

COURTESY TRANSLATION



**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

REPLY ON JURISDICTIONAL OBJECTIONS

FOR THE UNITED MEXICAN STATES:

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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	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	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	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	Agreement for the transfer of rights dated 1 March 2001, between Mr. 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
Hotel Amelie Tulum	Hotel that continued in operation on the Hotel Parayso by Mrs. Galán corresponding to its proportional part derived from the separation agreement between Mrs. Galán and Mr. Alexander.
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

	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..

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.

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).
PGR	Procuraduría General de la República
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.
ECT	Energy Charter Treaty
NAFTA	North American Free Trade Agreement.

Uno Astrolodge	Hotel Uno Astrolodge.
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I. INTRODUCTION

1. This submission replies to the arguments made by the Claimants in their Counter-Memorial. The Claimants' case has multiple legal and factual flaws that deny this Tribunal jurisdiction *ratione voluntatis*, *ratione temporis*, *ratione personae*, and *ratione materiae*. All of the claims must therefore be dismissed.

2. The Respondent maintains the positions stated in its Memorial. The following summarizes the principal elements of this Reply.

Self-Consolidation

3. Whether self-consolidation is permissible goes to the respondent State's consent to arbitration, which is *per se* a jurisdictional matter. It is governed by the texts of the four invoked treaties. Three of the four invoked treaties have specific provisions that address the fusion of two or more arbitrations into a single arbitration and establish that the States party to the treaties limited their agreement on fusion to consolidation *ex post* the establishment of the tribunals. Other forms of fusion, including the self-consolidation in this arbitration, were not agreed nor consented to and are outside the jurisdiction of this Tribunal. This treaty text distinguishes this arbitration from all previous arbitrations in which self-consolidation was challenged and permitted. Accordingly, the self-consolidation undertaken by the Claimants in this arbitration is not permitted. In their Counter-Memorial, the Claimants completely ignore these treaty provisions and their defining role in the Respondent's consent.

4. If this Tribunal decides that it is not bound by the texts of the invoked treaties, the facts of this arbitration do not support self-consolidation, even under the tribunal jurisprudence cited by the Claimants. The recent decision in *Kruck v. Spain* confirms that the permissibility of self-consolidation is a matter of consent of the respondent State. The Tribunal reasoned that if it had jurisdiction over each of the individual claims, the parties could agree to have all of the claims determined together; however, the pivotal question was whether both parties had in fact agreed and consented to that procedure. The point is not whether it is feasible for the tribunal to hear and decide all the claims together. It is whether all of the claims can properly be regarded as "a single dispute" that the State parties to the treaties have consented to be heard and decided in a single proceeding. The facts establish that there is not a single dispute before this Tribunal but, rather, either two or four distinct disputes, depending on which criteria the Tribunal uses to identify the

disputes. Accordingly, even under the arguments of the Claimants, self-consolidation is not permitted, and the Tribunal does not have jurisdiction over this arbitration.

5. In the further alternative, if the Tribunal finds in principle that it has jurisdiction to hear this self-consolidated arbitration, it still does not have jurisdiction because all of the legal requirements for arbitration specified in each of the invoked treaties apply cumulatively and multiple requirements have not been met. The cumulative application of the requirements is a reflection of the deliberate choice of the Claimants to self-consolidate this arbitration in NOA#2, including the manner in which NOA#2 is drafted wherein it is impossible to divide the elements in the NOA between the various disputes. This is exemplified in a single claim for damages “in excess of US \$80 million” for all Claimants together. Since multiple requirements have not been met, 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

6. In their Counter-Memorial, the Claimants have not rebutted the Respondent’s treaty-specific objections.

Sastre (Mexico-Argentina BIT)

- The claimed Tierras del Sol Investments were not covered nor protected by the BIT because: (i) Sastre has not proven ownership of the investments; and (ii) the investments were not in accordance with the Respondent’s laws.
- Sastre could not invoke the dispute settlement procedure in respect of the Tierras del Sol Investments because: (i) his dominant nationality was Mexican at the time of the alleged treaty breaches; (ii) he was domiciled in Mexico at the time of the alleged treaty breaches; (iii) he voluntarily and in writing renounced his rights to protections under the BIT when he became a naturalized citizen of Mexico; and (iv) with the exception of his denial of justice claim regarding the Amparo Court proceeding, the four-year limitation period for bringing claims had expired.
- The claimed Hamaca Loca Investments were not covered nor protected by the BIT because: (i) Sastre was not a *bona fide* investor; (ii) Sastre has not proven ownership of the investments; and (ii) the investments were not in accordance with the Respondent’s laws.
- Sastre could not invoke the dispute settlement procedure in respect of the Hamaca Loca Investments because: (i) Sastre did not file the mandatory notice of intent to arbitration under the BIT; (ii) Sastre acquired the rights to the investments solely to bring this claim which is an abuse of process; (iii) his dominant nationality was Mexican at the time of the alleged treaty breaches; (iv) he was domiciled in Mexico at the time of the alleged treaty breaches; (v) he voluntarily and in writing

renounced his rights to protections under the BIT when he became a naturalized citizen of Mexico; and (vi) with the exception of his denial of justice claim regarding the Amparo Court proceeding, the four-year limitation period for bringing claims had expired.

Galán and Alexander (NAFTA)

- The claimed Parayso Investments were not covered nor protected by the NAFTA because: (i) Galán and Alexander have not proven ownership of the investments; and (ii) the investments were not in accordance with the Respondent's laws.
- Galán and Alexander could not invoke the dispute settlement procedure because: (i) they did not file a complaint mandatory notice of intent to arbitration under the NAFTA; and (ii) their dominant nationalities were Mexican at the time of the investments, the alleged treaty breaches and the submission to arbitration.

Jacquet (Mexico-France BIT)

- The claimed Behla Tulum Investments were not covered nor protected by the BIT because: (i) Jacquet has not proven ownership of the investments; and (ii) the investments were not in accordance with the Respondent's laws.

Silva and Abreu (Mexico-Portugal BIT)

- The claimed Astrolodge Investments were not covered nor protected by the NAFTA because: (i) Silva and Abreu have not proven ownership of the investments; and (ii) the investments were not in accordance with the Respondent's laws.
- Silva and Abreu could not invoke the dispute settlement procedure in respect of the Astrolodge Investments because: (i) their dominant nationality was Mexican at the time of the alleged treaty breaches; and (ii) they voluntarily and in writing renounced their rights to protections under the BIT when they became naturalized citizens of Mexico.

II. BURDEN OF PROOF

7. Although the Respondent has raised specific jurisdictional objections, it is not its burden to contest the jurisdiction of this Tribunal.¹ It is up to the Claimants to meet the burden of proving all the essential facts necessary to establish the jurisdiction of their claims.² These jurisdictional facts are not subject to any "*prima facie*" evidence; and, in any event, that evidence would be

¹ Memorial on Jurisdiction, ¶ 25 and footnote 11.

² Memorial on Jurisdiction, ¶ 25 and footnote 11. See also **RL-193**, *Sergei Viktorovich Pugachev v. Russia*, Award on Jurisdiction, UNCITRAL, 18 June 2020, ¶ 248 ("it is an accepted principle of international law that the claimant in an arbitration bears the legal burden of showing that the tribunal has jurisdiction to consider its claim. This principle has been affirmed by a number of investment tribunals, including *Bayindir v Pakistan*, *Tulip v Turkey*, *National Gas v Egypt*, and *Emmis v Hungary*.")

inapplicable at this stage of the arbitration proceeding in which the Claimant and the Respondent have sufficient opportunity to provide evidence in support of their cases on the bifurcated jurisdictional issues and for the Tribunal to make final decisions on all relevant facts in dispute.³

8. The Claimants' objections are based on the application of the Higgins test.⁴ This test has no application in this bifurcated procedure. Since the Tribunal is making a final conclusion on the jurisdictional objections, the “burden of proof lies fairly and squarely” on the Claimants and must be “discharge[d] according to the normal standard of proof, namely on balance of probabilities”.⁵ Furthermore, regardless of the applicable burden of proof and the Claimants' arguments, the Respondent has tested each of its jurisdictional objections on the basis of a balance of probabilities.

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

9. In its Memorial, the Respondent explains why the Tribunal lacks jurisdiction because the Respondent has not consented to the Claimants' self-consolidated arbitration. The Respondent uses the term “self-consolidation” to refer to the fusion of two or more investment arbitrations into a single arbitration by the Claimants. The Respondent uses this term in the same manner as the term “self-consolidated” was used in the concurring opinion of arbitrator J. Christopher Thomas Q.C. in *Alemanni v. Argentina*.⁶

10. Irrespective of which descriptive term is used—*i.e.*, “self-consolidation” (Respondent) or “multi-party arbitration” (Claimants) or some other term,⁷ this Tribunal must determine whether

³ Memorial on Jurisdiction, ¶ 25 and footnote 11.

⁴ Counter-Memorial on Jurisdiction, ¶¶ 21-33.

⁵ **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.

⁶ **RL-059**, *Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, Concurring Opinion of Mr. J Christopher Thomas QC, 17 November 2014, ¶ 9. “In my view, the Claimants have effectively “self-consolidated” their individual claims by presenting them as one collective claim. As observed at paragraph 284 of the Decision, in the present Arbitration, there exist no separate sets of parallel proceedings, ‘but only one single proceeding instituted against the same Respondent by a multiple group of Claimants.’ [emphasis added].

⁷ Other terms used to refer to the fusion of two or more investment disputes into a single arbitration 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 investment arbitrations into a single arbitration.

it has jurisdiction over this arbitration which consists of the fusion of two or more different investment arbitrations that are distinguished by different investors, different investments, different alleged government measures, and different timelines.

A. Arguments of the parties

11. The Respondent's arguments in its Memorial on Jurisdiction can be summarized as follows:

- Consent by a State is a fundamental requirement for submitting disputes to arbitration and to a tribunal's jurisdiction;⁸
- The Respondent has consistently maintained from the outset of this arbitration and before this Tribunal was composed that it has not consented to the Claimants' self-consolidation intent;⁹
- Self-consolidation is a jurisdictional matter, not a procedural matter;¹⁰
- The fusion of arbitrations in this proceeding is limited to that permitted by the texts of the invoked treaties;¹¹
- The texts of the invoked treaties and their consequent impact on the jurisdiction of this Tribunal are distinguishable from all other arbitrations that have ruled on the fusion of two or more arbitrations into a single arbitration because three of the four treaties include specific consolidation provisions that establish the limits of the Respondent's consent to such fusion;¹² and
- The Respondent's interpretation of the treaties is confirmed by the public international law principles of *pacta sunt servanda* and *pacta tertiis* as codified in the Vienna Convention on the Law of Treaties.¹³

12. The Claimants' arguments in the Counter-Memorial on Jurisdiction can be summarized as follows:

- Investor-state jurisprudence overwhelmingly shows that multi-party arbitration is

⁸ Memorial on Jurisdiction, ¶ 34.

⁹ Memorial on Jurisdiction, ¶ 29. See also ¶¶ 10-16 of the Respondent's written submission on bifurcation, 10 June 2020, where the Respondent explains that its jurisdictional objections were communicated to the Claimants in a manner that was serious, timely (five months before the Tribunal was composed) and transparent (in writing), with additional details provided to the Claimants as the arbitration progressed up to the time of the bifurcation proceeding.

¹⁰ Memorial on Jurisdiction, ¶¶ 33-39.

¹¹ Memorial on Jurisdiction, ¶¶ 40-49.

¹² Memorial on Jurisdiction, ¶¶ 46-49.

¹³ Memorial on Jurisdiction, ¶¶ 50-65.

- permissible, and this arbitration falls within that jurisprudence;¹⁴
- The Tribunal has jurisdiction over this multi-party arbitration because it has plenary authority over procedural matters, and this is a procedural matter;¹⁵
 - Each Claimant perfected his or her consent under their respective treaty to bring an arbitration claim against Respondent;¹⁶
 - Investment treaty arbitration practice is replete with examples of proceedings which have involved more than one claimant and, if the Respondent's arguments are accepted, this Tribunal be the first ever to decline jurisdiction because Claimants brought their claims under a single proceeding;¹⁷
 - Multi-party proceedings are different from *ex post* consolidation and no valid analogy can be made between them;¹⁸
 - Contrary to the Respondent's arguments that the principles of *pacta sunt servanda* and *pacta tertiis* cannot add any obligations to host States, particularly since the Treaties are silent concerning auto-consolidation, the Respondent is trying to impose additional conditions and consent requirements outside of the four corners of the Treaties;¹⁹ and
 - The Tribunal should hear the claims together because it promotes efficiency and other policy considerations.²⁰
13. In the following sections, the Respondent replies to the arguments of the Claimants.

B. Self-consolidation is a jurisdictional matter that is governed by the texts of the invoked treaties which do not permit it

14. The Respondent explained that the self-consolidation that has occurred in this arbitration goes to the Respondent's consent to arbitration. Therefore, it is *per se* a jurisdictional matter that is governed by the four invoked treaties, not by the 1976 UNCITRAL Rules (UNCITRAL Rules) for the following reasons: (i) the texts of the four invoked treaties determine whether the Respondent has consented to this arbitration and not the applicable arbitration procedural rules;²¹ (ii) the UNCITRAL Rules are subservient to the texts of the four invoked treaties;²² and (iii) the

¹⁴ Counter- Memorial on Jurisdiction, ¶ 99 citing Claimants' 24 June 2020 written submission in opposition to bifurcation and brief in support of a multiparty proceeding, ¶¶ 14-51.

¹⁵ Counter- Memorial on Jurisdiction, ¶¶ 98-101, 108, 113, 114-115.

¹⁶ Counter- Memorial on Jurisdiction, ¶¶ 100 and 109.

¹⁷ Counter- Memorial on Jurisdiction, ¶¶ 104 and 105.

¹⁸ Counter- Memorial on Jurisdiction, ¶¶ 104-109.

¹⁹ Counter- Memorial on Jurisdiction, ¶¶ 110 and 111.

²⁰ Counter- Memorial on Jurisdiction, ¶¶ 116-123.

²¹ Memorial on Jurisdiction, ¶¶ 35 and 36.

²² Memorial on Jurisdiction, ¶¶ 37 and 38.

UNCITRAL Rules apply to this arbitration after the consent to arbitration has been given and are not legally relevant to proving consent.²³ Specifically, self-consolidation is an issue that has to do with consent to submit a claim to arbitration and, therefore, is a matter of jurisdiction, and not with admissibility or procedural issue provided for in the UNCITRAL Rules.

15. In the Counter Memorial, the Claimants do not rebut these arguments. Rather, they argue that: (i) there is no conflict between the treaty provisions and the UNCITRAL Rules and, therefore, the treaty provisions have no bearing on whether multi-party arbitration is permitted; (ii) multi-party arbitrations are procedural because the treaties are silent on whether they are permitted; and (iii) the UNCITRAL Rules plainly contemplate multi-party arbitrations and Article 15.1 empowers the tribunal to manage proceedings as it sees fit.²⁴

1. The Respondent must consent to self-consolidation

16. The recent decision on jurisdiction and admissibility in *Kruck v. Spain* confirms that the permissibility of multi-party arbitration (self-consolidation) is a matter of jurisdiction relevant to the consent to arbitration of the respondent State, and not of admissibility.²⁵ That arbitration concerned the conditions on which 116 claimants could come together and bring their claims under the Energy Charter Treaty (ECT) against Spain as a single claim to be heard and determined in a single arbitration.²⁶ The issue was whether the tribunal should exercise jurisdiction in the proceedings to adjudicate upon all of the claims brought by the claimants.²⁷

17. The tribunal did not doubt that, if it had jurisdiction over each of the individual claims, the Parties could agree to have all of the claims determined together. However, the question was whether both Parties had in fact agreed and consented to that procedure.²⁸ In the tribunal's view,

²³ Memorial on Jurisdiction, ¶ 39.

²⁴ Counter-Memorial on Jurisdiction, ¶¶ 114 and 115.

²⁵ **RL-101**, *Mathias Kruck and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction and Admissibility, April 19, 2021.

²⁶ *Id.*, ¶ 184.

²⁷ *Id.*, ¶ 190.

²⁸ *Id.*, ¶ 193.

whether treated as a question of jurisdiction or admissibility, the multi-party objection turned on the scope of the respondent State's consent to the arbitration of ECT claims.²⁹

18. The tribunal made it clear that the consent of the respondent must be derived from the texts of the governing treaties:

The Respondent is a Contracting State to the ICSID Convention and a Contracting Party to the ECT; and the question therefore depends upon the interpretation of those instruments in order to determine whether by its acceptance of them the Respondent has given the consent necessary to establish the jurisdiction of the Tribunal in this case and the admissibility of all of the claims presented.³⁰

[T]he Tribunal finds that the consent to arbitrate given in ECT Article 26, and specifically in Article 26(3) is a consent to accept the submission of a dispute to a tribunal and does not amount to consent to submit two or more distinct disputes to a tribunal in a single proceeding. This is not a question of the ECT or the ICSID Convention or Arbitration Rules imposing "a requirement of separate consent to a multi-party arbitration", as the Claimants put it: it is a question of the precise scope of the Respondent's actual consent.³¹

19. The tribunal emphasized that the point is not one of practicality and not whether it would be feasible for the tribunal to hear and decide all the claims together, but rather whether all of the claims could properly be regarded as "a dispute" which the Parties have consented to be heard and decided in a single proceeding.³² That tribunal clarified the following:

[B]oth sets of claims could be heard and determined in a single proceeding if the Parties so agreed. It is also plain that both sets of Claimants may wish, perhaps for reasons of efficiency and economy, to combine their claims in a single case; and that they could do, if the Parties, including the Respondent, agreed. The point is, however, that the Parties have not so agreed.³³

It is clear that throughout the entire course of these proceedings the Respondent has maintained its objection to the hearing together of what it describes as multiple disputes. It has not consented to the hearing together of the DSG claims and the TS claims.³⁴

The Tribunal might, for instance, have jurisdiction over most, if not all, of these 116 claims, if each of them were considered individually and in isolation from the others. The problem at this point in our analysis lies not in the Tribunal's lack of jurisdiction over any of the individual claims which have been collected together in the application

²⁹ *Id.*, ¶ 194.

³⁰ *Id.*, ¶ 194.

³¹ *Id.*, ¶ 202.

³² *Id.*, ¶ 209.

³³ *Id.*, ¶ 224.

³⁴ *Id.*, ¶ 225.

in this case, but rather in the absence of consent on the part of the Respondent to the exercise of jurisdiction over all of those claims in a single proceeding.³⁵

20. Like Spain in *Kruck v. Spain*, prior to the composition of this Tribunal and throughout the course of these proceedings, the Respondent has made clear to the Claimants that it has not consented to the Claimants' claims being heard and decided in a single proceeding.

2. The Respondent's consent is a jurisdictional, not a procedural matter

21. Since the self-consolidation that has occurred in this arbitration goes to the Respondent's consent, it is *per se* a jurisdictional matter that is governed by the four invoked treaties.³⁶

22. The Claimants' sole legal authority for the argument that multi-party arbitration "is procedural, not jurisdictional" is the award of the Tribunal in *Guaracachi v. Bolivia*.³⁷ The cited paragraph reads as follows:

344. With respect to the Claimants' argument that the Tribunal's discretion over the conduct of the proceedings should be exercised to avoid unnecessary delay and expense (Article 17(1) of the UNCITRAL Rules), the Tribunal finds that this is a rule governing questions of procedure and is not (necessarily) applicable to the determination of the existence or not of its jurisdiction.³⁸

23. The tribunal's reference to "procedure" is clearly in reference to avoiding unnecessary delays and expenses and not to the existence of its jurisdiction or competence over the multi-party proceeding. It does not support the Claimants' proposition that permitting multi-party arbitration is a procedural issue.

24. The tribunal in *PV Investors v. Spain* viewed the objection to aggregate proceedings (*e.g.*, self-consolidation, multi-party arbitration) "as one which must be dealt with when ascertaining jurisdiction" [emphasis added].³⁹ The tribunal in *Kruck v. Spain* confirmed that the consent of the respondent State is either jurisdictional or a question of admissibility without ruling on the issue.⁴⁰

³⁵ *Id.*, ¶ 228.

³⁶ Memorial on Jurisdiction, ¶ 34.

³⁷ Counter-Memorial on Jurisdiction, ¶ 114 and footnote 140.

³⁸ **CLA-0019**, *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014, ¶ 344.

³⁹ **CLA-0072**, *PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14, Preliminary Award on Jurisdiction, 13 October 2014, ¶ 94.

⁴⁰ *Kruck v. Spain*, ¶¶ 192 and 229.

It used the term “admissibility” in the context of tribunal competence. The tribunal reasoned the following:

The multi-party objection might be characterized as an objection based on the outer limits of the Respondent’s consent to accept the jurisdiction of the Tribunal, and in that sense a jurisdictional objection; alternatively, that objection might be said to relate to whether the manner in which the Claimants have submitted their claims (each of which is, *arguendo*, individually within the Tribunal’s jurisdiction) renders some or all of those claims inadmissible. That distinction was not the subject of argument before the Tribunal, and as was said above is not material in the present context. Accordingly, the Tribunal is not to be understood as deciding or taking a firm position on this question of the characterization of the multi-party objection as a matter of jurisdiction or of admissibility.⁴¹

The Tribunal does not consider it necessary to decide whether the question is to be classified as one relating to jurisdiction or to admissibility, because the practical result in the context of this case is the same whichever classification is adopted. The Tribunal is conscious that there may be arguments that the jurisdiction / admissibility distinction has critical significance in some contexts and does not wish to foreclose any such arguments: it therefore makes no decision on this question of classification.⁴²

25. The tribunal’s reasoning, in this case, shows that consent goes to a tribunal’s jurisdiction or the competence and is not a procedural matter.

3. The texts of the invoked treaties establish that the Respondent has not consented to the Claimants’ claims being heard and decided in a single proceeding

26. The foundation of the Claimants’ position appears to be that the treaties invoked in this arbitration are silent on multi-party arbitrations and, therefore, the UNCITRAL Rules fill the gap and govern whether multi-party arbitrations are permitted. The Respondent does not agree. Three of the four invoked treaties are not silent on the fusion of arbitrations. Rather they have specific provisions that address such fusion.

27. Article 31(1) of the Vienna Convention specifies that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In this instance, the existence of specific consolidation provisions in three of the four treaties must be given meaning— NAFTA (Article 1126), Mexico–

⁴¹ *Id.*, ¶ 192.

⁴² *Id.*, ¶ 229.

Portugal BIT (Article 12), and Mexico – Argentina BIT (Article 4 of the Annex).⁴³ These provisions establish that the parties to these treaties explicitly put their minds to the fusion of two or more arbitrations into a single arbitration and limited their agreement on fusion to the type of consolidation expressed in those provisions. That type of consolidation is *ex post* the establishment of arbitration tribunals and does not encompass the self-consolidation before this Tribunal. Self-consolidation is, therefore, beyond the scope of the parties' and the Respondent's consent to arbitration and is outside this Tribunal's jurisdiction. In his concurring opinion in *Alemanni*, J. Christopher Thomas Q.C. confirmed that the existence of these provisions is legally relevant to ascertaining a tribunal's jurisdiction in a multi-party arbitration.⁴⁴ In *Alemanni*, such provisions did not exist, and it was not necessary for that tribunal to take them into account. In this arbitration, they do exist, and their existence must be given meaning when assessing the scope of the Respondent's consent to the fusion of arbitrations. Their existence explicitly confirms that the Respondent did not consent to self-consolidation.

28. The Claimants argue that multi-party proceedings are different from *ex post* consolidation and no valid analogy can be made between them.⁴⁵ They are different; the Respondent is not arguing otherwise. However, both concern the fusion of two or more arbitrations. In this light, the existence of *ex post* consolidation provisions in a treaty without reference to other forms of fusion such as self-consolidation establishes the limits of the treaty parties' agreement on fusion. In this arbitration, it means that self-consolidation was not agreed upon, is not consented to by the Respondent, and is outside the jurisdiction of this Tribunal.

29. The Respondent's interpretation that self-consolidation is not permitted without the consent of the Respondent is confirmed by the public international law principles of *pacta sunt servanda* and *pacta tertiis* as codified in the Vienna Convention on the Law of Treaties.⁴⁶ These principles apply to this arbitration. In the four treaties invoked by the Claimants, outside the express consolidation provisions discussed above, no State parties have expressed an intention to

⁴³ Memorial on Jurisdiction, ¶¶ 41 and 42. The fact that NAFTA does not have consolidation provisions is functionally irrelevant because the other three treaties prevent self-consolidation in any combination of the four treaties.

⁴⁴ Memorial on Jurisdiction, ¶¶ 46-49.

⁴⁵ Counter-Memorial on Jurisdiction, ¶¶ 104-109.

⁴⁶ Memorial on Jurisdiction, ¶¶ 50-64.

extend the treaty obligations or rights such as consolidation of claims to a third State and their investors who are outside the protection of the treaty.⁴⁷ Moreover, no third State outside of the alleged treaty privities has consented to be bound by such obligations in writing or has 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 overlap with or cross over each other, which is what occurs if the Claimants' self-consolidation is permitted.

30. For these reasons, in the context of this arbitration, self-consolidation without the Respondent's consent is not permitted.

4. Responses to specific issues raised by the Claimants

a. The Tribunal's decision must be based on the texts of the treaties, not on policy considerations

31. The Claimants argue that the Tribunal should hear the self-consolidated claims because of various policy considerations.⁴⁸ The Tribunal's decision must be based on the interpretation and application of the texts of the invoked treaties, not on policy considerations. This was confirmed by the tribunal in *PV Investors v. Spain*:

In advocating in favor or against aggregate proceedings, the Parties have discussed issues such as procedural efficiency, costs and time of the proceedings, the potential to avoid contradictory decisions and a waste of resources. Whatever the merit of these considerations, they could not justify the admission of aggregate proceedings if it were not permitted under the framework of the ECT as a matter of law. The paramount question for a tribunal of limited and consensual jurisdiction is whether the Respondent's consent is affected by the number of potential claimants. Once the answer is given that under the ECT the Respondent's consent is not limited by the multiplicity of claimants, those policy considerations add nothing to the answer.⁴⁹

⁴⁷ The rights afforded to investor-nationals in investment treaties are derivatives of the rights of the party States.

⁴⁸ Counter-Memorial on Jurisdiction, ¶¶ 116-121.

⁴⁹ **CLA-0072**, *PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14, Preliminary Award on Jurisdiction, 13 October 2014, ¶ 124.

b. The Respondent's interpretation does not impose a separate consent requirement

32. The Claimants argue that the Respondent's interpretation imposes a separate consent requirement which is not required.⁵⁰ This is not correct. The tribunal in *Kruck v. Spain* found that consent to submit two or more distinct disputes to a tribunal in a single proceeding is not a question of imposing "a requirement of separate consent to a multi-party arbitration", as the Claimants put it; rather it is a question of the precise scope of the Respondent's actual consent.⁵¹

c. The Respondent's interpretation does not add new obligations, nor does it grant rights that do not exist in the treaties

33. The Claimants argue that the Respondent "stretches [the concepts of *pacta sunt servanda* and *pacta tertiis*] to conclude that Claimants cannot add any obligations to host States, particularly since the Treaties are 'silent concerning auto-consolidation'", that the Respondent "is trying to impose additional conditions and consent requirements outside of the four corners of the Treaties", and that the Respondent "cannot now create new rights (for itself) or obligations (against Claimants) to rewrite the requirements under the Treaties".⁵²

34. Self-consolidation, if permitted in the treaties, would be a right conferred upon a treaty party to the benefit of its investors. Thus, the Respondent's interpretation does not create new rights for the Respondent, nor does it create new obligations for itself or for the other treaty party and its investors. The Respondent is simply rejecting the existence of the rights asserted by the Claimants which do not exist in the invoked treaties.

d. The actions taken by individual claimants to perfect their claims pertain to treaty-specific arbitrations, not to self-consolidation

35. The Claimants state that each claimant qualifies as an investor under his or her corresponding treaty and has perfected his or her consent under that treaty to bring an arbitration claim against Respondent.⁵³ Even if such perfection had occurred (it has not for the reasons set out

⁵⁰ Counter-Memorial on Jurisdiction, ¶¶ 102, 114, 224, footnote 140.

⁵¹ **RL-101**, *Mathias Kruck and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction and Admissibility, April 19, 2021, ¶ 202.

⁵² Counter-Memorial on Jurisdiction, ¶¶ 110 and 111.

⁵³ Counter-Memorial on Jurisdiction, ¶¶ 55, 100 and 109.

in the Respondent's Memorial and elaborated upon in this Reply), it was only in relation to separate arbitrations under each treaty and not in relation to self-consolidation.

36. The tribunal in *Kruck v. Spain* addressed this situation in the following statement:

The Tribunal might, for instance, have jurisdiction over most, if not all, of these 116 claims, if each of them were considered individually and in isolation from the others. The problem at this point in our analysis lies not in the Tribunal's lack of jurisdiction over any of the individual claims which have been collected together in the application in this case, but rather in the absence of consent on the part of the Respondent to the exercise of jurisdiction over all of those claims in a single proceeding.⁵⁴

e. Other tribunals have declined jurisdiction over self-consolidated claims

37. The Claimants argue that investment treaty arbitration practice is replete with examples of proceedings that have involved more than one claimant and, if the Respondent's arguments are accepted, this Tribunal will be the first ever to decline jurisdiction because Claimants brought their claims under a single proceeding.⁵⁵

38. As explained above, self-consolidation can legally occur and has occurred in many arbitrations where the respondent State has consented, either explicitly or implicitly.⁵⁶ In only a few arbitrations has self-consolidation been challenged and in none of those arbitrations has the tribunal ruled on the implications of governing treaty texts that include explicit consolidation provisions, such as the ones before this Tribunal.

39. Additionally, contrary to the Claimants' argument that "this Tribunal [will] be the first ever to decline jurisdiction because Claimants brought their claims under a single proceeding"⁵⁷, other tribunals have already declined jurisdiction over self-consolidated claims under treaties without consolidation provisions, for example, *Kruck v. Spain* and *Erhas and others v. Turkmenistan*.⁵⁸

⁵⁴ **RL-101**, *Mathias Kruck and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction and Admissibility, April 19, 2021, ¶ 228.

⁵⁵ Counter-Memorial on Jurisdiction, ¶¶ 104 and 105.

⁵⁶ Memorial on Jurisdiction, ¶ 29.

⁵⁷ Counter-Memorial on Jurisdiction, ¶ 105.

⁵⁸ **RL-118**, Energy Charter Treaty, which demonstrates that the governing treaty did not have consolidation provisions. **RL-101**, *Mathias Kruck and others v. Kingdom of Spain* (ICSID Case No. ARB/15/23), Decision on Jurisdiction and Admissibility, 19 April 2021 was carried out under the Energy Charter which does not have consolidation provisions and **RL-119**, *Erhas and others v. Turkmenistan* (unreported) was carried out under the Turkey-Turkmenistan BIT (1992).

5. Conclusion

40. For these reasons, the self-consolidation of the Claimants' claims in this arbitration is not permitted and the Tribunal does not have jurisdiction to hear those claims.

C. In the alternative, the facts in this arbitration do not support self-consolidation

41. It is the Respondent's position that the existence of express consolidation provisions in three of the four invoked treaties must be given meaning, namely that the States party to these treaties agreed to the fusion of arbitrations only in the situation where consolidation is *ex post* the establishment of arbitration tribunals in accordance with the procedures in the provisions. This treaty text distinguishes this arbitration from all previous arbitrations in which self-consolidation was challenged and permitted. Accordingly, the self-consolidation undertaken by the Claimants in this arbitration is not permitted.

42. In the alternative, if the Tribunal disagrees with the Respondent's position, self-consolidation is still not permitted on the facts.

1. The authorities cited by the Claimants do not support self-consolidation in this arbitration

43. The Claimants refer to this proceeding as an "ordinary multiparty arbitration"⁵⁹ and argue that investor-state jurisprudence overwhelmingly shows that multi-party arbitration is permissible.⁶⁰ They argue that because of the shared similarities between the claims, this Tribunal should rule in favour of maintaining this multi-party arbitration.⁶¹

44. The Claimants cite two categories of arbitration decisions to support multi-party arbitration.⁶² The first category covers decisions where multi-party arbitration was not contentious

⁵⁹ Counter-Memorial on Jurisdiction, ¶ 12, d).

⁶⁰ Counter-Memorial on Jurisdiction, ¶ 99 citing Claimants' 24 June 2020 written submission in opposition to bifurcation and brief in support of a multiparty proceeding, ¶¶ 14-51.

⁶¹ Counter-Memorial on Jurisdiction, ¶¶ 115 and 119-120.

⁶² Counter-Memorial on Jurisdiction, ¶¶ 101-107.

and not addressed by the tribunal.⁶³ The second category covers decisions where the tribunal ruled on the permissibility of multi-party arbitration.⁶⁴

a. Arbitrations where consent was explicit or implicit

45. This category of arbitration decisions, which the Respondent has acknowledged, simply recognize that self-consolidation can legally occur and has occurred in many arbitrations where the respondent State has consented, either explicitly or implicitly.⁶⁵ Since there was no such explicit or implicit consent in this arbitration, this category is irrelevant to determining the permissibility of self-consolidation in this arbitration.

b. Arbitrations where tribunals ruled on the permissibility of self-consolidation

46. These decisions are legally and factually distinguishable from this arbitration. As discussed above, none concern investment treaties that include consolidation provisions that explicitly address the fusion of two or more arbitrations into a single arbitration and limit such fusion to *ex post* consolidation. Moreover, as discussed below, when multi-party arbitration was permitted in these arbitrations, there was a “single dispute” before the tribunal which is not the case here.

⁶³ **CLA-0112**, *Funnekotter and others v. Zimbabwe* (ARB/05/6), Award (April 22, 2009); **CLA-0031**, *OKO Pankki Oyj and others v. The Republic of Estonia* (ARB/04/6), Award, 19 November 2007; **CLA-0042**, *Suez et al v. Argentina*, ARB/03/19, Decision on Liability, July 30, 2010; **CLA-0045**, *von Pezold and others v. Zimbabwe* (ARB/10/15), Award (July 28, 2015); **CLA-0027**, *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Award, 11 December 2013; **CLA-0022**, *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Award, 1 March 2012; **CLA-0043**, *Teinver and others v. Argentina*, ICSID Case No. ARB/09/1, Award, 21 July 2017; **CLA-0024**, *Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Dec. on Jurisdiction, 8 March 2017; **CLA-0010**, *Cube Infrastructure v. Spain*, ICSID Case No. ARB/15/20, Award, 15 July 2019; **CLA-0026**, *Magyar Farming and others v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019.

⁶⁴ **CLA-0019**, *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014; **CLA-0052**, *Ambiente Ufficio S.P.A. and others (formerly Giordano Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013; **CLA-0028**, *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction (March 5, 2008).

⁶⁵ Memorial on Jurisdiction, ¶ 29.

2. In addition to consent, there must be a “single dispute” for self-consolidation to be permissible

a. Applicable authorities

47. Where tribunals have ruled on self-conjoining, the pivotal consideration has been whether there is a “single” dispute.

48. This was recently confirmed by the tribunal in *Kruck v. Spain* which examined Article 26 of the ECT and concluded that it made provision for the arbitration of “a dispute” or “the dispute” between the parties to it, indicating a “single” or a “unitary” dispute that will come before an arbitral tribunal and that the unconditional consent of the respondent State as to the submission of “a dispute”, in the singular, to international arbitration.⁶⁶ It agreed with the tribunal in *Alemanni* that the focus is on the question whether there is a dispute, in the singular: *i.e.*, whether what is put before a tribunal is or is not a single dispute.⁶⁷ In its view, the architecture of an investment treaty or an agreement such as the ECT points towards the conclusion that in principle, and subject to agreement to the contrary, each tribunal should ordinarily deal with one dispute and not with multiple disputes.⁶⁸ The consent given by the States party to the treaty does not amount to consent to submit two or more distinct disputes to a tribunal in a single proceeding.⁶⁹

⁶⁶ **RL-101**, *Mathias Kruck and others v. Kingdom of Spain* (ICSID Case No. ARB/15/23), Decision on Jurisdiction and Admissibility, April 19, 2021, ¶¶ 197-199. The tribunal observed that the only elements of the language of Article 26 that might suggest that it is possible to file multiple ‘disputes’ as a single ‘case’ appear in Article 26(1) and (2). Those paragraphs refer to “disputes” and appear to refer to disputes in the plural. Those paragraphs are, however, setting out general provisions applicable to each and every dispute “between a Contracting Party and an Investor of another Contracting Party relating to an investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part II.” Paragraph (1) says that such disputes (*i.e.*, each and every dispute within the definition in paragraph (1)) “shall, if possible, be settled amicably.” Paragraph (2) opens by referring to “such disputes”, *i.e.*, the disputes identified by paragraph (1): it provides (with emphasis added) that “[i]f such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution” But its meaning would be more accurately rendered by stating that the words “if any such dispute” cannot be so settled it may be submitted for resolution. It would be completely and obviously nonsensical to say that all disputes falling within Article 26(1) must remain unsettled before any such dispute may be submitted for resolution: *Kruck v. Spain*, ¶ 198.

⁶⁷ *Id.*, ¶ 201.

⁶⁸ *Id.*, ¶ 200.

⁶⁹ *Id.*, ¶ 202.

49. The tribunal went on to discuss how a tribunal is to distinguish between “a dispute” and multiple “disputes”, and the relationship between multiple parties and multiple disputes.⁷⁰ It elaborated as follows:

- ““Multiple parties” and “multiple disputes” are distinct concepts. The fact that there are multiple claimants does not mean that there are multiple disputes.⁷¹ If all 20 of the operators have the same nationality and bring the same claim under the same BIT (or the ECT), and rely on the same facts and legal arguments, there is no good reason for refusing to accept the 20 claims in a single proceeding.”⁷²
- ““[I]t is perfectly possible for “a dispute” to have more than one party on the claimant’s side. But the interest represented on each side of the dispute has to be in all essential respects identical for all of those involved on that side of the dispute.” The Tribunal considers that to be the correct test, and indeed a test dictated by practical necessity.”⁷³
- “But if the relevant commitments and representations and the evaluations of those representations differ from claimant to claimant, no single determination of liability is possible. The “case” is in truth a bundle of distinct disputes that may be closely related in terms of their factual underpinning, but which cannot properly be said to constitute one and the same dispute.”⁷⁴
- “In a case such as the present, multiple claims can generally be said to constitute a single dispute where, in the case put before the tribunal, all of the claimants (i) have invested in the same project or group of related projects, and (ii) have made their investments on the basis of the same terms and representations, and (iii) advance their claims on the basis of the same legal arguments, and (iv) do so against the same respondent, who maintains the same defences against each claimant. There will usually be a significant connection between the members of the group of claimants at the times when they make their respective investments. The Respondent used the concept of ‘homogeneity’ to refer to such multiple claims within a single dispute, and the Tribunal adopts that convenient usage.”⁷⁵
- “If a member of what purports to be a single group of claimants is in a materially different factual position from the others or relies upon or is met with materially different legal arguments in their claim or in the defence to their claim, their claim cannot properly be decided by saying that they are in the same position as the other members of the purported group: plainly, they are not.”⁷⁶

⁷⁰ *Id.*, ¶ 203.

⁷¹ *Id.*, ¶ 204.

⁷² *Id.*, ¶ 204.

⁷³ *Id.*, ¶ 205.

⁷⁴ *Id.*, ¶ 206.

⁷⁵ *Id.*, ¶ 207.

⁷⁶ *Id.*, ¶ 208.

50. The *Kruck* tribunal considered that the claims of the two different groups of claimants were materially different and had to be regarded as different disputes because, *inter alia*, the two groups were entirely separate in membership and organization. There were significant differences between the two groups in: (i) the timing of their investments; (ii) the investment projects at issue and the range of projects. Further, (iii) there was no relationship between the two groups of claimants prior to the arbitration proceedings and (iv) both groups took their advice from different sources and in different ways and at different times.⁷⁷

51. The question of whether there is a “single” dispute has also been considered in *Alemanni, LSG Building Solutions v. Romania* and *Theodoros Adamakopoulos v. Cyprus*. The *Alemanni* tribunal reasoned that treaty clauses “provide a mechanism for the settlement of individual disputes; they do not (absent either special agreement to that effect or joinder) provide a mechanism for the joint settlement of a collection of separate disputes”.⁷⁸ According to *Alemanni*, multiple claimants can bring a single arbitration against a respondent if they can prove that their respective claims form a single dispute. However, the interest represented on each side of the dispute has to be, in all essential respects, identical for either side.⁷⁹

52. Similarly, in *LSG*, the tribunal reasoned that for a “single dispute” to exist, the interests of both claimants and respondents need “to be in all essential respects identical for all of those involved on that side of the dispute”.⁸⁰ The *LSG* tribunal agreed with the *Giovanni* and held that multiple claimants may be permitted to bring a single arbitration against a State party if they can prove that their respective claims form a “single dispute.” When the claims, claimants and investments were unrelated, the tribunal saw no prior case where a tribunal had asserted jurisdiction in circumstances.

⁷⁷ *Id.*, ¶ 212-221, 226, 231.

⁷⁸ **RL-102**, *Giovanni Alemanni and others v. Argentine Republic* (ICSID Case No. ARB/07/8), Decision on Jurisdiction and Admissibility, November 17, 2014, ¶ 292

⁷⁹ **RL-102**, *Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 Nov 2014, RL-059, ¶ 292.

⁸⁰ **RL-103**, *LSG Building Solutions GmbH and others v. Romania*, ICSID Case No. ARB/18/19, Procedural Order No. 3, Decision on Bifurcation, October 9, 2019, ¶ 49.

53. Also, in *Theodoros* the tribunal observed that the commonality of the dispute in this case is derived from the fact that the allegations with respect to the actions of Cyprus are “so similar in their essence”.⁸¹

54. Similarly, in *Guaracachi*, the tribunal found the claims by the two claimants to be “in essence one and the same claim.”⁸² Furthermore, they must not be subject to any condition that claimants in arbitration proceedings must ground their claims in just one BIT and each claimant must accept the offer of arbitration in the precise terms in which the Respondent gave it.⁸³

b. The invoked treaty texts permit arbitration only for a single dispute

55. The investor-state dispute settlement provisions in the invoked treaties— Mexico-Argentina BIT,⁸⁴ the Mexico-France BIT,⁸⁵ the Mexico-Portugal BIT⁸⁶ and the NAFTA⁸⁷— refer

⁸¹ *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020, ¶ 213.

⁸² **CLA-0019**, *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014, ¶ 345.

⁸³ **CLA-0019**, *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014, ¶ 336. *Also see* ¶ 346 where the tribunal grounded its jurisdiction on the fundamental issue of consent of the Respondent under the applicable BITs. It found that the Respondent had given its consent to the jurisdiction of the tribunal to hear the claims submitted jointly by the claimants. In arriving at that decision, the tribunal stated that the consent given by the Respondent contained no limitation that would preclude the joint submission by two or more Claimants of identical claims under different BITs.)

⁸⁴ The Mexico-Argentina BIT adopts the singular term for “dispute”: “controversia”, “de controversia”, “la controversia” and “una contraversia”. Although the plural “disputes” is used-- “controversias”-- it is in reference to the dispute settlement mechanism generally and does not alter the conclusion that the arbitration mechanism applies only to single disputes.

⁸⁵ The Mexico-France BIT adopts the singular term for “dispute”: “controversia”, “la controversia”, “cualquier controversia” and “una contraversia”. Although the plural “disputes” is used-- “controversias”-- it is in reference to the dispute settlement mechanism generally and does not alter the conclusion that the arbitration mechanism applies only to single disputes.

⁸⁶ The Mexico-Portugal BIT adopts the singular term for “dispute”: “controversia”, “de controversia”, “la controversia”, “dicha controversia” “ninguna controversia” and “una contraversia”. Although the plural “disputes” is used-- “controversias”-- it is in reference to the dispute settlement mechanism generally and does not alter the conclusion that the arbitration mechanism applies only to single disputes.

⁸⁷ The NAFTA throughout Section B (Settlement of disputes between a Party and an investor of another Party) of NAFTA Chapter 11, a single “claim” submitted to arbitration is referenced. Although the term “claims” is used in some of the provisions, it does not alter the conclusion that Section B applies only to a single claim to arbitration. The definition of “investment” in Article 1126 refers in paragraph (i) and (j) to “claims” to money. Article 1117(3) refers to “claims” in the context of overlapping claims by an investor

to a single dispute (or claim)⁸⁸ being submitted to arbitration. The Claimants acknowledge this in their Counter Memorial:

- The Annex to the Mexico-Argentina BIT “states that investors ‘can... submit a claim to arbitration’ alleging breach of this BIT” [emphasis added].⁸⁹
- The France-Mexico BIT “allows ‘an investor’ of one Contracting Party to submit a claim to international arbitration against the other Contracting Party” [emphasis added].⁹⁰
- The Portugal-Mexico BIT “allows an ‘investor’ of one Contracting Party to submit a claim to international arbitration against the other Contracting Party” [emphasis added].⁹¹
- The NAFTA “allows an ‘investor of a Party’ to submit a claim to international arbitration” [emphasis added].⁹²

56. Thus, the Respondent and the other parties to the invoked treaties have consented to arbitration only in respect of a single dispute.

3. There are two or more distinct disputes in this arbitration, not a single dispute

57. Under investment treaties, a dispute or claim comprises the following principal elements: (i) claimants/investors; (ii) investments; (iii) government measures; and (iv) invoked treaty provisions. The relevant facts for each of these elements must be assessed to determine whether there is a single dispute or multiple distinct disputes.

on its own behalf and an investor on behalf of an enterprise. Article 1126 (2) and (3) refer to “claims” in the context of consolidation.

⁸⁸ In the context of self-consolidation, the terms “disputes” and “claims” are used interchangeably. See for example the statement of J. Christopher Thomas Q.C. “In my view, the Claimants have effectively “self-consolidated” their individual claims by presenting them as one collective claim. As observed at paragraph 284 of the Decision, in the present Arbitration, there exist no separate sets of parallel proceedings, ‘but only one single proceeding instituted against the same Respondent by a multiple group of Claimants.’” **RL-059**, *Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, Concurring Opinion of Mr. J Christopher Thomas QC, 17 November 2014, ¶ 9. In this submission, the term “disputes” includes both investment disputes and investment claims used in the matter of Mr. Thomas and other tribunals that refer to joint claims and mass claims.

⁸⁹ Counter-Memorial on Jurisdiction, ¶ 56.

⁹⁰ Counter-Memorial on Jurisdiction, ¶ 58.

⁹¹ Counter-Memorial on Jurisdiction, ¶ 59.

⁹² Counter-Memorial on Jurisdiction, ¶ 60.

a. The assessment of facts does not go to the merits of the Claimants' claims

58. The factual assessment to determine the number of disputes that are being self-consolidated in this arbitration does not require addressing matters reserved for the merits stage of this arbitration, should it advance to that stage. The relevant question is whether there is more than one distinct dispute, not whether the alleged breaches have occurred.

b. There are 4 distinct groups of unrelated claimants, investors and investments

59. Without prejudice to the Respondent's other jurisdictional challenges, there are four distinct groups of unrelated claimants who undertook their different investments separately, independently and that took place at different times:⁹³

Table 1: Groups of Claimants, investors and unrelated investors

Unrelated Claimants/ Investors		Investments and Dates
1.	Carlos Sastre (Claimed Nationality: Argentina)	<p>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):</p> <ul style="list-style-type: none"> • 25 August 2000 -Incorporation of CETSA;⁹⁴ • 12 October 2000 - CETSA's acquisition of rights to ejido Lot 19 "A";⁹⁵ • 21 December 2002 - Obtained Certificate of Possession regarding ejido Lot 19 "A";⁹⁶ • 12 Oct. 2000-2011-Construction and development of Cabañas Tierras del Sol;⁹⁷
		<p>Hamaca Loca S.A. de C.V. (HLSA), Cabañas Hamaca Loca, and the land parcel rights related to Cabañas Hamaca Loca (Hamaca Loca Investments):</p> <ul style="list-style-type: none"> • 2 February 2001-Incorporation of HLSA;⁹⁸ • 1 March 2003-HLSA acquisition of rights to ejido Lot 19;⁹⁹

⁹³ Memorial on Jurisdiction, ¶ 3; NOA # 2.

⁹⁴ Witness Statement of Carlos Sastre, ¶ 11; C-0002. CETSA's Articles of Association.

⁹⁵ Witness Statement of Carlos Sastre, ¶ 12; C-0012 Transfer of Rights Agreement between Mr. Novelo and CETSA.

⁹⁶ Witness Statement of Carlos Sastre, ¶ 12; CS-0005, Certificate of Possession and Usufruct in favor of Mr. Sastre, December 21, 2002.

⁹⁷ Witness Statement of Carlos Sastre, ¶¶ 14-15; CS-0006. Photos of Tierras del Sol.

⁹⁸ Witness Statement of Carlos Sastre, ¶ 30; CS-0013. CS-0013. HLSA's Articles of Incorporation, February 2, 2001.

⁹⁹ Witness Statement of Carlos Sastre, ¶ 30; C-0014, Hamaca Loca Transfer of Rights Agreement.

		<ul style="list-style-type: none"> • 2003-Construction and development of Cabañas Hamaca Loca;¹⁰⁰ • 24 May 2006- Mr. Urdiales obtained possessory rights over parcel in exchange for shareholding in HLSA;¹⁰¹ • 24 January 2008- Argentine national became HLSA shareholder;¹⁰² • 12 June 2017- Sastre acquired arbitration rights regarding HLSA.¹⁰³
2.	Renaud Jacquet (Claimed Nationality: France)	<p>Hotel Behla Tulum, La Tente Rose, and the land parcel rights related to Hotel Behla Tulum (Behla Tulum Investments):</p> <ul style="list-style-type: none"> • 24 March 2004- incorporation of Abodes Mexico;¹⁰⁴ • 2004-2016-Building and development of Behla Tulum hotel;¹⁰⁵ • 2004-2008-Paid Ed Villareal Cueva for Ms.Villareal's "North Lot" (Lot 10);¹⁰⁶ • 5 August 2006- Jose Mauricio Román Lazo was issued a Certificate of Possession;¹⁰⁷ • 15 August 2007-Lot 10 was transferred to Jose Mauricio Román Lazo with agreement to transfer to Jacquet in the future;¹⁰⁸ • 2 January 2008- Ed Villareal Cueva transferred the South Lot to Jose Mauricio Román Lazo;¹⁰⁹

¹⁰⁰ Witness Statement of Carlos Sastre, ¶ 32.

¹⁰¹ NOA #2, ¶ 27; **C-0015**, Certificate of ejidal possession in favor of Sr. Urdiales; Witness Statement of Carlos Sastre ¶¶ 33; **C-0013** and **CS-0015**, Assembly Act of HLSA, January 29, 2008.

¹⁰² NOA #2, ¶ 26; **C-0013** and **CS-0015**, Notarized HLSA Assembly Act.

¹⁰³ Witness Statement of Carlos Sastre, ¶ 59; CS-0018. Act of Assembly and Transfer of Rights Agreement from HLSA to Carlos Sastre.

¹⁰⁴ Witness Statement of Mr. Jacquet, ¶ 8; **RJ-0003**. Articles of Incorporation of Abodes Mexico S.A. de C.V., 24 March 2004; **RJ-0004**, Notary Notice, Secretary of Foreign Relations, 24 March 2004.

¹⁰⁵ Witness Statement of Mr. Jacquet, ¶¶ 17-31.

¹⁰⁶ Witness Statement of Mr. Jacquet, ¶¶ 9-10; **RJ-0008**. Addendum (Adendum), 1 May 2006, Transfer of Rights Agreement, 15 August 2007.

¹⁰⁷ Witness Statement of Mr. Jacquet, ¶¶ 11-12; C-0049, Certificate of Possession to Mr. Román.

¹⁰⁸ Witness Statement of Mr. Jacquet, ¶ 10; **RJ-0009**.

¹⁰⁹ Witness Statement of Mr. Jacquet, ¶¶ 13 and 14; C-0051. Transfer of Rights Agreement.

		<ul style="list-style-type: none"> 10 January 2008- Jose Mauricio Román Lazo transferred the South and North lot to Jacquet.¹¹⁰
3.	Maria Abreau & Eduardo Silva (Claimed Nationality: Portugal)	<p>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):</p> <ul style="list-style-type: none"> 15 December 2000- Castulo Jiménez Figueroa transferred the North Lot to Karla Lorena Gutiérrez Rodríguez;¹¹¹ 2001-2016- Building and development of hotel Uno Astrolodge;¹¹² 3 July 2003- Incorporated O.m del Caribe.;¹¹³ No date- Assigned 15% shares of O.m del Caribe to Abreu;¹¹⁴ 22 October 2003-South Lot was transferred to Abreu;¹¹⁵ 28 November 2003- Karla Lorena Gutiérrez Rodríguez transferred the North Lot to Abreu;¹¹⁶ 25 June 2006 – Certificate of Possession for North and South Lots issued in favour of Abreu;¹¹⁷ 25 June 2007- Abreu transferred right to Lots to O.m. Caribe through 10-year renewable Commodatum Agreement.¹¹⁸
4.	Graham Alexander & Monica Galan	Hotel Parayso Tulum and the land parcel rights related to Parayso (Parayso Investments):

¹¹⁰ **C-0052**, Commodatum Agreement (South); **C-0053**. Commodatum Agreements (North), 10 January 2008.

¹¹¹ Witness Statement of Nuno Silva, ¶¶ 7 and 8; NS-0003, Transfer of Rights Agreement, 15 December 2000

¹¹² Witness Statement of Nuno Silva, ¶ 14.

¹¹³ Witness Statement of Nuno Silva, ¶¶ 7-8; C-0006, Articles of Incorporation, O.m Del Caribe S.A. de C.V.

¹¹⁴ Witness Statement of Nuno Silva, ¶ 10.

¹¹⁵ Witness Statement of Nuno Silva, ¶ 10 and 11; **C-0020**. Transfer of Rights Agreement, dated 22 October 2003.

¹¹⁶ Witness Statement of Nuno Silva, ¶¶ 11-13; **C-0021**, Transfer of Rights Agreement, 28 November 2003; **NS-0018**, Power of Attorney from Ms. Gutiérrez to Mr. Nuno Silva, 12 August 2003.

¹¹⁷ Witness Statement of Nuno Silva, ¶ 19; **NS-0007**, Certificate of Possession, 25 June 2006.

¹¹⁸ Witness Statement of Nuno Silva, ¶ 23; **NS-0009**, Commodatum Agreement, 25 June 2007.

	(Claimed Nationality: Canada)	<ul style="list-style-type: none"> • 28 April 2004-Galán obtained rights to Hotel Parayso parcel through transfer of rights agreement with Rogelio Novelo Balam;¹¹⁹ • 28 May 2004- Alexander incorporated Rancho Santa Monica Developments, Inc (RSM) (Nevada corporation);¹²⁰ • 29 November 2004- RSM and Galán celebrated contract transferring half of western lot;¹²¹ • 25 June 2006- Certificate of Possession for Lot 1192 issued in favour of Galán;¹²² • 2006-2016-Built and developed Hotel Parayso.¹²³ • [REDACTED]-Galán and Alexander divided property as per separation agreement and rescinded the sale to Rancho;¹²⁴ • 10 September 2015-17 June 2016- adopted the commercial name “Amelie Tulum” for her portion of the hotel and Alexander adopted the commercial name “Villas Alex” for his portion of the hotel.¹²⁵
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Source: Own Elaboration

60. As in the case of *Kruck v. Spain*, these four groups were entirely separate in membership and organization, there were significant differences in the timing of their investments, they did not invest in the same project or range of projects, and they acted differently and independently of each other as to their investments.

61. Thus, the first two elements of a “dispute” demonstrate that there are four distinct disputes within this arbitration.

¹¹⁹ Witness Statement of Mónica Galán, ¶¶ 11 and 12; **C-0023**, Transfer of Rights Agreement, 28 April 2004.

¹²⁰ Witness Statement of Mónica Galán, ¶ 14.

¹²¹ Witness Statement of Mónica Galán, ¶ 14; **MG-0007**, Purchase Agreement between Rancho Santa Monica Developments Inc. and Monica Galán Rios, 29 November 2004.

¹²² Witness Statement of Mónica Galán, ¶ 18; **C-0060**, Certificate of Possession, 25 June 2006.

¹²³ Witness Statement of Mónica Galán, ¶ 18-38.

¹²⁴ Witness Statement of Mónica Galán, ¶ 39; **MG-0023**, Certificate of Divorce, [REDACTED] **C-0024-Resubmitted**, Monica Galán Rios and Graham Alexander Separation Agreement (redacted) (“Separation Agreement”), [REDACTED] **MG-0024**, RSM Sole Director Resolution, 21 September 2015.

¹²⁵ Witness Statement of Mónica Galán, ¶ 40.

c. There are 4 different combinations of measures allegedly affecting the investments

62. Each of the claimed investments was affected by distinct groups of government measures. The listing of these measures is intended to be as inclusive as possible to demonstrate the distinct measures affecting each of the investments. It is not to be interpreted as a concession by the Respondent that the Claimants can expand the list of challenged measures beyond those listed in the Notice of Arbitration.¹²⁶

Table 2: Combinations of measures at issue

Investments		Alleged Measures and Dates
1.	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)	1. Failure to investigate criminal complaint of 7 May 2008 brought before Public Prosecutor in Tulum; ¹²⁷
		2. Fraudulent court proceeding Juicio Ejecutivo Mercantil 1705/2009 initiated on 28 April 2009 under the Mercantile Courts of Guadalajara by Marco Antonio Gonzalez Sandoval, as proxy of Carlos Gonzalez Nuño, against Roberto López Chávez and the 11 April 2011 unlawful judgement and order; ¹²⁸
		3. 19 October 2011 unlawful pre-seizure actions by Quintana Roo authorities; ¹²⁹
		4. 24 October 2011 summons ordering presence before the PGR and questioning by PGR; ¹³⁰
		5. Failure to investigate criminal complaint of 31 October 2011 brought before Public Prosecutor in Tulum against Lorenzo Novelo Pacheco or anyone else responsible regarding illicit acts in the transfer of parcel; ¹³¹

¹²⁶ Memorial on Jurisdiction, ¶ 3.

¹²⁷ **CS-0016**, Criminal Complaint of Carlos Sastre before the Public Prosecutor, May 7, 2008.

¹²⁸ **R-043**, Commercial Executive Trial 1705/2009 before the Tenth Commercial Court, First Judicial Party of the State of Jalisco, promoted by Carlos Gonzales Nuño through attorney Marco Antonio González Sandoval, against Roberto López Chávez. (Initial action, judgment and court order including exequatur request and Tulum court order).

¹²⁹ NOA #2, 45; Witness Statement of Carlos Sastre, ¶ 35.

¹³⁰ Witness Statement of Carlos Sastre, ¶ 36.

