mr. Blanco now owns his shares *nunc pro tunc* as of August 25, 2011. In her report, she explains, first, that U.S. bankruptcy courts have authority to grant ownership rights to a bankruptcy debtor retroactively:

"Nunc pro tunc" in Latin, literally means "now for then" and is a "phrase typically used by courts to specify that an order entered at a later date should be given effect retroactive to an earlier date—that is, that it should be treated for legal purposes *as if* entered on the earlier date." *Fierro v. Reno*, 217 F.3d 1, 5 (1st Cir. 2000); *see also Negron v. United States of America*, 394 Fed. Appx. 788, 791 (2d Cir. 2010) (*Nunc pro tunc* refers to a court's inherent power to enter an order having retroactive effect); *Iouri v. Ashcroft*, 464 F.3d 172 (2d Cir. 2006) ("When a matter is adjudicated *nunc pro tunc*, it is as if it were done as of the time that it should have been done." (quoting *Edwards v. INS*, 393 F.3d 299, 308 (2d Cir. 2004))).

Bankruptcy Courts are courts of equity and have the inherent power to enter retroactive orders of approval. *See, e.g., Thinking Machines Corp. v. Mellon Financial Services Corp. (In re Thinking Machines Corp.)*, 67 F.3d 1021, 1028 (1st Cir. 1995); *Mitan v. Duval (In re Mitán)*, 573 F.3d 237, 246 (6th Cir. 2009). It was, therefore, within the Bankruptcy Court's discretion to grant the requested relief with retroactive effect to the Petition Date—here, August 25, 2011.⁴⁸

46. Ms. Cyganowski adds that, in Mr. Blanco's case, the order of the U.S. Bankruptcy Court mandated the conveyance of Mr. Blanco's shares to him retroactively:

Accordingly, the approved conveyance of the Tele Fácil Shares *nunc pro tunc* to the Petition Date has the same legal effect as if the Tele Fácil Shares were conveyed to Mr. Blanco on the Petition Date, August 25, 2011. ***With the***

⁴⁷ Order Granting Trustee's Motion to Approve Stipulation to Compromise Controversy, May 29, 2019, C-139.

⁴⁸ Expert Report by Melanie L. Cyganowski dated August 13, 2019 (hereinafter "Cyganowski Report"), ¶¶32-33, C-142.

*conveyance having occurred on August 25, 2011, Mr. Blanco, therefore, in effect owned the Tele Fácil Shares before, on and after August 25, 2011. In other words, by operation of the Stipulation and Settlement and Settlement Order, Mr. Blanco's ownership interest was uninterrupted by the commencement of the Bankruptcy Case.*⁴⁹

Thus, as a matter of U.S. law, as pronounced by the U.S. bankruptcy court of jurisdiction, Mr. Blanco's ownership in Tele Fácil has existed uninterrupted and in its entirety since his shares were issued to him on January 7, 2010.⁵⁰

47. The legal effect of the U.S. bankruptcy court cannot come as a surprise to Respondent in light of the advice of its U.S. bankruptcy counsel at Pillsbury. On May 13, 2019, Respondent's outside counsel advised that while Mr. Blanco had lost his ownership rights to his shares by inadvertently failing to disclose them, a bankruptcy court could nonetheless restore those rights to him: "In practice, it is possible that in the future, a bankruptcy court would decide that no harm was done and decide that the shares should be deemed to have been 'abandoned' by the trustee to Blanco."⁵¹ Strangely, however, Respondent did not take steps to monitor Mr. Blanco's reopened bankruptcy case.

48. The legal effect of a U.S. bankruptcy order restoring ownership to a debtor *nunc pro tunc* has been recognized in investor-State arbitration. In *Eurogas v. Slovakia*, for example, the U.S. investor's involvement in Chapter 7 bankruptcy proceedings in the United States became a central focus of the arbitration.⁵² In the bankruptcy action, the U.S. investor failed to disclose one of its principal assets, its investor-State arbitration claims against Slovakia, and thus

⁴⁹ Cyganowski Report, ¶34 (emphasis added), C-142.

⁵⁰ Incorporation Deed, C-014.

