

**IN AN INTERNATIONAL ARBITRATION UNDER
THE UNCITRAL 1976 RULES**

**MR. CARLOS ESTEBAN SASTRE,
MR. RENAUD JACQUET
MS. MARÍA MARGARIDA OLIVEIRA AZEVEDO DE ABREU
MR. EDUARDO NUNO VAZ OSORIO DOS SANTOS SILVA
MR. GRAHAM ALEXANDER
MS. MÓNICA GALÁN RÍOS**
Claimants,

V.

THE UNITED MEXICAN STATES,
Respondent.

CLAIMANTS' COUNTER-MEMORIAL ON JURISDICTIONAL OBJECTIONS

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I. INTRODUCTION

“Convinced that the promotion and protection of these investments would succeed in stimulating transfers of capital”

“Intending to encourage and create favourable conditions for investments . . . on the basis of equality and mutual benefit”

“resolved to . . . ensure a predictable commercial framework for business planning and investment”

“resolved to . . . create new employment opportunities and improve working conditions and living standards in their respective territories”

1. These were some of Respondent’s stated aspirations when it entered into the Treaties.¹

That was back then. Today, Respondent sings a very different tune.

2. The Claimants spent their resources and more than a decade of their lives to help turn Tulum from a deserted beach in the jungle to a world-class destination. Claimants were among the first investors to arrive there. And Respondent continues to reap the benefits from Tulum’s international tourism revenue.

3. Claimants arrived in Tulum around the year 2000.² They took loans from family members back home, sold off their prior businesses, and used their own savings to build unique and profitable businesses.³ The Investments attracted celebrities from all over the world.⁴ Claimants created something truly special out of a remote, desolate area.

¹ See Argentina-Mexico BIT, pmbl.; France-Mexico BIT, pmbl.; Portugal-Mexico BIT, pmbl.; NAFTA, pmbl.

² Witness Statement of Carlos Sastre ¶ 7; Witness Statement of Renaud Jacquet ¶ 6; Witness Statement of Nuno Silva ¶ 4; Witness Statement of Mónica Galán ¶ 8.

³ Witness Statement of Carlos Sastre ¶ 10; Witness Statement of Renaud Jacquet ¶¶ 10, 14, 32; Witness Statement of Nuno Silva ¶¶ 8, 12, 32; Witness Statement of Mónica Galán ¶¶ 11, 33.

⁴ Witness Statement of Carlos Sastre ¶ 20; Witness Statement of Renaud Jacquet ¶ 33; Witness Statement of Nuno Silva ¶ 33; Witness Statement of Mónica Galán ¶ 38.

4. Claimants did everything they could to remain in compliance with Respondent’s law. They hired attorneys,⁵ and they obtained licenses and permits from all levels of Respondent’s government including *ejido* authorities.⁶ They did all of this in good faith and in full transparency with Respondent’s agencies, which repeatedly gave their blessing to the Investments.

5. However, after more than a decade of success, first in 2011 and then in 2016, *without any notice whatsoever* several dozen masked, armed men and police officers violently threw Claimants out to the street, together with their hotel guests and their belongings.⁷

6. It gets worse. The *modus operandi* was a set of fraudulent lawsuits orchestrated by private parties – the Schiavon family and a man named Carlos González Nuño – and executed by government officials. Neither of the private parties bore any relationship, contractual or otherwise, to Claimants. A short time before each wave of takings, these private parties showed up at some of the hotels and demanded payment for being in “their” lots.⁸ Claimants had acquired the lots from the rightful possessors, so naturally they refused.⁹ But days later, these private parties manufactured a lawsuit against *another* private party (not the Claimants). The

⁵ Witness Statement of Carlos Sastre ¶¶ 9, 12, 29-30, 36; Witness Statement of Renaud Jacquet ¶¶ 5, 8-9, 28; Witness Statement of Nuno Silva ¶¶ 23, 26; Witness Statement of Mónica Galán ¶¶ 11, 35.

⁶ *See, e.g.*, Witness Statement of Carlos Sastre ¶ 16; Witness Statement of Renaud Jacquet ¶¶ 12, 17; Witness Statement of Nuno Silva ¶¶ 19, 27; Witness Statement of Mónica Galán ¶¶ 19-20.

⁷ Witness Statement of Carlos Sastre ¶¶ 34-51; Witness Statement of Renaud Jacquet ¶¶ 34-35; Witness Statement of Nuno Silva ¶¶ 35-38; Witness Statement of Mónica Galán ¶¶ 41-44.

