



**BEFORE THE HONORABLE ARBITRATION TRIBUNAL ESTABLISHED IN ACCORDANCE
WITH THE NORTH AMERICAN FREE TRADE AGREEMENT**

AND

**THE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED MEXICAN
STATES AND THE GOVERNMENT OF THE FRENCH REPUBLIC FOR THE
PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS**

AND

**THE AGREEMENT BETWEEN THE UNITED MEXICAN STATES AND THE PORTUGUESE
REPUBLIC FOR THE PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS**

AND

**THE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED MEXICAN
STATES AND THE GOVERNMENT OF THE ARGENTINE REPUBLIC FOR THE
PROMOTION AND RECIPROCAL PROTECTION OF INVESTMENTS**

- AND -

**THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
ARBITRATION RULES**

- between -

**CARLOS SASTRE AND OTHERS
(the "Claimants")**

and

**THE UNITED MEXICAN STATES
(the "Respondent")**

ICSID Case No. UNCT/20/2

MEMORIAL ON JURISDICTION

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GLOSSARY

Term	Definition
Abodes	Abodes Mexico S.A. de C.V.
Mexico-Argentina BIT	Agreement between the Government of the United Mexican States and the Government of the Argentine Republic for the Promotion and Reciprocal Protection of Investments.
Mexico-France BIT	Agreement between the United Mexican States and the Government of the French Republic for the Promotion and Reciprocal Protection of Investments.
Mexico-Portugal BIT	Agreement between the United Mexican States and the Portuguese Republic for the Promotion and Reciprocal Protection of Investments.
Mexico – Switzerland BIT	Agreement between the United Mexican States and the Swiss Confederation for the Promotion and Reciprocal Protection of Investments.
AFE	<i>Asamblea de Formalidades Especiales</i> [Assembly of Special Formalities]
AFS	<i>Asamblea de Formalidades Simples</i> [Assembly of Simple Formalities].
Behla	Hotel Behla Tulum
Cabañas Tierras del Sol	Hotel Cabañas Tierras del Sol
Abreu Transfer of Rights Agreements	Agreement for the transfer of rights dated 22 October 2003, between Mr. Jiménez and Ms. Abreu (NOA#2, C-0020) and the transfer of rights dated 28 November 2003, between Ms. Gutiérrez, represented by Mr. Silva and Ms. Abreu (NOA#2, C-0021).
CETSA Transfer of Rights Agreement	Agreement for the transfer of rights dated 12 October 2000, between Mr. Lorenzo Novelo, with the agreement of Mrs. Balam and CETSA, (NOA#2, C-0012).
Galán Transfer of Rights Agreement	Agreement for the transfer of rights dated 28 April 2004, between Mr. Novelo Balam, with the agreement of Mrs. Mendez, and Ms. Galán (NOA#2, C-0023).
HLSA Transfer of	Agreement for the transfer of rights dated 1 March 2001, between Mr.

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Rights Agreement	Lorenzo Novelo, with the agreement of Mrs. Balam and HLSA, (NOA#2, C-0014).
CETSA	Constructora Ecoturística S.A. de C.V.
ICSID	International Centre for Settlement of Investment Disputes.
Jacquet Commodatum	Commodatum contract dated 10 January 2008, between Mr. Román and Mr. Jacquet (NOA#2, C-0018)
Mexican Constitution	Political Constitution of the United Mexican States.
Vienna Convention	Vienna Convention on the Law of Treaties adopted on 23 May 1969.
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965.
Respondent	United Mexican States
Claimants	Mr. Carlos Esteban Sastre, Mr. Renaud Jacquet, Ms. Maria Margarida Oliveira Azevedo de Abreu, Mr. Eduardo Nuno Vaz Osorio dos Santos Silva, Mr. Graham Alexander and Ms. Mónica Galán Ríos.
Ejido	N.C.P.E. José María Pino Suárez, located in the municipality of Tulum, Quintana Roo.
DOF	<i>Diario Oficial de la Federación</i> [Official Gazette of the Federation].
Section of Lot 10- Parayso	Property related to Galan, identified as “Section of Lot 10” located at kilometer 8 of the Boca Paila – Tulum road, which is located on ejido land, municipality of Tulum, Quintana Roo, with an area of 2,120 meters.
Hamaca Loca	Hotel Cabañas Hamaca Loca.
Hotel Parayso	Hotel Parayso
HLSA	Hamaca Loca S.A. de C.V.
Astrolodge Investments	O.M. del Caribe S.A. de C.V., Hotel Uno Astrolodge and rights to ejido Lot no. 8, located on the Bocapaila-Tulum road, km. 8, in the town of José María Pino Suarez, municipality of Solidaridad, State of Quintana Roo.
Behla Tulum Investments	Hotel Behla Tulum, La Tente Rose and rights to Section A of Lot 10 located on the Tulum-Boca Paila road, in the Ejido José María Pino

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	Suarez in the municipality of Tulum, Quintana Roo and the AMSA Lot
Hamaca Loca Investments	Hamaca Loca S.A. de C.V., Cabañas Hamaca Loca and rights over Lot 19 “Hamaca Loca” of the N.C.P.E. José María Pino Suarez in the municipality of Tulum, Quintana Roo.
Tierras del Sol Investments	Constructora Ecoturística S.A. de C.V., Cabañas Tierras del Sol and rights over Lot 19 of the N.C.P.E. José María Pino Suarez in the municipality of Tulum, Quintana Roo
Parayso Investments	Hotel Parayso and rights over the Section of Lot 10, located at km 8 of the road to Boca Paila, of the Ejido José María Pino Suárez in the municipality of Solidaridad, Quintana Roo.
AMSA Lot	Unnamed property that Jacquet indicates was acquired by AMSA and is located in Ejido lands, municipality of Tulum, Quintana Roo, with a surface area of 1,870 square meters and the following boundaries: (a) to the north, in 85 meters with the property of Juliana Lira, (b) to the east, at 22 meters with the ZOFEMAT (Federal Maritime- Terrestrial Zone), (c) to the south, at 85 meters with land owned by Mr. José Mauricio Román Lazo, and (d) to the west, in 22 meters with the Tulum Boca Paila road.
Lot 8	Property denominated as “Lote Ejidal 8” [Ejido Lot 8] which Abreu and Silva indicate is located in Ejido lands, municipality of Tulum, Quintana Roo, located at kilometre 8 of the Bocapaila-Tulum road, with an area of 2,500 square meters and the following boundaries: (a) to the north, with the property of Karla Lorena Gutiérrez Rodríguez, (b) to the south with the property of Señor Jiménez, (c) to the east, with the Zona Federal Marítimo Terrestre del Mar Caribe [Federal Maritime-Terrestrial Zone of the Caribbean Sea], and (d) to the west with the Bocapaila-Tulum Federal Road.
Lot 8A	Property denominated “Lote Ejidal 8 A” [Ejido Lot 8 A] that Abreu and Silva indicate is located in Ejido lands, municipality of Tulum, Quintana Roo, located at kilometre 8 of the Bocapaila - Tulum road, with an area of 2,500 square metres, and the following adjacent areas: (a) to the north, with the property of Ms. Gutiérrez, (b) to the south, with the property of Ms. Gutiérrez, (c) to the east with the Zona Federal Marítimo Terrestre del Mar Caribe [Federal Maritime – Terrestrial Zone of the Caribbean Sea], and (d) to the west with the Bocapaila - Tulum Federal Road..

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Lot 10A	Property denominated as “fracción A of lot 10”, which Jacquet indicates is located in Ejido lands, municipality of Tulum, Quintana Roo, with a surface of 2,565.36 square meters and the following measures and boundaries (a) to the north, in 86. 75 meters with property of José Mauricio Román Lazo, (b) to the east, in 19.50 meters with the Zona Federal Marítimo Terrestre [Federal Maritime- Terrestrial Zone], (c) to the south, in 88.41 meters with Hotel Paraíso and (d) to the east, in 36.33 meters with Boca Paila – Tulum road.
Lot 19	Property denominated “Lote ejidal 19” [Ejido Lot 19] that Sastre indicates is located in Ejido lands, Municipality of Tulum, Quintana Roo, with a surface of 18,000 square meters, and the following measurements and boundaries: (a) to the north, in 120 meters with the parcel Los Moños, (ii) to the south, in 120 meters with Casa Magna, (iii) to the east, in 150 meters with Zona Federal Marítimo Terrestre del Mar Caribe [Federal Maritime- Terrestrial Zone of the Caribbean Sea] and (iv) to the west, in 150 meters with road to Boca Paila. Lot 19 was subdivided into Lot 19A and Lot 19-Hamaca Loca.
Lot 19A	Property denominated “Fracción 19-A del Lote 19”, [Section 19-A of Lot 19] which Mr. Sastre indicates is located in Ejido lands, Municipality of Tulum, Quintana Roo, with an area of 1,873.84 square meters and the following measurements and boundaries: (a) to the north, at 111.64, 7.73, 11.86, 4.50 and 19.72 meters with Mr. Novelo's parcel, (b) to the east, at 24.65 meters with the Zona Federal Marítimo Terrestre del Mar Caribe [Federal Maritime-Terrestrial Zone of the Caribbean Sea], (c) to the south, in 43.10, 19.43, 50.32 and 31 meters with the Casa Magna parcel, and (d) to the west, in 10 meters with the Ejido's common lands.
NOA#1	Notification to submit a claim to Arbitration and Annexes filed on December 29, 2017, by Counsel Ricardo Ampudia, representing Carlos Esteban Sastre.
NOA#2	Notification to submit a claim to Arbitration and Annexes filed on June 14, 2019, by Counsel Ricardo Ampudia on behalf of Carlos Esteban Sastre, Renaud Jacquet, Graham Alexander, Monica Galán Ríos, Eduardo Nuno Vaz Osorio Dos Santos Silva and Margarida Oliveira Azevedo de Abreu
NOI#1	Notice of intent to submit a claim to arbitration filed on 15 June 2017, by Counsel Ricardo Ampudia on behalf of Carlos Esteban Sastre and Constructora Ecoturística S.A. de C.V.

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NOI#2	Notice of intent to submit a claim to arbitration filed on 6 September 2017, by Counsel Ricardo Ampudia on behalf of Carlos Esteban Sastre regarding claims for Investments Hamaca Locas.
NOI#3	Notice of intent to submit a claim to arbitration filed on 17 January 2019, by Ricardo Ampudia on behalf of Renaud Jacquet, Graham Alexander, Mónica Galán Ríos, Rancho Santa Monica Developments, Inc., Eduardo Nuno Vaz Osorio dos Santos Silva, Margarida Oliveira Azevedo de Abreu and O.M. del Caribe, S.A. de C.V.
OMDC	O.M. del Caribe S.A. de C.V.
AMSA Promise	Promise Agreement of sale and purchase dated 15 May 2007 between Mr. Román and Abodes, represented by Mr. Jacquet, through which Mr. Román was obliged to transfer his rights over the AMSA-Behla Tulum Lot (NOA#2, C-0017).
RAN	<i>Registro Agrario Nacional</i> [National Agrarian Register]
UNCITRAL Rules of 1976	Arbitration Rules of the United Nations Commission on International Trade Law adopted in 1976.
Procedural Order No. 2	Procedural Order No. 2 regarding Decision on Bifurcation issued on 13 August 2020.
RPPyC	<i>Registro Público de la Propiedad y del Comercio</i> [Public Registry of Property and of Commerce].
SEDATU	<i>Secretaría de Desarrollo Agrario, Territorial y Urbano</i> [Ministry of Agrarian, Land, and Urban Development].
SRE	<i>Secretaría de Relaciones Exteriores</i> [Ministry of Foreign Affairs].
Abreu	Margarida Oliveira Azevedo de Abreu.
Alexander	Graham Gordon Alexander Aguilar.
Galán	Mónica Galán Ríos.
Jacquet	Renaud Marie Pierre Jacquet.
Sastre	Carlos Esteban Sastre.
Silva	Eduardo Nuno Vaz Osorio dos Santos Silva.
NAFTA	North American Free Trade Agreement.
Uno Astrolodge	Hotel Uno Astrolodge.

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Exhibit	Content
R-011	NAFTA, Preamble
R-012	<i>Decreto que Reforma el Artículo 27 de la Constitución Política de los Estados Unidos Mexicanos (CPEUM), Diario Oficial de la Federación, 10 de enero de 1934</i> (Decree amending Article 27 of the Political Constitution of the United Mexican States (CPEUM), Official Gazette of the Federation, 10 January 1934)
R-013	<i>Tercer Informe de Gobierno del Presidente Carlos Salinas de Gortari, 1 de septiembre de 1991</i> (Third Government Report by President Carlos Salinas de Gortari, 1 September 1991).
R-014	<i>Constitución Política de los Estados Unidos Mexicanos, Artículo 27.</i> (Political Constitution of the United Mexican States, Article 27).
R-015	<i>Ley Agraria, Artículos 1, 9, 21, 23, 24, 28, 40, 56, 57, 75 y 90.</i> (Agrarian Law, Articles 1, 9, 21, 23, 24, 28, 40, 56, 57, 75 and 90)
R-016	<i>Código Civil Federal, Artículo 750.</i> (Federal Civil Code, Article 750.)
R-017	Álvarez Morales, Eduardo. " <i>La Adquisición de Bienes Inmuebles por Parte de Extranjeros y los Fideicomisos sobre Bienes Inmuebles en zona restringida.</i> " <i>Revista de Derecho Notarial Mexicano</i> (1994)). (Álvarez Morales, Eduardo. "The Acquisition of Real Estate by Foreigners and Real Estate Trusts in the restricted zone." <i>Journal of Mexican Notarial Law</i> (1994))
R-018	<i>Secretaría de Economía, Régimen de Propiedad Inmobiliaria, 30 de agosto de 2016</i> (Ministry of the Economy, Real Estate Property Regime, 30 August 2016).
R-019	<i>Reglamento de la Ley de Inversión Extranjera y del Registro Nacional de Inversión Extranjera, Artículo 5 y 11</i> (Regulations of the Foreign Investment Law and the National Registry of Foreign Investment, Articles 5 and 11)
R-020	<i>Ley General de Títulos y Operaciones de Crédito, Artículo 381</i> (General Law on Credit Instruments and Operations, Article 381).
R-021	<i>Ley de Inversión Extranjera, Artículos 10-12, 14, 32.</i> (Foreign Investment Law, Articles 10-12, 14, 32)
R-022	Mexican Naturalization Letter of Sastre.
R-023	Mexican Naturalization Letter of Abreu.
R-024	Mexican Naturalization Letter of Silva.
R-025	Mexican Birth Certificate of Alexander.
R-026	Mexican Birth Certificate of Galán.
R-027	<i>Ley de Nacionalidad, Artículo 17 y 19.</i> (Nationality Law, Articles 17 and 19).

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R-028	Diccionario de la lengua española (Dictionary of the Spanish language) (Ed. 22, 2001), online at: < https://www.rae.es/drae2001/domicilio >.
R-029	“Domicile”, Merriam Webster Dictionary online, at: < https://www.merriam-webster.com/dictionary/domicile >.
R-030	Sastre's FM3 Visa.
R-031	Mexican Naturalization Application of Sastre.
R-032	Letter of Renunciation to Argentinean Nationality of Sastre.
R-033	Application Approvals and Mexican Passports of Galán
R-034	Application Approvals and Mexican Passports for Alexander
R-035	Government of Nevada, SilverFlume, Entity Search, Rancho Santa Monica Developments Inc., downloaded 20 December 2020.
R-036	United States Securities and Exchange Commission (SEC), 10-K, United States Securities and Exchange Commission (SEC), Form 10-K, Rancho Santa Monica Developments Inc., 2009, p. 5.
R-037	Letter of Renunciation of Portuguese Nationality from Silva
R-038	Approval of Silva's Mexican Passport
R-039	Approval of Application for Mexican Passport from Abreu.
R-040	IFE Voter Card of Abreu.
R-041	Letter of Renunciation of Portuguese Nationality of Abreu.
R-042	Spanish Passport of Sastre, adduced as “Annex N-1” of NOI#1.

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RL-040	H. Arthur, <i>The Legal Value of Prior Steps To Arbitration In International Law Of Foreign Investment</i> , <i>Anuario Mexicano de Derecho Internacional</i> , Vol. XV, 2015.
RL-041	<i>Abaclat et al. v. Argentine Republic</i> , ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011.
RL-042	<i>National Gas S.A.E. v. Arab Republic of Egypt</i> , ICSID Case No. ARB/11/7, Award, 3 April 2014.
RL-043	<i>M.C.I. Power Group L. C & New Turbine, Inc. v Republic of Ecuador</i> , ICSID Case No. ARB/03/6, Award, 31 July 2007.
RL-044	<i>Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. the Democratic Republic of Timor-Leste</i> , ICSID Case No. ARB/15/2, Award, 22 December 2017
RL-045	<i>Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal</i> , ICSID Case No. ARB/15/21, Award, 5 August 2016.

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RL-046	<i>Wintershall Aktiengesellschaft v. Republic of Argentina</i> , ICSID Case No. ARB/04/14, Award, 8 December 2008.
RL-047	<i>Fireman's Fund Insurance Company v. The United Mexican States</i> , ICSID Case No. ARB(AF)/02/1, Decision on the Preliminary Question, 17 July 2003.
RL-048	<i>Manuel García Armas y otros v. República Bolivariana de Venezuela</i> , Caso CPA No. 2016-08, Laudo sobre Jurisdicción, 13 de diciembre de 2019.
RL-049	<i>ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina</i> , Award on Jurisdiction, 10 February 2012.
RL-050	<i>Oded Besserglik v. Republic of Mozambique</i> , ICSID Case No. ARB(AF)/14/2, Award, 28 October 2019.
RL-051	<i>Hussein Nuaman Soufraki v. United Arab Emirates</i> , ICSID Case No. ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007.
RL-052	<i>Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama</i> , ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017
RL-053	<i>Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. V. The Republic of Hungary</i> , ICSID Case No. ARB/12/2, Award, 16 April 2014.
RL-054	<i>Canfor Corporation v. United States of America, Tembec Inc. et. al. v. United States of America and Terminal Forest Products Ltd. v. United States of America</i> , UNCITRAL, Decision of Preliminary Question, 6 June 2006
RL-055	<i>Corona Materials, LLC v. Dominican Republic</i> , ICSID Case N.º ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016.
RL-056	<i>Ambiente Ufficio S.p.A. and others v. Argentine Republic</i> , ICSID Case No. ARB/08/9 (formerly Giordano Alpi and others v. Argentine Republic), Decision on Jurisdiction and Admissibility, 8 February 2013
RL-057	Andrea Marco Steingruber, <i>Consent in International Arbitration</i> (Oxford: Oxford University Press, 2012) at 225
RL-058	<i>Garanti Koza LLP v. Turkmenistan</i> , ICSID Case No. ARB/11/20, Tribunal's Decision on the Objection to Jurisdiction for Lack of Consent, 19 December 2016
RL-059	Concurring Opinion of Mr. J Christopher Thomas QC, 17 November 2014.

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RL-060	International Law Commission, “ <i>Report of the Commission to the General Assembly: Draft Articles on the Law of Treaties with Commentaries</i> ” <i>Yearbook of the International Law Commission (1966-II)</i> , at p. 211 [ILC, “Draft Articles on the Law of Treaties with Commentaries”]
RL-061	<i>German Interests in Polish Upper Silesia (Germ. v. Pol.)</i> , 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25) ¶ 82
RL-062	<i>Anglo-Iranian Oil Co. Case: United Kingdom v. Iran (Preliminary Objections)</i> (1952) ICJ Rep. 93, at p. 112
RL-063	Michael Waibel, “ <i>The Principle of Privity</i> ” in Michael J Bowman and Dino Kritsiotis (ed) <i>Conceptual and Contextual Perspectives on the Modern Law of Treaties</i> (Cambridge University Press, 2018).
RL-064	<i>Cem Cengiz Uzan v. Republic of Turkey</i> , SCC Case No. V2014/023, Award on Respondent Bifurcated Preliminary Objection, 20 April 2016
RL-065	<i>Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka</i> , ICSID Case No. ARB/09/2, Award, 31 October 2012,
RL-066	<i>Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka</i> , ICSID Case No. ARB/09/2, Dissenting Opinion of Makhdoom Ali Khan
RL-067	<i>Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela II</i> , ICSID Case No. ARB(AF)/11/1, Excerpts of Award, 30 April 2014
RL-068	<i>Oxus Gold plc v. Republic of Uzbekistan</i> , UNCITRAL, Final Award, 17 December 2015
RL-069	<i>Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic</i> , ICSID Case No. ARB/14/3, Award, 27 December 2016
RL-070	<i>Aram Sabet et al v. Islamic Republic of Iran – Bonyad-E-Mostazafan</i> , Iran-US Claims Tribunal Case No. 815-816-817, Award No. 593-815/816/817-2, 29 June 1999
RL-071	<i>Libananco Holdings Co. Ltd. v. Republic of Turkey</i> , ICSID Case No. ARB/06/8, Award dated 2 September 2011
RL-072	<i>Europe Cement Investment & Trade S.A. v. Republic of Turkey</i> , ICSID Case No. ARB(AF)/07/2, Award dated 13 August 2009
RL-073	<i>Vito G. Gallo v. Government of Canada</i> , PCA Case No. 2008-03, Award, 15 September 2011 [Redacted]
RL-074	<i>Link-Trading Joint Stock Company v. Republic of Moldova</i> , UNCITRAL, Final Award, 18 April 2002
RL-075	<i>Vladislav Kim and others v. Republic of Uzbekistan</i> , ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017
RL-076	<i>Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon</i> , ICSID Case No. ARB/15/18, Award, 22 June 2017 [French]
RL-077	<i>Víctor Pey Casado y Fundación Presidente Allende c. República de Chile I</i> , Caso CIADI No. ARB/98/2, Laudo I, 8 de mayo de 2008

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RL-078	<i>David R. Aven and others v. Republic of Costa Rica</i> , ICSID Case No. UNCT/15/3, Final Award, 18 September 2018.
RL-079	<i>Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic</i> , ICSID Case No. ARB/97/4, <i>Decision of the Tribunal on Objections to Jurisdiction</i> , 24 May 1999.
RL-080	<i>Joseph Charles Lemire v. Ukraine II</i> , ICSID Case No. ARB/06/18, Award, 28 March 2011
RL-081	<i>Marvin Roy Feldman Karpa v. United Mexican States</i> , ICSID Case No. ARB(AF)/99/1, United States 1128 Submission, 6 October 2000
RL-082	<i>Mergé Case—Decision No. 55, 10 June 1955 y RL-083, Iran-United States Claims Tribunal, Case No. A/18, 6 April 1984</i>
RL-083	<i>Iran-United States Claims Tribunal</i> , Case No. A/18, Decision, 6 April 1984
RL-084	<i>Zachary Douglas, The International Law of Investment Claims</i> , Cambridge University Press, 2009, pp. 52, 321-323.
RL-085	Christoph Schreuer, “ <i>Jurisdiction and Applicable Law in Investment Treaty Arbitration</i> ”, McGill Journal of Dispute Resolution (2014) Vol 1:1, p. 18.
RL-086	<i>Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/07/27, Decision on Annulment, 9 March 2017.
RL-087	<i>Gambrinus, Corp. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/11/31, Decision on Annulment, October 3, 2017.
RL-088	<i>Gustav F.W. Hamester GmbH & Co. K.G. v. Republic of Ghana</i> , ICSID Case No. ARB/07/24, Award (18 June 2010).
RL-089	<i>Pac Rim Cayman LLC. v. Republic of El Salvador</i> , ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, June 1, 2012.
RL-090	<i>Tokios Tokelès v. Ukraine</i> , ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 Apr. 2004)
RL-091	<i>The Hulley Enterprises v. Russia, Yukos v. Russia, Veteran Petroleum v. Russia</i> , Final Awards, para. 1349
RL-092	<i>Saluka Investments BV (The Netherlands) v. Czech Republic</i> , PCA Case No. 2001-04, Partial Award, 17 March 2006
RL-093	<i>SAUR International SA v. República de Argentina</i> , ICSID Case No. ARB/04/4, Decisión sobre jurisdicción y sobre Responsabilidad, 6 de junio del 2012.
RL-094	<i>Álvarez y Marín Corporación S.A. y otros v. República de Panamá</i> , Caso CIADI No. ARB/15/14, Laudo, 12 de octubre de 2018.
RL-095	<i>Plama Consortium Limited v. Republic of Bulgaria</i> , ICSID Case No. ARB/03/24, Award, 27 August 2008.

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RL-096	<i>Philip Morris Asia Limited v. The Commonwealth of Australia</i> , UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015.
RL-097	<i>Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016.
RL-098	<i>B-Mex, LLC and Others v. United Mexican States</i> , ICSID Case No. ARB(AF)/16/3, Submission of the U.S., 28 February 2018.
RL-099	<i>Merrill & Ring Forestry L.P. v. Government of Canada</i> , ICSID Case No. UNCT/07/1, Decision on a Motion to Add a New Party, 31 January 2008.
RL-100	<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.

I. INTRODUCTION

1. This Memorial presents the Respondent's jurisdictional objections regarding that: (i) Claimants have self-consolidated separate arbitrations under four different investment treaties into a single arbitration in a manner not permitted by the treaties; and (ii) under each of the treaties, Claimants have not proven the existence of a “dispute”, arising out of an “investment,” between Respondent and an “investor” from one of the other States party to the investment treaties invoked. Specifically, Claimants have not proven:

- a. that they are “investors” as provided for in the treaties, including that they meet the nationality requirements;
- b. that, as investors, they have qualified “investments” under the invoked treaties in Respondent's territory, including that those investments are legal under Respondent's laws; and
- c. that they have complied with other requirements for submitting a “dispute” to arbitration, including that they have met the requirements for domicile, notice and time limitation or prescription periods, and that they have not waived their rights to arbitration against the Respondent.

2. In the following sections, the Respondent explains these objections and sets out the reasons why the Tribunal lacks jurisdiction *ratione voluntatis*, *ratione temporis*, *ratione personae* and *ratione materiae* and therefore must dismiss the claim.

Self-Consolidation Objection

3. The Respondent's first objection concerns the *Amended Notice of Arbitration and Appointment of Arbitrators* submitted by the Claimants on 14 June 2019 (NOA#2) wherein, without the Respondent's consent, the Claimants impermissibly self-consolidated a series of separate claims into a single arbitration comprising the following:

1. Claims under four different treaties, namely: (i) Mexico-Argentina BIT; (ii) Mexico-France BIT; (iii) Mexico-Portugal BIT; and (iv) NAFTA.

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2. Involving six different Claimants of different nationalities, including nationalities not disclosed in the NOA#2¹, namely: (i) Carlos Esteban Sastre (Sastre), with Mexican, Argentinian, and Spanish nationalities; (ii) Renaud Jacquet (Jacquet), with French nationality; (iii) María Margarida Oliveira Azevedo de Abreu (Abreu), with Portuguese and Mexican nationalities; (iv) Eduardo Nuno Vas Osorio dos Santos Silva (Silva), with Portuguese and Mexican nationalities; (v) Graham Alexander (Alexander), with Canadian and Mexican nationalities; and (vi) Mónica Galán Rios (Rios), with Canadian and Mexican nationalities.
3. Relating to at least 14 different alleged investments, namely:
 - a. Constructora Ecoturística S.A. de C.V. (CETSA), Cabañas Tierras del Sol, and the land parcel rights related to Cabañas Tierras del Sol (Tierras del Sol Investments);
 - b. Hamaca Loca S.A. de C.V. (HLSA), Cabañas Hamaca Loca, and the land parcel rights related to Cabañas Hamaca Loca (Hamaca Loca Investments);
 - c. Hotel Behla Tulum, La Tente Rose, and the land parcel rights related to Hotel Behla Tulum (Behla Tulum Investments);
 - d. O.M. del Caribe S.A. de C.V. (OMDC), Hotel Uno Astrolodge, and the land parcel rights related to Hotel Uno Astrolodge (Astrolodge Investments); and
 - e. Hotel Parayso Tulum and the land parcel rights related to Parayso (Parayso Investments).
4. Concerning 24 different alleged government actions that occurred in at least six different places and on three different dates (not counting the alleged fraudulent judicial proceedings, unlawful judgements and seizure orders):²

¹ Complete information on the nationalities of the individual Claimants has not been provided. The nationalities mentioned are without prejudice to the updating of these nationalities and the legal arguments associated with them as more information becomes available in the course of these proceedings.

² NOA#2 does not identify the dates of each of the 24 alleged government actions.

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- a. Tierras del Sol Investments: (i) fraudulent court proceeding and unlawful judgement; (ii) unlawful pre-seizure actions; (iii) unlawful judicial seizure order; (iv) unlawful seizure actions; (v) law-enforcement abuse; and (vi) failure to take criminal action.³
 - b. Tierras del Sol Investments: (i) Amparo proceeding; (ii) judicial delay; and (iii) unlawful judgement.
 - c. Hamaca Loca Investments: (i) fraudulent court proceeding and unlawful judgement; (ii) unlawful judicial seizure order; and (iii) unlawful seizure action (iv) failure to take criminal action.
 - d. Hamaca Loca Investments: (i) Amparo proceeding; (ii) judicial delay; and (iii) unlawful judgement.
 - e. Behla Tulum Investments: (i) fraudulent court proceeding and unlawful judgement; (ii) unlawful judicial seizure order; and (iii) unlawful seizure action (iv) failure to take criminal action.
 - f. Parayso Investments: (i) fraudulent court proceeding and unlawful judgement; (ii) unlawful judicial seizure order; and (iii) unlawful seizure action (iv) failure to take criminal action.
 - g. Astrolodge Investments: (i) fraudulent court proceeding and unlawful judgement; (ii) unlawful judicial seizure order; and (iii) unlawful seizure action (iv) failure to take criminal action.
4. The investment treaties pursuant to which the Respondent grants its consent to submit to arbitration and from which this Tribunal derives its jurisdiction do not allow for self-consolidation in these circumstances and the Respondent did not otherwise consent to it. Accordingly, the NOA#2 contains legal deficiencies, and the Tribunal must decline its jurisdiction and dismiss the claims in their entirety.
5. In the alternative, if the Tribunal finds that, it has jurisdiction to hear this self-consolidated arbitration, it still does not have jurisdiction because all of the legal requirements for arbitration

³ NOA#2, ¶¶ 45-47.

specified in each of the invoked treaties apply cumulatively. The Claimants have chosen to request this arbitration on a self-consolidated basis and, by doing so, they have deliberately subjected themselves to the cumulative application of these requirements.

6. In any arbitration, the claimant must comply with the requirements for submitting its claim to arbitration set out in the treaty it invokes. The same applies in this self-consolidated arbitration.

7. In this case, each Claimant must fulfil all of the requirements stipulated in each invoked treaty so that all requirements cumulatively are fulfilled in order for this arbitration to proceed. If just one jurisdictional requirement is not fulfilled under one of the invoked treaties, the self-consolidated arbitration in NOA#2 will be legally flawed, and the Tribunal will not have jurisdiction to hear this arbitration. Since jurisdictional requirements have not been fulfilled under each of the four invoked treaties (as addressed below), the self-consolidated arbitration in the NOA#2 must, as a whole, fail. Therefore, the Tribunal must find that it does not have jurisdiction to hear this arbitration, and the entirety of the claims must be dismissed.

Treaty-Specific Objections

8. If the Respondent's above objection is rejected and self-consolidation of this arbitration is permitted, this does not alleviate the Claimants from fulfilling the requirements for arbitration in each of the invoked treaties nor does it remedy any non-fulfilment of these requirements. All deficient treaty claims must be excluded from the arbitration. To do otherwise would render ineffective [*inutile*] the requirements for arbitration in each of these treaties and the interpretation would be contrary to the ordinary meaning of the terms and object and purpose of each treaty.

9. For each of the invoked treaties, the Claimants have failed to fulfil the following requirements for arbitration, which affect the jurisdiction of this Tribunal.

Sastre (Mexico-Argentina BIT)

- That Sastre was an Argentine national and that his dominant nationality was not Mexican at all relevant times, including the time of the alleged violation of the Mexico-Argentina BIT.
- That Sastre was an investor in the Tierras del Sol Investments at all relevant times, including the alleged violation of the Mexico-Argentina BIT.
- That Sastre was an investor in the Hamaca Loca Investments at all relevant times, including the alleged violation of the Mexico-Argentina BIT.
- That the transfer of the rights and claims related to Hamaca Loca Investments in favour

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of Sastre was not made solely for the purpose of accessing arbitration and thus constituted an abuse of process.