¹³¹ Witness Statement of Carlos Sastre, ¶ 36. **R-044**, Criminal complaint brought by Carlos Sastre as representative of CETSA dated 31 October 2011 against Lorenzo Novelo Pacheco in regard to illicit acts in the transfer of parcel Lot 19 “A” of hotel “Cabañas Tierra del Sol” and **R-045**, Criminal complaint brought by Carlos Sastre as representative of CETSA dated 31 October 2011 against Lorenzo Novelo Pacheco in regard to desposesión).

		6. 31 October 2011 unlawful judicial seizure order, actions, and law enforcement abuse by the Civil Court of Playa del Carmen, Quintana Roo; ¹³²
		7. 22 November 2011 Amparo proceeding initiated and delayed until 2 October 2015 Amparo judgement; ¹³³ and
		8. 2 October 2015 unlawful Amparo judgement. ¹³⁴
2.	Hamaca Loca S.A. de C.V. (HLSA), Cabañas Hamaca Loca, and the land parcel rights related to Cabañas Hamaca Loca (Hamaca Loca Investments)	1. Fraudulent court proceeding Juicio Ejecutivo Mercantil 1705/2009 initiated on 28 April 2009 under the Mercantile Courts of Guadalajara by Marco Antonio Gonzalez Sandoval, as proxy of Carlos Gonzalez Nuño, against Roberto López Chávez and the 11 April 2011 unlawful judgement and order; ¹³⁵
		2. 31 October 2011 unlawful judicial seizure order, actions, and law enforcement abuse by the Civil Court of Playa del Carmen, Quintana Roo; ¹³⁶
		3. 22 November 2011 Amparo proceeding initiated and delayed until 2 October 2015 Amparo judgement; ¹³⁷ and
		4. 2 October 2015 unlawful Amparo judgement. ¹³⁸
3.	Hotel Behla Tulum, La Tente Rose, and the land parcel rights related to Hotel Behla Tulum (Behla Tulum Investments)	1. Fraudulent court proceeding Juicio de Jurisdiccion Voluntaria 324/2016 and 326/2016 brought by Erick Castello Meraz, in representation of Mauricio Esteban Schiavon Magana, Ciro Miguel Schiavon Magana, Jose Rafael Schiavon Magana y Francesco Saveria Schiavon Magaña in the Family and Civil Courts of the Judicial District of Solidaridad, Quintana Roo on 24 May 2016 and unlawful judgement of 15 June 2016; ¹³⁹

¹³² NOA #2, 46-51; Witness Statement of Carlos Sastre, ¶ 37-51.

¹³³ **R-046**, Amparo 1585/2011 submitted by Sastre on behalf of CETSA.

¹³⁴ **C-0029**, Dismissal Juzgado Segundo de Distrito in Quintana Roo (Federal Court Dismissal).

¹³⁵ **R-043**, Commercial Executive Trial 1705/2009 before the Tenth Commercial Court, First Judicial Party of the State of Jalisco, promoted by Carlos Gonzales Nuño through attorney Marco Antonio González Sandoval, against Roberto López Chávez. (Initial action, judgment and court order including exequatur request and Tulum court order).

¹³⁶ NOA #2, ¶¶ 46-51; Witness Statement of Carlos Sastre ¶¶ 37-51.

¹³⁷ **R-048**, Amparo 1583/2011 submitted by Hamaca Loca-HLSA, November 22, 2011.

¹³⁸ **C-0029** Dismissal Juzgado Segundo de Distrito in Quintana Roo (Federal Court Dismissal).

¹³⁹ **R-049**, Voluntary Jurisdiction trial 324/2016 before the Oral Family and Civil Court of First Instance of the Judicial District of Solidaridad, Quintana Roo promoted by Erick Castello Meraz on behalf of Mauricio

		2. 17 June 2016 unlawful judicial seizure order; ¹⁴⁰
		3. 17 June 2016 unlawful seizure action; ¹⁴¹
		4. Amparo proceeding initiated; ¹⁴²
		5. Unlawful Amparo judgement;
4.	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)	1. Fraudulent court proceeding Juicio de Jurisdiccion Voluntaria 324/2016 and 326/2016 brought by Erick Castello Meraz, in representation of Mauricio Esteban Schiavon Magana, Ciro Miguel Schiavon Magana, Jose Rafael Schiavon Magana y Franceso Saveria Schiavon Magana in the Family and Civil Courts of the Judicial District of Solidaridad, Quintana Roo on 24 May 2016 and unlawful judgement of 15 June 2016; ¹⁴³
		2. 17 June 2016 unlawful judicial seizure order; ¹⁴⁴
		3. 17 June 2016 unlawful seizure action; ¹⁴⁵
		4. Unsuccessful legal action to recover property; ¹⁴⁶

Esteban, Ciro Miguel, José Rafael and Francesco Saveria , all surnamed Schiavon Magaña, against Claudia Yvette Arzapalo Tejeda; **R-050**, Compensation process, execution of the transactional agreement of evacuation and delivery 326/2016 before Itinerant Oral Court of First Instance of the Judicial District of Solidaridad, Quintana Roo promoted by Erick Castello Meraz as legal representative of Mauricio Esteban, Ciro Miguel , José Rafael and Francisco Saveria, all surnamed Schiavon Magaña, against Fernando Fuentes de la Cruz; NOA # 2, ¶¶53-57; Witness Statement of Mr. Jacquet, ¶¶ 34-46.

¹⁴⁰ *Idem.*

¹⁴¹ Witness Statement of Mr. Jacquet, ¶¶ 44-46.

¹⁴² Witness Statement of Mr. Jacquet, ¶¶ 44-46.

¹⁴³ **R-049**, Voluntary Jurisdiction trial 324/2016 before the Oral Family and Civil Court of First Instance of the Judicial District of Solidaridad, Quintana Roo promoted by Erick Castello Meraz on behalf of Mauricio Esteban, Ciro Miguel, José Rafael and Francesco Saveria , all surnamed Schiavon Magaña, against Claudia Yvette Arzapalo Tejeda; **R-050**, Compensation process, execution of the transactional agreement of evacuation and delivery 326/2016 before Itinerant Oral Court of First Instance of the Judicial District of Solidaridad, Quintana Roo promoted by Erick Castello Meraz as legal representative of Mauricio Esteban, Ciro Miguel , José Rafael and Francisco Saveria, all surnamed Schiavon Magaña, against Fernando Fuentes de la Cruz; NOA # 2, ¶¶53-57; Witness Statement of Mr. Jacquet, ¶¶ 35-43.

¹⁴⁴ *Idem.*

¹⁴⁵ Witness Statement of Nuno Silva ¶¶ 35-43

¹⁴⁶ Witness Statement of Nuno Silva ¶¶ 41.

		5. 2 July 2016 Amparo proceeding initiated; ¹⁴⁷
		6. Unlawful Amparo judgements; ¹⁴⁸
5.	Hotel Parayso Tulum and the land parcel rights related to Parayso (Parayso Investments)	1. Fraudulent court proceeding Juicio de Jurisdiccion Voluntaria 324/2016 and 326/2016 brought by Erick Castello Meraz, in representation of Mauricio Esteban Schiavon Magana, Ciro Miguel Schiavon Magana, Jose Rafael Schiavon Magana y Franceso Saveria Schiavon Magana in the Family and Civil Courts of the Judicial District of Solidaridad, Quintana Roo on 24 May 2016 and unlawful judgement of 15 June 2016; ¹⁴⁹ 2. 17 June 2016 unlawful judicial seizure order; ¹⁵⁰ 3. 17 June 2016 unlawful seizure action; ¹⁵¹ 4. 8 July 2016 Amparo proceeding initiated; ¹⁵² 5. Unlawful Amparo judgement and appeal; ¹⁵³

Source: Own elaboration.

¹⁴⁷ Witness Statement of Nuno Silva, ¶ 42; **R-051**, Amparo Indirecto 997/2016 before the Second District Court in the State of Quintana Roo, promoted by Maria Margarida de Abreu Oliveira and Eduardo Nuno Vaz Osorio Dos Santos Silva, the latter representing O.M. del Caribe S.A. de C.V.

¹⁴⁸ Witness Statement of Nuno Silva, ¶ 42; **R-051**, Amparo Indirecto 997/2016 before the Second District Court in the State of Quintana Roo, promoted by Maria Margarida de Abreu Oliveira and Eduardo Nuno Vaz Osorio Dos Santos Silva, the latter representing O.M. del Caribe S.A. de C.V.

¹⁴⁹ **R-049**, Voluntary Jurisdiction trial 324/2016 before the Oral Family and Civil Court of First Instance of the Judicial District of Solidaridad, Quintana Roo promoted by Erick Castello Meraz on behalf of Mauricio Esteban, Ciro Miguel, José Rafael and Francesco Saveria, all surnamed Schiavon Magaña, against Claudia Yvette Arzapalo Tejeda; **R-050**, Compensation process, execution of the transactional agreement of evacuation and delivery 326/2016 before Itinerant Oral Court of First Instance of the Judicial District of Solidaridad, Quintana Roo promoted by Erick Castello Meraz as legal representative of Mauricio Esteban, Ciro Miguel, José Rafael and Francisco Saveria, all surnamed Schiavon Magaña, against Fernando Fuentes de la Cruz; NOA # 2, ¶¶ 53-57; Witness Statement of Mónica Galán, ¶¶ 41-51.

¹⁵⁰ *Id.*

¹⁵¹ Witness Statement of Mónica Galán, ¶ 50. **R-047**, Amparo Indirecto 1003/2016 before the Third District Court of the State of Quintana Roo promoted by Mónica Galán Ríos; and **R-061**, Amparo en revisión 199/2017 before the Third Collegiate Court of the Twenty-Seventh Circuit, with residence in Cancún, Quintana Roo, promoted by Mónica Galán Ríos against the resolution in the 1003/2016 amparo trial.

¹⁵² Witness Statement of Mónica Galán, ¶ 50.

¹⁵³ Witness Statement of Mónica Galán, ¶¶ 41-51.

63. There are commonalities in the measures affecting the Tierras del Sol and Hamaca Loca investments and, separately, commonalities in the measures affecting the Behla Tulum, Astro lodge and Parayso investments. However, each group of investments was subject to a different combination of government measures, some of which were unique to the investments.

64. This third element of a “dispute” demonstrates that there are either two or four distinct disputes.

d. There are four distinct treaties being invoked

65. Claimants are invoking provisions under the Mexico-Argentina BIT, the Mexico-France BIT, the Mexico-Portugal BIT and the NAFTA. Thus, the fourth element of a dispute demonstrates that there are four distinct disputes.

e. The commonalities identified by the Claimants are not determinative of the existence of a single dispute

66. The Claimants do not address the above elements of a dispute. Instead, the Claimants identify the following commonalities in their claims:

- a. The investments were all in the same location—they were located on beachfront lots in Tulum, Mexico, all within a few meters of each other;
- b. Each Claimant acquired his or her rights to the investment from a member of the same *ejido*, pursuant to the same regulatory framework;
- c. Each Claimants’ investment was inspected and certified by the same authorities;
- d. Each of the investments was similar in type, size, and business makeup, which included a central hotel facility facing the ocean, with properties that were developed and expanded by each Claimant during the course of the investment;
- e. Respondent’s physical seizure of the hotel properties occurred on 31 October 2011 (in the case of two Claimant hotels) and 17 June 2016 (for the other three hotels), under the same administration of former governor Roberto Borge;
- f. Each of the investments was seized or destroyed using the same scheme via fraudulent lawsuits designed to deprive Claimants of their due process rights, in conspiracy with officials of Respondent acting in their official capacities;
- g. Each of the investments was seized by the same government officials, including public security officers and court representatives in the state of Quintana Roo;
- h. Each of the hotels was seized in violation of treaty provisions that are similar or identical, namely fair and equitable treatment, full protection and security, and the protection against unlawful expropriation;

i. Due to the similarities among the hotel investments, the damages caused by Respondent's unlawful conduct will be calculated using a similar methodology for each individual investment.¹⁵⁴

67. These commonalities relate to: (i) geographic location of the investments and applicable regulatory and compliance regime related to that location; (ii) sector in which the investments are made; (iii) governing administration, officials, representatives; (iv) character of the challenged measures; (v) substantive nature of invoked treaty provisions; and (vi) damages methodology.

68. These commonalities are not determinative of whether there is a single dispute or multiple distinct disputes in this arbitration. With respect to (i), a given geographic location and its location-specific regulatory and compliance regime can present multiple distinct disputes. The mere fact they are initiated in the same location does not make them a single dispute. The same reasoning applies to (ii) the sector in which the investments are made, (iii) the governing administration, officials and representatives, and (iv) the character of the challenged measures. Multiple disputes can arise within each category and the mere fact they are in that category does not mean they are a single dispute. The substantive type of treaty provisions invoked in this arbitration are commonly invoked by investors in other investment claims against Mexico and common damages methodologies are utilized in those claims. Under the Claimants' argument, these commonalities would make most if not all investment disputes brought against Mexico a single dispute.

(1) Claimants have not proven they acquired rights to investments from a member of the same ejido

69. As noted by Respondent's agrarian law expert, Claimants have not proven the ejido status of the persons allegedly transferring ejido rights to Claimants.¹⁵⁵

(2) Rights were not acquired in the same manner

70. Claimants acquired their investments in different ways and with different types of arrangements and contracts, for example:

- Sastre and HLSA initially acquired the hotels parcels through the corporate entities incorporated under Mexican laws, while Galan and Abreu acquired them as individuals. Jacquet's two parcels were acquired in similar ways.
- Jacquet, Silva and Abreu initially developed the hotel through third party rights;

¹⁵⁴ Counter-Memorial on Jurisdiction, ¶ 119.

¹⁵⁵ Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 10, 42, 48, 55, 65 and 71; and **PGPG-0048**.

- The types of contracts adduced to establish their rights to parcels also vary. For example, Jacquet has adduced a commodatum agreement instead of a transfer of rights agreement

(3) Ex-governor Roberto Borge is not a common element

71. Claimants own evidence disproves the argument that Roberto Borge was a common thread between the two different seizures. Claimants indicate two different dates in which the seizures of the Hotels took place. The first set of seizures affecting Sastre regarding Cabañas Tierras del Sol and Cabañas Hamaca Loca took place on 31 October 2011, a few months after Roberto Borge took office as Governor of Quintana Roo based on case 1709/2009 under the Mercantile Courts of Guadalajara.¹⁵⁶ The 31 October 2011 seizure was based on a court order dated 11 April 2011 from case 1709/2009 initiated on 28 April 2009 in the Mercantile Courts of Guadalajara, *i.e.*, the trail begun two years before Roberto Borge took office as Governor of Quintana Roo.¹⁵⁷ Roberto Borge clearly is not and could not have been a factor in the first set of seizures.

72. The second set of seizures took place on 17 June 2016 which were based on the Voluntary Jurisdiction trial (Jurisdicción Voluntaria) 324/2016 and 326/2016 initiated in the Family and Civil Courts of the Judicial District of Solidaridad, Quintana Roo on 24 May 2016. Nonetheless as the Claimants own evidence notes, since 2004, Jacquet was aware that his ejido parcel ownership “might not be airtight” and that there were “legal uncertainties surrounding land ownership” which resulted in other seizures in the area in 2009, 2011 and 2013.¹⁵⁸ The fact that Roberto Borge could have been a factor in the second set of seizures was incidental, as Claimants own record shows that the ownership issues affecting their parcels originated long before Roberto Borge became governor.

73. With respect to the administration of former governor Roberto Borge, Claimants have not presented any evidence that the administration specifically targeted their hotels with the measures identified above. Claimants witness statement and the licenses and permits obtained from the

¹⁵⁶ NOA #2, ¶ 62; C-0029, p. 2-3; **C-0040** 2011 Written Declaration of Luis Miguel Escobedo Perez, ¶ 76.

¹⁵⁷ **R-071**.

¹⁵⁸ **C-0026**, Kirk Semple, Evictions by Armed Men Rattle a Mexican Tourist Paradise, N.Y. Times (Aug. 16, 2016); C-0025, Alex Cuadros, Inside the Turmoil in Tulum, Mexico’s Hottest Beach Destination, Town & Country (March 7, 2017).

Quintana Roo state and Tulum municipal governments during the relevante dates shows otherwise.¹⁵⁹

(4) Claimants have not proven that seizures were based on a common government scheme

74. Claimants own evidence disproves their argument that the seizures were based on a common government scheme. Claimants refer to several media articles to prove the common government scheme.¹⁶⁰ However, Roberto Borge had not yet taken office as governor of Quintana Roo when case 1709/2009 that resulted in the first seizures was initiated. This case, which resulted in the first set of seizures was a mercantile proceeding, not a labor proceeding, originating in Guadalajara, not in Quintana Roo. With respect to the second set of seizures, whatever general role Roberto Borge would have had as the Governor that might have been relevant to the actions taken against the Claimants, it was incidental to Claimants' ownership issues with respect to their hotel parcels, which commenced long before Roberto Borge became governor.

(5) The invoked investment treaties are substantially different

75. As noted in this Reply, the invoked treaties are noticeably different and require that Claimants satisfy different jurisdictional requirements:

- Not all of the treaties contain consolidation provisions.
- Not all of the treaties contain explicit legality requirements;
- The Mexico-Argentina BIT contains special provisions regarding investors domicile;

¹⁵⁹ Counter-Memorial on Jurisdiction, ¶¶ 4, 76 and references in footnote 111.

¹⁶⁰ **C-0026**, *Kirk Semple, Evictions by Armed Men Rattle a Mexican Tourist Paradise*, *N.Y. Times* (Aug. 16, 2016); **C-0027**, *The Yukatan Times, Owners of Hotels Illegally Stripped in Tulum Seek to Recover Them* (February 8, 2017); **C-0030**, *Press Release, Beristain pide solución justa a demandas de despojados en Tulum, Quintana Roo* (Birstain asks for a fair solution for complaints by land seizures victims in Tulum, Quintana Roo); **C-0031**, *Juez Federal Frustra otro "Robo" de Robert Borge* (Federal Judge Frustrates Another "Theft" by Roberto Borge); **C-0042**, *La Historia de un Despojo en el Caribe Mexicano*, REVISTA PROCESO, 18 Diciembre 2015.

4. Conclusions

76. Individually or collectively, none of the commonalities identified by the Claimants override the above evidence related to the elements of a dispute: (i) claimants/investors; (ii) investments; (iii) government measures; and (iv) invoked treaty provisions. That evidence demonstrates that this arbitration consists of at least two or four distinct disputes.

77. On the basis of the foregoing, the facts clearly establish that there is not a single dispute before this Tribunal. Rather, there are either two or four distinct disputes. Accordingly, self-consolidation is not permitted.

IV. THE TRIBUNAL LACKS OF JURISDICTION BECAUSE THE REQUIREMENTS FOR ARBITRATION FOR EACH OF THE FOUR TREATIES HAVE NOT BEEN MET

A. General Issues Applicable to Respondent's Treaty-Specific Jurisdictional Objections

78. As the Respondent explained in the Memorial on Jurisdiction, the jurisdictional objections raised are related to the Claimants' lack of evidence regarding the existence of a “dispute”, arising from an “investment”, between the Respondent and an “investor” of one of the other States party to the invoked treaties.¹⁶¹ The Respondent reiterates its position established in the Memorial.¹⁶²

1. Relevante dates to demonstrate that jurisdictional requirements were met

79. In its Memorial, the Respondent objected to the Tribunal's jurisdiction on the basis that the Claimants' failed to prove that, at all relevante dates, they were:

(a) qualified “investors”; (b) investors in qualified “investments”; (c) their investments were legally constituted under the Respondent's laws, and (d) that they complied with all other requirements for submitting a dispute to arbitration.¹⁶³

80. The Claimants had to prove that they met these requirements at moments which include one or more of the following:

¹⁶¹ Memorial on Jurisdiction, ¶ 70.

¹⁶² Memorial on Jurisdiction, ¶ 90.

¹⁶³ Memorial on Jurisdiction, ¶ 71.

(i) when the investments were made; (ii) when the measures that gave rise to the alleged breaches occurred; and (iii) when the dispute was submitted to arbitration (i.e., at the time of the submission of the notice of arbitration (NOA)).¹⁶⁴

81. Specifically, on the facts of this arbitration, requirements (a)-(c) had to be proven to be met at relevant dates (i)-(iii);¹⁶⁵ the domicile requirement in requirement (d) at relevant dates (ii) and (iii);¹⁶⁶ and the other requirements in (d)—e.g., limitation period, notification, waiver, and other procedural requirements— at the relevant time (iv).¹⁶⁷ This Tribunal does not have jurisdiction because the Claimants have failed to prove that these requirements were met at the relevant dates.

82. These requirements and the relevant dates for proving them are specified in the texts of the invoked treaties, which govern the jurisdiction of this Tribunal.¹⁶⁸ Although the treaty texts take precedence, the requirements and relevant dates are also supported by ISDS jurisprudence.¹⁶⁹

83. In their Counter-Memorial, Claimants dismiss the Respondent’s objections completely calling them “an oversimplification”.¹⁷⁰ The Claimants contend that to be in compliance with the requirements of each Treaty at “all relevant dates” is “a blanket allegation”¹⁷¹ and a “blanket proposition that is belied by investor-State practice”¹⁷² because “it is not true that Claimants must prove that every jurisdictional claim is true at the moment of the investment, the violation, and the filing”.¹⁷³ The Claimants argue that they have met the *ratione temporis* requirements for this arbitration merely because the invoked treaties were in force when the alleged violations took place.¹⁷⁴

84. The Claimants agree with the Respondent on two of the requirements and some of the relevant dates for proving they have been met. The nationality requirement (which falls under

¹⁶⁴ Memorial on Jurisdiction, ¶¶ 27 and 71.

¹⁶⁵ Memorial on Jurisdiction, ¶ 71.

¹⁶⁶ Memorial on Jurisdiction, ¶¶ 216-219.

¹⁶⁷ Memorial on Jurisdiction, ¶¶ 228-248, 285-290, 352-359.

¹⁶⁸ Memorial on Jurisdiction, ¶ 72.

¹⁶⁹ Memorial on Jurisdiction, ¶ 73.

¹⁷⁰ Counter-Memorial on Jurisdictional Objections, ¶ 53

¹⁷¹ Counter-Memorial on Jurisdictional Objections, ¶ 12.f.

¹⁷² Counter-Memorial on Jurisdictional Objections, ¶ 49.

¹⁷³ Counter-Memorial on Jurisdictional Objections, ¶ 53.

¹⁷⁴ Counter-Memorial on Jurisdiction, ¶¶ 136-142, 252-255, 323-326.

requirement (a)) must be proven at the time of the measures that gave rise to the alleged breaches at the time the dispute was submitted to arbitration (relevant dates (ii) and (iii)).¹⁷⁵ The legality requirement (which falls under requirement (b)) must be proven at the time of the making of the investment (relevant date (i)).¹⁷⁶ With respect to the other requirements and relevant dates, the Claimants' arguments are legally flawed or incomplete.

85. First, the mere fact that the invoked treaties were in force when the alleged violations took place does not confer jurisdiction upon this Tribunal. The individual requirements specified in each treaty must be complied with.

86. Second, the texts of the invoked treaties are paramount in establishing the Jurisdiction of this Tribunal.¹⁷⁷ These texts specify the requirements that need to be proven and the relevant dates for doing so.¹⁷⁸ It is clear that requirements (a)-(c)—*i.e.*, qualified investor, qualified investment, and legality of investment— must be proven to be met at relevant dates (i)-(iii). This is consistent with the structure of the treaties wherein the substantive and procedural rights conferred upon the States parties to the treaties and their investors are limited to investors that are qualified under the terms of the treaty, who make qualified investments, and whose investments are legal under the laws of the respondent State, which is a condition of a qualified investment. These are common threads that tie together all stages of an investment and a dispute that must not be broken in order for an investor to bring a claim against a respondent State. The Claimants completely omit any discussion of these texts in their Counter-Memorial.

87. Third, although subordinate to the texts of the invoked treaties, the Respondent sets out in its Memorial the ISDS jurisprudence that supports the interpretation of the treaties.¹⁷⁹ The Claimants also refer to ISDS jurisprudence related to some, but not all, of the requirements and relevant dates, amounting to an incomplete rebuttal of the Respondent's jurisprudence. Moreover, the cited jurisprudence does not support the Claimants' propositions in all instances.¹⁸⁰ Although

¹⁷⁵ Counter-Memorial on Jurisdiction, ¶ 50 and footnote 68.

¹⁷⁶ Counter-Memorial on Jurisdiction, ¶ 51 and footnote 69.

¹⁷⁷ Memorial on Jurisdiction, ¶ 72.

¹⁷⁸ Memorial on Jurisdiction, ¶¶ 72, 216-219.

¹⁷⁹ Memorial on Jurisdiction, ¶ 73.

¹⁸⁰ Counter-Memorial on Jurisdiction, ¶ 50, footnote of page 68. For example, the Claimants cite the *García Armas and García Gruber v. Venezuela* case as supporting the principle that the only relevant dates to prove

different tribunals may express different views on the relevant dates, in part likely due to different treaty texts and factual circumstances. The jurisprudence cited by the Respondent and Claimants indicates that, with the exception of the legality of the investment, there is general agreement that the above requirements must be proven to have been met at both the time of the measures that gave rise to the alleged breaches and the time the dispute was submitted to arbitration. At the very least, the Respondent has established that the requirements were not met at the time of the alleged breaches. This, alone, is sufficient for this Tribunal to deny jurisdiction.

88. Fourth, the Claimants argue that the only relevant time for assessing the legality of the investment is at the time of making the investment.¹⁸¹ The Respondents agree that the time of making the investment is the principal time for assessing its legality, that an investment that is illegal when it is made is not covered by the respondent State's consent to arbitration, and that an arbitral tribunal has no jurisdiction over such an investment.¹⁸² However, this is without prejudice to the relevance of other time periods for assessing legality. The Respondent acknowledges the Claimants' concern regarding assessing the legality of investment at times subsequent to when it is first made. However, legality must be assessed on a case-by-case basis. There could be situations

nationality are the date of the alleged violation and the date on which the arbitral proceeding commences. This is incorrect because it ignores the set aside proceedings relevant to this arbitration. **CLA-0066**, *Serafin García Armas and Karina García Gruber v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-03, Decision on Jurisdiction, 15 December 2014, ¶ 9. In his Dissenting Opinion in *Garcia v. Venezuela*, Rodrigo Oreamuno Blanco disagreed with the majority and found that in order to be considered an investor and enjoy the protection afforded by the investment treaty, a potential claimant must have the nationality of one of the contracting parties when investing in the territory of the other contracting party. **RL-194**, *République Bolivarienne du Venezuela c. M. Garcia Armas & Mme Garcia Gruber*, *Cour d'appel de Paris no. 19/03588*, 3 juin 2020, ¶¶ 50-56. This opinion was echoed by the Paris Court of Appeal in the set aside proceedings. The Court of Appeal held that the tribunal wrongly declared itself competent and it set the tribunal's award aside in its entirety for several reasons: (a) the applicability of the arbitration clause deduced from the treaty depends on the fulfillment of all the conditions required by this Treaty on the nationality of the investor and the existence of an investment. (b) the tribunal did not undertake a textual analysis of the pertinent provisions in the BIT; (c) the tribunal erred in considering that the only condition for obtaining the protection of the BIT was to hold the nationality of the State of the investor on the date on which the alleged violation of the Treaty or the date of commencement of the arbitration; (d) the competence criteria set by the BIT are cumulative and indivisible; and (e) since the competence criteria set by the BIT are cumulative and indivisible, the arbitral tribunal failed to examine its jurisdiction in accordance with the terms of the Treaty and the offer of arbitration, by not verifying that the condition of nationality of the investors was fulfilled on the day when the investments were carried out.

¹⁸¹ Counter-Memorial on Jurisdiction, ¶ 51 and footnote 69.

¹⁸² Counter-Memorial on Jurisdiction, ¶ 52.

where an initial illegality is continued or evolves and further associated illegalities or new illegalities are created. In such circumstances, post-investment illegalities could be relevant to the tribunal's jurisdiction or other issues arising in the arbitration, including merits and damages. If the legality issue is settled in the jurisdictional stage, these broader aspects of illegality must be taken into account or deferred to a later stage.

2. The nationality and dominant and effective nationality of the other Party is a requirement in accordance with the text of the four invoked treaties and customary international law.

89. The Respondent established in its Memorial on Jurisdiction that the invoked treaties allow 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).¹⁸³ Respondent also pointed out that the invoked treaties do not pronounce on how to treat investors who have dual nationality.¹⁸⁴ In order to invoke dispute settlement mechanisms, the applicable principles of international law require investors with dual nationality to prove that their dominant and effective nationality at all relevant dates is that of one of the "other" States parties.¹⁸⁵

90. In their Counter-Memorial, Claimants point out that the fact, by itself, of upholding the nationality of one of the other State Parties to the invoked treaties allows them to access the dispute settlement mechanisms of the invoked Treaties.¹⁸⁶ With regard to the dual nationality of Sastre, Abreu, Silva, Galán, and Alexander and the application of the dominant and effective nationality doctrine, the Claimants argue that: (i) the treaties do not explicitly exclude dual nationals;¹⁸⁷ (ii) the UNCITRAL Rules do not rule on the criterion of dominant and effective nationality;¹⁸⁸ (iii) consequently, there is no place for the application of the dominant and effective nationality test in this case.¹⁸⁹

¹⁸³ Memorial on Jurisdiction, ¶ 74.

¹⁸⁴ Memorial on Jurisdiction, ¶ 74 and 76.

¹⁸⁵ Memorial on Jurisdiction, ¶ 76.

¹⁸⁶ Memorial on Jurisdiction, ¶¶ 55-65.

¹⁸⁷ Memorial on Jurisdiction, ¶¶ 133.

¹⁸⁸ Memorial on Jurisdiction, ¶¶ 133-135.

¹⁸⁹ Memorial on Jurisdiction, ¶¶ 133-135.

91. The Respondent reiterates that the Claimants have not met the *prima facie* standard regarding their nationality. Likewise, given that at least 5 of the investors are dual nationals with the nationality of the host State, the link between the investor and the host State is an issue that must be analyzed. This is particularly important in this case because, under Mexican law, only Mexican citizens can have the property rights that are claimed in this arbitration. As developed below, the invoked treaties and customary international law establish that, in the case of dual nationals, they may only file claims when their effective and dominant nationality is different from that of the host State. The Claimants have not demonstrated that their effective and dominant nationality during the relevant dates was different from that of Mexico.

a. Claimants have not met the *prima facie* standard regarding nationality

92. As a matter of international law, even in the practice of investment disputes in general, nationality is part of the "reserved domain" of the State.¹⁹⁰ As such, it is primarily by reference to the jurisdiction of a State that the investment tribunal generally confirms the nationality of a claimant, including its loss.¹⁹¹

¹⁹⁰ **RL-120**, *Nationality Decrees in Tunis and Morocco* (1923) PCJJ Scr. B., No. 4, 24.; **RL-121**, Convention Concerning Certain Questions relating to the Conflict of Nationality Laws of 12 April 1930, Article I, 179 L N. T.S. 89; R Y Jennings and A. Watts (eds.), *Oppenheim's International Law - Vol. I Peace* (9th cdn., Harlow: Longman, 1992) 852.

¹⁹¹ **RL-122**, *Hussein Nuaman Soufraki v United Arab Emirates*, ICSID Case ARB/02/7, Award of 7 July 2004, ¶¶ 49-52, 55; **RL-123**, *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 322. The tribunal noted that "...is well-established that the domestic laws of each Contracting State determine nationality, augmented where appropriate by international law"; **RL-104** *Dawood Rawat v. Republic of Mauritius*, PCA Case No. 2016-20, Award on Jurisdiction, 6 April 2018, ¶ 168 ("The question of whether an individual (or legal entity) is a national...is a question of municipal law"); **RL-124**, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt*, PCA Case No. 2012-07, Decision on Jurisdiction, 30 November 2017, ¶ 164. ("In summary, it is within the powers of and incumbent upon an international tribunal being a judge of its own competence to examine independently issues of nationality for the purposes of international law."); **RL-125**, *Nations Energy, Inc. y otros c. La República de Panamá*, Caso CIADI No. ARB/06/19, Laudo, 24 de Noviembre de 2010, ¶ 378. ("En cuanto a las reglas que determinan la nacionalidad, es generalmente aceptado en derecho internacional que las condiciones de adquisición y de pérdida de la nacionalidad están sometidas a la ley nacional.")

93. In the practice of investment disputes, evidence of nationality, such as passports, are part of the *prima facie* evidence that must be examined in cases presented by natural persons for the tribunals to ascertain their jurisdiction.¹⁹²

94. However, domestic determinations of nationality, including duly authorized passports, only constitute a *prima facie*, inconclusive, proof of nationality as a matter of international law.¹⁹³ Passports are accepted, inside and outside ICSID procedures, as *prima facie* evidence as long as they are not “effectively controverted by countering evidence or argument”.¹⁹⁴ This is because, as the *Soufraki* Ad Hoc Committee stated:

(...) international tribunals are empowered to determine whether a party has the alleged nationality in order to ascertain their own jurisdiction, and are not bound by national certificates of nationality or passports or other documentation in making that determination and ascertainment. This principle is well supported by the case law of international tribunals including ICSID tribunals, as well as by scholarly commentary on the subject (...).¹⁹⁵

95. In the *Soufraki* case, the tribunal noted that in order to determine whether the claimant had met its burden of proof regarding its Italian nationality, the tribunal had to “consider and analyze the totality of the evidence”, treating the nationality certificates of the claimants only as *prima*

¹⁹² **RL-126**, *Nottebohm Case (Liechtenstein v. Guatemala)*; Second Phase, International Court of Justice, 6 April 1955, p. 20: “it does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection...it is international law which determines whether a State is entitled to exercise protection and to seize the Court”; **RL-127**, C. Schreuer, *The ICSID Convention- A Commentary* (Cambridge CUP, 2001) Article 25, ¶ 433. *See also* **RL-122**, *Hussein Nuaman Soufraki v United Arab Emirates*, ICSID Case ARB/02/7, Award of 7 July 2004, ¶ 63. In determining the objection to the Respondent's *ratione personae* jurisdiction, the Tribunal noted that “The Tribunal will, of course, accept Claimant’s Certificates of Nationality as “*prima facie*” evidence”; **RL-124**, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt*, PCA Case No. 2012-07, Decision on Jurisdiction, 30 November 2017, ¶164. (“domestic determinations of nationality constitute prima facie evidence that generates a presumption of nationality that must be rebutted.”).

¹⁹³ **RL-075**, *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶ 230. “It is not in dispute that the ten Claimants’ passports serve as *prima facie* evidence of the existence of the ten Claimants’ Kazakh citizenship.”; **RL-129**, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Claimant Memorial, 14 May 2009, ¶ 38. (“A passport also constitutes *prima facie* evidence of nationality as a matter of international law...”).

¹⁹⁴ **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, ¶ 109. (With regard to the claimant's proof of nationality, the *Ad-Hoc* Committee determined that “[p]rima facie evidence is indeed evidence which should stand unless effectively controverted by countering evidence or argument.”).

¹⁹⁵ **RL-051**, *Hussein Nuaman Soufraki v United Arab Emirates*, ICSID Case ARB/02/7 Decision of the Ad Hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007, ¶ 64.

facie evidence.¹⁹⁶ Applying the Italian nationality law, the tribunal proceeded to remove the nationality documents that were supposed to inform the tribunal's opinion, including certain certificates of nationality issued by Italian officials and the letter from the Ministry of Foreign Affairs that was issued without investigating compliance with the Italian laws by the claimant or its full disclosure of relevant information to Italian officials.¹⁹⁷ Finally, the tribunal declined jurisdiction by determining that based on the “totality of the evidence adduced” the claimant had not met the burden of proof to demonstrate that it could invoke certain articles of Italian law to claim Italian citizenship in the two relevant dates.¹⁹⁸ The ICSID Annulment Committee confirmed the conclusion of the *Soufraki* tribunal and reiterated that when a jurisdictional issue is raised before an international tribunal regarding the interpretation of national law, based on the principle of jurisdiction, States do not have the last word on the matter of nationality.¹⁹⁹ The Committee also reiterated that official government documents of nationality “constitute *prima facie* – not conclusive – evidence, and are subject to rebuttal”.²⁰⁰ The annulment committee was careful to highlight that its findings were limited to a limited set of circumstances, many of which are present in the case before this Tribunal. Specifically, when the nationality tests are not suitable to conclusively establish the claimants' nationality (according to the national laws of the issuing state) when the nationality tests are issued without investigating the claimant's compliance with the nationality laws of the issuing country or are issued without the full disclosure of the claimants to the officials of the issuing country of information relevant to this determination. *Soufraki's*

¹⁹⁶ **RL-122**, *Hussein Nuaman Soufraki v United Arab Emirates*, ICSID Case ARB/02/7, Award, 7 July 2004, ¶¶ 62-63.

¹⁹⁷ **RL-122**, *Hussein Nuaman Soufraki v United Arab Emirates*, ICSID Case ARB/02/7, Award, 7 July 2004, ¶¶ 64-68.

¹⁹⁸ **RL-122**, *Hussein Nuaman Soufraki v United Arab Emirates*, ICSID Case ARB/02/7, Award, 7 July 2004, ¶¶ 81-82, 84.

¹⁹⁹ **RL-051**, *Hussein Nuaman Soufraki v. The 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, ¶¶ 59, 64.

²⁰⁰ **RL-051**, *Hussein Nuaman Soufraki v. The 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, ¶¶ 70 y 76.

approach has been reiterated and followed in *CEAC Holdings Limited*²⁰¹, *Víctor Pey Casado*²⁰², *Micula*²⁰³, *Bahgat*²⁰⁴, and *Arif*²⁰⁵.

96. It is also well established in international law that, although the domestic law of the State in question determines the nationality of a person, its effects in the international scope are within the competence of international law. Therefore, international law is applicable to determine whether the State Parties to an investment treaty agreed to grant protection to their binationals with no restrictions.²⁰⁶

97. This was established by the tribunal in *Serafín García Armas et al.* citing the following sources:

- Convention on Certain Questions Relating to the Conflict of Nationality Laws, April 12, 1930, Article 1 (“It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is

²⁰¹ **RL-128**, *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶¶ 154-160.

²⁰² **RL-077**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶ 319. Conclusiones que fueron confirmadas por las decisiones del comité de anulación del CIADI del 18 de diciembre de 2012 y del 8 de enero de 2020. Ver también, **RL-130**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Annulment, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012; **RL-130**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Annulment, 8 January 2020, ¶ 239.

²⁰³ **RL-131**, *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, ¶¶ 76-95.

²⁰⁴ **RL-124**, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt*, PCA Case No. 2012-07, Decision on Jurisdiction, 30 November 2017, ¶¶ 156-174.

²⁰⁵ **RL-132**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶¶ 357-359.

²⁰⁶ **RL-133**, *Serafín García Armas and Karina García Gruber v. República Bolivariana de Venezuela*, Caso CPA No. 2013-03, Decisión sobre Jurisdicción, 15 de diciembre de 2014, ¶ 707. (“La cuestión de si una persona posee o no la nacionalidad de un determinado Estado corresponde al derecho doméstico del Estado en cuestión. Sin embargo, los efectos de dicha nacionalidad en el plano internacional es un asunto que compete al derecho internacional.”). **RL-104**, *Dawood Rawat v. The Republic of Mauritius*, PCA Case 2016-20, ¶ 168. (“The first and key legal question, then, is whether the term “ressortissant”, as used throughout the France-Mauritius BIT includes or excludes dual nationals. The question of whether an individual (or legal entity) is a national or “ressortissant” of a state is a question of municipal law. Whether that nationality, once demonstrated, has legal effects on the international plane-the plane of investment treaties-is a question of international law”). **RL-134**, Draft Articles on Diplomatic Protection, with commentaries, text adopted by the International Law Commission at its fifty-eighth session, Yearbook of the International Law Commission, 2006, vol. II, Part Two, pp 31-35 (ILC Draft Articles on Diplomatic Protection).

consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.”);

- Comments on the Draft Articles on Diplomatic Protection, UN Doc. A/61/10, art. 4, ¶ 6 (“Although a State has the right to decide who are its nationals, this right is not absolute.”);
- European Convention on Nationality, November 6, 1997, ETS No. 166, art. 3;
- Nottebohm case (*Lichtenstein c. Guatemala*), International Court of Justice, Decision, April 6, 1955, 1955 ICJ Reports, p. 21 (“The naturalization [...] was an act performed [...] in the exercise of its domestic jurisdiction. The question to be decided is whether that act has the international effect here under consideration.”);
- Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco, 4, Permanent Court of International Justice, February 7, 1923, 1923 P.C.I.J. Reports, Serie B, No. 4, p. 24.²⁰⁷

98. Thus, in the area of disputes between investors and States, for a duly authorized passport to serve as *prima facie* proof of nationality, the following requirements must be met:

- The passport that proves nationality must cover the required dates;²⁰⁸
- No evidence is provided to indicate that the person does not have the presumed nationality on the relevant dates;²⁰⁹

²⁰⁷ **CLA-0066**, *Serafín García Armas and Karina García Gruber v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction, December 15, 2014, ¶ 707, footnote, 1162.

²⁰⁸ **RL-075**, *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶ 231. In this case, when examining whether the claimants had met the *prima facie* standard regarding their nationality based on the claimants' Kazakh passports, the tribunal distinguished between the claimants whose passport issuance covered the "required dates", the date of the non-compliance, and those that did not. However, the tribunal noted that it could conclude to apply the nationality laws of the state in question to determine the alleged citizenship of the claimant whose passport did not cover the required date because: a) "... no evidence has been adduced to suggest 'that he did not possess the alleged citizenship on the required date'"; b) the passport indicated that the claimant in question "... was born, according to its passport, in Kazakhstan", and; c) "in accordance with article 3 of the Citizenship Law it is probable that he has been a Kazakh citizen since his birth".

²⁰⁹ **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, ¶ 62. ("A certificate of nationality can, in principle, only be as correct as the information disclosed. The truth has to prevail over the formal appearance. ... mere recognition by a consul of a person as a citizen in a matter not requiring a specific investigation of citizenship is not sufficient."); **RL-124**, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt*, PCA Case No. 2012-07, Decision on Jurisdiction, 30 November 2017, ¶ 357. RL-. En *Bahgat*, the tribunal distinguished between "executive decisions interpreting and applying national law" that are "in general, are not final but open for judicial review under the laws of the State concerned" as examined by the tribunal of Soufraki y Micoula, and "judgment of the highest judicial branch whose decisions are final under Finnish law", at issue in *Bahgat*.

- Claimants do not have other nationalities.²¹⁰

99. The Respondent respectfully requests this Tribunal to exercise its *compétence-compétence* authority to determine whether it has jurisdiction over the Claimants' claim, as it considers that the Claimants' nationality documents do not satisfy the *prima facie* burden.

100. Even if this Tribunal considers that the evidence presented by the Claimants meets the standard for establishing the Claimants' nationality, the Respondent considers that it is insufficient to demonstrate its effects in the international scope at all relevant dates. Specifically, the Claimants have not proven that the invoked nationalities allow dual/triple nationality without any restriction and/or that the invoked nationality is their effective and dominant nationality.

b. The offers of arbitration in the four invoked treaties cannot be extended to claims of their own citizens in accordance with the text of the four invoked treaties and customary international law

101. The Respondent asserts that the Claimants have not demonstrated that their effective and dominant nationality during the relevant dates was different from that of Mexico. As developed below, the invoked treaties and customary international law establish that, in the case of dual nationals, they may only file claims when their effective and dominant nationality belongs to a party to the investment treaty other than the host State (*i.e.*, the Respondent).

102. In order to carry out a complete interpretation, the determination as to whether the text of each invoked Treaty allows claims by dual nationals is made below, consistent with the rule of interpretation contained in Article 31 of the Vienna Convention.

103. The Respondent asserts that an interpretation of the protection mechanisms contained in the invoked treaties in accordance with the ordinary meaning, in their context, and in the light of their objectives and purposes indicates that they do not cover the claims presented by dual nationals with the nationality of the Host State, in this case, Mexico.

²¹⁰ **RL-075**, *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶ 231; **RL-131**, *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (September 24, 2008), ¶ 104; **RL-135**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, ¶ 131.

104. In the following sections, each of the treaties invoked by the Claimants will be analyzed in detail.

(1) NAFTA

105. In the following sections, an analysis of Chapter XI of NAFTA will be carried out in accordance with the provisions of Article 31 of the Vienna Convention.

(a) Ordinary meaning of the term “investor of a Party”

106. As the Claimants grant, NAFTA limits access to the investor-State protection mechanism, to the “investor of a Party”.²¹¹

107. The definition of “investor of a Party” established in Article 1139 of NAFTA does not expressly include dual nationals. Therefore, the ordinary meaning established for the term “investor of a Party” is insufficient and it is necessary to analyze it in accordance to its context, as stated in Article 31 of the Vienna Convention, in order to establish whether the term, as it is used throughout the Chapter, includes the claims presented by dual nationals.

(b) Object and purpose

108. Article 102 of NAFTA establishes as the objective of the Agreement to “increase substantially investment opportunities in the territories of the Parties”, without expressly establishing the inclusion or exclusion of claims by dual nationals with regard to the mechanism contained in section B of Chapter XI of NAFTA, or provide further context on the meaning of the term “investor of a Party”.

(c) Context

109. First, according to Article 31(2) of the Vienna Convention, the context includes the text of the Treaty itself. Therefore, to interpret the text, the relevant provisions of the Agreement in which the term “investor of a Party” is used must be analyzed.

110. In this sense, it should be taken into account that the term “investor of a Party” is used throughout the Agreement in contrast to the reference to “another Party” to guarantee access to the protection of Chapter XI to a protected investor who is a foreign national (of “another Party”) and not a national of the Host State (“a Party”).

²¹¹ Counter-Memorial on Jurisdiction, ¶ 60.

111. Illustratively, Article 1116 (1) (Claim by an Investor of a Party on Its Own Behalf) of NAFTA limits access to the mechanism contained in Section B of Chapter XI to claims by an Investor of a Party (Canada) on its own behalf in the sense that another Party (Mexico) has breached an established obligation.²¹² The qualification of the term "Party" through the words "a" and "another" prevents the existence of identity in the reference to which they refer, *i.e.*, "a Party" and "another Party" cannot both be references to the Respondent State.

112. This same contrast is found in Article 1101, which limits the application of Chapter XI to measures adopted or maintained by **a Party** relating to investors of **another Party**. Allowing both references to mean the Respondent State would go against the logic of the Treaty, *i.e.*, granting protection only to "investors of another Party".

113. Second, Article 1122(2) (Consent to Arbitration) of NAFTA conditions consent of the Parties and the submission of a claim to arbitration by a disputing investor, *i.e.*, an investor that makes a claim under Section B of Chapter XI, to the fulfillment of the requirements indicated in Chapter II of the ICSID Convention (Jurisdiction of the Center).²¹³

114. In this way, Article 25 of the ICSID Convention is incorporated into the Treaty by reference, which excludes from the investor-State protection mechanism claims by dual nationals who have the nationality of the Respondent State.²¹⁴ To admit the contrary would imply to leave

²¹² NAFTA, Article 1116: Claim by an Investor of a Party on Its Own Behalf

"1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A or Article 1503(2) (State Enterprises), or (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A" [emphasis added]

²¹³ NAFTA, Article 1122 (Consent to arbitration). "[...] 2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties; [...]" [Emphasis Added]

²¹⁴ ICSID Convention, Article 25, "(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of

without effect the requirements of the consent of the Parties contained in Article 1122 of the NAFTA.

115. In conclusion, Chapter XI of NAFTA does not allow claims by dual nationals since (i) the references to “investor of a Party” and “another Party” cannot both be references to the Respondent State, and (ii) consent of the Parties is conditional on compliance with the requirements of the ICSID Convention.

(2) Mexico- Argentina BIT

116. In the following sections, analysis of the Mexico-Argentina BIT will be carried out in accordance with the provisions of Article 31 of the Vienna Convention.

(a) Ordinary meaning of the term

117. As established by the Claimants in their Counter-Memorial, Article 1 of the Mexico-Argentina BIT defines “Investor” as “toda persona física o jurídica que, realiza o ha realizado una inversión, y que, siendo persona física, sea nacional de una de las Partes Contratantes, de conformidad con su legislación”.²¹⁵ This term does not expressly include dual nationals. Therefore, the ordinary meaning is insufficient and it is necessary to analyze it according to the context of the Treaty, in accordance with its object and purpose.

(b) Object and purpose of the Mexico-Argentina BIT

118. The preamble of the Mexico-Argentina BIT indicates that it is intended to “ampliar e intensificar las relaciones económicas entre las Partes Contratantes, en particular, respecto de las inversiones de los inversores de una Parte Contratante en el territorio de la otra Parte Contratante” and “crear condiciones favorables para las inversiones de los inversores de una Parte Contratante en el territorio de la otra Parte Contratante, de acuerdo con el principio de reciprocidad internacional”.

Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.” [Emphasis added]

²¹⁵ Counter-Memorial on Jurisdiction, ¶ 56.

119. In this sense, the Treaty qualifies the "investor" by virtue of two elements (i) his investment and (ii) his relationship with one, not both, of the Contracting Parties, in contrast to the "other Contracting Party" in whose territory makes the investment.

120. Regarding the first point, Article One of the Mexico-Argentina BIT establishes that the protected investment is, "de conformidad con las leyes y reglamentaciones de la Parte Contratante receptora, todo tipo de activo invertido por inversores de una Parte Contratante en el territorio de la otra Parte Contratante". This definition enables the Host State, in accordance with its legislation, to delineate the scope of the "investment" protected by the Treaty. Under this premise, in Mexican law foreign investment is regulated through the Foreign Investment Law and its Regulations, the first one establishes in its Article 2, the following:

ARTICLE 2. For the purposes hereof, the following terms shall have the following meanings: [...]

II.- Foreign investment:

- a) Participation by foreign investors, in any percentage, in the capital stock of Mexican companies;
- b) Investments by Mexican companies in which foreign capital has majority interest; and
- c) Participation by foreign investors in activities and acts contemplated herein.

III.- Foreign investor: an individual or entity of any nationality other than Mexican, and foreign entities with no legal standing;²¹⁶ [Emphasis Added]

121. Therefore, according to the legislation of the Host State, in this case, Mexico, investments in Mexican territory must be made by investors who necessarily have a nationality other than Mexican, *i.e.*, who are not Mexican.²¹⁷

122. This position is strengthened by the second element that qualifies the "investor" in the Treaty, that is, the contrasting relationship between the references to "a Party" and "another Party" that are used throughout the Treaty, *e.g.*, Article 2, Article 10 and Article 1 of the Annex, to

²¹⁶ Foreign Investment Law, Article 2. **RL-137**.

²¹⁷ **R-138**, Political Constitution of the United Mexican States, Article 30. Mexican is understood to be those who have acquired nationality by birth or naturalization, in accordance with the scenarios provided by Article 30 of the Mexican Constitution. *Contrariu sensu*, only those who do not meet the requirements established in Article 30 of the Constitution are foreigners.

guarantee that the protected investment is made by an investor who is a foreign national and not a national of the Host State.

(c) Context

123. The Mexico-Argentina BIT provides in Article Tenth that investors may choose the ICSID Convention as a forum to submit their dispute. As explained *supra*, in this way, the exclusion of dual nationals established in Article 25 of the ICSID Convention is incorporated by reference into the Treaty.

124. To admit the contrary would mean to assume that the Treaty contains a different definition of the term “investor of a Party” depending on the eventual forum to which the dispute is submitted.

125. In conclusion, the protection mechanism contained in the Mexico-Argentina BIT does not cover claims submitted by dual nationals with the nationality of the Host State, in this case, Mexico, because (i) the treaty does not admit claims by virtue of investments made by investors with Mexican nationality, when the investments are made in Mexican territory, (ii) the contrast between the terms “investor of a Party” and “other Party” does not allow both to refer to the Respondent State and, (iii) the Reference to the ICSID Convention as a forum of choice confirms the exclusion of dual nationals.

(3) Mexico- France BIT

126. The objection related to the dual nationality of investors is not applicable to claims submitted under the Mexico-France BIT in this arbitration. However, the Claimant reiterates the jurisdictional objections contained in paragraphs 293-294 of the Memorial on Jurisdiction, which have not been rebutted by the Claimants.

(4) Mexico- Portugal BIT

127. In the following sections, analysis of the Mexico-Portugal BIT will be carried out in accordance with the provisions of Article 31 of the Vienna Convention.

(a) Ordinary meaning of the term

128. The Mexico-Portugal BIT defines “investor” as “personas físicas que tengan la nacionalidad de cualquiera de las Partes Contratantes, de conformidad con sus leyes y reglamentos”. This provision does not expressly extend BIT protection to dual nationals.

129. In this sense, the definition provided by the Treaty is insufficient to determine whether it includes within its protection dual nationals with the nationality of the respondent State. Said determination requires that the term "investor" be analyzed in its context, in light of the object and purpose of the BIT.

(b) Object and Purpose of the Mexico-Portugal BIT

130. The preamble of the Mexico-Portugal BIT establishes the objectives of “intensificar la cooperación económica entre los dos Estados”, “con el propósito de crear y promover condiciones favorables para las inversiones realizadas por los inversionistas de una de las Partes Contratantes en el territorio de la otra Parte Contratante sobre bases de igualdad y mutuo beneficio”.

131. In this sense, the Mexico-Portugal BIT qualifies the “investor” by virtue of two elements (i) the investment made and (ii) its relationship with one of the Contracting Parties, and not both, in contrast to the “other Contracting Party”.

132. With regard to the first point, Article 1 of the Mexico-Portugal BIT establishes that the protected investment is, “toda clase de activos y derechos invertidos por inversionistas de una Parte Contratante en el territorio de la otra Parte Contratante, de conformidad con las leyes y reglamentos de esta última”.

133. Likewise, Article 2.1 of the Mexico-Portugal BIT, specifies that “cada Parte Contratante promoverá y alentará dentro de su territorio, en la medida de lo posible, las inversiones realizadas por los inversionistas de la otra Parte Contratante, y admitirá dichas inversiones dentro de su territorio de conformidad con sus leyes y reglamentos”.

134. These provisions allow the State in whose territory the investment is received (host State), to delimit the scope of the “investment” protected by the Treaty in accordance with its own legislation.

135. As explained above, the Foreign Investment Law regulates foreign investments in Mexican territory and establishes that investment must be made by foreign investors, whom it defines as natural or legal persons who necessarily have a nationality other than Mexican, *i.e.*, those who are not Mexican.

136. Therefore, according to the legislation of the Host State, in this case, Mexico, the investments protected by the Mexico-Portugal BIT are confined to those made by investors who are not Mexicans.²¹⁸

137. The position of the Mexican State regarding the exclusion of dual nationals is strengthened with the second element that qualifies the "investor" protected in the Treaty, that is, the contrasting relationship between the references to "one of the Parties" and "another Party" that are used throughout the Treaty, *e.g.*, Article 3, Article 8 and Article 19, to guarantee that the protected investment is made in the territory of the host State by an investor who is a foreign national and not a national of the host State.

138. Therefore, the object and purpose of the Portugal-Mexico BIT do not allow to conclude that there is a willingness of the States Parties to include their dual nationals within the scope of protection of the Treaty.

(c) Context

139. The Mexico-Portugal BIT provides in Article 9 that investors may choose the ICSID Convention as a forum to submit their dispute. As explained above, in this manner, the exclusion of dual nationals contained in Article 25 of the ICSID Convention is incorporated by reference into the Treaty

140. To admit the contrary, would mean to assume that the Treaty contains a different definition of the term "investor of one of the Parties" depending on the eventual forum to which the dispute is submitted.

141. In conclusion, the protection mechanism included in the Mexico-Portugal BIT does not cover claims filed by dual nationals with the nationality of the Host State, in this case, Mexico, because (i) the treaty does not admit claims made by investors with Mexican nationality, when investments are made in Mexican territory, (ii) the contrast between the terms "investor of one of the Parties" and "other Party" does not enable both to refer to the respondent State, (ii) the reference to the ICSID Convention as a forum of choice confirms the exclusion of dual nationals.

²¹⁸ **R-138**, Political Constitution of the United Mexican States, Article 30. Mexican is understood to be those who have acquired nationality by birth or naturalization, in accordance with the scenarios provided by Article 30 of the Mexican Constitution. *Contrarius sensu*, only those who do not meet the requirements established in Article 30 of the Constitution are foreigners.

c. The requirement of nationality and dominant and effective nationality is in accordance with the text of the four invoked treaties and customary international law

142. As defined by the Respondent in paragraph 77 of the Memorial on Jurisdiction, the applicable international law rule is summarized in paragraph 8 of the United States' submission under Article 1128 of NAFTA in the case *Feldman v. Mexico*. In this case, the United States established and the tribunal held the position, that a State cannot be liable for claims made by its own nationals unless the Claimant is a dual national, whose dominant and effective nationality is that of another State.²¹⁹ The United States took a similar position in its submission under Article 1128 of NAFTA in *Alicia Grace et al. v. Mexico*.²²⁰ This principle has been reiterated by Zachary Douglas.²²¹

143. The Claimants argue that there is no place for the application of the dominant and effective nationality doctrine because the invoked treaties do not expressly exclude dual nationals and nationality must be determined in accordance with the applicable national law.²²² Likewise, they reject that the 1128 submission of the United States and the quotation of Zachary Douglas are applicable to support the application of said doctrine with respect to the invoked treaties.²²³

(1) The legal effects at the level of the invoked investment treaties is a matter of international law

²¹⁹ **R-048.** *Manuel García Armas and others v. República Bolivariana de Venezuela*, Caso CPA No. 2016-08, Laudo de Jurisdicción, 13 de diciembre de 2019, ¶ 90. (“El tribunal de *Feldman*, en un *dictum*, endosó la posición de los EE.UU. en ese sentido, y determinó que la búsqueda de la nacionalidad dominante era una consecuencia de la existencia de la doble nacionalidad.”)

²²⁰ **R-139.** *Alicia Grace and others v. United Mexican States*, ICSID Case No. UNCT/18/4, U.S. Submission under Article 1128, August 24, 2021, ¶¶ 3-8.

²²¹ **RL-084,** Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press (2009, p. 321; *See also RL-140,* Borzu Sabahi, Noah Rubins, Don Wallace, Jr. *Investor-State Arbitration* (2nd Edition) OUP, ¶ 11.24 (“Most investment treaties are silent about the status of dual nationals, raising the question whether the genuine and effective nationality rule applies. Professor Douglas is of the view that when an individual is a national of both the home and host state, a tribunal’s jurisdiction ‘extends to such individuals only if the former nationality is the dominant of the two’”).

²²² Counter-Memorial on Jurisdiction, ¶ 133-135.

²²³ Counter-Memorial on Jurisdiction, ¶ 135-137.