⁸ Witness Statement of Carlos Sastre ¶ 25; Witness Statement of Nuno Silva ¶ 34.

⁹ Witness Statement of Carlos Sastre ¶ 25; Witness Statement of Nuno Silva ¶ 34.

fake defendants “lost”, and just like magic an enforceable order was ready to remove Claimants.¹⁰

7. Moments after the spectacular heist, a lawyer for one of these private parties even admitted to manufacturing the lawsuit out of thin air.¹¹

8. Respondent’s courts played along without any reasonable scrutiny. A cursory look at the Respondent’s own registries would have confirmed that the lots were within *ejido* land. The lots were not owned by these private parties.

9. Respondent’s courts could have also sent a notice to Claimants, or joined them as interested parties. But they did neither. The court representatives appeared at the hotels one day and told everyone to leave immediately. No notice, no right to be heard.

10. Respondent’s court representatives could also have notified the judges in charge that Claimants’ hotels were in the lots at issue. But that did not happen. As the court representative’s own handwritten statement and videos of that day confirm, the court representative saw the hotels and spoke to the objecting owners and employees. But no matter—the representative forced Claimants out.¹²

11. Worse, Respondent’s courts repeatedly pillaged beachfront parcels all over Tulum. According to news reports, the waves of takings occurred repeatedly since 2009.¹³ And every

¹⁰ Amended Notice of Arbitration ¶¶ 42, 59-60.

¹¹ Video interview of Patricio O’Farrill, July 2016 approx., minutes 9, 22, C-0039 (admitting to manufacturing the lawsuits as a “legal strategy” that he pursued because his clients had been wanting “to sell” the lots); *see also* Photograph of Patricio O’Farrill talking to Nuno Siva, C-0038.

¹² Written Declaration of Court Representative Luis Miguel Escobedo Pérez, 31 October 2011, C-0040; Written Declaration of Court Representative María Elena Anaya Reyes, 17 June 2016, C-0041.

¹³ La Historia de un Despojo en el Caribe Mexicano, REVISTA PROCESO, 18 December 2015, C-0042; Mariel Ibarra and Silber Mesa, *Los piratas de Borge: El saqueo de bienes institucionalizado en Quintana Roo*, EXPANSION, 6 July 2016, CS-0017.

time, there was a public outcry at the manifest lack of due process. This was not a one-time mistake. This conduct is precisely the kind of abuse that the Treaties are intended to prevent.

12. Today, Respondent continues to cover its ears. In its Memorial, Respondent pulls every attempt imaginable to try to evade its responsibility:

- a. It pretends Respondent has no burden of proof, by arguing that Claimants have the *burden to disprove* Respondent's own defenses;¹⁴
- b. It refuses to acknowledge the investments' existence;¹⁵
- c. It raises frivolous, desperate objections, such as insisting that Claimants were required to prove their entire jurisdictional case in the Notice of Arbitration,¹⁶ that Claimants protected by one Treaty must meet the requirements of the *other* three Treaties,¹⁷ or that Claimants did not provide adequate notice, even though the notices of intent are on the record and are sufficient on their face;¹⁸
- d. It mischaracterizes *ad nauseam* this proceeding as an "auto-consolidation" instead of an ordinary multiparty arbitration;¹⁹
- e. It raises defenses that simply do not apply under these Treaties, such as the dominant and effective nationality test;²⁰ and

¹⁴ Respondent's Memorial on Jurisdiction ¶ 26.

¹⁵ *See, e.g.*, Respondent's Memorial on Jurisdiction ¶¶ 156, 309, 334.

¹⁶ Respondent's Memorial on Jurisdiction ¶ 27.

¹⁷ *See, e.g.*, Respondent's Memorial on Jurisdiction ¶¶ 7, 66.

¹⁸ Respondent's Memorial on Jurisdiction ¶¶ 241, 289.

¹⁹ Respondent's Memorial on Jurisdiction ¶ 32.

²⁰ *See, e.g.*, Respondent's Memorial on Jurisdiction ¶ 75.

f. It raises defenses that are bereft of support or simply opposite to what the law says, such as the domicile objection against Mr. Sastre,²¹ a blanket allegation that Claimants have to meet all requirements at “all relevant times”,²² that Mr. Sastre’s claims are an abuse of process and expired,²³ or that all the Investments were illegal²⁴ – none of which are true.