- That Sastre's investments in the Tierras del Sol Investments and in the Hamaca Loca Investments were in accordance with the Respondent's laws as required by the definition of "investment" in Article 1.1(a) of the Mexico-Argentina BIT.
- That Sastre was not domiciled in Mexico at all relevant times, including the time of the alleged violation, and therefore not excluded from invoking the ISDS mechanism under Article 2(3) of the Mexico-Argentina BIT in respect of that alleged violation.
- That Sastre was not excluded from invoking the ISDS mechanism by reason of his express renouncement of his rights in the Mexican naturalization procedure.
- That Sastre submitted his claims to arbitration within the four-year time limitation set by Article 1(2) of the Mexico-Argentina BIT.
- That Sastre notified the Respondent in writing of his intention to submit a dispute concerning the Hamaca Loca Investments to international arbitration under the Mexico-Argentina BIT as required by Article 10 (3) and (4) of the Mexico-Argentina BIT.

Galán and Alexander (NAFTA)

- That Galán and Alexander were Canadian nationals and that their dominant nationality was not Mexican at all relevant times, including the time of the alleged violation of the NAFTA.
- That Galán and Alexander were investors in the Parayso Investments at all relevant times, including the alleged violation of the NAFTA.
- That Galán's and Alexander's investments in Parayso Tulum were in accordance with the Respondent's laws.
- That Galán and Alexander filed a written notice of their intention to submit a claim to arbitration at least 90 days before the claim was submitted that complied with the condition's precedent set out in Article 1119 of the NAFTA.

Jacquet (Mexico-France BIT)

- That Jacquet was a French national at all relevant times, including the time of the alleged violation of the Mexico-France BIT.
- That Jacquet was an investor in the Behla Tulum at all relevant times, including the alleged violation of the Mexico-France BIT.
- That Jacquet's investments in the Behla Tulum Investments were in accordance with the Respondent's laws as required by Article 2(1) of Mexico-France BIT.

Silva and Abreu (Mexico-Portugal BIT)

- That Silva and Abreu were Portuguese nationals and that their dominant nationality was not Mexican at all relevant times, including the time of the alleged violation of the Mexico-Portugal BIT.

- That Silva and Abreu were not excluded from invoking the investor-state dispute settlement mechanism by reason of the renouncement of their rights in the Mexican naturalization procedure.
- That Silva and Abreu were investors in the Astrolodge Investments at all relevant times, including the alleged violation of the Mexico-Portugal BIT.
- That Silva's and Abreu's investments in the Astrolodge Investments were in accordance with the laws and regulations of the Respondent as required by the definition of "investment" in Article 1(1)(a) of the Mexico-Portugal BIT.

II. PROCEDURAL HISTORY

10. On 15 June 2017, the Ministry of Economy (Secretaría de Economía) received a Notice of Intent and Exhibits (NOI#1) sent by Counsel Ricardo Ampudia, on behalf of Carlos Esteban Sastre and Constructora Ecoturística, S.A. de C.V. (CETSA) (Mexican company with Argentinean national), regarding a claim under the Mexico-Spain BIT and Mexico-Argentina BIT. The Notice of Intent concerned an alleged seizure of the Cabañas Tierras del Sol Hotel located in Tulum, Quintana Roo, on 31 October 2011 by federal and local police.

11. On 6 September 2017, the Secretaría de Economía received a Second Notice of Intent and Exhibits (NOI#2) sent by Counsel Ricardo Ampudia, on behalf of Carlos Esteban Sastre regarding an additional claim relating to Hamaca Loca S.A. de C.V. (HLSA) and the Hamaca Loca hotel under the Mexico-Switzerland BIT. The foregoing, with the intention to add to Mr. Sastre's existing claim under BIT Mexico-Spain and Mexico-Argentina, filed in NOI#1. The NOI#2 was concerning an alleged seizure of the Hamaca Loca Hotel located in Tulum, Quintana Roo on 31 October 2011 by federal and local police. Additionally, NOI#2 related to HLSA's transfer to Mr. Sastre of rights regarding the Hamaca Loca parcel enabling Mr. Sastre to bring a claim under the Mexico-Switzerland BIT.

12. On 29 December 2017, the Secretaría de Economía received the First Notice of Arbitration and Exhibits (NOA#1) sent by Counsel Ricardo Ampudia, on behalf of Carlos Esteban Sastre regarding the claims notified in NOI#1 and NOI#2 and thereby submitting the Notice of Arbitration regarding this claim under the Mexico-Spain, Mexico-Argentina and Mexico-Switzerland BITs under the UNCITRAL Arbitration Rules of 1976.

13. On 17 January 2019, the Secretaría de Economía received the First Notice of Intent (NOI#3) sent by Counsel Ricardo Ampudia, on behalf of Renaud Jacquet (a French national),

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Graham Alexander and Monica Galan Rios (Canadian nationals), Rancho Santa Monica Developments, Inc. (Canadian Company), Eduardo Nuno Vaz Osorio dos Santos Silva and Margarida Oliveira Azevedo de Abreu (Portuguese nationals), and O.M. del Caribe S.A. de C.V. (Mexican entity of Portuguese nationals) under the Mexico-Portugal, Mexico-France BIT's and NAFTA. The Notice is related to hotels operated under the commercial names Hotel Parayso, owned by Canadian nationals; Uno Astro Lodge, owned by Portuguese nationals; and Behla Tulum, owned by a French national. The NOI#3 was concerning an alleged seizure of the hotels mentioned above located in Tulum, Quintana Roo on 17 June 2016 by federal and local police.

14. On 14 June 2019, a second NOA (NOA #2) was received by Secretaría of Economía which amended and expanded the NOA#1 by including the claims of five other Claimants (Renaud Jacquet, Graham Alexander, Monica Galan Rios, Eduardo Nuno Vaz Osorio dos Santos Silva and Margarida Oliveira Azevedo de Abreu) previously notified by way of the separate Jacquet NOI (NOI#3). The NOA#2 was issued by Counsel Ricardo Ampudia, from the law firm Shook, Hardy & Bacon, L.L.P., pursuant to the 1976 UNCITRAL Arbitration Rules and under NAFTA and the BITs between Mexico and (i) Argentina, (ii) France, and (iii) Portugal, on behalf of the Claimants. Notably, it excluded the claims under the Mexico-Switzerland BIT. NOA#2 alleges illegal seizure of the hotels mentioned above located in Tulum, Quintana Roo. Also, through NOA#2, the Claimants appointed Dr. Chales Poncet as arbitrator in these proceedings.

15. On 13 September 2019, the Respondent raised its jurisdictional objections in writing to the Claimants' counsel.⁴ The objections related to the jurisdictional deficiencies, included those in the NOA#2 and the notifications submitted prior the submission by Mr. Carlos Sastre, HLSA and CETSA. The deficiencies included the self-consolidation of separate arbitrations without Respondent's consent, deficiencies relating to ownership of the investment, nationality, domicile, and attempting to initiate a claim under the Mexico-Argentina BIT concerning investors and investments covered by the Mexico-Switzerland BIT.

⁴ **R-001**, Respondent's Response to the amended Notice of Arbitration and Appointment of Arbitrators submitted by the Claimants on 14 June 2019 (NOA#2) dated 13 September 2019.

16. Also, on 13 September 2019, the Claimants counsel sent a letter to the Secretary-General of the ICSID requesting the appointment of the remaining two arbitrators.⁵ The ICSID Secretariat notified the Respondent of this letter on 24 September 2019.

17. On 25 September 2019, the Respondent sent a letter to the Secretary-General of the ICSID informing of the Respondent's 13 September 2019 objections, providing a copy of those objections, and objecting to the appointment of arbitrators for the same reasons.⁶

18. By letter to the Secretary-General of ICSID, on 7 October 2019, Mexico appointed Professor Christer Söderlund as arbitrator in these proceedings.

19. On 11 February 2020, the parties agreed on the appointment of the President of the tribunal, Professor Eduardo Zuleta, thereby constituting the Tribunal.

20. On 13 May 2020, during discussions with the Claimants' counsel concerning the necessity of bifurcation of the proceedings into jurisdictional and merits phases, the Respondent sent a letter to the Claimants' counsel setting out in detail and on a without prejudice basis the Respondents jurisdictional objections.⁷ This same communication was sent to the Tribunal on 25 May 2020.

21. On 26 May 2020, the Tribunal held the First Session with the Parties during which issues related to the self-consolidated claim, bifurcation and other jurisdictional objections were raised by the Respondent. The Tribunal directed the parties to make two rounds of submission on the issues of bifurcation and the nature of the proceedings and procedural or substantive implications.⁸

22. On 28 May 2020, the Tribunal issued Procedural Order No.1 with respect to general issues governing the present arbitration.

23. On 13 August 2020, the Tribunal issued Procedural Order No. 2 regarding bifurcation, determining that all of the issues raised by the Respondent met the test for bifurcation.⁹

⁵ **R-002**, Claimants' Letter to the Secretary General of ICSID dated 13 September 2019.

⁶ **R-003**, Respondent's Letter to the Secretary General of ICSID dated 25 September 2019.

⁷ **R-004**, Respondent's Letter to Claimants' Counsel Regarding Defendant's Jurisdictional Objections, dated 13 May 2020.

⁸ Procedural Order No. 2, Bifurcation Decision, ¶¶ 1-2.

⁹ Procedural Order No. 2, Bifurcation Decision, ¶ 76.

24. On 17 September 2020, the Tribunal issued Procedural Order No.3, setting out the jurisdictional phase schedule of the proceedings.

III. BURDEN OF PROOF

A. The Claimants bear the burden of proving the facts necessary to establish that the Tribunal has jurisdiction *ratione voluntatis*, *ratione temporis*, *ratione personae*, and *ratione materiae*¹⁰

25. The burden is on the Claimants to prove at the jurisdictional stage the facts and conditions to establish the Tribunal’s jurisdiction *ratione voluntatis*, *ratione temporis*, *ratione personae*, and *ratione materiae* under each of the treaties.¹¹

26. In this arbitration, the Claimants have the burden of proving the following eight categories of treaty requirements, all of which affect the jurisdiction of this Tribunal, at all relevant times including at the time of the alleged treaty violations:

1. The Respondent’s consent to the self-consolidated arbitration;¹²

¹⁰ **RL-040**, H. Arthur, The Legal Value of Prior Steps To Arbitration In International Law Of Foreign Investment, *Anuario Mexicano de Derecho Internacional*, Vol. XV, 2015, pp. 449-491. (“Therefore, having a legal instrument that contains the consent to the jurisdiction of an international tribunal does not suffice for it to address the merits of a dispute. It is mandatory for the tribunal to take into account each and every element of this consent to determine the material, personal, temporal, territorial and voluntary spectrum upon which its jurisdiction rests.”)

¹¹ **RL-041**, *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 678. (“[I]t is Claimants who bear the burden to prove that all conditions for the Tribunal’s jurisdiction and for the granting of the substantive claims are met.”); **RL-042**, *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, 3 April 2014, ¶ 118. (“Although it is the Respondent which has here raised specific jurisdictional objections, it is not for the Respondent to disprove this Tribunal’s jurisdiction. Under international law, as a matter of legal logic and the application of the principle traditionally expressed by the Latin maxim “actori incumbit probatio”, it is for the Claimant to discharge the burden of proving all essential facts required to establish jurisdiction for its claims. Such jurisdictional facts are not here subject to any “prima facie” evidential test; and, in any event, that test would be inapplicable at this stage of the arbitration proceedings where the Claimant (as with the Respondent) had sufficient opportunity to adduce evidence in support of its case on the bifurcated jurisdictional issues and for the Tribunal to make final decisions on all relevant disputed facts”).

¹² **RL-043**, *M.C.I. Power Group L. C & New Turbine, Inc. v Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, ¶ 323. (“Under general international law, any obligation to submit for arbitration a dispute involving a State requires the existence of an agreement. That agreement, which may be verbal, must be proven by the party alleging it.”). **RL-044**, *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Award, 22 December 2017, ¶148. (“...consent cannot be presumed; it must be established by an express manifestation of intent or implicitly by conduct that demonstrates consent. Further, the burden of proving the existence of consent is on the Claimants, as they are the ones asserting jurisdiction.”); **RL-045**, *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, ICSID Case No. ARB/15/21, Award, 5 August 2016, ¶ 130. (“...selon le droit international en général, et selon l’arbitrage d’investissement en particulier, un Etat souverain ne peut pas être assujetti à une juridiction internationale

2. That all of the Claimants were “investors”, including that they all had the requisite “nationality” and that their dominant nationality was not Mexican;¹³
3. That all of the Claimants were investors in qualified “investments”;¹⁴

sans son consentement clairement exprimé et non-équivoque.”); **RL-046**, *Wintershall Aktiengesellschaft v. Republic of Argentina*, ICSID Case No. ARB/04/14, Award, 8 December 2008, ¶ 160(3). (“...it is a general principle of international law that international courts and tribunals can exercise jurisdiction over a State only with its consent... A presumed consent is not regarded as sufficient, because any restriction upon the independence of a State (not agreed to) cannot be presumed by courts...”); **RL-047**, *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Decision on the Preliminary Question, 17 July 2003, ¶ 64. (“...the Tribunal does not believe that under contemporary international law a foreign investor is entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement”); **RL-048**, *Manuel García Armas y otros v. República Bolivariana de Venezuela*, Caso CPA No. 2016-08, Laudo sobre Jurisdicción, 13 de diciembre de 2019, ¶ 631. (“...la jurisdicción en el plano internacional necesariamente presupone la existencia de un consentimiento expreso, el cual no puede ser presumido. En otras palabras, requiere de un “opt-in” por parte de los Estados, y no, por el contrario, de un “opt-out”); **RL-049**, *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, Award on Jurisdiction, 10 February 2012, ¶ 280. (“The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.”); **RL-050**, *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award, 28 October 2019, ¶ 366. (“The Tribunal would like to recall that Claimant bears the burden of establishing jurisdiction under the ICSID Convention and the BIT. As jurisdiction rests on the existence of certain facts, they have to be proved at the jurisdictional stage. The burden of proof of such facts is on Claimant insofar as Respondent contests them”).

¹³ **RL-051**, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, ¶ 108. (Referencing the *Hatton* Cases the Ad-Hoc Committee noted that the claimant “...had the burden of proving to the Tribunal that he possessed Italian nationality as of the pertinent dates”, a requirement that “is consistent with general principles of law and has been constantly applied by ICSID tribunals”. If the claimant failed in its burden to “prove his nationality to the Tribunal, the latter could not have jurisdiction to hear the case on the merits.” The Ad-Hoc Committee also quoted the Mexico-United States General Claims Commission in *Hatton* where it stated that “it is proper to observe . . . that convincing proof of nationality is requisite not only from the standpoint of international law, but as a jurisdictional requirement.”). **RL-038**, *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009, ¶112. (“It is undisputed that an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that it was an investor at the relevant time, i.e., at the moment when the events on which its claim is based occurred...”).

¹⁴ **RL-052**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, ¶ 153. (“... the burden of proof lies fairly and squarely on BSAM to demonstrate that it owns or controls a qualifying investment...a burden that BSAM must discharge according to the normal standard of proof, namely on balance of probabilities.”); **RL-053**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. V. The Republic of Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶ 171. (“The Tribunal must decide this question finally at the jurisdictional stage on the balance of probabilities. The Claimants bear the burden of proof. If the Claimants' burden of proving ownership of the claim is not met, the Respondent has no burden to establish the validity of its jurisdictional defences.”).

4. That all of the investments were “legal”;¹⁵
5. That all of the notices of intent (NOIs) to submit claims to arbitration were submitted in the proper form within the specified time limitations;¹⁶
6. That all of the notices of arbitration (NOAs) and all the claims therein were submitted within the specified time limitations;¹⁷
7. That Sastre was not “domiciled” in Mexico;¹⁸ and

¹⁵ **RL-024**, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 104.. (“... if it is manifest that the investment has been performed in violation of the law, it is in line with judicial economy not to assert jurisdiction.”); **RL-023**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 10 December 2014, ¶. 306. (“... it is possible that an economic transaction that might qualify *factually and financially* as an investment (*i.e.* be comprised of capital imported by a foreign entity into the economy of another state which is party to a BIT), falls, nonetheless, outside the jurisdiction of the tribunal established under the pertinent BIT, because legally it is not an “investment” within the meaning of the BIT.”).

¹⁶ **RL-025**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, ¶ 120. (“In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, *i.e.* that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118- 1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party’s consent to arbitration is established.”); **RL-054**, *Canfor Corporation v. United States of America, Tembec Inc. et. al. v. United States of America and Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Decision of Preliminary Question, 6 June 2006, ¶ 171. (Commenting on tribunal’s responsibility to assess compliance with pre-requisites and formalities under the treaty, “First, a mere assertion by a claimant that a tribunal has jurisdiction does not in and of itself establish jurisdiction. It is the tribunal that must decide whether the requirements for jurisdiction are met.— Second, in making that determination, the tribunal is required to interpret and apply the jurisdictional provisions, including procedural provisions of the NAFTA relating thereto, *i.e.*, whether the requirements of Article 1101 are met; whether a claim has been brought by a claimant investor in accordance with Article 1116 or 1117; and whether all pre-conditions and formalities under Articles 1118-1121 are satisfied.”)

¹⁷ **RL-055**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case N.º ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶¶ 188-191. (“... No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimants first acquired, or should have first acquired, knowledge of the breach alleged... If a claimant does not comply with the conditions and limitations established in Article 10.18, its claim cannot be submitted to arbitration...”).

¹⁸ **RL-056**, *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9 (formerly Giordano Alpi and others v. Argentine Republic), Decision on Jurisdiction and Admissibility, 8 February 2013, ¶ 301. “As regards the jurisdictional requirements *ratione personae* in the case at hand, the Tribunal would first note that – in analogy to the situation regarding jurisdiction *ratione materiae*¹³⁴ – both the pertinent prerequisites of the ICSID Convention and the Argentina-Italy BIT including its Additional Protocol [que contiene el requisito adicional de “domicilio” con respecto a las personas físicas] have to be met by the Claimants in order for the case to pass the threshold of jurisdiction and to proceed to the merits.”; *Ibid.*, Dissenting Opinion of Santiago Torres Bernárdez, ¶ 122. (“As to the requirements of the *ratione personae* jurisdiction of the Claimants, “nationality” and “domicile” are not, in the instant case, the only ones requiring verification. There are other elements like “consent” and “being a holder of a protected investment in the territory of the Argentine Republic at the relevant dates”, which are also in need of

8. That Sastre, Silva and Abreau, are not excluded from invoking the ISDS mechanism by reason of the waiver of their rights in the Mexican naturalization procedure.

B. The burden must be met at the time the NOA is filed

27. The burden is on the Claimants to prove that all the requirements for arbitration have been met at the time NOA#2 was filed.¹⁹ If this burden is not met at the time the NOA is filed, no error can be remedied in this procedure. The NOA must be refiled in accordance with the requirements of the applicable treaty.

IV. THE TRIBUNAL LACKS JURISDICTION BECAUSE THE RESPONDENT HAS NOT CONSENTED TO THE CLAIMANTS' SELF-CONSOLIDATED ARBITRATION

28. The Tribunal lacks jurisdiction because self-consolidation without the Respondent's consent is *per se* not permitted by the legal texts of the invoked treaties. The NOA#2 is legally flawed because it unilaterally self-consolidates into a single arbitration without the consent of the Respondent and without invoking the explicit consolidation provisions in the treaties: (i) claims under four different treaties; (ii) involving six different Claimants of different nationalities; (iii) relating to at least fourteen different investments; (iv) concerning twenty four different alleged government actions that occurred in at least six different places (not counting the places of the alleged fraudulent judicial proceedings, unlawful judgements and seizure orders) on numerous different dates.²⁰

29. Self-consolidation can legally occur and has occurred in many arbitrations where the respondent State has consented, either explicitly or implicitly, during the course of the arbitration.

detailed verification before being in a position allowing the Tribunal to declare the existence of *ratione personae* jurisdiction, either in general or with respect to each individual Claimant.”)

¹⁹ A tribunal's jurisdiction must exist on the day on which the respondent State receives the notice of arbitration, it cannot be cured, and the jurisdictional deficiency(ies) can be addressed in a new filing. See: **RL-020**, *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, ¶¶ 213- 219, 267-273; **RL-021**, *Waste Management, Inc. II v. Estados Unidos Mexicanos*, *Caso CIADI No. ARB(AF)/00/3*, Decisión sobre la objeción preliminar de México relativa al Procedimiento Previo, 26 de junio de 2002, ¶ 36.; **RL-022**, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. *ARB/05/01*, Award, 22 August 2012, ¶ 281.

²⁰ As noted in the Introduction, these figures do not count the alleged falsified judicial proceedings, default judgements and seizure orders.

No such consent has been given in this arbitration. The Respondent has consistently maintained from the outset of this arbitration that it has not consented to the Claimants' self-consolidation.

30. Unlike prior arbitrations that have addressed self-consolidation, three of the four treaties invoked in this arbitration explicitly set out the scope and limits of the Respondent's consent to consolidation.

A. The systemic importance of the Tribunal's ruling on this jurisdictional issue and the importance of interpreting the treaties in accordance with the Vienna Convention

31. This is the first time that the Respondent has encountered self-consolidation that it has not consented to. The Tribunal's ruling on whether such self-consolidation is permitted in this arbitration will have systemic implications for the Respondent and for the other States party to the invoked treaties, *i.e.*, Argentina, Portugal, France, Canada and the United States.

32. Self-consolidation as it has occurred in this arbitration goes to the Respondent's consent to this arbitration and therefore to the jurisdiction of this Tribunal. The four invoked treaties govern the Respondent's consent. The limitations of that consent are a matter of treaty interpretation guided by the rules of interpretation in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (Vienna Convention).

B. Self-consolidation is a jurisdictional issue

33. In Procedural Order No. 2, without deciding the nature of the Respondent's objection,²¹ the Tribunal questioned whether the Respondent's objection to the Claimants' self-consolidation is a jurisdictional or procedural issue. It stated:

Prima facie the objection is serious and substantial because the consent given by the Parties to determine the procedure is essential to the Tribunal's jurisdiction—if the objection were to be considered a jurisdictional one —, or to conduct the proceedings — if the objection were to be considered a procedural one.²²

²¹ Procedural Order No. 2, ¶ 49.

²² Procedural Order No. 2, ¶ 50.

... the objection is not a question related to the merits of the dispute. This objection is a matter of interpretation of the applicable procedural rules, and it has no bearing on the merits of the case²³ [Emphasis added]

34. Arbitral tribunals constituted under treaties, including this Tribunal, are “*creatures of consent*”.²⁴ Consent by a State is a fundamental requirement for submitting disputes to arbitration and to an arbitral tribunal’s jurisdiction by either express declaration (*i.e.*, investment treaties or the domestic laws governing foreign investment) or by actions that demonstrate consent.²⁵ Since the self-consolidation that has occurred in this arbitration goes to the Respondent’s consent to arbitration, it is *per se* a jurisdictional matter that is governed by the four invoked treaties, not by the 1976 UNCITRAL Rules.

1. The texts of the four treaties determine whether the Respondent has consented to this arbitration

35. The four treaties that provide for the parties’ consent to arbitration explicitly prescribe the following:

- Article 1122(1) of the NAFTA specifies that “[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement”; [emphasis added]
- Article 15(1) of the Mexico-Portugal BIT reads “A tribunal established under this Dispute Settlement Mechanism shall decide the submitted issues in dispute in accordance with this Agreement, the applicable rules of law and principles of International Law”; [emphasis added]
- Article 9(5) of the Mexico-France BIT specifies that “[t]he applicable arbitration rules shall govern the arbitration except to the extent modified by the present Article” and Article 9(7) specifies that “[a] tribunal established under this Article shall decide by a

²³ Procedural Order No. 2, ¶ 52.

²⁴ **RL-057**, Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford: Oxford University Press, 2012) at 225.

²⁵ *Id.*, 226; **RL-058**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Tribunal’s Decision on the Objection to Jurisdiction for Lack of Consent, 19 December 2016, ¶ 21.

majority of votes the dispute in accordance with this Agreement and applicable rules and principles of international law”; and

- Article 10(5) of the Mexico-Argentina BIT specifies that “the arbitration body shall decide disputes submitted for its consideration on the basis of the provisions of this Agreement, as well as the rules and principles of international law on the subject”.
[Emphasis added] [*unofficial translation*]

36. The above excerpts from each invoked treaty indicate that the underlying treaties override other instruments, such as the applicable arbitration procedural rules, in ascertaining the parties’ consent and the Tribunal’s jurisdiction.

2. The 1976 UNCITRAL Arbitration Rules are subservient to the four invoked treaties

37. Article 1(1) of the 1976 UNCITRAL Arbitration Rules explicitly provides that the rules are subservient to the treaties that govern the parties’ consent in the formation of an arbitration agreement which is the basis for an arbitral tribunal’s jurisdiction:

Article 1

Where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.²⁶ [Emphasis added]

38. The written agreements which govern the parties’ consent in this arbitration are the four invoked treaties. Thus, Article 1(1) of the 1976 UNCITRAL Rules affirms that it is the four treaties, not the arbitration rules, that determine the parties’ consent and the Tribunal’s jurisdiction.

3. The Arbitration Rules apply to the arbitration after the consent to arbitration has been given.

39. The Respondent’s consent to arbitration must be established prior to the application of the procedural rules to that arbitration. It is only once an arbitration is consented to that it is conducted under the applicable procedural rules, in this case the 1976 UNCITRAL Rules. Accordingly, the procedural rules are not legally relevant to proving the Respondent’s consent to arbitration.

²⁶ **RL-001**, Article 1, the 1976 UNCITRAL Arbitration Rules.

C. Consolidation is limited to that permitted in the texts of the invoked treaties

1. The texts of the treaties explicitly establish when two or more arbitrations can be fused

40. The Respondent uses the term “self-consolidation” to refer to the fusion of two or more arbitrations into a single arbitration by Claimants when an arbitration is initiated. Other terms used to refer to the fusion of two or more arbitrations include “consolidation”, “conjoining”, “multi-party arbitration”, “joint submission”, “joint claim”, and “mass claim”. The factual circumstances encompassed by these terms may differ, but they have the same common purpose, the fusion of two or more arbitrations into a single arbitration.

41. This arbitration is unique because in three of the four treaties that have been invoked, the parties to the treaties openly proposed the fusion of two or more arbitrations into a single arbitration and agreed to it in the following provisions:

- Mexico-Argentina BIT, Article 4 of the Annex;
- Mexico-Portugal BIT, Article 12; and
- NAFTA, Article 1126.

42. These provisions express the limits of the parties’ agreement to the fusion of arbitrations. They provide, *inter alia*, for special consolidation tribunals, that are separate from the original tribunals in the arbitrations, to consider the consolidation of arbitration proceedings in specified circumstances. The parties did not agree to the fusion of two or more arbitrations in any other circumstances, including in the circumstances of self-consolidation in this arbitration.

2. There is no basis for “inferred” consent in this arbitration

43. In *Giovanni Alemanni and others v. Argentine Republic*, the Tribunal was asked to determine whether it had jurisdiction over a dispute brought by a large number of investors.²⁷ In the tribunal’s view, the central issue raised by multiple claimants under the same treaty is whether:

²⁷ **RL-018**, *Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014, ¶ 269.

“(…) on the proper interpretation of the BIT, has the respondent, or has it not, given a consent which is wide enough in scope to cover the proceedings brought (as in this case) by the multiple group of co-claimants?”²⁸

44. The *Alemanni* tribunal rejected the investor’s contention that the respondent’s consent is of no essential relevance in prior cases in which arbitrations have proceeded on a multi-party basis. The *Alemanni* tribunal provided three scenarios in which the respondent’s consent to consolidation of arbitration can be induced:

In the Tribunal’s judgement, there are three sets of circumstances in which arbitration is possible with a multiplicity of parties. One is (hypothetically) when it is specifically provided for, e.g. in an applicable treaty or set of arbitration rules, or in the other instrument establishing the parties’ consent to arbitration, as for example where NAFTA Chapter Eleven and several later treaties contain a specific provision under which a “consolidation tribunal” may order that claims be consolidated with others on the ground that there are common issues of law and/or fact. Another is when it receives the particular assent of both parties *ad casum*, which could be express, for example in the procedural arrangements made by the tribunal at the commencement of the arbitration, or it could be inferred, for example by the respondent answering the claimants’ claim and continuing with the arbitration without raising objection to the fact that there is a multiplicity of claimants.... A variant on this possibility is the situation where, faced with multiple individual claims, a respondent agrees, at least for preliminary objection purposes, to have the individual claims heard in one proceeding (on the reasoning that if its objection is upheld, that will dispose of all of the claims). This is what occurred in *Bayview v Mexico* and *Canadian Cattlemen v United States* Arbitrations (and appears to have occurred in the *Anderson v Costa Rica* proceeding which, like *Bayview* and *Canadian Cattlemen*, was also dismissed after a jurisdictional hearing was held). In *Bayview*, although the Award does not record the fact, Mexico’s pleadings (available on the internet) show that notwithstanding Mexico’s objection to the claimants’ having unilaterally joined their claims in a single proceeding, it consented to having the tribunal’s jurisdiction determined for all claims in a single proceeding. In *Canadian Cattlemen*, the tribunal’s Procedural Order No. 1 recorded the fact that the jurisdictional phase was being conducted as a single proceeding by the consent of all parties.²⁹ [Emphasis added]

45. The *Alemanni* tribunal described the third scenario as follows:

In between those two classes of cases lies however a third. This is the case in which it is asserted that the instrument setting up the arbitration or establishing the

²⁸ *Id.*, ¶ 269.

²⁹ *Id.*, ¶ 285.

Respondent's consent to it can properly be interpreted, on the particular facts of the case, as covering the particular multiplicity of claimants within that consent. This is the situation which the Tribunal finds itself facing here. It requires the Tribunal to analyse Article 8 of the BIT and apply it to the specific facts of the present case.

³⁰ [Emphasis added]

46. According to the *Alemanni* tribunal, States' consent to arbitrate claims submitted by multiple claimants under a single proceeding can only be induced in three ways: (1) the consent contained in the specific consolidation clauses found in treaties; (2) the express or inferred consent made by the two disputing parties in the arbitration process; and (3) the consent inferred from treaty interpretation. The tribunal was of the view that it was only in the third scenario that should determine if consolidation was allowed by the treaty based on the principles of treaty interpretation.³¹

47. In his Concurring Opinion in *Alemanni*, Arbitrator J. Christopher Thomas Q.C. also emphasized that treaties containing consolidation clauses such as the NAFTA indicate that specific consent for consolidation has been given by the States under that treaty.³² It is only when the treaties are silent that arbitrators are invited to interpret whether States have consented to arbitrating multi-party disputes from a treaty interpretation perspective.³³ The arbitrator subjected the arbitral tribunal's exercise of discretion of treaty interpretation to explicit treaty language. In other words, when the treaty provides conditions for consolidation, an arbitral tribunal has no discretionary interpretative power but must abide to the provisions of the treaty:

In my view, the Tribunal's search for the existence of a single dispute where, on the one hand, all Claimants have felt the effect of the Respondent's measures, but on the other hand, they have acquired different security entitlements in different bond issues at different times and in different circumstances, represents the best possible solution in the circumstances, having regard to: (i) the absence of a special consent clause and special rules and procedures on multi-party ICSID arbitrations; (ii) the absence of a consolidation provision in the Treaty; and (iii) the fundamental precepts of ICSID arbitration (viz. equality of arms and a full opportunity to make one's case).³⁴ [Emphasis added]

³⁰ *Id.*, ¶ 286.

³¹ *Id.*, ¶ 286.

³² **RL-059**, Concurring Opinion of Mr. J Christopher Thomas QC, 17 November 2014, ¶ 6.

³³ *Id.*, ¶ 8, and in particular ¶ 11 reproducing the Tribunal's approach "[i]n the absence of a consolidation provision[.]"

³⁴ *Id.*, ¶ 12.