⁵¹ Email from Mr. Stephen Becker of Pillsbury Winthrop Shaw Pittman to Mr. Alan Bonfiglio Rios, Respondent's Counsel dated May 13, 2019, C-140. Note that after Claimant indicated to Respondent by email on June 18, 2019 that Mr. Buj had cited Mr. Becker's advice in his third expert report and thus that Respondent was required to provide the underlying document on which Mr. Buj offered his opinion, Respondent produced the Pillsbury email on June 21, 2019.

⁵² See *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award (Aug. 18, 2017), CL-156.

the bankruptcy trustee did not expressly administer those assets.⁵³ Accordingly, the respondent argued that when the bankruptcy case was closed, the arbitration claims were not abandoned back to the U.S. investor, but rather remained a part of the bankruptcy estate under the trustee's control.⁵⁴ Thus, according to the respondent, the investor lacked standing to claim under the relevant investment treaty.⁵⁵

49. Similar to the present case, in *Eurogas*, the investor's bankruptcy case was reopened to address the issue of its ownership of a critical asset.⁵⁶ There, the investor and the trustee entered into a settlement agreement whereby the investor paid a sum of money to satisfy any outstanding creditor claims in exchange for the return of the investor's assets *nunc pro tunc* as of the date of the initiation of the bankruptcy action.⁵⁷

50. The terms of the agreement were described as follows:

On 18 August 2016, Trustee Loveridge filed a motion with the Bankruptcy Court seeking approval of an agreement with EuroGas II whereby: (a) EuroGas II would pay the bankruptcy estate approximately USD 425,000.00; (b) the creditor Texas EuroGas Corp. would withdraw its claim against the estate; and (c) Trustee Loveridge would "abandon nunc pro tunc" whatever interest the estate has in Rozmin and EuroGas GmbH.⁵⁸

The settlement agreement was approved by an order of the responsible bankruptcy court.⁵⁹

51. In light of this development, the *Eurogas* Tribunal found that "the question [of whether the claims were implicitly abandoned back in the initial proceeding] has become moot due to the reopening of the Bankruptcy Proceedings and subsequent developments."⁶⁰ In addition, the tribunal noted:

⁵³ *Id.* at ¶¶ 62-66.

⁵⁴ *Id.* at ¶¶ 206-207, 210-211.

⁵⁵ *Id.* at ¶ 215.

⁵⁶ *Id.* at ¶¶ 64-65.

⁵⁷ *Id.* at ¶ 66.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at ¶ 380.

The abandonment *nunc pro tunc* of any interest that may have remained with EuroGas I's bankruptcy estate means that the Talc/Reassignment Claims must be considered as having remained with EuroGas I since the opening of the Bankruptcy Proceedings on 18 May 2004. As stated by the Bankruptcy Court in its Memorandum Decision approving the Agreement:

*The Trustee has requested a determination that the abandonment is effective nunc pro tunc to the petition date [18 May 2004]. Making a judicial finding that the abandonment is effective nunc pro tunc to the petition date is available only in "extraordinary circumstances." The legal effect of abandonment is determined as a matter of law. When property is abandoned, it "reverts to the debtor and stands as if no bankruptcy petition was filed."*⁶¹

Since the investor owned the arbitration claims—either by implicit abandonment initially or subsequent abandonment *nunc pro tunc*—the tribunal found that the “Claims must be deemed property of EuroGas I as from 18 May 2004 [the date of the original bankruptcy petition].”⁶²

52. The Tribunal should draw similar conclusions in the present case. Here, as in *Eurogas*, Mr. Blanco's Tele Fácil shares temporarily became part of the bankruptcy estate, but they were restored to him retroactively by way of a settlement agreement endorsed by the responsible bankruptcy court. It has been argued above that Mr. Blanco's loss of his shares in U.S. bankruptcy proceedings is not relevant to the question of his status as a shareholder under Mexican law. (Note that the *Eurogas* Tribunal only examined the question in the context of determining the investor's standing to claim.) However, to the extent the Tribunal finds relevance, it must be equally relevant that Mr. Blanco's ownership interests have been restored to him by a U.S. bankruptcy court *nunc pro tunc*.

53. In sum, Mr. Blanco's Tele Fácil shares have been restored to him *nunc pro tunc*. As a matter of principle, if Respondent is permitted to predicate its Objection on the loss of Mr. Blanco's shares by operation of U.S. bankruptcy law in 2011, then, likewise, the return of his

⁶¹ *Id.* at ¶ 384.

⁶² *Id.* at ¶ 387.

shares retroactively by order of a U.S. bankruptcy court must also be considered to have rectified the situation. On this basis alone, Respondent's Objection must fail.