144. The Claimants allege that the requirement of dominant and effective nationality is not applicable under the invoked treaties since “*the treaties do not invoke (or even mention) this limitation to nationality*”; Claimants argue that their nationality must be determined in accordance with applicable national law.²²⁴

145. The Respondent agrees that the determination of nationality is a matter of national law. However, the invoked treaties also establish that the Tribunal will decide disputes in accordance with the applicable rules of international law, when applicable.²²⁵ But as noted in paragraphs 96-97 above, determining whether such nationality has legal effects at the level of invoked investment treaties is a matter of international law. Regardless of the inclusion of the words "dominant and effective nationality" in a treaty, it is a concept of public international law deeply rooted in customary international law.²²⁶ Therefore, the Claimants' assertion that the doctrine of "dominant and effective nationality" "has no relevance here unless a Treaty expressly includes it"²²⁷ is incorrect.

(2) The principle of no-fault liability

146. As defined by the Respondent in paragraph 77 of the Memorial on Jurisdiction, the applicable international law rule is summarized in paragraph 8 of the United States' submission under Article 1128 of NAFTA in *Feldman v. Mexico* and paragraphs 5-8 of the United States' submission under Article 1128 of the NAFTA in the case of *Alicia Grace v. Mexico*. There it was established that a State cannot be responsible for claims made by its own nationals, unless the Claimant is a dual national whose dominant and effective nationality is that of another State.

147. As specified in the Memorial on Jurisdiction, the investor-State regime is based on the principle that investment protection extends to investors who are nationals of a Contracting Party

²²⁴ Counter-Memorial on Jurisdiction, ¶ 126.

²²⁵ **RL-190**, TLCAN, Artículos 102 (2) y 1131; **RL-187**, BIT México- Argentina, Artículos 105 y 11.5; **RL-188**, BIT México Portugal, Artículos 15.1 y 17.6; **RL-189**, BIT México- Francia, Artículos 7.7 y 11.5.

²²⁶ **CLA-0076**, *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Award, 3 September 2019 ¶¶ 529, 531 (“... Nevertheless, the Tribunal has no doubt that the expression “dominant and effective” is rooted on customary international law.”)

²²⁷ Counter-Memorial on Jurisdiction, ¶ 127.

other than that of the Host State.²²⁸ As a general principle, a State cannot be responsible for the claims of its own citizens.²²⁹

(3) The silence of investment treaties on claims of their own citizens, *per se*, does not imply the inclusion of dual nationals within their protection

148. The Claimants assert that Mexico “*demands th[e] Tribunal take the unprecedented step to apply the dominant and effective nationality test when the subject treaties make no mention of the standard*”.²³⁰ They also allege that “*if the contracting States had wished to bar or restrict dual national claimants, they would have done so. Indeed, at least one of Respondent’s other investment treaties expressly excludes dual national investors*”.²³¹

149. The invoked treaties specify that the dispute settlement tribunals will decide in accordance with the provisions of the treaties themselves and the applicable principles of international law.²³² Therefore, the provisions of the treaty itself, interpreted in accordance with the general rule established under Article 31 of the Vienna Convention, and the principles of international law are applicable to decide on the exclusion, or where appropriate, the inclusion of dual nationals.²³³

²²⁸ Memorial on Jurisdiction, ¶ 74.

²²⁹ **RL-141**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 27 October 2015, ¶274. (“[D]ominant and effective nationality” is... aimed at preventing claims by dual nationals of *both* State parties ...from seeking to use the FTA to claim against their own State of dominant and effective nationality – thereby defeating the purpose of the FTA to apply investment protection only to “investors of the other Party”). *Ver tambien*, **RL-142**, *Alberto Carrizosa Gelzis, Enrique Carrizosa Gelzis and Felipe Carrizosa Gelzis v. Republic of Colombia*, PCA Case No. 2018-56, Award, 7 May 2021, ¶ 180; **RL-143**, *Cem Cengiz Uzan v. Republic of Turkey*, SCC Case No. V 2014/023, Judgment in the Svea Court of Appeal, 26 February 2018, ¶ 83. (“[I]t is a principle of international law, that a natural person cannot commence international dispute resolution against a state where he/she has citizenship, unless that state has explicitly agreed, or the person has double citizenship. In the latter case, it has been deemed possible to hold a state accountable for its actions against its own citizens if the person has shown that he/she has substantially closer connection”).

²³⁰ Memorial on Jurisdiction, ¶ 132.

²³¹ Counter-Memorial on Jurisdiction, ¶ 133.

²³² **RL-190**, NAFTA, Article 1131. **RL-187**, Mexico- Argentina BIT, Articles 105 y 11.5. **RL-188**, Mexico- Portugal, Articles 15.1 y 17.6. **RL-189**, Mexico- France, Articles 7.7 y 11.5.

²³³ Counter-Memorial on Jurisdiction, ¶ 133.

150. The principle of dominant and effective nationality has been recognized by various arbitration tribunals and by scholars²³⁴ as a rule of customary international law and is applicable to this arbitration even in face of the silence of the treaties.²³⁵ The precedents in *Rawat v. Mauritius* and *Heemsen v. Venezuela*, support the Respondent's position and confirm that the silence of the invoked treaties, *per se*, cannot mean the inclusion of dual nationals within their protection.²³⁶

151. Furthermore, the existence of other investment treaties entered into by Mexico with an express clause excluding dual nationals is irrelevant to the discussion raised before this Tribunal.

²³⁴ Despite the Claimants' comments on its' Counter-Memorial, (¶ 137), in the field of international investment arbitration, there is an important and well-founded doctrinal tendency in favor of the application of the general rules of international law on dual nationality. See **RL-048**, *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, footnote 1145. ("C. Schreuer, R. Dolzer, Principles of International Investment Law, Oxford University Press (2nd ed., 2012), p. 48...("Nationals of the host state are generally excluded from international protection even if they also hold the nationality of another State."); R. Dolzer, M. Stevens, *Bilateral Investment Treaties*, Martinus Nijhoff (1995), p. 34; **RL-145**, K. Yannaca-Small, "Who is Entitled to Claim?" en K. Yannaca-Small (ed.), *Arbitration under International Investment Agreements*, OUP (2nd ed. 2018), ¶ 10.06; **RL-146**, J. García Olmedo, "Claims by Dual Nationals under Investment Treaties: Are Investors Entitled to Sue Their Own States?", vol. 8(4) *Journal of International Dispute Settlement* p. 695; **RL-148**, M. Paparinskis, "Investment Treaty Interpretation and Customary Investment Law Preliminary Remarks" en C. Browns, K. Miles (eds), *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press (2011), p. 72; **RL-084**, Z. Douglas, *The International Law of Investment Claims*, Graduate Institute of International Studies (2009), ¶ 600 (... Even though Z. Douglas excludes the rules of diplomatic protection from investment arbitration, he accepts the application of the principle of dominant nationality in the field of investment arbitration).

²³⁵ **RL-149**, *Florence Strusky c. Mergé, Comisión de Conciliación Italoamericana*, Laudo, 10 de junio de 1955, 14 *Recueil des Sentences Arbitrales* p. 236, p. 241 ("In this connexion two solutions are possible: (a) the principle according to which a State may not afford diplomatic protection to one of its nationals against the State whose nationality such person also possesses; (b) the principle of effective or dominant nationality."); **RL-123**, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Partial Dissenting Opinion of Professor Francisco Orrego Vicuña, 11 April 2007, p.62. ("As the ICSID Convention does not define nationality, the principles of international law governing this matter come into play instantly. Cardinal among such principles is that of effectiveness. Ever since the *Nottebohm* case, this has been the accepted premise in international law and the recent work on the diplomatic protection of persons and property of both the International Law Commission and the International Law Association so confirms. There is no difference of opinion on this question with my learned colleagues"); **RL-152**, *Enrique Heemsen and Jorge Heemsen v. Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award on Jurisdiction, 29 October 2019, ¶ 440. ("En definitiva, el Tribunal es de la opinión que, en materia de inversiones internacionales, en caso de silencio del Tratado, la aplicación de los principios generales del derecho internacional conduce a la aplicación de la nacionalidad dominante y efectiva".)

²³⁶ **RL-104**, *Dawood Rawat v. The Republic of Mauritius*, PCA Case 2016-20, Award, April 6, 2018, ¶ 171; **RL-152** *Enrique Heemsen and Jorge Heemsen v. Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award, 29 October 2019, ¶ 414.

The treaties with third parties are not part of the context, object, or purpose of the treaties invoked by the Claimants in this arbitration.²³⁷ In this sense, the analysis of the *Tribunal de première instance francophone de Bruxelles* regarding the decision issued by the arbitral Tribunal in the case *Rawat v. Mauritius* is enlightening:

Le fait que tant la France que la République de Maurice aient expressément exclu les binationaux du champ d'application de traités d'investissements conclus ultérieurement avec des Etats tiers ne contextualise pas l'usage du terme "ressortissant" dans le TBI litigieux, sauf à considérer que les deux États aient jugé utile, pour lever toute conclusion, de préciser la portée de ce terme dans des instruments internationaux postérieurs.

Autrement dit, rien ne permet de considérer que les TBI conclus par la France ou la République de Maurice avec d'autres États participeraient à la définition des relations commerciales franco-mauriciennes.²³⁸

[Énfasis añadido]

152. Contrary to what is established by the Claimants in their Counter-Memorial, the Tribunal in *Feldman v. Mexico* did not reject the application of the principle of effective and dominant nationality.²³⁹ On the contrary, the Tribunal only specified that the principle developed in *Nottebohm* was not "precisely relevant" to the case, because in *Feldman* the issue under discussion was the relevance of U.S. citizenship versus Mexican permanent residence and not dual nationality. Mr. Feldman's connection to the U.S., through his citizenship, was sufficient in contrast to his residence in Mexico:

"...We are, therefore, not confronted, in terms of the state-individual relationship, with a conflict between, on the one hand, permanent residence and, on the other hand, superficial or artificial conferral of citizenship, but rather between the former and a citizenship which was conferred under normal circumstances in the first place and was not subsequently tainted by a total break of relationship. In these circumstances, citizenship must, as a matter of principle, prevail over permanent residence, as far as the issue of standing is concerned."²⁴⁰

²³⁷ **RL-153**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, ¶ 108. ("There is nothing in the Vienna Convention that would authorize an interpreter to bring in as interpretative aids when construing the meaning of one bilateral treaty the provisions of other treaties concluded with other partner States.").

²³⁸ **RL-104**, *Dawood Rawat v. The Republic of Mauritius*, Tribunal de première instance francophone de Bruxelles, Section Civile, 2018/6033/A, p.10.

²³⁹ Counter-Memorial on Jurisdiction, ¶ 136.

²⁴⁰ **RL-081**, *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, reprinted at 40 I.L.M. 615, 2001, ¶ 30-32. In *Feldman v. Mexico* the tribunal upheld jurisdiction over the claim presented by a United States national who had been a

153. The importance of the *Feldman* case regarding "dominant and effective nationality" is that the tribunal considered that the principle developed in *Nottebohm* was applicable despite the lack of explicit reference in NAFTA²⁴¹ and only rejected its application with respect to permanent resident investors of the Host State that are citizens of another Party, not when an investor is a citizen of the host State Party and a citizen of another Party.²⁴² The fact is that the principle of effective and dominant nationality, and its applicability under NAFTA, was also defined by the United States (also a State Party) in its submission under Article 1128 of NAFTA, as established by the Respondent in its Memorial on Jurisdiction. The Respondent agrees with the position of the United States regarding investors who are citizens of the host State Party and citizens of another Party.²⁴³

154. As indicated by the tribunal in *Feldman*, customary international law, *per se*, leads to the application of the principle of dominant and effective nationality, without the necessity for the requirement to be expressly included in the Treaty.²⁴⁴ Even if the Tribunal rejects the inclusion

Mexican resident, without being a Mexican national, under the consideration that citizenship, without distinguishing it from nationality, rather than residence, as a geographical relationship, is the main connection factor between the State and a natural person.

²⁴¹ **RL-081**, *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, reprinted at 40 I.L.M. 615, 2001, ¶ 36.

²⁴² **RL-081**, *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, reprinted at 40 I.L.M. 615, 2001, ¶¶ 30-32, 36. **RL-195**, *Wisner Robert y Gallus Nick*, Nationality Requirements in Investor- State Arbitration, pp.6-7.

²⁴³ Memorial on Jurisdiction, ¶ 77. **RL-081**, *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Counter-Memorial on Preliminary Questions, 8 September 2000, ¶¶ 8-34, 38-39, 44-97; **RL-081**, *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Counter-Memorial on Preliminary Questions, 28 September 2000, ¶¶ 5-14.

²⁴⁴ **RL-152**, *Enrique Heemsen and Jorge Heemsen v. Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award, 29 October 2019, ¶ 440. ("En definitiva, el Tribunal es de la opinión que, en materia de inversiones internacionales, en caso de silencio del Tratado, la aplicación de los principios generales del derecho internacional conduce a la aplicación de la nacionalidad dominante y efectiva"); **RL-048**, *Domingo García Armas, Manuel García Armas, Pedro García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, ¶¶ 693, 704. ("el Tribunal constata que existe una amplia y fundada tendencia doctrinal que se inclina a favor de la aplicación de las reglas generales del derecho internacional sobre dobles nacionales en el ámbito del arbitraje internacional de inversiones."); **RL-081**, *Marvin Roy Feldman Karpa c. United Mexican States*, ICSID Case No. ARB (AF) / 99/1, Interim Decision on Preliminary Jurisdictional Issues, December 6, 2000, ¶ 31 ("dual nationality problems, including the search of the "dominant or effective nationality", require the existence of a double citizenship"). **RL-104**, *Dawood Rawat v. The Republic of Mauritius*, PCA Case 2016-20, ¶ 168 (The first and key legal question, then, is whether the term "ressortissant", as used throughout the France-Mauritius BIT includes or excludes dual nationals. The question of whether an individual (or legal entity)

of the requirement of effective and dominant nationality in light of the text of the invoked Treaties, customary international law, *per se*, leads to the application of the principle of dominant and effective nationality, with no necessity of the requirement being expressly included in the Treaty.²⁴⁵

155. In this sense, the principle of dominant and effective nationality has been recognized by various arbitral tribunals as a rule of customary international law and is applicable to this arbitration.

(4) The exclusion of dual nationals with the nationality of the respondent State contained in Article 25 of the ICSID Convention is incorporated in the Treaties by reference

156. Furthermore, the Claimants argue that “*UNCITRAL Rules are likewise silent as to the dominant and effective nationality test*”, therefore, “*the test simply does not apply in this case.*”²⁴⁶ This assertion is incorrect.

is a national or “ressortissant” of a state is a question of municipal law. Whether that nationality, once demonstrated, has legal effects on the international plane-the plane of investment treaties-is a question of international law). **RL-060**, Draft Articles on Diplomatic Protection, with commentaries, text adopted by the International Law Commission at its fifty-eighth session, Yearbook of the International Law Commission, 2006, vol. II, Part Two, pp 31-35 (ILC Draft Articles on Diplomatic Protection). **RL-150**, *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited*, IUSCT Case No. 56, Partial Award (Award No. 310-56-3), 14 July 1987, ¶ 112. (“[R]ules of customary law may be useful in order to fill in possible lacunae of the Treaty to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions.”).

²⁴⁵ **RL-152**, *Enrique Heemsen and Jorge Heemsen v. Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award, 29 October 2019, ¶ 440. (“En definitiva, el Tribunal es de la opinión que, en materia de inversiones internacionales, en caso de silencio del Tratado, la aplicación de los principios generales del derecho internacional conduce a la aplicación de la nacionalidad dominante y efectiva”); **RL-150**, *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited*, IUSCT Case No. 56, Partial Award (Award No. 310-56-3), 14 July 1987, ¶ 112. *See also*, **RL-151**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, ¶ 119. (“Chapter Eleven of the NAFTA constitutes *lex specialis* in respect of its express content, but customary international law continues to govern all matters not covered by Chapter Eleven”).

²⁴⁶ Memorial on Jurisdiction, ¶ 134.

157. The Tribunal must consider that the four invoked treaties expressly mention ICSID Convention as a forum to submit a claim to arbitration.²⁴⁷ Therefore, the exclusion of dual nationals with the nationality of the respondent State contained in Article 25 of the ICSID Convention is incorporated in the Treaties by reference.²⁴⁸

158. To admit the contrary, would mean that there is a different definition for the protected investor according to the elected forum for each dispute. In this regard, the tribunal in *Heemsen v. Venezuela* maintained the following:

Adicionalmente, el hecho de que las partes en la disputa, es decir el inversor y el Estado receptor, puedan elegir voluntariamente someterse a un reglamento distinto del CIADI, conforme lo permite el artículo 10(2) del Tratado, no resulta justificativo válido para alterar la anterior conclusión. Ello porque la cuestión de si el Tratado protege o no a los dobles nacionales, decisión que pertenece exclusivamente a los Estados soberanos que negociaron y firmaron el Tratado, no puede depender del resultado de la negociación entre el inversor de turno y el Estado demandado años después [...]. Sostener lo contrario, implicaría asumir que el Tratado contiene una definición distinta del término “nacional” dependiendo del eventual foro al cual se somete la disputa por acuerdo de partes a la disputa y por parte de los Estados Contratantes.²⁴⁹

[Emphasis added]

d. Claimants have not proven that the nationalities invoked were dominant and effective in the relevant dates

159. Claimants argue that they are qualified “investors” because they acquired their rights over the properties and hotels in their capacity as foreigners, nationals of Argentina, France, Portugal, and Canada.²⁵⁰

²⁴⁷ NAFTA, Article 1120; BIT Mexico-Argentina, Article 10.4; BIT Mexico-Portugal, Article 9.1; BIT Mexico-France, Article 9.4.

²⁴⁸ See also, RL-081, Marvin Feldman v. Mexico, ICSID Case No. ARB (AF)/99/1, Counter-Memorial on Preliminary Questions, 8 September 2000, ¶ 76.

²⁴⁹ **RL-152**, *Enrique Heemsen and Jorge Heemsen v. Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award, 29 October 2019, ¶ 419; other tribunals have adopted the same point of view, for example, **RL-104**, *Dawood Rawat v. The Republic of Mauritius*, PCA Case 2016-20, Award, April 6, 2018, ¶¶ 176-179. **RL-048**, *Manuel García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, ¶ 721. (“Debido a esta estructura que impone la prioridad u obligatoriedad de los arbitrajes bajo el Sistema CIADI, el principio de no responsabilidad allí contenido permea el Tratado. Mediante la referencia al Sistema CIADI, las Partes Contratantes “han implícita, pero necesariamente, excluido a los dobles nacionales [españoles-venezolanos] del ámbito de aplicación del TBI”.”.)

²⁵⁰ Counter-Memorial on Jurisdiction, ¶¶ 55-65.

160. All but one of the six Claimants are also citizens of the Respondent (*i.e.*, Sastre, Abreu, Silva, Alexander, and Galán).²⁵¹ Their dual nationality (three nationalities in Sastre's case) is legally relevant for the determination of their "dominant" nationalities.²⁵² If the dominant nationality of a claimant is Mexican, investment protection and access to the ISDS mechanism under the invoked treaties are not available.

161. In this sense, the main cases of international law that address dual nationality have established non-exhaustive elements of different levels of importance to determine whether the invoked nationality should be attributed with "full international effect"²⁵³. On investment treaty claims, tribunals have also considered factors such as the nationality used by the claimants to acquire investments and the nationality used in formal acts directly related to the investment.²⁵⁴

162. For the purposes of the analysis, in this case, Respondent uses the following illustrative elements related to the dominant nationality of the five Claimants²⁵⁵:

- Habitual residence;
- Center of economic and financial interest, including employment;

²⁵¹ Memorial on Jurisdiction, ¶¶ 75.

²⁵² Memorial on Jurisdiction, ¶¶ 74-79.

²⁵³ Memorial on Jurisdiction, ¶¶ 74-79; **RL-126**, *Nottebohm Case (Liechtenstein v. Guatemala)* Second Phase, ICJ, Judgment, 6 April 1955, pp. 22, 24; CLA-0074, *Mergé Case*, Italian-United States Conciliation Commission, Decision No. 55, 10 June 1955, p. 247. In the *Nottebohm* case, the ICJ established a list of non-exhaustive factors of varying importance to determine whether "full international effect" should be attributed to the invoked nationality: (1) naturalization (which the court considered of "profound importance" given "the serious nature" of the process); (2) habitual residence; (3) the center of interests; (4) family ties; (5) participation in public life; (6) attachment to the country and inculcation to children. Likewise, in the *Mergé* case, the Italy-United States Conciliation Commission considered: (1) habitual residence; (2) the individual behavior of their economic, social, political, civic and family life, and; (3) the closest and most effective link with one of the two States.

²⁵⁴ **CLA-0076**, *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, Award, September 3, 2019, ¶¶ 588-596, 598.

²⁵⁵ **CLA-0076**, *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, Award, September 3, 2019, ¶¶ 554, 559, 579, 590. "In *Nottebohm*, the ICJ took the view that naturalization, as opposed to other factors which it considered merely illustrative, would always be a relevant factor. Hence, it considered that "[n]aturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being". We agree with this last statement. Naturalization is an important event in a person's life. It creates a particular bond to a country that certainly has legal consequences, and thus, should not be taken lightly." "[T]he Tribunal considers that the investment itself, the status of investor as well as other circumstances surrounding those elements may be relevant factors for assessing nationality and its dominance and effectiveness".

- Nationality used to acquire real estate;
- Center of political interest;
- Nationality used by the claimants to obtain investments;
- Nationality invoked by the claimants in formal acts directly related to their investment;
- Nationality invoked by the claimants in formal acts before the Mexican authorities related to their investments and matters that affect their investments, and;
- Naturalization.

163. These elements serve as support to show that, during the relevant dates, the Claimants exercised their Mexican nationality as the dominant and effective nationality.

(1) Claimants' witness statements confirm that they exercised Mexican nationality as their effective and dominant nationality during the relevant dates.

164. Messrs. Sastre, Silva, and Galán assert that they comply with the nationality requirement established by the invoked treaties.²⁵⁶

165. In addition to the facts that will be set forth in sections V.B. to V.E., Respondent maintains that Claimants' witness statements confirm that their dominant and effective nationality during the relevant dates was not their Argentine, Portuguese and Canadian nationality, respectively, but rather their Mexican nationality:

- **Sastre:** Mr. Sastre states that since 1996 he decided to move his residence, as well as his center of economic and financial interest from Argentina to Mexico and “vend[er] su distribuidora en Argentina”. Finally, in May 2009, he decided to obtain the Mexican nationality by naturalization and maintained his residence and economic interests in Mexico after the date of the alleged violating measures.²⁵⁷
- **Silva:** Mr. Silva decided to establish his residence and center of financial and economic interest in Mexico since 2002. Finally, in 2016, he decided to obtain the Mexican nationality by naturalization and maintained his residence and economic interests in Mexico after the date of the alleged violating measures.²⁵⁸
- **Galán:** Ms. Galán is Mexican by birth, in 2004, when she decided to acquire the property on which Hotel Parayso was built, she had her residence and business

²⁵⁶ Counter-Memorial on Jurisdiction, ¶¶ 55-64.

²⁵⁷ Witness Statement of Mr. Sastre, ¶¶ 3, 35, 51, 53 and 57.

²⁵⁸ Witness Statement of Mr. Silva, ¶¶ 4, 10, 35, 40, 41 and 46.

center, including her job, in her birth city. In 2007, she obtained the permanent residence, not the nationality, of Canada due to her relationship with Mr. Alexander and until 2015 she obtained the Canadian nationality. Therefore, she acquired and developed the alleged investment being Mexican.²⁵⁹

166. The evidence submitted by the Claimants shows that, despite holding nationalities other than Mexican, *de facto*, they exercised their Mexican nationality as the dominant and effective nationality during the development of their investments and at least in one of the relevant dates.

167. Respondent reiterates that Claimants cannot access the protection mechanism established in the invoked treaties when their effective and dominant nationality is that of the host State at the relevant dates.

(2) The waiver of Messrs. Sastre, Silva, and Abreu to their nationality of origin and to the protection of the Investor-State mechanism is express and clear and confirms that they exercised Mexican nationality as their effective and dominant nationality during the relevant dates

168. As explained by the Respondent in its Memorial on Jurisdiction, Claimants Sastre, Silva and Abreu have expressly renounced to “any rights granted to foreigners by international treaties or conventions”, including the right to invoke the ISDS mechanism under the invoked BIT, as a result of their Mexican naturalization.²⁶⁰ Therefore, this Tribunal does not have jurisdiction over these Claimants’ claims.²⁶¹

169. In their Counter-Memorial, Claimants argue that: (i) the invoked treaties are silent on the issue of waiver to the rights conferred by these treaties;²⁶² (ii) that pre-dispute waivers by investors are not possible because only the contracting parties to a treaty can waive treaty rights;²⁶³ and (iii) alternatively, if deemed possible, waivers had to meet a high threshold, which Respondent had not met.²⁶⁴

²⁵⁹ Ms. Galán Witness Statement, ¶¶ 15, 20 and 30; MG-0010.

²⁶⁰ Memorial on Jurisdiction, ¶¶ 242-248.

²⁶¹ Memorial on Jurisdiction, ¶¶ 133, 358.

²⁶² Counter- Memorial on Jurisdiction, 144.

²⁶³ Counter- Memorial on Jurisdiction, 144.

²⁶⁴ Counter-Memorial on Jurisdiction, (Sastre) 152, (Abreu and Silva), 156. A high threshold as set established in *SGS v. Paraguay*, *SGS v. Philippines*, *Nissan v. India*, *Nissan v. India*, *Duke Energy*

**(a) Claimants must prove the facts necessary
for the establishment of jurisdiction**

170. In the Memorial on Jurisdiction, Respondent argued that Claimants must prove their standing to invoke the ISDS mechanism, including that they did not renounce their arbitration rights against the Respondent as part of the Mexican naturalization process.²⁶⁵

171. Claimants assert that it is Respondent's burden to prove that this tribunal does not have jurisdiction over Sastre's, Abreu's, and Silva's claims because of their waiver to their investment treaty rights by virtue of the Mexican naturalization process.²⁶⁶

172. The Respondent maintains its position, it is the Claimants' burden to prove their standing to invoke the ISDS mechanism.²⁶⁷

**(b) The law applicable to the waiver of
investment treaty rights as a result of the
Mexican naturalization process**

173. The Respondent asserts that the applicable law to determine whether it has consented to international arbitration claims over investment rights that the Claimants voluntarily waived by virtue of the Respondent's naturalization process are (i) the invoked treaties, (ii) the applicable rules of international law, and (iii) the Respondent's domestic laws.

174. The Respondent's domestic law is not confined to factual matters but has a substantive role in defining the rights of standing of investor, particularly when investors are dual nationals of the host State and property rights are involved in the dispute. These rights are not defined by international law but by the local law to which the Claimant's investor has voluntarily submitted. The Respondent also asserts that when the parties have agreed on a forum selection clause giving jurisdiction to a domestic court, like that found in the Claimants' waivers, this choice cannot be ignored later by an international tribunal.

Electroquil Partners and Electroquil S.A. v. Republic of Ecuador, TSA Spectrum de Argentina S.A. v. Argentine Republic, Aguas del Tunari, S.A., v. Republic of Bolivia and Ulysseas, Inc. v. Ecuador.

²⁶⁵ Memorial on Jurisdiction, ¶ 133.

²⁶⁶ Counter-Memorial on Jurisdiction, ¶ 150

²⁶⁷ Claimant's own case law on waivers confirms this. *See also* **CLA-0037**, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶¶ 53-58; **CLA-0079**, *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019, ¶ 271. *See also* **CLA-0080**, *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 2.

(c) The Respondent did not consent to arbitration, under the invoked treaties, of international investment rights waived by the Claimants as a result of the naturalization process

175. The four invoked treaties expressly require a breach of a treaty obligation under the invoked agreement to trigger the Respondent's offer to arbitrate:

- Article 1(1) of the Annex to the Mexico-Argentina BIT reads: “El inversor de una Parte Contratante podrá, [...] someter una reclamación a arbitraje, cuyo fundamento sea el que la otra Parte Contratante ha incumplido una obligación establecida en el presente Acuerdo.” [emphasis added]
- Article 9(1) of the Mexico-France BIT reads: “Este Artículo solamente se aplica a controversias entre una de las Partes Contratantes y un Inversionista de la otra Parte Contratante, respecto a una presunta violación de una obligación de la primera, en virtud de este Acuerdo, que ocasione pérdida o daño al inversionista o a su inversión”. [emphasis added]
- Article 8(1) of the Mexico–Portugal BIT reads: “Esta Sección se aplica a controversias entre una Parte Contratante y un inversionista de la otra Parte Contratante, respecto a un supuesto incumplimiento de una obligación de la primera Parte Contratante conforme a este Acuerdo, que ocasione pérdida o daño al inversionista o a su inversión. Una inversión de un inversionista de la otra Parte Contratante, no podrá someter una controversia a resolución de conformidad con este Acuerdo”. [emphasis added]
- Article 1116(1) of the NAFTA reads: “An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A or Article 1503(2) (State Enterprises), or (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A and that the investor has incurred loss or damage by reason of, or arising out of, that breach”. [emphasis added]

176. At the moment of the alleged measures, Claimants Sastre (31 October 2011), Abreu, and Silva (17 June 2016) had already waived before Mexican authorities “all rights that international treaties or conventions grant to foreigners”:

- **Sastre** signed an agreement with the Respondent on May 27, 2009 whereby he indicates “renunci[ar] expresamente a la nacionalidad ARGENTINA y a cualquier otra nacionalidad” and “renunci[ar] a todo derecho que los tratados o convenciones internacionales concedan a los extranjeros”.²⁶⁸

²⁶⁸ **R-032**, Waiver Letter of Argentine Nationality of Sastre.

- **Abreu** signed an agreement with the Respondent on October 2, 2000 whereby she indicates “renunci[ar] expresamente a la nacionalidad PORTUGUESA y a cualquier otra nacionalidad” and “renunci[ar] a todo derecho que los tratados o convenciones internacionales concedan a los extranjeros”.²⁶⁹
- **Silva** signed an agreement with the Respondent on May 6, 2016 whereby he indicates “renunci[ar] expresamente a la nacionalidad PORTUGUESA y a cualquier otra nacionalidad” and “renunci[ar] a todo derecho que los tratados o convenciones internacionales concedan a los extranjeros”.²⁷⁰

177. The Respondent did not consent to arbitrate investment claims involving international law rights afforded by the Respondent to foreigner investors that voluntarily waived their rights in writing before the Respondent’s authorities through a naturalization process.

178. At the moment of the alleged measures, the measures could not have constituted an international breach in respect of each of these Claimants because of the voluntary waivers of their rights under the treaties. Thus, the conditions to trigger the Respondent’s offer to arbitrate did not materialize. Claimants cannot have a right to bring a claim with respect to a breach of a treaty obligation if Respondent does not have an international treaty obligation towards the Claimant at the moment of the measures.²⁷¹

(d) Foreign investors can waive their investment treaties rights under international law

179. The Claimants’ unsupported statement that “[t]ribunals examining this issue have expressed doubts as to whether pre-dispute waivers by investors are even possible. Only the Contracting Parties may waive treaty rights”²⁷² is simply incorrect.

180. It is recognized that investment treaties can confer direct rights on investors to act “on their own behalf and without their national state’s involvement or even consent”.²⁷³ The direct standing

²⁶⁹ **R-041**, Waiver Letter of Portuguese Nationality of Abreu.

²⁷⁰ **R-037** Waiver Letter of Portuguese Nationality of Silva.

²⁷¹ **CLA-0052**, *Ambiente Ufficio S.P.A. and others (formerly Giordano Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Dissenting Opinion of Santiago Torres Bernardez, 2 May 2013, ¶ 374; **RL-196**, *Impregilo S.p.A. v. Argentina Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern of 21 June 2011, ¶¶ 79-80.

²⁷² Counter-Memorial on Jurisdiction, ¶ 144.

²⁷³ **RL-197**, *Swissbourn Diamond Mines (Pty) Limited and others v. Kingdom of Lesotho*, PCA Case No. 2013-29, Set Aside Judgment of the High Court of Singapore, 14 August 2017, ¶ 224 citing *Republic of*

provided to investors is the right to pursue the host State of the investment in respect of any “investment dispute” that arises within the scope of the treaty, in particular a breach of a treaty right.²⁷⁴ Under this view, investment treaties are seen as creating a direct relationship between the host state party to the investment treaty and the investors of the other party that enables foreign “investors” to bring a claim on their own behalf regarding an alleged breach of treaty rights and without their national state’s involvement or even consent.²⁷⁵

181. The corollary of this principle is that foreign investors also have the right to waive access and rights to international investment treaties.²⁷⁶

182. This has been recognized and followed in United States’ Claims Commission’s findings, international law, and investment treaty case law.²⁷⁷ In *Woodruff*²⁷⁸ and *North American Dredging*²⁷⁹ both Claims Commissions recognized the waiver in contracts signed by the claimant with the State as committing individuals to submit contractual claims to local courts.²⁸⁰

Ecuador v. Occidental Exploration and Production Co [2005] EWCA Civ 1116, [2006] QB 432 at ¶¶ 14-22.

²⁷⁴ **RL-084**, Zachary Douglas, *The International Law of Investment Claims* (2009), p. 269.

²⁷⁵ **RL-084**, Zachary Douglas, *The International Law of Investment Claims* (2009), ¶ 65; **RL-198**, Oppenheim’s *International Law* (9th Ed.), ¶ 375 (“States can, and occasionally do, confer upon individuals, whether their own subjects or aliens, international rights *strictu sensu*, ie rights which they can acquire without the intervention of municipal legislation and which they can enforce in their own name before international tribunals”).

²⁷⁶ See **RL-199**, *Gami Investments Inc. v. Mexico*, UNCITRAL, Award, 15 November 2004, ¶ 37; **RL-200**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 79; **RL-201**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (also known as: *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*), Award, 22 May 2007, ¶. 186. Tribunals have insisted on the independence of foreign shareholders claims from those of local licensees. This case law stands for the proposition that only the owners of a right to foreign protection under a BIT can renounce it. Local operators cannot renounce or waive the rights foreign investors under a BIT that they do not have.

²⁷⁷ See **RL-202**, Lucius Caflisch, Chapter 23: Waivers in International and European Human Rights Law in Mahnoush H. Arsanjani, Jacob Cogan, eds., *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers, 2010), pp. 407-431.

²⁷⁸ **RL-203**, *Woodruff v. Venezuela*, RIAA, volume IX, Hague ICJ Registry, p. 213.

²⁷⁹ **RL-204**, *North American Dredging Company of Texas v. United Mexican States*, RIAA, volume IV, Hague ICJ Registry, p. 26.

²⁸⁰ **RL-203**, *Woodruff v. Venezuela*, RIAA, volume IX, Hague ICJ Registry, p. 213; **RL-204**, *North American Dredging Company of Texas v. United Mexican States*, RIAA, volume IV, Hague ICJ Registry, p. 26.

183. Investment treaty case law has recognized and applied the holdings in *Woodruff*²⁸¹ and *North American Dredging*. The *Azurix* tribunal noted the significance of *Woodruff*²⁸² and *North American Dredging* and held that this case stood for the principle “that the private parties could waive access to the Claims Commissions to settle contractual disputes with a State with which they had contracted”.²⁸³ Similarly, the tribunal in *SGS Société Générale de Surveillance S.A. v. Philippines*, applied *Woodruff*²⁸⁴ and *North American Dredging* in determining that the mutually agreed jurisdiction clause at issue was a binding obligation on both parties to resort exclusively to local courts that was not overridden by the BIT and the ICSID dispute settlement provisions, affecting the tribunal's jurisdiction regarding the claim.²⁸⁵ As noted in *Agua del Tunari*, referencing *Azurix*, “an explicit waiver by an investor of its rights to invoke the jurisdiction of ICSID pursuant to a BIT could affect the jurisdiction of an ICSID tribunal.”²⁸⁶

(e) Respondent's laws prevent Claimants from invoking the Investor-State mechanism due to the waiver of these rights by virtue of their Mexican naturalization

184. Any investor who wishes to invest in Mexico is subject to the provisions of the Respondent's legislation.²⁸⁷ As noted in the Memorial, the Respondent's Nationality Law requires foreign nationals to renounce their nationality, as well as any foreign protection and any rights that international treaties or conventions grant to foreigners in order to acquire Mexican nationality via naturalization.²⁸⁸ This waiver involves a written statement signed by the foreigner by which they

²⁸¹ **RL-203**, *Woodruff v. Venezuela*, RIAA, volume IX, Hague ICJ Registry, p. 213.

²⁸² **RL-203**, *Woodruff v. Venezuela*, RIAA, volume IX, Hague ICJ Registry, p. 213.

²⁸³ **RL-205**, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award on Jurisdiction, 8 December 2003, ¶ 85. The tribunal found *Woodruff* and *North American Dredging* inapplicable to the claim before the *Azurix* tribunal because Argentina was not a party to the contracts at issue containing the waiver and “there was no waiver commitment made by the Claimant in favor of Argentina”.

²⁸⁴ **RL-203**, *Woodruff v. Venezuela*, RIAA, volume IX, Hague ICJ Registry, p. 213.

²⁸⁵ **CLA-0078**, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, ¶¶ 130-155.

²⁸⁶ **CLA-0082**, *Agua de Tunuari v. Bolivia*, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶ 119.

²⁸⁷ **R-027**, Nationality Law, Articles 17 y 19.

²⁸⁸ Memorial on Jurisdiction, ¶¶ (Sastre) 242-248, (Abreu y Silva) 352-359.

expressly waive the attributed nationality and all of the rights in international treaties and conventions granted by Mexico to foreigners.²⁸⁹

i) Claimants voluntarily waived their nationalities of origin and international treaty rights

185. Sastre, Silva, and Abreu decided, voluntarily, to be bound by Respondent's Nationality Law when they requested the Mexican nationality, which entails the waiver of any other nationality and the rights that international treaties grant to foreigners, being irrelevant what is indicated by the legislation of any other country.

186. Claimants Silva, Sastre, and Abreu signed, voluntarily, agreements that clearly demonstrate their waiver to any nationality different than Mexican, as well as to the rights to which they had access under international treaties. The agreements signed by Sastre, Abreu, and Silva are clear and leave no doubt with regard to their scope. Although they do not indicate that the waiver refers specifically to the rights under the invoked BITs, including the possibility of pursuing arbitration under those treaties, it is clear that Claimants waived the rights that they could have, as foreigners, under the invoked BITs.²⁹⁰

187. Claimants were not required to waive their nationality of origin and the rights that international treaties conferred them. The fact of starting the naturalization application process does not entail any waiver.²⁹¹ However, completing the naturalization process and accepting Mexican nationality does entail the waiver of any other nationality and the rights that international treaties confer to foreigners.²⁹² It was not a requirement from the Respondent that Sastre, Silva, and Abreu, applied for Mexican nationality, nor there was any pressure to present the waivers they made.

²⁸⁹ Memorial on Jurisdiction, ¶¶ (Sastre) 242-248, (Abreu y Silva) 352-359. Ver también, **R-076**, Regulations of the Nationality Law, Articles 6, 8, 9, 14-23.

²⁹⁰ **R-032**, Waiver of Argentine Nationality of Tailor; **R-037**, Waiver of Portuguese Nationality from Silva; **R-041**, Waiver of Portuguese Nationality of Abreu.

²⁹¹ **R-027**, Nationality Law, Article 19. "Article 19.- The foreigner who intends to naturalize Mexican must: (...) II. Formulate the resignations and protest referred to in article 17 of this ordinance; The Secretariat will not be able to demand that such resignations and protests be formulated until the decision to grant nationality to the applicant has been made. The letter of naturalization will be granted once it is verified that these have been verified. "

²⁹² *Ídem*.

ii) **The purpose of this waiver is to prevent Respondent from being defenceless against its own nationals and to treat all nationals equally**

188. Beyond determining which State has the power to grant or withdraw a specific nationality, this Tribunal must evaluate the “*effet utile*” of the waiver agreed between Sastre, Silva and Abreu, respectively, with the Respondent. Said effect is not, exclusively, the waiver to their nationality *per se*, but rather a waiver of the protection conferred by international treaties on nationals of a State other than the Respondent. The purpose of the said waiver is to prevent the Respondent from being defenceless against its own nationals and to guarantee that all nationals – by birth or naturalised - receive the same treatment. Sastre, Silva, and Abreu exercised rights as Mexicans and decided to develop their investments before the Mexican State as Mexicans, not as foreigners, and now they seek to exercise rights as foreigners, which are not even available to Mexicans themselves.

(3) **Claimants' approach regarding applicable law and the high-threshold "waiver" test is not applicable to the particular facts of this case**

189. The Respondent also objects to the test set out by the Claimants based on the referenced case law.²⁹³

190. Claimants attempt to dismiss this objection on the basis of precedents that are not applicable to this case. First, none of the precedents cited by the Claimants is related to a waiver of rights of the potential investors due to the acquisition of the nationality of the investment's Host State. Said precedents analyse the jurisdiction of their tribunals from aspects that are substantially different from the waivers of Sastre, Silva, and Abreu, for example, from the application of the “*umbrella clause*” in the invoked treaties, or their competence to analyse contractual breaches in case these were challenged.²⁹⁴ Second, the parties are also different. The precedents cited by

²⁹³ Counter-Memorial on Jurisdiction, ¶¶ 145-148.

²⁹⁴ **CLA-0037**, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶¶ 169-184; **CLA-0078**, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, ¶¶ 113-127; **CLA-0079**, *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019, ¶¶ 274-281; **CLA-0080**, *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶¶ 319-

Claimants relate to local companies that initiated local actions that allegedly resulted in the waiver of the rights of protected foreign investors in accordance with the applicable investment treaties. Third, the contracts referred to in the precedents cited by the Claimants have a language that is substantially different from that signed between Sastre and the Respondent, Silva and the Respondent, and Abreu and the Respondent.²⁹⁵

191. Regarding the requirement that a waiver must be “*explicit*,” Claimants seem to point out that the waiver made by Sastre, Silva, and Abreu is not valid because it does not specifically mention the Mexico-Portugal BIT or the Mexico-Argentina BIT, citing various investment cases as precedent.²⁹⁶ The subject of litigation and the analysis carried out by those tribunals are limited to specific facts and are not related to the type of waivers made by Claimants in this case or to their context. Evidence of this is that Claimants do not present any link between the aforementioned precedents and the waiver of this case. In this arbitration, the waiver made by Sastre, Silva and Abreu is unique, clear and is not based on an inference: “I waive all rights that international treaties

325; **CLA-0081**, *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, 19 December 2008, ¶ 58; **CLA-0082**, *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, ¶¶ 109-123; **CLA-0083**, *Ulysseas, Inc. v. Ecuador*, Interim Award, 28 September 2010, ¶¶ 148-163.

²⁹⁵**CLA-0037**, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, ¶ 34. Article 9, concerning dispute resolution, provided that “[a]ny conflict, controversy or claim deriving from or arising in connection with this Agreement, breach, termination or invalidity, shall be submitted to the Courts of the City of Asunción under the Law of Paraguay.”; **CLA-0078**, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, ¶22. Article 12 of the CISS Agreement provided that: “The provisions of this Agreement shall be governed in all respects by and construed in accordance with the laws of the Philippines. All actions concerning disputes in connection with the obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila”; and **CLA-0079**, *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019, ¶ 219: “[...] India maintains that the dispute is still subject to the 2008 MoU's dispute resolution clause (Clause 15), which provides in relevant part: The Parties agree to use their best efforts to negotiate in good faith and settle amicably all disputes that may arise or relate to this MoU or a breach thereof. If such dispute, doubt or question, arising out of or in respect of this MoU or the subject matter thereof, cannot be settled amicably through ordinary negotiations by the Parties, the same will be decided by arbitration in terms of the Indian Arbitration and Conciliation Act, 1996 (Central Act 26 of 1996). The venue of the arbitration will be only in Chennai, India, and the arbitration proceedings will be conducted in the English language. This MoU shall be governed and construed in accordance with the laws of India. The courts located in Chennai alone and only will have jurisdiction on any matter relating to this MoU, to the exclusion of all other courts in any other place.”

²⁹⁶ Counter-Memorial on Jurisdiction, ¶¶ 145-147, 152 and 156.

or conventions grant to foreigners (*Original: Renuncio a todo derecho que los tratados o convenciones internacionales concedan a los extranjeros*). It is clear that the phrase "all rights that international treaties or conventions grant to foreigners" includes investment rights.

(4) Alternatively, waivers and their naturalization process confirm that Sastre, Silva, and Abreu exercised the Mexican nationality as their dominant and effective nationality

192. Notwithstanding the foregoing, these waivers and their naturalization process confirm that Sastre, Silva, and Abreu exercised as dominant and effective nationality, the Mexican nationality they have been given.²⁹⁷

193. The foregoing, because their statements in the naturalization process confirm that they had a permanent domicile in Mexico when they requested their Mexican nationality, therefore, they exercised their Mexican nationality as dominant and effective. This is confirmed with the issuance of the diverse Mexican passports requested by Sastre, Silva and Abreu, and the right to exercise their political rights in Mexican territory.²⁹⁸

(a) Alternatively, the estoppel and abuse of rights doctrines should be applied

194. This is a clear example of the issues that the Respondent seeks to avoid through an agreement to "waive all rights that international treaties or conventions grant to foreigners" as a condition for granting Mexican nationality by naturalization. In addition to the legal effect of the waiver signed by Sastre, Silva, and Abreu, the intentions of this case are a clear example of an abuse of rights.

3. The domestic legislation of the host State is the applicable law to determine the existence, validity and legality of the property rights protected by the four treaties

195. Respondent's arguments regarding applicable law, including legality, can be summarized as follows:

²⁹⁷ See Section V.A.2, on dominant and effective nationality.

²⁹⁸ See **R-038**, Approval of Silva's Mexican Passport; **R-039**, Mexican Passport Application Approval for Abreu; **R-060**, Sastre's Mexican Passport (NOI # 1, Annex N-1, NOA # 1, Annex NDA-001); **NS-0002**, Silva's Mexican Passport; and **R-040**, Abreu IFE Credential.

- Each of the four invoked treaties lists the property or property rights that are within the scope of each treaty.²⁹⁹
- The question of whether certain rights exist or are legally valid, to whom they belong and what their content is, however, are matters to be decided based on the law of the host State.³⁰⁰
- The existence, validity and content of the investment rights alleged by Claimants are facts that must be established at the jurisdictional stage.³⁰¹
- The applicable law to determine the existence, validity, ownership and scope of the rights alleged in this dispute is the Respondent's Agrarian Law (ejido regime) and, alternatively, the Restricted Zone Regime.³⁰²
- In order for Claimants to establish their right under the protection of a treaty, they must first establish the existence of the rights that they sought to protect, under the Respondent's Agrarian Law and Restricted Zone Regime.³⁰³
- Claimants have not proven that they have the rights that they claimed to have under the Agrarian Law and the Restricted Zone Regime with respect to the Hotel Investments.³⁰⁴
- Respondent further maintains that the Tribunal does not have jurisdiction over the Claimants' Investments because the rights claimed were not in accordance with the Agrarian Law and the Restricted Zone Regime, an express jurisdictional requirement under the four treaties.³⁰⁵

196. Claimants' arguments regarding applicable law, including legality, can be summarized as follows:

- Claimants agree that the law of the host State is the applicable law to determine whether certain property rights exist, are legally valid, to whom they belong, and what their content is, as well as their legality.³⁰⁶

²⁹⁹ Memorial on Jurisdiction, ¶ 81.

³⁰⁰ Memorial on Jurisdiction, ¶ 81-87.

³⁰¹ Memorial on Jurisdiction, ¶ 83.

³⁰² Memorial on Jurisdiction, ¶ 81-87.

³⁰³ Memorial on Jurisdiction, ¶ 81-87.

³⁰⁴ Memorial on Jurisdiction, ¶¶ 143 – 182 (Sastre); ¶¶ 256-290 (Galán y Alexander); ¶¶ 299-315 (Jacquet) ¶¶ 323-346 (Abreu y Silva).

³⁰⁵ Memorial on Jurisdiction, ¶¶ 187 – 212 (Sastre); ¶¶ 274-284 (Galán y Alexander); ¶¶ 313-315 (Jacquet), ¶¶ 347-351 (Abreu y Silva).

³⁰⁶ Counter-Memorial on Jurisdiction, ¶ 188.

- Claimants agree that the Agrarian law and the Restricted Zone Regime are applied to determine the existence, validity and content of the property rights at issue in this claim, including their legality.³⁰⁷
- Claimants also set forth the applicability of Mexican general civil law jurisdiction and the principle of good faith to establish the existence, validity and content of the property rights at issue in this claim, including legality.³⁰⁸
- Additionally, Claimants presented the estoppel doctrine and the proportionality test established in *Kim v. Uzbekistan* to establish the legality of its Hotel Investments under International Law.³⁰⁹

197. In the following sections, the Respondent replies to the Claimants' arguments.

a. Mexican law is the framework that governs the existence, validity, substance, and legality of the property rights claimed by the Claimants under the four treaties

198. A well-settled principle of international investment law is that the applicable law for determining whether a claimant holds property or assets capable of constituting an investment under an investment treaty is host State law. This is because international law does not contain rules for determining property rights, it is the relevant domestic law that governs these rights.

199. This principle has been reiterated by the *Emmis* and *Vestey* tribunals and reiterated by McLachlan, Shore, and Weiniger:

“In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law. Public international law does not create property rights. Rather it accords certain protections to property rights created according to municipal law.”³¹⁰

“For a private person to have a claim under international law arising from the deprivation of its property, it must hold that property in accordance with the applicable rules of domestic law.”³¹¹

“The property rights that are the subject of protection under the international law of expropriation are created by the host State law. Thus, it is for the host State law to define

³⁰⁷ Counter-Memorial on Jurisdiction, ¶¶ 204-209, 214-215. First Expert Report of Sergio Bonfiglio, ¶¶ 6, 199.

³⁰⁸ Counter-Memorial on Jurisdiction, ¶¶ 209-210, 214-215. First Expert Report of Sergio Bonfiglio, ¶ 74.

³⁰⁹ Counter-Memorial on Jurisdiction, ¶¶ 189-199, specially in, ¶ 190.

³¹⁰ **R-053**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Republic of Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014 ¶ 162.

³¹¹ **R-175**, *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 257 (see also, ¶ 194).

the nature and extent of property rights that a foreign investor can acquire. However, the fact that a 'taking' of that property by the host State may be legal under municipal law does not affect the question of whether the State's conduct is expropriatory under international law."³¹²

b. Investment treaties only protect assets recognized as property rights by the host State law

200. Further, investment treaties only protect assets that are recognized property rights under the law of the host State. As stated by Douglas:

"...regardless of whether it is confirmed in the treaty text ...the requirement of a territorial connection with the host State demands that tangible and intangible property rights must be cognizable under its laws."³¹³ (emphasis added)

201. Property rights that are not recognized by the host State are not covered under investment treaties:

"for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador".³¹⁴

202. Thus, a prerequisite for a host State's consent to arbitration is that the claimant has "acquired an asset that is cognizable by the law of the host State and...the acquisition satisfies the

³¹² **R-144**, C. McLachlan, L. Shore, M. Weiniger, *International investment arbitration: substantive principles*, 2a ed., 2017, ¶ 8.65.

³¹³ **R-116**, Zachary Douglas, *The Pleas of Illegality in Investment Treaty Arbitration*, ICSID Review, Vol. 29, No. 1 (2014), p. 174.

³¹⁴ **R-111**, *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, ¶ 705; **R-112**, *América Móvil S.A.B. de C.V. c. República de Colombia*, Caso CIADI No. ARB(AF)/16/5, Laudo, 07 de mayo de 2021, ¶ 316; **R-053**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Republic of Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶ 162; **R-113**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶ 22.1: "There cannot be an expropriation of something to which the Claimant never had a legitimate claim"; **R-114**, *International Thunderbird Gaming Corp. v. United Mexican States, UNCITRAL case*, Award, 26 January 2006, ¶ 208: "[C]ompensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited"; **R-175**, *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 252: "To determine whether Venezuela's taking of Agroflora's land constitutes an expropriation, the Tribunal must assess whether Vestey held a title to the land"; **R-115**, *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. y Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Award, 14 December 2017, ¶ 350.

...characteristics of an investment."³¹⁵ Further, "[i]f the asset is not recognized under the host State's laws then there is no investment."³¹⁶

203. Lastly, if "the foreign national has purported to acquire property rights in a manner that is not effective to pass title or another legal interest under the host State's laws then there is no investment."³¹⁷

c. Claimants have not proven to be "investors" in property or assets capable of constituting an "investment" under the invoked treaties.

204. It is the Respondent's position that Claimants have not proven the legal existence of their rights to the Hotel Investments under the laws that govern their creation and existence, which under international law is Mexican Law. Moreover, as will be argued, Claimants cannot rely on international law and the doctrine of estoppel to create property rights that they have not proven to exist and that are contrary to fundamental laws of Mexico.

(1) Claimants have not established the Tribunal's *ratione materiae* jurisdiction with respect to Hotel Investments

205. As explained by the Respondent in its Memorial on Jurisdiction, Claimants have not proven that in the three relevant dates they were "investors" in qualified "investments" within the scope of application of the invoked Treaties. Specifically, Claimants have not proven their rights in the hotel "investments" they claim which include the existence and alleged ownership/rights to: (i) intervening hotel management companies;³¹⁸ (ii) hotel parcel ownership/rights;³¹⁹ (iii) hotel and

³¹⁵ **R-116**, Zachary Douglas, The Pleas of Illegality in Investment Treaty Arbitration, ICSID Review, Vol. 29, No. 1 (2014), p. 178.

³¹⁶ **R-116**, Zachary Douglas, The Pleas of Illegality in Investment Treaty Arbitration, ICSID Review, Vol. 29, No. 1 (2014), p. 178.

³¹⁷ **R-116**, Zachary Douglas, The Pleas of Illegality in Investment Treaty Arbitration, ICSID Review, Vol. 29, No. 1 (2014), p. 178.

³¹⁸ Memorial on Jurisdiction, ¶¶ 143-236 (Sastre), ¶¶ 256-285 (Galán and Alexander); ¶¶ 395-313 (Jacquet), ¶¶ 323-347 (Abreu and Silva).

³¹⁹ Memorial on Jurisdiction, ¶¶ 143-236 (Sastre), ¶¶ 256-285 (Galán and Alexander); ¶¶ 395-313 (Jacquet), ¶¶ 323-347 (Abreu and Silva).

hotel operations and;³²⁰ (iv) alleged property interest in hotels.³²¹ Regarding Sastre's investments in Hamaca Loca, the transfer of rights is not a bona fide "investment" and is an abuse of process.³²²

206. In their Counter-Memorial, Claimants state that they have the following “assets” and “investments” under each of the invoked treaties:

- Sastre: Article 1(1) of the Mexico-Argentina BIT. “Assets” and “investments” consisting of: (i) the possession, use, and enjoyment of the Tierras de Sol and Hamaca Loca hotel lots; (ii) the enterprise, business participation, and shares in CETSA and HLSA and (iii) the Tierras de Sol and Hamaca Loca hotel, restaurant, and tourism enterprises.
- Jacquet: Article 1(1) of the Mexico-France BIT. “Assets” and “investments” consisting of: (i) “two commodatum agreements for the possession, use, and enjoyment of two contiguous beachfront lots”³²³ of the Behla Tulum Hotel and La Tente Rose Store; (ii) the facilities, business interests in Tulum hotel and tourism enterprise and in the La Tente Rose liquor shop.
- Galán and Alexander: Article 1139 of NAFTA. “Assets” and “investments” consisting of: (i) possession, use, and enjoyment of a beachfront lot for Hotel Parayso; (ii) facilities, commercial spaces, tourism enterprise and property interest of Hotel Parayso.
- Abreu and Silva: Article 1(1) Mexico-Portugal BIT. “Assets” and “investments” consisting of: (i) the possession, use, and enjoyment of two contiguous beachfront lots of the Behla Tulum Hotel with yoga studio; (ii) the business interest in the hotel, yoga, and tourism enterprise.

207. Claimants argue that they have established the Tribunal's *ratione materiae* jurisdiction regarding their investments.³²⁴ Claimants claim to have proven: (i) the existence of hotel operations; (ii) that they built their hotels within the property boundaries indicated in the documents issued by the ejido authority, and (iii) that the Respondent knew of the existence, location, and nature of the investments.³²⁵

(a) The existence, validity, ownership, and scope of the rights invoked under the Agrarian Law, and their exclusion under

³²⁰ Memorial on Jurisdiction, ¶ 143-236 (Sastre), ¶¶ 256-285 (Galán y Alexander); ¶¶ 395-313 (Jacquet), ¶¶ 323-347 (Abreu y Silva).

³²¹ Memorial on Jurisdiction, ¶¶ 143-236 (Sastre), ¶¶ 256-285 (Galán y Alexander); ¶¶ 395-313 (Jacquet), ¶¶ 323-347 (Abreu y Silva).

³²² Memorial on Jurisdiction, ¶¶ 183-186.

³²³ Counter-Memorial on Jurisdiction, ¶ 71.

³²⁴ Counter-Memorial on Jurisdiction, ¶ 187.

³²⁵ Counter-Memorial on Jurisdiction, ¶ 76.

the Restricted Zone Regime have not been proven

208. The Respondent explained that for Claimants to establish their right to treaty protection, they must first establish the existence of the rights that they are seeking to protect under the Respondent's Agrarian Law (ejido law) and, alternatively, the regime relating to the Restricted Zone.³²⁶

209. In the Counter-Memorial, Claimants do not refute these arguments. Instead, they argue that they:

- have investments within the Ejido with recognized and valid ejido rights to Hotel/Parcels;³²⁷
- are recognized agrarian "possessors" of "tierras de uso común" not precluded by the nationality requirements of the Agrarian law;³²⁸
- have property rights to Hotel/Parcels outside the scope of the Restricted Zone Laws;³²⁹
- have proof that the Hotel Investments "existed"³³⁰.

210. The Respondent maintains that Claimants have not fulfilled their burden. The Respondent responds to each of these arguments in the subsections below.

(b) It has not been proven that the Claimants' Hotel Investments are in ejido territory

211. Claimants claim to have acquired and developed, as foreigners, Hotel Investments situated on beach-front ejido land in Tulum, Quintana Roo.³³¹

212. A requirement to establish Claimant's alleged rights regarding the Hotels/Parcels under Agrarian Law is formal legal proof that the properties: (a) are located within endowed Ejido lands; (b) were parcels ("*parcelas*") or lands of common use ("*tierras de uso común*") with recognized

³²⁶ Counter-Memorial on Jurisdiction, ¶¶ 204-205.

³²⁷ Counter-Memorial on Jurisdiction, ¶¶ 204-205.

³²⁸ Counter-Memorial on Jurisdiction, ¶¶ 205(b).

³²⁹ Counter-Memorial on Jurisdiction, ¶¶ 205(b).

³³⁰ Counter-Memorial on Jurisdiction, ¶¶ 76.