48. The present arbitration falls in the first scenario indicated by the *Alemanni* tribunal. The NAFTA, Mexico – Portugal BIT and Mexico – Argentina BIT include consolidation provisions, which evidence that Mexico and its counterpart(s) have deliberately consented to consolidation within the ambit of each treaty.

49. It is important to highlight that said provisions limit State parties' consent in the three treaties. They did not consent to consolidation of disputes arising from other treaties. That silence has a reason: under public international law, State parties to a treaty cannot create obligations to third-party States without their consent nor create rights to third-party States without explicitly stating so in the text of the treaty. This is confirmed by two important principles—*pacta sunt servanda* and *pacta tertiis* (treaty privity), both of which are codified in the Vienna Convention.

3. Self-consolidation in this arbitration is prohibited by public international law principles of *pacta sunt servanda* and *pacta tertiis* codified in the Vienna Convention

50. In addition to applying the general rule of treaty interpretation under Article 31 of the Vienna Convention, the State parties' explicit consent to consolidation under three individual invoked treaties and silence on multi-treaty self-consolidation under the four invoked treaties must be interpreted in light of the principles of *pacta sunt servanda* and *pacta tertiis nec nocent nec prosunt* (*pacta tertiis* or treaty privity).

51. Articles 26 (*Pacta Sunt Servanda*),³⁵ 34 (General Rule Regarding Third States),³⁶ and 36 (Treaties providing for rights for third States)³⁷ of the Vienna Convention set out the reciprocity and exclusivity of treaty privity

³⁵ Article 26, entitled “*Pacta Sunt Servanda*” provides that “Every Treaty in force is binding upon the parties to it and must be performed by them in good faith”.

³⁶ Article 35, entitled “Treaties Providing for Obligations for Third States” provides that “An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing”. Article 2 (h) of the VCLT specifies that “Third State” means a State not a party to the treaty”.

³⁷ Article 36, entitled “Treaties providing for rights for third States” provides that: (1) “A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides” and (2) “State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty”.

and the fundamental principle that third parties outside the treaty do not have rights or obligations under the treaty.

52. Under these two principles, the State parties to a treaty can only create rights and obligations to each other. Creating rights and obligations to a third State requires further action of the treaty parties and the third State in the event of creation of obligations. The silence on multi-treaty self-consolidation demonstrates that the treaty parties had no intention to extend the rights and obligations arising from a consolidation clause to a third State. Otherwise, they would have done so explicitly as required by international law.

a. Pacta sunt servanda

53. Under the principle of *pacta sunt servanda*, a treaty is binding only upon the parties to it (Article 26—*Pacta Sunt Servanda*³⁸) and it does not create either obligations or rights for a Third State without its consent (Article 34—treaty privity or the Roman law maxim *Pacta Tertiis Nec Nocent Nec Prosunt* or *Pacta Tertiis*). For a treaty to create obligations to States that are outside of that privity, *i.e.*, to third parties, the treaty parties have to express such intention and States outside of the treaty privity have to agree in writing (Article 35). For a treaty to provide for rights for Third States, the parties to the treaty must so intend and the third party must give their consent (Article 36).

54. These principles apply to the present arbitration. In the four treaties invoked by the Claimants, no State parties have expressed an intention to extend the treaty obligations or rights such as consolidation of claims to a Third State and their investors who are outside of that treaty privity. Moreover, no Third State outside of the alleged treaty privileges has consented to be bound by such obligations in writing or have assented to such rights. Thus, the four treaties operate reciprocally and exclusively between the two States that are parties to each treaty; they do not

³⁸ The principle of Pacta Sunt Servanda - Every treaty in force is binding on the parties and must be performed by them in good faith—“is the fundamental principle of the law of treaties”. **RL-060**, International Law Commission, “*Report of the Commission to the General Assembly: Draft Articles on the Law of Treaties with Commentaries*”, Yearbook of the International Law Commission (1966-II), at p. 211 [ILC, “Draft Articles on the Law of Treaties with Commentaries”]. One effect of the Pacta Sunt Servanda principle is that the treaty applies reciprocally between the parties.

overlap with or cross over each other. Among other things, this is evidenced by the preambles of the four treaties that emphasize the mutuality of the treaties.³⁹

55. The territorial scope of application of each treaty is further evidenced by the following Articles. Article 2(2) of the Mexico – France BIT provides the territorial scope of the treaty, *i.e.*, in the territory of each Contracting Party:

This Agreement shall apply to the territory and the maritime area of each Contracting Party. [Emphasis added]⁴⁰

56. In addition, Article 9(1) of the Mexico – France BIT further defines the scope of the investor’s non-sovereign, beneficiary investor right protected by the two State:

This Article only applies to dispute between a Contracting Party and an investor of the other Contracting Party concerning an alleged breach of an obligation of the former under this Agreement which causes loss or damage to the investor or its investment. [Emphasis added]

³⁹ **R-011**, ³⁹ NAFTA, Preamble, “The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to: STRENGTHEN the special bonds of friendship and cooperation among their nations; (...) CREATE an expanded and secure market for the goods and services produced in their territories; (...) ESTABLISH clear and mutually advantageous rules governing their trade; (...) HAVE AGREED as follows.” [Emphasis added]; **RL-014**, México-Argentina BIT, Preamble. (“The Government of the United Mexican States and the Government of the Argentine Republic, hereinafter referred to as “the Contracting Parties””; DESIRING to strengthen the bonds of friendship between their peoples and seeking to broaden and intensify economic relations between the Contracting Parties, in particular with respect to investments by investors of one Contracting Party in the territory of the other Contracting Party; RECOGNISING that a bilateral agreement on the promotion and protection of investments is necessary to foster economic development and to stimulate the flow of capital and technology between the Contracting Parties; WISHING to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party, in accordance with the principle of international reciprocity. HAVE agreed as follows:” [Emphasis added] [*unofficial translation*]); **RL-015**, Mexico – France BIT, Preamble, “The Government of the Republic of France and the Government of the United Mexican States hereinafter referred to as the Contracting Parties, Desiring to strengthen the economic cooperation between both States and to create favourable conditions for French investments in Mexico and Mexican investments in France, Convinced that the promotion and protection of these investments would succeed in stimulating transfers of capital and technology between the two countries in the interest of their economic development, Have agreed as follows:” [Emphasis added]; **RL-016**, Mexico – Portugal APRI, Preamble, “The Portuguese Republic and the United Mexican States, hereinafter referred to as the “Contracting Parties”, Desiring to intensify the economic co-operation between the two States, Intending to encourage and create favourable conditions for investments made by investors of one Contracting Party in the territory of the other Contracting Party on the basis of equality and mutual benefit, Recognizing that the mutual promotion and protection of investments on the basis of this Agreement will stimulate business initiative, Have agreed as follows.” [Emphasis added].

⁴⁰ See **RL-015**, Articles 3 to 8 of the Mexico – France BIT. Emphasizes the limited territoriality application of the treaty’s substantive provisions.

57. The intentions of Mexico and France expressed in these provisions is that the BIT only applies mutually and exclusively between the two State parties in their respective territory. In this context, the two States give each other's investors a defined third-party right to have recourse to arbitration when specific conditions set by the treaty privity have been met.⁴¹

58. Similarly, the Mexico–Argentina BIT,⁴² the Mexico – Portugal BIT⁴³ and the NAFTA⁴⁴, each have set the mutual and exclusive application between each other in their respective territories.

59. Consequently, the consolidation tribunals established under the NAFTA, Mexico-Portugal BIT and Mexico-Argentina BIT work exclusively under each treaty. The jurisdiction of each consolidation tribunal established under the respective treaty does not overlap.

60. By submitting one amended NOA that includes claims arising under four different treaties, the Claimants have beached Mexico's and its corresponding treaty partners' sovereign obligations and rights prescribed by the principle of *pacta sunt servanda*. The amended NOA violates the boundary of each treaty's privity. In so doing, it overrides the specific rights and obligations negotiated between Mexico and each of its treaty partners, including the consolidation clauses which operate under certain conditions defined in the treaties.

b. Treaty privity or *pacta tertiis*

61. The principle of *pacta tertiis* codified in the Vienna Convention reinforces the principle of *pacta sunt servanda* and the Respondent's position.

62. Article 34 of the Vienna Convention specifies the public international law principle of the treaty privity that treaties neither bind nor benefit Third States or *pacta tertiis*.⁴⁵ This means that

⁴¹ See *Ibid.* Article 9.

⁴² **RL-014**, Mexico-Argentina BIT, Preamble, Article 1(6), Article 2(1) and (2), and Article 10 (1) and (2).

⁴³ **RL-016**, Mexico - Portugal BIT, Preamble, Article 2(1) and (2), Article 8(1) and Article 19.

⁴⁴ **R-011** and **RL-017**, NAFTA, Preamble, Chapter 1 Article 102, Annex 104.1 Chapter 2 Article 201, Annex 201.1, Annex 1010.1 Chapter 11 Article 1101(1) and Article 1115.

⁴⁵ **RL-060**, International Law Commission (ILC), "Report of the Commission to the General Assembly: Draft Articles on the Law of Treaties with Commentaries" Yearbook of the International Law Commission (1966-II), at p. 226.

an agreement does not impose obligations or confer rights upon Third States. In international law, the justification for the rule of *pacta tertiis* goes beyond contract law theory to the principles of the State sovereignty and independence of States. The principle of *pacta tertiis* is “one of the bulwarks of the independence and equality of States”.⁴⁶ The principle has been applied by international courts and tribunals.⁴⁷

63. There are two aspects to the principle of *pacta tertiis*. First, treaties do not create obligations to a third State without their consent (the negative side of *pacta tertiis*). Second, treaties do not confer benefits to a Third State without their consent (the positive side of *pacta tertiis*).⁴⁸

64. Article 35 of the Vienna Convention deals with the negative side of the treaty privity. The negative side is crucial in safeguarding the sovereignty and independence of States.⁴⁹ For a treaty to create obligations to a State outside of that privity, two conditions must be met. First, the parties to the treaty must intend to establish obligations to States outside of that privity. Second, the State outside of that privity must expressly accept the obligations in writing.

D. Conclusion

65. For the foregoing reasons, the Tribunal lacks jurisdiction because self-consolidation without the Respondent’s consent is *per se* not permitted by the legal texts of the invoked treaties.

E. In the event the Tribunal finds that self-consolidation is permitted, all the legal requirements for arbitration specified in the four invoked treaties must be fulfilled and Claimants failed to do so

66. Each invoked treaty conditions its offer to arbitration on specific requirements. If self-consolidation without the Respondent’s consent is permitted in this arbitration, the arbitration requirements under the four invoked treaties must be applied cumulatively. This means that each

⁴⁶ **RL-060**, ILC, “Draft Articles on the Law of Treaties with Commentaries”, *id.*, at p. 227.

⁴⁷ See, for example, **RL-061**, German Interests in Polish Upper Silesia (Germ. v. Pol.), 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25) ¶ 82. (This case established that: “[a] treaty only creates law as between the State which are parties to it; in case of doubt, no rights can be deduced from it in favour of third State”); **RL-062**, Anglo-Iranian Oil Co. Case: United Kingdom v. Iran (Preliminary Objections) (1952) ICJ Rep. 93, at p. 112. The International Court of Justice declined jurisdiction over the case as it considered that there was no treaty privity (*pacta tertiis*) between the United Kingdom and Iran, thus the United Kingdom could not bring a claim on behalf of the Anglo-Iranian Oil company.

⁴⁸ **RL-063**, Michael Waibel, “The Principle of Privity” in Michael J Bowman and Dino Kritsiotis (ed) *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press, 2018), at p. 207.

⁴⁹ *Id.*, at p. 207. 38

claimant has to fulfil all of the requirements stipulated in the treaty it invokes before this arbitration can proceed.

67. There are three reasons, grounded in the general rule of interpretation in the *Vienna Convention*, that dictate why the arbitration requirements must be applied cumulatively to this arbitration:

- First, by virtue of the principle of effective treaty interpretation (*ut res magis valeat quam pereat*), all provisions in the invoked treaties must be given meaning, including the arbitration requirements. Permitting self-consolidation in this arbitration cannot render the arbitration requirements *inutile*.
- Second, allowing the Claimants to self-consolidate without requiring the fulfilment of the Respondent's counterbalancing arbitration requirements will disproportionately favour the Claimants and will violate the principle of equity.
- Third, the principle of good faith means, *inter alia*, that the terms of a treaty are not to be interpreted based on the assumption that one party is seeking to evade its obligations and will exercise its rights so as to cause injury to the other party.⁵⁰ If the arbitration requirements are not applied cumulatively, the Claimants will be evading their obligations under the offers to arbitration in the treaties and the rights of the Respondent under the treaties will be injured.

68. If the Tribunal accepts the position that all arbitration requirements under each treaty must be fulfilled by the investors making claims under that treaty for the self-consolidated arbitration to proceed (*i.e.*, if even one arbitration requirement is unfulfilled in respect of one claim the arbitration cannot proceed), it means that any deficiency, no matter how small, will deny this Tribunal jurisdiction over this arbitration.

V. THE TRIBUNAL LACKS JURISDICTION BECAUSE THE REQUIREMENTS FOR ARBITRATION UNDER EACH OF THE FOUR TREATIES HAVE NOT BEEN FULFILLED

69. For the reasons set out below, the Tribunal lacks jurisdiction *ratione voluntatis*, *ratione temporis*, *ratione personae* and *ratione materiae* for the claims under each of the four invoked treaties, *i.e.* the Mexico-Argentina BIT; the NAFTA; the Mexico-Portugal BIT; and the Mexico-France BIT.

⁵⁰ **RL-019**, Appellate Body Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R, adopted 25 March 2011, ¶ 326.

A. General matters applicable to the Respondent's treaty specific jurisdictional objections

70. The jurisdictional objections raised by the Respondent with respect to each of the treaties relate to the Claimants' failure to provide evidence of the existence of a “dispute”, arising out of an “investment”, between the Respondent and an “investor” of one of the other States parties to the treaties invoked. The Claimants have failed to prove:

- a. that they are “investors” within the meaning of the treaties, including that they meet the nationality requirements;
- b. that, as investors, they have qualified “investments” in the territory of the Respondent, including that those investments are legal under the Respondent's laws, as established by the invoked Treaties; and
- c. that they have complied with other requirements for submitting a “dispute” to arbitration, including compliance with the requirements for domicile, notification and limitation periods and have not renounced their arbitration rights.

1. Relevant times to prove being an “investor” (including nationality) and having an “investment” (including legality of the investment)

71. The Claimants have not proven, *inter alia*, the following requirements for establishing the jurisdiction of this Tribunal: (i) that they are qualified “investors”, in accordance with the definition established in the invoked treaties, including their nationality; (ii) that they are “investors” in qualified “investments” within the scope of application of the invoked Treaties; and (iii) that their investments were legally constituted under the Respondent's laws. The Claimants must prove that they complied with these requirements to be able to access to the arbitration, at the very least: (i) at the time the investments were made; (ii) at the time of the measures that gave rise to the alleged breaches; and (iii) at the time of the submission to arbitration (i.e., at the time of the submission of the notice of arbitration).⁵¹ The Claimants' lack of evidence to prove any one of these requirements at any one of these times will deny this Tribunal of jurisdiction under the treaty in question.

⁵¹ This Memorial will focus on these three moments. This is without prejudice to the relevance of other moments to prove the jurisdictional requirements specified by the Respondent.

72. The four treaties invoked expressly provide that the Claimants must prove compliance with these requirements at the following times:

Mexico-Argentina BIT

- The BIT applies to “investors” and their “investments” (Articles 1 (Definitions), and 2 (Scope of the Agreement)).
- An investment must be in accordance with the laws and regulations of the receiving Contracting Party (Article 2.1 (Scope of the Agreement)), it is therefore necessary to prove compliance with this requirement on the date on which the investment was made.
- The provisions on protection of the investors and their investments commence at the time in which the investments are admitted and made (Articles 2 (Scope of the Agreement) and 3 (National and MFN treatment)). For these provisions to apply, the “investor” and “investment” requirements must have been met. It is therefore implicit that it is also necessary that the requirements be proven at the time of admission of an investment and at the time they are made.
- The investment dispute settlement procedures apply to treaty breaches in relation to investors and their investments (Annex Article 1 (Settlement of disputes between an Investor and the Contracting Party receiving the Investment)), it is therefore necessary to prove the compliance with these requirements on the date of the alleged violations to the treaty and at the time the dispute settlement procedures are invoked, including at the time of submission of a claim to arbitration (*i.e.*, the time NOA#2 was received by the Respondent in this arbitration).

NAFTA

- NAFTA Chapter 11 (Investment) applies to “investors” and their “investments” (Article 1101(1) (Scope and coverage)).
- The provisions on protection of the investors and their investments commence at the time of the establishment and acquisition of the investments (Articles 1102 (National Treatment), 1103 (MFN Treatment), and 1106 (Performance Requirements)), necessitating that the requirements be proven at the time of establishment and acquisition of the investments. In order for said provisions to apply, the “investor” and

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“investment” requirements must be complied with. Therefore, it is implicit that it is necessary to prove the compliance with these requirements at the time of establishment and acquisition of the investments and acquisition of investments.

- The investment dispute settlement procedures apply to treaty breaches in relation to investors and their investments (Articles 1116 (Claim by an investor of a Party on its own behalf), and 1117 (Claim by an investor of a Party on behalf of an Enterprise)), it is therefore necessary to prove the compliance with these requirements at the time of the treaty breaches.
- Only “disputing investors” can invoke the dispute settlement procedures (Articles 1118 (Settlement of a claim through consultation and negotiation), 1119 (Notice of intent to submit a claim to arbitration), 1120 (submission of a claim to arbitration), and 1121 (conditions precedent to submission of a claim to arbitration)), it is therefore necessary to prove the compliance with these requirement at the time the dispute settlement procedures are invoked, including at the time of submission of a claim to arbitration (*i.e.*, the time NOA#2 was received by the Respondent in this arbitration (Article 1137)).

Mexico-France BIT

- The BIT applies to “investors” and their “investments” (Articles 1 (Definitions), and 2 (Scope of the Agreement)).
- An investment must be in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made (Article 1 (Definitions)).
- The provisions on protection of the investors and their investments commence at the time of promotion and admission of the investments (Article 3 (Promotion and admission of investments)) and the time they are made (Article 4 (Protection and treatment of investments)). For these provisions to apply, the “investor” and “investment” requirements must have been met. It is therefore implicit that it is also necessary that the requirements be proven at the time of promotion and admission of an investment and at the time they are made.
- The investment dispute settlement procedures apply to treaty breaches in relation to investors and their investments (Article 9 (Settlement of disputes between an investor

of one Contracting Party and the other Contracting Party)), therefore it is necessary to prove the compliance of these requirements at the time the dispute settlement procedures are invoked, including at the time of submission of a claim to arbitration (*i.e.*, the time NOA#2 was received by the Respondent in this arbitration).

Mexico-Portugal BIT

- The BIT applies to “investors” and their “investments” (Articles 1 (Definitions), and 2 (Scope of the Agreement)).
- The provisions on protection of the investors and their investments commence at the time investments are admitted and made (Articles 2 (Promotion and protection of investments) and 3 (National and MFN treatment)). For these provisions to apply, the “investor” and “investment” requirements must have been met. It is therefore implicit that it is also necessary that the requirements be proven at the time of admission of an investment and at the time they are made.
- The investment dispute settlement procedures apply to treaty breaches in relation to investors and their investments (Articles 8 (Scope and standing) and 9 (Means of settlement, time periods), necessitating that the requirements be proven at the time of the alleged treaty breaches and at the time the dispute settlement procedure is invoked, including at the time of submission of a claim to arbitration (*i.e.*, the time NOA#2 was received by the Respondent in this arbitration).

73. Investment arbitration tribunals have ruled that compliance with these requirements must be proven at the following times:

Time of the investment

- Claimants must prove that they are a qualified investor with the nationality requirement at the time the investment is made.⁵²

⁵² **RL-064**, *Cem Cengiz Uzan v. Republic of Turkey*, SCC Case No. V2014/023, Award on Respondent Bifurcated Preliminary Objection, 20 April 2016 ¶ 152.

- Claimants must prove the existence of a qualified investment at the time it is made.⁵³
- Claimants must prove an investment is in conformity with the host State's laws, including international treaties, at the time the investment is made.⁵⁴

Time of the breach

- Claimants must prove the nationality requirement at the time of the alleged breach.⁵⁵
- Claimants must prove ownership of a qualified investment at the time of the alleged breach.⁵⁶
- Claimants must prove standing to sue as an investor at the time of the breach.⁵⁷

Time of presentation of the NOA

- Claimants must prove the nationality requirement at the time of the submission of their claim.⁵⁸

⁵³ **RL-065**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 295 (“It should also be recalled that the existence of an investment must be assessed at its inception and not with hindsight.”); **RL-066**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Dissenting Opinion of Makhdoom Ali Khan, ¶ 52 (“Whether a financial transaction is an investment must be judged at the time of its inception.”); **RL-067**, *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela II*, ICSID Case No. ARB(AF)/11/1, Excerpts of Award, 30 April 2014, ¶ 130 (“...it is the alleged investment at the time of its inception that should be considered, not the impact that the investment has ultimately had.”).

⁵⁴ **RL-024**, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 103; **RL-068**, *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015 ¶ 706.

⁵⁵ **RL-069**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016 ¶ 305.

⁵⁶ **RL-070**, *Aram Sabet et al v. Islamic Republic of Iran – Bonyad-E-Mostazafan*, Iran-US Claims Tribunal Case No. 815-816-817, Award No. 593-815/816/817-2, 29 June 1999, ¶ 55 (“In order to succeed in their claims, the Claimants must prove, as a preliminary matter, that, during the relevant period, they owned the shares that they claim the Respondents expropriated”); **RL-071**, *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, ¶ 128 (“In order to establish jurisdiction, the Claimant must prove that it owned ÇEAŞ and Kepez shares during the time at which it claims the acts constituting a violation of the ECT were committed by the Respondent.”). **RL-072**, *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award dated 13 August 2009, ¶ 140; **RL-073**, *Vito G. Gallo v. Government of Canada*, PCA Case No. 2008-03, Award, 15 September 2011, ¶ 328.

⁵⁷ **RL-074**, *Link-Trading Joint Stock Company v. Republic of Moldova*, UNCITRAL, Final Award, 18 April 2002 ¶ 55.

⁵⁸ **RL-075**, *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017 ¶ 191; **RL-076**, *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award, 22 June 2017 [French] ¶¶ 5, 288-289; **RL-077**, *Víctor Pey Casado y Fundación Presidente Allende c. República de Chile I*, Caso CIADI No. ARB/98/2, Laudo I, 8 de mayo de 2008, ¶ 238.

- Claimants must prove the existence of a qualified investment.⁵⁹
- Claimants must prove their standing to invoke the dispute resolution mechanism.⁶⁰

2. Proof of nationality and the dominant and effective nationality of dual nationals

74. Investment treaties confer rights on foreign investors, such as those raised in this arbitration, which are unavailable to their own nationals.⁶¹ This is the case for all four of the invoked treaties. Each of the treaties permits investors to invoke the dispute settlement mechanism against a State party (*i.e.*, Mexico) only if they are investors, and therefore nationals, of the other State party (*i.e.*, Argentina, Canada, France, Portugal).⁶² Accordingly, each of the Claimants must prove that they were nationals of the relevant “other” party (*i.e.*, Argentina, Canada, France or Portugal) at all relevant times.

75. As stated above and elaborated upon below, the following Claimants are dual nationals:

- a. Carlos Esteban Sastre (Sastre), Mexican, Argentinian, and Spanish nationalities;⁶³
- b. María Margarida Oliveira Azevedo de Abreu (Abreu), Portuguese and Mexican nationality;⁶⁴
- c. Eduardo Nuno Vas Osorio dos Santos Silva (Silva), Portuguese and Mexican nationality;⁶⁵

⁵⁹ **RL-078**, *David R. Aven and others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, ¶ 295.

⁶⁰ **RL-079**, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, ¶ 31.

⁶¹ **RL-080**, *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶¶ 56-57.

⁶² **RL-014**, México-Argentina BIT, Articles 10(1), (2)(1) and Annex-Article (1)(1); **RL-015**, Mexico-France BIT, Articles 9(1) and 1(2)(a); **RL-016**, Mexico-Portugal BIT, Articles 8 and 1(3); **RL-017**, NAFTA, Articles 1116, 1117 and 1139 (definition of “investor of a Party”).

⁶³ See **R-042**, Spanish Passport of Sastre (NOI#1, Annex N-1); NOA#2, C-0004; **R-022**, Mexican Naturalization Letter for Sastre.

⁶⁴ NOA#2, C-0007; **R-023**, Mexican Naturalization Letter for Abreu.

⁶⁵ NOA#2, C-0008; **R-024**, Mexican Naturalization Letter for Silva.

- d. Graham Alexander (Alexander), Canadian and Mexican nationality;⁶⁶ and
- e. Mónica Galán Rios (Rios), Canadian and Mexican nationality.⁶⁷

76. The treaties are silent on how to treat investors that are dual nationals, the nationality of the Respondent party (*i.e.*, Mexico) and the other State party (*i.e.*, Argentina, Canada, France, Portugal), as is the case for at least five of the six investors in this arbitration. However, the treaties specify that the dispute settlement tribunals established under their provisions shall decide issues in accordance with the treaties and with applicable principles of international law.⁶⁸ Accordingly, given the treaties are silent on dual nationality, the principles of international law govern this issue.

77. The relevant principle of international law is summarized in paragraph 8 of the United States' NAFTA Article 1128 submission in the *Feldman* arbitration:

(...) the United States accepts that the rule set forth in *United States ex rel. Mergé v. Italian Republic*, and adopted by *Iran v. United States, Case No. A/18*, provides a rule of decision that governs [NAFTA] Chapter Eleven tribunals by virtue of Article 1131(1) (...) This rule in effect states that the principle of “non-responsibility” must yield to the principle of “dominant and effective” citizenship which the claim is brought by or on behalf of a dual citizen whose “dominant and effective” citizenship is not that of the defending State. In other words, a State is not responsible for a claim asserted against it by one of its own citizens, unless the claimant is a dual citizen whose dominant and effective citizenship is that of the other State.⁶⁹ [emphasis added]

78. This principle is described by Professor Zachary Douglas, Q.C. as follows:

Where an individual claimant with the nationality of one contracting state also has the nationality of the host contracting state party, the tribunal's jurisdiction *ratione personae* extends to such an individual only if the former nationality is the dominant of the two, subject to a contrary provision of an investment treaty or the application of Article 25 of the ICSID Convention.⁷⁰

⁶⁶ NOA#2, C-0009; **R-025**, Mexican Birth Certificate for Alexander.

⁶⁷ NOA#2, C-0010; **R-026**, Mexican Birth Certificate for Galán.

⁶⁸ **RL-014**, Mexico-Argentina BIT, Article 10(5); **RL-015**, Mexico-France BIT, Article 11(5); **RL-016**, Mexico-Portugal BIT, Article 15(1); **RL-017**, NAFTA, Article 1131(1).

⁶⁹ **RL-081**, Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, United States 1128 Submission, 6 October 2000, citando **RL-082**, Mergé Case—Decision No. 55, 10 June 1955 and **RL-083**, Iran-United States Claims Tribunal, Case No. A/18, 6 April 1984.

⁷⁰ **RL-084**, Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press (2009), pp. 321-323.

79. Since the treaties are silent and the ICSID Convention does not apply to this arbitration ruled by the 1976 UNCITRAL Arbitration Rules, in order for dual national investors to invoke the dispute settlement mechanisms in the invoked treaties, they must prove that their dominant and effective nationality at all relevant times is that of one of the “other” States parties (*i.e.*, Argentina, Canada, France and Portugal), and not from Mexico.

3. Applicable law governing the existence, validity and substance of the claimed property rights protected by the four treaties

80. The lack of evidence of ownership or rights to land parcels and hotels associated with the alleged investments is a deficiency in the claims under the invoked Treaties. For this reason, the Mexican law and procedure relating to such property and rights is addressed first.

81. Each of the Treaties relied on by the Claimants establishes a list of the property or property rights falling within the scope of each Treaty.⁷¹ However, the question of whether certain rights exist or are legally valid, to whom they belong and what their content is are matters to be decided on the basis of the law of the host State. When there is a dispute over the existence of rights that the investor seeks to protect, determining whether these rights are property rights, rights arising out of contracts or other intangible rights involves recourse to the national law of the host state, even if the claim is based on a violation of the treaty.⁷²

82. This principle is well reflected in investment treaty arbitration case law.⁷³ The rule is noted by Zachary Douglas:

⁷¹ **RL-014**, Mexico-Argentina BIT, Article 1 (1); **RL-015**, Mexico-France BIT, Article 1 (1); **RL-016**, Mexico-Portugal BIT, Article 1 (1); **RL-017**, NAFTA, Article 1139.

⁷² **RL-085**, Christoph Schreuer, “*Jurisdiction and Applicable Law in Investment Treaty Arbitration*”, McGill Journal of Dispute Resolution (2014) Vol 1:1, p. 18.

⁷³ **RL-086**, *Venezuela Holdings, B.V., et al* (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, 9 March 2017, ¶¶ 168, 170; **RL-087**, *Gambrinus, Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/31, Decision on Annulment, October 3, 2017, ¶ 202; **RL-071**, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, ¶ 112 (“[I]t is common ground between the Parties that Turkish law applies to the issue of whether (and when) Libananco acquired the shares in question and thus had an “Investment”.); **RL-053**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶¶ 142-145, 147 (“[T]he existence and nature of any such rights must be determined in the first instance by reference to Hungarian

“101. Investment disputes are about investments, investments are about property, and property is about specific rights over tangibles and intangibles cognizable by the municipal law of the host state. General international law contains no substantive rules of property law. Nor do investment treaties purport to lay down rules for acquiring rights *in rem* over tangibles and intangibles.

102. Whenever there is a dispute about the scope of the property rights comprising the investment, or to whom such rights belong, there must be a reference to a municipal law of property. Insofar as investment treaties require a territorial nexus between the investment and one of the contracting state parties, that property law is the municipal law of the state in which the claimant alleges that it has an investment.”⁷⁴ [Emphasis in the original]

83. Likewise, when a tribunal's jurisdiction is based on the existence of certain facts in relation to the investments, these must be proven at the jurisdictional stage.⁷⁵

84. The Claimants, as a basis for their claim, allege that they obtained rights to investments in ejido lands located in the Ejido José María Pino Suárez in Tulum, Quintana Roo, through the celebration of various contracts with alleged ejidatarios through which they allegedly received the rights to such ejido lands, on which they subsequently built various hotels.⁷⁶

85. In Mexico, agrarian law is the legal framework that regulates ejidos and their rights. Therefore, given that the Claimants have filed this dispute claiming to have investment rights in the Ejido José María Pino Suárez, in order to be entitled to protection under the invoked treaties, they must all demonstrate the rights they invoke at the relevant times:

1. Legally exists under Mexican agrarian law;
2. Were validly created under Mexican agrarian law, and

law, before the Tribunal proceeds to decide whether any such rights can constitute investments capable of giving rise to a claim for expropriation for the purpose of its jurisdiction under the Treaties and the ICSID Convention.”).

⁷⁴ **RL-084**, Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, p. 52.

⁷⁵ **RL-050**, *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award, 28 October 2019 ¶ 366. (“The Tribunal would like to recall that Claimant bears the burden of establishing jurisdiction under the ICSID Convention and the BIT. As jurisdiction rests on the existence of certain facts, they have to be proved at the jurisdictional stage. The burden of proof of such facts is on Claimant insofar as Respondent contests them); **RL-088**, *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 143 (“If jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage”); **RL-089**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, 1 June 2012, ¶¶ 2.8-2.9.

⁷⁶ NOA #2, ¶¶ 17-21.

3. They comply with the requirements within agrarian law to hold the rights they claim to have.

86. Alternatively, Claimants must prove at the relevant times their ownership in light of the requirements of Mexican law governing “restricted zones” [*“zona restringida”*] in Mexico.

87. In this regard, to be entitled to protection under the invoked Treaties, Claimants must prove that at the relevant times the various contracts and documents on which they rely to substantiate their alleged rights and “property interests” in the investments complied with the provisions of the Mexican ejido property regime and, alternatively, with all the requirements and conditions established by the regime for the acquisition of real estate in the restricted zone for foreigners.