B. Claimant Also Has Standing To Claim Under Article 1117 Based On His *De Facto* Control Of Tele Fácil.

54. In its Objection, Respondent takes the position that the concept of "control" under Article 1117 covers legal control, but not *de facto* control.⁶³ By "legal control," Mexico means control of an enterprise by virtue of share ownership in accordance with Mexican corporate law. This position is unfounded. The only reasonable interpretation of the NAFTA clearly indicates that an investor may also claim under Article 1117 on the basis of *de facto* control. Further, the facts in this case demonstrate that Mr. Nelson exercised *de facto* control over Tele Fácil at all relevant times during his dispute with Mexico.

1. The term "control" in Chapter Eleven includes *de facto* control.

55. Respondent unpersuasively argues that the meaning of the term "control," as used in Article 1117, means "legal corporate control of a company under the *lex situs* (*i.e.*, Mexican law in this case)."⁶⁴ According to Respondent, a minority shareholder only has standing to claim under Article 1117 if it can decide "the appointment and removal of the company's directors and offices, 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."⁶⁵

56. Respondent's interpretation of the scope of Article 1117 does not pass muster, however. Respondent invokes the interpretive principles of the Vienna Convention on the Law of Treaties in an attempt to support its case.⁶⁶ However, a proper application of such principles,

⁶³ Objection, ¶¶ 68-71.

⁶⁴ Objection, ¶ 71.

⁶⁵ *Id.*

⁶⁶ *Id.* at ¶ 68.

yields the opposite conclusion: that the term “control” is broad in meaning and scope and covers *de facto* control, in addition to legal control. The reasons are set forth below:

57. First, the ordinary meaning of the word “control” extends beyond legal control. Claimant agrees with Respondent’s proposed definition of control from the Oxford English Dictionary: “The power to influence or direct people’s behaviour or the course of events.”⁶⁷ Such a definition properly reflects the ordinary meaning of the term “control.”

58. However, Claimant refutes Respondent’s position that the ordinary meaning of the term “control” is limited somehow by the narrower concept of “corporate control,” as defined in Black’s Law Dictionary. Specifically, Mexico argues that “control,” as used in Article 1117, required “ownership of more than 50% of the shares in a corporation” or “[t]he power to vote enough of the shares in a corporation to determine the outcome of matters that the shareholders vote on.”⁶⁸ There is no textual evidence in the NAFTA that supports Respondent proposed interpretation that the word “control” has a restricted, specialized meaning. Nor can it be reasonably assumed, without additional express language, that the word “control” is implicitly modified by the word “corporate,” such that it is subject to a narrower definition like the one offered by Respondent from Black’s Law Dictionary.

59. Second, the context in which the NAFTA uses the word “control” confirms that its ordinary meaning is broad. Article 1117 entitles an investor to claim on behalf of an enterprise that it “owns *or* controls.”⁶⁹ It is well established that “owns” in this context means majority ownership of an enterprise.⁷⁰ Accordingly, by adding the disjunctive phrase “or

⁶⁷ *Id.* at ¶ 69 (citing <https://www.lexico.com/en/definition/control>).

⁶⁸ *Id.* at ¶ 68.

⁶⁹ Emphasis added.

⁷⁰ To the extent Respondent’s reference to “full ownership” of the enterprise means over 50% of the shares in the enterprise, claimant concurs. Objection, ¶ 67.

controls” to Article 1117, the NAFTA Parties expressly contemplated a second basis on which an investor may claim that is broader than control of an enterprise by way of majority ownership. This fact alone fatally undermines Respondent’s attempt to equate “control” with “corporate control,” as defined in Black’s Law Dictionary, as the concept of “corporate control”—at least by way of share ownership—is already subsumed under the term “owns.”

60. Respondent also ignores important context provided by other key terms in the NAFTA, namely the expressly qualified approach to control in the definition of “state enterprise.” (Note that Article 1117 also covers claims in connection with “state enterprises.”) According to Article 201.1 of the NAFTA, “state enterprise” is defined as “an enterprise that is owned, or controlled *through ownership interests*, by a Party.”⁷¹

61. Thus, the concept of control is limited, in this context, to that achieved exclusively through corporate shareholdings. Given the disjunctive formulation of the phrase “owned, or controlled . . .,” it is clear that Article 201.1 covers both control through majority shareholdings (“owns”) and control through other types of “ownership interests,” such as golden-share arrangements in which minority shareholders exercise control over an enterprise. Importantly, the definition of “state enterprise” excludes the concept of *de facto* control of an enterprise—that is, control achieved through influence generally—by the addition of express limiting language: “controlled through ownership interests.”