³³¹ Memorial on Jurisdiction, ¶ 84.

economic or de facto division (*parcelación*) by the Ejido's Assembly, and; (c) are located on the same land where each one of them built the corresponding hotels.³³²

213. Alternatively, Claimants must prove compliance with the requirements governing the Restricted Zone.³³³ Claimants adduce Mr. Bonfiglio's Expert Report to prove that Claimants investments "were situated within the *ejido*", that Claimants had recognized and valid Ejido rights to Hotel/Parcels and that Claimant's Hotel/Parcels do not fall within those governed by the Restricted Zone Regime.³³⁴

214. Respondent's position is that Mr. Bonfiglio's conclusion that all the Claimants Hotel Investments were in Ejido Land, and entailed Ejido Rights and that the Restricted Zone Regime do not apply, is insufficient proof of these facts because:

- PHINA information lacks probative value to establish the territorial boundaries of the Ejido Jose Maria Pino Suárez and of Claimant's Parcels: The topographical study relied on by Claimants expert to determine that Claimants properties are in the Ejido is based on PHINA information that has no official legal probative value for establishing the territorial boundaries of the Ejido Jose Maria Pino Suárez.³³⁵ There are also discrepancies between the description of the land in the contracts, in the maps exhibited by the Claimants, and in the maps exhibited by Mr. Bonfiglio.³³⁶
- **"1994 Assembly" does not establish the Ejido right to beachfront lands:** The "1994 Assembly" document from which Claimants expert concludes that Claimants complied with the chain of ownership requirement and that the ejidatarios of the Ejido had consent to possess, use and enjoy the beachfront in common use lands is null and void and unenforceable before courts because it was not approved in accordance with the Agrarian Law requirements for these types of land agreements.³³⁷ To the extent that the "1994 Assembly" could be held valid, it expressly provides that the coastal zone lands would be exclusively given in

³³² First Expert Report of Mr. Gutiérrez de la Peza, ¶ 16 (ii). Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 8, 18 (v), 31, 32 and Table II: "Documentary and legal deficiencies of the general evidence".

³³³ Memorial on Jurisdiction, ¶¶ 119-130.

³³⁴ Counter-Memorial on Jurisdiction, ¶ 204; Sergio Bonfiglio Expert Report, ¶ 5.

³³⁵ Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 31, 76, Table II. "Documentary and legal deficiencies of the general evidence", Table XXIV "Arguments used in the SBM Report and views on their relevance".

³³⁶ Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 12, 35 (ii), 41 (ii), 47 (ii), 59 (a) and 65 (a). The maps submitted as part of the transactions entered by the Claimants were also drawn after the contracts were signed, and therefore do not form part of them.

³³⁷ Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 6, 13, 14, 15, Table II. "Documentary and legal deficiencies of the general evidence", with regard to proof 2.

usufruct to the Ejido's ejidatarios to prevent outsiders from unduly occupying them. This confirms that, from the beginning, it was the Ejidal Assembly's intention that the coastal lands would be occupied only by ejidatarios and not by the Claimants.³³⁸ Further, the document does not prove that the Claimants have the authorization required by the Assembly to occupy the parcels.³³⁹

- **Claimant's certificates of possession of parcels are null and void:** The certificates of possession adduced are null and void because they are contrary to Articles 13 and 15 of the Agrarian Law and Internal Regulation of the Ejido and do not prove that the Claimants were possessors of common use lands. It has not been proven that: (i) the certificates were signed by the persons to whom they are attributed and that such persons held the positions with which they held themselves; (ii) of the certificates that expressly state that they correspond to lands of common use of the Ejido, these do not contain evidence of the required Ejido Assembly authorization, and (iii) certificates of possession adduced do not contain evidence of compliance with the requirements and payment for third parties in accordance with Articles 13 and 15 of the Agrarian Law.³⁴⁰
- **Claimant's Transfer of Rights Agreements are null and void and do not establish rights and/or chain of ownership:** The multiple contracts adduced by Claimants to establish rights and chain of ownership are equally null and void. The Villarreal Transfer, AMSA Transfer, Román Transfer and Gutiérrez Transfer do not comply with the formalities established by the Agrarian Law for contracts of this type and do not demonstrate that the transferor were legitimate owners of the rights they purported to assign.³⁴¹ Jacquet's private purchase and sale contracts and commodatum contracts are null and void as the contract itself states that they are ejido lands and to which the seller acknowledges he had no title.³⁴² Mr. Román and Mrs. Abreu's commodatum contracts are equally null as no documents were adduced to prove that the "comodantes" (*i.e.*, Mr. Román and Mrs. Abreu) had the right to grant the use and enjoyment of the land that was the object of each contract.³⁴³
- **Claimants Cession Contracts are legally invalid due to the absence of RAN registration:** Lack of RAN registration is not a minor deficiency. The RAN registration serves unique and distinct purposes than registration in civil property systems. As noted by Respondent's expert:
 - "In agrarian matters, RAN works as a guarantor of legality and certifies the validity of the legal acts executed on ejido property. By keeping the record of

³³⁸ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 15.

³³⁹ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 9 and 15; Table II "Documentary and legal deficiencies of the general evidence", with regard to proof 2.

³⁴⁰ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 16 and 17.

³⁴¹ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 9.

³⁴² Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 10.

³⁴³ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 10.

the subjects and agrarian rights, it is the person who can confirm whether the transferors of rights are really holders of the rights they transfer and that the other requirements of existence and validity established by the Agrarian Law for such legal acts are met.”³⁴⁴

– The RAN Register “... grants ... to the registered documents a presumption of legality, and that their records are full proof in court”.³⁴⁵

- **Land use licenses and certificates do not establish property rights:** The land use licenses and certificates adduced do not prove the grant of real rights nor do they serve as proof of the existence of any rights of the Claimants. Only certificates and issued by the RAN prove the existence of these ejido land rights.
- **Non-compliance with the Restricted Zone requirements is not remediable and renders incompliant acts null and void.**³⁴⁶ The constitutional prohibition regarding the Restricted Zone applies, without distinction, to all corresponding lands. All legal acts by which a foreign person intends to acquire ownership or direct dominion of land in the strip of land known as the restricted zone are absolutely null and void.³⁴⁷

215. Claimants have thus not proven that their Hotel Investments were in Ejido Land, entailed existing and valid Ejido rights and that Restricted Zone Laws do not apply to Claimant's alleged rights to Hotel/Parcels.

(c) The existence and validity of the rights invoked under the Agrarian Law has not been proven

³⁴⁴ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 18 (v).

³⁴⁵ Second Expert Report of Mr. Gutiérrez de la Peza, Table XXIV “Arguments used in the SBM Report and views on their relevance”, p. 66; and footnote 38, regarding Jurisprudence 2a./J.8/2000 under the heading “PARCELARY RIGHTS. THE NOTIFICATION TO THE NATIONAL AGRARIAN REGISTRY OF THEIR TRANSFER IS A VALIDITY REQUIREMENT” with record 192469, Annex PGPG-0055. . In accordance with Mexican jurisprudence: “[the notification to the RAN] constitutes a requirement for the validity of the agreement; however, this does not imply that the registration before the registry mentioned act different from the notification, has constitutive effects, since (...) the acts that should be registered but are not, cannot produce damages to third parties. This confirms that when a transfer of land rights is made, in relation to the RAN, three different acts are carried out, namely, the notification, which is made by the parties before that institution and which does constitute an element of validity of the agreement, the registration and the issuance of the new certificates, which corresponds to the registry organism and which only produce evidentiary effects before third parties, without these last two can be considered within the elements of validity of the agreement, since the referred article 80 does not include it within them” Alternatively, even if the Claimants proved that the Transfers were signed by the corresponding parties and complied with the pre-2008 version of the Agrarian Law, they would remain invalid due to their lack of notification and registration before the RAN.

³⁴⁶ **RW-001, ¶71.**

³⁴⁷ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 19.

216. Claimants contend that under Agrarian Law they are recognized "possessors" of "common use lands" (*tierras de uso común*) without ejidatario status and/or registered or recognized rights before the RAN.³⁴⁸ Claimants also contend that under Agrarian Law their status as foreign nationals or non-Mexican nationals is not directly applicable to the Claimants as ejido "possessors" and "common use land tenure".³⁴⁹ Claimants' Expert characterized Claimants alleged rights as involving rights applicable to "tenencias tales como alquileres, comodatos, o tenencias sobre tierras de uso común", and not rights of "direct ownership" or "ownership" over land.³⁵⁰ Mr. Bonfiglio also has classified Claimant's status as ejido right holders as "possessors" according to Article 23 sec. VIII and Article 48 of the Agrarian Law.³⁵¹ Regarding the character of Claimants agrarian rights to parcels, Mr. Bonfiglio has classified them as "irregular possessions" devoid of Ejidatario status and involving rights that are not registered or recognized in the RAN's Basic file of the Ejido, and the registry book of the Commissariat of ejidal assets.³⁵²

217. Regarding the effect that Claimants' foreign national or non-Mexican status has on Claimants' status as "possessors" or "irregular possessors" of ejido rights, Mr. Bonfiglio states that under Agrarian Law, nationality is not directly applicable to Claimants status as "irregular possessors" of ejido and to common use land tenure.³⁵³ Further, according to Mr. Bonfiglio, foreign nationality does not affect Claimants' right to protect possessory ejido rights through civil and other courts.³⁵⁴

218. Respondent submits that Mr. Bonfiglio's conclusory statements that all the individual claimants have "possessory" ejido rights over the Hotel Parcels pursuant to Agrarian Law are insufficient evidence to prove that Claimants have the Agrarian Law/Ejido Rights they alleged to have regarding Hotel Parcels because:

³⁴⁸ Sergio Bonfiglio Expert Report, ¶¶ 79-80, 83, 88, 99-109 (Sastre), ¶¶ 144-151 (Jacquet), ¶¶ 165-170 (Abreu and Silva), ¶¶ 181-187 (Galán and Alexandre).

³⁴⁹ Sergio Bonfiglio Expert Report, ¶¶ 199.

³⁵⁰ Sergio Bonfiglio Expert Report, ¶ 199.

³⁵¹ Sergio Bonfiglio Expert Report, ¶¶ 83, 88, 99-109 (Sastre), ¶¶ 144-151 (Jacquet), ¶¶ 165-170 (Abreu and Silva), ¶¶ 181-187 (Galán and Alexandre).

³⁵² Sergio Bonfiglio Expert Report, ¶¶ 79-80, 83.

³⁵³ Sergio Bonfiglio Expert Report, ¶¶ 207-208.

³⁵⁴ Sergio Bonfiglio Expert Report, ¶¶ 207-208.

- **The limits to foreign investment in ejido and the foreign possession of ejido common use lands:** Foreign investment and possession of Ejido common use lands by persons outside the Ejido can only be carried out (legally) under association or use contracts entered between foreigners, as third parties, and the Ejido, represented by the Ejidal Commissariat and with the approval of the Assembly. These contracts can only have a lifespan according to the productive project, which cannot be longer than 30 years, extendable. If the land is in the possession of an individual ejidatario, that person must give his or her consent.³⁵⁵
- Foreign investment in ejido and the foreign possession of ejido common use lands cannot be obtained through purchase and sale agreements or transfer of rights: Foreign investment and the possession of common use lands of an ejido by persons outside the Ejido cannot be carried out through purchase and sale agreements or assignment of rights, such as those entered into by Claimants.³⁵⁶ The Agrarian Law prohibits the sale of common use lands, and only allows the alienation or transfer of rights to those who have the status of ejidatarios or avecindados, which none of the Claimants proved to have.³⁵⁷ The recognition by the Assembly of the tenure held by possessors must be made in AFE, in order to be legal and valid.³⁵⁸
- **Regularization of possessor's tenure rights requires a special formalities Assembly:** Article 56 of the Agrarian Law requires that an AFE (special formalities meeting) must be held to recognize the economic or *de facto* division of land and regularize the tenure of possessors. Noncompliance with this requirement would render any decision in this regard null and void for contravening the Agrarian Law.³⁵⁹ This requirement has not been complied regarding Claimants parcels.
- **Individual ejido members cannot transfer ownership of common use lands:** The ownership of common use lands belongs to the Ejido, not to the ejidatarios.³⁶⁰ Thus individual ejido members cannot transfer ownership of common use lands.
- **Possessors must be Mexican nationals:** A systematic interpretation of Article 48 of the Agrarian Law requires possessors to be Mexican nationals.³⁶¹ This is the

³⁵⁵ Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 17, 18, 39 (v) y 48; Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 19 and 25.

³⁵⁶ Expert Report of Mr. Gutiérrez de la Peza, ¶ 26; Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 16 (i), (iii), (iv) y (v); 17 y 19.

³⁵⁷ *Id.*

³⁵⁸ Second Expert Report of Mr. Gutiérrez de la Peza, Tables V, VIII, XI, XIV, XVII, XX, XXIII y XXIV.

³⁵⁹ Second Expert Report of Mr. Gutiérrez de la Peza, Table XXIV "Arguments used in the SBM Report and views on their relevance".

³⁶⁰ First Expert Report of Mr. Gutiérrez de la Peza, Table II "Ejidal lands according to their destination" and Table V "Rights over ejidal lands, according to their destination"; Second Expert Report of Mr. Gutiérrez de la Peza Gutiérrez, Table XXIV "Arguments used in the SBM Report and views on their relevance"

³⁶¹ Second Expert Report of Mr. Gutiérrez de la Peza, Table XXIV "Arguments used in the SBM Report and views on their relevance", pp. 70 and 71.

criterion shared by agrarian authorities (Agrarian Prosecutor's Office, RAN and Agrarian Courts).³⁶² Further, Mr. Bonfiglio's interpretation would be contrary to the Agrarian Law because it would give foreigners and legal entities the possibility of acquiring ejido rights by the simple passage of time. This is contradictory because Agrarian Law does not allow foreigners to acquire ejido rights by contract, because these rights can only be alienated to individuals who have the status of ejidatarios and avecindados, *i.e.* Mexican nationals.³⁶³ Mr. Bonfiglio's interpretation does not address the question of on what basis foreigners can acquire rights by the simple passage of time if Agrarian law does not allow them to acquire ejido rights by contract.

- **Claimants alleged right first had to be recognized by the Agrarian Tribunal to be enforceable before Agrarian and Civil courts:** Mr. Bonfiglio also omits to explain or provide legal support for the theory that foreign national irregular possessors can formalize their tenancy rights under Agrarian Law³⁶⁴ and that foreign nationals can successfully enforce irregular possessory ejido rights through civil and other courts. According to the Respondent's expert, for Claimants to be able to enforce the rights that they allege they have they should have first obtained a judgment from the Agrarian Tribunal recognizing their rights, which required a prior hearing with the persons who claimed to have assigned rights to them, the Ejidal Commissariat and the adjacent parties. Mr. Bonfiglio did not address whether Claimants can and did enforce their irregular possessory ejido rights in Agrarian Tribunals and or whether if they sued the transferors for eviction or indemnification for the deprivation of possession to recover amounts paid for the transfers of rights and/or damages suffered.³⁶⁵

219. Thus, Claimants have not proven they held existing Agrarian Law rights to Hotel Investments and that their rights were enforceable before agrarian and civil courts.

(d) It has not been proven that the Claimants' Hotels legally existed and were their property

³⁶² Second Expert Report of Mr. Gutiérrez de la Peza, Table XXIV “Arguments used in the SBM Report and views on their relevance”, pp. 70 and 71.

³⁶³ Mr. Bonfiglio provides no legal basis or support to interpret either Article 23 sec. VIII or Article 48 of the Agrarian Law as extending rights to foreign nationals over beach-front property that is explicitly protected from foreign tenure under the Mexican Foreign Investment Law, Constitution, and Federal law. Nor does Mr. Bonfiglio address the Constitutional and Foreign Investment Law limitations that such an interpretation would entail. Mr. Bonfiglio also omits to explain under which specific Agrarian law article Claimants obtained their possessor status and did not examine Claimant’s compliance with the article requirements.

³⁶⁴ Sergio Bonfiglio Expert Report, ¶ 80.

³⁶⁵ Second Expert Report of Mr. Gutiérrez de la Peza, Table XXIV “Arguments used in the SBM Report and views on their relevance”, p.72.

220. Claimants argue that they have proven the Hotel Investments "existed".³⁶⁶

221. The documents referenced by Claimants in their Counter-Memorial do not prove the legal existence of the Hotels at issue or Claimants' ownership of said Hotels.³⁶⁷ Claimants' own expert states that land use permits reference by Claimants as proof of Hotel ownership "no son los documentos idóneos que acreditan la titularidad" of the Claimants' Hotel Investments.³⁶⁸ Further, because the scope of Mr. Bonfiglio's expert report is limited to determining whether Claimants had valid agrarian law rights regarding the alleged Hotel Investments, it is not proof that Claimants' Hotels legally existed and were owned by Claimants.

222. In response to Respondent's Production Request in this regard, Claimants stated that they had already submitted the responsive documents in their possession, custody, or control.³⁶⁹ Respondent notes that the documents referenced by Claimants in response to this request are documents relating to companies that manage the Claimants' Hotel Investments, which does not prove the legal existence of the Hotels or Claimants ownership of Hotels. Even assuming the conclusions of the Claimant's expert regarding Claimants' rights to the parcels were legally correct (which the Respondent contests), it is clear that rights to ejido parcels are not equivalent to ownership of hotels and Hotel Investments.

223. In conclusion, Claimants have not proven the legal existence of their Hotels or their ownership.

(e) The alleged "*property interest*" in the Hotels has not been proven

³⁶⁶ Counter-Memorial on Jurisdiction, ¶ 204.

³⁶⁷ Counter-Memorial on Jurisdiction, ¶¶ 204-205.

³⁶⁸ Sergio Bonfiglio Expert Report, ¶ 198.

³⁶⁹ Procedural Order Number 4, Annex B, p. 20. "Claimants already submitted the requested documents. Claimants observe that they already have submitted documents responsive to this request, including Exhibit C-0002, C-0006, C-0013, C-0067, CS-0013, CS-0015, CS-0018, RJ-0003, MG-0007, MG-0024. Aside from the documents already submitted, there are no non-privileged documents responsive to this request in Claimants' possession, custody, or control."

224. Claimants' own expert states that land use permits referenced by Claimants as proof of Hotel ownership "no son los documentos idóneos que acreditan la titularidad" of the Claimants Hotel Investments.³⁷⁰ Respondent's expert agrees with this finding.

(f) It has not been proven that Claimants' Hotel Investments are not subject to the Restricted Zone Regime

225. Claimants have accepted that the applicable Mexican law to determine whether certain property rights exist are legally valid and whom they belong to, includes the legal regime of the Restricted Zone.³⁷¹ Claimants contend, however, that their rights to the Hotel/Parcels are not governed by the Restricted Zone regime because the rights they allege to have do not involve the type of direct ownership rights to land or "*dominio directo sobre la superficie*" governed by the Restricted Zone.³⁷² Claimants argue that their rights are different from those governed by the Restricted Zone because they are similar to those applicable to "*tenencias tales como alquileres, comodatos, o tenencias sobre tierras de uso común*", and not rights of "direct control" or "title" over the land.³⁷³

226. Respondent's position is that the Claimants' theory regarding the non-applicability of the Restricted Zone/Foreign Investment Law regime to Claimants' Hotel/Parcels is untenable under Mexican property and Constitutional laws. As stated by the Respondent's expert:

"The Mexican Constitution states that "in a strip of one hundred kilometers along the borders and fifty kilometers along the beaches (the "Restricted Zone"), for no reason may foreigners acquire direct ownership over lands and waters⁴⁶". The constitutional prohibition applies, without distinction, to all lands, including ejido lands. Any juridical act by which a foreign person intends to acquire domain or direct ownership over lands in the Restricted Zone is absolutely null and void ."³⁷⁴

227. As to the Claimants argument that the Restricted Zone law does not apply to the specific rights adduced by Claimants:

"43. The prohibition in the restricted area is constitutional. This means that the prohibition prevails over any other law or particular factual situation. In addition, it is

³⁷⁰ Sergio Bonfligio Expert Report, ¶ 198.

³⁷¹ Counter-Memorial on Jurisdiction, ¶¶ 204-209, 214-215. Sergio Bonfligio Expert Report, ¶¶ 6, 199.

³⁷² Sergio Bonfligio Expert Report, ¶ 199.

³⁷³ Sergio Bonfligio Expert Report, ¶ 199.

³⁷⁴ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 19.

of public order and general interest, so its observance is non-derogable. The priority nature of this prohibition and for which it was included in the CPEUM has historically been to safeguard national sovereignty, as well as to maintain the integrity of the national territory.”³⁷⁵

228. It is important to note that:

- Claimants' expert provides no legal basis or support for distinguishing Claimants' alleged tenancy rights under Agrarian Law and those of the Restricted Zone Laws when both regimes involve the grant of indirect property rights.
- The interpretation put forward by Claimants's expert implies exceptions to the Mexican nationality requirements which are at the root of both regimes and which are constitutionally mandated.
- The interpretation put forward by Claimants's expert implies reading-in legal exceptions in the Restricted Zone regime permitting a foreigner to become right holders to beach-front property. This contradicts Mexico's Constitutional law and foreign policy of protecting beach-front lands from foreign tenure.

4. Claimant's investments are against the law

229. As explained by the Respondent in its Memorial on Jurisdiction, its consent to arbitrate has been limited through the definition of "investment" in Articles 1.1 of the Mexico-Argentina and the Mexico-Portugal BIT and 2.1 of the Mexico-France BIT, which expressly require investments be "in accordance with" laws and regulations of the Party in whose territory the investment is made.³⁷⁶ This limit to the consent to arbitration can also be found in NAFTA since investment tribunals have ruled that the legality of an investment is an implicit jurisdictional requirement of investment treaties.³⁷⁷ Respondent's consent to arbitration under the invoked treaties is limited to claims that are, first, in accordance with the four treaties and, secondly, in accordance with the applicable arbitration rules and principles of international law.³⁷⁸

230. In the Counter-Memorial, Claimants reject that the Hotel Investments are not compliant with Mexican Law and unprotected by the four treaties.³⁷⁹ Claimants also contend that Respondent has not addressed the applicable law governing the legality of investments.³⁸⁰ Claimants argue that

³⁷⁵ Witness Statement of Marcelino Miranda Aceves, ¶ 43.

³⁷⁶ Memorial on Jurisdiction, ¶ 131.

³⁷⁷ Memorial on Jurisdiction, ¶ 132.

³⁷⁸ Memorial on Jurisdiction, ¶¶ 35-39.

³⁷⁹ Counter-Memorial on Jurisdiction, ¶¶ 202-215.

³⁸⁰ Counter-Memorial on Jurisdiction, ¶ 187.

they have established the Tribunal's *ratione materiae* jurisdiction regarding their investments.³⁸¹ Claimants agree that the Mexico-Argentina, Mexico-Portugal, Mexico-France BIT's contain "in accordance with" the host State law provisions regarding investments but reject that this requirement is implicit in NAFTA and that legality is a condition for jurisdiction.³⁸² Claimants invoke Mexican civil law jurisdiction and the general principle of good faith to sustain the legality of their investments.³⁸³ Claimants also invoke the international law doctrine of estoppel in support of the legality of their investments based on Respondent's alleged treatment of Hotel Investments as lawful and the proportionality test set in *Kim v. Uzbekistan*.³⁸⁴

231. The basis for Claimant's invocation of Mexican civil law jurisdiction, the general principle of good faith,³⁸⁵ estoppel, and the *Kim* test is unclear. Claimants appear to take the alternative position that the issue of whether the Hotel Investments were made in accordance with the four treaties should be resolved under the referenced international law, and Mexican civil law jurisdiction and the general principle of good faith, not by reference to Agrarian and Restricted Zone Laws.³⁸⁶

232. This section first responds to the Claimants argument regarding the applicable law governing the legality of investments. It reiterates the Respondent's position that the four investment treaties invoked do not protect investments contrary to the host state's law and to the international principle of good faith.

a. The invoked investment treaties do not protect investments contrary to the law

233. As acknowledged by Claimants, the Mexico-Argentina, Mexico-Portugal, the Mexico-France BIT all contain explicit provisions that limit coverage only to "investments made in accordance with the law of the host State".³⁸⁷

³⁸¹ Counter-Memorial on Jurisdiction, ¶ 187.

³⁸² Counter-Memorial on Jurisdiction, ¶ 188 and footnote 203.

³⁸³ Counter-Memorial on Jurisdiction, ¶¶ 204-210.

³⁸⁴ Counter-Memorial on Jurisdiction, ¶¶ 189-199, specially at ¶ 190.

³⁸⁵ Counter-Memorial on Jurisdiction, ¶¶ 204-210.

³⁸⁶ Counter-Memorial on Jurisdiction, ¶ 190, footnotes 206 and 207.

³⁸⁷ Counter-Memorial on Jurisdiction, ¶ 188.

234. The provisions and case law limiting coverage only to "investments made in accordance with the law of the host State" means that Respondent's consent to arbitrate does not extend to investments not made in accordance with its laws.³⁸⁸

235. Claimants have not addressed this issue in their Counter-Memorial. Instead, Claimants contend to "have established that their investments give this Tribunal jurisdiction *ratione materiae* over this dispute".³⁸⁹

(1) The explicit legality clauses of the Mexico-Argentina, Mexico-France, and Mexico-Portugal BITs limit the Respondent's consent to arbitration to investments made in accordance with its laws.

236. The Mexico-Argentina, Mexico-France, and Mexico-Portugal BITs contain additional provisions on the treaty scope, investor qualifications, definitions, and substantive obligations expressing the Parties intent to limit the protection of investments to those made in accordance with the laws of the host State:

- **Mexico-Argentina BIT:**

- Article 1(1), the basis of the legality requirement, requires that an investment be made "de conformidad con las leyes y reglamentaciones de la Parte Contratante...de acuerdo con la legislación de esta última".
- Article 1(3) contains a parallel legality requirement for investor qualification limiting the status "investor" to physical persons and entities "in accordance to" the laws of the Parties.
- The legality requirement is further incorporated in treaty references to "inversión" and "inversiones" including the Protocol.
- The "in accordance to" host State law requirement is further incorporated into Article 2 (6) regarding the exclusion of National Treatment and Most-Favored-Nation Treatment for measures maintained by Parties "de conformidad con su legislación vigente" upon entry into force of the treaty and adopted thereafter.

- a. **Mexico-France BIT:**

- Article 2 (1), the basis of the legality requirement, limits the applicability of the treaty to "covered investments" which are those

³⁸⁸ Memorial on Jurisdiction, ¶¶ 35-39.

³⁸⁹ Counter-Memorial on Jurisdiction, ¶ 187.

made after the entry into force of the treaty "de conformidad con la legislación de la Parte Contratante".

- That the legality requirement is further incorporated within treaty references to "inversión" and "inversiones", including the Protocol, is based on the exclusion from the definition of "investment" of any change to the form of investments that is contrary to the laws of the host Party contained in paragraph 2 of the Article 1(1).
- Article 1(2) contains a parallel legality requirement for investor qualification limiting the status "investor" to physical persons and national entities or incorporated "in accordance to" the laws of the Parties.
- Article 3, regarding promotion and admission of investments, contains a precondition that investment be "in accordance to" host Party's law.

b. Mexico-Portugal BIT:

- Article 1(1) of the BIT, the basis of the legality requirement, requires investments to be "de conformidad con las leyes y reglamentos" of the host Party.
- Article 1(1)(f), regarding "investments", specifically contains a precondition for "activos a disposición de un arrendatario" in the host Party that they are "en virtud de un contrato de arrendamiento y de conformidad con sus leyes y reglamentos".
- The legality requirement is further incorporated in treaty references to "inversión" and "inversiones".
- Article 1(3) contains a parallel legality requirement for investor qualification, limiting the status of "investor" to physical persons and entities that are nationals or incorporated "in accordance to" the laws and regulations of the Parties.
- Article 2(1), regarding promotion and admission of investments and fair and equitable treatment, contains a precondition that investment is "in accordance to" the host Party's law.
- Article 2(2), regarding full protection and security, contains a precondition that investment is "in accordance to" the host Party's law.

237. The Mexico-Argentina, Mexico-France, and Mexico-Portugal BITs have thus limited their consent with the "accordance with law" clauses not only in the definition of the investment itself

but also in the provisions related to protection and non-impairment, treaty scope, and promotion and admission of investments.³⁹⁰

(2) NAFTA's implicit legality requirement limits Respondent's consent to arbitration with respect to investments made in accordance with its laws

238. As explained by the Respondent in its Memorial on Jurisdiction regarding 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. Consequently, it is an implicit jurisdictional requirement under NAFTA treaties that the investments be legal under the Respondent’s laws and regulations.³⁹¹

239. Claimants' contention that Respondent has mischaracterized the law on this issue is simply incorrect.³⁹² An overwhelming majority of tribunals have implied a legality requirement in investment treaties in the absence of one.³⁹³ Moreover, most of these tribunals have treated

³⁹⁰ See **RL-154**, *Inceysa Vallisoletana, S.L. c. República de El Salvador*, Caso CIADI No ARB/03/26, Laudo del 2 de agosto de 2006, ¶¶ 188-189.

³⁹¹ Memorial on Jurisdiction, ¶ 132.

³⁹² Counter-Memorial on Jurisdiction, ¶ 188, footnote 203.

³⁹³ See, **RL-147**, Caline Mouawad and Jessica Beess und Chrostin, “The illegality objection in investor–state arbitration”, *Arbitration International*, 2021, p. 58: “First, the requirement that an investment must be legal to enjoy the protections of the applicable investment treaty (*i.e.*, the legality requirement) either arises from the express provisions of the investment treaty or is implied from generally accepted or international legal principles. Absent an express legality requirement, the overwhelming majority of tribunals have implied one.”; **RL-155**, *Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶ 204 “although not in terms of the definition of an ‘investment’, it is necessarily implicit in Article 2 of the treaty that an investment must have been made in accordance with the provision of the host State’s laws. Por lo tanto, se determine que “the obligation upon the host State to admit an investment by a foreign investor (*i.e.* in the present context, to allow the purchase of shares in a local company) only arises if the purchase is made in compliance with its laws”; **RL-095**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 138; **RL-156**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, ¶ 140; **RL-093**, *SAUR International c. República Argentina*, Caso CIADI No. ARB/04/4, Decisión sobre Jurisdicción y sobre Responsabilidad, 6 de junio de 2012, ¶ 308; **RL-157**, *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014, ¶ 131; **RL-158**, *Yukos Universal Limited (Isle of Man) v. Russia*, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, ¶¶ 1349-1352, 1364; **RL-159**, *Veteran Petroleum Limited (Cyprus) v. Russia*, PCA Case No. 2005-05/AA228, Final Award, 18 July 2014, ¶¶ 1349-1352, 1364; **RL-160**, *Hulley Enterprises Limited (Cyprus) v. Russia*, PCA Case No. 2005-03/AA226, Final Award, 18 July 2014, ¶¶ 1349-1352, 1364. The tribunal also agreed with the respondent's position

allegations of illegality as a jurisdictional issue subject to the conditions of a State's consent to arbitrate.³⁹⁴ Only a few have treated illegality objections as an admissibility issue— the results of which have been "immaterial" because illegality has also resulted in the dismissal of the claim— and less have treated it as a merits issue.³⁹⁵

240. Consequently, it is the position of the Respondent that the requirement that investments be legal under the Respondent's laws and regulations is a condition of its consent to arbitrate under all of the invoked treaties and a jurisdictional requirement that each of the Claimants must fulfill under each of the invoked treaties.

b. Investment treaties do not protect investments contrary to the international principle of good faith

241. It is a well-settled principle that investors must invest in accordance with the general principles of international law, including good faith:

that the examination of the legality of an investment should not be limited to verifying whether the last of a series of transactions leading to the investment was in accordance with the law; the realization of the investment will often consist of several consecutive acts and all of them must be legal and in good faith; **RL-186**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines II*, ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶¶ 328, 332; **RL-109**, *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶ 359; **RL-069**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, 264; **RL-162**, *South American Silver Limited El Estado c. El Estado Plurinacional de Bolivia*, Caso CPA No. 2013-15, Laudo, 30 de agosto de 2018, ¶ 456.

³⁹⁴ **RL-186**, *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/11/12, Award, 10 December 2014 ('Fraport II Award'), ¶ 467; **RL-154**, *Inceysa Vallisoletana, S.L. c. República de El Salvador*, Caso CIADI No ARB/03/26, Laudo, 2 de agosto de 2006, ¶ 207; **RL-163**, *Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/ 20, Award, 14 July 2010, ¶¶ 114–115; **RL-164**, *Georg Gavrilovic and Gavrilovic d.o.o. v Republic of Croatia*, ICSID Case No ARB/12/39, Award, 26 July 2018, ¶ 221; **RL-165**, *Anglo-Adriatic Group Limited v Republic of Albania*, ICSID Case No ARB/17/6, Award, 7 February 2019, ¶ 287.

³⁹⁵ **RL-166**, *Churchill Mining Plc v Republic of Indonesia*, ICSID Case No ARB/12/14 and 12/40, Decision on Jurisdiction, 24 February 2014, ¶528 ('the general principle of good faith and the prohibition of abuse of process entail that the claims before this Tribunal cannot benefit from investment protection under the Treaties and are, consequently, deemed inadmissible'); **RL-041**, *Abaclat y otros. c. La República Argentina*, Caso CIADI No ARB/07/5, Decisión sobre Jurisdicción y Admisibilidad, 4 de Agosto de 2011 ('Abaclat v Argentina Decision') (treating illegality as a matter of merits, not jurisdiction, because the legality requirement was found in the 'applicable law' provision rather than the definition of 'investment'), para 382.

- In *Phoenix*, the tribunal insisted that arbitral tribunals had a duty not to protect abuse of the system of international investment protection under the ICSID Convention or bilateral investment treaties.³⁹⁶
- In *Hamester*, the tribunal held that, as a general principle, investments will not be protected if created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It also noted that investments made in violation of the host State's law will also not be protected.³⁹⁷
- In *Sempra*, the tribunal held that that the duty of good faith permeated the approach to protection granted under treaties and contracts.³⁹⁸
- In *Plama*, the tribunal determined that the substantive protections of a BIT cannot apply to investments made contrary to law.³⁹⁹
- In *Khan*, the tribunal held that "[a]n investor who has obtained its investment in the host state only by acting in bad faith or in violation of the laws of the host state, has brought him or herself within the scope of application of the ECT only as a result of his wrongful acts. Such an investor should not be allowed to benefit as a result, in accordance with the maxim *nemo auditur propriam turpitudinem allegans*."⁴⁰⁰

242. Tribunals have also recognized the international and national dimensions of violations of the principle of good faith and its international public policy implications.⁴⁰¹

243. In *Inceysa*, claimants brought a claim regarding breach and expropriation of a government contract involving establishment and operation of stations to control vehicle emissions.⁴⁰² The respondent alleged that the contract was unlawful because it was obtained using false information

³⁹⁶ **RL-167**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 144.

³⁹⁷ **RL-088**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶¶ 123-124.

³⁹⁸ **RL-168**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶ 299.

³⁹⁹ **RL-095**, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, ¶ 139.

⁴⁰⁰ **RL-169**, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, Decision on Jurisdiction, 25 July 2012, ¶ 383.

⁴⁰¹ **RL-167**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 111-113; **RL-170**, *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, ¶¶ 148, 157.

⁴⁰² **RL-154**, *Inceysa Vallisoletana, S.L. c. República de El Salvador*, Caso CIADI No ARB/03/26, Laudo del 2 de agosto de 2006, ¶ 3.

before and during the procurement process.⁴⁰³ The tribunal found that claimants' acts constituted a breach of the principles of (i) good faith⁴⁰⁴; (ii) “*nemo auditur propiam turpitudinem allegans*” (i.e. “a foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and...enjoy the protection granted by the host State”);⁴⁰⁵ (iii) international public policy to “sanction illegal acts and their resulting effects”;⁴⁰⁶ and (iv) prohibition of unjust enrichment⁴⁰⁷. The tribunal found no jurisdiction as the claimants did not comply with the legality requirements intended by the parties to the BIT and of the host state's investment law.⁴⁰⁸

244. The *Inceysa* tribunal underscored the international public policy implications to the claimant's violations of the Salvadorian law and how violations of the international and national principle of good faith work together:

"Good faith is a supreme principle, which governs legal relations in all their aspects and content ... El Salvador gave its consent to the jurisdiction of the Centre, presupposing good faith behavior on the part of future investors (...)

By falsifying the facts, *Inceysa* violated the principle of good faith from the time it made its investment and, therefore, it did not make it in accordance with Salvadorian law. Faced with this situation, this Tribunal can only declare its incompetence to hear *Inceysa's* complaint, since its investment cannot benefit from the protection of the BIT.

(...)

It is not possible to recognize the existence of rights arising from illegal acts, because it would violate the respect for the law which ... is a principle of international public policy."⁴⁰⁹

⁴⁰³ **RL-154**, *Inceysa Vallisoletana, S.L. c. República de El Salvador*, Caso CIADI No ARB/03/26, Award, 2 august 2006, ¶¶ 53-62.

⁴⁰⁴ **RL-154**, *Inceysa Vallisoletana, S.L. c. República de El Salvador*, Caso CIADI No ARB/03/26, Award, 2 august 2006, ¶¶ 230-239.

⁴⁰⁵ **RL-154**, *Inceysa Vallisoletana, S.L. c. República de El Salvador*, Caso CIADI No ARB/03/26, Award, 2 august 2006, ¶¶ 240-244.

⁴⁰⁶ **RL-154**, *Inceysa Vallisoletana, S.L. c. República de El Salvador*, Caso CIADI No ARB/03/26, Award, 2 august 2006, ¶¶ 245-252.

⁴⁰⁷ **RL-154**, *Inceysa Vallisoletana, S.L. c. República de El Salvador*, Caso CIADI No ARB/03/26, Award, 2 august 2006, ¶¶ 253-257

⁴⁰⁸ **RL-154**, *Inceysa Vallisoletana, S.L. c. República de El Salvador*, Caso CIADI No ARB/03/26, Award, 2 august 2006, ¶¶ 302-337.

⁴⁰⁹ **RL-154**, *Inceysa Vallisoletana, S.L. c. República de El Salvador*, Caso CIADI No ARB/03/26, Award, 2 august 2006, ¶¶ 230, 243, 249.

245. Similarly, in *Plama*, the tribunal found that conduct contrary to Bulgarian law as contrary to the good faith principles found in Bulgarian and international law, and thus contrary to international public policy:

"(...) the Tribunal has decided that the investment was obtained by deceitful conduct that is in violation with Bulgarian law ... It would also be contrary to the basic notion of international public policy – that a contract obtained through wrongful means (fraudulent misrepresentation) should not (sic) be enforced by a tribunal ... The Tribunal finds that Claimant's conduct is contrary to the principle of good faith which is part not only of Bulgarian law ... but also of international law ..."⁴¹⁰

246. As these tribunals have concluded, to extend treaty protections to investments made in bad faith or violation of domestic law would reward investors' misconduct, in violation of the principle of *nemo auditor propriam turpitudinem allegans*: no one can benefit from his or her own wrongdoing.⁴¹¹

247. Violations of national laws that are a violation of the international principle of good faith which have been dismissed on jurisdictional grounds include:

- the *structuring* of investments in breach of foreign investor laws for economic gain;⁴¹²
- false assertion of ownership of an investment or right to investment to commence an arbitration;⁴¹³
- the making of an investment for the sole purpose of bringing an international claim against a host State that could not be brought under the domestic law;⁴¹⁴

⁴¹⁰ **RL-095**, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, ¶¶ 143-144.

⁴¹¹ **RL-154**, *Inceysa Vallisoletana, S.L. c. República de El Salvador*, Caso CIADI No ARB/03/26, Laudo del 2 de agosto de 2006, ¶ 242; **RL-169**, *Khan Resources Inc., Khan Resources B.V., and CAUC Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012, ¶ 383.

⁴¹² **RL-186**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines II*, ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶¶ 328, 332. See footnote *ibid*.

⁴¹³ **RL-072**, *Europe Cement Investment and Trade SA v Republic Turkey*, ICSID Case No ARB(AF)/ 07/2, Award (13 August 2009), ¶ 175. The tribunal declined jurisdiction and also finds abuse of process.

⁴¹⁴ **RL-167**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 111-113, 145.

- investment acquired through financial, professional, and legal misrepresentations to host State and improper bidding process;⁴¹⁵
- investments acquired based on misrepresentations (and intentional withholding of information) to host state regarding corporate ownership;⁴¹⁶

248. In *Fraport*, the tribunal underscored that the violation of the national law had been done through secret agreements concerning the structuring of foreign investment.⁴¹⁷ The *Fraport* tribunal focused primarily on the violation of the national law (foreign investment restrictions) but added that the structuring was perpetrated through bad faith behaviour.⁴¹⁸ A key factor was that the breach of national law was central to the investment's profitability.⁴¹⁹ The respondent had noted that "[d]espite knowing that its investment structure violated the Constitution and the ADL (law to prevent evasion of constitutional nationality restrictions for operation of public utilities, referred to as Anti-Dummy Law or ADL), *Fraport* proceeded to implement this unlawful scheme since the only way to ensure that the Project would be profitable was to secretly secure its management control." ⁴²⁰ The tribunal noted that:

"There is therefore no room for "good faith," "absence of intent" or a similar defense by *Fraport*. *Fraport's* interest in entering into the Project was so great that the decision was

⁴¹⁵ **RL-154**, *Inceysa Vallisoletana, S.L. c. República de El Salvador*, Caso CIADI No ARB/03/26, Laudo del 2 de agosto de 2006, ¶ 242. The Inceysa tribunal declined jurisdiction over an investment obtained in breach of domestic law.

⁴¹⁶ **RL-095**, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶¶ 135, 139.

⁴¹⁷ **RL-186**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines II*, ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶ 398.

⁴¹⁸ **RL-186**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines II*, ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶ 396.

⁴¹⁹ **RL-186**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines II*, ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶¶ 396, 398. Mientras que un Comité ad-hoc del CIADI (*Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines I*), (ICSID Case No. ARB/03/2, Decision on the Application for Annulment of *Fraport AG Frankfurt Airport Services Worldwide*, 23 December 2010) annulled the 2007 *Fraport I* decision (*Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines I*, ICSID Case No. ARB/03/25, Award, 16 August 2007), both the *Fraport I* and *Fraport II* tribunals declined jurisdiction based on claimants breach of foreign investment restrictions in the making of its investment.

⁴²⁰ **RL-186**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines II*, ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶ 343.

made to approve the proposed transaction despite the risk resulting from the failure to comply with the Philippine Constitution and the ADL."⁴²¹

249. These factors led the *Fraport* tribunal to hold that the economic activity was not a protected investment, as it violated the principle of good faith in the domestic legal order.⁴²² The *Fraport* tribunal noted as follows regarding the economic benefits of investments:

402. As for policy, BITs oblige governments to conduct their relations with foreign investors in a transparent fashion. Some reciprocal if not identical obligations lie on the foreign investor. One of those is the obligation to make the investment in accordance with the host state's law. It is arguable that even an investment which is not made in accordance with host state law may import economic value to the host state. But that is not the only goal of this sector of international law. Respect for the integrity of the law of the host state is also a critical part of development and a concern of international investment law.⁴²³

250. In *Europe Cement*, the claimants asserted ownership of shares in companies owning concessions that were terminated by Turkey.⁴²⁴ Based on the claimant's admission of its inability to produce evidence of its shareholding, the tribunal's adverse inferences regarding the authenticity and irregularity of some of the documents, and the claimant's lack of rebuttal evidence, the tribunal held that claimants did not own and "never had such ownership "in the companies."⁴²⁵ The tribunal also held that claimants had committed an abuse of process because they had not shown good faith in asserting an investment based on "documents that...were not authentic", noting the findings in *Inceysa and Phoenix*.⁴²⁶ As noted by the tribunal:

175. In the above cases [*Inceysa and Phoenix*], the lack of good faith was present in the acquisition of the investment. In the present case, there was in fact no investment at all, at least at the relevant time, and the lack of good faith is in the assertion of an investment on the basis of documents that according to the evidence presented were not authentic. The Claimant asserted jurisdiction on the basis of a claim to ownership of shares, which

⁴²¹ **RL-186**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines II*, ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶ 441. See footnote *ibid*.

⁴²² **RL-186**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines II*, ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶¶ 328, 332. See footnote *ibid*.

⁴²³ **RL-186**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines I*, ICSID Case No. ARB/03/25, Award, 16 August 2007, ¶402.

⁴²⁴ **RL-072**, *Europe Cement Investment and Trade SA v Republic Turkey*, ICSID Case No ARB(AF)/ 07/2, Award (13 August 2009), ¶¶ 139-141. The tribunal declined jurisdiction and also finds abuse of process.

⁴²⁵ **RL-072**, *Europe Cement Investment and Trade SA v Republic Turkey*, ICSID Case No ARB(AF)/ 07/2, Award (13 August 2009), ¶¶ 143-145. The tribunal declined jurisdiction and also finds abuse of process.

⁴²⁶ **RL-072**, *Europe Cement Investment and Trade SA v Republic Turkey*, ICSID Case No ARB(AF)/ 07/2, Award (13 August 2009), ¶¶ 166-176. The tribunal declined jurisdiction and also finds abuse of process.

the uncontradicted evidence before the Tribunal suggests was false. Such a claim cannot be said to have been made in good faith. If, as in Phoenix, a claim that is based on the purchase of an investment solely for the purpose of commencing litigation is an abuse of process, then surely a claim based on the false assertion of ownership of an investment is equally an abuse of process.⁴²⁷

251. As the jurisprudence above shows, investment tribunals lack jurisdiction over claims regarding investments made in violation of domestic law or violate the international principle of good faith, including the principle of *nemo auditor propriam turpitudinem allegans* and international public policy.

252. The Respondent's position is that it would be inappropriate for the Tribunal to grant jurisdiction to Claimants in this claim because doing so would violate these principles.

c. The Claimants did not acquire rights over the Hotel Investments under Mexican or International Law

253. As explained above, Claimants violated Mexican law and did not act in good faith in undertaking the transactions to obtain rights to their parcels and hotels. Claimants violated Mexican law, including the Mexican Constitution and Agrarian Law and Foreign Investment regimes, and failed to act in good faith.⁴²⁸

254. Ejidos and beach-front land are considered areas with a special status under the Mexican Constitution and international law.⁴²⁹ The Agrarian Law provides that only Mexican nationals can be ejido land right holders; third parties, *i.e.* corporate entities, foreigners, and other non-ejido subjects, can only obtain rights to ejido land under strict limits.⁴³⁰

255. Likewise, the Mexican Constitution and the Laws on Foreign Investments (Restricted Zone Regime) provide that foreigners and foreign entities can only obtain rights to beach-front land under strict limits.⁴³¹

⁴²⁷ **RL-072**, *Europe Cement Investment and Trade SA v Republic Turkey*, ICSID Case No ARB(AF)/07/2, Award (13 August 2009), ¶ 175. The tribunal declined jurisdiction and also finds abuse of process.

⁴²⁸ First Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 29-35.

⁴²⁹ Memorial on Jurisdiction, ¶¶ 104-105, 121. Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 19.

⁴³⁰ Memorial on Jurisdiction, ¶ 99.

⁴³¹ Memorial on Jurisdiction, ¶¶ 121-130. Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 20-23; **RW-001**, ¶¶ 57-64.

256. Rights acquired by foreigners through contracts in breach of these two frameworks are *void ab initio*.⁴³² These restrictions on foreign land rights are widely known and have existed since the early XXth century.⁴³³ Instead of using the proper procedure to obtain rights regarding Ejido and beach-front land as foreigners, Claimants purposefully structured their investments to obtain an unlawful indirect interest in beach-front ejido lands without the Respondent's authorization and at a non-competitive price. They simulated their transactions in fraud of the Constitutional prohibitions on foreign investments and restrictions on ejido rights holders.

257. Claimants' investments and action regarding those investments violated the international and national principle of good faith and international public interest. They were deliberately structured to illegally obtain domestic rights to land and Hotel Investments otherwise only available to Mexican nationals. Some of the Claimants subsequently proceeded to acquire Mexican nationality to attempt to cure the illegality and capitalize on the irregular purchase. These unrecognized unlawful interests are at the root of the investments upon which Claimants bases its claim. Misuse of the international arbitral system by bringing false assertion of ownership/rights of investments to commence arbitration is an abuse of law, abuse of process, and violation of international public interest that must deprive this Tribunal of jurisdiction.

258. The *Saba Flakes*, *Europe Cement*, *Álvarez y Marín* tribunals faced a similar situation.

259. In *Saba Flakes*, claimants alleged to have an investment based on temporary share certificates in a Turkish company.⁴³⁴ In examining whether claimants had an investment, the tribunal asked itself whether any property and rights had been transferred to the Claimant' as a result of that transaction.⁴³⁵ The tribunal held that the claimants had not acquired legal title to the shares in a manner recognized by the host State's law.⁴³⁶ The tribunal found there to be no investment and reasoned as follows:

"...bilateral investment treaties are at liberty to condition their application and the whole protection they afford, including consent to arbitration, to a legality requirement of one form or another ... the Contracting Party cannot be deemed to have given its consent to

⁴³² Memorial on Jurisdiction, ¶ 129; First Expert Report of Mr. Gutiérrez de la Peza, ¶ 95.

⁴³³ First Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 31-32.

⁴³⁴ **RL-163**, *Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/ 20, Award, 14 July 2010, ¶ 148.

⁴³⁵ **RL-163**, *Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/ 20, Award, 14 July 2010, ¶ 124.

⁴³⁶ **RL-163**, *Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/ 20, Award, 14 July 2010, ¶ 29.

arbitrate the dispute under Article 8(3) of the BIT [if the investment is not established in accordance with the laws] and there would therefore be no consent to the Centre's jurisdictional within the meaning of Article 25(1) of the ICSID Convention."⁴³⁷

260. Similarly, in *Europe Cement Investment*, the claimant alleged it had share certificates establishing rights in two Turkish companies.⁴³⁸ Claimants had adduced copies of the share transfer agreements, and the respondent challenged the authenticity of the documents and transactions.⁴³⁹ Drawing an adverse inference on claimants' lack of production of the original share agreements, the Tribunal found that the claimant did not own the shares in question and declined jurisdiction for lack of an investment.⁴⁴⁰ Further, it found that the irregularities in the documentation and transfers indicated that "the Claimant initiated a claim asserting that the Tribunal had jurisdiction on the basis of a false claim that it owned shares in Turkish companies and thus had an investment in Turkey."⁴⁴¹ The tribunal determined as follows on this issue:

171. In the light of the above, do the circumstances of this case constitute an abuse of process? It was this issue that Respondent's counsel described as one of "international public interest...

(...)

175.(...) In the present case, there was in fact no investment at all, at least at the relevant time, and the lack of good faith is in the assertion of an investment on the basis of documents that according to the evidence presented were not authentic. The Claimant asserted jurisdiction on the basis of a claim to ownership of shares, which the uncontradicted evidence before the Tribunal suggests was false. Such a claim cannot be said to have been made in good faith. If, as in *Phoenix*, a claim that is based on the purchase of an investment solely for the purpose of commencing litigation is an abuse of process, then surely a claim based on the false assertion of ownership of an investment is equally an abuse of process.⁴⁴²

⁴³⁷ **RL-072**, *Europe Cement Investment and Trade SA v Republic Turkey*, ICSID Case No ARB(AF)/ 07/2, Award, 13 August 2009, ¶ 114.

⁴³⁸ **RL-072**, *Europe Cement Investment and Trade SA v Republic Turkey*, ICSID Case No ARB(AF)/ 07/2, Award, 13 August 2009, ¶ 83-91.

⁴³⁹ **RL-072**, *Europe Cement Investment and Trade SA v Republic Turkey*, ICSID Case No ARB(AF)/ 07/2, Award, 13 August 2009, ¶¶ 92-110.

⁴⁴⁰ **RL-072**, *Europe Cement Investment and Trade SA v Republic Turkey*, ICSID Case No ARB(AF)/ 07/2, Award, 13 August 2009, ¶¶ 92-110.

⁴⁴¹ **RL-072**, *Europe Cement Investment and Trade SA v Republic Turkey*, ICSID Case No ARB(AF)/ 07/2, Award, 13 August 2009, ¶ 163.

⁴⁴² **RL-072**, *Europe Cement Investment and Trade SA v Republic Turkey*, ICSID Case No ARB(AF)/ 07/2, Award, 13 August 2009, ¶¶ 171-175.

261. In *Álvarez y Marín*, claimants initiated a claim alleging loss of rights to beach-front parcels situated within two different land regimes.⁴⁴³ The respondent objected on the basis of illegality alleging that the parcels had been acquired illegally and at a price that was lower than required under the governing land regime.⁴⁴⁴ Applying the *Kim* test, the tribunal determined that the claimants purchase of the parcels was illegal and contrary to the governing land regime.⁴⁴⁵ The tribunal examined the claimants’ good faith and “due diligence” in undertaking the investment through an assessment of the transactions and determined that it did not merit treaty protection:⁴⁴⁶

181. Aun bajo el supuesto de que las Demandantes no hubieran participado en las anteriores ilicitudes, la consecuencia sería la misma: la inversión sería ilegal.

182. Esto es así porque los inversionistas recibieron multiplicidad de alertas de las irregularidades en los procesos que llevaron a su adquisición de la propiedad, y por tanto, debe considerarse que conocían o debieron haber conocido la existencia del fraude. La “ignorancia deliberada” de las Demandantes no las exime de responsabilidad.

(...)

184. En cualquiera de los escenarios, bien sea porque las Demandantes participaron directamente en las irregularidades, o bien porque las Demandantes incurrieron en un supuesto de ignorancia deliberada, éstas no actuaron de buena fe y no pueden reclamar protección al amparo de los Tratados.⁴⁴⁷ (emphasis added)

262. The Respondent’s position is that it would be inappropriate for the Tribunal to grant jurisdiction to Claimants in this claim because doing so would result in a misuse of the international arbitral system by allowing false assertion of ownership/rights of investments to commence arbitration, which is an abuse of law and abuse of process, and violates international and national public interest.

⁴⁴³ **RL-094**, *Álvarez y Marín Corporación S.A. y otros c. Republica de Panama*, Caso CIADI No. ARB/15/14, Laudo, 12 de octubre de 2018, ¶¶ 11-19.

⁴⁴⁴ **RL-094**, *Álvarez y Marín Corporación S.A. y otros c. Republica de Panama*, Caso CIADI No. ARB/15/14, Laudo, 12 de octubre de 2018, ¶¶ 350-384.

⁴⁴⁵ **RL-094**, *Álvarez y Marín Corporación S.A. y otros c. Republica de Panama*, Caso CIADI No. ARB/15/14, Laudo, 12 de octubre de 2018, ¶¶ 346-348.

⁴⁴⁶ **RL-094**, *Álvarez y Marín Corporación S.A. y otros c. Republica de Panama*, Caso CIADI No. ARB/15/14, Laudo, 12 de octubre de 2018, ¶¶ 193-295.

⁴⁴⁷ **RL-094**, *Álvarez y Marín Corporación S.A. y otros c. Republica de Panama*, Caso CIADI No. ARB/15/14, Laudo, 12 octubre 2018, ¶¶ 181,182,184. The tribunal found in favour of illegality in the transfer of ownership of the parcels despite the land purchase not having been declared void.

**d. Claimants' estoppel claim does not preclude
Respondent's objection of illegality**

263. In the Counter Memorial, Claimants state that tribunals have rejected respondent's allegations of illegality based on estoppel under seven general circumstances:

- when the respondent has accrued benefits from the investment and has formed the claimant's legitimate expectation of investments legality (*ADC*).⁴⁴⁸
- when the claimant's illegality involves incompliance with mere "formalistic" requirements (*Desert Line*).⁴⁴⁹
- when the claimant and respondent conducted themselves as if the investment was legal and in effect (*RDC*).⁴⁵⁰
- when claimant's illegality did not involve criminal conduct and or misleading of the state (*Fraport I*).⁴⁵¹
- when claimant's illegality consists of good faith mistakes by claimants in the context of unclear host state laws and failure of local counsel to flag issue *Fraport I*;⁴⁵²
- when claimant's illegality consists of good faith mistakes by claimants that are not "central to the profitability of the investment"(*Fraport I*);⁴⁵³

⁴⁴⁸ Counter-Memorial on Jurisdiction, ¶¶ 189-191, citing ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, 2 October 2006, **CLA-0095**.

⁴⁴⁹ Counter-Memorial on Jurisdiction, ¶ 192, citing Desert Line Projects LLC v. Republic of Yemen, ICSID Case No. ARB/05/17, Award, 6 February 2008 ¶ 119, **CLA-0096**.

⁴⁵⁰ Counter-Memorial on Jurisdiction, ¶ 193, citing Railroad Development Corporation v. Republic of Guatemala, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010 ¶ 139, **CLA-0097**.

⁴⁵¹ Counter-Memorial on Jurisdiction, ¶¶ 195-196, citing *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines I*, ICSID Case No. ARB/03/25, Award, 16 August 2007 ¶¶ 346-47, **CLA-0098**.

⁴⁵² Counter-Memorial on Jurisdiction, ¶ 196, citing *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines I*, ICSID Case No. ARB/03/25, Award, 16 August 2007 ¶¶ 346-47, **CLA-0098**.

⁴⁵³ Counter-Memorial on Jurisdiction, ¶ 196, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines I*, ICSID Case No. ARB/03/25, Award, 16 August 2007 ¶¶ 346-47, **CLA-0098**.

⁴⁵³ Counter-Memorial on Jurisdiction, ¶ 196, citing *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines I*, ICSID Case No. ARB/03/25, Award, 16 August 2007 ¶¶ 346-47, **CLA-0098**.

- when claimant's illegality consists of good faith mistakes by claimants that are "not serious or central enough" to the investment (*Tokios*).⁴⁵⁴

(1) The legality of an investment is a jurisdictional requirement that cannot be changed through the “estoppel” principle

264. As explained by the Respondent in its Memorial on Jurisdiction, its consent to arbitrate has been limited through the definition of "investment" in Articles 1.1 of the Mexico-Argentina and the Mexico-Portugal BIT and 2.1 of the Mexico-France BIT, which expressly require investments be "in accordance with" laws and regulations of the Party in whose territory the investment is made.⁴⁵⁵ This limit to the consent to arbitration can also be found in NAFTA since investment tribunals have ruled that the legality of an investment is an implicit jurisdictional requirement of investment treaties.⁴⁵⁶

265. In the Counter-Memorial, the Claimants agree that the Mexico-Argentina, Mexico-Portugal, Mexico-France BIT's require that investments be made "in accordance with" the host State law provisions, but reject that this requirement is implicit in NAFTA and that legality is a condition for jurisdiction.⁴⁵⁷ Claimants, in turn, invoke Mexican civil law jurisdiction and the general principle of good faith to sustain the legality of their investments.⁴⁵⁸

266. The principle that the legality of investment is a jurisdictional requirement that cannot be changed through the principle of estoppel or legitimate expectations has been well established in *Achmea* and *Besserglik*. In *Achmea* where the tribunal determined as follows regarding the sources informing its jurisdiction:

"...the Tribunal must satisfy itself of the existence and extent of its jurisdiction. It considers that its jurisdiction is fixed by laws (as explained further below), and that such jurisdiction cannot here be created, continued or extended by arguments based on the

⁴⁵⁴ Counter-Memorial on Jurisdiction, ¶ 197, citing *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 ¶¶ 83-86, **CLA-0101**.