88. To understand the legal framework within which the Claimants decided to develop their investments, the following section will describe the institutional, legal and judicial context in which they were developed. It will also elaborate on each of the elements contemplated in Mexican law to determine the existence, validity and quality of the rights of foreigners over (i) ejido lands and, alternatively, on (ii) lands located in the “restricted zone” [*“zona restringida”*].

a. The framework governing the existence, validity and substance of the property rights claimed by the Claimants

89. The Claimants claim to have acquired, as foreigners, rights to ejido land which is, additionally, beach front, on which they built a number of hotels.

90. According to Mexican law, in order to determine the existence, legal validity and legal quality of the rights and property of each of the Claimants, an assessment based on agrarian law (the system governing the Ejido) is required.

91. For better understanding, the Respondent expands on the agrarian law and the *ejido* property regime in Mexico and its main characteristics, the internal organization of the ejido in Mexico, who can transfer and acquire ejido rights, and the form of acquisition and transfer.

92. Alternatively, Respondent expands on the regulation of land acquisition in the restricted zone by foreigners, including information regarding who can acquire and transmit these lands and requirements.

(1) Agrarian Law and Ejidal Property in Mexico

93. As Mr. De la Peza explains, the ejido property regime in Mexico was the result of the Mexican Revolution movement to abolish latifundia and distribute land equitably among the campesino groups.⁷⁷ This movement culminated with the amendment of Article 27 of the Mexican Constitution in 1934, enshrining the commitment to promote the development of ejido agricultural property in Mexico:

“(…) The nation shall at all times have the right to impose on private property the modalities dictated by the public interest... to ensure the equitable distribution of public wealth and to ensure its conservation. To this end, the necessary measures shall be enacted for the division of latifundia; for the development of agricultural property in exploitation; for the creation of new agricultural population centers (“nuevos centros de población agrícola”) with the land and water indispensable for them; for the promotion of agriculture and to prevent the destruction of natural elements and the damage which property may suffer to the detriment of society. The population centers (“núcleos de población”) that lack land and water or do not have them in sufficient quantity for the needs of their population, shall have the right to be endowed with them, taking them from the immediate properties, always respecting small agricultural property. (...) (...)”⁷⁸ [emphasis added]

[unofficial translation]

94. Between 1915-1992, the foundations were laid for the process known as *reparto agrario* (agrarian distribution) through which thousands of ejidos were created, including Ejido José María Pino Suárez.⁷⁹

95. This led to the development of a specific legal, administrative and judicial framework regulating ejido property, which recognizes the autonomy of the ejidos and their right to appoint their representatives, determine the use of their land.⁸⁰ Nowadays, the protection of the ejido and social property in Mexico remains a national priority.⁸¹

⁷⁷ Expert Report by Mr. De la Peza, ¶ 31.

⁷⁸ **R-012**, Decree amending Article 27 of the Political Constitution of the United Mexican States (CPEUM), Official Gazette of the Federation, 10 January 1934.

⁷⁹ Expert Report by Mr. De la Peza, ¶ 31.

⁸⁰ Idem., ¶ 31 and 35.

⁸¹ **R-013**, Third Government Report by President Carlos Salinas de Gortari, 1 September 1991. (“Agrarian struggles have been essential in the formation of our country. They have been battles for freedom and justice in the fields (*“campo”*). From them we have useful lessons to learn...Today, the struggles for freedom and justice in the fields (*“campo”*) continue to be of enormous importance and, because of their historical morality and truth, they continue

96. The ejido is a form of social property in which the ejido and communal property is owned by the community. It differs from other property regimes in that it falls exclusively under federal jurisdiction, and the main objective of ejido property is to protect ejido land rights.⁸² Within the ejido regime, the social interest in protecting the *ejidatarios* (ejido subjects) and ejidos will always prevail over the individual will.⁸³

97. The framework of laws, institutions and actors regulating ejidos in Mexico aims to recognize and protect the role of agrarian subjects, including rural, indigenous communities to promote agricultural activity.⁸⁴

98. The fundamental principles of the ejido regime in Mexico are described below.

(a) Fundamental principles of the ejido regime in Mexico

99. On this basis, protection of the ejido in Mexico is carried out in accordance with the following guiding principles:

- **The Ejido:** An autonomous legal entity with its own capacity and patrimony, with rights to appoint its representatives, to administer determine the use, transfer and release [*“desincorporación”*] of its lands, created through presidential resolution.⁸⁵ The ejido, by resolution of its supreme body, is empowered to carry out acts of disposition of ejidal property, such as establishing the use of land to include it in one of its three categories, its boundaries and location within the land assigned to the ejido.⁸⁶ Likewise, it is responsible for assigning each type of ejido property to the individuals that fulfil the necessary requirements.⁸⁷
- **Only agrarian individuals of Mexican nationality are admitted;** because it is a closed and specially protected system, that only allows as subjects and holders of ejido rights

and will continue to deserve our deep respect, as well as passionate and effective support. Today the campesinos show us in their daily efforts and in their daily practices that these struggles are taking place in a different way, with different demands, with direct and social control, building in practice a new campesino reform." [*unofficial translation*].

⁸² Expert Report by Mr. De la Peza. ¶¶ 29.

⁸³ Idem., ¶¶ 33.

⁸⁴ Idem., ¶¶ 13 and 29.

⁸⁵ Idem., ¶¶ 29.

⁸⁶ Idem., ¶¶ 36 and Table III: Organs of the ejido.

⁸⁷ Idem., ¶¶ 39 and Table III: Organs of the ejido.

natural persons who have the status of “*ejidatarios*”, “*avecindados*” or “*poseionarios*” of the ejido, and exceptionally third parties when certain conditions prioritizing ejido rights are met.⁸⁸ Moreover, nationality is a fundamental requirement, thus foreigners are prohibited from acquiring any rights over land belonging to the social property system, because only natural persons of Mexican nationality (by birth or naturalization) may be recognized as ejido subjects, and in accordance with this status they may acquire certain rights over land that forms part of the ejido property.⁸⁹ Transfers by *ejidatarios* fully recognized as such in the ejido, must also be reported to the ejido, whereby the transfer must be validated by the ejido commissariat [“*comisariado ejidal*’] and the assembly [“*asamblea*’].⁹⁰

- **Inalienability and Use of Ejido Lands:** Ejido lands are considered inalienable [“*inalienables*”], imprescriptible [“*imprescriptibles*”], unattachable [“*inembargables*”] and irreducible [“*irreductibles*”].⁹¹ Also, ejido lands present certain characteristics which are determined based on their use, *i.e.* the type of ejido land in question.⁹² The determination of this use is determined by each ejido's Assembly, with the possibility of using the land for human settlements [“*tierras de asentamientos humanos*”], parcelled land [“*tierras parceladas*”] or land for common use [“*tierras de uso común*”].⁹³ In general, the transfer of ejidal property may be carried out by the ejido or its ejidatarios, as long as the assembly approves it, and the requirements and conditions applicable to each case are met.⁹⁴
- **The administration of the use, disposition and change of land and ejido rights is a responsibility of the federal government:** The federal authorities, institutions, bodies and actors involved in the functioning of the ejido regime include, among others⁹⁵: (i) the SEDATU (establishes and directs national policy for the development of the social property system); (ii) RAN (records original transactions and changes in land ownership and legally constituted rights to ejido and communal property); (iii) Agrarian Tribunals

⁸⁸ Idem., ¶¶ 37 and Table IV: Individual subjects of ejidal rights.

⁸⁹ Idem., ¶ 41.

⁹⁰ Idem., ¶ 39.

⁹¹ In addition to being allocated in equal parts to all ejidatarios unless otherwise agreed by the assembly, this is the highest body that may modify the size of each allocation according to the material, financial and work contributions of each ejidatario and considering an order of preference where appropriate. Idem., Table II: Ejidal lands according to their legal purpose, ¶ 36.

⁹² Idem., ¶ 38 and Table V: Rights over ejidal lands, according to their legal use.

⁹³ Idem., ¶ 39 and Table II: Ejidal lands according to their legal use.

⁹⁴ Idem., ¶ 39 and 40.

⁹⁵ Idem., ¶ 35.

(courts that resolve disputes arising from the application of the Agrarian Law [*“Ley Agraria”*] and its regulations).⁹⁶

b. The Ejido's governance and regulatory framework and the key actors identified in the context of the Claimants' claims

(1) Federal institutions and authorities involved in the operation of the ejido property regime

100. As explained by Mr. De la Peza, the Ministry of Agrarian, Territorial and Urban Development [*“Secretaría de Desarrollo Agrario, Territorial y Urbano”*] (SEDATU) is the main entity of the federal public administration organ responsible for establishing and directing national policy for the development of the social property system.⁹⁷

101. This organ includes the National Agrarian Register [*“Registro Agrario Nacional”*] (RAN), which is responsible for land tenure control and document security arising from the application of the Agrarian Law [*“Ley Agraria”*].⁹⁸ The RAN is the office in charge of registering documents showing original transactions and changes in land ownership and legally constituted rights to ejido and communal property.⁹⁹

102. In addition, the Agrarian Attorney Office [*“Procuraduría Agraria”*] (PA) is responsible for the defense and protection of agrarian persons before administrative or jurisdictional authorities and has the power to foster the resolution of conflicts over social property and to participate in certain acts of the ejidos.¹⁰⁰

⁹⁶ Idem, ¶ 35 and Table I: Organs of the Mexican State that intervene in the ejido regime.

⁹⁷ Idem., Table I: Organs of the Mexican State that intervene in the ejido regime. Responsible for planning, coordinating, generating and executing public policies applicable to social property, it is also responsible for (i) the administration of (a) the RAN and (b) vacant and national lands, (ii) issues related to limits and demarcation of ejido lands and (iii) problems of ejidos. Article 41, sections I, III, IX, of Organic Law of the Federal Public Administration, Annex PGPG-0027.

⁹⁸ Idem.

⁹⁹ Idem.

¹⁰⁰ Specifically, (i) it can issue the summons for the Ejido Assembly to meet, (ii) it participates in the Assemblies that deal with the matters listed in sections VII to XIV of Article 23 of the Agrarian Law, and (iii) it issues its opinion on the contribution of ejido common lands to civil or mercantile companies. **R-015**, Agrarian Law, Articles 23, 24, 28, 40 and 75.

103. As to the administration of agrarian justice, the legal framework includes the Agrarian Courts [*“Tribunales Agrarios”*], specialized in agrarian matters, which have the power to substantiate, settle and resolve the disputes arising from the application of the Agrarian Law [*“Ley Agraria”*] and its regulations.¹⁰¹ In turn, the Courts of the Federal Judiciary Power [*“Tribunales del Poder Judicial de la Federación”*] have jurisdiction to hear indirect amparo proceedings filed by ejido members or any person affecting ejido rights and direct amparo claims brought against final judgments or those that put an end to an agrarian trial, issued by Agrarian Courts.¹⁰²

(2) Main ejido institutions and authorities involved in the functioning and administration of the Ejido

104. As Mr. De la Peza explains, the Mexican Constitution provides for a system of social property or ejidal regime,¹⁰³ also known as ejido population center [*“núcleo de población ejidal”*] or *Ejido*. Ejidos are created through a presidential resolution granting land to a group of farmers and by providing the ejido with its own legal personality and patrimony.¹⁰⁴ This resolution grants the beneficiary farmers the status of *ejidatarios*, giving them ownership of land sufficient to guarantee their subsistence and that of their families, and once the resolution is published, a process of possession and demarcation is carried out, which involves handing over the land in question by drawing up a survey and an attestation of the process.¹⁰⁵

105. As constitutionally autonomous entities, ejidos have an internal governance system made up of three main bodies responsible for supervision the operation of the ejido in accordance with

¹⁰¹ Expert Report by Mr. De la Peza, Table I: Organs of the Mexican State that intervene in the ejido regime ¶ 35.

¹⁰² Idem.

¹⁰³ Idem., ¶ 34.

¹⁰⁴ **R-014**, CPEUM, Article 27, section VII; **R-015**, Agrarian Law, article 1, 9, 90. In order to establish an ejido, it is necessary to comply with the requirements established in the Agrarian Law as the regulatory law and ordinance governing agrarian matters and, therefore, social property. Therefore, an application for the creation of an ejido must be submitted by at least 20 individuals, i.e. natural persons, who contribute an area of land for its formation and have a draft set of internal regulations, both registered with the RAN.

¹⁰⁵ Expert Report by Mr. De la Peza, ¶ 32 and Table II: Ejidal lands according to their legal use.

the applicable legal regulation: (i) the assembly [*“la asamblea”*], (ii) the ejidal commissariat [*“el comisariado ejidal”*] and (iii) the supervisory council [*“el consejo de vigilancia”*].¹⁰⁶

106. The Assembly [*“Asamblea”*] is the *ejido's* supreme collective body responsible for making decisions on the disposition of ejido property and on acts such as the separation or acceptance of *ejidatarios* and the approval or change of the *ejido's* internal regulations.¹⁰⁷

107. The Ejidal Commissariat [*“Comisariado Ejidal”*] is the collegiate body in charge of convening the assembly and implementing the agreements reached therein, as well as administering the property belonging to the *ejido* and representing it legally.¹⁰⁸

108. The Supervisory Board [*“Consejo de Vigilancia”*], as its name indicates, is the body that oversees the acts and operations of the *ejido* commissary and is charged with convening the assembly when the commissary does not do so.¹⁰⁹

(3) Ejido rights holders

109. In general, to be the holder of a right to *ejido* land, it is necessary to have the status of *ejidatario* or *avecindado*.¹¹⁰ However, it is also possible to become a holder of *ejido* rights by

¹⁰⁶ Idem., ¶ 37 and Table III: Organs of the *ejido*; **R-015**, Agrarian Law, Article 21.

¹⁰⁷ Idem., All persons who qualify as *ejidatarios* participate in the Assembly and can take part in this temporal meeting to make decisions concerning the *ejido*. In practice, there are generally two types of assemblies: Special Formalities Assemblies (*“Asambleas de Formalidades Especiales”*) (AFE) and Simple Formalities Assemblies (*“Asambleas de Formalidades Simples”*) (AFS). They are classified according to the type of acts to be analysed in them. The AFE analyses acts of disposition of the social property and requires the presence of a notary public and a representative of the Agrarian Procurator's Office when dealing with acts of disposition of the property. The establishment of AFE agreements requires compliance with the requirements of convocation and quorum. The AFS discusses the rest of the acts that are not related to the disposition of the social property and to establish agreements requires the fulfilment of the requirements of convocation and quorum. The resolutions of both types of assembly are taken by vote with the approving vote of two thirds of the attendees for the establishment of AFE resolutions while a simple majority suffices for AFSs.

¹⁰⁸ Idem., Table III: “Organs of the *ejido*”, p. 22.

¹⁰⁹ Idem.

¹¹⁰ Idem., Table IV: Individual subjects of *ejidal* rights.

having the status of *poseionario*¹¹¹, or even being a third party if the applicable requirements are complied with.¹¹²

110. In order to be the holder of a right to ejido land, it is essential to meet the main nationality requirement, given that only Mexicans can be subjects that can acquire ejido land,¹¹³ as well as other additional requirements for the recognition of such rights to ejido land.¹¹⁴

111. While natural person can be ejido subject [*“sujetos ejidales”*], *contrario sensu*, legal entities may only acquire rights to the use ejido land through an association, lease, usufruct or other means, provided that the duration does not exceed thirty years, with the possibility of extension.¹¹⁵

(4) Ejidal property and land use

112. There are three types of ejido land: (i) land for human settlement [*“tierras de asentamientos humanos”*], (ii) parceled or parcels [*“parceladas o parcelas”*] and (iii) land for common use [*“tierras de uso común”*].¹¹⁶

113. The land for human settlement [*“tierras de asentamientos humanos”*] are the area of the ejido where the ejido's community living takes place, designated as such by an assembly [*“asamblea”*], this area consists of the land of the urbanization zone and its legal estate [*“zona de urbanización y su fundo legal”*], (a) the ejido house [*“la casa ejidal”*], (b) the ejido offices [*“las oficinas ejidales”*], (c) the streets and walkways of the ejido's urban zone, (d) the buildings that serve as infrastructure for the provision of public services, and (e) other areas reserved for human

¹¹¹ Natural persons -men and women- who have possession of ejido land, fulfilling the following requirements (i) their possession is as the holder of ejido rights, (ii) the land is not land for human settlement, nor is it forest or jungle, (iii) they maintain peaceful, continuous and public possession for 5 years if the possession is in good faith, or 10 years if in bad faith, and (iv) they fulfil the requirements to be ejidatarios.

¹¹² Expert Report by Mr. De la Peza, ¶ Table IV: “Individual subjects of ejidal rights”.

¹¹³ Idem., ¶ 17 and Table IV: Individual subjects of ejidal rights.

¹¹⁴ Idem., ¶ 17, 39 and Table V: Rights over ejidal lands, according to their legal purpose.

¹¹⁵ Idem.

¹¹⁶ Idem., Table II: Ejidal lands according to their legal use; **R-015**, Agrarian Law, Article 56, ¶2- This purpose is established and approved by the assembly, which must comply with the technical standards issued by the RAN in this regard and may also resort to this authority for any other type of assistance that may be required.

settlement. They are inalienable [*“inalienables”*], imprescriptible [*“imprescriptibles”*], unseizable [*“inembargables”*] and irreducible [*“irreductible”*], which is different to private property, not forgetting that within the urbanization area are the urban plots.¹¹⁷

114. “Parcelled lands or parcels” [*“tierras parceladas o parcelas”*] are those which have been delimited by the Assembly [*“Asamblea”*] to be exploited by one or more specific ejido persons and are assigned according to the order of preference established by the law itself.¹¹⁸

115. “Common use lands” [*“tierras de uso común”*] are those not designated by the assembly [*“asamblea”*] as lands for human settlement [*“tierras de asentamiento humano”*] or as parcels [*“parcelas”*] and also constitute the economic support of the ejido. The principle governing this type of land is in the right to use and benefit from the common use lands, which is ruled in accordance with the principle that only subjects of the agrarian law [*“sujetos del derecho agrario”*] have the right to acquire ejidal rights, since this type of land can only be acquired by the ejidatarios.

(5) Transfer of Ejido Land/Rights

116. The following options exist for the transfer of property by ejidatarios:

- a. *Land for common use* [*“Tierras de uso común”*]: Ejidatarios can transfer the rights of use and usufruct and these can only be granted in favour of credit institutions or in favour of persons who have a commercial or associative relationship with the ejidatarios and must be granted before a public notary and registered before the RAN.
- b. *Ejidatarios' parceled land* [*“Tierras parceladas de los ejidatarios”*]: these can be transferred to other ejidatarios or third parties. This transfer may involve use rights, usufruct of their parcels and may even involve transferring the usufruct rights for the formation of corporations or partnerships. In the event of transfer of the right of use to

¹¹⁷ Idem., Table II: Ejidal lands according to their legal use. These are lots delimited within the ejido's urbanisation zone, with the extension determined by the Assembly (in principle with the necessary surface area for ejidatarios, their families and inhabitants) to build their houses or dwellings. The lots, once delimited and assigned by the Assembly, are the full property of their owners. The rights over them are proven by the title deed issued by the RAN, and subsequent acts are regulated by the common law, or private property regime.

¹¹⁸ Idem.; **R-015**, Agrarian Law, Article 57, this order being as follows: (i) possessors (*“posesionarios”*); (ii) *ejidatarios* and *avecindados*; (iii) children of *ejidatarios* and *avecindados*; and (iv) such other persons as the Assembly may determine. It is clear from the above that preference will always be given to persons belonging to the ejido over persons not belonging to it, which is fully compatible with the purpose of protecting the ownership of the ejido population nuclei over the lands they are endowed with in accordance with the Mexican Constitution.

third parties, the duration of the transfer is limited in accordance with the corresponding productive project, which may not exceed three years, with the possibility of extension.

c. *Lots [“Solares”]*: it is possible for an ejidatario to transfer the property rights held over it, as this right is recognized by the law itself.

117. However, certain ejido lands can also be converted into public or private property that can be transferred to non-ejido persons:

- a. *Land for human settlement [“tierras de asentamientos humanos”]*: both the urbanization zone and its legal estate can be removed from the ejido system and incorporated into the public property system, as contributions towards state or municipal governments for their use in the provision of public services.
- b. *Parcelled land [“tierras parceladas”]*: can be incorporated into the private property regime when "full ownership" [*“dominio pleno”*] of the land is obtained, *i.e.* when an assembly [*“asamblea”*] meeting is held to grant an ejidatario this right to his plots, the ejidatario requests the RAN to remove the allocated plots from its registry and requests the issuance of a property title in his favour, which must be registered with the Public Registry of Property and Commerce [*“Registro Público de la Propiedad y del Comercio”*] (RPPyC)¹¹⁹ of the town where the ejido is located. It is precisely this act of cancellation or deregistration [*“cancelación o baja de registro”*] from the RAN that changes the status of ejido property to private property, and once the plots are incorporated into this category they will be governed by civil law provisions.

118. Finally, the removal of the land for common use [*“desincorporación de las tierras de uso común”*] may be undertaken if it is given as a contribution to corporations or partnerships, if and when: (1) this contribution is useful for the ejido, (2) the contribution is deemed valid by a Special Formalities Assembly [*“Asamblea de Formalidades Especiales”*] (AFE) and (3) the Federal Agrarian Attorney [*“Procuraduría Agraria”*] issues a favourable opinion on the certitude of the investment relationship arising from this contribution, on the rational and sustainable use of natural

¹¹⁹ Office for the registration of deeds creating, declaring, recognising, acquiring, transmitting, modifying, limiting, encumbering or extinguishing ownership, original possession and other rights in rem over immovable property subject to the private property regime.

resources, and on the existence of equity in the conditions and terms agreed upon regarding this contribution.

c. Regulation of land acquisition by foreigners in the “restricted zone”

119. Mexico’s real property regime differs in that it contains specific regulations regarding the acquisitions of real property by foreigners, especially in the border zone [*“zona fronteriza”*] and the restricted zone [*“zona restringida”*]. These regulations apply to the land and the buildings attached to it and to the rights in rem over the real property.¹²⁰

120. The historical basis of this restriction, which was later enshrined in the Mexican Constitution of 1917, was the loss of about half of the national territory in the previous century, which led to the introduction, for reasons of security and protection of national sovereignty, of strict regulations on acquisitions by foreigners in the restricted zone [*“zona restringida”*].¹²¹

121. Article 27, section I of the Mexican Constitution establishes the restriction on the acquisition of direct ownership [*“dominio directo”*] of real estate by foreigners in the border zones [*“zona fronteriza”*] and coastal zones [*“zona costera”*]:

“...The legal capacity to own Nation’s lands and waters shall be governed by the following provisions:

(...) Within the zone that covers one hundred kilometers along the international borders and fifty kilometers along the beach, under no circumstances may foreigners acquire direct ownership of land and water ...[emphasis added]”¹²²

122. The text of Article 27 of the Mexican Constitution is clear, under no circumstances foreigners may acquire direct ownership of land and water within the zone that covers fifty kilometers along the beach.

(1) Fundamental principles of the regime of the restricted area in Mexico

¹²⁰ **R-016**, Federal Civil Code, Article 750, sections I and XII.

¹²¹ **R-017**, Álvarez Morales, Eduardo. *“La Adquisición de Bienes Inmuebles por Parte de Extranjeros y los Fideicomisos sobre Bienes Inmuebles en zona restringida.”* Revista de Derecho Notarial Mexicano (1994), p.3.

¹²² **R-0014**, CPEUM, Article 27, section I.

123. In principle, foreign individuals and companies have no legal capacity to acquire property in Mexico's restricted zone.

124. However, Mexican law provides mechanisms for the acquisition of indirect ownership of real estate in the restricted zone by foreigners that allow the use and enjoyment by foreigners of property located in the restricted zone.

125. These mechanisms are subject to two types of conditions: the intended use of the property (residential or non-residential) and the type of person acquiring it (individual or legal entity).¹²³ Real property for residential use is that which is used exclusively for housing by the owner or third parties. Real property intended for non-residential activities is that which is used for some industrial, commercial or tourist activity and which is simultaneously used for residential purposes, among others.¹²⁴

(2) Requisites for the acquisition of real estate in the restricted zone by Mexican companies with an admission clause for foreigners

126. Mexican companies with an admission clause for foreigners can obtain ownership of real estate located in the restricted zone for non-residential activities by complying with the requirements of the law.¹²⁵

(3) Requirements for the acquisition of real estate in the restricted zone by foreign natural and legal persons

127. In the case of foreign natural and legal persons, the Regulation of the Foreign Investment Law [*“Reglamento de la Ley de Inversión extranjera”*] establishes as a requirement, that the property be used for hotels and motels, tourism developments, among others in order to grant the permit to create a trust [*“fideicomiso”*].¹²⁶

¹²³ See **R-018**, Secretaría de Economía, *Régimen de Propiedad Inmobiliaria*, 30 de agosto de 2016, p.3.

¹²⁴ **R-019**, Regulations of the Foreign Investment Law and the National Registry of Foreign Investment, Article 5.

¹²⁵ By submitting a notice to the SRE within 60 working days after the acquisition is made. The only requirement is that their articles of association contain the so-called calvo clause and that the corresponding fees are paid.

¹²⁶ **R-020**, General Law on Credit Instruments and Operations, Article 381. El contrato de fideicomiso es definido como: “Artículo 381. By virtue of the fideicomiso, the settlor transfers to a fiduciary institution the ownership or title

128. According to the applicable law, foreigners must apply for a permit, which is a *sine qua non requirement*, before the SRE for the creation of *fideicomiso* allowing them to use and exploit real property located in the restricted zone.¹²⁷

129. This means that foreigners interested in acquiring real property in the restricted zone may only do so as trustees [*fideicomisarios*] with respect to the rights regarding their use or enjoyment, with the ownership of the real property remaining with the fiduciary institution [*institución fiduciaria*] where the trust is created the *fideicomiso*. Any other act of acquisition carried out by foreigners with respect to this type of real property is considered null and the property will become property of the Nation.

130. Additionally, *fideicomiso* contracts concluded in accordance with the Foreign Investment Law [*Ley de Inversión Extranjera*] must contain certain conditions in order to be entitled to the permit granted by the SRE, including the following:

“...1. That the respective public instrument establishes that the foreign trustees [*fideicomisarios extranjeros*] agree to consider themselves as Mexicans with respect to their rights as trustees [*fideicomisarios*] not to invoke, thereby, the protection of their governments, under a penalty, otherwise, of losing such rights for the benefit of the Nation.”¹²⁸ [*unofficial translation*]

4. Legality of the Investments

a. Mexico-Argentina BIT, Mexico-Portugal BIT and Mexico-France BIT

131. The definitions of “investment” in Article 1.1 of the Mexico-Argentina BIT and Article 1.1 of the Mexico-Portugal BIT expressly require that an investment must be “in accordance with the

to one or more assets or rights, as the case may be, to be used for lawful and determined purposes, entrusting the realisation of these purposes to the fiduciary institution itself.” [*unofficial translation*].

¹²⁷ **R-0021**, Foreign Investment Law, Article 11. (“ARTÍCULO 11.- Permission from the Ministry of Foreign Affairs is required for credit institutions to acquire as fiduciaries, rights over real estate located within the restricted zone, when the purpose of the trust is to allow the use and exploitation of such property without constituting real rights over them, and the fideicommissaries are: I.- Mexican companies without a foreigner exclusion clause as provided for in section II of article 10 of this Law; and II.- Foreign individuals or legal entities. [emphasis added]”) [*unofficial translation*].

¹²⁸ **R-019**, Regulations of the Foreign Investment Law and the National Registry of Foreign Investment, Article 11 (I).

laws and regulations of” the Party in whose territory the investment is made. The scope of application clause contained in Article 2.1. of the Mexico-France BIT specifies that qualified investments are those made “in accordance with the legislation of the Contracting Party in the territory or maritime area where the investments are made”. Consequently, it is an express jurisdictional requirement under both treaties that the investments be legal under the Respondent’s laws and regulations.¹²⁹

b. NAFTA

132. The NAFTA does not have explicit language in their definitions of “investment” that require investments to be in accordance with the laws and regulations of the Party in whose territory the investment is made. However, investment tribunals have ruled that the legality of an investment is a condition for protection under an investment treaty even in the absence of express language in the treaties.¹³⁰ Consequently, it is an implicit jurisdictional requirement under NAFTA treaties that the investments be legal under the Respondent’s laws and regulations.

5. Other requirements for submitting dispute to arbitration

133. As discussed below under each of the four invoked treaties, the Claimants have not complied with the requirements for submitting a dispute to arbitration, including the requirements of domicile, notification and limitation periods. In the cases of Sastre, Silva and Abreu, they have

¹²⁹ **RL-090**, *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 Apr. 2004), ¶ 84, (finding that “[t]he requirement ... that investments be made in compliance with the laws and regulations of the host state is a common requirement in modern BITs’.); **RL-023**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014), ¶ 331. (“For these reasons, the Tribunal disagrees with Claimant’s contentions that the phrase “accepted in accordance with the [host State’s] laws and regulations,” as used in Article 1(1), simply contemplates a potential regime for regulation of the admission of foreign investment. Rather, the Tribunal finds that the use of this phrase limits the scope of “investment” in the BIT to investments that were lawful under (i.e., “in accordance with”) the host State’s laws and regulation *at the time the investments were made*.” [emphasis in the original])

¹³⁰ **RL-091**, *The Hulley Enterprises v. Russia*, *Yukos v. Russia*, *Veteran Petroleum v. Russia* Final, Awards, ¶. 1349; **RL-024**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 100-102; **RL-092**, *Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006 ¶ 204; **RL-088**, *Gustav F.W. Hamester GmbH & Co. K.G. v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 123–24; **RL-093**, *SAUR International SA v. República de Argentina*, Caso CIADI No. ARB/04/4, Decisión sobre Jurisdicción y sobre Responsabilidad, 6 de junio de 2012, ¶ 308; **RL-094**, *Álvarez y Marín Corporación S.A. y otros v. República de Panamá*, Caso CIADI No. ARB/15/14, Laudo, 12 de octubre de 2018, ¶ 135; **RL-095**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 ¶ 138.

not proven that they have not renounced their arbitration rights against the Respondent as part of the naturalization process that they undertook.

B. Jurisdictional objections under the Mexico-Argentina BIT

134. The Tribunal lacks jurisdiction over the claims under the Mexico-Argentina BIT. The objections in this section are based on the facts currently available to the Respondent on the date of submission of the Memorial on Jurisdiction and are without prejudice to introducing additional objections and arguments as new facts are presented in the course of this proceeding.

1. Relevant dates

135. The relevant dates on which Sastre must prove he was an “investor” within the meaning of the BIT, including that he met the nationality requirements, that that he had qualified “investments” covered by the treaty in the territory of the Respondent, including that those investments are legal under the Respondent’s laws, and that he has complied with all other requirements for submitting a dispute to arbitration are:

	Tierras del Sol Investments	Hamaca Loca Investments
Date of the investments*	25 August 2000	n.a.
Date of the alleged breaches*	19 October 2011 (alleged pre-seizure actions) 31 October 2011 (alleged seizures) 2 October 2015 (amparo decision)	n.a.
Date on which the notice of arbitration was submitted	14 June 2019	14 June 2019

* The NOA#2 does not identify the specific investments and the dates of those investments nor does it identify the specific alleged measures that breach the treaty and the times of those breaches. The dates presented in this table are best estimates available that must be clarified by the Claimants and revised by the Tribunal during the course of this procedure.

2. It has not been proven that Sastre was a qualified “investor”

136. In order to invoke the investor-State dispute settlement procedure in the Mexico- Argentina BIT, Sastre must prove that he is an “investor” who is a national of Argentina.¹³¹ Sastre has not proven that he was a national of Argentina at the following relevant dates: 25 August 2000 (date of investment); 31 October 2011 (date of the seizures); 2 October 2015 (date of the amparo); and 14 June 2019 (date of the submission of the NOA).

a. It has not been proven that Sastre was a national of Argentina at all relevant times

137. The NOA#2, dated 14 June 2019, states that Sastre is a citizen of Argentina and “is currently domiciled” in the city of Ciudad de Rio Cuarto in Córdoba, Argentina. In the NOA#2, Exhibit C-0004 is adduced, containing a copy of Sastre’s Argentinian passport issued on 12 October 2016 valid until 12 October 2026, as an evidence to establish Sastre’s Argentinian nationality.