62. By comparison, Article 1117 does not qualify the term “control” in any way and, notably, not by including the phrase “through ownership interests.” Thus, the NAFTA Parties intended the term “control” to have a broader scope based on its original meaning. As the term “controlled through ownership interests” is a subset of the broad concept of control—one

⁷¹ NAFTA, ch. 2, art. 201.1 (emphasis added).

involving only an equity stake in an enterprise—the term “control,” as unqualified in Article 1117, naturally must cover other types of control, including *de facto* control of an enterprise.

63. Third, tribunal practice confirms the broad meaning of the term “control” as used in the NAFTA and other investment treaties. In *International Thunderbird v. Mexico*, the tribunal noted correctly that “[t]he term control is not defined in the NAFTA.”⁷² The tribunal also observed that “virtually identical” language in the Energy Charter Treaty had been understood broadly as encompassing *de facto* control. Accordingly, the tribunal concluded:

Interpreted in accordance with its ordinary meaning, control can be exercised in various manners. Therefore, a showing of effective of “*de facto*” control is, in the Tribunal’s view, sufficient for the purposes of Article 1117 of the NAFTA.⁷³

64. Thus, the *International Thunderbird* Tribunal did not restrict itself to determining the investor’s standing to claim under Article 1117 on the basis of legal control. Rather, it looked to whether the investor generally “had the ability to exercise a significant influence on the decision-making of [the enterprise]” and was “through its actions, officers, resources, and expertise, the consistent driving force behind [the enterprise’s] business endeavor in Mexico.”⁷⁴

65. Claimant is not aware of any other NAFTA tribunal that has interpreted the term “control” (or even “controlled”) in the restrictive manner asserted by Respondent. Further, other investor-State tribunals interpreting similar language have agreed with the approach in *International Thunderbird*.⁷⁵ Finally, the term “controlled” in Article 25 of the ICSID

⁷² *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award (Jan. 26, 2006), ¶ 106, CL-049.

⁷³ *Id.*

⁷⁴ *Id.* at ¶ 107.

⁷⁵ *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on the Remaining Issues of Jurisdiction and on Liability, 12 September 2014, ¶ 526, CL-157; *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 324, CL-158.

Convention has been interpreted to mean “both actual exercise of powers or direction and the rights arising from the ownership of shares.”⁷⁶

66. Fourth, the NAFTA Parties have not expressed their agreement with Respondent’s interpretation of the term “control.” To the contrary, the United States’ longstanding position, for example, is directly contrary. In representations to the U.S. Senate regarding investment treaty ratification, the U.S. Executive Branch has always indicated that term “control” is left undefined “because these [determinations] involve factual situations that must be evaluated on a case-by-case basis.”⁷⁷ Respondent’s suggestion in its Objection that the NAFTA Parties have agreed to assign a “special meaning” to the term “control” is therefore entirely unpersuasive.⁷⁸

67. Fifth, the commentary by Professor Douglas, on which Respondent heavily relies, is not only flawed in its reasoning, but has not borne out over time. Professor Douglas opines that the term “control” should be determined exclusively by the *lex situs*; that there is no place for *de facto* control in the definition.⁷⁹ However, while citing other provisions of the NAFTA,⁸⁰ Professor Douglas does not account for the significance of the difference between the phrase “controlled through ownership interests,” in the Article 201.1, and “control” in Article 1117, as discussed above. He cites the Energy Charter Treaty, but not the 1998 Understanding that

⁷⁶ *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, ¶ 264, **CL-159**.

⁷⁷ *See, e.g.*, Hearing Before the Committee on Foreign Relations of the United States Senate on the Bilateral Investment Treaties with Argentina, Armenia, Bulgaria, Ecuador, Kazakhstan, Kyrgyzstan, Moldova, and Romania, S. Hrg. 103-292, 103rd Cong., 1st Sess., 27 (Sept. 10, 1993) (Responses of the U.S. Department of State to Questions Asked by Senator Pell), **CL-161**; *see also* Kenneth Vandeveld, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 116 (2009) (“a determination of whether an investor controls a company requires factual determinations that must be made on a case by case basis”), **CL-162**.