⁴⁵⁵ Memorial on Jurisdiction, ¶ 131.

⁴⁵⁶ Memorial on Jurisdiction, ¶ 132.

⁴⁵⁷ Counter-Memorial on Jurisdiction, ¶ 188 and footnote 203.

⁴⁵⁸ Counter-Memorial on Jurisdiction, ¶¶ 204-210.

possible operation of doctrines of acquiescence, waiver or estoppel in respect of acts or omissions of Respondent (or Claimant)."⁴⁵⁹

267. The tribunal in *Besserglik* came to similar conclusions:

422. The jurisdiction of the Tribunal and the BIT being in force is a matter of law. Just as the jurisdiction of the Tribunal cannot be created by invoking the doctrine of estoppel, neither can a treaty which is not in force be given effect by an argument based on estoppel.⁴⁶⁰

268. It is the Respondent's position that the alleged Hotel Investments were made illegally and therefore, the Respondent has not consented to arbitration.

(2) International law, good faith, legitimate expectations and the principle of *estoppel* cannot determine the standing of the Claimants to present an investment claim

269. In the Counter Memorial, the Claimants invoke the international law doctrine of *estoppel* in support of the legality of their investments based on Respondent's alleged treatment of Hotel Investments as lawful and Respondent's failure to satisfy the proportionality test set in *Kim v. Uzbekistan*.⁴⁶¹ The basis for Claimants' invocation of the principle of estoppel and international law is unclear. Claimants appear to take the alternative position that the issue of whether the Hotel Investments were made in accordance with the four treaties should be resolved under those same treaties and the applicable international law, not by reference to Mexican law.⁴⁶²

270. International law, good faith, legitimate expectations, estoppel, and the *Kim* test cannot be the basis of the existence of Claimants' rights to the Hotel Investments and their legality.

271. It is well established in *América Móvil, Vestey, Mobil v Canada*, and *Blusun* that international law and its principles cannot be a source of property rights or a source of jurisdiction where none would otherwise exist:

⁴⁵⁹ **R-171**, *Achmea B.V. (formerly Eureka B.V.) v. Slovak Republic I*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, ¶ 219.

⁴⁶⁰ **RL-050**, *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award, 28 October 2019, ¶ 422.

⁴⁶¹ Counter-Memorial on Jurisdiction, ¶¶ 189-199, specially at ¶ 190.

⁴⁶² Counter-Memorial on Jurisdiction, ¶ 190, footnotes 206 and 207.

- “los principios de derecho internacional sobre expectativas legítimas, buena fe y *estoppel* no son fuente de derechos de propiedad.”⁴⁶³
- “the principle of estoppel cannot create otherwise inexistent property rights. This is so if one grounds the principle of estoppel on international law”.⁴⁶⁴
- “the principle of good faith forms part of international law and is relevant to the manner in which a State is required to perform its treaty obligations, but that it does not constitute a separate source of obligation where none would otherwise exist.”⁴⁶⁵
- “[i]nternational law does not make binding that which was not binding in the first place [...]”.⁴⁶⁶

272. Respondent also takes the position that, as set forth in *Parkerings, Hamester, and BayWa r.e. v. Spain*, contractual rights *per se* cannot give rise to legitimate expectations.

273. The *Parkerings v Lithuania* tribunal made a clear distinction between contractual obligations and expectations and legitimate expectations under international law:

It is evident that not every hope amounts to an expectation under international law. The expectation a party to an agreement may have of the regular fulfilment of the obligation by the other party is not necessarily an expectation protected by international law. In other words, contracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law. Indeed, the party whose contractual expectations are frustrated should, under specific conditions, seek redress before a national tribunal.⁴⁶⁷ (emphasis added)

274. The same position was adopted in *Hamester*:

⁴⁶³ **R-112**, *América Móvil S.A.B. de C.V. c. República de Colombia*, Case CIADI No. ARB(AF)/16/5, Laudo del 07 de mayo de 2021, ¶ 454.

⁴⁶⁴ **R-175**, *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 257.

⁴⁶⁵ **R-112**, *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, ¶ 168. Ver también, **RL-179** *Border and Transborder Armed Actions Case (Nicaragua v. Honduras)*, International Court of Justice, Jurisdiction and Admissibility Judgment (20 December 1988, ¶ 94. “[Good faith] is not in itself a source of obligation where none would otherwise exist”.

⁴⁶⁶ **RL-069**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, ¶ 371.

⁴⁶⁷ **RL-180**, *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, [Parkerings], ¶ 344. See also **RL-155**, *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶¶ 217 y 218.

It is important to emphasise that the existence of legitimate expectations and the existence of contractual rights are two separate issues. This has been highlighted by the *Parkerings v. Lithuania* tribunal [...]⁴⁶⁸

275. In *BayWa r.e. v. Spain* the tribunal noted that, in principle, an investor cannot have a legitimate expectation of treatment which is unlawful under the law of the host State, provided the host State law itself is not inconsistent with the treaty under which the tribunal exercises its jurisdiction.⁴⁶⁹

276. Under international law, the only applicable law for determining the existence and validity of Claimants' rights to the Hotel Investments is Mexican Law.

(3) Claimants' jurisprudence is legally and factually distinguishable

277. Claimants refer to *Alpha v. Ukraine*, *Inmaris v. Ukraine*, *Karkey v. Pakistan*, *ADC v. Hungary*, and *Desert Line Projects v. Yemen*, *RDC v. Guatemala*, in support of the proposition that investment tribunals have applied *estoppel* to reject State allegations of illegality of the States.⁴⁷⁰ This case law is both factually and legally inapplicable.

(a) Alpha

278. In *Alpha v. Ukraine* the tribunal did not apply the doctrine of estoppel to the determination of legality of the investment as the Claimants suggest. The case is also factually distinguishable because the tribunal's jurisdiction was determined based on registered contracts, some of which had faulty registration (due to extensions or amendments), but none of which were found improperly registered.⁴⁷¹ Ukraine also did not argue that the agreements, *per se*, were illegal or

⁴⁶⁸ **RL-088**, *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶¶ 335-337.

⁴⁶⁹ **RL-181**, *BayWa r.e. renewable energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, ¶ 569.

⁴⁷⁰ Counter-Memorial on Jurisdiction, ¶ 190, specially footnote 207.

⁴⁷¹ **RL-182**, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶ 61.

contrary to law, only that they did not qualify as protected investments given their character and terms.⁴⁷² In the paragraph referred to by Claimants, the tribunal found that:

“[it did] not consider the prolongation of the [registered] contracts to be a basis for finding Claimant’s investment to be illegal under Ukrainian law” [as the extension was not] “illegal’ [because it] “had received the explicit approval of the State Tourist Administration”.⁴⁷³

279. Nonetheless, the *Alpha* tribunal’s factual and legal findings support Respondent’s position. A tribunal should decline jurisdiction when the illegality involves a breach of a host state’s fundamental laws, including foreign investment restrictions, and when the Claimant’s inability to establish registration is directly linked to the illegality and inexistence of registration rights for the rights alleged. The *Alpha* tribunal, agreeing with the *Tokios* tribunal reiterated that “(...) Respondent’s registration of each of Claimant’s investments indicates that the ‘investment’ in question was made in accordance with the laws and regulations of Ukraine” and determined that claimant’s investment was “not excluded from the Tribunal’s jurisdiction by virtue of alleged defects in Claimant’s registration paperwork”.⁴⁷⁴

(b) *Inmaris*

280. *Inmaris*, is also legally and factually distinguishable because the Respondent, in that case, did not contest that the obligations contained in Bareboat Charters *per se* could give rise to claim as an investment.⁴⁷⁵ The issue in debate was which Bareboat contract was the contract in effect between the parties for purposes of valid claims to investments.⁴⁷⁶

281. Regarding legality, additional issues were whether the terms and changes to the Bareboat Charter Contract were contrary to Ukrainian Law and whether the lack of registration rendered the

⁴⁷² **RL-182**, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶ 442.

⁴⁷³ **RL-182**, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶ 302.

⁴⁷⁴ **RL-182**, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶ 297.

⁴⁷⁵ **RL-183**, *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, ¶ 67

⁴⁷⁶ **RL-183**, *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, ¶¶ 60-62.

contracts contrary to law and unprotected under the BIT.⁴⁷⁷ The tribunal determined that the only consequence of non-registration under Ukrainian Law was that claimants could not benefit from the “privileges and guarantees” provided by the foreign investment law, but it did not render such contracts as ‘illegal’ based on the applicable domestic contract law.⁴⁷⁸ This is unlike the situation before this Tribunal. Here, the Claimants’ illegality involves breach of the Respondent’s Constitutional and federal laws, including foreign investment restrictions. Additionally, Claimant’s inability to register their land rights is directly linked to the illegality and inexistence of the rights alleged.

282. Further, contrary to the Claimants’ assertions, the *Inmaris* tribunal rejected the argument that the doctrine of *estoppel* precluded the Respondent from claiming illegality despite the fact that the Respondent did not view the contract or the payment as illegal under domestic law during the course of negotiations prior to arbitration.⁴⁷⁹

(c) *Karkey*

283. *Karkey v. Pakistan*, is also factually distinguishable as the respondent, in that case, did not contest *per se* the underlying legality of the obligations at the root of the original contract. Respondent alleged contract illegality regarding material changes to the contract post-bid, in breach of Pakistani law.⁴⁸⁰ Central to the tribunal’s finding that Pakistan was precluded from arguing that the investment was invalid due to breach of Pakistani laws was that the investment involved contractual modifications which Pakistan had previously argued before the Pakistani Supreme Court that it had been procured in compliance with Pakistani procurement laws.⁴⁸¹

(d) *ADC*

⁴⁷⁷ **RL-183**, *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, ¶¶ 67, 136-145.

⁴⁷⁸ **RL-183**, *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, ¶ 144-145

⁴⁷⁹ **RL-183**, *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, ¶ 140.

⁴⁸⁰ **RL-184**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶ 277.

⁴⁸¹ **RL-184**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶¶ 624-627.

284. Claimants cite *ADC* in support of the proposition that the illegality of Claimants' investment should be objected to when the Respondent has accrued benefits from the investment and has formed Claimants' legitimate expectation of investments legality.⁴⁸²

285. *ADC* is apposite to this case in many respects. First, like the cases above, the respondent did not contest *per se* the underlying legality of the obligations at the root of the contracts. As the tribunal pointed out, Hungary agreed that claimants "...had a perfectly lawful and legitimate role in the Project" at issue.⁴⁸³

286. Second, unlike the case before this Tribunal, the case involved valid contracts between the claimants and the Hungarian state entity, that were awarded through a strict tendering process that lasted more than seven years, and that were subsequently held to be invalid by Hungary due to change to the mandate of the Hungarian state entity party to the contract.⁴⁸⁴

287. Third, key to the tribunal's finding that the defects of illegality raised by Hungary did not render the contracts invalid was that the content and structure of the web of agreements at issue "was insisted upon and voluntarily entered into by organs of the Hungarian Government" and that Hungary raised the issues "only ...at a very late stage in these proceedings which themselves commenced many years after the matters complained of".⁴⁸⁵

(e) *Fraport I*

288. Claimants cite *Fraport I* in support of the proposition that objections to legality have prevailed despite Claimants' *estoppel* arguments only in extreme scenarios.⁴⁸⁶ Claimants also cite to *Fraport I* in support of the proposition that the illegality objection should not prevail when the host State law is not clear and this situation induces claimants to make "good faith" mistakes and

⁴⁸² Counter-Memorial on Jurisdiction, ¶¶ 189-191; **RL-185** *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, CLA-0095.

⁴⁸³ **RL-185** *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, bullet point 7.

⁴⁸⁴ **RL-185**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006

⁴⁸⁵ **RL-185**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 456.

⁴⁸⁶ Counter-Memorial on Jurisdiction, ¶¶ 194-196, **CLA-0098**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines I*, ICSID Case No. ARB/03/25, Award, 16 August 2007 ¶ 346.

the “the offending arrangement was not central to the profitability of the investment” or “not serious or central enough” to the investment.⁴⁸⁷

289. The Respondent objects to the Claimants position on the precedential or persuasive value of *Fraport I* because the specific text cited is *obiter dicta* and this interpretation of the principle of good faith to investor’s investment and exceptions to illegality found therein was annulled by the ICSID ad-hoc committee.⁴⁸⁸

290. Still, the Claimants’ mischaracterize the facts in this case. The *Fraport* claim was brought on the basis of the Philippine Supreme Court decision declaring airport concession null and *void ab initio* due to illegality in its procurement and negotiation.⁴⁸⁹ The Philippines objected to jurisdiction based on illegality because Fraport had structured its investments in breach of the Philippine Constitution nationality-based investment restrictions and anti-dummy laws (ADL) regarding public utility companies.⁴⁹⁰ The ADL law contained penalties for the breach.⁴⁹¹

291. *Fraport I* (and *Fraport II*) tribunal’s factual and legal findings support Respondent’s position that a tribunal should decline jurisdiction when a claimant’s illegality involves a breach of a host state’s foreign investment restrictions in the making of its investment and the illegality is central to the profitability of the investment, as has occurred in this case. Further, the finding of the *Fraport* tribunal also supports the principle that an asset that is an “economic value to the host

⁴⁸⁷ Counter-Memorial on Jurisdiction, ¶¶ 194-196, citing **CLA-0098**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines I*, ICSID Case No. ARB/03/25, Award, 16 August 2007 ¶ 346.

⁴⁸⁸ **RL-161**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I)*, (ICSID Case No. ARB/03/2, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010, *See also* footnote 419; Counter-Memorial on Jurisdiction, ¶197; **CLA-0101**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 ¶¶ 83-86.

⁴⁸⁹ **RL-186**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines II*, ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶ 10.

⁴⁹⁰ **RL-186**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines II*, ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶ 15.

⁴⁹¹ **RL-186**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines II*, ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶ 345.

state” does not automatically make it a protected investment because “[r]espect for the integrity of the law of the host state ...and a concern of international investment law” is also required.⁴⁹²

(f) *Desert Line*

292. Claimants reference *Desert Line* in support of the proposition that the illegality of Claimants’ investment should be objected when the illegality involves incompliance with mere “formalistic” requirements.⁴⁹³ Claimants’ reference to *Desert Line* is also inaccurate and factually and legally distinguishable.

293. First, as with the cases above, in *Desert Line*, the Respondent did not contest *per se* the underlying legality of the obligations at the root of the contracts.⁴⁹⁴ Second, the respondent argued that Claimants’ investment was not a qualified investment because it lacked the necessary acceptance and certificate under the Yemeni Investment Law.⁴⁹⁵ The reference to *estoppel* can be found in subsequent paragraphs in regard to whether the business dealings between the claimant and “President of the Republic, the Prime Minister, the Minister of Finance, and the Minister of Public Works”⁴⁹⁶ had resulted in Respondent’s waiver of the certificate requirement and could not “rely on it to defeat jurisdiction”.⁴⁹⁷ It was in this context of legitimate expectations, that the tribunal made its finding on the non-compliance with certificate requirements. The situation did not concern a legality requirement involving a substantive “breach of fundamental principles of the host State’s law”.⁴⁹⁸

294. The facts in *Desert Line*, are unlike the facts before the Tribunal:

⁴⁹² **CLA-0098**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines I*, ICSID Case No. ARB/03/25, Award, 16 August 2007, ¶ 402.

⁴⁹³ Counter-Memorial on Jurisdiction, ¶¶ 194-196; **CLA-0096**, *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 ¶ 119.

⁴⁹⁴ **CLA-0096**, *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶ 118.

⁴⁹⁵ **CLA-0096**, *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶¶ 90, 92-93.

⁴⁹⁶ *Id.*, ¶ 105.

⁴⁹⁷ *Id.*, ¶ 118.

⁴⁹⁸ *Id.*, ¶ 104 and 106.

- Claimants' claims do not involve incidental illegalities during the investment.⁴⁹⁹ The illegalities are significant. They include violations to Respondent's fundamental laws, including Constitutional laws and restrictions on foreign investment that protect key "sectorial or geographical areas", which have an important public policy function.⁵⁰⁰
- Additionally, as highlighted in *Kim* and *Liman*, the illegalities in this case render the investments *void ab initio* and not curable.⁵⁰¹
- Regarding registration, the Respondent is of the position that Claimants' inability to establish registration and other legal certifications of their Hotel Investments with the RAN and/or under the Foreign Investment Law is directly linked to their illegality and non-existence of registration rights under these regimes for the rights alleged; deficiencies that are incurable.

(g) *RDC*

295. Claimants cite to *RDC* in support of the proposition that the illegality of claimant's investment should be rejected when the claimant and respondent conducted themselves as if the investment was legal and in effect.⁵⁰²

296. The case of *RDC v Guatemala*, involved a claim regarding one of the claimants' contracts with the state rail company to rebuild and operate the Guatemalan rail system. Similar to the cases above, the legality of the contract source of the claimant's agreement with the Guatemalan rail

⁴⁹⁹ Counter-Memorial on Jurisdiction, ¶ 19; **CLA-0101**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 ¶¶ 83-86.

⁵⁰⁰ **RL-109**, *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Dissenting Opinion of Steven A. Hammond, 30 March 2015, ¶¶ 127-129; **CLA-0104**, *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-07, Award, 21 December 2020 ¶ 709; Counter-Memorial on Jurisdiction, ¶¶ 198(a); **CLA-0102**, *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic I*, PCA Case No. 2008-13, Final Award, 7 December 2012, ¶ 177; **CLA-0103**, *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶ 483-94; and **CLA-0104**, *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-07, Award, 21 December 2020, ¶ 713.

⁵⁰¹ Counter-Memorial on Jurisdiction, ¶¶ 198(a) and (b); **CLA-0025**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, ¶ 187; **RL-075**, *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶¶ 405-08.

⁵⁰² Counter-Memorial on Jurisdiction, ¶ 192; **CLA-0097**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, ¶ 139.

company was never in contention. As stated by the tribunal, “[i]t is...not in dispute that... the Railway Usufruct Contract was lawfully concluded as a matter of Guatemalan law.”⁵⁰³

297. The dispute on legality was regarding one of the multiple contracts *RDC* claimed to have with the state rail company (Contract 41/143).⁵⁰⁴ This contract was not approved in the form required by law. However, the terms were subsequently authorized and carried out between the parties through letters and a subsequent contract (Contract 143) under similar terms as the original Contract 41.⁵⁰⁵ It is in this context that the tribunal determined that Guatemala was “precluded from raising any objection to the Tribunal’s jurisdiction on the ground that Claimant’s investment is not a covered investment under the Treaty or the ICSID Convention.”⁵⁰⁶

298. The facts before this Tribunal are unlike the facts in *RDC*. This arbitration does not concern a series of contracts between the Respondent and the Claimants of which the validity is at issue. The Respondent’s position is that all of the contracts and agreements adduced by Claimants are contrary to the Respondent’s law and therefore are null and void. In addition, the Claimants’ claim of legitimate expectations regarding the legality of their investments is in bad faith, as the Claimants’ own expert has determined that licenses and permits do not establish property rights.⁵⁰⁷

(h) *Tokios*

299. Claimants cite *Tokios* in support of the proposition that objections based on illegality should not proceed when the illegality consists of good faith mistakes that are “not serious or central enough” to the investment.⁵⁰⁸ First, as with the cases above, in *Tokios*, the respondent did

⁵⁰³ **CLA-0097**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, ¶ 22-23.

⁵⁰⁴ **CLA-0097**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, ¶¶ 27-28, 141-143.

⁵⁰⁵ **CLA-0097**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, ¶ 28.

⁵⁰⁶ **CLA-0097**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, ¶ 147.

⁵⁰⁷ Sergio Bonfligio Expert Report, ¶ 198.

⁵⁰⁸ Counter-Memorial on Jurisdiction, ¶ 197; Citing **CLA-0101**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 ¶¶ 83-86.

not contest *per se* the underlying legality of the obligations at the root of the contracts.⁵⁰⁹ As noted by the tribunal:

“...the Respondent does not allege that the Claimant’s investment and business activity—advertising, printing, and publishing—are illegal *per se*. In fact, as discussed above, governmental authorities of the Respondent registered the Claimant’s subsidiary as a valid enterprise in 1994, and, over the next eight years, registered each of the Claimant’s investments in Ukraine, as documented in twenty-three Informational Notices of Payment of Foreign Investment.”⁵¹⁰

300. Second, the tribunals finding against Respondents’ objection must be assessed in terms of the whole scope of omissions identified by the respondent. In *Tokios*, the respondent objected based on illegality due to the company’s incorporation name and documentary, errors, and omission in the documents submitted for registration.⁵¹¹ Thus, it is logical that the tribunal determined that “the Respondent’s registration of each of the Claimant’s investments indicates that the ‘investment’ in question was made in accordance with the laws and regulations of Ukraine.”⁵¹²

301. The facts before this Tribunal are unlike the facts in *Tokyo*. The Respondent’s position is that all the contracts and agreements adduced by Claimants are contrary to the Respondent’s law and therefore are null and void. Claimants’ omissions regarding their contracts are not minor and are serious enough to render them void *ab initio*. Further, none of the Claimants’ contracts or agreements are registered or have improper registration.

e. Claimants do not meet the requirements to invoke estoppel against the Respondent regarding the legality of their Hotel Investments

302. The premise of Claimants estoppel defense is articulated in paragraph 211 of their Counter-Memorial:

211. *Fourth*, Respondent is estopped from alleging illegality with respect to the investments. Respondent’s numerous agencies and officials examined the relevant documentation, visited the site of the Investments repeatedly, and treated the Investments as lawful. Multiple levels of Respondent’s government, including Federal,

⁵⁰⁹ **CLA-0101**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, ¶¶ 21, 78, 83.

⁵¹⁰ **CLA-0101**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, ¶ 86.

⁵¹¹ **CLA-0101**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, ¶ 83.

⁵¹² **CLA-0101**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, ¶ 86.

State, Municipal, and *ejido* authorities, acknowledged the legitimacy of Claimants' hotel businesses. Respondent's agencies were intimately familiar with the Investments. Respondent and its agencies also collected fees and revenue from Claimants for close to a decade, in addition to the revenue from international tourism attracted by the Investments. As the *ADC v. Hungary* Tribunal found, Respondent led Claimants to believe that the Investments were legal and fully benefitted from the Investments. Respondent's eleventh-hour illegality allegation simply comes too late.

303. The Respondent made no such representations to Claimants and, insofar as “examin[ation of] documentation”, “visit[s]”, “collec[tion of] fees and revenue” may be regarded as representations to Claimants on which Claimant could rely, none were made regarding the legality of Claimants investments. Further, “examina[tion of] documentation”, “visit[s]”, “collect[ion of] fees and revenue” do not constitute representations of any sort. In any case, Claimants have provided no evidence to show that they changed their positions in any way because of reliance on the conduct of either the Respondent or the Respondent's treatment of the investors. Claimants must therefore be precluded from presenting an estoppel argument regarding the legality of their investments.

304. As noted in *Pan American* (citing the ICJ case of *Temple of Preah Vihear*), the conditions for estoppel are:

“(i) a clear statement of fact by one party which (ii) is voluntary, unconditional and authorised; and (iii) reliance in good faith by another party on that statement to that party's detriment or to the advantage of the first party.”⁵¹³

305. The *Pope & Talbot* tribunal has reiterated this test for estoppel:

“In international law it has been stated that the essentials of estoppel are (I) a statement of fact which is clear and unambiguous; (2) this statement must be voluntary, unconditional, and authorised; and (3) there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.

(...)

At the same place Brownlie suggests that the essence of estoppel is the element of conduct which causes the other party in reliance on such conduct detrimentally to change its position or to suffer some prejudice.”⁵¹⁴

⁵¹³ **CLA-0032**, *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic and BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL v. Argentine Republic*, ICSID Case No. ARB/03/13 & ARB/04/8, Decision on Preliminary Objections, 27 July 2006, ¶ 151.

⁵¹⁴ **CLA-0093**, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, 26 June 2000 ¶ 111.

306. Claimants’ estoppel defense refers to Claimant’s witness statements and Claimants adduced land use permits and business licenses.⁵¹⁵

307. Claimants’ own expert agrees that the land use permits referenced by Claimants do not prove ownership of hotel and parcels.⁵¹⁶

198. Los demandantes me han proporcionado permisos de uso de suelo emitidos por el Municipio de Tulum para cada uno de los hoteles de los demandantes. Conforme a mi experiencia con este tipo de permisos y otros, para que se emitan, el solicitante debe presentar los documentos que acrediten que está en posesión del predio. De igual manera, las autoridades gubernamentales competentes envían un inspector al campo para verificar la superficie relevante y que esté en posesión del solicitante. Si bien es cierto que estos permisos no son los documentos idóneos que acreditan la titularidad, el hecho que estos permisos se han emitido para los hoteles es evidencia de que las autoridades relevantes tenían conocimiento de la existencia de los hoteles, la ubicación de los mismos, y que el Municipio revisó y aceptó los mismos. (emphasis added)

308. It is therefore illogical and in bad faith for Claimants to put forth the position that “examina[tion of] documentation”, “visit[s]”, “collect[ion of] fees and revenue” amount to an acknowledgement by Respondent of Claimants’ property rights on the investments and their legality.

309. As noted in *América Móvil, Vestey, Mobil*, international law and its principles cannot be a source of property rights or a source of jurisdiction where none would otherwise exist.⁵¹⁷

310. Claimants’ estoppel defense aims to sidestep the core ownership issues and legality issues affecting Claimants’ assets.

311. To the extent that these actions could constitute “representations” regarding Claimants’ ownership and legality of their investments, Claimants have failed to provide evidence to show that these actions concerned the existence and validity of claimant’s rights regarding their

⁵¹⁵ Counter-Memorial on Jurisdiction, ¶ 211.

⁵¹⁶ Sergio Bonfligio Expert Report, ¶ 198.

⁵¹⁷ **RL-112**, *América Móvil S.A.B. de C.V. c. República de Colombia*, Caso CIADI No. ARB(AF)/16/5), Laudo del 7 de mayo de 2021, ¶ 454; **R-175**, *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 257; **RL-069**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award 27 December 2016, ¶ 371.

investments and their legality or that Claimants changed their position in any way due to reliance on the conduct of either the Respondent or the Respondent's treatment of the Claimants.⁵¹⁸

312. As noted by Pedro Nikken in *AWG*, the threshold of estoppel in international law "is higher than mere expectation".⁵¹⁹ Nikken concludes:

"[t]he Court has referred repeatedly to the general requirements for estoppel to be invoked, one of these being the conduct, statements, etc. of a State, that have clearly and consistently (*d'une manière claire et constante*) evinced the State's acceptance of a particular regime".⁵²⁰ (emphasis added)

313. This position was also held by the tribunal in *Duke*:

...for the conduct or declaration of a state entity to be invoked as grounds for estoppel, it must be **unequivocal**, that is to say, it must be the result of an action or conduct that, **in accordance with the normal practice and good faith**, is perceived by third parties as an expression of the State's position, and as being incompatible with the possibility of being contradicted in the future.⁵²¹ (emphasis in original).

314. This onus is especially high for investors, who have a due diligence obligation to know the legal order governing their investment and the state authorities authorized to make determinations in connection with their investment of the jurisdiction where they invested. As stated by Nikken in *Duke Energy*:

10. The relationship between a State and an investor, however, is not identical to the relationship between two States. An investor must know the legal order of the State within whose jurisdiction he has invested, at least in respect of the fundamental issues connected with his economic activity. The tax law is one of them. This does not mean that an investor must have exhaustive knowledge of the tax regime and the interpretation of the tax laws. But there are certain fundamental rules that an investor has to know, among them the rules that determine which organ can approve or object to tax accounting and within what delays it must exercise its powers. If an agent of the State that is manifestly incompetent in tax matters has approved a taxable act, every investor

⁵¹⁸ **RL-176**, *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Award, 18 August 2008, ¶ 221. ("Furthermore, the statements or actions of a State agency that merely imply a specific interpretation or application of the law do not, in the Tribunal's opinion, provide a sufficiently sound basis upon which to conclude that a stable interpretation of the law existed. That is not to say, however, that such statements or actions could not provide a sufficient basis to engage the State's liability under the theory of estoppel (*la doctrina de los actos propios*). This is a different issue, involving an inquiry into whether such statements or actions were sufficient to lead the investor to the reasonable conclusion that such an implied interpretation or application of the law would not be modified in the future."

⁵¹⁹ **RL- 173**, *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Separate Opinion of Arbitrator Pedro Nikken, 30 July 2010, ¶ 22.

⁵²⁰ *Id.*, ¶ 22.

⁵²¹ **RL-176**, *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Award, 18 August 2008, ¶ 249.

must know that the tax authority remains entitled to object to it within the prescribed period. The only facts creating a reasonable appearance that a taxable act will not be challenged in the future are either its approval by the tax authority or the expiration of the term within which it can be challenged. In other words, the approval of a taxable act by an official or an agency manifestly incompetent in tax matters cannot, by itself, create a reasonable appearance inducing an investor (national or foreign) to rely on the invulnerability of that act, in the sense that it could not be objected to by the tax authority within the prescribed period. Every investor knows or must be deemed to know that the approval by an incompetent organ is not legally incompatible with the possibility that the competent tax authority will assess a taxable act in the future.

11. The International Court of Justice has opined several times on the general requirements that must be met in order to invoke estoppel. One of them consists in a conduct, declarations and the like made by a State which clearly and consistently (d'une manière claire et constante) evinced acceptance by that State of a particular régime. In my view, an investor cannot reasonably conclude that a tax matter has been approved in a clear and consistent way (d'une manière claire et constante) by the State if the tax authority has not intervened at all in the so-called approval and if the period prescribed for assessment is still open.⁵²² (emphasis added)

315. The Respondent's position is that Claimants have not met the elements of *estoppel* under international law principles. Thus, it cannot preclude the Respondent from arguing that Claimants acquired their investments illegally.

f. Claimants' claim does not meet *Kim* test

316. In their Counter-Memorial, Claimants presented the *Kim*'s proportionality test to assess the State's allegations of illegality.⁵²³

317. Respondent refers to *Kim*'s legal framework adopted by the tribunal in *Álvarez and Marín*.⁵²⁴ The Tribunal in *Álvarez and Marín* clarified that the severity of the breach is established based on the relevance of the law violated and the intention of the investor.⁵²⁵

(1) The Transfers of rights violate the Agrarian Law and the Restricted Zone Law

⁵²² **RL-177**, *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Partial Dissenting Opinion of Arbitrator Pedro Nikken, 22 July 2008, ¶¶ 10 y 11.

⁵²³ **CLA-0024**, *Kim v. Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶ 413.

⁵²⁴ **CLA-0024**, *Kim v. Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶¶ 406-408 (in *Álvarez y Marín Corporación S.A. and others v. Republic of Panama*, ICSID Case No. ARB/15/14, Laudo, 12 de octubre de 2018, ¶ 153 (emphasis in original)).

⁵²⁵ **RL-094**, *Álvarez y Marín Corporación S.A. y otros v. República de Panamá*, ICSID Case No. ARB/15/14, Laudo, 12 de octubre de 2018, ¶ 154.

318. Respondent has already pointed out that Mr. Bonfiglio's conclusion, stating that all the Claimants' Hotel Investments were on ejidal lands, thus that they implied ejidal rights, and that the restricted zone law is not applicable, is not sufficient evidence of this assertion.

319. As the Respondent's expert stated⁵²⁶:

- The Transfers of Rights are contrary to the nationality requirements of the Agrarian Law and the laws on foreign investment in ejidal zones.
- The Transfers of Rights are contrary to Agrarian Law and have no basis before the agrarian and civil courts.
- The lack of registration before the RAN is a fundamental deficiency.
- The Transfers of Rights between the Ejidal Commissariat and third parties do not make them compatible with Agrarian Law.
- The Transfers of Rights violate foreign investment laws in the Restricted Zone and cannot be remedied.

**(2) The Agrarian Law and the Restricted Zone Law
are part of the Respondent's fundamental laws
that protect important public interests**

320. Claimants criticize Respondent's characterization of the ejidos in the Memorial on Jurisdiction as a “national priority”.⁵²⁷

321. As *Mamidoil and Cairn* stated, Claimants' violations are significant and involve substantive constitutional laws and key federal laws that protect key sectoral and geographic areas from foreign investment.⁵²⁸

322. In this sense, both the ejido property regime (Agrarian Law) and the Restricted Zone Regime (Foreign Investment Law and its Regulation) are laws that regulate the constitutional principles enshrined in Article 27 of the Mexican Constitution.

⁵²⁶ First Expert Report of Mr. Gutiérrez de la Peza, ¶ 41. Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 18 and Table XXIV. Arguments used in the SBM Report and views on their relevance; Witness Statement of Mr. Marcelino Miranda Aceves, ¶ 64.

⁵²⁷ Counter-Memorial on Jurisdiction, ¶ 212 (c)(i).

⁵²⁸ **RL-109**, *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Dissenting Opinion of Steven A. Hammond, March 30, 2015, ¶ 127; **CLA-0104**, *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-07, Award, 21 December 2020, ¶ 709.

323. This constitutional article governs the ability to acquire ownership over the lands and waters of the Nation.⁵²⁹ The principles contained in Article 27 establish the modalities of ownership of the lands and waters, and regulate their exploitation and use for the Mexican State. Therefore, this article is at the top of the normative pyramid of the Mexican State with regard to property regulation. Its principles are part of the primary or fundamental Law on which the Mexican State is constituted and it could only be derogated through an amendment of the Constitution.⁵³⁰

324. Article 27 of the Mexican Constitution contains sectoral protection mechanisms through special property regimes, *i.e.*, the ejido property regime, which is regulated by the Agrarian Law, and the Restricted Zone Regime, which is regulated by the Law of Foreign Investment and its Regulations.⁵³¹ Both sectoral protection mechanisms (ejidal property regime, which is regulated by the Agrarian Law, and the restricted zone regime), *per se*, are non-derogable due to the fact that they are at the top of the normative range of the Mexican State and they protect priority interests of a public and social nature, the ejido population nuclei and their autonomy and sovereignty and the national territory.⁵³² As the Respondent's witness explains, the enforcement of the prohibition in the Restricted Zone:

“(…) is constitutional. This means that the prohibition prevails over any other law or particular factual situation. In addition, it is of public order and general interest, so its observance is non-derogable. The priority nature of this prohibition and for which it was included in the CPEUM has historically been to safeguard national sovereignty, as well as to maintain the integrity of the national territory.”⁵³³

⁵²⁹ Witness Statement of Mr. Marcelino Miranda Aceves, ¶ 41.

⁵³⁰ First Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 31-34; Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 19; Witness Statement of Mr. Marcelino Miranda Aceves, ¶ 43.

⁵³¹ First Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 31-34. Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 18; Witness Statement of Mr. Marcelino Miranda Aceves, ¶ 52.

⁵³² First Report of Mr. Gutiérrez de la Peza, ¶ 29, 31, 33. “Unlike civil or private law, where the principle of autonomy of the will and freedom prevails, according to which people can do what is not prohibited by law, in the agrarian regime the public or social interest prevails that, in protection of ejidos and ejidatarios, establishes that the provisions of the Agrarian Law are not waivable nor can they be modified by the will of the parties”; Witness Statement of Mr. Marcelino Miranda Aceves, ¶ 47-48. Witness Statement of Mr. Marcelino Miranda Aceves, ¶¶ 20-21 and 43.

⁵³³ Witness Statement of Mr. Marcelino Miranda Aceves, ¶ 43.

(3) Registration is a requirement of compliance with the Agrarian Law and the Foreign Investment Law

325. Claimants argue that registration under the Agrarian Law and the Foreign Investment Law is a minor deficiency under Mexican law because there are no “civil or criminal penalties for the alleged noncompliance” and according to the *Kim* test, this indicates that both regimes are not a national priority.⁵³⁴

326. That's not true. In agrarian matters, registration " functions as a guarantor of legality and certifies the validity of the legal acts celebrated on ejido property. ".⁵³⁵

327. Regarding the restricted zone, the Foreign Investment Law requires foreign investors to register their investments in the RNIE. In this sense, as the Respondent's witness, with fourteen years of experience as a public official within the SRE states:

- The lack of registration before the SRE affects a substantial interest, given that it violates a constitutional principle of a priority nature, allowing its violation would mean allowing a constitutional precept to be circumvented.⁵³⁶ The Mexican State has assigned the highest importance to this national policy with regard to the property of foreigners, in such a way that it has established a special office within the SRE to issue authorizations and keep the record of such procedures, has mechanisms to inform about these requirements to foreigners, public notaries and diplomatic offices of other countries.⁵³⁷
- The lack of registration before the SRE cannot be remedied, on the contrary, due to the fact that it is a breach of a constitutional precept, it implies the nullity of any acquisition made outside the provisions of the Law and the loss of the asset, for which protection is invoked, in benefit of the nation. There is no legal mechanism to correct the omission or to amend the act.⁵³⁸
- The lack of registration before the SRE is not only a serious illegality, but also results in the lack of a recognized investment, that is, the Mexican State does not recognize any right *ab initio* to foreigners who seek to obtain direct ownership of property in the restricted area, outside the mechanisms established by Law.⁵³⁹

⁵³⁴ Counter-Memorial on Jurisdiction, ¶ 212 (c) (i and iii).

⁵³⁵ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 18(v); Witness Statement of Mr. Marcelino Miranda Aceves, ¶ 66.

⁵³⁶ Witness Statement of Mr. Marcelino Miranda Aceves, ¶¶ 43 and 67.

⁵³⁷ Witness Statement of Mr. Marcelino Miranda Aceves, ¶ 50.

⁵³⁸ Witness Statement of Mr. Marcelino Miranda Aceves, ¶¶ 68 and 74.

⁵³⁹ Witness Statement of Mr. Marcelino Miranda Aceves, ¶¶ 8 and 67.

**(4) Acts contrary to the Agrarian Law and the
Restricted Zone Law are punished with the
maximum civil sanction, absolute nullity**

328. In the Counter-Memorial, Claimants argue that even assuming that Claimants incurred in non-compliance, it does not satisfy the *Kim* test because the non-compliance is minor and formalistic, such as⁵⁴⁰ (i) possession of ejido land with no registration before the RAN, since it is generalized, there is no sanction, it is related to formalities and Claimants have contracts with the ejido and the members of the ejido;⁵⁴¹ (ii) Claimants were not required to stop investments while the ejido was in the registration process;⁵⁴² (iii) the record of non-compliance is not attributable to Claimants and was remediable.⁵⁴³

329. Claimants are incorrect. As stated by the Respondent's expert, the deficiencies identified are not minor since they contravene a constitutional principle and have as a consequence the nullity or lack of recognition, *ab initio*, of their alleged investments. In this sense, it should be specified that:

- Claimants lose sight of one of the most important effects of registration before the RAN, which is to give the registered documents a presumption of legality, and that their records constitute full evidence before courts.⁵⁴⁴ Without registration before the RAN, the asset allegedly acquired by the Claimants is not recognizable under the law of the host State.
- The RAN functions as a guardian of legality and certifies the validity of the legal acts executed on ejido property. By keeping the record of the subjects and agrarian rights, the RAN can confirm whether the transferors of rights are really holders of the rights they transfer and that the other requirements of existence and validity established by the Agrarian Law for such legal acts are met.⁵⁴⁵ The lack of registration is not a minor deficiency, since it is a mechanism through which the Mexican State guarantees the observance of the sectoral protection regime contained in the Constitution.

⁵⁴⁰ Counter-Memorial on Jurisdiction, ¶ 213.

⁵⁴¹ Counter-Memorial on Jurisdiction, ¶ 212 (a)(i-ii).

⁵⁴² Counter-Memorial on Jurisdiction, ¶ 212 (a)(iii).

⁵⁴³ Counter-Memorial on Jurisdiction, ¶ 212 (a)(iv).

⁵⁴⁴ Second Expert Report of Mr. Gutiérrez de la Peza, Table XXIV. Arguments used in the SBM Report and views on their relevance Arguments used in the SBM Report and views on their relevance

⁵⁴⁵ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 18.

- Acts contrary to what is established by Agrarian law are punished with the nullity of the act.⁵⁴⁶

(a) The assessment of illegality of an investment does not depend on the existence of a criminal conduct

330. In the Counter-Memorial, Claimants argue that the failure to register before the RAN or the one related to the Restricted Zone are not an "illegality" punishable under Mexican law and, therefore, the Claimants' omissions are minors and do not preclude investment protection under the treaties.⁵⁴⁷

331. Claimants' argument is an attempt to divert attention from the central issue in this case: Claimants request protection over investment rights not recognized by the Respondent due to the fact that they breach the Respondent's constitutional prohibitions to foreign investment in sectoral and geographical areas. This is exactly the kind of illegality contained in the illegality provisions of the treaties. Claimants' misconduct is serious.

332. In *Achmea*, the tribunals distinguished between two types of illegalities: (i) common illegalities "that may occur in the context of the making of an investment", which are remediable and do not make the investment "illegal" for the purposes of any requirement implicit of legality and; (2) illegalities that amount to violations of prohibitions, including those related to foreign investment, that would render the investment "illegal" for the purposes of any implicit requirement of legality.⁵⁴⁸ For example, substantive violations of the foreign investment law of the Host State are contrary to the requirement of legality of the BIT and deprive the investment of the protection of the treaty.⁵⁴⁹ This occurs especially when the alleged property rights are not recognized by the host State.⁵⁵⁰ Also, when the illegalities violate "fundamental principles of the host State's law"

⁵⁴⁶ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 18.

⁵⁴⁷ Counter-Memorial on Jurisdiction, ¶ 203, 206.

⁵⁴⁸ **CLA-0102**, *Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic I*, PCA Case No. 2008-13, Final Award, 7 December 2012, ¶¶ 173-176; *Ver también CLA-103*, *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶ 494.

⁵⁴⁹ **RL-109**, *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Dissenting Opinion of Steven A. Hammond, March 30, 2015, ¶ 128.

⁵⁵⁰ **RL-110**, *EnCana Corporation c. La República del Ecuador*, CNUDMI/LCIA Caso No UN3481, Laudo (3 de febrero de 2006), ¶ 184; **RL-111**, *Infinito Gold Ltd. c. La República de Costa Rica*, (Caso CIADI No. ARB/14/5), Laudo, 3 de junio de 2021, ¶ 705; **RL-112**, *América Móvil S.A.B. de C.V. c. La República de Colombia*, (Caso CIADI No. No. ARB(AF)/16/5), Laudo, 7 de mayo de 2021, ¶ 316. **RL-053**, *Emmis*

and substantive laws that “reserve certain sectors to national entities or protect certain sectorial or geographical areas... illegal”, for foreign investment purposes, depriving the investment of the protection of a treaty in the context of jurisdiction.⁵⁵¹

333. The basis for the Claimants' argument that failure to register before the RAN or with regard to the Restricted Zone is minor illegality that does not preclude protection under the invoked treaties, is incorrect.

334. Investment treaty jurisprudence shows⁵⁵² that violations of the domestic laws of the host State that result in illegality include non-compliance with foreign investment, acquisitions, corporate ownership, licenses, and criminal laws.⁵⁵³ The jurisprudence cited by the Claimants

International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Republic of Hungary, ICSID Case No. ARB/12/2, Award, 16 April 2014; **RL-113**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003, ¶ 22.1: “There cannot be an expropriation of something to which the Claimant never had a legitimate claim”; **RL-114**, *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL Case, Award, January 26, 2006, ¶ 208. “[C]ompensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed avested right in the business activity that was subsequently prohibited”; **CL-0099**, *Vestey Group Ltd. c. República Bolivariana de Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 252: “To determine whether Venezuela’s taking of Agroflora’s land constitutes an expropriation, the Tribunal must assess whether Vestey held a title to the land”; **RL-115**, *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. y Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Award, December 14, 2017., ¶ 350; **RL-116**, Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, ICSID Review, Vol. 29, No. 1 (2014), 178.

⁵⁵¹ **RL-117**, *HOCHTIEF AG c. La República Argentina*, (Caso CIADI No. ARB/07/31), Decisión sobre Responsabilidad, 29 de diciembre de 2014, ¶ 199; **CLA-103**, *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶ 372.

⁵⁵² See ¶ 68.

⁵⁵³ **RL-117**, *HOCHTIEF AG c. La República Argentina*, (Caso CIADI No. ARB/07/31), Decisión sobre Responsabilidad, 29 de diciembre de 2014, ¶ 199.

contradicts their argument.⁵⁵⁴ As they highlighted in *Kim* and *Liman*, the illegalities in this case render the investments void *ab initio* and non-rectifiable, as asserted by the Claimants.⁵⁵⁵

335. In this sense, the Respondent's expert opinion is important, an act is illegal when it is contrary to the laws of public order or good customs. The Agrarian Law and the Restricted Zone Regime are of public order.

Under the CCF, an act is unlawful when it is contrary to laws of public order or morality.⁴² On the other hand, according to the Federal Criminal Code, a crime is an act or omission punishable by criminal law.⁴³ By definition, they are different concepts. Unlawful acts are regulated by agrarian law and, supplementarily, by federal civil law, and are punishable by nullity of the act, depriving it of legal effects. Any controversy over such acts is a matter for the Agrarian Courts. On the other hand, crimes are regulated by criminal legislation and the applicable sanctions may consist of imprisonment, pecuniary sanctions, confinement, among others. Their sanction is under the jurisdiction of the Criminal Courts. Acts may be unlawful without constituting an offence.⁵⁵⁶ [emphasis added]

(5) Foreign investment in the ejidal regime and in the restricted zone is allowed when it is done in accordance with the law

336. Since 1937, Mexico created legal figures to facilitate foreign investment in the restricted zone. As the expert and the witness points out, currently foreign investment is allowed in the restricted zone through the figure of a “trust” (“*fideicomiso*”) and in accordance with the Foreign

⁵⁵⁴ **CLA-0005**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶ 306. The respondent objected on the basis of the mining land rights obtained against the constitutional law of Peru; **CLA-0095**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 353. Respondent objected on the basis of illegality due to legislative changes that turned void the acquired contract; **CLA-0098**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines I*, ICSID Case No. ARB/03/25, Award, 16 August 2007, ¶ 346. In this case, respondent objected due to a breach of the constitutional restrictions on foreign investment, a breach that had both civil and criminal effects; the civil effect was a null *ab initio* effect on the investment; **CLA-0101**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, ¶¶ 83-86. Respondent's objection of illegality was based on the claimant's non-compliance due to omissions in the investment register.

⁵⁵⁵ Counter-Memorial on Jurisdiction, ¶ 198(a), citing **CLA-0025**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010 ¶ 187; **CLA-006**, *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶¶ 405-408.

⁵⁵⁶ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 18.

Investment Law, its Regulations, and the Registry of Foreign Investments of Mexico (“Regulation of the LIE”).

337. As in the restricted zone, foreign investment in the ejido zone is only allowed in compliance with the Agrarian Law, when (i) the contract is valid in accordance with the CCF; (ii) the contract is approved by the Ejidal Commissariat and/or with the approval of the Assembly (depending on the type of land or ejidatario) and; (iii) that the contract complies with the duration and registration requirements indicated in the Agrarian Law. These foreign investment contracts grant their beneficiaries “capacity of a third party, with rights over parceled or common use lands, as the case may be ” and⁵⁵⁷ of which the competent Agrarian Tribunal can adjudicate.⁵⁵⁸

338. The Respondent submits that the Claimants' investments were made in contravention of the legal requirements established by the legal regime applicable to the Restricted Zone. Both the Respondent's expert and witness have indicated that:

- Any legal act by which a foreign person intends to acquire ownership or direct ownership of lands in the restricted zone is, *ab initio*, subject to absolute nullity.⁵⁵⁹
- Failure to comply with the Restricted Zone Regime is not a minor or incidental illegality, since it gives rise to the nullity of the act and/or the loss of the assets affected in benefit of the Nation.⁵⁶⁰
- Failure to comply with the requirements established in the Restricted Zone Regime is not rectifiable, there is no legal mechanism to correct the omission or amend the act and do it again.⁵⁶¹
- Respondent cannot amend the illegality nor is it prevented from invoking the illegality, in fact, the illegality implies that the acquisition is null and void for the State and it may be declared as so.⁵⁶²

339. Mexican authorities are not accomplices of the Claimants' illegalities, since, in principle, the rights that Claimants argue to have with respect to the parcels and their hotels do not exist

⁵⁵⁷ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 28.

⁵⁵⁸ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 27.

⁵⁵⁹ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 19. Witness Statement of Mr. Marcelino Miranda Aceves, ¶ 11.

⁵⁶⁰ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 22. Witness Statement of Mr. Marcelino Miranda Aceves, ¶ 11, 74 and 75.

⁵⁶¹ Second Expert Report of Mr. Gutiérrez de la Peza, Table XXIV. Arguments used in the SBM Report and views on their relevance; Witness Statement of Mr. Marcelino Miranda Aceves, ¶ 68.

⁵⁶² Witness Statement of Mr. Marcelino Miranda Aceves, ¶ 11.

under the Respondent's Restricted Zone Regime. Much less, the property or any other type of right claimed by the investors. Claimants acceded to the alleged rights through irregular acts to evade the scrutiny of legality that is generated precisely through registration before the legal authorities and compliance with the mechanisms established by the law.

340. Likewise, Claimants' investments were made in contravention of the legal requirements established by the sectoral protection regime established in the Agrarian Law. In this regard, Respondent's expert has indicated that:

- Foreigners can have ejido lands in possession, *i.e.*, *de facto* power over them.⁵⁶³
- The recognition of ejidal rights derived from possession, as a *de facto* situation, can only arise from the Assembly and the Unitary Agrarian Tribunals, after hearing the interested parties and when the applicable requirements are met. Claimants' Investments were never recognized and the failure to comply with legal requirements created nullity *ab initio*.⁵⁶⁴
- Failure to comply with the requirements established by the Agrarian Law is not a minor or incidental illegality, it is an illegality that is punished with the maximum civil penalty, the nullity of the act.⁵⁶⁵
- Despite having legal advice, Claimants acted in contravention of the legality requirements established in the Agrarian Law. Respondent cannot remedy the Claimant's omissions.

341. Mexican authorities were not accomplices of the Claimants' illegalities, since, in principle, property or any other type of ejido right alleged by the investors have never been formally recognized. Claimants acceded to the alleged rights through irregular acts to evade the scrutiny of legality that is generated precisely through registration before the competent legal authorities.

(6) Behaviour of the host State once the non-compliance is detected

342. Claimants identify as inconsistent measures the alleged dispossession of their investments by the Mexican State derived from civil actions brought by individuals regarding the ownership of the ejido lands of which they argue ownership. Claimants ignore two important facts.

- The dispossession was the result of the access by private individuals to the State mechanisms established precisely to protect legal property. If the investment had

⁵⁶³ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 18.

⁵⁶⁴ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 18.

⁵⁶⁵ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 18.

been legal and proven by the investors, the State mechanisms would not have generated the result alleged as an inconsistency by the Claimants.

- Respondent was prevented from having knowledge of the Claimants' illegal alleged rights, because these were never registered before the competent authorities, nor recognized by the law.⁵⁶⁶

(7) Claimants did not act in good faith

343. In the Counter-Memorial, the Claimants argue that they acted in good faith because: (i) they hired Mexican advice, negotiated and reached free and voluntary agreements with ejidatarios and other related parties;⁵⁶⁷ (ii) contracted with the Ejidal Commissariat, legal representative of the ejido;⁵⁶⁸ (iii) hired agrarian counsel "to protect their Investments before agrarian authorities and to obtain RAN registration";⁵⁶⁹ (iii) the development of the Investments continued after reaching agreements in good faith with ejidatarios and ejidos.⁵⁷⁰

344. Receiving the advice of an attorney does not mean that the advice was appropriate or correct. Claimants themselves acknowledge in their testimonies that before the evictions, they were involved in litigation related to their parcels. Although the Claimants clearly waived the privilege of professional secrecy, they have not submitted evidence of the legal counsel invoked or the facts on which they obtained the counselling. This Tribunal cannot give weight to the Claimants' assertions that their attorneys told them that their investments were in accordance with the law without having the opportunity to examine the advice received, including the warnings and exceptions reported, or whether the Claimants were given options to make their investments in accordance with the regimes applicable to ejidos and the restricted zone.

⁵⁶⁶ Witness Statement of Mr. Marcelino Miranda Aceves, ¶ 77. "In the Ministry of Foreign Relations there is no evidence whatsoever that the claimants have followed the requirements established by law for the acquisition of the land". See, Second Expert Report of Mr. Gutiérrez de la Peza, Table XXIV. Arguments used in the SBM Report and views on their relevance. "As far as I know, the agrarian authorities (Procuraduría Agraria, RAN and Agrarian Courts) share this criterion. In my more than 10 years of experience in the sector, I have not known of a single case of parceled lands certificates or rights over common use lands certificates issued in favor of a foreigner."

⁵⁶⁷ Counter-Memorial on Jurisdiction, ¶ 212(b)(i).

⁵⁶⁸ Counter-Memorial on Jurisdiction, ¶ 212(b)(ii).

⁵⁶⁹ Counter-Memorial on Jurisdiction, ¶ 212(b)(iii).

⁵⁷⁰ Counter-Memorial on Jurisdiction, ¶ 212(b)(iv).

345. Claimants reiterate that they negotiated and concluded free and voluntary agreements with the ejidatarios and the Ejidal Commissariat. But the Respondent's expert has identified multiple flaws in Claimants' contracts that indicate otherwise, including irregularities in the payment and transactions using third parties or frontman, and fundamental deficiencies in the basic documentation of their rights.⁵⁷¹

346. Despite these assertions, Claimants have not proven that they complied with the applicable legality requirements in accordance with the Agrarian Law and the Restricted Zone, on the contrary, Respondent's expert pointed out that Claimants entered into legal acts contrary to the applicable law and that the documents submitted to prove their alleged rights contain various legal deficiencies that have not been corrected and that confirm the illegality of their alleged investments.⁵⁷²

347. As explained *supra*, acts contrary to Mexican law are, as well, contrary to the principles of good faith in Mexican and international law and, therefore, contrary to international public order. Extending the protection of the treaties to investments made in violation of national legislation would reward the misconduct of investors.

**(a) Las Demandantes no ejercieron su debida
due diligence antes de embarcarse en la
inversión**

348. As established *supra*, investors had the responsibility of conducting a comprehensive investigation of the regulatory framework of the Mexican State. Claimants argue that they were advised by lawyers during the establishment of their investments, this cannot be used to correct the deficiencies of their obligation of due diligence before embarking on the investment.

349. Precisely, the legal advice obtained by Claimants would confirm that the legality requirements applicable to their investment in accordance with the restricted zone regime and the agrarian property regime were reachable for the Claimants. In any event, Claimants incurred in a case of deliberate “ignorance”, since they contributed to the irregularities in the processes that led to their acquisition of the investment. Even if the Tribunal considers that statement as sufficient to demonstrate due diligence, the result remains the same, the investments are illegal.

⁵⁷¹ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 9.

⁵⁷² First Expert Report of Mr. Gutiérrez de la Peza, ¶ 85.

(a) Claimants were aware of the illegality of their acts

350. The Claimants were aware of the irregularities of their investments at least since 2008, when they became aware of the litigation in which Ejido was involved and decided to hire legal advice to ensure their alleged rights, nonetheless, this legal advice did not rectify the illegality of their actions in any moment. The intentional or bad faith ignorance of the law on the part of investors regarding the illegality of the investment is reflected in the lack of formality and irregularity in the documentation, the agreed prices, and the search for legal advice to give legality to their illegal transactions after learning of the possibility of being affected by litigation involving the Ejido.

351. The Respondent and its expert have identified various red flags of irregularities in the alleged acquisition of Claimants' investments, which are detailed below.

i) Transfer of ownership/rights

352. The red flags around the Claimants' transfers of property/rights are, *inter alia*:

- Claimants did not seek to secure their ejido rights, either against third parties or the Mexican State, through their registration before the RAN. A responsible investor would have sought to give his documents the presumption of legality through registration.

Claimants never went before the Agrarian Courts to make their contracts binding before Tribunals. As stated by Respondent's expert, "Claimants do not mention whether they went before the Unitary Agrarian Court of District 44, the court competent to hear, settle and resolve disputes arising from the application of the provisions contained in the Agrarian Law, to demand the recognition and respect of the ejido rights that they claim to have or have had."⁵⁷³

- The certificates of possession exhibited by the Claimants are private documents, not recognized by those who signed them, so they lack probative value. In any case, their issuance should have been approved by the Assembly, but the documents did not include Assembly minutes approving its issuance.⁵⁷⁴
- Exhibit C-0041 corresponding to the actuarial record obtained during the eviction proceedings ordered in the origin lawsuits, Ms. Galán mentioned that she was in negotiations with the owner of the property [executing party].

⁵⁷³ Second Expert Report of Mr. Gutiérrez de la Peza, Table XXIV. Arguments used in the SBM Report and views on their relevance.

⁵⁷⁴ *Id.*

- The evidence presented by Jacquet confirms that the alleged ejido rights belonged to Mr. Román and not to Jacquet.
- The statements of Messrs. Jacquet and Silva establish that they acted through intermediaries in the alleged acquisition of their ejido rights, Ms. Gutiérrez and Mr. Román. Both declared having paid for the transfers between the ejidatarios of origin and their intermediaries.⁵⁷⁵
- None of the Claimants proved that they have the status of ejidatarios or *avecindado* that they claim to have in this process.⁵⁷⁶

ii) Price agreed and paid

353. As stated by the Respondent's expert "There were exhibited some documents intended to be taken as proof of payment, however, none contains information that relates them to the payments agreed in the CETSA Transfer, HLSA Transfer, Sastre Transfer, Abreu 8 Transfer, Abreu 8A Transfer, Galán Transfer, Jacquet Promise, and Jacquet Sale".⁵⁷⁷ It should be noted that prices agreed in accordance with the alleged transfers do not seem to match the true value of the properties, *e.g.*, the payment of \$53 per square meter agreed in the CETSA Transfer.

iii) Legal advice and its follow up

354. The dates in which the Claimants decided to seek legal advice, or even the lack of such throughout the development of their alleged investment is a red flag of illegalities:

- Ms. Galán stated that at least since 2008 she was informed of litigation involving the Ejido, Ms. Galán did not seek legal advice regarding the possible impact on her lands.
- Mr. Silva stated that he acquired and established his investment since 2000, it was until 2006 that he sought legal advice.⁵⁷⁸ Mr. Silva did not complete the alleged process for the official recognition of his rights before the RAN, despite the concern generated by the litigation involving the Ejido.
- Mr. Jacquet sought to certify possession of his alleged ejido parcel, despite the existence of legal mechanisms to acquire possession on his own, he decided to carry out the procedures in favor of Mr. Román, presumably Mexican.⁵⁷⁹ Despite his

⁵⁷⁵ Witness Statement of Mr. Silva, ¶ 8.