138. This passport does not cover the dates of investment and of the two alleged breaches. Thus, with respect to Sastre, the Claimants *prima facie* did not meet the burden of proof with respect to nationality.

139. In the Claimant’s Submission in Opposition to Bifurcation, the Claimants categorized as “frivolous” the Respondent’s *rationae personae* objections indicating the lack of evidence that Sastre was an investor of Argentina, asserting that the Claimants had satisfied the *prima facie* showing of jurisdiction *rationae personae* by asserting the relevant facts in the Amended Notice of Arbitration, referencing paragraphs 4 to 12 of the NOA#2 and Sastre’s Argentine passport included in NOA#2.¹³² However, the Claimants did not dispute that Exhibit C-0004 contained an issue date after the dates of the alleged treaty breaches.¹³³ The Claimants nonetheless contended that the Argentine passport showed Sastre’s place and date of birth as taking place in Argentina before the investment was made and before the alleged treaty breaches occurred. This is

¹³¹ **RL-015**, Mexico-Argentina BIT, Articles 1(1)(3), 10(2) and Article 1 (1) of the Annex.

¹³² Claimant’s Submission in Opposition to Bifurcation and Brief in Support of a Multiparty Arbitration, ¶ 68.

¹³³ Claimant’s Rejoinder in Opposition to Bifurcation and Brief in Support of a Multiparty Arbitration, ¶ 55.

insufficient, Sastre's place and date of birth as stated in Sastre's passport does not, alone, prove that Sastre was an Argentine national and the dates of investment and alleged treaty breaches.

b. It has not been proven that Sastre's dominant and effective nationality was Argentinian at all relevant times

140. As explained above, in order for a dual national such as Sastre to invoke the dispute settlement mechanism in the Mexico-Argentina BIT, it must be proven that his dominant and effective nationality at all relevant times was from Argentina not Mexico. Clearly, this is not the case.

141. The naturalization records from the Ministry of Foreign Affairs of Mexico show that Sastre received a Certificate of Naturalization on 27 of May 2009.¹³⁴ According to the Mexican Constitution and Nationality Laws, naturalized Mexicans cannot be dual nationals; they are required to renounce their nationality of origin to obtain a Certificate of Mexican Nationality.¹³⁵

142. Thus, as the table below shows, at two important times, Sastre was a naturalized Mexican national and as such is excluded from protection under the Mexico-Argentina BIT unless it is proven that his Argentine nationality was his dominant and effective nationality at those times:

	Tierras del Sol Investments	Hamaca Loca Investments	Sastre's Mexican Nationality
Date on which the investments were made*	25 August 2000	n.a.	_____
Dates of the alleged breaches*	19 October 2011 (alleged pre-seizure actions) 31 October 2011	n.a.	Naturalized Mexican national

¹³⁴ **R-022**, Mexican Naturalization Letter of Sastre.

¹³⁵ **R-027**, Nationality Law, Article 19(II). The Law establishes the following about the requirement of renunciation of nationality or origin:

Article 19.- The foreigner who intends to become a naturalised Mexican must:

(...) II. Formulate the renunciations and oaths referred to in article 17 of this law;

The Ministry shall not require such renunciations and oaths to be made until a decision has been taken to grant the nationality to the applicant. The naturalisation letter shall be granted once it is established that these have been verified.(...)

[unofficial translation].

	(alleged seizures) 2 October 2015 (amparo decision)		
Date on which the notice of arbitration was submitted	14 de junio de 2019	14 de junio de 2019	Naturalized Mexican national

3. It has not been proven that Sastre had qualified “investments” in the territory of the Respondent according to the Mexico-Argentina BIT

143. Respondent objects to Mr. Sastre's claims as an investor on his own behalf and on behalf of CETSA under Mexico-Argentina BIT because Mr. Sastre has not demonstrated that he is an “investor” in CETSA and Tierras del Sol, including on the dates of the investment and of the alleged treaty violations.

144. Article 1 (3) of the Mexico-Argentina BIT states that:

3.- “Investor” means any natural or legal person who makes or has made an investment, and who a) being a natural person, is a national of one of the Contracting Parties, in accordance with its legislation, or b) being a juridical person, is incorporated under the laws and regulations of a Contracting Party and has its seat in the territory of that Contracting Party. [*unofficial translation*]

145. This provision is a condition to the offer of arbitration contained in the BIT, which has not been fulfilled. Consequently, the claims filed under the Mexico-Argentina BIT in relation to CETSA and Tierras del Sol are not valid and the Tribunal lacks jurisdiction over those claims.

i) Relevant Dates

146. Relevant dates on which Sastre and CETSA must prove the existence and ownership of a qualified investment:¹³⁶

Investments relating to Lot 19-A and Hotel Tierras del Sol	
Date in which the investment was made	12 October 2000
Date of the alleged breach	31 October 2011 (alleged measure complained of)

¹³⁶ NOA#2 does not specifically identify the alleged treaty violations. The dates presented in the table are therefore best estimates available, which will need to be clarified by Claimants and revised by the Tribunal as this proceeding progresses.

	2 October 2015 (decision of amparo proceedings)
Date on which the notice of arbitration was submitted	n. June 2019

a. It has not been proven that Sastre was an investor in the Tierras del Sol Investments at all relevant times

147. The NOA#2 states that Mr. Sastre is the majority shareholder of CETSA, which owns the hotel operating as Tierras del Sol.¹³⁷ This hotel is located on a parcel whose rights were obtained by CETSA on 12 October 2000.¹³⁸ With respect to the Hotel Tierras del Sol, Exhibit C-0012 is adduced, the agreement for the transfer of rights by which CETSA acquired the rights to Lot 19-A, where the Hotel Tierras del Sol is built.¹³⁹

148. Despite these claims, there is no evidence to support those assumptions.

(1) Sastre's rights over CETSA and Lot 19-A have not been proven.

149. As Mr. De la Peza explains, the CETSA Transfer (Annex C-0012) is insufficient and does not serve to prove the claims contained therein because it “does not meet a single of the requirements established in the Agrarian Law to be valid” because:

- It lacks the basic legal formalities to be effective between the parties themselves, before third parties, the Ejido and the RAN;
- It lacks the basic official legal documentation and information to support the status of the land and the ejido rights transferred and acquired by CETSA.¹⁴⁰

150. As Mr. De la Peza concludes, “even assuming that (i) the parties effectively entered into the CETSA’s Transfer of rights on the date mentioned in the respective document, (ii) Lot 19A-

¹³⁷ NOA #2, ¶ 5.

¹³⁸ Id., ¶¶ 22-24.

¹³⁹ Id., ¶¶ 23-25; NOA #2, C-0012.

¹⁴⁰ Expert Report by Mr. De la Peza, ¶ 53-55 and Table VII: Documentary deficiencies related to Lot 19A-Tierras del Sol.

Tierras del Sol is within the lands owned by the Ejido, and (iii) Mr. Novelo had rights over it”¹⁴¹, this document is invalid and insufficient to prove that Mr. Sastre has acquired land or ejido rights regarding Lot 19-A because the acts described therein are in breach of the Agrarian Law, because:

- As a subject, CETSA did not have and does not have the legitimacy to have the necessary status of ejidataria or *avecindada* of the Ejido to acquire parcel rights;¹⁴²
- As a legal document, CETSA's transfer of rights lacks the legal requirements to be effective before the RAN and third parties;
- With regard to the transferred rights, the rights of use and benefit from the land granted in the CETSA Transfer lacks of the requirements and legal formalities to be effective before the Ejido.

151. Alternatively, the Claimants have failed to demonstrate that CETSA complied with the requirements of the SRE regarding the restricted area in order for the acquisition of Lot 19 to be considered legal.

(2) Sastre and CETSA's rights over Lot 19-A in relation to Hotel Tierras del Sol have not been proven.

152. The Claimants assert that through the CETSA Transfer, Mr. Lorenzo Novelo Pacheco granted in “real, definitive and irrevocable [...] any rights that correspond to his status as ejidatario of the ejido JOSE MARIA PINO SUAREZ” to CETSA over Lot 19-A.¹⁴³

153. Mr. De la Peza explained the permissibility to grant third parties outside the Ejido the use of common land (“*tierras de uso común*”) through leasing (“*arrendamiento*”), association (“*asociación*”) or usage (“*aprovechamiento*”) agreements.¹⁴⁴ For it to be considered legal and valid, the agreement must: (i) not be prohibited by law; (ii) be concluded by the Ejido, represented by the Ejidal Commissariat (“*Comisariado Ejidal*”) and with the approval of the Assembly

¹⁴¹ Expert Report by Mr. De la Peza, ¶ 54.

¹⁴² Expert Report by Mr. De la Peza, Table VIII: Documentary deficiencies related to Lot 19A-Tierras del Sol.

¹⁴³ NOA#2, C-0012 (p. 2).

¹⁴⁴ Expert Report by Mr. De la Peza, Table V: Rights over ejidal lands, according to their legal purpose.

(“*Asamblea*”); and (iii) be for a limited period of time in accordance with a productive project (“*proyecto productivo*”) which must not exceed 30 years; and (iv) be registered before the RAN.¹⁴⁵

154. Based on CETSA's Transfer of Rights Agreement, Mr. De la Peza concludes that:

- CETSA's Transfer of Rights Agreement was not signed by the Ejidal Commissioner (“Comisario Ejidal”);
- CETSA's Transfer of Rights Agreement was not approved by the Assembly;
- CETSA's Transfer of Rights Agreement was not for a limited period of time;
- CETSA's Transfer of Rights Agreement was not registered before the RAN.¹⁴⁶

155. As a result of the foregoing, it is submitted that the Claimants do not have the right of use, or any other right, on Lot 19-A. In particular, they do not have the right to develop, build, or otherwise exploit the Hotel Tierras del Sol.

(3) The existence of the Hotel Tierras del Sol has not been proven

156. Claimants have not submitted a legal document that reliably supports the existence of the Hotel Tierras del Sol, *i.e.*, Respondent is not certain that this hotel: (i) indeed existed; and if it did (ii) that the hotel operated under the Mexican legal framework governing the legal operation of hotels.

(4) Sastre's and CETSA's ownership of the Hotel Tierras del Sol have not been proven

157. There is also no evidence of Mr. Sastre's ownership of the hotel Tierras del Sol or of CETSA's ownership of the hotel Tierras del Sol, which is different from any right in the land. In order to prove *prima facie* the existence of the Hotel Tierras del Sol and the rights of Sastre and CETSA over the Hotel Tierras del Sol, the Claimants were required to submit, at least, evidence of their existence and of the rights of Sastre and CETSA over the Hotel Tierras del Sol.

(5) CETSA's “property interest” in the Hotel Tierras del Sol has not been proven.

¹⁴⁵ Idem.

¹⁴⁶ Expert Report by Mr. De la Peza, VIII: Documentary deficiencies related to Lot 19A-Tierras del Sol.

158. Claimants assert that CETSA had a “property interest” in the Hotel Tierras del Sol, located off the coast,¹⁴⁷ which were recognized by the municipality of Tulum through “government assessments, operating licenses, and land use licenses”.¹⁴⁸

159. Notwithstanding these statements, there is no evidence to support the existence of these allegations: *i.e.*, (i) the “*property interest*” that CETSA had in Hotel Tierras del Sol; (ii) the above-mentioned government property assessments, operating and land use licences, and (iii) of the alleged recognition by the municipality of Tulum of CETSA's “*property interest*” in the Hotel Tierras del Sol through the aforementioned government property, operating and land use assessments. Respondent notes that even if Claimants produce such documents, these documents do not create or recognize the rights to ejido land that Claimants argue.

160. In order to prove *prima facie* that CETSA had the alleged “*property interest*” in the Hotel Tierras del Sol, the Claimants had to submit, at a least, evidence of these documents and of the alleged rights recognized therein by the municipality of Tulum. They must also prove *prima facie* the legal existence of the Hotel Tierras del Sol and of CETSA's rights over the Hotel Tierras del Sol and, alternatively, as stated above, CETSA must prove that it complied with the applicable requirements before the SRE with respect to the restricted zone in order for the acquisition of the Hotel Tierras del Sol to be considered legal.

161. Without first determining who owns and controls CETSA and the Tierras del Sol hotel, and the parcels of land on which it is located, the Tribunal cannot establish that it has jurisdiction, as it cannot determine whether the investment qualifies as an “investment” under the Mexico-Argentina BIT, and whether Mr. Sastre qualifies as an “investor” and meets the nationality requirement of the Mexico-Argentina BIT.

b. It has not been proven that Sastre was an investor in Investments Hamaca Loca at all relevant times.

162. As with Tierras del Sol Investments, Sastre had to demonstrate compliance with the legal requirements applicable to Hamaca Loca Investments on the relevant dates in order to be

¹⁴⁷ NOA#2, ¶ 5.

¹⁴⁸ NOA#2, ¶ 25.

considered a qualified “investment” under the Mexico-Argentina BIT. The relevant dates for Hamaca Loca's investments are listed below.

163. Sastre acquired the rights to Hamaca Loca Investments on June 12, 2017. This transfer of rights occurred long after the investments were made, however, even assuming that Mr. Sastre has any rights to Hamaca Loca's Investments, he must prove compliance with Respondent's laws and regulations at the following relevant times.

164. Relevant dates on which Sastre had to prove the existence and ownership of a qualified investment with respect to HLSA, Lot 19 and Hamaca Loca:¹⁴⁹

Investments regarding Lot 19 and Hotel Hamaca Loca	
Date on which the investments were made*	12 June 2017
Date on which the investments were acquired	12 June 2017
Date of the alleged breach	31st of October 2011
Date on which the notice of arbitration was submitted	14 June 2019

165. [Translation note: This blank paragraph is in the official Spanish version.]

(1) Sastre's rights regarding HLSA Lot 19 and Hamaca Loca have not been proven

166. Assuming that it can be shown that Mr. Sastre notified Respondent, in the proper manner and in writing, of his intention to submit a claim to arbitration under Article 10(4) of Mexico-Argentina BIT with respect to HLSA and Hamaca Loca, there is *prima facie* evidence to show that Mr. Sastre was not an “investor” in HLSA and Hamaca Loca at the relevant time, as the evidence presented by Mr. Sastre is contradictory and unclear regarding the rights he acquired in relation to Hamaca Loca Investments.

¹⁴⁹ NOA#2 does not specifically identify the alleged treaty violations. The dates presented in the table are therefore the best available estimates, which will need to be clarified by Claimants and revised by the Tribunal as this proceeding progresses.

167. First, the NOA#2 states that Mr. Sastre has rights in HLSA, a Mexican company that owns the Hotel Hamaca Loca and the parcel where that hotel operates, Lot 19.¹⁵⁰ The Claimants submit Exhibit C-0003, the “Hamaca Loca Transfer of Rights and Resolution” to establish the alleged transfer of rights which includes the allocation of Lot 19 and the rights of litigation related to the seizure of the Hotel Hamaca Loca and the company related to that parcel.¹⁵¹ However, Exhibit C-0003, in the section “Resolución Asamblea Especial de Accionistas”, section “Tercero” refers to Lot 19-A. The same applies to the “Cesión de Derechos” of Exhibit C-0003, which expressly states that the rights ceded are in relation to Lot 19-A and not to Lot 19 which supposedly belong to HLSA and Hotel Hamaca Loca according to Exhibit C-0014 “Hamaca Loca Transfer of Rights Agreement”.¹⁵² Respondent submits that Mr. Sastre has not established that he has rights to Lot 19 of HLSA and Hamaca Loca. Furthermore, since Mr. Sastre has not established that he has rights to Lot 19, he has also not established that he has the right to bring litigation regarding HLSA and the Hamaca Loca Hotel in relation to their alleged seizure.¹⁵³ It is clear from the above that Mr. Sastre has not proven that he can claim rights that have been violated against HLSA or the Hotel Hamaca Loca that are not related to the alleged eviction of the company from Lot 19-A. The Respondent therefore submits that Mr. Sastre does not have any rights in Lot 19 to continue this arbitration on behalf of HLSA and Hamaca Loca as he does not have the rights to the lot that the Claimants themselves claim as part of HLSA and Hamaca Loca.

168. Second, in NOA#2, the Claimants claim “the seizure of Hamaca Loca” by the Government of Mexico,¹⁵⁴ without establishing which of the Claimants (i) has the status of investor over that Hotel to claim the alleged seizure; or (ii) whether there is a power for disputes and collections granted in this respect by the owners of that Hotel. As noted in the paragraph above, Mr. Sastre

¹⁵⁰ NOA#2, ¶ 5.

¹⁵¹ NOA#2, ¶ 5, footnote 3.

¹⁵² NOA#2, ¶ 27. See Expert Report by Mr. De la Peza, Table X: Documentary deficiencies of the Cesión HLSA and Cesión Sastre.

¹⁵³ NOA#2, C-0003(p. 2).

¹⁵⁴ NOA#2, ¶ 52.

can only claim violations in respect of the alleged dispossession of HLSA and its partners from Lot 19-A.

169. If this Tribunal considers that the identification of Lot 19-A instead of Lot 19 within the transfer of rights in favour of Mr. Sastre is not sufficient to demonstrate that this Claimant has no rights to bring claims in these proceedings, Mr. De la Peza notes that this transfer of rights in Lot 19-A allegedly belonging to HLSA and Hotel Hamaca Loca equally “is insufficient to prove that Mr. Sastre acquired parcel or ejidal rights over Lot 19A-Tierras del Sol and/or Lot 19-Hamaca Loca, since it does not meet a single of the requirements established by the Agrarian Law for its validity”.¹⁵⁵

170. Mr. Sastre does not have the right to make any claim in respect of Hotel Hamaca Loca and/or Lot 19 because HLSA did not grant him rights for this purpose. In addition, any claims Mr. Sastre makes must be made exclusively against the HLSA with respect to Lot 19-A.

(a) Sastre's rights in HLSA and Lot 19 have not been proven

171. The NOA #2 states that Mr. Sastre has “the rights in Hamaca Loca S.A de C.V. (HLSA)”¹⁵⁶ because in 2017 HLSA ceded the rights to the parcel 19-A.¹⁵⁷ HLSA is also a company incorporated under Mexican law which shareholders are all foreign persons (*i.e.* Swiss and Argentine nationals).¹⁵⁸ In addition, Claimants claim that HLSA allegedly acquired all of the ejido rights to Lot 19 located within the Ejido José María Pino Suarez¹⁵⁹ by an agreement for the transfer of rights concluded between HLSA and Mr. Lorenzo Novelo Pacheco on 1 March.¹⁶⁰ HLSA built the Hamaca Loca Hotel on this lot.¹⁶¹

¹⁵⁵ Expert Report by Mr. De la Peza, ¶ 61.

¹⁵⁶ NOA#2, ¶ 25.

¹⁵⁷ *Ibid.*, C-0003 (p. 2).

¹⁵⁸ See NOA#2, ¶ 26. “Swiss nationals Daniela Marchetti, Dario Sartore, Reto Sartora y Claudio Giobbi created the company Hamaca Loca S.A. de C.V. (“HLSA”) and Argentine national Alvaro Urdiales subsequently joined as a shareholder on 24 January 2008”.

¹⁵⁹ *Ibid.*, ¶ 27.

¹⁶⁰ *Ibid.*, C-0012.

¹⁶¹ *Ibid.*, ¶¶ 27 and 28.

172. Despite these claims, there is no evidence to support this assumption. On the contrary, the HLSA Transfer is *prima facie* evidence that Mr. Sastre's investment in HLSA and Hotel Hamaca Loca was illegally acquired in violation of Mexican law governing ejido lands and oceanfront property and in contravention of Article 1.1(a) of Mexico-Argentina BIT.

173. As explained by Mr. De la Peza, the HLSA Transfer,¹⁶² is insufficient and does not serve to prove the affirmations contained in given that it “contravenes public order provisions of the Agrarian Law”¹⁶³ because:

- It lacks the basic legal formalities to be effective between the themselves, before third parties, the Ejido and before the RAN;¹⁶⁴
- It lacks basic official legal documentation and information to support the status of the land and the ejido rights thereby transferred and acquired by HLSA;¹⁶⁵

174. As Mr. De la Peza concludes, “even assuming that (i) the parties effectively entered into the HLSA Transfer on the date mentioned in the respective document and that it really refers to Lot 19- Hamaca Loca (not as established, to Lot 19A) (ii) Lot 19- Hamaca Loca is within the lands owned by the Ejido, and (iii) Mr. Novelo had rights over it”¹⁶⁶, this document is insufficient to prove that Mr. Sastre has acquired land rights or ejido rights regarding Lot 19 because the acts described therein contravene the Agrarian Law, since:

- As a (legal) subject, HLSA did not and does not have the legitimacy to hold the status of *ejidataria* or *avecindada* of the Ejido required to acquire parcel rights;
- As a legal instrument, the CETSA Transfer lacks the legal requirements to be effective before the RAN and third parties; and
- With regard to the rights transferred, the rights of use and benefit from land that were agreed upon in CETSA Transfer, the requirements and formalities of law to be in effective before the Ejido are not met.¹⁶⁷

¹⁶² NOA#2, C-0014.

¹⁶³ Expert Report by Mr. De la Peza, ¶ 60.

¹⁶⁴ *Ibid.*, ¶ 58.

¹⁶⁵ *Ibid.*, ¶ 58.

¹⁶⁶ *Ibid.*, ¶ 59.

¹⁶⁷ *Ibid.*, Table XI: Legal Deficiencies of HLSA Transfer.

175. As the lot acquired by CETSA, Lot 19 acquired by HLSA is beachfront and is therefore clearly within the “restricted zone” [“*zona restringida*”].¹⁶⁸ Therefore, in the alternative, HLSA should have complied with the SRE's requirements concerning restricted zones in order for this acquisition to be legal. Nevertheless, Mr. Sastre has also failed to demonstrate compliance with the above.

(b) HLSA's rights regarding Hamaca Loca have not been proven

176. The Claimants assert that HLSA “developed the parcel [Lote 19] and built Hamaca Loca”.^{169,170} Despite these assertions, there is no evidence to support the existence of these allegations: *i.e.*, (i) that HLSA “built Hamaca Loca”; (ii) that HLSA owns the Hotel Hamaca Loca, and (iii) that a legal document exists to prove its ownership. Respondent notes that even if Claimants adduce such documents, these do not create or recognize the rights to ejido land claimed by Claimants.

177. In addition, since Claimants have not submitted legal documents that reliably support the existence of the Hotel Hamaca Loca, that is, Respondent is not certain that this hotel: (i) actually exists; and if it does (ii) that the hotel would operate under the Mexican legal framework that regulates the legal operation of hotels.

178. To prove *prima facie* that HLSA had the alleged ownership interest in the Hotel Hamaca Loca, the Claimants had to submit at least evidence of these documents. They must also prove *prima facie* the legal existence of the Hotel Hamaca Loca and of HLSA's rights to the Hotel Hamaca Loca and, alternatively, must prove that HLSA complied with the applicable requirements before the SRE with respect to the restricted areas in order for the acquisition of the Hotel Hamaca Loca to be considered legal.

¹⁶⁸ NOA#2, C-0014.

¹⁶⁹ *Ibid.*, ¶ 28.

¹⁷⁰ *Ibid.*, ¶ 25.

179. The same conclusions regarding the CETSA Transfer Agreement apply to the HLSA Transfer Agreement since it has not been proven that the HLSA Transfer Agreement.¹⁷¹

- Was signed by the Ejidal Commissioner (“*Comisario Ejidal*”);
- Was approved by the Assembly;
- Establishes its duration for a maximum period of 30 years;¹⁷²
- Has been registered in the RAN.

180. Derived from the above, it is argued that the Claimants do not have the right of use, or any other right, to Lot 19-A. Specifically, they do not have the right to develop, build, or otherwise exploit Hotel Hamaca Loca.

181. The same conclusions with regard to CETSA apply to HLSA with respect to compliance with the SRE requirements for the restricted zone. In the alternative, the Claimants have not demonstrated that HLSA complied with this requirement related to the restricted zone in order for the acquisition of the Hamaca Loca Hotel to be considered legal.

182. The same conclusion made for Investments Tierras del Sol applies for Investments Hamaca Loca. Sastre has not demonstrated *prima facie* compliance with Mexican law regarding the rights he argues in this arbitration.

(2) The investors in the Hamaca Loca Investments were Swiss

183. Sastre acquired the rights to the Hamaca Loca Investments on 12 June 2017 in order to make a claim for violations on the Mexico-Switzerland BIT.¹⁷³

184. This rights transfer occurred long after the investments were made, and the alleged treaty breaches occurred. Although no evidence has been filed by the Claimants concerning the ownership of the Hamaca Loca Investments at those times, it appears that the original 2001 shareholders of HLSA were Danila Marchetti, Dario Satore, Reto Satore and Claudio Giobbi who

¹⁷¹ Expert Report by Mr. De la Peza, ¶¶ 60 and Table XI: Legal Deficiencies of HLSA Transfer.

¹⁷² *Ibid.*, Table XI: Legal Deficiencies of HLSA Transfer.

¹⁷³ NOA#2, ¶5 and footnote 3.

were Swiss nationals.¹⁷⁴ In 2008, Alvaro Urdiales, claimed to be an Argentinian national, joined as a shareholder of HLSA.¹⁷⁵ Urdiales acquired one share in the company (out of 200 issued shares) for a 0.05 percent ownership share.¹⁷⁶ The Swiss investors held the remaining 199 shares and collectively held a 99.95 percent ownership share in the company. Accordingly, the available evidence establishes that the Hamaca Loca Investments were owned by Swiss nationals at the times they were made and the moment of the alleged treaty breaches.

(3) The transfer of rights to Sastre is not a bona fide “investment”

185. In addition to not being an investor in the Hamaca Loca Investments at the times they were made and the time of the alleged treaty breaches, Sastre was not an “investor” in the Hamaca Loca Investments at the time that NOA#2 was filed. The Respondent objects to the transfer of rights regarding the Hamaca Loca Investments to Sastre for the sole purpose of initiating this arbitration. Such a transfer is an abuse of rights and should be rejected by the Tribunal as a basis for Sastre to establish investor and investment status. Even if this Tribunal were to rule that the transfer of rights was not an abuse of process and that Sastre could bring claims in this arbitration regarding those investments, the transfer evidenced in Exhibit C-0003 does not meet the definition of an “investment” in Article 1(1) of the BIT. It is not a *bona fide* economic investment, based on the actual or future value of the Hamaca Loca Investments. At the time of the transfer, the Hamaca Loca Investments were not actively engaged in business. Finally, Sastre only made a nominal payment of USD \$100 to secure the rights, which in light of the foregoing, were solely the arbitration rights related to the Hamaca Loca Investments.¹⁷⁷

(4) The transfer of rights to Sastre is an abuse of process

186. The sole purpose of the transfer of rights to the HLSA Investments evidenced in Exhibit C-0003 is to secure Sastre’s arbitration rights related to the Hamaca Loca Investments. The rights

¹⁷⁴ *Ibid.*, ¶ 26.

¹⁷⁵ *Idem.*

¹⁷⁶ *Ibid.*, C-0013 (p.3).

¹⁷⁷ It was clearly not a *bona fide* investment. See, for example, the discussion on the *bona fide* character of an investment by the tribunal in en **RL-024**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 135-142.

were acquired on 12 June 2017. This was approximately 6 years after the alleged treaty breaches occurred (meaning that there is no doubt that Sastre knew and could have foreseen the materialization of the measures) and less than 3 months before the Claimants filed the notice of intention to submit to arbitration under the Mexico-Switzerland, Mexico-Spain and Mexico-Argentina BITs. The above shows that that the sole purpose of the transfer of rights was to conclude “an artificial transaction to gain access” to this arbitration and clearly an abuse of process.¹⁷⁸ For this reason, this Tribunal must deny jurisdiction over Sastre’s claims regarding the Hamaca Loca Investments

c. It has not been proven that the Tierras del Sol Investments and Hamaca Loca Investments were in accordance with the Respondent’s laws at all relevant times

187. Article 1(1) of the Mexico-Argentina BIT establishes as a condition of a qualified “investment” that the investment be in accordance with the laws and regulations of the receiving Contracting Party. Thus, to qualify as “investments”, the Claimants must prove that the Tierras del Sol Investments and the Hamaca Loca Investments are in accordance with the laws and regulations of the Respondent. They have not been done.

188. Regarding the Tierras del Sol Investments and the Hamaca Loca Investments, the Claimants have not proven that:

- CETSA complied with the legal requirements to have the alleged rights over Lot 19-A of the Ejido José María Pino Suarez under Agrarian Law and, alternatively, under the law applicable to the Restricted Zone.
- CETSA complied with the legal requirements to have the alleged rights over the Hotel Tierras del Sol located in Lot 19-A in the Ejido José María Pino Suarez under Agrarian

¹⁷⁸ See **RL-096**, *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 585, The Tribunal in Philip Morris found that an abuse of process exists when a restructuring [in this case an transfer of rights between HLSA and Sastre] is undertaken for the sole purpose of acquiring the protection of the investor-state dispute settlement mechanism and at a time when the dispute is foreseeable [in this case the transfer of rights contained in Exhibit C-0003 of the NOA#2 clearly states “esta cesión de derechos expresamente incluye...derechos de llevar litigios correspondientes al desalojamiento nuestro y de nuestra Sociedad de dicho predio” (this transfer of rights expressly includes.. rights to pursue litigation pertaining to our and our Company's eviction from the said premises)];

“585. In view of the above considerations, the Tribunal concludes that the commencement of treaty based investor-State arbitration constitutes an abuse of right (or abuse of process) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time where a dispute was foreseeable. A dispute is foreseeable when there is a reasonable prospect that a measure that may give rise to a treaty claim will materialize”

Law and, alternatively, under the law applicable to the Restricted Zone.

- HLSA complied with the legal requirements to have the alleged rights over Lot 19 in the Ejido José María Pino Suarez under Agrarian Law and, alternatively, under the law applicable to the Restricted Zone.
- HLSA complied with the legal requirements to have the alleged rights over the Tierras del Sol Hotel located on Lot 19 in Ejido José María Pino Suarez under Agrarian Law and, alternatively, under the law applicable to the Restricted Zone.

189. Consequently, Mr. Sastre has not complied with Article 1.1(a) of the Mexico-Argentina BIT since he has not proven that his alleged investment was made in accordance with Mexican legislation.

(a) Tierras del Sol Investments

i) Relevant Dates

190. Sastre must prove that he was an “investor” with a qualified “investment” on the following relevant dates in order to submit a claim to arbitration. Specifically, he must demonstrate that the alleged rights he holds in Tierras del Sol Investments were acquired in accordance with the Respondent's legal framework at the time they were made.

191. Relevant dates on which Sastre and CETSA had to prove that their investment was legal with respect to Lot 19-A and the Hotel Tierras del Sol:¹⁷⁹

Investments in Lot 19-A and Hotel Tierras del Sol	
Date on which the investments were made	12 October 2000
Date of the alleged breaches	31 October 2011 (alleged measure claimed) 2 October 2015 (decision of amparo proceedings)
Date on which the notice of arbitration was submitted	14 June 2019

ii) Sastre's rights over CETSA and Lot 19-A

¹⁷⁹ NOA#2 does not specifically identify the alleged treaty violations. The dates presented in the table are therefore best estimates available, which will need to be clarified by Claimants and revised by the Tribunal as this proceeding progresses.

192. Mr. Sastre claims to be the majority shareholder of the company Constructora Ecoturística S.A. de C.V. (CETSA),¹⁸⁰ with which, he claims, he acquired all the ejido rights to Lot 19-A within the Ejido José María Pino Suarez¹⁸¹ through an agreement for the transfer of rights concluded between CETSA and Mr. Lorenzo Novelo Pacheco on 12 October 2000.¹⁸² CETSA is a company incorporated under Mexican law whose shareholders are entirely foreigners.¹⁸³ The construction of the Hotel Cabañas Tierras del Sol was carried out in this lot. CETSA allegedly has rights to Lot 19-A within the Ejido José María Pino Suarez where the Hotel Cabañas Tierras del Sol was built and operated.