⁷⁸ Objection, ¶ 62.

⁷⁹ Objection, ¶ 72 (citing RL-020, Douglas, Zachary; *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS*; CAMBRIDGE UNIVERSITY PRESS, 2009, ¶ 556.)

⁸⁰ *See* footnote 61 of Douglas’ treatise (citing Article 1139 of the NAFTA on definitions).

clarifies that the test for “control” is factual, not legal.⁸¹ To Claimant’s knowledge, his opinion on this issue has not been adopted by any investor-State tribunal. In fact, as explained above, tribunals have expressly endorsed the approach in *International Thunderbird*, thus rejecting Professor Douglas’ criticism of that tribunal.

68. Finally, Respondent’s assertion that if “control” includes *de facto* control it must be proven beyond a reasonable doubt is unfounded. Effectively, Respondent insists that the NAFTA requires the Tribunal to apply a heightened standard of proof akin to proving criminal wrongdoing.⁸² There is no provision in the NAFTA indicating the necessity of applying such a heightened standard. Further, the UNCITRAL Arbitration Rules simply state that “[e]ach party shall have the burden of proving the facts relied on to support its claim or defence.”⁸³ It says nothing about the strictness of that burden. As explained below, there is ample evidence in the record to make a finding that Claimant exercised *de facto* control over Tele FÁCIL.

69. In sum, Article 1117 permits Claimant to claim on behalf of Tele FÁCIL if he can demonstrate he has exercised *de facto* control over the company at all relevant times.

2. Claimant exercised *de facto* control over Tele FÁCIL at all relevant times.

70. In *International Thunderbird*, the tribunal recognized that “[o]wnership and legal control” of an enterprise was not required where an investor nonetheless possessed the “ultimate right to determine key decisions” of the enterprise: “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

⁸¹ *Id.*

⁸² See Mojtaba Kazazi, BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 344-45 (1994) (describing the practice of international tribunals in requiring proof beyond a reasonable doubt in cases, among others, where “quasi-criminal allegations are involved”).

⁸³ Art. 27, 2010 UNCITRAL Arbitration Rules.

control of the enterprise to that person.”⁸⁴ In this regard, the tribunal articulated a useful test for determining the existence *de facto* control:

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.⁸⁵

71. According to the tribunal, it is sufficient to satisfy the requirements of “control” in Article 1117 if the investor had “the ability to exercise significant influence on the decision-making” of the enterprise and was “the consistent driving force behind [the enterprise’s] business endeavor in Mexico.”⁸⁶

72. The facts in this case readily meet the standard. As explained in Claimant’s Statement of Claim, Claimant, was the sole financier of Tele Fácil.⁸⁷ He supplied the capital required to fund Tele Fácil during its critical start-up period, allowing the company, among other things, to hire lawyers and accountants, to obtain a telecommunications concession, to hire and pay salaries to Tele Fácil’s staff, including Mr. Sacasa and Mr. Blanco, to fund Tele Fácil’s general operations, to pay Tele Fácil’s rent, and to litigate Tele Fácil’s interests in Mexican court and in international arbitration.⁸⁸ Without Mr. Nelson’s funding, Tele Fácil would have been halted in its tracks.

73. Importantly, Claimant did not provide financial resources in one lump-sum payment to Tele Fácil from which expenses could be paid at will—even the will of the General Manager, Mr. Sacasa. Rather, Claimant’s funding was doled out judiciously, on an iterative

⁸⁴ *International Thunderbird, Award*, ¶ 108, **CL-049**.

⁸⁵ *Id.*

⁸⁶ *Id.* at ¶ 107.

⁸⁷ Statement of Claim, ¶332; Witness Statement of Joshua Dean Nelson, ¶¶ 59-63, **C-001**.

⁸⁸ Statement of Claim, ¶ 332; Witness Statement of Joshua Dean Nelson, ¶¶ 59-63, **C-001**.

basis, as needs were identified and justified. This fact is demonstrated by the document produced to Respondent, pursuant to Document Request #31, entitled “List of Transfers Sent by Josh Nelson.”⁸⁹ This chart documents funds wired to Tele Fácil on 50 separate occasions from August 24, 2009 to January 13, 2017, in order to meet Tele Fácil’s financial needs as they arose.