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.*

⁵⁷⁸ Witness Statement of Mr. Silva, ¶ 2.

⁵⁷⁹ Witness Statement of Mr. Jacquet, ¶ 12.

concern over the lawsuits related to the Ejido, Mr. Jacquet did not follow up on the legal advice to obtain the registration of his alleged rights.

- Similar to the other Claimants, despite stating that there was concern about the litigation involving the Ejido, and that since 2008 he had received information regarding property interests of third parties in his properties, Mr. Sastre did not follow up on the legal advice to obtain a response on the alleged registration process before the RAN.⁵⁸⁰

355. This Tribunal must dismiss the claim because the Claimants cannot prove the existence of the rights they allege to have with respect to their investments and they cannot prove the acquisition of their investments in accordance with the Respondent's laws and in good faith. Although the tribunals have deferred on what kinds of illegalities deprive an investor-state tribunal of jurisdiction, a host state cannot consent to arbitration over investments that were illegally acquired. In this case, the illegalities are manifest and fundamental and affect the root of the Respondent's consent, depriving the Claimants of protection under the invoked treaties.

B. Jurisdictional objections under the Mexico- Argentina BIT

1. Sastre has not proven that he has submitted its claims to arbitration within the four-year limitation period specified in the Mexico-Argentina BIT

356. In its Memorial, Respondent objected to the jurisdiction of this Tribunal over Sastre's claims concerning Tierras del Sol Investments and Hamaca Loca Investments because those claims were time-barred by virtue of Article 1(2) of the Annex to the Mexico-Argentina BIT.⁵⁸¹ The four-year limitation period would have started to run on 19 October 2011 (the date of the first official notification of the alleged hotel seizures which physically occurred on 31 October 2011) and would have expired on 19 October 2015, significantly before NOA#2 was submitted (14 June 2019).

357. In their Counter-Memorial, Claimants make two arguments with respect to Tierras del Sol Investments:

- Sastre knew or should have known that the Respondent committed a treaty breach not at the time of the alleged seizures in October 2011, but at some unspecified date in 2015 when he: "gained actual or constructive knowledge of intent and planning by Respondent's officials to take his investment"; he became aware of "suspected plotting by Respondent's officials"; media reports "began to expose the illegal

⁵⁸⁰ Witness Statement of Mr. Sastre, ¶¶ 24-26.

⁵⁸¹ Memorial on Jurisdiction, ¶¶ 228-235.

methods used by public figures to enrich themselves at the expense of the ousted hotel owners in the Tulum region”; he learned “of certain government officials’ suspected involvement in the land capture scheme”; and he “was BITsed of the suspected involvement of certain government officials in directing, causing, or allowing the waves of physical takings of Tulum’s beachfront hotels”;⁵⁸² and

- The “operative date when [Sastre’s] denial of justice and judicial expropriation claims crystallized was 2 October 2015, when the *Juzgado Segundo de Distrito* in Quintana Roo dismissed Mr. Sastre’s pleas for basic due process”.⁵⁸³

358. The above arguments do not include the Hamaca Loca Investments. Claimants did not refute the Respondent’s position that the four-year limitation period for the Hamaca Loca Investments expired long before NOI#1 and NOA#2.⁵⁸⁴

a. Importance of limitation periods

359. The requirements of temporal limits set out in an investment treaty in the form of limitation periods are “clear and rigid” and cannot be subject to any “suspension,” “prolongation,” or “other qualification.”⁵⁸⁵ While the rules of international law on limitation periods and their consequences are applicable to the question before the Tribunal, the black letter law of the applicable treaty as the *leges speciales* is unassailable.⁵⁸⁶ Recently, J. Christopher Thomas QC, in dissent, found that a tribunal has no power to suspend or otherwise vary the operation of the limitation period provided by a treaty.⁵⁸⁷ Compliance with a limitation period goes to the jurisdiction of the Tribunal.

⁵⁸² Counter-Memorial on Jurisdiction, ¶¶ 84, 256-158, 260.

⁵⁸³ Counter-Memorial on Jurisdiction, ¶¶ 262-264.

⁵⁸⁴ Counter-Memorial on Jurisdiction, ¶¶ 233-235.

⁵⁸⁵ **RL-206** *Grand River Enterprises Six Nations, Ltd. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, July 20, 2006, ¶ 29 (“Grand River Decision on Objections to Jurisdiction”); **RL-081** *Marvin Feldman c. México*, Caso CIADI No. ARB(AF)/99/1, Laudo, 16 de diciembre de 2002, ¶ 63; **RL-207** *Apotex Holdings Inc. and Apotex Inc. v. United States of America II*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, ¶ 327 (quoting Grand River Decision on Objections to Jurisdiction).

⁵⁸⁶ **RL-208** *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶ 258.

⁵⁸⁷ **RL-209** *The Renco Group Inc. v. Republic of Peru II*, PCA Case No. 2019-46, Dissenting Opinion of J. C. Thomas QC, 30 June 2020, ¶¶ 25, 57, 65.

360. In *Tennant v. Canada*, the United States made submissions explaining the importance of limitation periods in the context of the NAFTA. Those submissions are equally applicable to the four-year limitation period in the Mexico-Argentina BIT:

An ineffective limitations period would fail to promote the goals of ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential respondents and third parties. An ineffective limitations period would also undermine and in effect change the State party's consent because, as noted above, the Parties did not consent to arbitrate an investment dispute if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach and knowledge that the claimant has incurred loss or damage.⁵⁸⁸

361. Thus, the four-year limitation period in the Mexico-Argentina BIT must be strictly applied.

**b. There are three types of government measures:
Mercantile Court proceeding, Amparo Court proceeding
and failure to investigate criminal complaints**

362. Claimants identify three types of measures:

- ***The first*** relates to the Mercantile Court proceeding and related decision, order and subsequent hotel seizures, which the Claimants characterize as a judicial expropriation (for ease of reference collectively referred to in this section as the Mercantile Court proceeding).⁵⁸⁹ As discussed above, for these types of measures the limitation period expired prior to the submission of NOA#2.
- ***The second*** relates to the Amparo Court proceeding and decision on the alleged due process violations in the Mercantile Court, which was issued on 2 October 2015 (for ease of reference collectively referred to in this section as the Amparo Court proceeding). For this class of measures, the limitation period did not expire prior to the submission of NOA#2 (discussed below).⁵⁹⁰
- ***The third*** relates to criminal complaints filed by Mr. Sastre after the seizure of his hotel that were not investigated (for ease of reference collectively referred to in this section as the Criminal Complaints). For this class of measures, the limitation periods expired on 7 May 2012 and 31 October 2015, significantly before the submission of NOA#2 (discussed below).

⁵⁸⁸ **RL-210** *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Second Submission of the United States of America, ¶ 5.

⁵⁸⁹ Counter-Memorial on Jurisdiction, ¶¶ 252, 262-263.

⁵⁹⁰ Counter-Memorial on Jurisdiction, ¶ 264. The amparo claims consisted of violations of due process rights and the right to receive a written order from a competent authority before being deprived of property under Articles 14 and 16 of the Constitution (NOA#2, ¶ 62).

363. As discussed below in the context of applying a limitation period to a series of government measures, the limitation period must be applied to each type of measures separately.

c. This Tribunal only has jurisdiction to consider Sastre's denial of justice claim related to the Amparo Court proceeding

364. The foregoing leads to the conclusion that this Tribunal has jurisdiction to consider only a denial of justice claim related to the Amparo Court proceeding. It does not have jurisdiction to consider claims related to the Mercantile Court proceeding, including the alleged judicial expropriation claim, nor does it have jurisdiction to consider claims related to the Criminal Complaints.

365. This outcome is legally sound and is fair to the Claimants. The Respondent's judicial system is equipped with an amparo process specifically to address situations like those encountered by the Claimants in the Mercantile Court proceeding and, if necessary, take corrective action. Claimants chose to avail themselves of the Respondent's judicial system by initiating an Amparo Court challenge of the Mercantile Court proceeding rather than initiating, within the limitation period, an arbitration under the Mexico-Argentina BIT. The BIT explicitly recognizes this choice in Article 10(3), which contemplates an investor submitting a matter to the competent courts of the respondent State (*e.g.*, Amparo Court) or, alternatively, to arbitration. Once the choice is made, it is final. Thus, the Claimants cannot now submit the Mercantile Court proceeding, including the alleged judicial expropriation claim, to arbitration. However, their interests in the Amparo Court proceeding are protected by amparo law and procedure and by the right to initiate an arbitration under the BIT and bring a denial of justice claim against the Amparo Court proceeding should one be merited.

366. This outcome is also fair to the Respondent because it is consistent with what it agreed to in the BIT. It also prevents the Respondent from being prejudiced by actions taken by the Claimants in the amparo proceeding. The Claimants have complete control of the presentation of their case and evidence to the Amparo Court. The belief is that if the Claimants' amparo challenge has merit and is diligently presented, the matter will be fully resolved by the Amparo Court. The Respondent will only face liability under the BIT if there is a denial of justice by the Amparo Court.

d. The four-year limitation period begins on the date of actual or constructive knowledge

367. The limitation period for these three classes of actions begins on the date that the Claimants obtained actual or constructive knowledge of the adoption of the measures and damages claimed.⁵⁹¹ The “should have first acquired knowledge” test is an objective standard— what a prudent claimant exercising reasonable care or reasonable diligence should have known or must reasonably be deemed to have known.⁵⁹²

(1) Mercantile Court Proceeding

368. Sastre had actual knowledge of the Mercantile Court proceeding, order, seizure and damages or, at the very least, “should have” had such knowledge on October 21, 2011, when the seizures occurred or, at latest, on November 22, 2011, when he filed the amparo with respect to the alleged due process violations in the Mercantile Court proceeding.⁵⁹³ For the reasons presented at the beginning of this section, this type of measure is clearly outside the prescribed four-year period. Therefore, all claims related solely to actions taking place during the Mercantile Court proceeding, including the alleged judicial expropriation, are outside the jurisdiction of this Tribunal. This includes any denial of justice claim related to the Mercantile Court proceeding.⁵⁹⁴

⁵⁹¹ Memorial on Jurisdiction, ¶ 230 citing **RL-097**, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 213.

⁵⁹² **RL-206** *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, *Decision on Objections to Jurisdiction*, 20 July 2006 ¶¶ 59, 66; **RL-211** *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (anteriormente Spence International Investments, LLC, Berkowitz et al) c. República de Costa Rica*, Caso CIADI No. UNCT/13/2, Laudo Provisional, 25 de octubre de 2016, ¶ 209.

⁵⁹³ NOA#2, ¶ 62. The amparo claims consisted of violations of due process rights and the right to receive a written order from a competent authority before being deprived of property under Articles 14 and 16 of the Constitution.

⁵⁹⁴ The following argument is presented in the Counter-Memorial: “Importantly, even if Mr. González Nuño abused Respondent’s court system, this does not absolve Respondent of responsibility from Mr. Sastre’s claims, including in particular, but not limited to, denial of justice. As Mr. Sastre intends to show in the merits phase of this proceeding, a legal system that does not deny justice would not have ousted Mr. Sastre in that manner, without due process. Thus, Respondent cannot plead ignorance and pass the responsibility to Mr. González Nuño” (Counter-Memorial on Jurisdiction, footnote 317). Any claims of denial of justice are, at most, limited to the amparo proceeding discussed below. They cannot be raised in respect of the Mercantile Court proceeding, decision, order and resulting seizures.

(2) Amparo Court proceeding

369. The decision in the Amparo Court proceeding was issued on October 2, 2015.⁵⁹⁵ On that date, the Claimants would have had actual knowledge of the outcome of the proceeding. The four-year limitation period would have expired on October 2, 2019. NOA#2 was submitted on 14 June 2019 almost four months before the limitation period expired for this type of measure. From the perspective of the application of the limitation period, this type of measure is within the jurisdiction of this Tribunal.

(3) Criminal Complaints

370. In his witness statement, Sastre refers to a 7 May 2008 criminal complaint and another on 31 October 2011 (Witness Statement of Carlos Sastre, ¶ 34 and 36, CS-0016). The four-year limitation periods for these criminal complaints expired on 7 May 2012 and 31 October 2015, significantly before the submission of the NOA#2 (14 June 2019).

371. Other than alleging that the “Respondent violated its full protection and security obligations by failing to investigate the criminal complaints filed by Mr. Sastre after the seizure of his hotel by Respondent” (emphasis added),⁵⁹⁶ the Claimants do not provide information on the referenced Criminal Complaints including the dates they were made.⁵⁹⁷ In his witness statement, Sastre refers to a 7 May 2008 criminal complaint and another on the morning of 31 October 2011, both of which occurred before and not after the seizure of his hotel. Assuming that these are the Criminal Complaints that form the basis for the claims, the four-year limitation periods expired on 7 May 2012 and 31 October 2015, while the NOA#2 was submitted on 14 June 2019. Accordingly, any claims concerning the Criminal Complaints are outside the jurisdiction of this Tribunal.

⁵⁹⁵ Counter-Memorial on Jurisdiction, ¶ 255.

⁵⁹⁶ Counter-Memorial on Jurisdiction, ¶ 84.

⁵⁹⁷ NOA #2, ¶ 104 states that “Claimants filed criminal complaints relating to these illegal seizures, but Mexican government authorities failed to provide full protection and security by ignoring, and continuing to ignore to this day, these criminal complaints in the years subsequent to the takings”.

e. Sastre had actual knowledge of the alleged breaches concerning the Mercantile Court proceeding in 2011, not in 2015

372. As explained above, Sastre had actual knowledge of the seizure and the alleged due process violations and related treaty breaches in 2011.

373. There is no factual basis for the Claimants' argument that Sastre did not know or should not have known that the Respondent committed the alleged treaty breaches until 2015 when he became aware of media reports on suspected participation of government officials in the seizures. Although the Claimants' arguments are not clear, they appear to argue that government corruption influenced the decision of the Mercantile Court. This assertion is grounded in paragraph 58 of Sastre's witness statement and in exhibit C-0001.⁵⁹⁸ The relevant part of Sastre's statement reads as follows:

58. A finales de 2015 y en 2016, leí dos reportajes investigativos de fuentes muy reconocidas en México que alegaban que el entonces gobernador de Quintana Roo, Roberto Borge Angulo, estaba vinculado a despojos de tierras valiosas en la zona de Tulum.¹⁹ Esta fue la primera vez que yo tuve razón de sospechar de una posible intención por parte de autoridades mexicanas detrás de las tomas de Tierras del Sol y Hamaca Loca. Sin embargo, aparte de estos artículos, no he tenido conocimiento de primera mano de que así haya sido. Antes de leer estos artículos, mi creencia era que únicamente Carlos González Nuño era el responsable de todos los actos acontecidos.

374. Footnote 19 to this paragraph of his statement cites exhibits C-0001 and CS-0017. Sastre's statement and exhibits C-0001 and CS-0017 specifically name ex-Governor Roberto Borge as the related governmental official.

375. The physical seizures of the Tierras del Sol and the Hamaca Loca Investments took place on 31 October 2011, pursuant to case 1709/2009 of the Mercantile Courts of Guadalajara which was initiated on 28 April 2009 and which resulted in a court order dated 11 April 2011 authorizing the seizures.⁵⁹⁹ Roberto Borge took office on 5 April 2011, almost two years after the court proceeding was initiated and only six days before the court order was issued. For these reasons, Roberto Borge could not have been a factor in the court proceeding, decision, order and the resulting seizures. Moreover, the alleged corrupt actions of Borge referenced in CS-0017 relate to "dubious labour lawsuits", which are not the type of actions that occurred with regard to the

⁵⁹⁸ Counter-Memorial on Jurisdiction, footnote 316.

⁵⁹⁹ NOA #2, ¶ 62; C-0029, p. 2-3; C-0040 2011 Written Declaration of Luis Miguel Escobedo Perez, p. 76.

seizures of the Tierras del Sol and Hamaca Loca Investments. Thus, irrespective of whether Roberto Borge was involved in other corrupt activities, there is no evidence that any of those activities involved the seizures of the Tierras del Sol and the Hamaca Loca Investments.

376. Accordingly, there is no factual basis for the Claimants' argument that Sastre only became aware of the alleged treaty breaches at an unspecified date in 2015 when he read in press reports about the alleged corrupt actions of Roberto Borge.

f. The limitation period must be separately applied to each of the three types of governmental measures

377. In claiming that the invoked treaties have been breached, the Claimants identified the three types of governmental measures above, which they refer to as "independent bases".⁶⁰⁰ They argue that the treaty violations associated with the Mercantile Court proceeding were "crystallized" by the amparo court decision on 2 October 2015 (*i.e.*, the Amparo Court proceeding) because "a denial of justice occasioned by judicial action occurs when the final judicial instance... has rendered its decision".⁶⁰¹ On this basis, the Claimants argue that the four-year limitation period for the Mercantile Court proceeding re-started on 2 October 2015 and would therefore have expired on 2 October 2019.⁶⁰² The Claimants essentially argue that the same limitation period applies to the Mercantile Court proceeding and the Amparo Court proceeding.

378. As discussed above, Article 10(3) of the BIT prevents the Claimants from bringing claims in relation to the Mercantile Court proceeding. Even if Article 10(3) did not apply, the issuance of the Amparo Court's decision did not re-start the limitation period for the Mercantile Court proceeding notwithstanding that the Amparo Court proceeding considered procedural challenges to the Mercantile Court proceeding.

379. Interpreting the limitation period in Article 1(2) of the Annex of Mexico-Argentina BIT in a manner that re-starts the limitation period for the Mercantile Court proceeding renders that

⁶⁰⁰ Counter-Memorial on Jurisdiction, ¶¶ 84, 262.

⁶⁰¹ Counter-Memorial on Jurisdiction, ¶¶ 84, 255, 263. 1. Claimants do not include the Criminal Complaints in this argument.

⁶⁰² Counter-Memorial on Jurisdiction, ¶ 264.

provision *inutile* in respect of that proceeding. This is an impermissible interpretation of the treaty provision under the general rule of interpretation in Article 31 of the *Vienna Convention*.⁶⁰³

380. Moreover, an investor cannot invoke the last event in a series of related or similar actions by the State to claim the benefit of the treaty, in particular where there is only one alleged violation whose effects have been maintained throughout domestic court proceedings.⁶⁰⁴ Allowing this would “render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries”.⁶⁰⁵ In time-bar (*i.e.*, limitation period) circumstances, a series of associated actions may be divided up into those that meet the time-bar requirement and are thus justiciable, and those that do not meet the time-bar requirement, and are thus not justiciable.⁶⁰⁶ In this instance, claims regarding the Mercantile Court proceeding and the Amparo Court proceeding must be divided up and the limitation period must be separately applied to determine if each one is justiciable before this Tribunal.

⁶⁰³ “One of the corollaries of the “general rule of interpretation” in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility”, **RL-212**, Informe del Órgano de Apelación, Estados Unidos – Pautas para la gasolina reformulada y convencional, WT/DS2/AB/R, adoptado el 20 de mayo de 1996, p. 27. *See also* **RL-213** *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017 ¶ 459 (“The State Parties to the Canada-Slovakia BIT cannot have intended that Article 15(6) be read and applied in a way that exposes them to claims from investors that could date from more than three years before the entry into force of the treaty, just because a certain dispute was not settled and/or might give rise to a follow-up action. Considering that the State’s refusal to overturn an existing alleged breach gives rise to a new dispute would open the floodgates to a possible complete disregard of the condition *ratione temporis* of the application of a BIT. The consequence would be that an investor could bypass the *ratione temporis* limitations of a treaty by commencing local court proceedings after the entry into force of the treaty, in respect of an old dispute. This cannot be a sensible legal result.”).

⁶⁰⁴ **RL-213**, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017, ¶ 460.

⁶⁰⁵ **RL-206**, *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 81.

⁶⁰⁶ **RL-211**, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶ 211.

2. Sastre did not notify the Respondent in writing of its intention to submit to arbitration the claims related to the Hamaca Loca Investments under the Mexico-Argentina BIT

381. In its Memorial on Jurisdiction, the Respondent objected to this Tribunal's jurisdiction over claims regarding the Hamaca Loca Investments because Sastre failed to give written notice under Article 10(4) of the Mexico-Argentina BIT.⁶⁰⁷ Instead, these claims were notified under the Mexico-Switzerland BIT.⁶⁰⁸ Consequently, the Respondent did not consent to arbitration under the Mexico-Argentina BIT for those claims.⁶⁰⁹

382. In their Counter-Memorial, the Claimants state the following:

- The second notice identifies the Switzerland-Mexico BIT as potentially at issue in addition to the treaty protections and consent provisions of the Argentina-Mexico BIT;⁶¹⁰
- Respondent was notified about the applicability of the Argentina-Mexico BIT at all relevante dates;⁶¹¹
- The second notice of intent states plainly that “the treatment afforded to Hamaca Loca S.A. de C.V. and its Shareholders by [Respondent] violates the obligations in the Investment Protection Treaties”;⁶¹²
- The second Notice of Intent expressly defines the term “Investment Protection Treaties” to include Respondent's investment protection treaties with Spain, Switzerland, and Argentina;⁶¹³ and
- Mr. Sastre later filed his arbitration claim under the Argentina-Mexico BIT, in accordance with his status as an Argentine national. Respondent cannot now contend any lack of notice about these claims under the Argentina BIT, when the second notice of intent is replete with references to that instrument.⁶¹⁴

⁶⁰⁷ Memorial on Jurisdiction, ¶¶ 236-241.

⁶⁰⁸ Memorial on Jurisdiction, ¶¶ 237-238.

⁶⁰⁹ Memorial on Jurisdiction, ¶¶ 238, 241.

⁶¹⁰ Counter-Memorial on Jurisdiction, ¶ 225.

⁶¹¹ Counter-Memorial on Jurisdiction, ¶ 226.

⁶¹² Counter-Memorial on Jurisdiction, ¶ 227.

⁶¹³ Counter-Memorial on Jurisdiction, ¶ 227.

⁶¹⁴ Counter-Memorial on Jurisdiction, ¶ 227.

383. These statements are factually inaccurate. All references to the Mexico-Argentina BIT are in the context of the Tierras del Sol Investments, not the Hamaca Loca Investments. The relevant part of the second paragraph of the second Notice of Intent reads as follows:

En 12 de junio de 2017, con el fin de hacer que se someta una reclamación por las violaciones al BIT entre México y Suiza descritas a continuación, la empresa Hamaca Loca S.A. de C.V. (la “Empresa” o “Hamaca Loca”), una sociedad anónima mexicana de capital variable, y sus accionistas acordaron y aprobaron una cesión de derechos al Sr. Carlos Esteban Sastre (el “Sr. Sastre” o el “Inversionista”)⁶¹⁵ (emphasis added)

384. The highlighted text passage makes it clear that the second NOI was filed in order to file a claim for violations of the Mexico-Switzerland BIT in relation to the Hamaca Loca Investments. The power of attorney in Annex NA-2 to the NOI#2 explicitly confirms that the authorization to Mr. Ampudia is to initiate an arbitration concerning the Hamaca Loca Investments under the Mexico-Switzerland BIT:

El Sr. Carlos Esteban Sastre, domiciliado en [REDACTED] Córdoba, República Argentina (el “Cliente”) por medio de la presente autoriza a: Ricardo Ampudia de International Dispute Resources, LLC, ubicada en 401 East Las Olas Boulevard, Suite 1400, Fort Lauderdale, FL 33301, Estados Unidos de América (el “Abogado Representante”) a representar y comparecer a nombre del Cliente para iniciar y llevar un arbitraje contra los Estados Unidos Mexicanos bajo el Acuerdo de Promoción y Protección Recíproca de las Inversiones de los Estados Unidos Mexicanos con la Confederación Suiza.⁶¹⁶ (emphasis added).

385. The NOI did not notify the Respondent that Mr. Sastre would be bringing claims for the Hamaca Loca Investments under the Mexico-Argentina BIT. In fact, the Claimants counsel, Mr. Ampudia, is not authorized to bring claims on behalf of the Hamaca Loca Investments under the Mexico-Argentina BIT.

386. Accordingly, the facts clearly establish that the Respondent was not notified that Sastre would be bringing claims for the Hamaca Loca Investments under the Mexico-Argentina BIT.

387. The Claimants argue that the Respondent was not prejudiced by their failure to properly notify the claims respecting the Hamaca Loca Investments. The nature of the prejudice suffered by the Respondent is irrelevant to the legal requirement in Article 10(4) of the Mexico-Argentina BIT. That provision states that “[e]l inversor deberá notificar por escrito a la Parte Contratante su

⁶¹⁵ C-0033, Second Notice of Intent, 6 September 2017 at p. 1.

⁶¹⁶ See Exhibit NA-2, Additional Power of Attorney from the investor to International Resources, LLC.

intención de someter la controversia a arbitraje internacional”. Since in the case of the Hamaca Loca Investments this was not done, it is *per se* a violation of the provision.⁶¹⁷ Nothing other than an express waiver on the part of the Contracting Party (*i.e.*, the Respondent State) can excuse or justify a claimant’s failure to give notice as required by Article 10(4).⁶¹⁸

3. Sastre was domiciled in Mexico when the alleged breaches occurred and could not initiate this arbitration pursuant to Article 2(3) of the Mexico-Argentina BIT

388. In the Memorial on Jurisdiction, Respondent argues that Article 2(3) of the Mexico-Argentina BIT prohibited Sastre from invoking the investor-state dispute settlement mechanism because it was not proven that he was not domiciled in Mexico at the time of the breaches and at

⁶¹⁷ **RL-214**, *Philip Morris Brands SÀRL et al v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, ¶ 140 (“The sequence of steps to be followed by the Claimants under Articles 10(1) and (2) before resorting to international arbitration is of importance for the purpose of this analysis. Each such step is clearly indicated as part of a binding sequence, as evidenced by the word “shall” before each step as follows...”). It added that (“[t]he ordinary meaning of the terms used for the two steps (i) and (ii), which are preliminary to the institution of international arbitration, is clearly indicative of the binding character of each step in the sequence. That is apparent from the use of the term “shall” which is unmistakably mandatory and from the obvious intention of Switzerland and Uruguay that these procedures be complied with, not ignored.”); **RL-215**, *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* ICJ Reports, Preliminary Objections - Judgment of 1 April 2011, ¶ 130 (“[t]o the extent that the procedural requirements of [a dispute resolution clause] may be conditions, they must be conditions precedent to the seisin of the Court even when the term is not qualified by a temporal element.”); **RL-216**, *Submission of the Government of the United States of America pursuant to NAFTA Article 1128*, ¶ 8 (“A disputing investor who does not deliver a Notice of Intent ninety (90) days before it submits a Notice of Arbitration or Request for Arbitration fails to satisfy this procedural requirement and fails to engage the respondent’s consent to arbitrate. Under such circumstances, a tribunal will lack jurisdiction ab initio. As discussed below with respect to Article 1121(3), a respondent’s consent cannot be created retroactively; consent must exist at the time a claim is submitted to arbitration. Unlike the Claimant’s consent required by Article 1121(3), however, which must accompany and be in conjunction with a Notice of Arbitration, satisfaction of the requirements of Article 1119 through submission of a valid Notice of Intent must precede submission of a Notice of Arbitration by 90 days.”); **RL-191**, *Cargill, Incorporated c. Estados Unidos Mexicanos*, Caso Ciadi No. ARB(AF)/05/2, Award, 18 September 2009, the tribunal observed that the respondent’s consent must be established that is subject to compliance with the obligation to provide preliminary notice, consent and waiver ¶¶ 160 and 183 (¶ 160. “A claimant must also provide preliminary notice pursuant to Article 1119 and satisfy the conditions precedent via consent and, where appropriate, waiver, under Article 1121. Consent of the respondent must be established pursuant to Article 1122.”) (¶ 183... Because Claimant’s capacity to initiate arbitration under Article 1122 is limited to claims “to arbitration in accordance with the procedures set out in this Agreement,” the question is then whether Claimant has failed to comply with a procedural requirement...”)

⁶¹⁸ See Memorial on Jurisdiction, § II. Procedural History.

the time of the submission of the claim.⁶¹⁹ In the Counter-Memorial, Claimants argue that the domicile requirement in Article 2(3) applies only to the filing date (*i.e.*, at the time of submission of the claim) and that Sastre’s claim was not precluded because he was domiciled in Argentina at the time of the filing.⁶²⁰

a. The domicile requirement clearly applies at the time of the alleged treaty breaches

389. Article 2(3) is a crucial part of the Respondent’s consent to arbitration and to the offer to arbitration in the BIT. It specifies that, with respect to the investor-state dispute settlement procedure in the BIT, nationals of Argentina domiciled in Mexico “solamente podrán prevalerse del tratamiento otorgado por esta Parte Contratante a sus propios nacionales”. This restricts the access of Argentinian nationals domiciled in Mexico to the “tratamiento otorgado por esta Parte Contratante a sus propios nacionales”. Mexican nationals have no access to any element of the investor-state dispute settlement procedures in the Respondent’s investment treaties. Thus, the access denied to Argentinian nationals domiciled in Mexico is to the dispute settlement procedure as a whole. The denial is not limited to the filing of a notice of arbitration.

390. Article 1(1) of the Annex to the Mexico-Argentina BIT, entitled “Solución de Controversias entre una Parte Contratante y un Inversor de la otra Parte Contratante” defines the scope of the dispute settlement procedure (*i.e.*, the procedure as a whole) to which Argentinian nationals domiciled in Mexico do not have access:

“El inversor de una Parte Contratante podrá, [...] someter una reclamación a arbitraje, cuyo fundamento sea el que la otra Parte Contratante ha incumplido una obligación establecida en el presente Acuerdo.” [emphasis added]

391. The language “la otra Parte Contratante ha incumplido una obligación establecida en el presente Acuerdo” is important. Such domiciled nationals cannot submit a claim to arbitration on the basis that the Respondent has breached an obligation in the BIT. This provision links the denied access in Article 2(3) to any breach of any substantive obligation in the BIT. In other words, it links the denied access to the time of the breach. This interpretation is logical because the dispute settlement procedure only becomes relevant upon the occurrence of a breach.

⁶¹⁹ Memorial on Jurisdiction, ¶¶ 133, 213-227.

⁶²⁰ Counter-Memorial on Jurisdiction, ¶157.

392. To give Article 2(3) meaning, it must be interpreted to encompass the date of the alleged treaty breach. Otherwise, an investor who is a national of Argentina could simply change his or her domicile from Mexico to Argentina following the breach but before submitting a claim to arbitration, rendering the consent to arbitration in Article 2(3) meaningless and inutile. Such an interpretation is impermissible. One of the corollaries of the general rule of interpretation in Article 31 of the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.⁶²¹

393. The Claimant's contention that Article 2(3) cannot be construed as requiring assessment at the time of the breach because it is a provision that contains procedural elements is incorrect.⁶²² Article 2(3) goes to the Respondent's consent to arbitrate and to the offer to arbitration in the BIT.

b. Supplementary means of interpretation are not applicable

394. Claimants argue that the Italy-Argentina investment treaty and the analysis of this treaty in *Ambiente Ufficio* supports their position on the burden of proof regarding the place of domicile and that Article 2(3) only applies to those investors who were domiciled at the time of the filing. It justifies reference to this treaty as a supplementary means of interpretation.

395. Article 32 of the Vienna Convention permits consideration of supplementary means of interpretation, such as the *travaux préparatoires*, only when interpretation under Article 31 results in an interpretation that is ambiguous or obscure or leads to a manifestly absurd result. As explained above, this is clearly not the case.

396. Even if Article 32 was applicable to the interpretation of Article 2(3), the Italy-Argentina BIT and the observations in *Ambiente Ufficio* concerning that BIT are not supplementary means of interpretation of the Mexico-Argentina BIT. They simply identify how the domicile issue is addressed differently in another treaty and underscore that Article 2(3) must be interpreted in light of its specific language, not on the basis of language in another treaty that does not exist in Article

⁶²¹ **RL-212**, Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, p.27.

⁶²² **RL-217**, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Dissenting Opinion of Santiago Torres Bernárdez, 20 June 2018, ¶ 170; **RL-218**, *Quasar de Valores SICAV S.A. and others (formerly Renta 4 S.V.S.A and others) v. Russia*, SCC Case No. 24/2007, Separate Opinion of Charles N. Brower, 20 March 2009, ¶ 10.

2(3). The *Ambiente* tribunal’s approach regarding the burden of proof is a departure from a well-settled principle of international law and should not be followed.

c. Burden of proof

397. The domicile requirement in Article 2(3) goes to the Respondent’s consent to arbitration, the offer to arbitration in the BIT, and to the jurisdiction of this Tribunal. The Claimants cite the tribunal majority’s finding in *Ambiente Ufficio* on the burden of proof in support of its position that the burden was on the Respondent to prove that the domicile exclusion applies to Sastre.⁶²³ This is incorrect.

398. The *Ambiente Ufficio* tribunal’s approach regarding the burden of proof departs from well-settled principle of international law and should be disregarded. This is recognized in the Dissenting Opinion of Santiago Torres Bernárdez which strongly critiqued the nationality and domicile analysis and determinations by the majority.⁶²⁴ The *Abaclat* tribunal sets out the correct burden of proof:

(...) Indeed, it 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. In case relevant information in the Annexes is missing, erroneous or unreliable, this would be taken into consideration by the Tribunal when deciding whether Claimants complied with their burden of proof with respect to the concerned claims and/or Claimants.⁶²⁵

d. Mr. Sastre was “Domiciled” in Mexico

399. Claimants argue that the Respondent’s evidence regarding Sastre domicile does not prove that Sastre was “domiciled” in Mexico because it does not prove that he had the intent to remain

⁶²³ Counter-Memorial on Jurisdiction, ¶¶ 164-165.

⁶²⁴ He considered that the tribunals approach regarding the burden of proof and artificial division of positive and negative element of *ratione personae* jurisdiction, “establish[ed] a kind of presumption in favour of Claimants in matters of nationality and domicile it alters the normal allocation of the burden of proof as between the Parties in those matters” and that it was a “departure from a well-settled principle of international law”. **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*), Dissenting Opinion of Santiago Torres Bernárdez, 2 May 2013, ¶¶ 139, 140.

⁶²⁵ **RL-041**, *Abaclat and others (formerly Giovanna a Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 678.

there permanently.⁶²⁶ Claimants cite Sastre witnesses' statement in support of the position that Sastre's intent while in Mexico was to stay there temporarily.⁶²⁷

400. Naturalization is an important indication that an individual's residence is not temporary, a fact recognized by the Court in *Nottebohm*:

Naturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves his breaking of a bond of allegiance and his establishment of a new bond of allegiance. It may have far reaching consequences and involve profound changes in the destiny of the individual who obtains it. It concerns him personally, and to consider it only from the point of view of its repercussions with regard to his property would be to misunderstand its profound significance. In order to appraise its international effect, it is impossible to disregard the circumstances in which it was conferred, the serious character which attaches to it, the real and effective, and not merely the verbal preference of the individual seeking it for the country which grants it to him.⁶²⁸

401. Ultimately, the Court determined that Mr. Nottebohm's nationality was not based on any genuine prior link with Liechtenstein, and the sole object of his naturalization was to enable him to acquire the status of a neutral national in time of war. This is unlike the situation of Sastre who had established a long-standing and close connection between him and Mexico, a link that was strengthened when he became a naturalized Mexican. The Court determined as follows:

These facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala, a link which his naturalization in no way weakened. That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations.

Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life

⁶²⁶ Counter-Memorial on Jurisdiction, ¶¶ 178-179.

⁶²⁷ **CLA-0073**, *Nottebohm Case* (Liechtenstein v. Guatemala) Second Phase, ICJ, Judgment, (April 6, 1955), p. 26.

⁶²⁸ **CLA-0073**, *Nottebohm Case* (Liechtenstein v. Guatemala) Second Phase, ICJ, Judgment, (April 6, 1955), p. 24.

or of assuming the obligations-other than fiscal obligations-and exercising the rights pertaining to the status thus acquired.⁶²⁹

402. In *Ballantine*, the tribunal underscored the importance of naturalization as a determining factor of dominant and effective nationality. The tribunal stated as follows:

4. Naturalization

578. The Claimants voluntarily acquired, through naturalization, the Dominican nationality on December 30, 2009.¹¹¹¹ In addition, they made the relevant citizenship requests for two of their children, for whom they stated formally to the authorities: “[w]e want the Dominican citizenship to be granted to them as well since they comply with all the requirements according to the Law and we feel very identified with the sentiment and Dominican customs since we have had a close bond of coexistence and respect”.¹¹¹² The Tribunal notes that a similar statement was provided in relation to the Claimants’ naturalization process.¹¹¹³

579. In *Nottebohm*, the ICJ took the view that naturalization, as opposed to other factors which it considered merely illustrative, would always be a relevant factor. Hence, it considered that “[n]aturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being”.¹¹¹⁴ We agree with this last statement. Naturalization is an important event in a person’s life. It creates a particular bond to a country that certainly has legal consequences, and thus, should not be taken lightly. In this case, the ICJ asserted the “profound significance” and “the serious character” of such procedure and took into account within its examination that “naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred”.¹¹¹⁵ Furthermore, it considered that:

[i]n order to appraise its international effect, it is impossible to disregard the circumstances in which it was conferred, the serious character which attaches to it, the real and effective, and not merely the verbal preference of the individual seeking it.¹¹¹⁶ (Emphasis added)⁶³⁰

403. In *Ballantine*, the tribunal ultimately did not find that the Claimants dominant and effective nationality was that of the Dominican Republic, but it was because “[t]he sole reason for becoming Dominican and domestic investors was the investment.”⁶³¹ Again, this is unlike the situation of Sastre who established a long-standing and close connection between him and Mexico, a link that was strengthened when he became a naturalized Mexican.

⁶²⁹ **CLA-0073**, *Nottebohm Case* (Liechtenstein v. Guatemala) Second Phase, ICJ, Judgment, (April 6, 1955), p. 26.

⁶³⁰ **CLA-0076**, *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Award, 3 September 2019, ¶ 579.

⁶³¹ **CLA-0076**, *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Award, 3 September 2019, ¶ 584.

404. The Claimants argument that Sastre’s intent while in Mexico was to stay there temporarily is contradicted by the overwhelming evidence that indicates otherwise.

e. Mr. Sastre cannot use the MFN clause in Article (3)2 of the Mexico-Argentina BIT to circumvent the application of conditions *ratione voluntatis*

405. The Claimants argue that Sastre can use the MFN provision contained in Article 3(2) of the Mexico-Argentina BIT to import the “treatment” under the Mexico-France BIT and sidestep the application of the domicile requirements contained in Article 2(3) of the Mexico-Argentina BIT.⁶³² This is incorrect.

406. Sastre cannot use the MFN clause in the BIT to circumvent the application of conditions *ratione voluntatis*, i.e., the conditions to access to dispute settlement. Consent is the cornerstone of, and condition *sine qua non* for, the jurisdiction of an international court or tribunal.⁶³³ As such “a State may not be compelled to submit its disputes to arbitration without its consent”.⁶³⁴ A State’s consent cannot be presumed, it “must be established by an express declaration or by actions that demonstrate consent”.⁶³⁵ The consent “should be clear and unambiguous”.⁶³⁶

407. The Respondent’s consent to arbitration is set out, *inter alia*, in Article 2(3) of the BIT. That consent cannot be modified. Where there is no consent to arbitrate certain disputes under the BIT, an MFN clause cannot be used to create that consent because the parties to the BIT have not

⁶³² Counter-Memorial on Jurisdiction, 180-186.

⁶³³ **RL-022**, *Daimler Chrysler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012), ¶ 168.

⁶³⁴ **CLA-0088**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, ¶. 21 y 22 citando *Ambatielos Case* (Greece v. United Kingdom) Merits: Obligation to Arbitrate, Judgment of May 19, 1953 (I.C.J.R EPORTS 1953) p. 19; Ver también, **RL-219**, *Status of Eastern Carelia*, Advisory Opinion of July 23, 1923 (P.C.I.J.SERIES B, No. 5) p. 27 y **CLA-0043**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction of December 21, 2012, ¶ 176.

⁶³⁵ **CLA-0088**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013, ¶ 21; **RL-022**, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2012), ¶ 175

⁶³⁶ **RL-220**, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶¶ 198-199; **RL-046**, *Wintershall Aktiengesellschaft c. República Argentina*, Caso CIADI No. ARB/04/14, Laudo, 8 de diciembre de 2008, ¶¶ 160, 172.

clearly and explicitly agreed to extend their consent in such a manner.⁶³⁷ To do so would result in a substantial re-write of the treaty and would extend the consent of the party States beyond what they agreed to.

408. A corollary of the principle of consent underlying treaty commitments is that an obligation or rule of treatment contained in a treaty, like an MFN provision, cannot displace the Parties' conditions to arbitrate because to do so would allow investors to benefit from the substantial treaty rights without fulfilling "the conditions *ratione personae*, *ratione materiae*, and *ratione temporis* as well as a supplementary condition relating to the scope of the State's consent to such jurisdiction, the condition *ratione voluntatis*".⁶³⁸ The same idea was put forward in *Tecmed*, but related to the effect of an MFN clause on the application *ratione temporis* of the BIT. The tribunal considered that the MFN clause could not apply to a provision that integrates "the core of matters that must be deemed to be specifically negotiated by the Contracting Parties."⁶³⁹

409. Several tribunals have rejected Claimant's argument.⁶⁴⁰ The Concurring and Dissenting Opinion of Professor Brigitte Stern in *Impregilo* explains clearly why the MFN could not apply to the conditions of access to dispute settlement (as the condition *ratione voluntatis* could not be modified):

[It] cannot change the conditions *ratione personae*, *ratione materiae*, and *ratione temporis* [...] it must be equally true that an MFN clause cannot change the condition

⁶³⁷ **RL-221**, *A11Y Ltd. v. Czech Republic*, ICSID Case No. UNCT/15/1, Decision on Jurisdiction, 9 February 2017, ¶¶ 103-104 ("The arbitral jurisprudence cited above confirms that where there is no consent to arbitrate certain disputes under the basic Treaty, an MFN clause cannot be relied upon to create that consent unless the Contracting Parties clearly and explicitly agreed thereto."); *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. **RL-222**, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013, ¶ 79.

⁶³⁸ **RL-222**, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013, ¶ 79.

⁶³⁹ **RL-223**, *Técnicas Medioambientales Tecmed, SA c. Estados Unidos Mexicanos*, Caso CIADI No. ARB(AF)/00/2, Laudo, 29 de mayo de 2003, ¶ 69.

⁶⁴⁰ **RL-222**, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013, ¶ 386 ("...Such arguments have, however, been rejected by the tribunals in *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, *Salini Construttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, *Plama, Berschader* (with a dissenting opinion by Mr. Todd Weiler), *Telenor*, *Wintershall*, *Renta 4* (with a separate opinion by Judge Charles N. Brower), *Tza Yap Shum*, *Austrian Airlines* (with a dissenting opinion by Judge Charles N. Brower), *ICS*, and, most recently, *Daimler* (with a dissenting opinion by Judge Charles N. Brower).")

ratione voluntatis, which is a qualifying condition for the enjoyment of the jurisdictional rights open for the protection of substantial rights.

[...]

In other words, before a provision relating to the dispute settlement mechanism can be imported into the basic treaty, the right to international arbitration – here ICSID arbitration – has to be capable of coming into existence for the foreign investor under the basic treaty, in other words the existence of this right is conditioned on the fulfillment of all the necessary conditions for such jurisdiction, the conditions *ratione personae*, *ratione materiae*, and *ratione temporis* as well as a supplementary condition relating to the scope of the State's consent to such jurisdiction, the condition *ratione voluntatis*.

[...]

As long as the qualifying conditions expressed by the State in order to give its consent are not fulfilled, there is no consent, in other words no access of the foreign investor to the jurisdictional treatment granted by ICSID arbitration. An MFN clause cannot enlarge the scope of the basic treaty's right to international arbitration, it cannot be used to grant access to international arbitration when this is not possible under the conditions provided for in the basic treaty.⁶⁴¹

410. Brigitte Stern and others have emphasized that if the conditions surrounding the consent as required in the basic treaty were not met, no right to arbitration exists and therefore no right can be modified by the MFN clause, and in particular the scope of the right to arbitrate.⁶⁴²

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

411. In the Memorial on Jurisdiction, Respondent held that Claimants had failed to prove that at all relevant dates, Mr. Sastre was a qualified “investor”, national of Argentina and whose effective and dominant nationality was Argentinian.

412. In their Counter-Memorial, Claimants state that, by the mere fact of possessing the nationality of one of the other States Parties to the invoked treaties, they have the right to access to the dispute settlement mechanisms of the invoked treaties and that the doctrine of dominant and

⁶⁴¹ **RL-196**, *Impregilo S.p.A. v. Argentina Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern of 21 June 2011, ¶¶ 78-80.

⁶⁴² CLA-0088, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Dissenting Opinion of Laurence Boisson de Chazournes, 3 July 2013, ¶¶ 59, 62; **RL-224**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. c. La República Argentina*, Caso CIADI No. ARB/09/1, Opinión Separada del Dr. Kamal Hossain, 21 de diciembre de 2012, ¶ 17; **RL-144**, *Ambiente Ufficio S.P.A. and others (formerly Giordano Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Dissenting Opinion of Santiago Torres Bernardez, 2 May 2013, ¶ 396

effective nationality is not applicable on the basis of the text of the treaties and the UNCITRAL Rules.

413. However, Claimants have not provided evidence to confirm the Argentine nationality of Mr. Sastre on the relevant dates, nor have they disputed the fact that the proof of nationality submitted, so far, is insufficient.⁶⁴³ Nor have Claimants proven that the effective and dominant nationality of Mr. Sastre was Argentine in all the relevant dates.

414. Respondent maintains that the dominant and effective nationality of Mr. Sastre at all relevant dates was Mexican, which prevented him from invoking the dispute settlement mechanism provided for in the applicable treaty.

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

415. In the Memorial on Jurisdiction, the Respondent established that the passport presented by Mr. Sastre as proof of his Argentine nationality is not sufficient to corroborate the effective nationality at all relevant dates.⁶⁴⁴

416. In their Counter-Memorial, the Claimants reiterate that “*Mr. Sastre is an Argentine national, and thus a protected investor under this BIT*”⁶⁴⁵, and, therefore, can file claims on its behalf and on behalf of the companies CETSA and HLSA.⁶⁴⁶

417. The following timeline illustrates the need to define Mr. Sastre's effective nationality during all relevant dates, due to the conflict between Claimants' nationality allegations and the evidence of multiple nationalities presented in this arbitration.

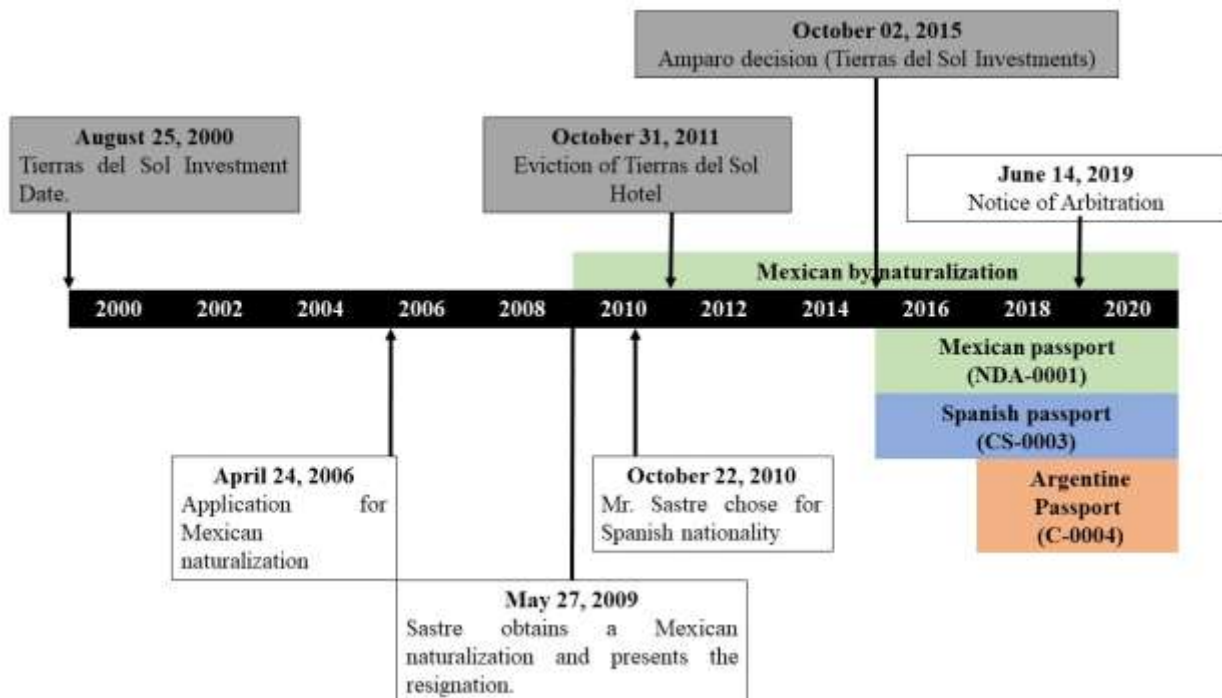
⁶⁴³ Memorial on Jurisdiction, ¶¶ 136-139.

⁶⁴⁴ Memorial on Jurisdiction, ¶¶ 137-139.

⁶⁴⁵ Counter-Memorial on Jurisdiction, ¶ 57.

⁶⁴⁶ Counter-Memorial on Jurisdiction, ¶ 57.

Image 1: Mr. Sastre’s evidence of nationality vis-a-vis alternate nationalities and claimed measures



Source: Own Elaboration based on Exhibits NDA-001, C-0004, R-032, R-031, CS-0003 y CS-0002.

418. The Claimants have not satisfied, *prima facie*, the burden of proof concerning Mr. Sastre's Argentine nationality, which makes it impossible to establish whether or not he qualifies as an investor under the Mexico-Argentina BIT.

a. The evidence submitted by the Respondent to demonstrate that Mr. Sastre holds his Argentine nationality is insufficient

419. In the Counter-Memorial on Jurisdiction, the Claimants adduce the Simoliunas case, issued by the Federal National Electoral Court of Argentina to prove that the Argentine nationality is inalienable and, therefore, the dominant and effective nationality of Mr. Sastre.⁶⁴⁷ This case is insufficient to establish Mr. Sastre's nationality because: (i) Mr. Sastre is not a party in that case;

⁶⁴⁷ Counter-Memorial on Jurisdiction, ¶ 151.

(ii) it has not been proven that the case applies to Mr. Sastre, and; (iii) it has not been proven that the case has the status of mandatory law in Argentina with regard to nationality.

420. In summary, the Argentine nationality of Mr. Sastre is not established *prima facie*, for the following reasons:

- argentine nationality has not been proven at all relevant dates;
- the quality of *jus soli* is not sufficient proof to hold Argentine nationality at all relevant dates;⁶⁴⁸
- The Simoliunas Case⁶⁴⁹ is not sufficient evidence to establish the Argentine nationality of Mr. Sastre at all relevant dates since it has not been proven that it applies to Mr. Sastre;
- Claimants have not submitted any evidence during the document production phase to support Mr. Sastre's Argentine nationality;⁶⁵⁰
- Mr. Sastre is a naturalized Mexican and maintains his Mexican nationality;⁶⁵¹
- Mr. Sastre has presented passports issued in his favor by the Respondent and by the Spanish government.⁶⁵²

6. Sastre's dominant and effective nationality at the relevant dates is the Mexican nationality

421. Claimants have not demonstrated that Mr. Sastre meets the requirement of effective and dominant nationality under the text of the Mexico-Argentina BIT and the principles of customary international law.

422. As illustrated in Image 1, Mr. Sastre held Mexican nationality at least in two of the relevant dates, the date of the claimed measures and at the time of the presentation of the claim.

423. Likewise, the effective and dominant nationality of Mr. Sastre during the relevant dates was Mexican, because: (i) his habitual residence, the center of economic and financial interest, including his employment, was Mexico; (ii) Mexican nationality was the nationality used to acquire real estate and make arrangements regarding his investments, and; (iii) Mr. Sastre also acquired Mexican nationality by naturalization. Next, the Respondent develops the relevant

⁶⁴⁸ Claimants' Rejoinder Opposing to the Bifurcation Request, ¶ 56; CS-001.

⁶⁴⁹ C-0063.

⁶⁵⁰ Procedural Order No. 4, June 16, 2021.

⁶⁵¹ Counter-Memorial on Jurisdiction, ¶ 141.

⁶⁵² CS-0003.

elements that the Tribunal must take into account to establish Mexican nationality as the dominant and effective nationality of Mr. Sastre at the relevant dates.

a. Habitual residence and center of economic and financial interest, including employment

424. The Claimants point out that Mr. Sastre's intention was to return to Argentina, and that his residence in Mexico was only temporary.⁶⁵³

425. However, as the Respondent stated in its Memorial on Jurisdiction, confirmed by Mr. Sastre in his witness statement⁶⁵⁴, and as indicated by the immigration documentation, Mr. Sastre, along with his family, clearly resided habitually in Mexico at the time of the investments and at the time of the alleged measures that violated the treaty.

426. Mr. Sastre changed his habitual residence to Mexico in 1996⁶⁵⁵, when he “vend[ió] [su] distribuidora en Argentina y decid[ió] buscar oportunidades de emprendimiento en México”⁶⁵⁶ and kept it during the relevante dates until 2015, year in which he allegedly left Mexican territory.⁶⁵⁷ During this period, Mr. Sastre on multiple occasions declared himself domiciled and residing in Tulum, Quintana Roo, he was effectively residing in Mexico during that time.⁶⁵⁸

427. Mr. Sastre's witness statement also confirms that, in 1996, when he decided to move to Mexico, he concluded his commercial ties in Argentina to establish his center of economic and financial interest, including his employment, in the territory of the Respondent, and that, since

⁶⁵³ Witness Statement of Mr. Sastre, ¶ 22.

⁶⁵⁴ Witness Statement of Mr. Sastre, ¶ 3-4, 57

⁶⁵⁵ Witness Statement of Mr. Sastre, ¶ 4

⁶⁵⁶ Witness Statement of Mr. Sastre, ¶ 3

⁶⁵⁷ Witness Statement of Mr. Sastre, ¶ 4, 57; C-0002, p. 12.

⁶⁵⁸ **R-056**, Migratory document of “Visiting non-migrant” of Mr. Sastre, p.3-7; **R-031**, Application for Mexican Naturalization of Mr. Sastre; **R-053**, Official Letter ASJ-24493, August 16, 2006, request for an opinion on the naturalization of Carlos Sastre; **R-054**, Official Letter 8304, Favorable opinion on the naturalization of Carlos Sastre, October 9, 2006; **R-057**, Statement by Mr. Sastre with regard to the acquisition of the Letter of Naturalization, dated July 31, 2009; **R-055**, Test of knowledge and identification with the history and general culture of Mexico of Carlos Esteban Sastre, September 5, 2008; Witness Statement of Mr. Sastre, ¶ 29.

2001 until after its eviction, Tierras del Sol Hotel was the center of economic and financial interests of Mr. Sastre.⁶⁵⁹

- 1996: Mr. Sastre acquired a yacht in Cancun through which he offered advertising services to various local companies, this was his only source of employment in that period.⁶⁶⁰
- 1998: Mr. Sastre sold his yacht to buy a beachfront lot and “establecer una empresa turística” in Tulum, Quintana Roo.⁶⁶¹
- 2000: Mr. Sastre constituted CETSA to manage Tierras del Sol Hotel, which would be built with the profit from his sales in Mexico and would be subsequently developed using funds generated from its initial investment, that is, from the profits from its sale in Mexico.⁶⁶²
- October 31, 2011, and after: even though Mr. Sastre was allegedly evicted from Tierras del Sol Hotel, on October 31, 2011, Mr. Sastre did not intend to change his economic and financial interest, including his employment, outside of Mexico, therefore, he organized the rental of a property to turn it into a hotel in the town of Tulum and continue developing his economic activity in Mexico as a Mexican.⁶⁶³
- He acquired real property within the territory of the Respondent, which is indicative of his intention to establish permanent residence:
 - Mr. Sastre rented a building in its entirety in the town of Tulum, Quintana Roo to turn it into a hotel.⁶⁶⁴
 - Mr. Sastre assures that he had an apartment located in Tulum, Quintana Roo.⁶⁶⁵ Mr. Sastre himself has stated that said department was his.⁶⁶⁶

⁶⁵⁹ Witness Statement of Mr. Sastre, ¶ 3. “En 1996 vendí mi distribuidora en Argentina [...]”

⁶⁶⁰ Witness Statement of Mr. Sastre, ¶ 4.

⁶⁶¹ Witness Statement of Mr. Sastre, ¶ 10.

⁶⁶² Witness Statement of Mr. Sastre, ¶ 11 y 13-14; Memorial on Jurisdiction, ¶ 192.

⁶⁶³ Witness Statement of Mr. Sastre, ¶ 53.

⁶⁶⁴ Witness Statement of Mr. Sastre, ¶ 53. The Respondent does not know whether it was in fact a rental or was acquired by Mr. Sastre.

⁶⁶⁵ Witness Statement of Mr. Sastre, ¶ 51.

⁶⁶⁶ Witness Statement of Mr. Sastre, ¶¶ 41 y 51. “Mi esposa y yo habíamos dejado a nuestros hijos en nuestro apartamento.” y “Regresamos a mi departamento en Tulum.” The Respondent does not know the date on which Mr. Sastre acquired that property, as well as the terms of that acquisition.

b. Nationality held to acquire real estate and make formal arrangements directly related to the investment

428. Mr. Sastre also exercised his Mexican nationality on different events directly related to his alleged investments:

- On October 31, 2011, Mr. Sastre went to the Quintana Roo State Attorney General's Office to report an attempt of dispossession. In that report, it is noted that Mr. Sastre exhibited passport [REDACTED] issued in his favor by the Ministry of Foreign Relations. Additionally, Mr. Sastre stated "ser originario de CORDOBA ARGENTINA, de nacionalidad MEXICANA".⁶⁶⁷
- On November 22, 2011, after the alleged eviction from Hotel Tierras del Sol, Mr. Sastre filed an Amparo lawsuit. In his claim, Mr. Sastre stated that he was a "naturalized Mexican".⁶⁶⁸ Despite filing the complaint as CETSA's attorney, Mr. Sastre identified himself before this District Court as a Mexican national. Mr. Sastre decided to declare himself as a Mexican before national courts to seek protection of his alleged "investment", instead of doing so as an Argentine national, as he now alleges in this arbitration.

c. Naturalization

429. In 2006, Mr. Sastre opted for Mexican naturalization.⁶⁶⁹ The relevant facts of the context and effects of Mr. Sastre's application for naturalization are summarized below:

- In 2006, after 10 years of permanent residence in Mexico and after establishing his center of economic and financial interest, as well as personal and cultural interest in Mexican territory, in 2006, Mr. Sastre decided to start the naturalization process before the SRE.⁶⁷⁰
- On September 5, 2008, Mr. Sastre took an examination on knowledge and identification with the history and general culture of Mexico⁶⁷¹, which he attested. Within the opinion of validation to authorize Mr. Sastre the Mexican nationality, it was stated that "el señor (a) CARLOS ESTEBAN SASTRE, sabe hablar español, conoce la historia del país y está integrado a la cultura nacional".⁶⁷²

⁶⁶⁷ **R-0045**, Witness Statement of Carlos Esteban Sastre, Preliminary investigation, October 31, 2011, p.1.