193. Despite these assertions, there is no evidence to support this allegation. On the contrary, the CETSA Transfer is *prima facie* evidence that Mr. Sastre's investment in CETSA and Tierras del Sol was illegally acquired in violation of Mexican law governing ejido lands and oceanfront property and in contravention of Article 1.1(a) of the Mexico-Argentina BIT.¹⁸⁴

194. As Mr. De la Peza explains, the CETSA Transfer (Exhibit C-0012), is insufficient and does not serve to prove the affirmations contained in it because it is “illegal because it contravenes public order provisions of the Agrarian Law” as it lacks the basic legal formalities to support the validity of the agreements, the status of the land and the ejido rights there transferred and acquired by CETSA.¹⁸⁵

195. As Mr. De la Peza concludes, even assuming that what was agreed upon in the CETSA Transfer is true, the document is equally “not a valid or sufficient document to demonstrate that Mr. Sastre acquired parcel or ejidal rights over Lot 19A because the acts therein contravene the provisions of the Agrarian Law”.¹⁸⁶

¹⁸⁰ NOA#2, ¶ 5.

¹⁸¹ *Ibid.*, ¶ 23.

¹⁸² *Ibid.*, C-0012.

¹⁸³ The only two partners of CETSA, i.e. Mr. Sastre and Mr. Marana, declared themselves to be of Argentinean nationality. NOA#2, C-0002 (p.12).

¹⁸⁴ Expert Report by Mr. De la Peza, ¶ 55.

¹⁸⁵ *Ibid.*, ¶ 55 and Table VIII: Legal deficiencies related to Lot 19A-Tierras del Sol.

¹⁸⁶ Expert Report by Mr. De la Peza, ¶ 55.

196. Alternatively, with respect to compliance with the requirements regarding the Restricted Zone, the Claimants have not proven that CETSA complied with the SRE requirements regarding the Restricted Zone necessary for the acquisition of Lot 19 to be considered legal.

iii) CETSA and Hotel Tierras del Sol

197. The Claimants assert that through the CETSA Transfer, Mr. Lorenzo Novelo Pacheco has granted “real, definitive and irrevocable [...] any rights that correspond with his status as ejidatario of the ejido JOSE MARIA PINO SUAREZ” to CETSA regarding Lot 19-A.¹⁸⁷

198. As Mr. De la Peza explains, in order for the CETSA Transfer to be valid and to grant CETSA use rights over Lot 19-A for construction and operation, it should have complied with the requirements of the law, but it failed to do so given that CETSA's Transfer of Rights Agreement, as Mr. De la Peza concludes that:

- CETSA's Transfer of Rights Agreement was not signed by the Ejidal Commissioner (“*Comisario Ejidal*”);
- CETSA's Transfer of Rights Agreement was not approved by the Assembly;
- CETSA's Transfer of Rights Agreement was not for a limited period of time;
- CETSA's Transfer of Rights Agreement was not registered in the RAN.¹⁸⁸

199. Based on the above, it is submitted that the Claimants do not have the right to use, or any other right in relation to, Lot 19-A. In particular, they do not have the right to develop or build the Hotel Tierras del Sol, or to exploit it, as the agreement is contrary to law.

(b) Hamaca Loca Investments

i) Relevant Dates

200. As with Tierras del Sol Investments, Sastre was required to prove compliance with the legal requirements regarding Hamaca Loca Investments on the relevant dates in order to be considered a qualified “investment” under the Mexico-Argentina BIT. The relevant dates for Hamaca Loca Investments are listed below.

201. Sastre acquired the rights to Hamaca Loca Investments on 12 June 2017. This transfer of rights occurred long after the investments were made, however, even assuming that Mr. Sastre has

¹⁸⁷ NOA#2, C-0012 (p. 2).

¹⁸⁸ Expert Report by Mr. De la Peza, Table VIII: Legal deficiencies related to Lot 19A-Tierras del Sol.

any rights to Hamaca Loca Investments, he must prove compliance with Respondent's laws and regulations at the following relevant times:

202. Relevant dates on which Sastre should have demonstrated the legality of his investment in Lot 19:¹⁸⁹

Investments regarding Lot 19	
Date on which the investments were made*	12 June 2017
Date on which the investments were acquired.	12 June 2017
Date of the alleged breaches	31 October 2011
Date on which the notice of arbitration was submitted	14 June 2019

203. [Translation note: This blank paragraph is in the official Spanish version.]

204. Relevant dates in which Sastre should have proven the legality of his investment with respect to Hamaca Loca:¹⁹⁰

Investments regarding the Hotel Hamaca Loca	
Date on which the investments were made*	12 June 2017
Date on which the investments were acquired.	12 June 2017
Date of the alleged breaches	31st October 2011
Date on which the notice of arbitration was submitted	14 June 2019

205. [Translation note: This blank paragraph is in the official Spanish version.]

ii) HLSA and Lot 19

¹⁸⁹ NOA#2 does not specifically identify the alleged treaty violations. The dates presented in the table are therefore best estimates available, which will need to be clarified by Claimants and revised by the Tribunal as this proceeding progresses.

¹⁹⁰ NOA#2 does not specifically identify the alleged treaty violations. The dates presented in the table are therefore best estimates available, which will need to be clarified by Claimants and revised by the Tribunal as this proceeding progresses.

206. The NOA #2 states that Mr. Sastre has “the rights in Hamaca Loca S.A de C.V. (HLSA)”¹⁹¹ because in 2017 HLSA ceded the rights to parcel 19-A.¹⁹² HLSA is also a company incorporated under Mexican law which only has foreign persons as shareholders (*i.e.* Swiss and Argentine nationals).¹⁹³ In addition, Claimants claim that HLSA allegedly acquired all of the ejido rights to Lot 19 located within the Ejido José María Pino Suarez¹⁹⁴ through a agreement for the transfer of rights concluded between HLSA and Mr. Lorenzo Novelo Pacheco on 1 March 2001.¹⁹⁵ HLSA built the Hamaca Loca hotel on this lot.¹⁹⁶

207. Despite these claims, there is no evidence to support this assumption. To the contrary, the HLSA Transfer is *prima facie* evidence that Mr. Sastre's investment in HLSA and Hotel Hamaca Loca was illegally acquired in violation of Mexican law governing ejido lands and oceanfront property and in contravention of Article 1.1(a) of the Mexico-Argentina BIT.

208. As explained by Mr. De la Peza, the HLSA Transfer,¹⁹⁷ is insufficient and does not serve to prove the statements contained therein since it is “illegal because it contravenes public order provisions of the Agrarian Law”¹⁹⁸ because:

- It lacks the basic legal formalities to be effective between the two parties, before third parties, the Ejido and before RAN;¹⁹⁹
- It lacks basic official legal documentation and information to support the status of the land and the ejido rights therein transferred and acquired by HLSA;²⁰⁰

¹⁹¹ NOA#2, ¶ 25.

¹⁹² *Ibid.*, C-0003 (p. 2).

¹⁹³ “Swiss nationals Daniela Marchetti, Dario Sartore, Reto Sartora y Claudio Giobbi created the company Hamaca Loca S.A. de C.V. (“HLSA”) and Argentine national Alvaro Urdiales subsequently joined as a shareholder on 24 January 2008”, NOA#2, ¶ 26.

¹⁹⁴ NOA#2, ¶ 27.

¹⁹⁵ *Ibid.*, C-0012.

¹⁹⁶ *Ibid.*, ¶¶ 27 and 28.

¹⁹⁷ *Ibid.*, C-0014.

¹⁹⁸ Expert Report by Mr. De la Peza, ¶ 60.

¹⁹⁹ *Ibid.*, Table XI: Legal Deficiencies of HLSA Transfer.

²⁰⁰ *Ibid.*, Table XI: Legal Deficiencies of HLSA Transfer.

209. As Mr. De la Peza concludes, “even assuming that (i) the parties effectively entered into the HLSA Transfer on the date mentioned in the respective document and that it really refers to Lot 19- Hamaca Loca (not as established, to Lot 19A) (ii) Lot 19- Hamaca Loca is within the lands owned by the Ejido, and (iii) Mr. Novelo had rights over it,”²⁰¹ this document is insufficient to prove that Mr. Sastre has acquired land or ejido rights over Lot 19 because the acts described therein contravene the Agrarian Law, since:

- As a (legal) subject, HLSA did not and does not have legitimacy to hold the status of *ejidataria* or *avecindada* of the Ejido required to acquire parcel rights;
- As a legal instrument, the HLSA Transfer lacks the legal requirements to be effective before the RAN and third parties; and
- With regard to the ceded rights, the rights of use and enjoyment of land contracted in the HLSA Transfer they lack the legal requirements and formalities to be effective before the Ejido.²⁰²

210. As with the lot acquired by CETSA, Lot 19 acquired by HLSA is located in the coastal zone and is therefore clearly within the “restricted zone” (“*zona restringida*”).²⁰³ Therefore, alternatively, HLSA should have filed a notice with the SRE regarding the acquisition of such property in order for this acquisition to be legal. However, Mr Sastre has also not demonstrated HLSA's compliance with the SRE's requirements regarding the restricted zone.

211. The same conclusions regarding CETSA apply to HLSA. Under NOA#2, the Claimants contend that HLSA built the Hamaca Loca Hotel located in front of the coast.²⁰⁴ Therefore, as noted above, in the alternative, HLSA should have complied with the requirements applicable with respect to restricted zones. The Claimants have not demonstrated that HLSA complied with the applicable SRE requirements regarding the restricted zones in order to consider the acquisition of the Hamaca Loca Hotel and Lot 19 as legal.

²⁰¹ *Ibid.*, ¶ 59.

²⁰² *Ibid.*, Table XI: Legal Deficiencies of HLSA Transfer.

²⁰³ NOA#2, C-0014

²⁰⁴ *Ibid.*, ¶¶ 27 and 28.

212. The same conclusion made in regard to the Tierras del Sol Investments applies to the Hamaca Loca Investments. Sastre has not demonstrated *prima facie* compliance with Mexican law regarding the rights he holds in this arbitration.

4. It has not been proven that Sastre has complied with other requirements to submit this dispute to arbitration

a. It has not been proven that Sastre was not domiciled in Mexico when the alleged breaches occurred

(1) Sastre has not proven that he was not domiciled in Mexico at the time of the alleged violations as required by Article 2(3) of the Mexico-Argentina BIT in order to initiate this arbitration

213. Article 2(3) of the Mexico-Argentina BIT reads as follows:

SECOND ARTICLE

(...)

3.- With respect to the provisions provided for in Articles Four and Ten, natural persons who are nationals of a Contracting Party and who are domiciled in the territory of the other Contracting Party where the investment is located may only avail themselves of the treatment accorded by that Contracting Party to its own nationals.

[*unofficial translation*]

214. Article 4 of the Mexico-Argentina BIT governs “transfers” and Article 10 governs the Investor-State dispute settlement procedure. The latter is relevant to this arbitration. With respect to Investor-State dispute settlement, Article 2(3) of the Mexico-Argentina BIT makes it clear that natural persons who are nationals of a Contracting Party and who have their domicile in the territory of the other Contracting Party where the investment is located, may only take advantage of the treatment granted to the nationals of the Contracting Party in which their investment is located. In other words, they are treated like domestic nationals and cannot invoke the Investor-State dispute settlement procedure.

215. If Sastre is found to be a national of Argentina during the relevant times, he must prove that he was not domiciled in Mexico in order to have recourse to the investor-State dispute settlement procedure under the Mexico-Argentina BIT.

(2) The domicile of an investor must be assessed at the time of the alleged breach of the treaty and the submission of the claim

216. Article 2(3) of the Mexico-Argentina BIT does not specify the relevant time for assessing when a natural person who is a national of the other Contracting Party is domiciled in the Contracting Party where the investment is located. However, the relevant time is clear when this provision is interpreted in accordance with its ordinary meaning in its context and in the light of its object and purpose as required by Article 31(1) of the Vienna Convention.

217. Article 2(3) of the Mexico-Argentina BIT, itself, expressly identifies Articles 2 and 10 as immediate contexts. Article 10 and its corresponding Annex, which is incorporated by reference in Article 10 (2), comprise the principal context for interpreting Article 2(3) as it applies to this arbitration. Article 10 and its Annex establish the investor-State dispute settlement procedure in the Mexico- Argentina BIT.²⁰⁵ That procedure can be invoked immediately upon an investor becoming aware of the presumed breach and the losses or damages suffered.²⁰⁶ It is at that time that “an natural person who is a national of a Contracting Party and who is domiciled in the territory of the other Contracting Party where the investment is situated” [*unofficial translation*], first acquires the right to invoke the dispute settlement mechanism contained in Article 10 and the Annex of the Mexico-Argentina BIT. Accordingly, the domicile of that person, which in this arbitration is Sastre, must be assessed at the time that the alleged treaty breach occurred as well as at the time of the submission of the claim to arbitration.

218. Article 2(1) of the Mexico-Argentina BIT, which is the proximate context to Article 2(3), confirms this interpretation. It provides that the Mexico-Argentina BIT applies to “measures taken or maintained by a Contracting Party in respect of investors of one Contracting Party in respect of their investments and the investments of such investors made in the territory of the other Contracting Party” [*unofficial translation*]. “Measures taken or maintained” by a Contracting Party are the focal point of the BIT and, thereby, the focal point of the Investor-State dispute settlement

²⁰⁵ **RL-014**, Mexico-Argentina BIT, Article 10(2).

²⁰⁶ *Ibid.*, Article 1(2) of the Annex.

procedure. The date on which those measures occurred is, therefore, vital to the operation of the of the dispute settlement procedure. This is confirmed by the fact that the four-year limitation period for invoking the procedure begins with knowledge of the measures and the losses or damages suffered.²⁰⁷

219. For these reasons, if Sastre is found to be a national of Argentina during the relevant times, he must prove that he was not domiciled in Mexico at the time of the alleged measures that breached the treaty and at the time of the submission of the claim to arbitration in order to have recourse to the Investor-State dispute settlement procedure under the BIT.

(3) Sastre was domiciled in Mexico during the relevant time

220. Article 2(3) does not define the term “domicile”. Its meaning must be interpreted in accordance with its ordinary meaning in its context and in the light of its object and purpose as required by Article 31(1) of the Vienna Convention.

(a) Ordinary meaning

221. The ordinary meaning of “domicile” is found in dictionary definitions. In Spanish, “domicilio” is defined as:

1. a fixed and permanent abode; 2. [p]lace in which someone is legally considered to be established for the fulfilment of its obligations and the exercise of its rights.
3. Home in which someone lives or lodges.²⁰⁸

[unofficial translation]

222. The term “domicile” is defined as “a dwelling place: place of residence”.²⁰⁹ In the sense of “law” it is “a person’s fixed, permanent and principal home for legal purposes”.²¹⁰

223. Accordingly, the ordinary meaning, the term “domicile” (“*domicilio*”) in Article 2(3) of the Mexico-Argentina BIT is the place where the natural person lives with the intention of

²⁰⁷ **RL-014**, BIT México- Argentina, Article 1(2) of the Annex.

²⁰⁸ **R-028**, “Domicilio”, Diccionario de la lengua española (Ed. 22, 2001), online at: < <https://www.rae.es/drae2001/domicilio>>.

²⁰⁹ **R-029**, “Domicile”, Merriam Webster Dictionary online, at: < <https://www.merriam-webster.com/dictionary/domicile>>.

²¹⁰ *Idem*.

remaining there and that permanence in one place for a certain period of time provides a presumption of domicile.

(b) Context, object and purpose

224. As explained above, the relevant context for Article 2(3) in this arbitration is the investor-state dispute settlement procedure in the BIT. Even if they have an investment, natural persons cannot invoke the Investor-State dispute settlement procedure if they are domiciled in the territory of the Contracting Party where the investment is located. They may only take advantage of the treatment granted by that Contracting Party to its own nationals. This is consistent with the general principle that investment treaties confer rights on foreign investors, including investor-State dispute settlement procedure rights, but not on their own nationals.²¹¹ This principle applies to this BIT. Foreign nationals can invoke the dispute settlement mechanism against Mexico but Mexican nationals cannot.

225. In this context, “domicile” is used as a measurement to equate a natural person to a domestic national, in this arbitration, a national of Mexico. Thus, facts that indicate the “domicile” of a natural person include facts that indicate a natural person is a national.

(c) Application to Sastre

226. Sastre was clearly “domiciled” in Mexico at the time of the investments and at the time of the alleged measures that breached the treaty, as confirmed by the following facts:

- Sastre obtained a foreigner FM3 visa from Mexican immigration authorities [7 June 2000];²¹²
- Sastre declared himself as domiciled in Mexico when incorporating CETSA in Cancún, Quintana Roo [31 August 2000];²¹³
- Sastre signed the CETSA Transfer of Rights Agreement in Tulum, Quintana Roo [12 October 2000]²¹⁴

²¹¹ **RL-080**, *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶¶ 56-57.

²¹² **R-030**, Sastre's FM3 Visa.

²¹³ NOA#2, C-0002 (p. 14).

²¹⁴ *Ibid.*, C-0012 (p. 5).

- Sastre extended his FM3 visa three times [between 7 June 2000 and 02 October 2009];²¹⁵
- Sastre requested to become a naturalized Mexican national [24 April 2006];²¹⁶
- Sastre renounced to his Argentinian nationality on [27 May 2009];²¹⁷
- Sastre became a naturalized Mexican citizen and Mexican national on [27 May 2009];²¹⁸
- Sastre was in the hotel Tierra del Sol on 19 October 2011, prior to the seizure;²¹⁹
- Sastre and his family were residing in the hotel Tierra del Sol at the time of the seizure;²²⁰
- Sastre continued to be domiciled in Mexico after the alleged measures;²²¹

227. Accordingly, Article 2(3) of the BIT prohibits Sastre from invoking the Investor-State dispute settlement procedures in the BIT.

b. It has not been proven that Sastre submitted his claims to arbitration within the prescribed four-year limitation period established in the Mexico-Argentina BIT

(1) Applicable Law

228. The Claimants have alleged that the principal breaches of the Mexico-Argentina APRI (*i.e.*, the seizures) took place on 31 October 2011. These claims are time-barred by Article 1(2) of the Annex of Mexico-Argentina BIT. This provision reads as follows:

The investor shall bring a claim under this Agreement as soon as he/she has knowledge of the alleged breach as well as of the loss or damage suffered, or at the latest within four years from the date on which he/she should have had knowledge thereof.

[unofficial translation]

²¹⁵ **R-030**, Sastre's FM3 Visa.

²¹⁶ **R-031**, Mexican Naturalization Application of Sastre.

²¹⁷ **R-032**, Letter of Renunciation to Argentinean Nationality of Sastre.

²¹⁸ **R-022**, Mexican Naturalization Letter of Sastre.

²¹⁹ NOA#2, ¶ 45.

²²⁰ *Ibid.*, ¶ 50. NOA#2 states that during the seizure the authorities “seized the personal belongings of the Mr. Sastre”, “ignored Mr. Sastre's pleas for the safety of his family” including his son [REDACTED] and that his wife was also threatened.

²²¹ *Ibid.*, ¶ 62 (NOA#2 states that Sastre, CETSA and HLSA filed an amparo “before the Mexican Federal Courts of Quintana Roo”); NOA#2, C-0029 (Federal Court Dismissal) and Annex C-0029 containing the dismissal of the amparo petition indicates that the amparo lawsuit was filed on behalf of CETSA by Carlos Sastre on 22 November 2011.

229. This provision is clear on the limitation period and on the date on which this period is to be counted. A claim must be submitted to arbitration by an investor as soon as it has become aware of the alleged breach as well as loss or damage suffered or, at the latest, within four years from the date on which it should have become aware of the breach.

(2) Tierras del Sol Investments

230. The four-year limitation period starts to be counted on the date that the claimant obtained actual or constructive knowledge of the adoption of the measures and damages claimed.²²²

231. NOA#2 establishes that Sastre had actual or constructive knowledge (*i.e.*, was aware or should have been aware) of the alleged breach and the loss or damage suffered (*i.e.*, the seizure of the Tierras del Sol hotel) on 19 October 2011.²²³ Sastre's NOA#1 was submitted on 29 December 2017, almost six years after the Claimant's actual knowledge of the alleged measure. Similarly, NOA#2 was submitted on 14 June 2019, over seven years after Claimant's actual knowledge of the alleged measure.

232. Thus, the limitation period was met and the claim regarding the seizure of the Tierras del Sol Investments is time barred. Accordingly, this Tribunal does not have jurisdiction over the claims regarding those investments.

(3) Hamaca Loca Investments

233. Sastre was not an investor in the Hamaca Loca Investments at the time these were made nor was he an investor at the time of the alleged seizures. At those times, the Swiss investors discussed *supra* were the investors in these investments. Those investors would have had actual or constructive knowledge (*i.e.*, were aware or should have been aware) of the alleged breach and the loss of damage suffered (*i.e.*, the seizure of the Hamaca Loca Investments) on 19 October 2011. The limitation period would have started to run on that date.

²²² **RL-097**, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 213.

²²³ NOA #2, ¶¶ 45-52.

234. As discussed above, the Respondent objects to the transfer of rights regarding the Hamaca Loca Investments to Sastre for the sole purpose of initiating this arbitration. Even if this Tribunal were to determine that the transfer was not an abuse of procedure and that Sastre could bring claims regarding those investments, the Swiss investors could not have transferred to Sastre more rights than they themselves held.²²⁴ Accordingly, since the Swiss investors' claim would have been time barred in relation to the seizure of the Hamaca Loca Hotel on the dates that NOA#1 and NOA#2 were filed, any rights they transferred to Sastre would also have been time barred.

235. Thus, assuming that all other requirements for arbitration applicable to Sastre and the Hamaca Loca Investments were met, the limitation period applicable to those investments was not met and the claim regarding the seizure of the Hamaca Loca Investments is time barred. Accordingly, this Tribunal does not have jurisdiction over the claims regarding those investments.

c. It has not been proven that Sastre notified the Respondent in writing of his intention to submit a dispute regarding the Hamaca Loca Investments to international arbitration under the Mexico-Argentina BIT

236. Sastre has failed to comply with the mandatory requirement established in Article 10(4) of the Mexico-Argentina BIT. This provision reads as follows:

4.- The investor must notify in writing to the Contracting Party of its intention to submit the dispute to international arbitration at least 90 days in advance, a period which may run concurrently with the second half of the period referred to in paragraph (3).

[unofficial translation]

237. Thus, Sastre was required to notify the Respondent in writing of its intention to submit the dispute to arbitration in respect of the Hamaca Loca Investments under the Mexico-Argentina BIT. Which he did not do. Instead, it filed a notice of intention to submit the dispute to arbitration regarding these investments under the Mexico-Switzerland BIT.

²²⁴ No one can transfer more rights over a thing than one has. It is a basic principle of property law in accordance with the maxims "*Nemo dat quod non habet*" which means "no one gives what they do not have" and "*nemo plus iuris ad alium transferre potest quam ipse habet*" that means that "no one can transfer a greater right than he himself has".

238. The relevant notice of intent to submit a dispute to arbitration was filed on 6 September 2017.²²⁵ Leaving out the claims of Sastre regarding the investments of Hamaca Loca. These claims were notified under the Mexico-Switzerland BIT, as evidenced by the following:

“Notification of arbitration under Mexico's BITs with Switzerland, Spain and Argentina”;²²⁶

In reference to our Notification of 15 June 2017 (the “**First Notification**”), and pursuant to the Agreement for the Promotion and Reciprocal Protection of Investments of the United Mexican States with the Swiss Confederation, the Kingdom of Spain and the Argentine Republic (collectively, the “**BITs**”), we submit this Notice of Arbitration on the basis of the facts described below (the “**Second Notification**”);²²⁷

“On 12 June 2017, in order to cause a claim to be asserted for the violations of the BIT between Mexico and Switzerland described below, the company Hamaca Loca S.A. de C.V. (the “Company” or “Hamaca Loca”), a Mexican corporation of variable capital, and its shareholders agreed and approved a transfer of rights to Mr. Carlos Esteban Sastre (the “Mr. Sastre” or the “Investor”);²²⁸ and

“Therefore, in accordance with the procedures contained in the BITs, including Article 4 of the BIT between Switzerland and Mexico, we respectfully submit this notice of arbitration.”²²⁹ [emphasis added]

[*unofficial translation*]

239. The notice of intention concerning Sastre’s claims regarding the Hamaca Loca Investments was filed under the Mexico-Switzerland BIT and not the Mexico-Argentina BIT.

240. Article 10(4) of the Mexico-Argentina BIT requires investors to submit a Notice of Intent at least 90 days before submitting the Notice of Arbitration, this requirement is not merely technical, but constitutes a requirement that explicitly conditions the consent of the Respondent and was established to fulfil specific functions, such as allowing the treaty Parties to identify and coordinate with national authorities the defence strategy.

²²⁵ NOI #2.

²²⁶ *Ibid.*, p. 1.

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ *Ibid.*, p. 4 and 5.

241. The Claimants did not comply with this requirement, which affects the Respondent's consent to arbitration. Thus, the tribunal lacks jurisdiction *ab initio*, since the Respondent's consent cannot be granted retroactively, consent must exist at the time the claim is submitted to arbitration,²³⁰ *i.e.*, the requirement to submit a Notice of Intent is a condition for the Respondent's consent, which is expressly set out in the arbitration agreement contained in the Mexico-Argentina BIT and must be complied with from the outset or the claim cannot be submitted to arbitration. Since, as established by the Tribunal in *Merrill & Ring v. Canada*:

29. The Tribunal has no doubt about the importance of the safeguards noted and finds that they cannot be regarded as merely procedural niceties. They perform a substantial function which, if not complied with, would deprive the Respondent of the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim announced. This would be hardly compatible with the requirements of good faith under international law and might even have an adverse effect on the right of the Respondent to a proper defense.²³¹

d. It has not been proven that Sastre was not excluded from invoking the investor-state mechanism pursuant to the waiver of his rights by virtue of his Mexican naturalization

242. Under Mexican law, for a person to acquire Mexican nationality via naturalization, that person must renounce their nationality, as well as any foreign protection and any rights that international treaties or conventions grant to foreigners.

243. Article 19 of the Nationality Law states:

Article 19.- The foreigner who intends to become a naturalized Mexican shall: (...)

I. Submit an application to the Ministry in which he/she expresses his/her intent to acquire Mexican nationality;

II. Formulate the renunciations and oaths referred to in Article 17 of this law; (...)²³²[Emphasis added]

[unofficial translation]

²³⁰ **RL-098**, *B-Mex, LLC and Others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Submission of the U.S., 28 February 2018, ¶ 7.

²³¹ **RL-099**, *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Decision on a Motion to Add a New Party, 31 January 2008), ¶ 29.

²³² **R-027**, Nationality Law, Article 19.

244. According to Article 17 of the Nationality Law, the renunciations and oaths that must be undertaken by a foreigner who intends to become a naturalized citizen are the following:

Article 17.- (...) To this end, they shall expressly renounce the nationality attributed to them, all submission, obedience and loyalty to any foreign State, especially of that which attributes the other nationality to them, all protection outside Mexican laws and authorities, and all rights granted to foreigners by international treaties or conventions. Likewise, they shall protest adherence, obedience and submission to Mexican laws and authorities and shall refrain from any conduct that implies submission to a foreign State.²³³ [Emphasis added]

[*unofficial translation*]

245. The renunciations referred to in Articles 17 and 19 of the Nationality Law are only granted once the Government of Mexico has favourably approved the naturalization process initiated by the interested party, so that the request for naturalization itself does not imply a renunciation.²³⁴

246. Sastre received a letter of Mexican naturalization on 27 May 2009,²³⁵ which implies having successfully initiated and concluded the naturalization process, and with it, having presented the renunciation required by Article 19 of the Nationality Law. On 27 May 2009, Sastre also signed a document indicating “expressly renouncing to the ARGENTINE nationality and any other nationality” and “renouncing to any rights granted to foreigners by treaties or international conventions” [*unofficial translation*].²³⁶

247. Therefore, Sastre has expressly renounced to “any rights granted to foreigners by international treaties or conventions”. This includes the right to invoke the investor-state dispute settlement mechanism under the Mexico-Argentina BIT.

²³³ **R-027**, Nationality Law, Article 17.

²³⁴ *Ibid.*, Article 19. “Article 19.- The foreigner who intends to become a naturalised Mexican shall: (...) II. Formulate the renunciations and oath referred to in Article 17 of this law; the Ministry may not require such renunciations and oaths to be formulated until the decision to grant nationality to the applicant has been taken. The letter of naturalization shall be granted once it has been verified that these have been verified.

²³⁵ **R-022**, Mexican Naturalization Letter for Sastre.

²³⁶ **R-032**, Letter of Renunciation to Argentinean Nationality from Sastre.

248. Given that, through the naturalization process, Sastre and Respondent agreed to this clear renunciation, this renunciation is effective, and this Tribunal must decline its jurisdiction over Sastre.²³⁷

C. Jurisdictional objections under the NAFTA

249. The Tribunal lacks jurisdiction over the claims under the NAFTA. The objections in this section are based on the facts currently available to the Respondent and are without prejudice to introducing additional objections and arguments as new facts are presented in the course of this proceeding.

1. Relevant dates

250. The relevant dates on which Galán and Alexander must prove nationality, that they were investors in qualified investments, and that their investments were legal under the Respondent's laws are:

Date on which the investments were made*	28 April 2004 7 February 2007
Date of the alleged breaches *	17 June 2016
Date on which the notice of arbitration was submitted	14 June 2019

* The NOA#2 does not identify the specific investments and dates of those investments nor does it identify the specific alleged measures that breach the treaty and the date of those breaches. The dates presented in this table are best estimates available that must be clarified by the Claimants and revised by the Tribunal during the course of this procedure.

2. It has not been proven that Galán and Alexander were qualified “investors” in accordance with NAFTA

251. In order to invoke the investor-State dispute settlement procedure in the NAFTA, Galán and Alexander must prove that they were investors who were nationals of Canada.²³⁸

²³⁷ **RL-100**, *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), ¶¶ 118-119.

²³⁸ **RL-017**, NAFTA, Articles 1101(1) and 1139 (definition of “investor of a party”).

a. It has not been proven that Galán and Alexander were nationals of Canada at all relevant times

252. The NOA#2, dated 14 June 2019, states that Galán and Alexander are citizens of Canada and are “currently domiciled” in the city of Vancouver, British Columbia, Canada.²³⁹ Exhibits C-0009 and C-0010 were adduced in NOA#2 as evidence to establish Canadian nationality. These exhibits contain a copy of Galan's Canadian passport, which was issued on 3 July 2015 and valid until 3 July 2025, and a copy of Alexander's Canadian passport, which was issued on 4 June 2015 and valid until 4 June 2020.

253. These passports do not cover the dates of the Parayso Investments. Thus, with respect to Galán and Alexander, the Claimants *prima facie* have not met the burden of proof with respect to their nationality at all relevant times.

b. It has not been proven that Galán’s and Alexander’s dominant and effective nationality was Canadian at all relevant times

254. As explained above, in order for dual nationals like Galán and Alexander to invoke the dispute settlement mechanism in the NAFTA, it must be proven that their dominant and effective nationality at all relevant times was of the other treaty Party (i.e., Canada), not Mexico. Clearly it is not the case.

255. The copy of Galán’s Canadian passport filed as Exhibit C-0010 indicates that she was born in Coatzacoalcas, Mexico. Galán exercises her Mexican nationality as she has at the least been issued four Mexican passports covering time periods between 13 January of 1983 and 11 March of 2020.²⁴⁰ The copy of Alexander’s Canadian passport filed as Exhibit C-0009 indicates that he was born in Oaxaca, Mexico. The Government of Mexico’s records of Alexandre’s Mexican birth certificate confirm he was born in Oaxaca, Mexico.²⁴¹ Alexander also exercises his Mexican nationality as he applied and has been approved a Mexican passport at least for the periods 02 March 2012 to 02 March 2018 and around 23 September 2015 to 23 September 2021.²⁴² This is

²³⁹ NOA #2, ¶¶ 10-11.

²⁴⁰ R-033, Application Approvals and Mexican Passports for Galán.

²⁴¹ R-025, Mexican Birth Certificate for Alexander.