74. Accordingly, in all critical respects, Tele Fácil, including its partners and staff, could not act before Claimant’s funds were sent. This is the epitome of *de facto* control. Not only did Claimant assume all of the financial risk of Tele Fácil, but in his role as sole provider of “access to capital,” he had “the power to effectively decide and implement the key decisions” of the company by virtue of the fact that critical decisions could not be implemented without him.⁹⁰

75. Additionally, Mr. Nelson was the exclusive provider of all critical technology for the venture in Mexico.⁹¹ In effect, he supplied unique technology that replicated his highly successful and well respected no-cost conferencing infrastructure in the United States. Specifically, he supplied a Genband softswitch and related items, A/C power equipment, Cambium Network wireless broadband Point-to-Multipoint radios and related equipment, Ethernet cabling, IP network equipment, servers, equipment racks, and various other tools and wiring.⁹² In other words, from a technical perspective, Tele Fácil could not function without Mr. Nelson’s equipment and know-how.

76. As a matter of objective fact, therefore, Tele Fácil could not advance without Claimant. He influenced and controlled the venture through several means, including (as recognized in *International Thunderbird*): “technology,” “access to capital,” “know how,” and

⁸⁹ *Relacion de Transferencias Enviadas Por Josh Nelson*, CLAIMANT0004399, (produced in April 22, 2017 by Miguel Sacasa in preparation for the present arbitration), **C-141**.

⁹⁰ *International Thunderbird*, Award, ¶ 108, **CL-049**.

⁹¹ Statement of Claim, ¶ 332; Witness Statement of Joshua Dean Nelson, ¶ 62, **C-001**.

⁹² *Id.*

“authoritative reputation.” In this manner, Claimant possessed the “ultimate right to determine key decisions,” regardless of the level of his shareholdings in Tele FÁCil.⁹³

77. Respondent’s Objection ignores this important reality and focuses instead on trivial issues of little significance. To this end, it makes two arguments: (1) that “Mr. Nelson unsuccessfully tried to have his ownership in Tele FÁCil increased in the fall of 2013”;⁹⁴ and (2) that Mr. Nelson’s delegation of tasks to Mr. Sacasa and Mr. Blanco indicates a lack of control. Both arguments are groundless.⁹⁵

78. First, Respondent argues unpersuasively that Claimant did not have control over Tele FÁCil because “throughout the fall of 2013 Mr. Nelson unsuccessfully requested that the ownership structure be reorganized in accordance with the MOU.”⁹⁶ As alleged support, it cites an email sent by Claimant to Mr. Bello in August 2013 indicating a desire, at the time, to increase his share ownership to 60%. According to Respondent, this email “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.”⁹⁷

79. Respondent’s arguments are puzzling, particularly given its complete failure to direct any questions about these emails to Tele FÁCil’s partners or legal counsel during the hearing. Instead, it asks the Tribunal to make assumptions and draw the unfounded conclusion that Claimant lacked *de facto* control in 2013 merely because a change in the recorded ownership did not occur at that time. Noticeably absent from Respondent’s argument is any evidence that either Mr. Sacasa or Mr. Blanco ever disputed Claimant’s *de facto* control or his entitlement to

⁹³ *International Thunderbird*, Award, ¶ 108, CL-049.

⁹⁴ Objection, ¶¶ 33-38, 84.

⁹⁵ Objection, ¶¶ 20-26.

⁹⁶ Objection, ¶ 32.

⁹⁷ Objection, ¶ 34.

demand that his ownership shares be increased to 60% when he so desired (and, indeed, it is undisputed that Claimant did increase his share ownership to 60% in 2016 without any problem).

80. Despite a period of tension with his partners, as Claimant testified, the partners “did not formally amend the ownership documents after changes in the law because Tele Fácil was not yet operational and we did not consider the formality necessary given our Memorandum of Understanding.”⁹⁸ Instead, “[a]t that point, based on the partner’s original Memorandum of Understanding, it was reaffirmed that Mr. Nelson would assume control of the company.”⁹⁹ Indeed, as Mr. Bello advised the partners, “the Memorandum of Understanding would operate as a shareholders’ agreement” and it would “bind them and be enforceable between them under Mexico law,” thus, “once the changes in the regulatory regime took place and lifted the restrictions on foreign ownership, Claimant, as agreed, automatically assumed majority control of Tele Fácil vis-à-vis the other shareholders.”¹⁰⁰