⁶⁶⁸ **R-0058**, Initial Submission of Amparo Claim from Mr. Sastre, November 22, 2011, p.1.

⁶⁶⁹ Memorial on Jurisdiction, ¶¶ 242 - 248.

⁶⁷⁰ **R-031**, Sastre's Mexican Naturalization Application, p.1.

⁶⁷¹ **R-055**, Examination of knowledge and identification with Mexico's history and general culture of Mr. Sastre, September 5, 2008.

⁶⁷² **R-059**, Accreditation of the Procedure to obtain Mexican nationality by naturalization, in favor of Carlos Esteban Sastre, May 27, 2009, page 2.

- In his own application for naturalization, Sastre indicates that he has remained in Mexico, at least, from April 25, 2004 to April 25, 2006 with three departures and returns; (i) He left Mexico on September 17, 2004 and returned on September 24, 2004 (he was out of Mexico for a week); (ii) He left Mexico on May 9, 2005 and returned on June 17, 2005 (He was out of Mexico for two months and one week); and (iii) He left Mexico on February 18, 2006 and returned on March 24, 2006 (He was out of Mexico for a month and a week)⁶⁷³;
- On May 27, 2009, Mr. Sastre acquired the Mexican nationality, after deciding, *motu proprio*, to waive (i) his Argentine nationality and (ii) the protection that international treaties granted him as a foreigner.⁶⁷⁴

d. The Claimants did not provide evidence to refute the factual elements related to the Mexican nationality as the dominant and effective nationality of Mr. Sastre during the relevante dates

430. Derived from the multiple nationalities that Mr. Sastre holds, it is imperative that the Claimants demonstrate with sufficient evidence that Mr. Sastre's dominant and effective nationality at all relevant dates was Argentine. So far this has not been proven.

7. Sastre is excluded from invoking the Investor-State mechanism due to the waiver of his rights by virtue of his naturalization as a Mexican

431. In their Counter-Memorial on Jurisdiction, the Claimants indicated that "the purported waiver document is a blanket boilerplate" that "has no legal effect on Mr. Sastre Treaty rights".⁶⁷⁵

432. However, as explained *supra*, it was Mr. Sastre's will to initiate the naturalization procedure as a Mexican on April 24, 2006, and conclude it by signing an agreement with the Mexican State whereby, clearly and expressly, he waived all protection different from the Mexican laws and authorities, and to all rights that international treaties or conventions granted him, until that moment, in his capacity as Argentine.

433. Contrary to what the Claimants assert, Mr. Sastre was aware of the effects of concluding the naturalization process as a Mexican and of the implications of the waiver that he agreed to on May 27, 2009, with the Government of Mexico.⁶⁷⁶ Mr. Sastre cannot, on the one hand, enforce his

⁶⁷³ **R-072**, Proof of Residence in Mexico for Sastre's naturalization application.

⁶⁷⁴ **R-022**.

⁶⁷⁵ Counter-Memorial on Jurisdiction, ¶ 152.

⁶⁷⁶ **R-032**, Letter of waiver to Argentine Nationality of Sastre p.2.

agreement with the Government of Mexico to maintain the benefits of Mexican nationality, while, on the other hand, he repudiates the agreement in order to access the benefits of the Mexico-Argentina BIT as an Argentine national.

434. This waiver and the naturalization process, *per se*, proves that Mr. Sastre (i) had his domicile in Mexico, (ii) had the intention of exercising Mexican nationality, including the rights and obligations provided by Mexican law, as well as protection under them, and (iii) he exercised his effective and dominant Mexican nationality during the relevant dates.⁶⁷⁷

435. Consequently, even if Mr. Sastre holds the Argentine nationality, the Tribunal must take into account the agreement signed by Mr. Sastre with the Government of Mexico by which he waived all protection and all rights that international treaties or conventions granted him in its capacity as an Argentine national, including the Mexico-Argentina BIT. Claimants cannot use this arbitration to unilaterally invalidate this agreement, which, in addition, is the materialization of Mexican constitutional principles.

436. By the foregoing, it is clear that Mr. Sastre cannot invoke the dispute settlement mechanism contained in the Mexico-Argentina BIT since he is a national of Mexico and has waived the protection of the invoked Treaty, therefore, the Tribunal must declare its lack of jurisdiction over the claims presented by Mr. Sastre.

⁶⁷⁷ Specifically, Mr. Sastre reported the following facts to the Mexican authorities: (i) during the period from 2004 to 2006, he only left Mexican territory on 3 occasions; (ii) he resided in Tulum, Quintana Roo; (iv) he had been living in the territory of Mexico for 6 years, and; (iv) presented an exam to prove his knowledge and identity with the history and general culture of Mexico; (v) he had been living in Mexico for more than 13 years and, after obtaining Mexican nationality, he spent 6 years residing, together with his family, in the territory of the Respondent. Mr. Sastre was sufficiently attached to the Respondent by spending almost 20 years residing in his territory. **R-052**, Statement by Carlos Esteban Sastre on departures from the Mexican national territory addressed to the Ministry of Foreign Relations, April 25, 2006; **R-053**, Official Letter ASJ-24493, Request for opinion on naturalization of Mr. Sastre, August 16, 2006; **R-0054**, Official Letter 8304, Favorable opinion on the naturalization of Mr. Sastre, October 9, 2006; **R-0055**, Examination of knowledge and identification with the history and general culture of Mexico of Mr. Sastre, September 5, 2008; Witness Statement of Mr. Sastre, ¶ 3. “En 1996 vendí mi distribuidora en Argentina y decidí buscar oportunidades de emprendimiento en México.”; Witness Statement of Mr. Sastre, ¶ 57. “A finales de 2015, decidí regresar con mi familia a Río Cuarto, Argentina.”

8. It has not been proven that Sastre was an “investor” covered by the Mexico-Argentina BIT in the territory of the Respondent

437. Mr. Sastre has not complied with the condition of the arbitration offer outlined in Article 1(3) of the Mexico-Argentina BIT⁶⁷⁸ with regard to CETSA and Tierras del Sol, nor his rights over the Investments of Hamaca Loca, nor has he demonstrated that these comply with the laws and regulations at the relevant dates, so the Tribunal lacks jurisdiction.⁶⁷⁹

438. As specified in the Memorial on Jurisdiction, the claims related to Mr. Sastre, Tierras del Sol Investments and Hamaca Loca Investments must be dismissed by the Tribunal, since the Claimants have not demonstrated that Mr. Sastre complies, on the relevant dates, with the applicable legal requirements according to the Mexico-Argentina BIT.⁶⁸⁰

9. It has not been proven that Sastre was an “investor” in Tierras del Sol Investments and Hamaca Loca Investments at all relevant dates

439. The following sections detail the assertions that have not been proven by Mr. Sastre concerning his alleged investments.

(1) It has not been proven that Sastre has rights over CETSA and Lot 19-A

440. So far, the Claimants have not demonstrated that Mr. Sastre has full control over CETSA.⁶⁸¹

⁶⁷⁸ **RL-014**, artículo primero, “3.- “Inversor” designa a toda persona física o jurídica que, realiza o ha realizado una inversión, y que a) siendo persona física, sea nacional de una de las Partes Contratantes, de conformidad con su legislación, o b) siendo persona jurídica, esté constituida de conformidad con las leyes y reglamentaciones de una Parte Contratante y tenga su sede en el territorio de dicha Parte Contratante.”

⁶⁷⁹ Memorial on Jurisdiction, ¶¶ 143-145, 162-164.

⁶⁸⁰ Memorial on Jurisdiction, ¶¶ 143-161.

⁶⁸¹ *See also*, Second Expert Report of Mr. Gutiérrez de la Peza, Table V “Table IV: Documentary Deficiencies Related to Lot 19A-Tierras del Sol”; **C-0002**, p. 11. “According to the articles of incorporation of CETSA, it is made up of two shareholders, Mr. Sastre and Mr. Mariana Melchiorre. Additionally, the Respondent is unaware that there is a CETSA Shareholder Meeting Minutes by means of which Mr. Sastre has been given full control of the company or full powers to hold that status in the face of this arbitration”.

441. Likewise, the deficiencies identified by the Respondent's expert in his First Report with regard to Mr. Sastre's rights over CETSA and Lot 19-A, including compliance with the SRE requirements, have not been rectified by the Claimants.⁶⁸²

442. On the contrary, the evidence presented by the Claimant is contradictory or inadequate and prevents the Respondent from verifying the ownership chains of Lote 19-A:

- On the one hand, the Claimants assert that CETSA acquired ownership of the lot through the CETSA Transfer on October 12, 2000.⁶⁸³
- On the other hand, the evidence submitted by Mr. Sastre indicates that “[e]sta parcela la obtuvo el Sr. CARLOS ESTEBAN SASTRE, por cesión de derecho agrario de fecha 12 de octubre de 2001”.⁶⁸⁴ The notorious contradiction between the evidence submitted by the Claimants prevents the Respondent from verifying the chain of ownership of Lote 19-A and is a red flag with regard to the lack of legality of the alleged “investment”.

(2) The legal existence of Tierras del Sol Hotel has not been proven

443. Despite the allegations regarding the non-existence of Tierras del Sol Hotel, Claimants have not provided evidence to refute these arguments⁶⁸⁵. Instead, Claimants intend to provide documents in which Tierras del Sol is identified as a Restaurant⁶⁸⁶.

(3) The ownership of Sastre and CETSA over Hotel Tierras del Sol has not been proven

⁶⁸² Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 24, 34, 35 y 38; First Expert Report of Mr. Gutiérrez de la Peza, ¶ 53-55 y Table VII: Documentary deficiencies related to Lot 19A-Tierras del Sol; Memorial on Jurisdiction, ¶ 152-155. “To be considered legal and valid, the contract must: (i) not be prohibited by law; (ii) be celebrated by the Ejido, represented by the Ejido Commissariat and with the approval of the Assembly; and (iii) for a temporary period according to a productive project which must not be more than 30 years; and (iv) enroll in the RAN”. *See also*, First Expert Report of Mr. Gutiérrez de la Peza, Table V: Rights over ejidal lands, according to their legal purpose.

⁶⁸³ Memorial on Jurisdiction, ¶ 152.

⁶⁸⁴ CS-0005, p. 2.

⁶⁸⁵ Counter-Memorial on Jurisdiction, ¶ 68; C-0046; C-0012.

⁶⁸⁶ CS-0008.

444. The deficiencies identified by the Respondent's expert in his First Report with regard to Mr. Sastre's, CETSA's or any other person or entity, ownership over Hotel Tierras del Sol have not been rectified by the Claimants.⁶⁸⁷

(4) The property interest of Sastre and/or CETSA in Hotel Tierras del Sol have not been proven

445. The deficiencies identified by the Respondent's expert concerning the property interest on Hotel Tierras del Sol have not been rectified by the Claimants.⁶⁸⁸

446. The Claimants failed to establish the relationship between these types of documents and the "property interests" that they claim to have. In fact, the same documents establish that "this license does not prove ownership or possession".

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

447. The deficiencies identified by the Respondent's expert in his First Report with regard to Mr. Sastre's rights over Hamaca Loca Investments have not been rectified by the Claimants.⁶⁸⁹

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

448. The deficiencies identified by the Respondent's expert in his First Report with regard to Mr. Sastre's rights to HLSA, Lote 19 and/or Hotel Hamaca Loca have not been rectified by the Claimants.⁶⁹⁰

⁶⁸⁷ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 34, Table VII: [Documentary deficiencies related to Lot 19-Hamaca Loca](#) ; First Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 53-55 y 152-155, Table VII: Documentary deficiencies related to Lot 19A-Tierras del Sol.

⁶⁸⁸ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 34, Tabla VII: Documentary deficiencies related to Lot 19-Hamaca Loca ; CS-0007, CS-0008 y CS-0009; CS-0008, p.2.

⁶⁸⁹ Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 40 y 41, Table VII: Documentary deficiencies related to Lot 19-Hamaca Loca ; CS-0018; Memorial on Jurisdiction, ¶ 163; First Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 57 y 58, Table X: Documentary deficiencies over the HLSA Transfer and Sastre Transfer

⁶⁹⁰ Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 40 y 41, Table VII: Documentary deficiencies related to Lot 19-Hamaca Loca ; CS-0018; Memorial on Jurisdiction, ¶ 163; First Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 57 y 58, Table X: Documentary deficiencies over the HLSA Transfer and Sastre Transfer .

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

449. The deficiencies identified by the Respondent's expert in his First Report with regard to Mr. Sastre's rights over HLSA and Lote 19 have not been rectified by the Claimants either.⁶⁹¹

(b) Sastre's rights to Hamaca Loca Hotel have not been proven

450. The deficiencies identified by the Respondent's expert in his First Report with regard to Mr. Sastre's rights over the Hotel Hamaca Loca have not been remedied by the Claimants either.⁶⁹²

(c) Sastre's "property interests" in HLSA and Hamaca Loca have not been proven

451. The deficiencies identified by the Respondent's expert in its First Report with regard to Mr. Sastre's "property interests" in HLSA and Hamaca Loca have not been rectified by the Claimants.⁶⁹³ The use license submitted as evidence is not suitable to establish property or property interest.

(2) Hamaca Loca's investments are not covered by the Mexico-Argentina BIT and the claim constitutes an abuse of process

452. In the Memorial on Jurisdiction, the Respondent objected to the Tribunal's jurisdiction in respect of Sastre's claim involving the Hamaca Loca Investments.⁶⁹⁴ Specifically, the Respondent asserted that Sastre's acquisition of the rights to Hamaca Loca Investments was not a "bona fide" qualified investment according to Article 1(1) of the Mexico-Argentina BIT because: (i) the transfer was not based on the "actual or future value of the Hamaca Loca Investments"⁶⁹⁵; (ii) at the time of the transfer "the Hamaca Loca Investments were not actively engaged in the business" and;⁶⁹⁶ (iii) Sastre "only made a nominal payment of USD \$100 to secure the rights"⁶⁹⁷. Further,

⁶⁹¹ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 44; Memorial on Jurisdiction, ¶¶ 167-168, 172; First Expert Report of Mr. Gutiérrez de la Peza, ¶ 60.

⁶⁹² Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 40 and 41; Memorial on Jurisdiction, ¶¶ 176-182.

⁶⁹³ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 11, 42 and 44.

⁶⁹⁴ Memorial on Jurisdiction, ¶¶ 185 and 186.

⁶⁹⁵ Memorial on Jurisdiction, ¶¶ 185 and 186.

⁶⁹⁶ Memorial on Jurisdiction, ¶¶ 185 and 186.

⁶⁹⁷ Memorial on Jurisdiction, ¶¶ 185-186.

it was an abuse of process because: (i) Sastre acquired the rights for the sole purpose of bringing this claim;⁶⁹⁸ (ii) the rights were acquired less than three months before Sastre filed his NOI, a time which was long after the investments were made and the alleged treaty breaches occurred;⁶⁹⁹ (iii) the rights, if any, that Sastre allegedly acquired from the Swiss Investors (who owned 99.5 percent of HLSA and therefore controlled the investment) limited any claim by the Swiss investors on their own behalf and on behalf of HLSA to the Mexico-Switzerland BIT, not the Mexico-Argentina BIT;⁷⁰⁰ and (iv) the rights, if any, that Sastre allegedly acquired from the sole Argentine investor, limited any claim by that investor under the Mexico-Argentina BIT to one on his own behalf for his 0.5 percent interest in HSLA.⁷⁰¹

453. In their Counter-Memorial, the Claimants dismiss the Respondent's objections regarding Sastre's Hamaca Loca Investments. They argue that the case law cited is factually and legally inapplicable because "[t]he assignment is neither in bad faith nor an abuse of process because Mr. Sastre has established that the Hamaca Loca business was never a domestic investment".⁷⁰² The Claimants re-frame Sastre's claim as one of acceptable treaty shopping. Claimants assert that the "assignment of HLSA and Hamaca Loca to Mr. Sastre did not 'create new rights' or elevate a municipal Mexican dispute to the realm of investment treaty law" because, from their inception, HLSA and Hamaca Loca have been "an international concern...cloaked under the protection of multiple investment treaties".⁷⁰³

454. Respondent re-states the position put forward in the Memorial and addresses the issues raised by Claimants.

(a) Claimants provide no support for their theory that Hamaca Loca is an

⁶⁹⁸ *Id.*

⁶⁹⁹ *Id.*

⁷⁰⁰ Memorial on Jurisdiction, ¶¶ 185 and 186. The Swiss Investors collectively owned 199 of 200 shares (99.5 percent) and had control of HLSA, Exhibit C-0013.

⁷⁰¹ Memorial on Jurisdiction, ¶¶ 185-186. The sole Argentine investor (Mr. Alvaro Urdiales) owned 1 of 200 shares (0.5 percent and no control), Exhibit C-0013. Mr. Urdiales' rights, if any, under the Mexico-Argentina BIT were limited to a claim on his own behalf for his 0.5 percent interest in HLSA, since he did not have a controlling interest in HLSA.

⁷⁰² Counter-Memorial on Jurisdiction, ¶¶ 236-242.

⁷⁰³ Counter-Memorial on Jurisdiction, ¶¶ 239-241

**international concern under the protection
of multiple investment treaties**

455. Claimants list the following arguments in support of their proposition that Sastre's assigned claim regarding Hamaca Loca Investments is not "assignment...in bad faith" or "an abuse of process":

- "HLSA and Hamaca Loca have been an international concern since their inception, cloaked under the protection of multiple investment treaties".
- The "Hamaca Loca business was never a domestic investment".⁷⁰⁴
- From its inception in 2001 to the seizure of Hamaca Loca hotel in October 2011, the Hamaca Loca Investments were treaty protected by either the Swiss-Mexico or the Mexico-Argentina BIT.⁷⁰⁵
- From its inception in 2001 to the seizure of Hamaca Loca hotel in October 2011, and the process that resulted in denial of justice in June 2015, HLSA was held by foreign nationals from either Switzerland or Argentina.⁷⁰⁶
- The ejido Certificate of Possession was issued to Alvaro Urdiales (holding only 0.5 percent of the shares in HLSA) and an Argentine national regarding an Hamaca Loca parcel.⁷⁰⁷

**i) Claimants provide no basis for their
theory that the Hamaca Loca Transfer is
an international concern cloaked under
the protection of multiple investment
treaties**

456. It is unclear on what basis the Claimants are arguing that "Hamaca Loca business was never a domestic investment" and instead was an international concern cloaked under the protection of multiple investment treaties.⁷⁰⁸

⁷⁰⁴ Counter-Memorial on Jurisdiction, ¶ 239 (emphasis in original).

⁷⁰⁵ Counter-Memorial on Jurisdiction, ¶¶ 236-242.

⁷⁰⁶ Counter-Memorial on Jurisdiction, ¶¶ 239 and 240.

⁷⁰⁷ Counter-Memorial on Jurisdiction, ¶¶ 239 and 240.

⁷⁰⁸ Counter-Memorial on Jurisdiction, ¶ 239.

457. The Claimants argue that the transfer of treaty claims is not governed by “domestic” law, but they have provided no basis for this theory. As stated above, public international law does not create property rights.⁷⁰⁹

458. Moreover, to determine whether an investor/claimant holds property or assets capable of constituting an investment, reference to host State law is required. The case law cited by the Claimants, *Ryan and Schooner Capital*, and *African Holding* supports this principle. Both tribunals referred to municipal law to determine the legal nature of the transfer of claims.⁷¹⁰

459. To the extent that the Claimant’s theory extends only to the transfer of the treaty claim, this also contradicts investment treaty case law. The *Mihaly* tribunal has stated that “[a] claim under the ICSID Convention...is not a readily assignable chose in action as shares in the stock exchange or other types of negotiable instruments, such as promissory notes or letters of credit.”⁷¹¹ Various tribunals have followed this reasoning.⁷¹²

460. The statement by the *Mihaly* tribunal stands for the proposition that isolated treaty claims are not assignable property on their own and do not amount to “rights and interests” in an investment. Further, to the extent that Sastre may claim to hold a “complete” transfer of a right to a claim regarding Hamaca Loca Investments, Sastre has not proven that the transferors met the

⁷⁰⁹ **RL-053**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Republic of Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶ 162.

⁷¹⁰ **CLA-0106**, *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award, 24 November 2015 ¶ 344-347; **CLA-0107**, *African Holding Company of America, Inc., and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, 29 July 2008, ¶ 60.

⁷¹¹ **R RL-105**, *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, ¶ 24.

⁷¹² **RL-106**, *Occidental Petroleum Corporation y Occidental Exploration and Production Company c. La República del Ecuador*, (Caso CIADI No. ARB/06/11), Opinión Disidente de la Profesora Brigitte Stern, 20 de septiembre de 2012, ¶ 167; **RL-107**, *Perenco Ecuador Limited c. La República del Ecuador y Empresa Estatal Petróleos del Ecuador (PETROECUADOR)*, (Caso CIADI No. ARB/08/6), Decisión sobre Jurisdicción, 30 de Junio de 2011, ¶ 91; **RL-024**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 91; **CLA-0107**, *African Holding Company of America, Inc., and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, 29 July 2008, ¶ 61; **RL-077**, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile I*, Caso CIADI No. ARB/98/2, Laudo I, 8 de Mayo de 2008, ¶ 543.

jurisdictional requirements to transfer the rights to Sastre or that the Hamaca Loca Investments were in accordance with the Respondent's laws. Thus, to the extent that Sastre may claim to hold a "complete" transfer of a right to a claim regarding Hamaca Loca Investments, this is also precluded given Sastre's inability to prove that the transferors met the jurisdictional requirements to transfer the rights to Sastre or that the Hamaca Loca Investments were in accordance with the Respondent's laws.

461. As stated in *Mihaly*, "no one could transfer a better title than what he really has".⁷¹³ A defective investment claim against a respondent State cannot be improved via its transfer to another claimant; this is especially true when the respondent's consent to arbitration requires investment to be in compliance with its laws. As noted by *Mihaly*:

“(...) whatever rights Mihaly (Canada) had or did not have against Sri Lanka could not have been improved by the process of assignment, with or without, and especially without, the express consent of Sri Lanka, on the ground that *nemo dat quod non habet* or *nemo potius potest transfere quam ipse habet*. That is, no one could transfer a better title than what he really has. (...)”⁷¹⁴

**ii) Claimants case law on the transfer of
factual claims and legally distinguishable**

462. Claimants cite the *Ryan and Schooner Capital* and *African Holding* cases as supporting the principle that Sastre's claim does not amount to treaty shopping and that Sastre's rights amount to a permitted "assignment of all rights and legal claims" protected under the Mexico-Argentina BIT.⁷¹⁵

463. It is crucial to provide context for the *Ryan and Schooner Capital* and *African Holding* cases to show why these cases are inapplicable and, in fact, support the Respondent's position.

464. The *Ryan and Schooner Capital* case relates to a claim regarding tax measures by Polish tax authorities, which claimants alleged had unlawfully interfered with the claimants' investments in Kama Foods, an oil and margarine manufacturer, leading to its bankruptcy.⁷¹⁶ One of the

⁷¹³ **RL-105**, *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, ¶ 24.

⁷¹⁴ *Id.*, ¶ 24.

⁷¹⁵ Counter-Memorial on Jurisdiction, ¶¶ 242-247.

⁷¹⁶ **CLA-0106**, *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award, 24 November 2015, ¶ 181.

respondent's jurisdictional objections was that the tribunal lacked jurisdiction over one of the claimants, AIP, because when the shares were assigned to AIP, the company was in the bankruptcy process and had acquired the shares at a "practically zero" value.⁷¹⁷ The respondent was of the position that the acquisition was not a "bona fide" transaction because it was undertaken to obstruct domestic proceedings. The tribunal found in favour of claimants and held that AIP, as the Polish SPV's successor, had the legal right to bring all claims related to the assets acquired. It also determined that assignment was not an abuse of process as there was no after-the-event acquisition of assets from non-protected investors to obtain BIT protection.

465. *Ryan* is distinguishable because it involves submitted claims based on the transfer of company shares, assets and legal claims between affiliated companies formally recognized as such by the Respondent's organs through a formal transfer.⁷¹⁸ It does not involve the sole transfer of legal claims to those assets. The tribunal's conclusions regarding Claimants standing were strictly on this basis. Moreover, there was no dispute between the parties that an investment had been made or of the tribunal's *ratione materiae* jurisdiction.⁷¹⁹ The *Ryan* tribunal noted the unique circumstances of its findings regarding AIM:

197. First, the Tribunal is mindful of the fact that the so-called "*Salini criteria*" are merely tools to assist in the determination of the existence of an investment for the purposes of ICSID arbitration and are not jurisdictional criteria. **If the Tribunal had to determine A standing to bring the claim in isolation then the Tribunal might have been persuaded to adopt the Salini criteria to guide its analysis because in such a case, the Tribunal would have had to first determine that it had jurisdiction over the subject matter of the dispute (i.e. *ratione materiae*). In the present case, however, the Parties do not contest the Tribunal's jurisdiction over the subject matter of the dispute.** The Parties agree that an investment has been made. The questions are whether the investment has been made by A and whether A can bring a claim on the basis of that investment. It is A[s] *ratione personae* that the Respondent is contesting.⁷²⁰

[Emphasis added]

466. The *Ryan* tribunal also distinguished AIM's claim from the claim resolved by the tribunals in *Phoenix*, *Caratube*, and *Quiborax*, indicating that AIM's claim did not fall within these

⁷¹⁷ *Id.*, ¶ 184.

⁷¹⁸ *Id.*, ¶¶ 193 y 194.

⁷¹⁹ **CLA-0106**, *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award, 24 November 2015, ¶¶ 181, 184. Originally the respondent didn't even argue that the transfer of shares was to create an international treaty claim.

⁷²⁰ *Id.*, ¶ 197.

tribunals' findings. Specifically, the tribunal did not find that the ADM transfer lacked an economic motive or had been only undertaken to comply with requirements to submit a treaty claim.⁷²¹

467. It is in this specific context that the tribunal ruled that claimant had “stepped into” the transferor’s shoes and could bring a claim:

204. Having carefully considered the evidence tendered by the Parties, the Tribunal concludes that there is no evidence on the record of any abuse of international investment protection in the present case. In fact, the Respondent itself appears to have conceded this point by admitting that “the shareholding of Atlantic has not been intended by the Claimants to open a path to an international treaty claim, but instead to interfere in the domestic legal proceedings in Poland.” The Tribunal is, therefore, not persuaded by and dismisses the Respondent’s first objection to the Tribunal’s jurisdiction with regard to A.⁷²²

[Emphasis added]

468. The Respondent is of the position that the factual and legal elements in Sastre’s claim regarding the Hamaca Loca Investments, including the alleged acquisition and rights transferred, are entirely different from those in *Ryan*:

- Sastre has not established that the alleged transfer is legally valid or that the Respondent has formally recognized it;
- the Sastre transfer does not involve related entities;
- Sastre has not proven the economic motive for the transaction or that it was not undertaken to comply with requirements to submit a treaty claim;
- Sastre has not established that the transferor(s) themselves had the standing to bring a claim, including Alvaro Urdiales (a 0.5 percent shareholder in HLSA);
- Unlike in *Ryan*, there is an allegation of abuse of international investment protection regarding the Sastre transfer.

469. The case of *Africa Holding* is also similarly distinguishable. In *Africa Holding*, Safricas, a company incorporated in the Democratic Republic of Congo (DRC), transferred its debt regarding a construction contract with the DRC to a related company incorporated in the US. The transfer had been notified to the DRC prior to initiating the claim. The respondent objected to the

⁷²¹ **CLA-0106**, *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award, 24 November 2015, ¶ 200-201.

⁷²² **CLA-0106**, *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award, 24 November 2015. ¶ 204.

admissibility of the claim arguing that the acquisition of a claim by means of a transfer was not an investment according to the ICSID Convention as there was no inflow of capital or economic activity in the DRC.⁷²³ The question turned on “celle de savoir s’il y a eu ou pas cession de créances dans la transaction entre les deux sociétés”⁷²⁴ (whether or not there was a transfer of claims in the transaction between the two companies). Citing *Mihaly* - and based on the French and Congolese laws governing the transfer contract - the tribunal determined that at the time of the transfer, Safricas and Africa Holding were both US companies, so the rights transferred to Africa Holding, including claims and consent to arbitration, had not changed.⁷²⁵ The tribunal also rejected the respondent’s claim that there was no contribution to the economic development of DRC as it found the transfer to be “est aussi la cession de la valeur économique du travail effectué et non payé.”⁷²⁶ (it is also the transfer of the economic value of work done and not paid.) As noted by the tribunal, the transfer “ne transforme pas les droits en cause et ne se traduit pas par la novation des obligations. Les dettes demeurent donc les mêmes”⁷²⁷ (does not transform the rights involved and does not result in the novation of obligations. The debts therefore remain the same). The tribunal also ruled that Safricas did not have the standing to bring a claim against the DRC because:

“Ce contrat particulier ne peut pas être considéré comme un contrat d’investissement avec la RDC, c’est un contrat commercial privé entre les deux sociétés.”⁷²⁸ (This particular contract cannot be considered an investment contract with the DRC, it is a private commercial contract between the two companies.)

470. The Respondent is of the position that the factual and legal elements in Sastre’s claim regarding the Hamaca Loca Investments, including the alleged acquisition and rights transferred, are also entirely different from those in *Africa Holding*:

- Sastre has not established that the alleged Transfer is legally valid or that it has been formally recognized or notified to the Respondent;

⁷²³ **CLA-0107**, *African Holding Company of America, Inc., and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, 29 July 2008, ¶ 58.

⁷²⁴ *Id.*, ¶ 60.

⁷²⁵ *Id.*, ¶ 63.

⁷²⁶ *Id.*, ¶ 78.

⁷²⁷ *Id.*, ¶ 60.

⁷²⁸ **CLA-0107**, *African Holding Company of America, Inc., and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, 29 July 2008, ¶ 71. [Free translation to english]

- To the extent that the Sastre Transfer could be held valid, it is not a contract with the Respondent that includes payment obligations;
- the Sastre Transfer does not involve related entities;
- Sastre has not proven the economic motive of the Transfer or that it was not undertaken solely to submit a treaty claim;
- Sastre has not established that the transferors had standing to bring an investment claim on their own behalf, including Alvaro Urdiales (a minority shareholder in HLSA);
- Similar to Safricas, Sastre's transfer "cannot be considered an investment contract" it is a private contract between Sastre and HLSA that does not provide Sastre standing to bring an investment claim regarding Hamaca Loca Investments.

**(b) The substantial factual similarity between
Phoenix Action and *Philip Morris* and
Sastre's claim on the Hamaca Loca
Investments**

471. Claimants contend that the HLSA Transfer bears no resemblance to *Phoenix*, or the *Phillip Morris* cases.⁷²⁹ However, there are significant similarities between Sastre's claim and the claims of *Phoenix* and *Phillips*, which show otherwise.

472. As noted in *Phoenix*, "investments not made in good faith" or that are not "bona fide investments", including investments "made in violation of the laws of the host State" and obtained "through misrepresentations, concealments, or corruption, or amounting to an abuse of the international ICSID arbitration system".⁷³⁰ Further, a party that invests "not for the purpose of engaging in commercial activity, but for the sole purpose of gaining access to international jurisdiction" is "deemed not to be a protected investment".⁷³¹

473. A well-known example of non-*bona fide* investment that results in abuse of process can be seen in *Phoenix Action Ltd v Czech Republic*. In *Phoenix*, the claimant acquired two bankrupt companies that were undergoing litigation, not for any economic activity "based on the actual or

⁷²⁹ Counter-Memorial on Jurisdiction, ¶ 240.

⁷³⁰ **RL-024**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 100.

⁷³¹ **RL-038**, *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009.

future value of the companies” but to bring international litigation against the Czech Republic.⁷³² The tribunal found abuse of rights based on “claimant’s creation of a legal fiction...to gain access to an international arbitration procedure to which it was not entitled.”⁷³³ The tribunal declined jurisdiction as it found that “the whole ‘investment’ was an artificial transaction to gain access to ICSID.”⁷³⁴

474. The *Phoenix* tribunal examined the following factors to determine whether the claimant’s investment was protected: (i) the contribution of money or other assets;⁷³⁵ (ii) the duration of the investment;⁷³⁶ (iii) claimant’s investment risk;⁷³⁷ (iv) the economic activity undertaken by the claimant in the host State, and;⁷³⁸ (v) whether the investment was in accordance to the host State laws.⁷³⁹

475. The *Phoenix* tribunal also examined the following factors to determine whether the investment was “*bona fide*”: (i) the timing of the investment (including the timing of the damages claimed occurred); (ii) the initial request to ICSID (including any changes in position); (iii) the timing of the claim (in contrast to actions regarding the investment); (iv) the substance of the transaction (the parties, terms and content of the transaction), and; (v) the nature of the operation (the economic terms of the transaction).⁷⁴⁰

476. The factual pattern that resulted in the tribunal’s determination of abuse of process in *Phoenix* very closely resembles the facts surrounding the transfer of the Hamaca Loca claim to Sastre:

⁷³² **RL-024**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 140.

⁷³³ **RL-024**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 143.

⁷³⁴ *Id.*, ¶ 143.

⁷³⁵ *Id.*, ¶¶ 118-123.

⁷³⁶ *Id.*, ¶¶ 124 y 125.

⁷³⁷ *Id.*, ¶¶ 126-128.

⁷³⁸ *Id.*, ¶¶ 129-133.

⁷³⁹ *Id.*, ¶ 134.

⁷⁴⁰ **RL-024**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 135-144.

Table 3: Comparison between factual patterns in *Phoenix v. Czech Republic* and *Hamaca Loca Transfer*

<i>Phoenix</i> factors	<i>Phoenix</i> facts	Sastre's Hamaca Loca Assignment facts
Contribution of money or other assets	The claimant paid a nominal price for the share purchase of two Czech companies and undertook post-investment contributions. ⁷⁴¹	Sastre paid a nominal price for the right in HLSA, Hamaca Loca Hotel and parcel, and there were <u>no post-investment contributions</u> .
Investment duration	Claimants did not sell the share purchase of two Czech companies' post-investment. ⁷⁴²	Claimants did not sell the rights in HLSA, Hamaca Loca Hotel and parcel post-investment.
Claimant's investment risk	Claimants purchased companies for a small price that did not involve economic risk. ⁷⁴³	Sastre acquired rights in HLSA, Hamaca Loca Hotel and parcel for a small price that did not involve economic risk.
The economic activity undertaken by claimant in the host State	Claimant did not engage in post-investment economic activity.	Sastre did not engage in post-investment economic activity regarding HLSA, Hamaca Loca Hotel and parcel.
The legality of the investment	The claimant's acquisition of the investment was in accordance with the host State laws. ⁷⁴⁴	Sastre's acquisition of the right in HLSA, Hamaca Loca Hotel and parcel <u>was not in accordance with the host State laws</u> . ⁷⁴⁵
Timing of the investment	Claimant acquired "investment" with an ongoing seizure action (seizure of all of Benet Praha assets on April 25,	12 June 2017 – Sastre acquired Hamaca Loca "investment" six years after it had been "seized" and continued for that same

⁷⁴¹ **RL-024**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 118-123.

⁷⁴² *Id.*, ¶¶ 124 y 125.

⁷⁴³ *Id.*, ¶¶ 126-128.

⁷⁴⁴ *Id.*, ¶ 134.

⁷⁴⁵ Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 41, 42 and 44.

	2001, and the continuance for almost 2 years after the investment was made ⁷⁴⁶), civil litigation and tax and customs problems (14 months civil litigation and bank account frozen 18 months) that later formed part of the damages claimed in the investment dispute. ⁷⁴⁷	period and six months after HLSA's Amparo claims had been dismissed. These two actions later formed part of the damages claimed in the investment dispute.
Initial request to Arbitral organ (ICSID)	There were differences between claimants' initial claims brought before arbitral institution and after that. ⁷⁴⁸	Differences between Sastre NOI's and NOA's: 15 June 2017- Sastre initially brought a claim only in his name and in the representation of CETSA under the Mexico-Argentina BIT (NOI #1); 6 September 2017 (less than three months after acquiring investment) - Sastre brought a claim in his name and in the representation of CETSA and HLSA under the Mexico-Argentina and Mexico-Swiss BIT (NOI #2); 29 December 2017- (6 months after acquiring investment) Sastre presented an NOA in his name and in the representation of CETSA and HLSA

⁷⁴⁶ **RL-024**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 4 y 8.

⁷⁴⁷ *Id.*, ¶ 136.

⁷⁴⁸ **RL-024**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 44-48 and 135-144. In Phoenix's original Request for Arbitration submitted to ICSID, it informed the ICSID Secretariat (in response to questions raised by the Secretariat) that its theory was that the Czech companies had "assigned" their claims against the Czech Republic to Phoenix. Phoenix subsequently abandoned that theory, claiming that its damages arose from the continuing harm caused to its "investments," which arose from the Czech Republic's earlier actions

		under the Mexico-Argentina, Mexico-Swiss and Mexico-Spain BITS (NOA#1); 14 June 2019- Sastre et. al. presented an NOA in his name, representing CETSA and HLSA under the Mexico-Argentina BIT (NOA#2).
Timing of the claim	The claimant submitted the NOA before ownership registration occurred and left a short time window after acquisition to resolve post-investment investment problems. ⁷⁴⁹	There was no ownership registration as the rights related to the arbitration proceedings.
The substance of the transaction	Claimant structured and priced the transaction akin to a related-party transaction. ⁷⁵⁰	Sastre structured the transaction as an unrelated party purchase of litigating right but at a non-arm's length price.
True nature of the operation	The transaction does not include evidence of planning, financing, and valuation of the economic transaction. ⁷⁵¹	The transaction does not include evidence of planning, financing, and valuation of the economic transaction.

Source: Own Elaboration based on Exhibit RL-024.

477. Likewise, in *Phillip Morris*, the tribunal dealt with a situation where corporate restructuring took place not before a claim had already arisen but at a time when there was a reasonable prospect that the dispute would materialize. The tribunal determined that the legal test for abuse of rights was linked to the concept of foreseeability and reasons for restructuring.⁷⁵² The tribunal reasoned that it is not generally an abuse of rights to bring a BIT claim in the wake of a corporate restructuring if the restructuring was justified independently of the possibility of bringing such a

⁷⁴⁹ **RL-024**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 138.

⁷⁵⁰ *Id.*, ¶ 139.

⁷⁵¹ *Id.*, ¶ 140.

⁷⁵² **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, ¶ 554.

claim.⁷⁵³ The Phillip tribunal ultimately concluded that the main and determinative, if not sole, reason for the Phillip restructuring was to bring a claim under the treaty and subsequently declined to exercise jurisdiction over Phillip Morris' claims.⁷⁵⁴

478. Like in *Phillip Morris*, the transfer of the Hamaca Loca Investments occurred when there was a reasonable prospect that the investment dispute would materialize, *i.e.*, Sastre brought forth a NOA regarding Hamaca Loca Investments less than three months after acquiring the investment. Further, Claimants have provided no explanations to demonstrate that the transfer was justified independently of the possibility of bringing a claim.

479. Claimant's theory that the HLSA Transfer bears no resemblance to *Phoenix*, or the *Phillip Morris* cases fails. Thus, the Respondent reiterates its request that the Tribunal deny jurisdiction over Sastre's claims regarding the Hamaca Loca Investments for constituting an abuse of process.

(3) Tierras de Sol Investments and Hamaca Loca Investments do not comply with the legality requirements of Mexican law

480. The deficiencies identified by the Respondent's expert in his First Report about the compliance by CETSA and/or Mr. Sastre with all the legal requirements to obtain rights over Lote 19-A, Hotel Tierras del Sol, HLSA and Lote 19 have not been rectified by the Claimants.⁷⁵⁵

(a) Sastre's claim does not meet Kim's test

481. Likewise, Sastre's claim does not meet Kim's test. The additional documentation and the Transfers violate the Agrarian Law and the Restricted Zone Regime, which are part of the Respondent's fundamental laws that protect ejidos/ejidatarios and coastal zones from foreign investment in order to protect important public interests from the property of foreigners, such as the protection of the property and autonomy of historically disadvantaged population centers.⁷⁵⁶

⁷⁵³ *Id.*, ¶ 570.

⁷⁵⁴ *Id.*, ¶ 584.

⁷⁵⁵ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 35,38, 41 and 44; Memorial on Jurisdiction, ¶ 188; First Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 44, 38, 55,60 and 62 Table X: Documentary deficiencies over the HLSA Transfer and Sastre Transfer.

⁷⁵⁶ Witness Statement of Mr. Miranda Aceves, ¶ 43-45; First Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 91, 93 y 93; Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 18, 80-82.

Therefore, acts contrary to the Agrarian Law and the Restricted Zone Law are punished with the maximum civil sanction, an absolute nullity.⁷⁵⁷

482. Also, the Claimants did not act in good faith. Mr. Sastre did not exercise his “*due diligence*” before embarking on the investment and he was hardly not aware of the illegality of his actions given the multiple red flags that should have alerted the Claimants of the illegality of their investments:

- The alleged ejido rights acquired by the Claimants were not insured against third parties or the Mexican State through their registration in the RAN to grant a presumption of legality to their documentation;⁷⁵⁸
- The Claimants did not go before the Agrarian Courts to make their contracts binding before the Tribunals;⁷⁵⁹
- The Claimants did not ensure the validity of the documents to prove their rights;⁷⁶⁰
- Claimants were aware of lawsuits related to the ejido and its parcels for which it is presumed that there was suspicion of irregularity in their documentation regarding the possession of the properties;⁷⁶¹
- Claimants presented multiple documents with different information regarding the same parcel and the same owner indicating irregularity in the identification of the parcel that is the object of the contract, the transaction, and the rights acquired and transferred.⁷⁶²
- The acquisition of parcels through third parties was a common practice among some Claimants;⁷⁶³

⁷⁵⁷ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 18 (viii) y (ix), 19, 80-82; First Expert Report of Mr. Gutiérrez de la Peza, ¶ 91. Witness Statement of Mr. Miranda Aceves, ¶ 74.

⁷⁵⁸ First Expert Report of Mr. Gutiérrez de la Peza, ¶ 43; Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 18 (V), Table XXIV. Arguments used in the SBM Report and views on their relevance, p.70

⁷⁵⁹ Second Expert Report of Mr. Gutiérrez de la Peza, Table XXIV. Arguments used in the SBM Report and views on their relevance, p.69

⁷⁶⁰ First Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 91-95; Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 81-82.

⁷⁶¹ Witness Statement of Mr. Sastre, ¶ 23.

⁷⁶² First Expert Report of Mr. Gutiérrez de la Peza, Table VII: Documentary deficiencies related to Lote 19A-Tierras del Sol and Table X: Documentary deficiencies of the HLSA Assignment and Sastre Assignment; Second Expert Report of Mr. Gutiérrez de la Peza, Table IV: Documentary Deficiencies Related to Lot 19A-Tierras del Sol and Table VII: Documentary deficiencies related to Lot 19-Hamaca Loca

⁷⁶³ Second Expert Report of Mr. Gutiérrez de la Peza, PGP-0048.

- Claimants paid low prices for their parcels that were well below the commercial value of similar land.⁷⁶⁴
- Despite claiming to have “ejidal rights”, none of the Claimants proved that they were ejidatarios or “avecindados”.⁷⁶⁵
- None of the Claimants complied with the requirements of the legal regime applicable to the restricted zone.

C. Jurisdictional objections under NAFTA

1. The requirements of the Notice of Intention submitted under NAFTA must be duly distinguished and are not optional

483. With regard to the compliance with the requirements to submit a notice of intent established in Article 1119 of NAFTA, Claimants seem to argue that a vague reference to the requirements of Article 1119 is sufficient to warrant compliance.⁷⁶⁶

484. This is incorrect, “[t]he procedural requirements in Article 1119 are not merely technical “niceties” but are explicit treaty requirements (i.e., “shall deliver; “shall specify”) that serve important functions”.⁷⁶⁷

485. The requirements established in Article 1119 must be fully satisfied from the moment the claim is submitted, otherwise, it would mean that the Claimant could generate an *ex post facto* jurisdiction of the Tribunal, without having the consent of the Respondent for arbitration.⁷⁶⁸ This

⁷⁶⁴ First Expert Report of Mr. Gutiérrez de la Peza, Table VII: Documentary deficiencies related to Lote 19A-Tierras del Sol, p. 43, Table X: Documentary deficiencies of the HLSA Assignment and Sastre Assignment p. 50 and 52, ¶92 (vi); Second Expert Report of Mr. Gutiérrez de la Peza, Table XXIV, p.69; Table IV, p. 26, Table V, p.28, Table VII, p. 33 and 35 and PGP-0048.

⁷⁶⁵ First Expert Report of Mr. Gutiérrez de la Peza, ¶¶52, 54 and 61; Second Expert Report of Mr. Gutiérrez de la Peza, Table XXIV. Arguments used in the SBM Report and views on their relevance, p. 68

⁷⁶⁶ Counter-Memorial on Jurisdiction, ¶¶ 221-223.

⁷⁶⁷ **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.

⁷⁶⁸ **RL-098**, “A claimant cannot bring itself into compliance with Article 1119 after it has submitted its claim to arbitration under Article 1120 because Article 1119 requires that notice be given “at least 90 days before the claim is submitted.” Moreover, the jurisdiction of a NAFTA tribunal is determined on the date on which the proceedings are instituted, not after. This general rule of international law has been confirmed by NAFTA and other international courts and tribunals. As such, a claimant cannot *ex post facto* create jurisdiction by giving notice under Article 1119 after the proceedings have been instituted, unless the respondent NAFTA Party provides its express consent to accept the claim regardless”. **RL-098**, *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Submission of the U.S., February 28, 2018, ¶ 7. “A disputing investor who does not deliver a Notice of Intent ninety (90) days before it submits a Notice of Arbitration or Request for Arbitration fails to satisfy this procedural

deprives the Respondent of its right to be informed in advance of claims against its measures and to mitigate them.

486. The Respondent's consent is conditioned on compliance with the requirements established in Article 1119 and cannot be created retroactively; it must exist at the time the claim is submitted to arbitration, therefore, as the requirements of Article 1119 were not duly defined, the Respondent and the Tribunal are prevented from establishing whether there is jurisdiction over the claims. The Claimant filed a “self-consolidated” NOI without clearly satisfying the elements established in Article 1119 and section IV of the FTC Statement on the presentation of NOI, this affects the Respondent's consent because it prevents it from knowing the conditions of the claim in the specific context of the Treaty.

2. It has not been proven that Galán and Alexander are qualified as “investors” under NAFTA

487. In the Memorial on Jurisdiction, the Respondent held that the Claimants had failed to prove that at all relevant dates Ms. Galán and Mr. Alexander were qualified “investors”, nationals of Canada and whose effective and dominant nationality was Canadian.

488. In the Counter-Memorial on Jurisdiction, the Claimants stated that by the mere fact of possessing the nationality of one of the other States Parties to the invoked treaties, they have the right to access the dispute settlement mechanisms of the invoked treaties and that the doctrine of dominant and effective nationality is not applicable on the basis of the text of the treaties and the UNCITRAL Rules.

489. However, the Claimants have not provided evidence confirming the Canadian nationality of Ms. Galán and Mr. Alexander on the relevant dates, nor have they contested the fact that the proof of nationality submitted, as of this moment, is insufficient.⁷⁶⁹ Also, Claimants have not

requirement and fails to engage the respondent’s consent to arbitrate. Under such circumstances, a tribunal will lack jurisdiction ab initio. As discussed below with respect to Article 1121(3), a respondent’s consent cannot be created retroactively; consent must exist at the time a claim is submitted to arbitration. Unlike the Claimant’s consent required by Article 1121(3), however, which must accompany and be in conjunction with a Notice of Arbitration, satisfaction of the requirements of Article 1119 through submission of a valid Notice of Intent must precede submission of a Notice of Arbitration by 90 days”.

⁷⁶⁹ Memorial on Jurisdiction, ¶¶ 254 and 255

proven that the effective and dominant nationality of Ms. Galán and Mr. Alexander was Canadian at all relevant dates.

490. The Respondent submits that the dominant and effective nationality of Ms. Galán and Mr. Alexander at all relevant dates was Mexican, which prevented them from invoking the dispute settlement mechanism of the applicable treaty.

a. It has not been proven that Galán and Alexander were Canadian nationals at all relevant dates

491. In the Memorial on Jurisdiction, the Respondent established that the passports submitted by Ms. Galán and Mr. Alexander as evidence of their Canadian nationality are not sufficient to corroborate effective nationality at all relevant dates. This fact remains uncontroversial.⁷⁷⁰

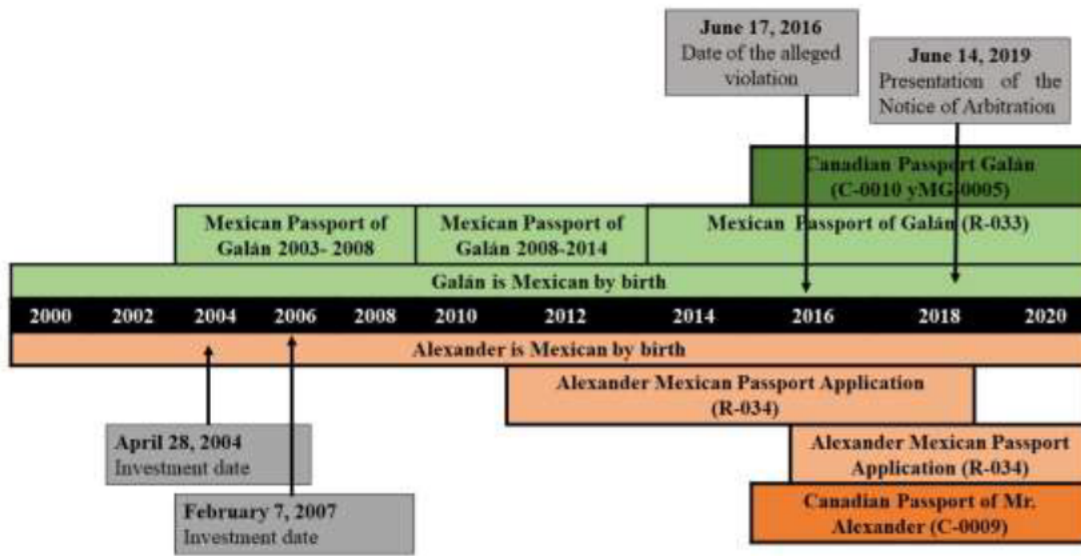
492. Due to their dual nationality, the Canadian passports exhibited by the Claimants and Mr. Alexander's Canadian voting card of 1989 (MG-0003) are insufficient to demonstrate, *prima facie*, that the effective and dominant nationality of Ms. Galán and Mr. Alexander at all relevant dates was the Canadian⁷⁷¹. These documents prevent the establishment of whether or not they qualify as an investor under NAFTA.

493. The following timeline illustrates the need to define the effective nationality of Ms. Galán and Mr. Alexander during all relevant dates, due to the conflict between the Claimants' nationality allegations and the evidence of Mexican nationality presented in this arbitration.

Image 2: Proof of nationality of Ms. Galán and Mr. Alexander vis-a-vis their Mexican nationality and relevant dates

⁷⁷⁰ Memorial on Jurisdiction, ¶¶ 252-255.

⁷⁷¹ C-0007 y C-0008.



Source: Own elaboration based on Exhibits R-033, R-034, C-0009 and C-0010.

494. Claimants have not met, *prima facie*, the burden of proof with regard to the Canadian nationality of Ms. Galán and Mr. Alexander.

(1) The evidence submitted by the Respondent to demonstrate that Ms. Galán and Mr. Alexander hold the Canadian nationality is insufficient

495. As for Galán, she indicates that she was born in Coatzacoalcas, Mexico in [REDACTED].⁷⁷² This confirms that Galán is Mexican by birth and fully exercises her nationality, as confirmed by the Approvals of Applications for and Passports of Mónica Galán Ríos. There is also no *prima facie* evidence of the process that Ms. Galán followed to obtain Canadian nationality under Canadian law, nor is there evidence to support that argument.

496. On the other hand, Mr. Alexander was born in Oaxaca, Mexico, so he holds Mexican nationality by birth and he has not produced documents that can refute this argument. This is confirmed by Alexander's Mexican passport approvals.⁷⁷³

497. Therefore:

- the Canadian nationality has not been tested at all relevant dates;

⁷⁷² Witness Statement of Mrs. Galán, ¶ 2.

⁷⁷³ R-034, Application Approvals and Mexican Passports of Alexander.

- Claimants have not submitted any evidence during the document production phase to support the alleged Canadian nationality of Mr. Alexander and Ms. Galán;
- the Respondent has submitted various passports issued by its authorities in favor of Mr. Alexander and Ms. Galán; and
- Mr. Alexander and Ms. Galán still hold their Mexican nationality.

b. The dominant and effective nationality of Galán and Alexander is the Mexican nationality at all relevant dates

498. The Claimants have failed to demonstrate that Messrs. Galán and Alexander meet the effective and dominant nationality requirement under NAFTA and the principles of customary international law. Instead, the Claimants pretend that the Tribunal confirms their Canadian nationality without analyzing the legal effects of their Mexican nationality, including its effectiveness and dominance over their claims at the level of the invoked Treaty.

499. As shown in Image 2, both Mrs. Galán and Mr. Alexander held Mexican nationality during all relevant dates.

(1) Legal effects of Mexican nationality

500. Mr. Galán and Alexander, unlike Mr. Sastre, Abreu and Silva, hold Mexican nationality by birth. The legal effects of the Mexican nationality must be analyzed in light of the Mexican provisions that govern the legal acts entered into by dual nationals by birth within and outside of the Mexican territory.

501. In this sense, the Mexican Nationality Law is very clear when it establishes in Article 13 that it will be understood that Mexicans by birth who possess or acquire another nationality, act as nationals concerning (i) the legal acts that they celebrate in national territory and in the areas in which the Mexican State exercises its jurisdiction under international law, and (ii) the legal acts that they celebrate outside the limits of national jurisdiction, through which they hold the ownership of real estate located in the national territory or other rights whose exercise is limited to the national territory.⁷⁷⁴

502. In addition, this provision specifies that if dual Mexican nationals by birth act with another nationality, they must state it in writing at least at the time of performing the act at issue. Therefore, the acquisition and development of the Parayso Investments within Mexican territory, as well as

⁷⁷⁴ **R-077**, Nationality Law, Article 13.

any agreement signed with regard to these outside of Mexican territory and for which Ms. Galán and Mr. Alexander held the property of Hotel Parayso and/or the lots on which they were built must be considered as made in their capacity as Mexicans unless they have declared otherwise in the celebration of the act.

503. In any case, in the presence or absence of the declaration of nationality, under Article 14 of the Nationality Law, regarding acts celebrated by dual nationals by birth, the protection of a foreign government may not be invoked, under penalty of losing in benefit of the Nation the assets or any other right on which said protection has been invoked.⁷⁷⁵

504. Therefore, the Tribunal must consider that (i) there is no evidence to adduce that Ms. Galán and Mr. Alexander entered into the legal acts related to Parayso Investments as Canadian nationals and (ii) the law restricts dual nationals the access to the protection of other governments with regard to acts carried out in their capacity as Mexicans, *i.e.*, access to NAFTA protection in their capacity as Canadians.

(2) Habitual residence and center of economic and financial interest, including employment

505. Ms. Galán kept her habitual residence in Mexico during the relevant dates, which she manifested in formal acts, even after the alleged inconsistent measures.⁷⁷⁶

- In the transfer of rights held in April 2004 between Mr. Rogelio Novelo Balam and Ms. Galán, she stated that she was domiciled in Veracruz, Mexico⁷⁷⁷.
- In 2003, Mrs. Galán requested the renewal of her Mexican passport indicating her address in Veracruz, Mexico.⁷⁷⁸ This passport was valid from 2003 to 2008.
- In the purchase agreement between Ms. Galán and Rancho on November 29, 2004, Ms. Galán declared that she was domiciled in Veracruz, Mexico⁷⁷⁹.
- In the various administrative documents requested by Ms. Galán in 2006, she declared her domicile in Quintana Roo, Mexico⁷⁸⁰.

⁷⁷⁵ **R-077**, Nationality Law, Article 14.

⁷⁷⁶ Witness Statement of Monica Galan Rios, 8-45.

⁷⁷⁷ **C-0023**, p.3.

⁷⁷⁸ **R-033** Application Approvals and Mexican Passports of Galán. 2003-2008

⁷⁷⁹ MG-0007.

⁷⁸⁰ MD-0007, MG-0008, MG-0009, MG-0010, p.3.

- According to Exhibit C-0041, Ms. Galán was at the Hotel Parayso at the time of the alleged seizure.

506. It is a fact that, from the alleged investment, until the moment in which the alleged inconsistent measures took place, Ms. Galán had her domicile in Mexico.

(3) Nationality held to acquire real estate and make formal arrangements directly related to the investment

507. The Respondent has identified, in the documents submitted by the Claimants as alleged evidence of ownership of Parayso Investments, that Ms. Galán has identified herself as Mexican in the transfer of rights celebrated for the alleged acquisition of the investment, using her credential of Mexican voter as a means of identification.

508. It should be noted that, at least until before 2015, the year in which she obtained her Canadian citizenship, Ms. Galán identified herself in all real estate and investment-related transactions as Mexican.

509. Ms. Galán and Mr. Alexander have also exercised their Mexican nationality on various occasions directly related to their alleged investments.

- At the time of the execution of the transfer of rights presented as Exhibit C-0023, Ms. Galán was exercising her Mexican nationality.
- All licenses presented by Ms. Galán, obtained before 2015, including the concession for the use and exploitation of the federal maritime land zone, were requested by Ms. Galán in her capacity as a Mexican national.
- After acquiring her Canadian citizenship, Ms. Galán exercised her Mexican nationality, in 2016, by filing an Amparo lawsuit in which she declared to be Mexican.⁷⁸¹

510. Ms. Galán exercised her Mexican nationality as effective and dominant in formal acts directly related to the alleged investment, specifically with the measures that she is now claiming in this arbitration. The Respondent does not know on how many occasions Ms. Galán and Mr. Alexander exercised their Mexican nationality, however, there is no doubt that all the paperwork and procedures related to the alleged investment were carried out by Ms. Galán, using her Mexican nationality as her effective nationality.

⁷⁸¹ **R-047**, Mrs. Galán's Initial Submission of Amparo claim, July 8, 2016, p.1.

c. The Claimants do not provide evidence to refute the factual elements related to Alexander and Galán's Mexican nationality as their dominant and effective nationality during the relevant dates

511. Derived from the dual nationality held by Ms. Galán and Mr. Alexander, the Claimants must demonstrate with sufficient evidence that their dominant and effective nationality at all relevant dates was Canadian. So far this has not been proven.