²⁴² R-034, Application Approvals and Mexican Passports for Alexander.

evidence that they were Mexican nationals at all relevant times. As Mexican nationals, they are excluded from protection under the NAFTA unless it is proven that their Canadian nationality was their dominant and effective nationality at all relevant times. This has not been done.

3. It has not been proven that Galán and Alexander had qualified “investments” in accordance with NAFTA in the territory of the Respondent

256. To prove ownership of the Parayso Investments, Galán and Alexander adduce Exhibit C-0023, an April 2004 document regarding the possessory rights of the parcel on which Hotel Parayso was situated, purchased in the name of Monica Galan Rios, unmarried. Galan and Alexander also adduce as proof of ownership Exhibit C-0024, a separation agreement between Graham Alexander and Mónica Galán Ríos filed before the Supreme Court of British Columbia, Canada, dated [REDACTED] distributing the ownership of Hotel Parayso and the parcel between the two Claimants.

257. Below is a breakdown of the relevant dates on which they must prove the existence of a qualifying investment in respect of Lot 10 Parayso and Hotel Parayso:²⁴³

Investments regarding Section Lot 10-Parayso and Investments regarding Hotel Parayso	
Date on which the investments were made	28 April 2004
Date of the alleged breaches	17 June 2016
Date on which the notice of arbitration was submitted	14 June 2019

a. The documents filed as evidence of ownership are materially deficient

(1) The documents do not relate to the Hotel

²⁴³ NOA#2 does not specifically identify the alleged treaty violations. The dates presented in the table are therefore best estimates available, which will need to be clarified by Claimants and revised by the Tribunal as this proceeding progresses.

258. The documents filed as evidence of ownership do not refer to Galán's and Alexander's ownership rights, if any, in the hotel that was allegedly built on the parcel, which are different from any rights in the parcel of land.

(2) The Canadian separation agreement is not proof of ownership

259. Ownership of investments in the territory of the Respondent must be established under the Respondent's laws. There is no evidence that the separation agreement filed in the Supreme Court of British Columbia had legal status in the territory of the Respondent. Moreover, there is no evidence of the formal division of the Parayso Investments as per the separation agreement.

(3) The documents do not disclose the ownership of the investments by Rancho Santa Monica Developments Inc.

260. Between the alleged acquisition of ownership rights in April 2004 by Galán in the land parcel (Exhibit C-0023) and the date of filing of the NOA#2, a United States company named Rancho Santa Monica Developments Inc. (Rancho) was an owner of the Parayso Investments.²⁴⁴ The Claimants have not disclosed to the Respondent and this Tribunal this participation in the ownership of the alleged investment. Given its existence, it is insufficient for the Claimants to pretend to prove ownership of the Parayso Investments by Galán and Alexander simply by relying on Exhibits C-0023 and C0024.

261. Rancho was incorporated in Nevada, United States, on 28 May 2004 and appears to have been active until 27 May 2015, the date of its last declaration filing.²⁴⁵ It was registered with the US Securities and Exchange Commission (SEC) between 2004 and 25 February 2010. On 10 March 2010, the British Columbia Securities Commission issued a cease trade order on its stock.²⁴⁶

²⁴⁴ **R-006**, GlobeNewswire, Rancho Santa Monica Developments, Inc. Announces Completion of Its Tulum, Mexico Development: Parayso Hotel and Spa, February 12, 2007.

²⁴⁵ **R-035**, Government of Nevada, SilverFlume, Entity Search, Rancho Santa Monica Developments Inc., downloaded 20 December 2020.

²⁴⁶ **R-009**, British Columbia Securities Commission, Cease Trade Order, Rancho Santa Monica Developments, Inc., 2010 BCSECCOM 136, March 10, 2010.

262. Rancho acquired Galán's rights over the land parcel on 29 November 2004.²⁴⁷ Rancho's 2009 10-K SEC filing includes the following statements:

Under the terms of our agreement with Ms. Galan-Rios, we were assigned her interest in an occupation order issued by the Ejidal Commissariat of the Ejido NCPE Jose Maria Pino Suarez for the use and possession of the Solidaridad Property. Under Mexican law we own the right to possess and make use of the Solidaridad Property but do not own title to the property until a legal survey is completed by the Mexican government. The Mexican government is expected to undertake a legal survey of the Solidaridad Property and surrounding areas within the next twelve months. Once the legal survey is completed the Mexican government may require an additional fee prior to effecting a transfer of legal title to the property to Rancho. Because we do not own legal title to our Solidaridad Property we are subject to the risk that: (i) conditions may be imposed on our occupation order for the property and/or the order may be cancelled; (ii) the Mexican government may delay the implementation of a legal survey or decide not to undertake a survey of the property; and (iii) if a legal survey is completed there is no assurance that we will not be required to pay additional fees for the transfer of legal title to the property or that the property boundaries will be identical to those granted in the occupation order issued by the Ejidal Commissariat.²⁴⁸

Under Mexican law we own the right to possess and make use of the Solidaridad Property but do not own title to the property until a legal survey is completed by the Mexican government. Because we do not own legal title to our Solidaridad Property we are subject to the risk that: (i) conditions may be imposed on our occupation order for the property and/or the order may be cancelled; (ii) the Mexican government may delay the implementation of a legal survey or decide not to undertake a survey of the property; and (iii) if a legal survey is completed there is no assurance that we will not be required to pay additional fees for the transfer of legal title to the property or that the property boundaries will be identical to those granted in the occupation order issued by the Ejidal Commissariat.²⁴⁹

We Do Not Own Legal Title To Our Solidaridad Property, And As A Result May Lose All Or Substantially All Of Our Interests In The Property. Under the terms of the property purchase agreement for our Solidaridad Property, Ms. Galan-Rios assigned to us her interest in an occupation order issued by the Ejidal Commissariat of the Ejido NCPE Jose Maria Pino Suarez for the use and possession of the Solidaridad Property. Under Mexican law we own the right to possess and make use of our Solidaridad Property but do not own title to the property until a legal survey is completed by the Mexican government. Because we do not own legal title

²⁴⁷ **R-005**, Purchase Agreement dated for reference 29 November 2004 between Mónica Galán-Ríos and Rancho Santa Mónica Developments Inc.

²⁴⁸ **R-036**, United States Securities and Exchange Commission (SEC), 10-K, United States Securities and Exchange Commission (SEC), Form 10-K, Rancho Santa Monica Developments Inc., 2009, p. 5.

²⁴⁹ *Ibid.*, p. 7.

to our Solidaridad Property we are subject to the risk that: (i) conditions may be imposed on our occupation order for the property and/or the order may be cancelled; (ii) the Mexican government may delay the implementation of a legal survey or decide not to undertake a survey of the property; and (iii) if a legal survey is completed there is no assurance that we will not be required to pay additional fees for the transfer of legal title to the property or that the property boundaries will be identical to those granted in the occupation order issued by the Ejidal Commissariat. The occurrence of any of the above risks would have a material adverse effect our business, results of operations or financial condition.²⁵⁰

We entered into an agreement dated for reference November 29, 2004 with Monica Galan-Rios pursuant to which we acquired certain lands located in the State of Quintana Roo, Mexico consisting of approximately 2,120 square meters. Under the terms of the agreement, Ms. Galan-Rios assigned to us her interest in an occupation order issued by the Ejidal Commissariat of the Ejido NCPE Jose Maria Pino Suarez for the use and possession of a fraction of the Solidaridad Property for consideration of \$30,000 cash and an unsecured promissory note in the amount of \$50,000. Currently, we own the right to possess and make use of the Solidaridad Property. We will own title to the property when a legal survey is completed by the Mexican government.

Mr. Alexander served as President of Galan Ventures Ltd., the developer of ParaYso Hotel, Tulum Mexico, a 11suite boutique hotel located in the Mayan Riviera Mexico.²⁵¹

We entered into an agreement dated for reference November 29, 2004 with Monica Galan-Rios pursuant to which we acquired our property located in Solidaridad, Mexico. Subsequently in 2005, our President, Mr. Alexander, married Mrs. Galan-Rios.²⁵²

263. Rancho continued to operate at the time the NOA#2 was submitted, as evidenced by the power of attorney presented by Graham Alexander which includes “Rancho Santa Monica Developments Inc” (Rancho).²⁵³ The separation agreement filed in the Supreme Court of British Columbia (Exhibit C-0024) indicates that all accounts of the Parayso Investments are registered in a company called “Rancho” and that Galán and Alexander are directors and equal shareholders in

²⁵⁰ *Ibid.*, p. 8.

²⁵¹ *Ibid.*, p. 20.

²⁵² *Ibid.*, p. 24.

²⁵³ NOA#2, C-0011(p. 1).

the company. Accordingly, there is *prima facie* evidence that the Parayso Investments are owned by Rancho, a United States company that is not a claimant in this arbitration.

b. In any event, the documentation submitted by the Claimants does not comply with Mexican law

264. For Hotel Parayso, Mónica Galán Ríos and Graham Alexander adduce Exhibit C-0023, a document on the possessory rights over the parcel of land on which Hotel Parayso was located, purchased in the name of Mónica Galán Ríos, unmarried.²⁵⁴ Mónica Galán Ríos and Graham Alexander also submit Exhibit C-0024, a separation agreement between Graham Alexander and Mónica Galán Ríos registered before the Vancouver courts on [REDACTED], whereby ownership of the Hotel Parayso and the parcel is distributed between the two parties.²⁵⁵

(1) Galán's rights over the Section of Lot 10- Parayso have not been proven.

265. As Mr. De la Peza explains, the Galán Transfer, “it is insufficient to prove that Mrs. Galán acquired possessory rights over Lot 10-Parayso Fraction”²⁵⁶, for the following reasons.²⁵⁷

- Assuming that it is a parcel (“*parcela*”) and the ceded rights were of parcel rights (“*derechos parcelarios*”), the Galán Transfer is invalid as: (i) Galán was not an ejido member (“*ejidataria*”) or *avecindada* of the Ejido, and therefore lacks the capacity or legitimacy to acquire parcel rights; (ii) it was not executed before two witnesses; (iii) it does not appear that the right of first refusal (“*derecho del tanto*”) was respected nor that notice was given to the Ejidal Commissariat (“*Comisariado Ejidal*”); and (iv) it was not registered with the RAN.
- Assuming that it is a development contract (“*contrato de aprovechamiento*”) related to parcel (“*parcela*”), it was not registered with the RAN.
- Assuming that it is an economic or de facto parcel (“*parcela económica o de hecho*”) formally delimited by the Ejido as land of common use (“*tierras de uso común*”), the transfer fails to comply with the requirements established for the validity of grants of

²⁵⁴ *Ibid.*, ¶ 37 and C-0023.

²⁵⁵ *Ibid.*, ¶ 38 and C-0024.

²⁵⁶ Expert Report by Mr. De la Peza, ¶ 87.

²⁵⁷ As Mr. De la Peza explained, within the social or ejido property there are different types of property, given the impossibility of determining, based on the document exhibited by the Claimant to which type of ejido land the transfer agreement refers, Mr. De la Peza established assumptions under different scenarios assuming that the rights over the Section of Lot 10-Parayso were effectively recognised by the ejido authorities.

use and enjoyment of rights to land of common use (“*tierras de uso común*”) in favor of third parties, since (i) it was not signed by the Ejidal Commissariat (“*Comisariado Ejidal*”); (ii) it was not approved by the Assembly; and (iii) it does not indicate the period of time allowed by the Law.

266. Therefore, the transfer of rights was not carried out in accordance with the laws of the Respondent, since it does not comply with any of the requirements of the Agrarian Law for its validity.²⁵⁸

(2) Alexander's rights over the Section of Lot 10-Parayso have not been proven

267. In NOA#2, Alexander states that he acquired 50% ownership of the Section of Lot 10-Parayso through a separation agreement entered into with Galán on [REDACTED] [REDACTED].²⁵⁹

268. Even assuming, without conceding, that Galán had ownership of the Section of Lot 10-Parayso when the separation agreement with Alexander was concluded, as Mr. De la Peza explains, the Separation Agreement, “is not a valid or sufficient document to demonstrate that Mrs. Galán was the owner of the Lot 10-Parayso Fraction”, for the following reasons:²⁶⁰

- The Separation Agreement does not in itself entail a transfer of property or any other rights in favour of Alexander in relation to the Section of Lot 10-Parayso;²⁶¹
- Mr. Alexander did not adduce a valid and enforceable contract by virtue of which Ms. Galán transferred any rights to Mr. Alexander over the Section of Lot 10-Parayso;
- There is no proof that the Separation Agreement was registered before the RAN;
- There is no evidence that Galán had validly granted rights under the Agrarian Law regarding the Section of Lot 10-Parayso that could be transferred to Alexander.²⁶²

269. Therefore, Alexander has not proven that he has acquired the parcel or ejido rights (“*derechos parcelarios o ejidales*”) that he claims, given that the document with which he intends to prove his ownership of the Section of Lot 10-Parayso is not a valid or sufficient document to

²⁵⁸ Expert Report by Mr. De la Peza, ¶ 88.

²⁵⁹ NOA#2, ¶ 37 and C-0024.

²⁶⁰ Expert Report by Mr. De la Peza, ¶ 90.

²⁶¹ *Ibid.*, Table XXVI: Documentary deficiencies of Fraction of Lot 10-Parayso.

²⁶² *Ibid.*, ¶ 89-90.

prove that Mrs. Galán was the owner of the Section of Lot 10-Parayso and that she transferred 50% of the property rights to Mr. Alexander.²⁶³

270. Alternatively, the Claimants also failed to establish that the applicable SRE requirements regarding the restricted zone were met.

(3) Galán and Alexander's "property interests" in Hotel Parayso have not been proven

271. Galán and Alexander assert that the Municipality of Tulum recognized their "*property interests*" in Hotel Parayso through operating and land use licenses.²⁶⁴

272. However, these documents were not adduced, and Claimants have not proven that the operating and land use licenses are evidence of their "*property interests*" in the Hotel Parayso or that the Municipality of Tulum recognized their "*property interests*" through them. Likewise, it is specified that the land use and operation licenses issued by the Municipality of Tulum cannot be considered as proof of possession or ownership of the ejido parcel.

273. Given that 50% of the Section of Lot 10-Parayso allegedly acquired by Alexander as a Canadian national is located in the coastal zone, *i.e.*, in the restricted zone, alternatively, Claimants should have proven he fulfilment of the requirements of Mexico's laws regarding the restricted zone had been met.

c. It has not been proven that the Parayso Investments complied with Respondent's laws at the relevant time

274. Unlike the other treaties invoked by the Claimants, NAFTA does not contain an express requirement that investments be made in accordance with Mexican law. However, several Tribunals have established that it is an implicit requirement that investments be made in accordance with the laws of the host State, even when the treaty does not expressly provide for it. Accordingly, Respondent will analyze, in accordance with the Agrarian Law, the legality of the rights claimed by Galán and Alexander with respect to the parcels on which the Hotel Parayso was

²⁶³ *Ibid.*, ¶ 90.

²⁶⁴ NOA#2, ¶ 37.

built and, alternatively, the provisions regulating the acquisition of real estate by foreigners in the restricted zone.

275. In this regard, Claimants must prove that the Parayso Investments were made in accordance with Respondent's laws and regulations on the relevant dates. They have not done so. With respect to the legality of the Parayso Investments, Claimants have not proven that:

- Galán and Alexander complied with the legal requirements for having the alleged rights over the Section of Lot 10-Parayso in the Ejido José María Pino Suárez according to the Agrarian Law and, alternatively, the law applicable to the restricted zone (“zona restringida”).
- Galán and Alexander had rights over the Section of Lot 10 on which the Hotel Parayso was built.

276. Consequently, Galán and Alexander have not complied with the legality requirement, as their investment was not made in accordance with Mexican law.

(a) Parayso Investments

i) Relevant Dates

277. The Claimants claim that Ms. Galan and Mr. Alexander have a qualified “investment”, therefore, that they are in compliance with the Respondent's laws and regulations. However, Claimants have not demonstrated that on each of the relevant dates they complied with Respondent's laws and regulations for their investment to be considered legal.

278. Below is a breakdown of the relevant dates on which they must prove that the Parayso Investments were in accordance with Mexican law. Relevant dates on which Galán and Alexander had to prove that their investment was legal with respect to Section Lot 10 Parayso:²⁶⁵

²⁶⁵ NOA#2 does not specifically identify the alleged treaty violations. The dates presented in the table are therefore best estimates available, which will need to be clarified by Claimants and revised by the Tribunal as this proceeding progresses.

Investments in the Section of Lot 10 Parayso	
Date on which the investments were made	28 April 2004
Date of the alleged breaches	17 June 2016
Date on which the notice of arbitration was submitted	14 June 2019

279. Relevant dates when Galán had to prove that the investment was legal with respect to Hotel Parayso:²⁶⁶

Investments regarding Hotel Parayso	
Date on which the investments were made	28 April 2004
Date of the alleged breaches	17 June 2016
Date on which the notice of arbitration was submitted	14 June 2019

ii) Galán's rights regarding the Section of Lot 10 – Parayso

280. In NOA# 2, Galán claims to have “*purchased*”²⁶⁷ the possessory rights (“*derechos posesorios*”) of a land located in the coastal area of Ejido José María Pino Suárez through an agreement for the transfer of rights concluded with Mr. Rogelio Novelo Balam on 28 April 2004 (Exhibit C-0023, Galán Transfer).²⁶⁸

281. Despite these arguments, there is no evidence to support this allegation.²⁶⁹ On the contrary, the Galán Transfer is *prima facie* evidence that the Parayso Investment was illegally acquired in violation of the Agrarian Law and, alternatively, the property regime that regulates beachfront property (restricted zone), and therefore in contravention of NAFTA. As Mr. De la Peza explains,

²⁶⁶ NOA#2 does not specifically identify the alleged treaty violations. The dates presented in the table are therefore best estimates available, which will need to be clarified by Claimants and revised by the Tribunal as this proceeding progresses.

²⁶⁷ NOA#2, ¶ 37.

²⁶⁸ *Ibid.*, C-0023.

²⁶⁹ See sections, *supra*.

the Galán Transfer contravenes its provisions since “is insufficient to prove that Mrs. Galán acquired possessory rights over Lot 10-Parayso Fraction, since it does not meet a single of the requirements established by the Agrarian Law for its validity.”²⁷⁰

282. Notwithstanding the above, it is clear from Exhibit C-0023 that Galán acted as a Mexican national in concluding the transfer of rights. However, this fact should not be understood as Galán's compliance with the requirement of legality of the investment under NAFTA, since, as Mr. De la Peza states in his report, the transfer of rights does not comply with any of the requirements established by the Agrarian Law for its validity.²⁷¹

283. The NOA#2 and the Galán Transfer show that the Section of Lot 10-Parayso, over which rights are allegedly held, is located in front of the coast. Therefore, alternatively, it should have complied with the Mexican legislation applicable to restricted zones (“*zonas restringidas*”).

284. For the reasons above, Galán and Alexander have not proven that they made their investments in accordance with Respondent's laws, as required by the legality requirement implicit in NAFTA, therefore the Tribunal lacks jurisdiction over the claims related to the Parayso Investments with respect to Galán and Alexander.

4. Not proven that Galán and Alexander have complied with other requirements to submit this dispute to arbitration.

a. Not proven that Galán and Alexander filed a proper written notice of their intention to submit a claim to arbitration at least 90 days before the claim was submitted.

285. The consent to arbitrate contained in Article 1122(1) of the NAFTA provides that “[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.” This provision makes clear that the consent to arbitrate is not unconditional and requires that the arbitration claim be submitted in “accordance with the procedures set out in this Agreement.” As stated in *Methanex*, “in accordance with the procedures set out in this Agreement”, implies the following:

In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 11 01

²⁷⁰ Expert Report by Mr. De la Peza, ¶ 87.

²⁷¹ *Ibid*, ¶ 87.

are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.²⁷²

286. With respect to the claims of Galán and Alexander, the Claimants have not complied with the conditions precedent set out in Article 1119 of the NAFTA to submit a claim to arbitration under Article 1116.

287. Article 1119 of the NAFTA reads as follows:

The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify:

- (a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise;
- (b) the provisions of this Agreement alleged to have been breached and any other relevant provisions;
- (c) the issues and the factual basis for the claim; and
- (d) the relief sought and the approximate amount of damages claimed.

288. The requirements contained in Article 1119 of the NAFTA are elaborated upon in the “Statement of the Free Trade Commission on notices of intent to submit a claim to arbitration” (FTC Statement), which, while not imposing mandatory requirements, details how claimants can assure that the notice of intent satisfies the requirements of Article 1119.

289. The deficiencies in the Notice of intent of 17 January 2019, by which Galán and Alexander submitted their NAFTA claim are:

- It does not mention “the provisions of this Agreement alleged to have been breached” as required under Article 1119(b).²⁷³

²⁷² **RL-025**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award (Preliminary Award on Jurisdiction and Admissibility), 7 August 2002, ¶ 120.

²⁷³ **RL-027**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶¶ 127-134. In *ADF Group v. United States*, the tribunal determined that “the notice of intention to submit to arbitration should specify not only “the provisions of [NAFTA] alleged to have been breached” but also “any other relevant provisions [del TLCAN].” In other words, while Article 1119 does not require exhaustiveness on the part of claimants, it does require them to at least specifically point out to the respondent the alleged NAFTA violations.

- It only indicates one amount for damages of “US\$ 70 million”, without distinguishing between the individual claims or between the claims under each treaty.
- It does not indicate the type of investment involved or evidence of direct or indirect ownership or control by Galán and Alexander of the Hotel Parayso as required under section IV of the FTC Statement.

290. These failures invalidate the notice of intent. Accordingly, with respect to the claims under the NAFTA, the Claimants have not met this requirement for submitting this dispute to arbitration.

D. Jurisdictional Objections under the Mexico-France BIT

291. The Tribunal lacks jurisdiction over the claims under the Mexico-France BIT. The objections in this section are based on the facts currently available to the Respondent and are without prejudice to introducing additional objections and arguments as new facts are presented in the course of this proceeding.

1. Relevant dates

292. The relevant dates on which Jacquet must prove nationality, that he was an “investor” in qualified “investments” under the Treaty, and that his investments were legal under the Respondent’s laws are:

Date on which the investments were made	15 May 2007 10 January 2008 2008 2011
Date of the alleged breaches	17 June 2016
Date on which the notice of arbitration was submitted	14 June 2019

* The NOA#2 does not identify the specific investments and dates of those investments nor does it identify the specific alleged measures that breach the treaty and the times of those breaches. The dates presented in this table are best estimates available, that must be clarified by the Claimants and revised by the Tribunal during the course of this procedure.

2. It has not been proven that Jacquet was a qualified “investor” in accordance with the Mexico-France BIT

293. In order to invoke the investor-state dispute settlement procedure in the BIT, Jacquet must prove that, at all relevant times, he was an investor who was a national of France.²⁷⁴

294. The NOA#2, dated 14 June 2019, states that Jacquet was a citizen of France and was “currently domiciled” in Quintana Roo, Mexico.²⁷⁵ In the NOA#2, it was presented Exhibit C-0005, containing a copy of Jacquet’s French passport issued by the Consulate General of France in Mexico on 19 November 2015 and valid until 18 November 2025, which was adduced to establish his French nationality. Jacquet’s domicile is blacked out in the copy of the passport. The passport does not cover the dates of the Behla Tulum Investments. Therefore, the Claimants *prima facie* have not met the burden of proof with respect to Jacquet’s nationality at all relevant times.

3. It has not been proven that Jacquet had qualified “investments” in the territory of the Respondent in accordance with the Mexico–France BIT

295. The Claimants claim to have rights over Behla Tulum Investments. However, they have not demonstrated that they have qualifying investments on the relevant dates to be classified as qualifying “investments” under Article 2(1) of the BIT Mexico-France. As a result, the relevant dates on which Jacquet should have demonstrated that Behla Tulum Investments qualified as such are:²⁷⁶

Investment regarding Lot AMSA and Lot 10A	
Date on which the investments were made	15 May 2007
Date of the alleged breaches	17 June 2016
Date on which the notice of arbitration was submitted	14 June 2019

296. Relevant dates on which Jacquet should have proven that his investment was legal in respect of Behla Tulum.²⁷⁷

Investments regarding Hotel Behla Tulum		
	Jacquet	Abodes
Date on which the investments were made²⁷⁸	10 January 2008	15 May 2007

Date of the alleged breaches	17 June 2016	17 June 2016
Date on which the notice of arbitration was submitted	14 June 2019	14 June 2019

a. It has not been proven that Jacquet was an investor in the Behla Tulum at all relevant times

297. To prove ownership of the Behla Tulum Investments, Jacquet has adduced Exhibit C-0017 and Exhibit-C-0018 to show rights over the parcels where the hotel Behla Tulum and Store La Tente Rose were located.²⁷⁹ Exhibit C-0017, shows that parcel rights were acquired by Abodes Mexico, S.A. de C.V. (Abodes). Although it is stated in NOA#2 that Jacquet had an interest in Abodes, no ownership information was provided for the company.²⁸⁰ Exhibit C-0018 is a commodatum agreement (“*acuerdo de comodato*”) which is asserted to grant Jacquet (not Abodes) possessory rights (“*derechos posesorios*”) for the parcels, thus, the rights to the parcels relevant to the Behla Tulum Investments appear to be divided between Abodes and Jacquet. No evidence of ownership of the hotel or store has been adduced, which is different from any rights to the parcel of land.²⁸¹

²⁷⁴ **RL-015**, Mexico-France BIT, Articles 1(2)(a) and 9(1).

²⁷⁵ NOA #2, ¶ 7.

²⁷⁶ NOA#2 does not specifically identify the alleged treaty violations. The dates presented in the table are therefore best estimates available, which will need to be clarified by Claimants and revised by the Tribunal as this proceeding progresses

²⁷⁷ NOA#2 does not specifically identify the alleged treaty violations. The dates presented in the table are therefore best estimates available, which will need to be clarified by Claimants and revised by the Tribunal as this proceeding progresses.

²⁷⁸ NOA#2 does not identify the specific dates on which these alleged investments took place. The dates presented in the table are therefore best estimates available, which should be clarified by Claimants and reviewed by the Tribunal as this proceeding progresses.

²⁷⁹ NOA#2, ¶ 29.

²⁸⁰ *Ibid.*, ¶ 80.

²⁸¹ NOA#2 does not identify the specific dates on which these alleged investments took place. The dates presented in the table are therefore best estimates available, which should be clarified by Claimants and reviewed by the Tribunal as this proceeding progresses.

298. Thus, the documents provided in NOA#2 are incomplete and do not establish that Jacquet was an investor in the Behla Tulum at the relevant times.

(1) Jacquet's rights over Abodes and AMSA Lot have not been proven

299. With respect to Exhibit C-0017, the Claimants assert that Jacquet acquired ownership of the AMSA Lot through a private promise to purchase agreement (“*contrato privado de promesa de compraventa*”) entered into between Abodes and Mr. José Mauricio Roman Lazo on 15 May 2007 (AMSA Promise).²⁸² Abodes claims to be a corporation incorporated under the laws of Mexico²⁸³. Abodes allegedly has rights over the AMSA Lot where the Behla Tulum Hotel was allegedly built and operated, as well as La Tente Rose.²⁸⁴ Despite these assertions, there is no evidence to support this claim.

300. Mr. De la Peza has detailed in his expert report that the AMSA Promise is not sufficient or serve to demonstrate the claims contained therein as they are not sufficient to prove that Mr. Jacquet is the holder of parcel or ejido rights (“*derechos parcelarios o ejidales*”) regarding the AMSA Lot, due to documentary and legal deficiencies²⁸⁵ because:

- It lacks the basic legal formalities to be enforceable between the parties themselves, before third parties;
- It lacks basic official legal documentation and information to support the creation and existence of Abodes;
- It lacks documentation and official information to support that Abodes was, indeed, represented at the celebration of the AMSA Promise;
- It lacks of official documentation to prove the exact location of the AMSA Lot, as well as the property regime that it belongs to;
- It lacks official documentation to prove the transfer of rights on 4 August 2006 in favor of Mr. José Mauricio Román Lazo;
- It lacks official documentation to prove that the transferee corresponding to the transfer

²⁸² NOA#2, C-0017.

²⁸³ *Ibid.*, C-0017(p. 2).

²⁸⁴ *Ibid.*, ¶ 30-31.

²⁸⁵ Expert Report by Mr. De la Peza, ¶ 65.

of rights of 4 August 2006 was, in fact, in possession of Lot AMSA; and

- It lacks official documentation to prove that an agreement of sale was concluded between Mr. José Mauricio Román Lazo and Abodes regarding the AMSA.²⁸⁶

301. As Mr. De la Peza concludes, the documents submitted by the Claimants are insufficient and do not prove that José Mauricio Román Lazo was the owner of the AMSA Lot or that he transferred his rights over it to AMSA.²⁸⁷ Additionally, it cannot be demonstrated that Mr. José Mauricio Román Lazo had any rights regarding the AMSA Lot that could be transferred to Abodes.

302. Despite deficiencies in the documentation submitted by the Claimants relating to Mr. Jacquet's rights over Abodes and AMSA Lot and assuming that (i) Abodes is a corporation incorporated under the laws of Mexico; (ii) the contracting parties to the AMSA Promise actually executed the agreement; (iii) AMSA Lot is located within the Ejido; and (iv) Mr. José Mauricio Román Lazo had rights to that lot, Mr. De la Peza contends that “the AMSA Promise is insufficient to prove that AMSA acquired parcels or ejidal rights over the Lot AMSA-Behla Tulum, since it does not meet a single one of the requirements established by the Agrarian Law for its validity”²⁸⁸ thus “is a document by which no rights over Lot AMSA-Behla Tulum were transferred”²⁸⁹ because:

- As a subject, Abodes could not claim to have the status of *ejidataria* or *avecindada* of the Ejido necessary to acquire parcel rights;
- As a legal instrument, the AMSA Promise lacks the legal requirements to be enforceable before the RAN and third parties;
- With regard to the transferred rights, the rights of use and enjoyment of land agreed in the AMSA Promise lacks the legal requirements and formalities to be enforceable before the Ejido.²⁹⁰

²⁸⁶ *Ibid.*, Table XIV: Documentary deficiencies related to AMSA – Behla Tulum.

²⁸⁷ *Ibid.*, ¶ 66.

²⁸⁸ *Ibid.*, ¶ 66.

²⁸⁹ *Ibid.*, ¶ 67.

²⁹⁰ *Ibid.*, Table XV: Legal deficiencies related to AMSA Promise.

303. Alternatively, the Claimants have also failed to demonstrate that Abodes complied with the SRE's requirements regarding the restricted zone in order for the acquisition of the AMSA Lot to be considered legal.

(2) Jacquet's rights to Lot 10A have not been proven

304. Regarding Exhibit C-0018, in NOA #2 Jacquet claims to have acquired the rights to Lot 10A through a commodatum agreement (“contrato de comodato”) entered into between Jacquet and Mr. José Mauricio Roman Lazo on 10 January 2008 (Commodatum Jacquet).²⁹¹ Mr. Jacquet claims to be a citizen of France.²⁹² Mr. Jacquet allegedly holds rights to Lot 10A on which the Behla Tulum Hotel was built and operated, as well as La Tente Rose.²⁹³ Despite these claims, there is no evidence to support this allegation.

305. As Mr. De la Peza explains, the Commodatum Jacquet is not sufficient to prove the claims contained therein because “it does not meet the requirements established by the Agrarian Law for its validity”²⁹⁴ because:

- It lacks the basic legal formalities to be enforceable between the parties themselves, before third parties, the Ejido and before RAN;
- It lacks basic official legal documentation and information to support the status of the land and the ejido rights therein transferred and acquired by Mr. Jacquet.²⁹⁵

306. Assuming that (i) the parties did, in fact, enter into Commodatum Jacquet; (ii) Lot 10A is within the lands owned by the Ejido; and (iii) José Mauricio Román Lazo had possession of that land on the date of the conclusion of Commodatum Jacquet, this document is insufficient to prove that Mr. Jacquet acquired land rights or ejido rights (“*derechos parcelarios o ejidales*”) in Lot 10A because the acts described therein contravene the Agrarian Law, since:

- As a foreign subject, Jacquet did not have and does not have the legitimacy to have the status of *ejidatario* or *avecindado* of the Ejido required to acquire parcel rights;

²⁹¹ NOA#2, C-0018.