81. Thus, far from demonstrating that Claimant lacked *de facto* control, the record during this time period establishes that he ultimately decided that the “formality” of effectuating a legal change in share ownership was unnecessary. It is Claimant who raised the issue, and it is Claimant who ultimately concluded, based on the input of his counsel and the agreement of his partners, that his interests were already fully protected. Claimant already understood that, as its sole financier, he had *de facto* control of the company. Now, as a result of these tense discussions, he also gained the understanding that, because of the automatic effect of the shareholders’ agreement, he also had control by means other than his shareholdings.¹⁰¹ These

⁹⁸ Witness Statement of Joshua Dean Nelson, ¶ 38, C-001.

⁹⁹ Witness Statement of Jorge Blanco, ¶ 24, C-002.

¹⁰⁰ Witness Statement of Carlos Bello, ¶ 18, C-004.

¹⁰¹ Respondent also argues that Claimant’s 2013 email “demonstrates that Mr. Nelson understood the importance of obtaining legal control by owning more than 50% of the shares.” Objection, para. 34. However, Claimant’s views on the relative security provided by legal versus *de facto* control is irrelevant. The only question for the Tribunal is whether Claimant, in fact, exercised *de facto* control over Tele Fácil.

facts have never been contested by Respondent, and its effort to draft erroneous conclusions from a few isolated emails, while ignoring the other record evidence, must be rejected.

82. Second, Respondent erroneously equates day-to-day management responsibilities with *de facto* control. Respondent points out, among other things, that Claimant “did not prepare or review Tele Fácil’s Concession Application,” “participate in negotiations with Telmex,” or sign certain business agreements.¹⁰² However, nowhere in the test for *de facto* control does the investor’s level of micro-management figure in. Like many enterprises that are controlled by another person or entity, Tele Fácil had a highly qualified General Manager, Mr. Sacasa, and a renown telecom sales expert, Mr. Blanco, both of whom handled various responsibilities based on their skillset and language abilities.

83. As explained in his first witness statements, Claimant was directly involved in the decision-making with respect to every key initiative affecting Tele Fácil’s prospects, if not the execution of many of those decisions. Putting aside the most critical decisions regarding funding and technology, these included, among others, the decision to submit the concession application for approval, to negotiate with Telmex to seek a high rate and indirect interconnection, and to initiate the IFT’s dispute resolution process against Telmex.¹⁰³ All of these decisions were ultimately Claimant’s because he provided the financial and technical resources necessary to carry each of them through to completion.

¹⁰² Objection, ¶ 84.

¹⁰³ Witness Statement of Joshua Dean Nelson, ¶¶ 40-54, C-001. Sacasa Witness Statement, ¶ 29 (noting that once investment restrictions were lifted in Mexico, “Mr. Nelson assumed majority control of the company and had the right to approve all key decisions about the direction of the business thereafter”) & ¶ 44 (explaining that, with respect to the decision to accept Telmex’s proposed rate of USD .00975, “Mr. Nelson confirmed that the rate would work for the free conference services and, therefore, we determined that the rate would be beneficial for Tele Facil and this line of business”); Blanco Witness Statement, ¶ 24 (stating that once investment restrictions were lifted in Mexico, Claimant would assume control of Tele Fácil) & *id.* (“As the sole source of Tele Facil’s funding, Mr. Nelson would have to approve all key decisions about the direction of the business as of that date.”)

84. Tellingly, Respondent makes no attempt in its Objection to counter these compelling facts. In sum, the record reflects that Claimant had *de facto* control over Tele Fácil. Accordingly, even if he did not legally control the company through his shareholders, he is still entitled to claim on behalf of Tele Fácil under Article 1117.

C. Respondent Has Unjustifiably Delayed The Arbitration Proceedings.

85. In the end, Respondent's Objection has been all bluster, and no substance. As a consequence, Respondent has thwarted Mr. Blanco's good faith attempt to exit these proceedings in the least disruptive manner. As explained in Claimant's March 26, 2019 letter, without knowing if and when he could complete the steps for restoring his ownership rights to his Tele Fácil shares, Mr. Blanco chose to withdraw as a claimant in this case in an effort to avoid delaying and complicating the proceedings. Respondent, however, has undermined that effort by bringing an entirely unsubstantiated Objection, again utilizing Mr. Buj as an expert in an area of the law where he is clearly not an expert. Further, it did so without expending any effort to determine whether any relevant legal action had ever been initiated, either by Respondent or anyone else, to challenge or otherwise refute Mr. Blanco's status as a shareholder in Tele Fácil.