512. In this sense, the Respondent develops the relevant elements that the Tribunal must take into account to establish Mexican nationality as the dominant and effective nationality of Ms. Galán and Mr. Alexander during the relevant dates.

3. It has not been proven that Galán and Alexander are “investors” in the Respondent's territory according to NAFTA

513. As specified in the Memorial on Jurisdiction, the documents exhibited by Messrs. Galán and Alexander (C-0023 and C-0024) to establish that they were investors in the Investments of Hotel Parayso are insufficient to prove that they are qualified investors in all of the relevant dates.⁷⁸²

a. It has not been proven that Galán and Alexander were “investors” in Parayso Investments at all relevant dates.

514. The following sections detail the statements that Ms. Galán and Mr. Alexander have failed to demonstrate with regard to their alleged investments.

(1) Galán and Alexander's rights over the Section of Lot 10 – Parayso have not been proven

515. The deficiencies identified by the Respondent's expert in his First Report in relation to the rights of Galán and Alexander over Lot 10-Parayso Fraction have not been remedied by the Claimants.⁷⁸³

(2) It has not been proven that RSM's rights over Hotel Parayso were cancelled

⁷⁸² Memorial on Jurisdiction, ¶¶ 256-263.

⁷⁸³ Memorial on Jurisdiction, ¶¶ 264, 265, 269, 270; First Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 85, 86, 87.

516. The deficiencies identified by the Respondent's expert in his First Report in relation to the rights of Galán and Alexander over the transfer of rights of Hotel Parayso and parcel to RSM has not been remedied by the Claimants.⁷⁸⁴ Exhibit MG-0024 contains a not formalized document that is only signed by Mr. Alexander dated September 21, 2015, indicating the conditions described. There are no reports of the cancellation or any other official document to prove it. RSM is not a claimant in this arbitration. If it still has rights to the parcel and hotel, those rights are not covered by the claims in this arbitration. During the production of documents, the Claimants indicated that there is no other document that officially proves the alleged cancellation.⁷⁸⁵

517. It must be pointed out that, the Claimants are wrong to establish that "even if RSM were the owner of the Parayso investment, Ms. Galán and Mr. Alexander would still be investors who own or control the investment "directly or indirectly".⁷⁸⁶

- First, the claim was filed by Messrs. Galán and Alexander, in their own right, with respect to the Parayso Investments, and not on behalf of RSM or by RSM in its own right. In any event, RSM is not a party to this proceeding, Claimants cannot, now, argue that they filed a claim on RSM's behalf.
- Second, the Claimants pretend to ignore the scope of application of Chapter XI contained in Article 1101 of the NAFTA, which specifies that the Chapter applies to measures adopted or maintained by a Party relating to the "investments of investors of another Party in the territory of the Party". Strictly speaking, Messrs. Galán and Alexander's participation in RSM is an "investment" in Canada, and would therefore be excluded from the scope of application. Claimants cannot file claims for investments located outside of Mexican territory.

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

518. The deficiencies identified by the Respondent's expert in his First Report in relation to the rights of Mr. Alexander over the Hotel Parayso and/or the Lot 10-Parayso Fraction have also not been remedied by the Claimants.⁷⁸⁷

⁷⁸⁴ Counter-Memorial on Jurisdiction, ¶¶ 61-65; Witness Statement of Mrs. Galán, ¶ 39.

⁷⁸⁵ Procedural Order No. 4, Decision on Document Production of the Claimants, Annex B, Reply to the requests for production of documents No. 13, June 16, 2021. "Claimants observe that they already have submitted documents responsive to this request including MG-0007, MG-0024." *See also*, Memorial on Jurisdiction, ¶¶ 260-263.

⁷⁸⁶ Counter-Memorial on Jurisdiction, ¶ 64.

⁷⁸⁷ Memorial on Jurisdiction, ¶¶ 267-270.

(4) Galán and Alexander's “property interests” in Hotel Parayso have not been proven

519. The deficiencies identified by the Respondent’s expert in his First Report in relation to the “*property interest*” of Messrs. Galán and Alexander in the Hotel Parayso have also not been remedied by the Claimants.

(5) Hotel Villas Alex is not a party in this arbitration

520. In her witness statement, Mrs. Galán refers that after her divorce from Mr. Alexander, Hotel Parayso was operated separately, under the names “Amelie Tulum” (owned by Galán) and “Villas Alex” (owned by Alexander).⁷⁸⁸ Claimants have offered no evidence to confirm her statement. Hotel Villas Alex and Amelie Tulum are not part of the claim that was presented by the Claimants in this proceeding. Only Hotel Parayso is part of the claim.

(6) Parayso Investments do not comply with the legality requirements of Mexican Law

521. The deficiencies identified by the Respondent’s expert in his First Report in relation to Mrs. Galán and Mr. Alexander’s compliance with all legal requirements to obtain rights over Lot 10 and Hotel Parayso have not been remedied by the Claimants.⁷⁸⁹

(a) Galán and Alexander’s claim do not meet Kim’s test

522. Galán and Alexander’s claim do not comply with Kim’s test. The transfer of rights violates the Agrarian Law and law applicable to the restricted zone, which are part of the Respondent’s fundamental laws that protect ejidos/ejidatarios and coastal zones from the foreign investment that protect important public interests over foreigners personal property and protection of the property and autonomy of historically disadvantaged population centers.⁷⁹⁰ Therefore, acts contrary to the

⁷⁸⁸ Witness Statement of Mrs. Galán, ¶ 40.

⁷⁸⁹ Memorial on Jurisdiction, ¶¶ 274-284, 293-294; Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 70 and 71, Table XXIII: Arguments used in the SBM Report and opinion on each one Arguments used in the SBM Report and opinion on each argument.

⁷⁹⁰ Witness Statement of Mr. Miranda Aceves, ¶¶ 43-45; First Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 91, 92 and 93; Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 18, 80-82.

Agrarian Law and law applicable to the restricted zone are sanctioned with the maximum civil sanction, an absolute nullity.⁷⁹¹

523. Likewise, Ms. Galán and Mr. Alexander did not act in good faith. Ms. Galán and Mr. Alexander did not exercise their “due diligence” before embarking on the investment and, hardly, they were not aware of the illegality of their actions given the multiple red flags that should have warned of the illegality of their investments:

- The alleged ejidal rights acquired by Claimants were not insured against third parties or the Mexican State through their registration before the RAN to grant a presumption of legality to their documentation;⁷⁹²
- They did not go to Agrarian Courts to make their contracts binding before Courts;⁷⁹³
- They did not ensure the validity of the documents to prove their rights;⁷⁹⁴
- Ms. Galán and Mr. Alexander were involved in litigation related to the ejido and its parcels, indicating that they knew that there was irregularity in the documentation regarding their possession of the properties;⁷⁹⁵
- The Claimants presented multiple documents with different information regarding the same parcel and the same owner indicating irregularity in the identification of the parcel that is the object of the contract, the transaction, and the acquired and transferred rights;⁷⁹⁶
- The acquisition of the parcels through third parties was a common practice among some Claimants;⁷⁹⁷

⁷⁹¹ Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 18 (viii) and (ix), 19, 80-82; First Expert Report of Mr. Gutiérrez de la Peza, ¶ 91. Witness Statement of Mr. Miranda Aceves, ¶ 74.

⁷⁹² First Expert Report of Mr. Gutiérrez de la Peza, ¶ 43; Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 18 (V), Table XXIV. Arguments used in Mr. Bonfiglio Expert Report and opinion about its pertinence, p.70.

⁷⁹³ Second Expert Report of Mr. Gutiérrez de la Peza, Table XXIV. Arguments used in the SBM Report and views on their relevance , p.69.

⁷⁹⁴ First Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 88, 90, 91-95; Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 74, 81 y 82.

⁷⁹⁵ Witness Statement of Mrs. Galán, ¶ 26

⁷⁹⁶ First Expert Report of Mr. Gutiérrez de la Peza, Table XXVI: Documentary deficiencies of Lot 10-Parayso Fraction, p. 83; Second Expert Report of Mr. Gutiérrez de la Peza, Table XXII: Documentary deficiencies related to Lot 10-Hotel Parayso , p. 61.

⁷⁹⁷ Second Expert Report of Mr. Gutiérrez de la Peza, PGP-0048

- The Claimants paid low prices for their parcels that were far below of the commercial value of similar land;⁷⁹⁸
- Despite their allegation of “ejidal rights”, none of the Claimants proved that they have the status of ejidatarios or avecindados;⁷⁹⁹
- None of the Claimants complied with the requirements of the legal regime applicable to the restricted zone.

524. As stated by the Respondent in its Memorial on Jurisdiction, the Claimants have not demonstrated that Ms. Galán and Mr. Alexander complied with the legality requirements under the ejidal property regime and, if they had assumed their status as foreigners, the regime applicable to the restricted zone.⁸⁰⁰

D. Jurisdictional Objections under Mexico-France BIT

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

525. As mentioned in the Memorial on Jurisdiction, the passport presented by Jacquet as evidence of his French nationality does not cover the relevant dates of the Behla Tulum Investments, therefore, the Claimants have failed, *prima facie*, with the burden of proof regarding Jacquet's nationality at all relevant dates.⁸⁰¹ This jurisdictional deficiency has not been addressed by the Claimants.

526. On the other hand, it is surprising that Claimants have deliberately omitted to point out that, on August 15, 2007, Abodes transferred to José Mauricio Roman Lazo his alleged rights over AMSA Lot.⁸⁰² Taking this fact into account, it remains doubtful whether Mr. Jacquet can hold any right over the AMSA Lot, furthermore, there is the possibility that Abodes company has no rights to the lot either, due to the transfer it made in favor of Mr. Roman Lazo.

⁷⁹⁸ First Expert Report of Mr. Gutiérrez de la Peza, Table XXVI, p.81, ¶ 92 (vi); Second Expert Report of Mr. Gutiérrez de la Peza, Table XXII, p. 62 and PGP-0048.

⁷⁹⁹ First Expert Report of Mr. Gutiérrez de la Peza, Table XXVII: Legal Deficiencies of Galán Transfer, p.85; Second Expert Report of Mr. Gutiérrez de la Peza, Table XXIV. Arguments used in the SBM Report and views on their relevance , p. 68.

⁸⁰⁰ Memorial on Jurisdiction, ¶¶ 274-284

⁸⁰¹ Memorial on Jurisdiction, ¶¶ 293 and 294.

⁸⁰² **RJ-0009**, p. 3

2. It has not been proven that Jacquet was an “investor” in the Behla Tulum Investments at all relevant dates

527. As stated in the Memorial on Jurisdiction, the documents exhibited by Mr. Jacquet to demonstrate that he was an investor in the Behla Tulum Investments are insufficient. The Respondent supports its position.⁸⁰³ The documents presented by the Claimants are not proof of ownership of the Hotel or the store, which is different from any right to the parcel.

a. Jacquet's rights over Abodes and AMSA Lot have not been proven

528. The deficiencies identified by the Respondent's expert in his First Report in relation to the ownership of Jacquet's rights to Abodes and AMSA Lot have not been remedied by the Claimants.

529. The Claimants have not established that Mr. Jacquet has full control over Abodes to file claims on its behalf. Mr. Jacquet was only, as far as the Respondent is aware, in March 2014 a 50% shareholder of the Abodes shares.⁸⁰⁴ Assuming that Mr. Jacquet continues to be a shareholder in Abodes, he does not have full control over Abodes to consider as valid the filing of claims on behalf of that company. In that order, Mr. Jacquet also has no rights to the AMSA Lot.

530. Abodes allegedly acquired property rights to the AMSA Lot through the AMSA Promise.⁸⁰⁵ Therefore, Abodes would be the only person, whether natural or legal, who can argue that they have a possible right to the AMSA Lot. Abodes is not a party to this proceeding.

531. However, assuming without granting that i) Abodes has acquired property rights over the AMSA Lot on May 15, 2007, through the AMSA Promise and ii) that Mr. Jacquet has rights over Abodes to file claims on its behalf within of this arbitration, on August 15, 2007, Abodes assigned José Mauricio Roman Lazo his alleged rights over the AMSA Lote.⁸⁰⁶

532. With all the foregoing, it is clear that it is impossible to support that Mr. Jacquet had rights over Abodes at the relevant dates and, much less, over the AMSA Lot. The Claimants have not established that Abodes and/or Jacquet comply with the legality requirements established in the Agrarian Law and with the regime applicable to the restricted zone.

⁸⁰³ Memorial on Jurisdiction, ¶¶ 297 and 298.

⁸⁰⁴ **RJ-0003**, p. 17.

⁸⁰⁵ C-0017.

⁸⁰⁶ **RJ-0009**, p. 3.

b. Jacquet's "property interest" in the Hotel Behla Tulum and La Tente Rose have not been proven

533. The deficiencies identified by the Respondent's expert in his First Report in relation to Mr. Jacquet's "*property interests*" in the Hotel Behla Tulum and the Tente Rose have not been remedied by the Claimants either. These documents do not recognize or presuppose property rights over ejidal lots or the Hotel and contain various inconsistencies with the facts asserted by the Claimants.

- The documents presented by Mr. Jacquet as proof of *property interests* point to Mr. Roman Lazo and not Mr. Jacquet. Likewise, it was Mr. Román and not Mr. Jacquet who covered the payments to the Municipality.⁸⁰⁷
- The documents in which the name of Mr. Jacquet appears do not recognize the ownership or possession of the property. In fact, he claimed to be "responsible for the works and activities carried out on the property", not the owner.⁸⁰⁸

3. Behla Tulum Investments do not comply with the legality requirements of Mexican Law

534. The deficiencies identified by the Respondent's expert in his First Report in relation to Mr. Jacquet's compliance with the legality requirements under the ejido property regime and the regime applicable to the restricted zone have not been remedied by the Claimants regarding Behla Tulum Investments.⁸⁰⁹

a. Jacquet's claim does not meet Kim's test

535. Jacquet's claim does not comply with *Kim's* test. The transfer of rights infringes the Agrarian Law and law applicable to the restricted zone, which are part of the Respondent's fundamental laws that protect ejidos/ejidatarios and coastal zones from the foreign investment that protect important public interests over foreigners personal property and protection of the property and autonomy of historically disadvantaged population centers.⁸¹⁰ Therefore, acts contrary to the

⁸⁰⁷ RJ- 0012; RJ-0013, RJ-016, RJ-020; RJ-021

⁸⁰⁸ RJ-0021, p. 2.

⁸⁰⁹ Memorial on Jurisdiction, ¶¶ 313-315; Dr. De la Peza Second Expert Report, ¶¶ 10, 24, 46, 47 y 50.

⁸¹⁰ Witness Statement of Mr. Miranda Aceves, ¶¶ 43-45; First Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 91, 92 and 93; Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 18,80-82.

Agrarian Law and law applicable to the restricted zone are sanctioned with the maximum civil sanction, an absolute nullity.⁸¹¹

536. Likewise, Claimants did not act in good faith.⁸¹² Mr. Jacquet did not exercise their “due diligence” before embarking on the investment and, hardly, they were not aware of the illegality of their actions given the multiple red alerts that should have warned of the illegality of their investments:

- The alleged ejidal rights acquired by the Claimants were not insured against third parties or the Mexican State through their registration in the RAN to grant a presumption of legality to their documentation;⁸¹³
- The Claimants did not go to Agrarian Courts to make their contracts binding before Courts;⁸¹⁴
- They did not ensure the validity of the documents to prove their rights;⁸¹⁵
- The Claimants were involved in litigation related to the ejido and its parcels, indicating that they knew that there was irregularity in their documentation of their possession of the properties;⁸¹⁶
- The Claimants presented multiple documents with different information regarding the same parcel and the same owner indicating irregularity in the identification of the parcel that is the object of the contract, the transaction, and the acquired and transferred rights;⁸¹⁷
- The acquisition of the parcels through third parties was a common practice among some Claimants;⁸¹⁸

⁸¹¹ Witness Statement of Mr. Miranda Aceves, ¶74. Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 18 (viii) and (ix), 19, 80-82; First Expert Report of Mr. Gutiérrez de la Peza, ¶ 91;

⁸¹² Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 18 (viii) and (ix); First Expert Report of Mr. Gutiérrez de la Peza, ¶ 91. RW-001, ¶ 31; Witness Statement of Mr. Miranda Aceves, ¶74.

⁸¹³ First Expert Report of Mr. Gutiérrez de la Peza, ¶ 43; Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 18 (V), Table XXIV. Arguments used in the SBM Report and views on their relevance .

⁸¹⁴ Second Expert Report of Mr. Gutiérrez de la Peza, Table XXIV. Arguments used in the SBM Report and views on their relevance, p.69.

⁸¹⁵ First Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 67, 72, 91-95; Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 50, 56, 81 and 82.

⁸¹⁶ Witness Statement of Mr. Jacquet, ¶ 28.

⁸¹⁷ First Expert Report of Mr. Gutiérrez de la Peza, Table VII: Documentary deficiencies related to Lot 10 A-Behla Tulum, p.63; Tabla XIV: Documentary Deficiencies Related to the AMSA-Behla Tulum Lot, p. 57; Second Expert Report of Mr. Gutiérrez de la Peza, Table XIII: Documentary deficiencies related to Lot 10A-Behla Tulum, p.46.

⁸¹⁸ Second Expert Report of Mr. Gutiérrez de la Peza, PGP-0048

- The Claimants paid low prices for their parcels that were far below of the commercial value of similar land;⁸¹⁹
- Despite hold to have “ejidal rights”, none of the Claimants proved that they have the status of ejidatarios or avecindados;⁸²⁰
- None of the Claimants complied with the requirements of the legal regime applicable to the restricted zone.

537. In particular, the documentation presented by Mr. Jacquet regarding the Jacquet Commodatum is illegal because it contravenes public order provisions of the Agrarian Law, *inter alia*:⁸²¹

- Not allow confirming that the Contract was actually celebrated, that the lands that were the object of the same were the property of the Ejido, their legal destination and that the Assembly of the Ejido assigned or recognized any right over them in favor of Mr. Román.⁸²²
- The Jacquet Commodatum does not prove that Mr. Román had possession of 10A-Behla Tulum, nor does it prove that the transfer of rights from Mr. Novelo Balam to Mr. Jacquet is valid, it only shows the irregularities that existed regarding the transfer of rights to the property.⁸²³
- They did not show any minutes of the Assembly that approved the contract celebrated by Mr. Jacquet.⁸²⁴
- The contract states that it will initiate the procedures to obtain Mexican nationality, which is why it lacked legitimacy to carry out the sales.⁸²⁵

⁸¹⁹ First Expert Report of Mr. Gutiérrez de la Peza, Table XIV, p.58 and ¶ 92 (vi); Second Expert Report of Mr. Gutiérrez de la Peza, Table X, p. 41 and PGPG-0048.

⁸²⁰ First Expert Report of Mr. Gutiérrez de la Peza, Table XVIII. Legal deficiencies related to Lot 10A-Behla Tulum, p.65; Second Expert Report of Mr. Gutiérrez de la Peza, Table XXIV. Arguments used in Mr. Bonfiglio Expert Report and view on their pertinence, p. 68.

⁸²¹ Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 10, 24, 46, 47 and 50.

⁸²² Second Expert Report of Mr. Gutiérrez de la Peza, Table X: Documentary Deficiencies Related to the AMSA-Behla Tulum Lot, p.40.

⁸²³ Second Expert Report of Mr. Gutiérrez de la Peza, Table X: Documentary Deficiencies Related to the AMSA-Behla Tulum Lot, p.40, Table XI: Arguments used in the SBM Report and opinion on each argument.

⁸²⁴ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 47 (ii), Table XI. Arguments used in the SBM Report and opinion on each argument.

⁸²⁵ Second Expert Report of Mr. Gutiérrez de la Peza, Table XIV: Arguments used in the SBM Report and opinion on each one

538. Likewise, " the additional evidence exhibited is not sufficient to prove that Mr. Jacquet holds land or ejido rights to Lot 10A-Behla Tulum, "⁸²⁶, *inter alia*, because:

- It was confirmed that the lands endowed to the ejido do not comprise the property that is the object of the contract.
- It is still not possible to confirm whether or not Mr. Román had any rights to the property identified as Lot AMSA-Behla Tulum, nor its location, which he may have.
- It is still not possible to confirm that the agreed price has actually been delivered.
- Regardless of the agreements entered into by Mr. Román and Mr. Jacquet, the Jacquet Commodatum-Parcela 1,496 does not show that Mr. Román had possession of the Lot AMSA-Behla Tulum, nor that it is the same property that is the object of the AMSA Promise.⁸²⁷
- Not shows any minutes of the Assembly that approved the contract celebrated by Mr. Jacquet.⁸²⁸

539. As the Respondent pointed out in its Memorial on Jurisdiction, the Claimants have not demonstrated that Mr. Jacquet complied with the legality requirements under the ejido property regime and, if he had assumed his status as a foreigner, the regime applicable to the restricted zone.⁸²⁹

E. Jurisdictional Objections under Mexico-Portugal BIT

1. Silva and Abreu were excluded from invoking the ISDS mechanism by reason of the renunciation of their rights upon their Mexican naturalization

540. In the Memorial on Jurisdiction, the Respondent argued that the Claimants had failed to prove that at all relevant dates Silva and Abreu were qualified "investors", a national of Portugal and whose dominant and effective nationality was the Portuguese nationality.

541. In their Counter-Memorial, the Claimants affirm that, by the mere fact of possessing the nationality of one of the other States Parties to the invoked treaties, they have the right to access the dispute settlement mechanisms of the invoked treaties and that the doctrine dominant and

⁸²⁶ Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 46 and 52.

⁸²⁷ Second Expert Report of Mr. Gutiérrez de la Peza, Table XI. Arguments used in the SBM Report and opinion on each argument, p. 43

⁸²⁸ Second Expert Report of Mr. Gutiérrez de la Peza, Table XI. Arguments used in the SBM Report and opinion on each argument.

⁸²⁹ Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 53.

effective nationality is not applicable on the basis of the text of the treaties and the UNCITRAL Rules.

542. However, the Claimants have not provided evidence confirming the Portuguese nationality of Messrs. Abreu and Silva on the relevant dates, nor have they disputed the fact that the evidence of nationality submitted, so far, is insufficient.⁸³⁰ Claimants have also failed to prove that the effective and dominant nationality of Messrs Abreu and Silva was Portuguese at all relevant dates.

543. The Respondent maintains that the dominant and effective nationality of Messrs. Abreu and Silva at all relevant dates was Mexican and prevented them from invoking the dispute settlement mechanism provided for in the applicable treaty.

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

544. In the Counter-Memorial, the Claimants contend that “Ms. Abreu and Mr. Silva are nationals of Portugal. They are thus each an “investor” of Portugal eligible to submit a claim against Respondent under this Treaty”.⁸³¹

545. However, the particular situation of Messrs. Abreu and Silva as double nationals who hold the nationality of the host State, makes their statement insufficient to establish the effective nationality of the Claimant.

546. In the following sections, the Respondent develops the elements established in section V.A.2 to establish that Messrs. Abreu and Silva, according to the information that has been presented in this arbitration, do not qualify as “investors” under the BIT Mexico- Portugal, since they exercised as effective and dominant nationality, the nationality of the receiving State, *i.e.*, the Mexican nationality.

⁸³⁰ Memorial on Jurisdiction, ¶¶ 318 and 319.

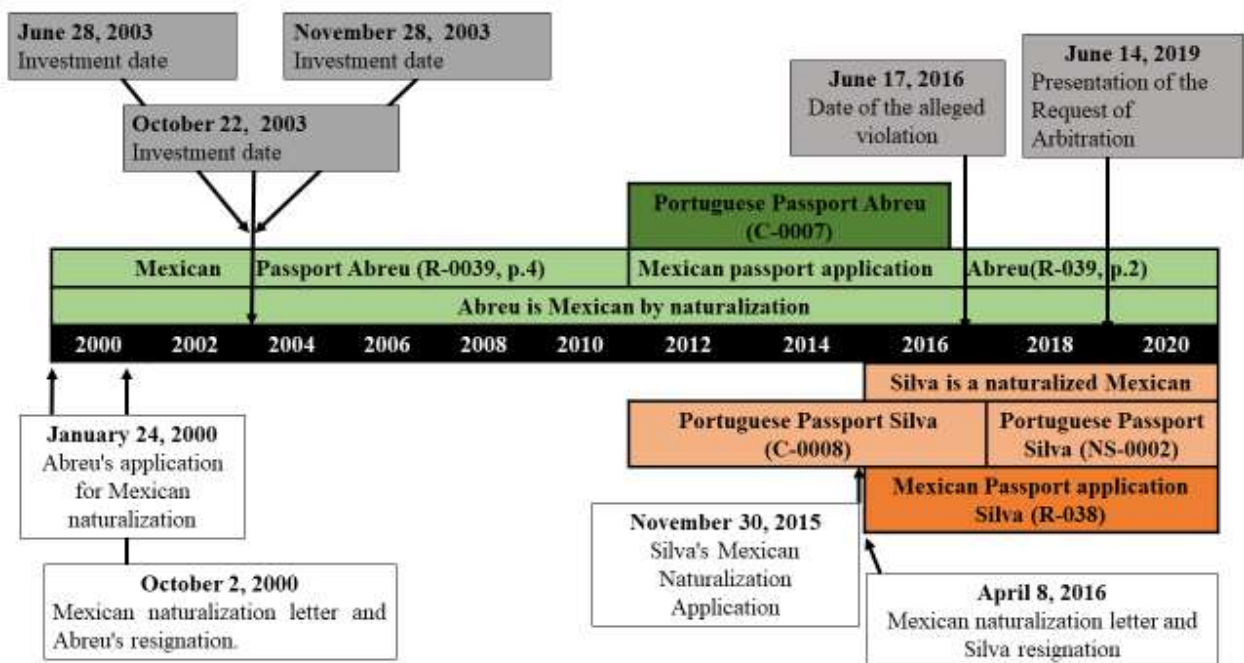
⁸³¹ It should be noted that the Claimants have not indicated that the claims related to the Uno Astrolodge Investments have been presented on behalf of OMDC, so the Tribunal must analyze its jurisdiction over the claims only with respect to Messrs. Abreu and Silva.

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

547. In its Memorial on Jurisdiction, the Respondent established that the passports presented by Messrs. Abreu and Silva as proof of Portuguese nationality are not sufficient to corroborate effective nationality at all relevant dates. This fact remains uncontroversial.⁸³²

548. The following timeline illustrates the need to define the effective nationality of Ms. Abreu and Mr. Silva during all relevant dates, due to the conflict between the Claimants' nationality allegations and the evidence of Mexican nationality presented in this arbitration.

Image 3. Proof of nationality of Ms. Abreu and Mr. Silva vis-à-vis their Mexican nationality and relevant dates



⁸³² Memorial on Jurisdiction, ¶¶ 317-319. The relevant dates are: the date on which the investments were made (October 22, 2003; June 28, 2003; November 28, 2003; 2006, 2008), dates of the alleged violations (June 17, 2016), and date on which the request of arbitration was filed (June 14, 2019).

Source: Own elaboration based on exhibits R-0023, R-0038, R-039, R-0041, C-0007, C -0008.

549. Claimants have not satisfied, *prima facie*, the burden of proof in relation to the Portuguese nationality of Messrs. Abreu and Silva. In fact, as explained below, the evidence in the record and Mr. Silva's witness statement confirms that both he and Ms. Abreu exercised Mexican nationality as their effective and dominant nationality during the relevant dates.

a. The evidence presented by the Claimant to show that Mr. Silva and Ms. Abreu maintain Portuguese nationality is insufficient

550. Although Silva and Abreu showed Certificates of the Portuguese Embassy in Mexico that may help to conclude that "they have always maintained their Portuguese nationality",⁸³³ the Portuguese authority does not claim to have had their respective Mexican naturalization letters in view. For the Respondent, this is still not sufficient proof to prove that they not only had Portuguese nationality but that they acted under it during all relevant dates.

551. However, the Respondent is aware that the Embassy of Mexico in the Republic of Portugal forwarded diplomatic note No. 1249 to the Portuguese Ministry of Foreign Affairs, sending it Portuguese Passport No. [REDACTED] in favor of María Margarida Oliveria de Abreu⁸³⁴ and informing it that Ms. Abreu obtained a Mexican Naturalization Letter in her favor.⁸³⁵

552. This is why Silva and Abreu have not proven *prima facie* their Portuguese nationality because:

- they have not proven that they have Portuguese nationality as the effective and dominant nationality during all relevant dates;
- the quality of *jus soli* is not sufficient proof to hold Portuguese nationality at all relevant dates;
- Claimants have not presented any evidence during the document production stage to support their Portuguese nationality;

⁸³³ NS-0004 and NS-0001

⁸³⁴ **R-039**, Passport valid from May 27, 1992 to May 27, 2002.

⁸³⁵ **R-063**, Diplomatic Note from the Embassy of Mexico in the Republic of Portugal to the Ministry of Foreign Affairs of Portugal, dated December 26, 2000.

- The Respondent has shown various documents issued by its authorities in favor of Silva and Abreu in which they hold Mexican nationality;
- Mr. Silva has presented a Mexican passport;
- both Abreu and Silva have displayed their Mexican nationality before the Respondent's authorities.

4. Silva's and Abreu's dominant and effective nationality was Mexican at all relevant dates

553. The Claimants have not demonstrated that Messrs. Abreu and Silva meet the requirement of effective and dominant nationality under the text of the Mexico-Portugal BIT and the principles of customary international law. Instead, the Claimants' claim is that the Tribunal consider the place and date of birth as sufficient evidence without analyzing the legal effects of their other nationalities, including the effectiveness and dominance of their Mexican nationality, on their claims at the level of the Treaty invoked.

554. As shown in Image 3, Ms. Abreu held Mexican nationality during all relevant dates. While, Mr. Silva held Mexican nationality in at least two of the relevant dates, the date of the measures claimed and at the time of the presentation of the claim.

a. Dominant and effective nationality of Ms. Abreu

(1) Usual residence and center of economic and financial interest, including employment

555. According to Ms. Abreu's application for naturalization, Ms. Abreu had her habitual residence, at least since 1989, in the territory of the Respondent.⁸³⁶ It is clear that Ms. Abreu intended to maintain her habitual residence in Mexico. Claimants have not demonstrated that Ms. Abreu had her habitual residence outside of Mexico during the relevant dates.

- On January 24, 2000, have his domicile in Villahermosa, Tabasco, indicating telephone numbers of his neighbors.
- In 2000, Mrs. Abreu obtained the voting credential in which the code State 27 is established, corresponding to the State of Tabasco.⁸³⁷ Same that is used in 2011 as official identification of the power of attorney issued in favor of Mr. Silva.

⁸³⁶ **R-039**, Approval of Application for Mexican Passport of Abreu, p.1.

⁸³⁷ **R-040**

- In the contract for the transfer of rights of October 22, 2003⁸³⁸ and in the transfer of November 28, 2003⁸³⁹, Ms. Abreu states that she is domiciled in the city of Villa Hermosa, Tabasco.
- In her passport application dated November 16, 2010, Ms. Abreu declared that she was domiciled in Veracruz, Mexico.⁸⁴⁰
- In the general power of attorney for lawsuits and collections issued on April 30, 2011 in favor of Mr. Silva, Abreu indicated that he was domiciled in the city of Boca del Río, Veracruz.⁸⁴¹

556. It is a fact that, from the alleged investment to the moment in which the alleged violations occurred, Ms. Abreu was domiciled in the national territory.

557. It also had its center of economic and financial interest, including its employment in the Mexican territory.⁸⁴² The Respondent does not know if there were changes in Ms. Abreu's center of economic interest.

- Since 2000, at the time of requesting her naturalization, Ms. Abreu indicated that her sole profession and source of income was her salary as a theater and dance teacher at the Centro de Estudios e Investigaciones de las Bellas Artes del Instituto de Cultura de Tabasco.⁸⁴³
- At the time of the alleged transfers of rights, Ms. Abreu declared that she was a teacher residing in Mexican territory.⁸⁴⁴
- According to its evidence of the fiscal situation, on January 6, 2012, it began its operations in the fiscal regime pertaining to salary and salaries for economic activities related to orphanages and other social assistance residences belonging to the public sector, declaring its domicile in Veracruz, Mexico. Her status in the registry is still active.

558. In this sense, Ms. Abreu maintained her center of economic and social interest within the Mexican territory during the relevant dates.

⁸³⁸ C-0020

⁸³⁹ C-0021

⁸⁴⁰ **R-039**, p.2

⁸⁴¹ NS-0005.

⁸⁴² **R-062**, Ms Abreu's application for naturalization, p.2.

⁸⁴³ **R-062**, Ms Abreu's application for naturalization, p.2.

⁸⁴⁴ C-0020 y C-0021

(2) Nationality held to acquire real assets and make formal arrangements directly related to her investment

559. The Respondent has identified, in the documents submitted by the Claimants as alleged proof of ownership of the Uno Astrolodge Investments, that Ms. Abreu has identified herself at all times as Mexican. First, in the contracts for the transfer of rights, Ms. Abreu identified herself as Mexican with a Mexican voting credential No. 132438978 issued by the Federal Electoral Institute (in Spanish Instituto Federal Electoral; now the National Electoral Institute, in Spanish Instituto Nacional Electoral).⁸⁴⁵ Second, in the commodatum contract entered with OMDC, Ms. Abreu declared that she was a “Mexican citizen by naturalization.”⁸⁴⁶

560. The Respondent clarifies that Ms. Abreu has exercised her Mexican nationality on various occasions directly related to her alleged investments.

- At the time of the creation of OMDC, on June 25, 2003, Ms. Abreu declared having Mexican nationality by naturalization, proving her nationality with a naturalization letter and using her Mexican voting credential as an identity document.⁸⁴⁷
- In October 2004, Mr. Silva and Ms. Abreu applied to OMDC for registration with the Directorate General for Foreign Investment a Mexican entity in charge of the National Registry of Foreign Investments. Abreu stated in the application that he had Mexican nationality.⁸⁴⁸
- On April 30, 2011, Ms. Abreu issued a general power of attorney for lawsuits and collections in favor of Mr. Silva, in which she declared to be Mexican, using her naturalization letter to prove her nationality, as well as her voting credential issued by the Federal Electoral Institute.⁸⁴⁹
- On July 8, 2016, after the alleged dispossession of Uno Astrolodge, Mr. Silva and Ms. Abreu filed an amparo lawsuit, in which both declared to be Mexican by naturalization.⁸⁵⁰ In other words, Messrs. Silva and Abreu tried to invoke the protection of the amparo proceeding, identifying themselves as naturalized Mexicans, and could also have filed this amparo while holding their Portuguese nationality. However, this was not the case.

⁸⁴⁵ C-0021, p.4; C-0020, p.4

⁸⁴⁶ C-0056, p. 2.

⁸⁴⁷ C-0006, p.19.

⁸⁴⁸ **R-067**, Application for registration with the National Foreign Investment Registry, October 20, 2004, p. 6.

⁸⁴⁹ NS-0005, p.4 and C-0057, p.4

⁸⁵⁰ Witness Statement of Mr. Silva, ¶42; **R-051**, Initial Submission in the Indirect Amparo Trial 997/2016, July 8, 2016.

561. Ms. Abreu exercised her Mexican nationality as effective and dominant in formal acts directly related to the alleged investment, specifically with the measures that she is now claiming in this proceeding. The Respondent does not know how many times Ms. Abreu exercised her Mexican nationality, however, there is no doubt that once she acquired her Mexican nationality, Ms. Abreu held it as her effective nationality for matters related to her alleged "investment" in Mexico.

(3) Naturalization

562. Mrs. Abreu opted for Mexican naturalization after having established her center of economic, cultural, and social interest in the Mexican territory and since then exercised her Mexican nationality as dominant and effective during the development of her supposed "investment" and throughout all the relevant dates. The Respondent has already addressed the elements of her naturalization process in her Memorial on Jurisdiction, however, the relevant facts of the context and effects of Ms. Abreu's naturalization are detailed below.

- After more than 11 years of permanently residing in Mexico and establishing its center of economic, financial, social and cultural interest in Mexican territory and derived from its "deep identification with the people, beautiful cultural values and land that are Mexico", Ms. Abreu made the "deep, long-matured" decision of wanting to be officially recognized as a Mexican in order to "be able to live and work as a Mexican also by law".⁸⁵¹
- Ms. Abreu presented her test of knowledge and identification with the history and general culture of Mexico, which she accredited and decided to conclude the naturalization process with the renouncement of her Portuguese nationality and the protection that international treaties granted her as a foreigner.
- In his own application for naturalization Abreu requested on November 18, 1999, a certificate proving that he had resided in the Respondent's territory for seven years, that is, since 1992 Abreu resided in Mexico.⁸⁵²
- Ms. Abreu gave Mexican authorities her Portuguese passport after obtaining her naturalization as a Mexican, which was sent on November 21, 2000, to the Mexican embassy in the Portuguese Republic to be delivered to the issuing Portuguese authority.⁸⁵³

⁸⁵¹ **R-062**, Application for Letter of Naturalization of January 24, 2000.

⁸⁵² **R-074**, Proof of Residence in Mexico for Abreu's naturalization application.

⁸⁵³ **R-063**, Diplomatic Note from the Embassy of Mexico in the Republic of Portugal to the Ministry of Foreign Affairs of Portugal, dated December 26, 2000.

- After obtaining her naturalization, Ms. Abreu sought to exercise her political rights as a Mexican, for which she processed a voting credential, which she used on various occasions as a means of identifying herself as a Mexican national.⁸⁵⁴

563. It is important to mention that Ms. Abreu has continued to use her Mexican nationality at different times, for example, in Mexican passport applications,⁸⁵⁵ always identifying herself as Mexican when entering and leaving Mexico.⁸⁵⁶

b. Dominant and effective nationality of Mr. Silva

(1) Usual residence and center of economic and financial interest, including employment

564. Mr. Silva established his domicile in the Respondent's territory around 2002 and 2003.⁸⁵⁷ From that moment on, he has indicated having different addresses in Mexican territory throughout the relevant dates.⁸⁵⁸

- Upon establishing OMDC and in the transfer of rights on November 28, 2003, Silva stated that he was domiciled in Playa del Carmen, Quintana Roo.⁸⁵⁹
- In OMDC's application for registration in the General Registry of Foreign Investments, he stated that his address was at Carretera Punta Allen-Tulum km. 8 Lot 8 of the municipality of Solidaridad, Quintana Roo.⁸⁶⁰
- In his application for a naturalization letter, Mr. Silva stated that he was domiciled in Tulum, Quintana Roo.⁸⁶¹

565. It is a fact that, from the alleged investment until after the alleged measures claimed, Mr. Silva maintained his habitual residence in Mexican territory.⁸⁶²

⁸⁵⁴ **R-0040.**

⁸⁵⁵ **R-0039**

⁸⁵⁶ **R-068**, National Migration Institute, Official Letter INM / DGCVM / DGAIIM / DIMI / 3539/2020, November 27, 2020.

⁸⁵⁷ Witness Statement of Mr. Silva, ¶ 10.

⁸⁵⁸ Memorial on Jurisdiction, ¶¶ 317, 324-326.

⁸⁵⁹ C-0006, pp. 18 and 19; C-0021, p. 3

⁸⁶⁰ **R-067**, Application for registration with the National Foreign Investment Registry, October 20, 2004, p.8.

⁸⁶¹ **R-073**, Application for Naturalization of Mr. Silva, p.2

⁸⁶² Witness Statement of Mr. Silva, ¶ 40.

566. Mr. Silva's witness statement confirms that since 2000, Mr. Silva explored the possibility of establishing his center of economic and financial interest, including his employment in Mexican territory, deciding to change his residence in 2003 permanently to Mexico.⁸⁶³ His witness statement, the Constitutive Act of OMDC, and his application for naturalization confirm that, after his naturalization as a Mexican, his center of economic and social interest remained in Mexico by stating being a partner of the OMDC company as his sole profession.⁸⁶⁴

(2) Nationality held to acquire real assets and make formal arrangements directly related to her investment

567. The Respondent clarifies that Mr. Silva has exercised his Mexican nationality in formal acts directly related to his alleged investments.

- On July 8, 2016, after the alleged dispossession of Uno Astrolodge, Mr. Silva and Ms. Abreu filed an amparo lawsuit, in which both declared to be Mexican by naturalization.⁸⁶⁵ In other words, Messrs. Silva and Abreu tried to invoke the protection of the amparo proceeding, identifying themselves as naturalized Mexicans, and could also have filed this amparo while holding their Portuguese nationality. However, this was not the case.
- Additionally, Mr. Silva exercised his Mexican nationality when requesting a Mexican passport before the Mexican authorities, on December 16, 2016, six months after the alleged dispossession of Uno Astrolodge.⁸⁶⁶

568. However, Mr. Silva exercised his Mexican nationality as effective and dominant in formal acts directly related to the alleged investment, specifically with the measures that he is now claiming in this arbitration. The Respondent does not know how many times Mr. Silva exercised his Mexican nationality, however, there is no doubt that once he acquired it, Mr. Silva held it as effective nationality for matters related to his alleged “investment” in Mexico.

(3) Naturalization

⁸⁶³ Witness Statement of Mr. Silva, ¶¶ 3 and 4.

⁸⁶⁴ Witness Statement of Mr. Silva, ¶10; C-006, p.19; and C-0021, p. 3.

⁸⁶⁵ Witness Statement of Mr. Silva, ¶42; **R-051**, Initial Statement of Claim in the Indirect Amparo Trial 997/2016, July 8, 2016.

⁸⁶⁶ **R-038**.

569. Mr. Silva opted for Mexican naturalization for having established his center of economic, cultural and social interest in the Mexican territory and exercised Mexican nationality as dominant and effective during at least two of the relevant dates. The Respondent has already addressed the elements of its naturalization process in its Memorial on Jurisdiction, however, the relevant facts of the context and effects of Mr. Silva's application for naturalization are summarized below.

- In 2015, after residing permanently in Mexico at least since 2003 and establishing his center of economic, financial, social, family, and cultural interest in Mexican territory and “for wanting Mexican sovereignty, not only as a citizen who I am already but as a national I want to be able to have all the political, social and legal rights due to a great concession and relationship that I develop with this nation”⁸⁶⁷, Mr. Silva decides to start the naturalization process before the SRE.⁸⁶⁸
- On November 30, 2015, Mr. Silva presented his test of knowledge and identification with the history and general culture of Mexico, which he accredited in order to continue with his naturalization process.
- In his own application for naturalization, Silva states that he stayed in Mexico from at least November 30, 2013, to November 30, 2015, with three departures and returns: (i) He left Mexico on July 28, 2014, and returned on July 5, September 2014 (he was out of Mexico for a month and a week); (ii) He left Mexico on February 28, 2015, and returned on March 8, 2015 (he was out of Mexico for 11 days); and (iii) He left Mexico on May 25, 2015, and returned on July 1, 2015 (he was out of Mexico for a month and a week);⁸⁶⁹ and
- On May 6, 2016, Mr. Silva decided to conclude the naturalization process by renouncing his Portuguese nationality and the protection that international treaties granted him as a foreigner. This after having expressed for the second time, on November 30, 2015, his desire to continue and conclude the naturalization process.⁸⁷⁰

570. It is important to mention that Mr. Silva has continued to use his Mexican nationality at different times, for example, when applying for a Mexican passport. The statement of Mr. Silva on the occasion of his application for naturalization must be taken into account by the Tribunal.

c. Claimants did not provide evidence to refute the factual elements related to Mexican nationality as the dominant

⁸⁶⁷ **R-064** Request for Letter of Naturalization from Mr. Silva, p.3.

⁸⁶⁸ **R-064**, Request for Letter of Naturalization from Mr. Silva, p.1; Witness Statement of Mr. Silva, ¶ 9.

⁸⁶⁹ **R-073**, Proof of Residence in Mexico for Silva's naturalization application.

⁸⁷⁰ **R-069**, Letter from Mr. Silva requesting his naturalization letter, November 30, 2015.

**and effective nationality of Messrs. Silva and Abreu
during the relevant dates**

571. Derived from the dual nationality held by Messrs. Abreu and Silva, it is imperative that the Claimants demonstrate with sufficient evidence that the dominant and effective nationality at all relevant dates of Messrs. Abreu and Silva was Portuguese. So far this has not been proven.

572. Next, the Respondent develops the relevant elements that the Tribunal must take into account to establish Mexican nationality as the dominant and effective nationality of Messrs. Abreu and Silva during the relevant dates.

**5. 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
dates**

573. As specified in the Memorial on Jurisdiction, the documents exhibited by Messrs. Silva and Abreu (Exhibits C-0006, C-0020 and -C-0021) to demonstrate that they were investors in the Astrolodge Investments are insufficient to prove the existence investment and that they are qualified investors at all relevant dates.⁸⁷¹ The Respondent supports its position, because:

- Mr. Silva stated that, in principle, the parcel of Lot 8 (north) was acquired by the alleged transfer of rights between Mr. Jiménez and Mrs. Gutiérrez (NS-0003). Mrs. Gutiérrez's power of attorney to Mr. Silva presented as Exhibit NS-0018 is not proof of ownership or rights of Mr. Silva over the property, much less over the Uno Astrolodge Hotel. In any case, Mr. Jiménez's legal ownership of Block 8 has not been duly demonstrated.
- OMDC was established in 2003, at least 3 years after Mr. Silva declared that he had “paid for the purchase of lot 8” and two years after the construction of the Hotel began. The Claimants have failed to establish that Mr. Silva and Ms. Abreu were “investors” in an “investment.”
- The transfer of rights contracts (Annexes C-0020 and C-0021) are insufficient to demonstrate the ownership of Mrs. Abreu, Mr. Silva and/or OMDC over the hotel, which is different from the ownership of the parcel of land identified as “Lot 8”. In

⁸⁷¹ Memorial on Jurisdiction, ¶ 323

any case, the documents do not demonstrate any participation of Mr. Abreu in the alleged acquisition of the property identified as "Lot 8".

- Mr. Silva stated that in 2006, after carrying out procedures within the Ejido, the certificate of possession was issued in favor of Ms. Abreu.⁸⁷² The certificate was issued with respect to the parcel identified as "1181", the Claimants have not demonstrated that there is an identity between the "Parcel 1181" mentioned in exhibit NS-0007 and the "Lot 8" assigned by the transfer of rights contracts identified in the Exhibits C-0020 and C-0021.
- The incorporation of OMDC (Exhibit C-0006), *per se*, is not enough to prove ownership by Mr. Silva, Ms. Abreu and/or OMDC of the Hotel Uno Astrolodge.
- The Commodatum Contract (NS-0009) signed between Mrs. Abreu and OMDC, without prejudice to its legal defects and the fact that it is a private document that does not have effects for third parties nor was it endowed with legal seriousness to Through its registration before the RPPYC or ratification before a notary, it is regarding the parcel identified as "parcel 1181". The Claimant has not proven the identity between "Parcel 1181" and "Lot 8". In any case, OMDC's alleged ownership or rights over the parcel should not be confused with OMDC's ownership or rights over the Hotel.
- The power of attorney signed by Ms. Abreu in favor of Mr. Silva in 2011 (NS-0005 and C-0057) is not proof of any kind of rights of OMDC or Mr. Silva over the Uno Astrolodge Hotel or the property on it that was built.

574. As indicated in the Memorial on Jurisdiction, the Claimants have not demonstrated that Messrs. Abreu and Silva have rights over the Uno Astrolodge Investments and they complied with the legality requirements established in the Agrarian Law and with the regulations applicable to the restricted zone.⁸⁷³

**(1) Silva, Abreu or OMDC's rights over Lot 8 and 8A
have not been proven**

575. The deficiencies identified by the Respondent's expert in his First Report in relation to Ms. Abreu, Mr. Silva, and/or OMDC on lots 8 and 8A have not been remedied by the Claimants.⁸⁷⁴

**(2) Silva, Abreu or OMDC's rights over Hotel Uno
Astrolodge have not been proven**

⁸⁷² Witness Statement of Mr. Silva, ¶ 19

⁸⁷³ Memorial on Jurisdiction, ¶¶ 327-331.

⁸⁷⁴ First Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 76 and 81; Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 58 and 64. Memorial on Jurisdiction, ¶¶ 329-330; Mr. Bonfiglio Expert Report, ¶167. Transfers of rights contracts C-0020 and C-0021, Commodatum Contract NS-009 and C-0056.

576. The deficiencies identified by the Respondent's expert in his First Report in relation to Ms. Abreu, Mr. Silva and/or OMDC regarding the Uno Astrolodge Hotel have not been remedied by the Claimants.⁸⁷⁵

(3) Silva, Abreu or OMDC's alleged “*property interest*” on Hotel Uno Astrolodge have not been proven

577. The deficiencies identified by the Respondent's expert in his First Report in relation to Ms. Abreu, Mr. Silva and/or OMDC regarding the "property interest" of Hotel Uno Astrolodge have not been remedied by the Claimants.⁸⁷⁶

578. The documents presented as evidence do not recognize or presuppose property rights over Lots 8 and 8A or the Hotel and contain various inconsistencies with the facts asserted by the Claimants:

- The letter presented as exhibit NS-0006 was extended with respect to “Hotel Ecológico Uno” and not with respect to Hotel Uno Astrolodge. The management does not mention that said Hotel (i) is in the José María Pino Suárez Ejido and (ii) that it is located within Lots 8 and/or 8A.⁸⁷⁷
- Mr. Silva points out that the “paid the municipalities for (a) the yearly property taxes for the lot, (b) for the use of the Federal Zone in front of the hotel property, and (c) for the collection of garbage from the property.”⁸⁷⁸ The evidence offered indicates that it was Ms. Abreu and OMDC who made these payments and not Mr. Silva. The Respondent emphasizes that the addresses indicated in the documents do not coincide or refer to different parcels.

579. In this sense, the Claimants have not established the reasoning under which they intend to classify documents for administrative procedures as suitable to confirm the "property interests" of Mr. Silva, Mrs. Abreu and / OMDC regarding the Hotel Tierras del Sol. The Respondent maintains

⁸⁷⁵ Memorial on Jurisdiction, ¶¶ 338-346.

⁸⁷⁶ The Claimants attempt to present administrative documents to show that both Mr. Silva, Ms. Abreu and OMDC have a property interest in the Uno Astrolodge Hotel.: NS-0010, NS-0011, NS-0012, NS-0014, NS-0015, NS-0016 and NS-0017.

⁸⁷⁷ NS-0006, p.3; NS-0014, p.4. This receipt refers to being issued in favor of OM del Caribe S.A. de C.V. for the hotel business for the entity with the commercial name "Cabañas Nuno", not Uno Astrolodge. In this regard, the Claimants have not provided any evidence that indicates that they are in the same hotel or are in the same place.

⁸⁷⁸ Witness Statement of Mr. Silva, ¶ 29

that it is not possible to confirm “property interest” derived from documentation used for administrative procedures such as authorizations and permits for land use.

580. In any event, the Claimants fail to establish the relationship between these types of documents and the “property interests” that they claim to have. On the contrary, they show various inconsistencies that make it impossible to confirm a property or other right of the Claimants over the Uno Astrolodge Hotel and/or the properties on which it was built. Under this reasoning, it is clear that said “property interest” does not correspond to Ms. Abreu, OMDC, much less Mr. Silva.

**b. The Uno Astrolodge Investments do not comply with the
legality requirements of Mexican Law**

581. The deficiencies identified by the Respondent's expert in its First Report in relation to Uno Astrolodge Investments' compliance with the legality requirements of Mexican law have not been remedied by the Claimants either.⁸⁷⁹

(1) Abreu and Silva’s claims do not meet *Kim*’s test

582. The Claimants do not comply with Kim’s test. The transfer of rights infringes the Agrarian Law and law applicable to the restricted zone, which are part of the Respondent's fundamental laws that protect ejidos/ejidatarios and coastal zones from the foreign investment that protect important public interests over foreigners personal property and protection of the property and autonomy of historically disadvantaged population centers.⁸⁸⁰ Therefore, acts contrary to the Agrarian Law and law applicable to the restricted zone are sanctioned with the maximum civil sanction, an absolute nullity.⁸⁸¹

583. Likewise, the Claimants did not act in good faith. Ms. Abreu and Mr. Silva did not exercise their “due diligence” before embarking on the investment and, hardly, they were not aware of the

⁸⁷⁹ Memorial on Jurisdiction, ¶¶ 347-351; Witness Statement of Mr. Silva, ¶¶ 8, 12, 19 y 29-30.

⁸⁸⁰ Witness Statement of Mr. Miranda Aceves, ¶¶ 43-45; First Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 77, 82, 83, 91, 92 y 93;

⁸⁸¹ Second Expert Report of Mr. Gutiérrez de la Peza, ¶¶ 18 (viii) y (ix), 19, 80-82; First Expert Report of Mr. Gutiérrez de la Peza, ¶ 91. Witness Statement of Mr. Miranda Aceves, ¶74.

illegality of their actions given the multiple red alerts that should have warned of the illegality of their investments:⁸⁸²

- The alleged ejidal rights acquired by the Claimants were not insured against third parties or the Mexican State through their registration in the RAN to grant a presumption of legality to their documentation;⁸⁸³
- They did not go to Agrarian Courts to make their contracts binding before Courts;⁸⁸⁴
- They did not ensure the validity of the documents to prove their rights;⁸⁸⁵
- The Claimants were involved in litigation related to the ejido and its parcels, indicating that they knew that there was irregularity in their documentation of their possession of the properties;⁸⁸⁶
- The Claimants presented multiple documents with different information regarding the same parcel and the same owner indicating irregularity in the identification of the parcel that is the object of the contract, the transaction, and the acquired and transferred rights;⁸⁸⁷
- The acquisition of the parcels through third parties was a common practice among some Claimants;⁸⁸⁸
- The Claimants paid low prices for their parcels that were far below of the commercial value of similar land;⁸⁸⁹

⁸⁸² First Expert Report of Mr. Gutiérrez de la Peza, ¶ 76-77, 81-82; Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 77

⁸⁸³ First Expert Report of Mr. Gutiérrez de la Peza, Table XXIV: Legal Deficiencies over Lot 8A-Uno Astrolodge and Table XXI: Legal Deficiencies over Lot 8-Uno Astrolodge; Second Expert Report of Mr. Gutiérrez de la Peza, ¶ 18 (V), Table XXIV. Arguments used in Mr. Bonfiglio Expert Report and opinion about its pertinence.

⁸⁸⁴ Second Expert Report of Mr. Gutiérrez de la Peza, Table XXIV. Arguments used in the SBM Report and views on their relevance; First Expert Report of Mr. Gutiérrez de la Peza, Table XXIV: Legal Deficiencies over Lot 8A-Uno Astrolodge and Table XXI: Legal Deficiencies over Lot 8-Uno Astrolodge

⁸⁸⁵ Second Expert Report of Mr. Gutiérrez de la Peza, Table XXIV. Arguments used in the SBM Report and views on their relevance , ¶18 First Expert Report of Mr. Gutiérrez de la Peza, Table XXIV: Legal Deficiencies over Lot 8A-Uno Astrolodge and Table XXI: Legal Deficiencies over Lot 8-Uno Astrolodge

⁸⁸⁶ Witness Statement of Mr. Silva, ¶ 26

⁸⁸⁷ First Expert Report of Mr. Gutiérrez de la Peza, Table XXIII: Documentary deficiencies related to Lot 8A-Uno Astrolodge and Table XX: Documentary deficiencies of Abreu 8 Transfer; Second Expert Report of Mr. Gutiérrez de la Peza, Table XIX: Documentary deficiencies related to Lot 8A-Uno Astrolodge, Table XVI: Documentary deficiencies related to Lot 8-Uno Astrolodge, ¶¶ 58 and 64.

⁸⁸⁸ Second Expert Report of Mr. Gutiérrez de la Peza, PGP-0048; Witness Statement of Mr. Silva, ¶8.

⁸⁸⁹ First Expert Report of Mr. Gutiérrez de la Peza, Table XXIII: Documentary deficiencies related to Lot 8A-Uno Astrolodge and Table XX: Documentary deficiencies of Abreu 8 Transfer; Second Expert Report of Mr. Gutiérrez de la Peza, Table XIX: Documentary deficiencies related to Lot 8A-Uno Astrolodge, Table XVI: Documentary deficiencies related to Lot 8-Uno Astrolodge

- Despite hold to have “ejidal rights”, none of the Claimants proved that they have the status of ejidatarios or avecindados;⁸⁹⁰
- None of the Claimants complied with the requirements of the legal regime applicable to the restricted zone.

584. As stated by the Respondent in its Memorial on Jurisdiction, the Claimants have not demonstrated that Ms. Abreu and Silva complied with the legality requirements under the ejidal property regime and, if they had assumed their status as foreigners, the regime applicable to the restricted zone.⁸⁹¹

V. ORDER REQUESTED

585. For the foregoing reasons, the Respondent respectfully requests 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

⁸⁹⁰ First Expert Report of Mr. Gutiérrez de la Peza, Table XXIII: Documentary deficiencies related to Lot 8A-Uno Astrolodge and Table XX: Documentary deficiencies of Abreu 8 Transfer; Second Expert Report of Mr. Gutiérrez de la Peza, Table XIX: Documentary deficiencies related to Lot 8A-Uno Astrolodge, Table XVI: Documentary deficiencies related to Lot 8-Uno Astrolodge, Table XXIV. Arguments used in Mr. Bonfiglio Expert Report ad views on their relevance.

⁸⁹¹ Memorial on Jurisdiction, ¶¶ 347-351.

- a. Have not proven that Sastre was a qualified “investor” at all relevant dates, 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 dates, 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 Exhibit Article 1(2) of the BIT;
- 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

- a. Have not proven that Galán and Alexander were qualified “investors” at all relevant dates, specifically, that they were nationals of Canada and that their dominant and effective nationalities were not Mexican;
- b. Have not proven that Galán and Alexander were investors in qualified “investments” at all relevant dates, specifically that they were investors in the Parayso Investments and the investments were made in accordance with the Respondent’s laws; and
- c. 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

- a. Have not proven that Jacquet was a qualified “investor” at all relevant dates in accordance to Mexico-France BIT, specifically, that he was a national of France; and

b. Have not proven that Jacquet was an investor in qualified “investments” at all relevant dates 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

a. Have not proven that Silva and Abreu were qualified “investors” at all relevant dates, specifically, that they were nationals of Portugal and that their dominant and effective nationalities were not Mexican;

b. Have not proven that Silva and Abreu were investors in qualified “investments” at all relevant dates, specifically, that they were investors in the Astrolodge Investments and that the investments were made in accordance with the Respondent’s laws; and

c. 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 Claimants to cover the costs of this phase of the proceeding and indemnify Respondent for the fees, legal costs, Mexico's share of the expenses related to the Tribunal and ICSID, and order Claimants to pay those costs in solidarity form.

Respectfully submitted on behalf of the Respondent,

Director General de Consultoría Jurídica de Comercio Internacional

Orlando Pérez Gárate