²⁹² *Ibid.*, ¶ 7.

²⁹³ *Ibid.*, ¶ 30-31.

²⁹⁴ Expert Report by Mr. De la Peza, ¶ 71.

²⁹⁵ *Ibid.*, ¶ 70.

- As a legal instrument, the Commodatum Jacquet lacks the legal requirements to be enforceable before the RAN and third parties; and
- With respect to transferred rights, the rights of use and enjoyment of land agreed upon in the Jacquet Commodatum lacks the legal requirements and formalities to be enforceable before the Ejido.²⁹⁶

307. Alternatively, Mr. Jacquet was required to comply with the Mexican law requirements regarding restricted zones.

(3) The existence of Hotel Behla Tulum and Tienda La Tente Rose and Jacquet's "property interest" in these investments has not been proven

308. Mr. Jacquet claims to have "*property interest*" in the Behla Tulum Hotel,²⁹⁷ located on the beachfront, which were recognized by the municipality of Tulum through "operating permits, and land use licenses".²⁹⁸

309. Despite these claims, there is no evidence to support the existence of these allegations: i.e., (i) Jacquet's "*property interest*" in Hotel Behla Tulum; (ii) the operating and land use permits; and (iii) the alleged recognition by the municipality of Tulum of Mr. Jacquet's "*property interest*" in Hotel Behla Tulum. Respondent notes that even if Claimants produce such documents, they do not generate or recognize the rights to land claimed by Claimants.

310. In addition, since Claimants have not submitted a legal reliable document establishing the existence of the Hotel Behla Tulum, that is, the Respondent is not certain that this hotel: (i) actually existed; and if it did (ii) that the hotel operated under the Mexican legal framework governing the legal operation of hotels.

311. In order to prove *prima facie* that Mr. Jacquet had a "*property interest*" in the Behla Tulum Hotel, the Claimants had to present, at the very least, evidence of these documents and of the alleged rights recognized therein by the municipality of Tulum. They must also prove *prima facie* the legal existence of the Hotel Behla Tulum and Mr. Jacquet's rights to that hotel and, as noted above, alternatively, Jacquet must prove that he complied with applicable Mexican law with

²⁹⁶ Expert Report by Mr. De la Peza, Table XVII: Documentary deficiencies related to Lot 10A-Behla Tulum.

²⁹⁷ NOA#2, ¶ 32.

²⁹⁸ *Ibid.*, ¶ 32.

respect to the restricted area in order for the acquisition of the Hotel Behla Tulum to be considered legal.

312. Clearly neither Abodes nor Jacquet complied with Mexican law regarding the rights they purport to hold in this arbitration in relation to the Behla Tulum Investments owing to their failure to comply with the Agrarian Law and, alternatively, the regulatory framework for the acquisition of real estate in the restricted zone.

b. It has not been proven that the Behla Tulum Investments were in accordance with the Respondent's laws at all relevant times

313. With respect to Jacquet's rights over Abodes and Lote AMSA, as explained by Mr. De la Peza the AMSA Promise is *prima facie* evidence that Mr. Jacquet's investment in Abodes, Hotel Behla Tulum and La Tente Rose was illegally acquired in violation of Mexican law governing ejido lands and ocean front property and in contravention of Article 2.1 of the Mexico-France BIT. According to Mr. De la Peza the AMSA Promise “does not meet a single one of the requirements established by the Agrarian Law for its validity”²⁹⁹ thereby “is a document by which no rights over Lot AMSA-Behla Tulum were transferred”.³⁰⁰ Alternatively, Abodes also failed to comply with the SRE's applicable requirements regarding the restricted zone in order for the acquisition of the AMSA Lot to be considered legal.

314. Regarding Mr. Jacquet's rights to Lot 10A, as explained by Mr. De la Peza the Commodatum Jacquet is *prima facie* evidence that Mr. Jacquet's investment in Lot 10A, Hotel Behla Tulum and La Tente Rose was illegally acquired in violation of Mexican law governing ejido lands and ocean front property and in contravention of Article 2.1 of Mexico-France BIT. According to Mr. De la Peza, the Commodatum Jacquet “does not meet the requirements established by the Agrarian Law for its validity”³⁰¹ because:

- As a foreigner, Jacquet did not have and does not have the legitimacy to have the status of *ejidatario* or *avecindado* of the Ejido that is necessary to acquire parcel rights;

²⁹⁹ Expert Report by Mr. De la Peza, ¶ 66.

³⁰⁰ *Ibid.*, ¶ 67.

³⁰¹ *Ibid.*, ¶ 71.

- As a legal instrument, the Jacquet Commodatum lacks the legal requirements to be enforceable before the RAN and third parties; and
- With respect to transferred rights, the rights of use and enjoyment of land agreed upon in the Jacquet Commodatum lacks the legal requirements and formalities to be enforceable before the Ejido.³⁰²

315. Clearly neither Abodes nor Jacquet complied with Mexican law regarding the rights they purport to hold in this arbitration in relation to the Behla Tulum Investments because they failed to comply with the Agrarian Law and, alternatively, the regulatory framework for the acquisition of real property in the Restricted Zone.

E. Jurisdictional objections under the Mexico-Portugal BIT

316. The Tribunal lacks jurisdiction over the claims under the Mexico-Portugal BIT. The objections in this section are based on the facts currently available to the Respondent and are without prejudice to introducing additional objections and arguments as new facts are presented in the course of this proceeding.

1. Relevant dates

317. The relevant dates on which Silva and Abreu must prove nationality, that they were “investors” in qualified “investments” under the Mexico-Portugal BIT, and that their investments were legal under the Respondent’s laws are:

Dates on which the investments were made*	22 October 2003 28 June 2003 28 November 2003 2006 2008
Date of the alleged breaches*	17 June 2016
Date on which the notice of arbitration was submitted	14 June 2019

* The NOA#2 does not identify the specific investments and dates of those investments nor does it identify the specific alleged measures that breach the treaty and the times of those breaches. The dates presented in this table are best estimates available that must be clarified by the Claimants and revised by the Tribunal during the course of this procedure.

³⁰² *Ibid.*, Table XVIII: Legal deficiencies related to Lot 10A-Behla Tulum.

2. Not proven that Silva and Abreu were qualified “investors” in accordance with Mexico-Portugal BIT

a. It has not been proven that Silva and Abreu were nationals of Portugal at all relevant times

318. The NOA#2, dated 14 June 2019, states that Silva and Abreu were citizens of Portugal and are “currently domiciled” at addresses in Portugal.³⁰³ In NOA#2 Exhibit C-0008 was adduced as evidence to establish Silva's Portuguese nationality, the exhibit contains a copy of Silva's Portuguese passport, which was issued on 23 August 2012 and is valid until 28 August 2017. Also, in NOA#2 Exhibit C-0007 was adduced as evidence to establish Abreu's Portuguese nationality, the exhibit contains a copy of Abreu's Portuguese passport, which was issued on 27 October 2011 and is valid until 27 October 2016.

319. These passports do not cover the relevant dates of the Astrolodge Investments. Thus, with respect to Silva and Abreu, the Claimants *prima facie* have not met the burden of proof with respect to their nationality at all relevant times.

b. It has not been proven that Silva’s and Abreu’s dominant and effective nationality was Portuguese at all relevant times

320. As explained above, in order for dual nationals such as Silva and Abreu to invoke the dispute settlement mechanism in the Mexico-Portugal BIT, it must be proven that their dominant and effective nationality at all relevant times was Portugal and not Mexico. Clearly, this is not the case.

321. As the Claimants note in Exhibit C-0006 of NOA#2, on 25 June 2003, Abreu declared herself a Mexican national by naturalization.³⁰⁴ Abreu became a naturalized Mexican national on 2 October 2000,³⁰⁵ and exercised her Mexican nationality to obtain a Mexican passport covering the periods from 31 October 2000 to 31 October 2010 and from 8 December 2010 to 8 December

³⁰³ NOA #2, ¶¶ 8-9.

³⁰⁴ *Ibid.*, C-0006 (p.19).

³⁰⁵ **R-023**, Mexican Naturalization Letter of Abreu.

2020.³⁰⁶ Abreu also obtained a Mexican voting card from the *Instituto Nacional Electoral* (National Electoral Institute) (formerly the *Instituto Federal Electoral*).³⁰⁷

322. The naturalization records from the SRE of Mexico show that Silva became a naturalized Mexican national on 08 April 2016.³⁰⁸ Silva renounced his Portuguese nationality, and to the rights contained in treaties and conventions granted to foreigners on 06 May 2016.³⁰⁹ Silva exercised his Mexican nationality to obtain Mexican passports covering the period 16 December 2016 to 16 December 2022.³¹⁰

3. It has not been proven that Silva and Abreu had qualified “investments” in the territory of the Respondent in accordance with the Mexico- Portugal BIT

a. It has not been proven that Silva and Abreu were investors in the Astrolodge Investments at all relevant times

323. In respect of Abreu, the Claimants adduce Exhibit C-0020 (Transfer of Rights Agreement, 22 October 2003) and Exhibit C-0021 (Transfer of Rights Agreement, 28 November 2003) to show her rights over two adjacent beach-front parcels.³¹¹ Claimants also adduce Exhibit C-0006, “OMDC Formation” to evidence the incorporation of O.M. del Caribe, S.A. de C.V. (OMDC), on 25 June 2003.³¹² Silva held the 85% of a series of shares and Abreu 15% of a series of shares.³¹³ Thus, the rights to the Astrolodge Investments were divided between Abreu and OMDC.³¹⁴ No

³⁰⁶ **R-039**, Approval of Application for Mexican Passport of Abreu.

³⁰⁷ **R-040**, IFE Voter Card of Abreu.

³⁰⁸ **R-024**, Mexican Naturalization Letter of Silva.

³⁰⁹ **R-037**, Letter of Renunciation to the Portuguese Nationality from Silva.

³¹⁰ **R-038**, Approval of Silva's Mexican Passport.

³¹¹ NOA#2, ¶33.

³¹² *Ibid.*, ¶34.

³¹³ *Ibid.*, C-0006 (p.16).

³¹⁴ NOA#2 notes that OMDC operated the Hotel Uno Astrolodge and that Ms. Abreu owned the rights to the parcel where the Hotel Uno Astrolodge is located, ¶ 8.

proof of ownership of the hotel has been adduced, which is different from any rights to the parcel of land.³¹⁵

324. The relevant dates on which Abreu and Silva must prove that their investment qualified as such with respect to Lots 8A are:³¹⁶

Investments regarding Lot 8A		
	Lot 8	Lot 8A
Dates on which the investments were made	22 October 2003	28 November 2003
Dates of the alleged breaches	17 June 2016	17 June 2016
Dates on which the notice of arbitration was submitted	14 June 2019	14 June 2019

325. The relevant dates in which Abreu and Silva should prove that their investment qualified as such with respect to Hotel Uno Astrolodge are:

Investments regarding Hotel Uno Astrolodge	
Date on which the investments were made	28 November 2003
Date of the alleged breaches	17 June 2016
Date on which the notice of arbitration was submitted	14 June 2019

326. In addition, the Claimants have indicated that Uno Astrolodge was developed through OMDC, and that both Ms. Abreu and Mr. Silva are shareholders therein. Therefore, they also had to prove that OMDC qualified as such on the relevant dates in order to prove that they had an “investment” according to the provisions of the Mexico-Portugal BIT, those dates are:³¹⁷

³¹⁵ Regarding the Hotel, Exhibit C-0022 to NOA#2 was adduced, which consists of an electronic article about the Uno Astrolodge Hotel. This does not constitute evidence of ownership of the Hotel.

³¹⁶ NOA#2 does not specifically identify the alleged treaty violations. The dates presented in the table are therefore best estimates available, which will need to be clarified by Claimants and revised by the Tribunal as this proceeding progresses.

³¹⁷ NOA#2 does not specifically identify the alleged treaty violations. The dates presented in the table are therefore best estimates available, which will need to be clarified by Claimants and revised by the Tribunal as this proceeding progresses.

Investments regarding Hotel Uno Astrolodge	
Date on which the investments were made	28 November 2003
Date of the alleged breaches	17 June 2016
Date on which the notice of arbitration was submitted	14 June 2019

(1) Abreu's rights to Lots 8A have not been proven

327. In NOA #2, the Claimants assert that Abreu, a Portuguese national, acquired all the ejido rights to Lots 8 and 8A (collectively, Lots 8A) by entering into two agreements for the transfer of rights (“*contratos de cesión de derechos*”).³¹⁸ The first was concluded with Mr. Cástulo Jiménez Figueroa on 22 October 2003,³¹⁹ and the second with Ms. Karla Lorena Gutierrez Rodriguez³²⁰ on 28 November 2003 (Abreu Transfers).³²¹

328. In these lots and once Abreu became a shareholder of OMDC, a company incorporated under Mexican law, the construction and start of operations of Uno Astrolodge was carried out.³²² Despite these arguments, the Claimants have not proven these facts to be true.

329. As Mr. De la Peza indicates, both Transfer Agreements concluded by Abreu are insufficient to prove that she is the holder of ejido rights (“*derechos ejidales*”) regarding Lots 8A, since they do not comply with the legal requirements established in the Agrarian Law³²³ because:

- They lack the basic formalities required by law to be enforceable between the parties, against third parties, the Ejido and before the RAN.³²⁴

³¹⁸ NOA#2, ¶ 33

³¹⁹ *Ibid.*, C-0020.

³²⁰ Ms. Gutiérrez was represented by Mr. Silva in the execution of this Agreement.

³²¹ NOA#2, C-0021.

³²² *Ibid.*, ¶ 34

³²³ Expert Report by Mr. De la Peza, ¶¶ 76 and-81

³²⁴ *Ibid.*, Table XX: Documentary deficiencies of Transfer Abreu 8 and Table XXII: Documents exhibited by Mrs. Abreu regarding Lot 8A-Uno Astrolodge

- It lacks the basic official documentation and information established by law to determine the location of the lot that is the object of the contracts, to support the type of ejido land involved, and with it the types of ejido rights that can be transferred and acquired by Abreu.³²⁵

330. Equally, Mr. De la Peza concludes that: “even assuming that Lot 8-Uno Astrolodge is within the lands owned by the Ejido, and (ii) Mr. Cástulo Jiménez Figueroa had rights over it”³²⁶ and “that (i) Lot 8A-Uno Astrolodge³²⁷ is within the lands owned by the Ejido, and (ii) Mrs. Karla Lorena Gutiérrez Rodríguez had rights over it”³²⁸, these documents remain invalid and insufficient to prove that Ms. Abreu has acquired parcel or ejido rights (“*derechos parcelarios o ejidales*”) to Lots 8A, as the acts contained therein contravene the Agrarian Law³²⁹, given that:

- As legal instruments, Mrs. Abreu's transfers lack the legal requirements to be enforceable before the RAN and third parties.
- There is no indication that Mr. Jimenez received the rights to Lots 8A from the Assembly (“*Asamblea*”) or that he has been granted full ownership of the lot with a favourable title issued by the RAN.
- As a subject, Mrs. Abreu was not and cannot be an *ejidataria* or *avecindada* of the Ejido because she lacks the capacity and legitimacy to acquire parcel rights.
- As this is common land (“*tierra de uso común*”), the transfer of this ejidal land was not approved by the Assembly (“*Asamblea*”) or signed by the Ejidal Commissary (“*Comisariado Ejidal del Ejido*”), nor is it established that its duration will be 30 years.

331. Alternatively, Ms. Abreu does not prove the alleged rights to Lot 8A, located in front of the Federal Maritime Zone, in accordance with the regulations applicable to the restricted zone.

³²⁵ *Ibid.*, Table XXI: Legal Deficiencies over Lot 8-Uno Astrolodge and Table XXIII: Documentary deficiencies over Lot 8A-Uno Astrolodge.

³²⁶ *Ibid.*, ¶76.

³²⁷ Property called “Lote ejidal 8” that Mr. Abreu and Mr. Oliveira state is located on Ejido lands, municipality of Tulum, Quintana Roo, located at kilometre 8 of the Bocapaila - Tulum road, with a surface area of 2,500 square metres, and the following boundaries: (a) to the north, with the property of Mrs. Gutierrez, (b) to the south, with the property of Mrs. Gutierrez, (c) to the east with the Federal Maritime Terrestrial Zone of the Caribbean Sea, and (d) to the west with the Bocapaila - Tulum Federal Highway. (NOA#2, C-0021).

³²⁸ Expert Report by Mr. De la Peza, ¶81.

³²⁹ *Ibid.*, Table XXI: Legal Deficiencies over Lote 8-Uno Astrolodge and Table XXIII: Documentary deficiencies over Lot 8A-Uno Astrolodge.

(2) The existence of Hotel Uno Astrolodge and OMDC's rights over this hotel has not been proven

332. Ms. Abreu indicated that the Hotel Uno Astrolodge operated in Lots 8A. The Claimants indicated that Uno Astrolodge was operated by OMDC, a Mexican corporation that had an ownership interest in the hotel, which was recognized by the municipality of Tulum through the granting of operating licenses and land use licenses during the course of its operations.³³⁰

333. Despite these assertions, Claimants have not provided any evidence to support these facts (i.e., (i) that Uno Astrolodge was operated by OMDC; (ii) that Abreu has an ownership interest in Uno Astrolodge; and (iii) the alleged recognition by the municipality of Tulum of these ownership interests through operating and land use licences. Nevertheless, Respondent states that even if such documents are produced, they do not create or recognize rights to the ejido lands that Claimants purport to hold.

334. Similarly, the Claimants have not submitted any legal document that reliably attests to the existence of Uno Astrolodge, thus there is no certainty that: i) Uno Astrolodge existed; and if it did, ii) Uno Astrolodge operated in Lot 8A; and iii) Uno Astrolodge operated in accordance with the Mexican legal framework applicable to the operation of hotels.

335. The Claimants also contend that it is on Ms. Abreu's alleged property, Lot 8A, that Uno Astrolodge operated, however, as mentioned above, it has not been proven that the hotel Uno Astrolodge is located on that lot, so that it is not possible to prove that: i) Uno Astrolodge existed, and if so ii) that Abreu indeed has any connection with the hotel.

336. However, the Claimants have not provided any legal document that OMDC operated Uno Astrolodge, and therefore have not proven that Ms. Abreu has any rights in the hotel.

337. Alternatively, with respect to compliance with the law applicable to the Restricted Zone, Ms. Abreu did not demonstrate to have complied with the regulation applicable to the Restricted Zone allowing her to use and exploit real property located in the Restricted Zone.

³³⁰ NOA#2, ¶ 34 and 36

(3) Silva's rights to Uno Astrolodge and Lots 8A have not been proven

338. The Claimants note that Mr. Silva is a shareholder of OMDC, a Mexican company which operates the Uno Astrolodge hotel, allegedly located in Lots 8A.³³¹

339. However, as stated in Mr. De la Peza's report, "Claimants did not provide any document in which they could prove that OMDC and Mr. Silva acquired or are holders of parcel or ejidal rights over Lot 8-Uno Astrolodge and Lot 8A-Uno Astrolodge".³³²

340. The reason for this is that, at the same time, the Claimants pretend to prove that it is Ms. Abreu who has rights over ejido lands, thus, even assuming that Ms. Abreu has such rights, this would be through the celebration of an act in her own right, becoming more than obvious that as Ms. Abreu does not have the same legal personality as Mr. Silva, this does not constitute any right in favour of Silva.

341. Therefore, Silva has not proven to have a right to any ejido land or any property located in the restricted zone.

(4) OMDC's rights to Uno Astrolodge have not been proven

342. The Claimants contend that OMDC is a Mexican corporation that allegedly operated the Uno Astrolodge hotel located on Lots 8A, allegedly owned by Ms. Abreu.

343. Claimants contend that OMDC was the operator of Uno Astrolodge. Furthermore, Claimants submit that it is on Ms. Abreu's alleged property, Lot 8, that Uno Astrolodge operated, but, as mentioned above, it has not been proven that the hotel Uno Astrolodge is located on that lot, so that it is not possible to prove that: i) Uno Astrolodge existed, and if so ii) that OMDC was indeed in charge of the operations of that hotel.

344. However, the Claimants have not provided any legal documents to prove that OMDC operated Uno Astrolodge, and therefore have not proven that they have any rights in it.

345. Even assuming that OMDC had rights over any ejido land, that company would have had to comply with the legal requirements to be the subject of ejido rights over common use or fully

³³¹ *Ibid.*, ¶ 34.

³³² Expert Report by Mr. De la Peza, ¶83.

owned land (“*tierras de uso común o tierras con dominio pleno*”). Alternatively, it would be necessary to have complied with the regulations applicable to the restricted zone in order to have the right to use and enjoy a property located in the restricted zone.

346. In conclusion, the Claimants have not provided any evidence to prove that Ms. Abreu, Mr. Silva and OMDC have acquired or hold any ejido rights over any of the lots, in Lots 8A or, alternatively, that they have acquired or hold rights over real property located in the restricted zone, both in accordance with Respondent's applicable legislation. They have therefore failed to prove that they have an investment in accordance with Article 1.1(a) of the Mexico-Portugal BIT.

b. It has not been proven that the Astrolodge Investments were in accordance with the Respondent's laws at all relevant times

347. Article 2(1) and 2(2) of the Mexico-Portugal BIT contain the legality requirement for investments:

Promotion and Protection of Investments

1. Each Contracting Party shall promote and encourage, as far as possible, within its territory investments made by investors of the other Contracting Party and shall admit such investments into its territory in accordance with its laws and regulations. It shall in any case accord such investments fair and equitable treatment.

2. Investments made by investors of one Contracting Party in the territory of the other Contracting Party in accordance with its laws and regulations shall enjoy full protection and security in the territory of the latter. (...)

[emphasis added]

348. As stated in the NOA#2 and in the two Transfer of Rights Agreements (C-0020 and C-0021), the two parcels where Hotel Astrolodge was located are beachfront property located in the Ejido Jose Maria Pino Suarez in the Municipality of Solidaridad of the state of Quintana Roo.³³³ These parcels are governed in accordance with the specialized legal regimes governing ejido lands and ocean-front property in Mexico.

(1) Abreu and Lots 8A

³³³ NOA #2, ¶ 33-35, C-0020 (p. 1) and C-0021(p. 1).

349. Regarding Abreu's rights over Lots 8 and 8A (jointly, Lots 8A),³³⁴ as Mr. De la Peza states, both Transfer Agreements concluded by Abreu do not comply with the legal requirements established in the Agrarian Law because the acts contained therein contravene the Agrarian Law³³⁵, because:

- As legal instruments, Ms. Abreu's transfers lack the legal requirements to be enforceable before the RAN and third parties.
- There is no evidence that Mr. Jimenez has been assigned with the rights to Lots 8A by the Assembly [*"Asamblea"*] or that he has been authorized full ownership (*"dominio pleno"*) or that he has been authorized full ownership with a favourable title issued by the RAN.
- As a subject, Ms. Abreu was not, and cannot be, an *ejidataria* or *avecindada* of the Ejido because she lacks the legal capacity and legitimacy to acquire parcel rights.
- As land for common use (*"tierra de uso común"*), the transfer of this ejidal land was not approved by the Assembly (*"Asamblea"*) or signed by the Ejidal Commissary of the Ejido (*"Comisariado Ejidal del Ejido"*), nor does it establish that its duration will be 30 years.³³⁶ Notwithstanding the fact of having celebrated this act as a Mexican, *per se* does not mean that the requirements of legality established in the Agrarian Law have been fulfilled, since it would still lack the basic documentation and legitimacy to acquire ejido lands.

350. Alternatively, with respect to Abreu's rights over Lots 8 and 8A (jointly, Lots 8A) in relation to compliance with the law of the Restricted Zone, these have not been established in accordance with the regulations applicable to the Restricted Zone, located in front of the Federal Maritime Zone.

(2) Silva, Uno Astrolodge and Lots 8A

351. With respect to Silva's alleged rights in relation to Uno Astrolodge and Lots 8A, Silva has not proven to have any rights to any ejido land or any real property located in the restricted zone. Even if Silva had any rights over ejido land, the same conclusions as Abreu regarding the applicability of requirements and necessary formalities applies, since it must comply with all the requirements established by the Agrarian Law and, alternatively, in relation to the restricted zone, in order for the investment to be considered as legal.

³³⁴ *Ibid.*, ¶ 33

³³⁵ Expert Report by Mr. De la Peza, Table XXI: Legal Deficiencies over Lot 8-Uno Astrolodge and Table XXIII: Documentary deficiencies over Lot 8A-Uno Astrolodge.

³³⁶ *Ibid.*, Table II: Ejidal lands according to their legal purpose.

4. It has not been proven that Silva and Abreu have complied with other requirements to submit this dispute to arbitration

a. It has not been proven that Silva and Abreu were not excluded from invoking the ISDS mechanism by reason of their renunciation of their rights upon Mexican naturalization

352. Under Mexican law, in order for a person to acquire Mexican nationality through the naturalization process, that person must renounce to their nationality, as well as any foreign protection and any rights that international treaties or conventions grant to foreigners.

353. Article 19 of the Nationality Law states as follows:

Article 19.- The foreigner who intends to become a naturalised Mexican shall: (...)

I. Submit an application to the Ministry in which he/she expresses his/her intent to acquire Mexican nationality;

II. Formulate the renunciations and oaths referred to in Article 17 of this law; (...) ³³⁷
[Emphasis added]

[*unofficial translation*]

354. In accordance with Article 17 of the Nationality Law, the renunciations and oaths that must be presented by the foreigner who intends to naturalize are as follows:

Article 17.-(...) To this end, they shall expressly renounce the nationality attributed to them, all submission, obedience and loyalty to any foreign State, especially of that which attributes the other nationality to them, all protection outside Mexican laws and authorities, and all rights granted to foreigners by international treaties or conventions. Likewise, they shall protest adherence, obedience and submission to Mexican laws and authorities and shall refrain from any conduct that implies submission to a foreign State. ³³⁸ [Emphasis added]

[*unofficial translation*]

355. The renunciations referred to in Articles 17 and 19 of the Law on Nationality are only granted once the Government of Mexico has favourably approved the naturalization process

³³⁷ **R-027**, Nationality Law, Article 19.

³³⁸ **R-027**, Nationality Law, Article 17.

initiated by the interested party, therefore the application for naturalization itself does not imply a renunciation.³³⁹

356. Abreu received a letter of Mexican naturalization on 2 October 2000,³⁴⁰ which implies having successfully initiated and concluded the naturalization process, and with it, having presented the renunciation required by Article 19 of the Nationality Law. In fact, on 2 October 2000, Abreu signed a document in which she “expressly renounced the PORTUGUESE nationality and any other nationality” and “renounced any rights granted to foreigners by treaties or international conventions” [*unofficial translation*].³⁴¹

357. Silva received a letter of Mexican naturalization on April 8, 2016,³⁴² which implies having successfully initiated and concluded the naturalization process, and with it, having presented the renunciation required by Article 19 of the Nationality Law. In fact, on 6 May 2016 Silva signed a document in which he, “expressly renounced the PORTUGUESE nationality and any other nationality” and “renounced any rights granted to foreigners by treaties or international conventions”.³⁴³

358. Therefore, Abreu and Silva have expressly renounced “any rights granted to foreigners by treaties or international conventions”. This includes the right to invoke the Investor-State dispute settlement mechanism under the Mexico-Portugal BIT.

359. Since, through the process of naturalization, both Abreu and the Respondent, as well as Silva and the Respondent, agreed to this clear renunciation, such renunciation is effective, and this Tribunal must decline jurisdiction in respect of both Abreu and Silva.³⁴⁴

³³⁹ *Ibid.*, **R-027**, Nationality Law, Article 19. “Article 19.- The foreigner who intends to become a naturalised Mexican shall: (...) II. Formulate the renunciations and oaths referred to in Article 17 of this law; the Ministry may not require such renunciations and oaths to be formulated until the decision to grant nationality to the applicant has been taken. The letter of naturalisation shall be granted once it has been verified that these have been verified.

³⁴⁰ **R-023**, Mexican Naturalization Letter of Abreu.

³⁴¹ **R-041**, Letter of Renunciation of Portuguese Nationality of Abreu.

³⁴² **R-024**, Mexican Naturalization Letter of Silva.

³⁴³ **R-037**, Letter of Renunciation to the Portuguese Nationality from Silva.

³⁴⁴ **RL-100**, *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), ¶¶118-119.

VI. ORDER REQUESTED

360. For the foregoing reasons, the Respondent respectfully requests that this Tribunal to:

1. Decline jurisdiction over the claims in their entirety:
 - a. On the basis that the investment treaties from which this Tribunal derives its jurisdiction do not allow for self-consolidation in these circumstances and the Respondent did not otherwise consent to it; or
 - b. In the alternative, if this Tribunal determines that it can proceed to hear this self-consolidated arbitration, it should still decline jurisdiction over the claims in their entirety because the legal requirements under the four invoked treaties apply cumulatively and one or more of those requirements have not been fulfilled.
2. If the Tribunal does not decline jurisdiction over the claims in their entirety, the Respondent respectfully requests that the Tribunal decline jurisdiction over those claims for which the jurisdictional requirements for arbitration are not fulfilled. In this regard, the Respondent requests that the Tribunal find that the Claimants:

Mexico-Argentina BIT

- a. Have not proven that Sastre was a qualified “investor” at all relevant times, specifically, that he was a national of Argentina and that his dominant and effective nationality was not Mexican;
- b. Have not proven that Sastre was an investor in qualified “investments” at all relevant times, specifically: (i) that he was a *bona fide* investor in the Hamaca Loca Investments, that the transfer of rights related to those investments was not an abuse of process, and that the investments were made in accordance with the Respondent’s laws; and (ii) that he was an investor in the Tierras del Sol Investments and that the investments were made in accordance with the Respondent’s laws;
- c. Have not proven that Sastre was not domiciled in Mexico when the alleged violations occurred, as required under Article 2(3) of the BIT;
- d. Have not proven that Sastre filed his claims within the four-year limitation period prescribed in Annex Article 1(2) of the BIT;

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- e. Have not proven that Sastre notified the Respondent in writing of his intention to submit to arbitration the claims related to the Hamaca Loca Investments as required by Article 10(4) of the BIT; and
- f. Have not proven that, in the course of naturalization into a Mexican national, Sastre did not expressly waive his rights to the Investor-State dispute settlement procedure under the BIT.

NAFTA

- g. Have not proven that Galán and Alexander were qualified “investors” at all relevant times, specifically, that they were nationals of Canada and that their dominant and effective nationalities were not Mexican;
- h. Have not proven that Galán and Alexander were investors in qualified “investments” at all relevant times, specifically that they were investors in the Parayso Investments and the investments were made in accordance with the Respondent’s laws; and
- i. Have not proven that Galán and Alexander submitted adequate written notice of their intention to submit a claim to arbitration at least 90 days before the claim is filed as required by Articles 1122(1) and 1119 of the NAFTA.

Mexico-France BIT

- j. Have not proven that Jacquet was a qualified “investor” at all relevant times in accordance to Mexico-France BIT, specifically, that he was a national of France; and
- k. Have not proven that Jacquet was an investor in qualified “investments” at all relevant times in accordance to the BIT, specifically, that he was an investor in the Behla Tulum, and that the investments were made in accordance with the Respondent’s laws.

Mexico-Portugal BIT

- l. Have not proven that Silva and Abreu were qualified “investors” at all relevant times, specifically, that they were nationals of Portugal and that their dominant and effective nationalities were not Mexican;
- m. Have not proven that Silva and Abreu were investors in qualified “investments” at all relevant times, specifically, that they were investors in the Astrolodge Investments and that the investments were made in accordance with the Respondent’s laws; and

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- n. Have not proven that, in the course of naturalization into Mexican nationals, Silva and Abreu did not expressly waive their rights to the investor-state dispute settlement procedure under the BIT.
3. Order that the Claimants bear the costs of this phase of the proceedings and compensate Respondent for fees, legal costs and Mexico's share of Tribunal and ICSID expenses.

Respectfully submitted on behalf of the Respondent,

Orlando Pérez Gárate

Director General de Consultoría Jurídica de Comercio Internacional

Secretaría de Economía