86. First, Respondent ignored developments in Mr. Blanco's reopened U.S. bankruptcy case—even though it was put on notice that he would be seeking to restore his ownership rights *nunc pro tunc*. Among other clear signals, on March 29 and April 5, 2019, respectively, Claimant both disclosed Mr. Blanco's involvement in this arbitration “[i]n the new bankruptcy action [in which he made] a request to reopen his case”¹⁰⁴ and explained that “Mr. Blanco withdrew not because he could not at some point in the future regain ownership of his shares *nunc pro tunc*, but rather because the process for doing so could not be completed in the

¹⁰⁴ Claimant's letter of March 29, 2019 to the Tribunal, at 2.

limited time before the hearing.”¹⁰⁵ Despite this notice and the express acknowledgement by Respondent’s counsel that Claimant would be raising the “*nunc pro tunc* argument,” Respondent inexplicably chose not to monitor the U.S. proceedings.¹⁰⁶

87. Respondent’s conduct contrasts sharply with that of the respondent in the *Eurogas* case, where its U.S. counsel actively engaged in the relevant U.S. bankruptcy proceedings. Here, Respondent—even with its U.S. bankruptcy counsel at Pillsbury advising with respect to the restoration of Mr. Blanco’s shares—chose to sit back while Mr. Blanco’s case was reopened and proceeded, as a matter of public record. It then feigned shock and surprise when Claimant noted that it had not addressed Mr. Blanco’s Stipulation and *nunc pro tunc* order in their Objection.¹⁰⁷ If Respondent had genuine concerns about Claimant’s standing to claim, it would have followed developments in the U.S. case on which its entire Objection was premised.

88. Second, Respondent took no action to initiate a legal proceeding in Mexico pursuant to Article 292 of the *Law on Commercial Bankruptcy*—if it even knew this was a possibility. Only through such action (and assuming Mr. Blanco’s Trustee was willing to initiate it) might the loss of Mr. Blanco’s shares possibly have been implemented in the Mexican legal system. Yet, despite having U.S. bankruptcy counsel and a purported Mexican bankruptcy expert on its team, Respondent took no action. Its Objection was all bluster.

89. Third, Respondent threatened that, if Claimant did not accept the invalidity of Claimant’s 2016 share transfer, it might have to initiate a two-year legal action in Mexican court to void the results of the shareholders’ meeting approving the transfer.¹⁰⁸ This message was

¹⁰⁵ Claimant’s letter of April 5, 2019 to the Tribunal, at 5.

¹⁰⁶ As noted in Claimant’s prior correspondence with the Tribunal, Respondent’s counsel acknowledge that Claimant would be arguing that Mr. Blanco’s shares had been restored to him *nunc pro tunc*.

¹⁰⁷ Respondent’s letter to the Tribunal dated April 3, 2019, at 1.

¹⁰⁸ *Id.*

clearly designed to raise the stakes in order to pressure the Tribunal to allow additional briefing on the bankruptcy issues. Yet Respondent never took such action even when Claimant maintained that the transfer was valid. Most likely, Respondent knew then or eventually figured out that it lacked standing to void the shareholders' action. Again, Respondent made much noise about its concerns, but could not back them up with action.

90. In sum, while Respondent could have simply accepted Mr. Blanco's withdrawal as the most pragmatic and efficient course of action, especially since it had no effect on Claimant's ability to claim under Article 1117, Respondent objected at Claimant's expense. As explained above, that Objection is unsupported by sound legal or factual arguments or legitimate legal action in the United States or Mexico. Claimant should not have to incur the costs of what amounted to Respondent's unfounded knee-jerk reaction to an unusual development in the case or, worse, an opportunistic and unjustified attempt to delay the proceedings.

IV. REQUEST FOR RELIEF

91. On the basis of the foregoing, Claimant respectfully request the following relief:

- a) a decision that the Respondent's Objection to Jurisdiction is dismissed on all counts; and
- b) an award of costs in favor of Claimant in connection with its response to Respondent's Objection to Jurisdiction.

Respectfully submitted

August 15, 2019



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