13. Regarding the last objection, illegality, Respondent cannot point to a single provision in the law that says that Claimants’ investments were illegal. Instead, Respondent’s last shot is to muddy the waters and magnify mere *optional* formalisms that give notice to third parties, which Claimants were pursuing anyway.²⁵ It is a basic tenet that the non-registration of an interest (which was always an ameliorable situation) is not equivalent to “illegality,” much less when the ability to register belonged to the *ejido*, as Claimants’ agrarian law expert explains.²⁶ And the *ejido*, as well as all the relevant *ejido* members, gave their consent for Claimants to build their investments there.²⁷

14. In short, Respondent invokes every objection imaginable, regardless of merit, to try to escape its obligations. From the date of the takings until today, Respondent has come a very

²¹ Respondent’s Memorial on Jurisdiction ¶¶ 219, 226.

²² Respondent’s Memorial on Jurisdiction ¶¶ 72-73.

²³ Respondent’s Memorial on Jurisdiction ¶¶ 185, 228.

²⁴ *See, e.g.*, Respondent’s Memorial on Jurisdiction ¶¶ 172, 193, 264, 313, 349.

²⁵ *See, e.g.*, Respondent’s Memorial on Jurisdiction ¶¶ 109, 119.

²⁶ Expert Report of Lic. Sergio Bonfiglio ¶¶ 6, 201.

²⁷ Expert Report of Lic. Sergio Bonfiglio ¶¶ 7, 206.

long way from its past desire to “create favorable conditions for”, “encourage”, or “protect” investments, as it declared when it signed the Treaties.

15. Respondent’s disregard for its obligations and scorched-earth tactics to increase Claimants’ costs must not go unaddressed. Claimants will seek a reasonable costs order at the appropriate moment.

* * *

16. In this Counter-Memorial, Claimants set forth their case for jurisdiction and refute Respondent’s meritless objections:

- a. Section II rectifies Respondent’s mischaracterization of the burden and standard of proof rules that govern this arbitration;
- b. Section III lays out how each of the Claimants meet the jurisdictional requirements applicable to his or her Treaty;
- c. Section IV refutes Respondent’s objections, each of which is entirely unfounded;

17. This submission is accompanied by the factual exhibits, legal authorities, and the following fact witness statements:

- Witness statement of Mr. Carlos Sastre, owner of the *Tierras del Sol* and *Hamaca Loca* investments;
- Witness statement of Mr. Renaud Jacquet, owner of the *Behla Tulum* investment;
- Witness statement of Mr. Nuno Silva, co-owner of the *Uno Astrolodge* investment;
- Witness statement of Ms. Mónica Galán, co-owner of the *Hotel Parayso* investment.

18. Further, this submission is accompanied by the expert report of Lic. Sergio Bonfiglio, former Commissioner of the Agrarian Law Section of the Mexican Bar, which certifies that

Claimants' investments were located within ejido lands and were not illegal, contrary to Respondent's unfounded characterization.

19. As such, Claimants and their Investments are protected under the Treaties, and this dispute is within the jurisdiction of this Tribunal.

II. CLAIMANTS MEET THEIR BURDEN OF PROOF

20. Respondent's position is that in their Notice of Arbitration, Claimants must prove every jurisdictional allegation and conclusively negate every conceivable jurisdictional defense.²⁸ This view is misguided and unsupported in public international law. This Section clarifies the standard of proof applicable to bifurcated proceedings during the jurisdictional phase.

Specifically:

- a. Merits allegations are taken as true and jurisdictional claims and objections must be proven under a preponderance or balance of probabilities standard (Section II.A);
- b. Claimants bear the burden to prove their jurisdictional claims, while Respondents bear the burden to prove jurisdictional objections and defenses (Section II.B)
- c. Claimants discharge their burden of proof *at the conclusion of the jurisdictional phase*, and not at the moment of filing as Respondent argues (Section II.C).
- d. Finally, Claimants refute Respondent's blanket assertion that every jurisdictional requirement must be met at the moment of investment, the time of the violation, and the moment of filing (Section II.D). Claimants address each point in turn.

²⁸ Respondent's Memorial on Jurisdiction ¶ 72.

A. STANDARD OF PROOF: MERITS ARE TAKEN AS TRUE AND JURISDICTIONAL CLAIMS ARE EVALUATED UNDER A PREPONDERANCE STANDARD

21. The Higgins test (also called the *Oil Platforms* test) adopted by most tribunals provides the most sensible approach to evaluate Claimants' allegations at the jurisdictional phase. For bifurcated proceedings, during the jurisdictional stage the tribunal (1) assumes merits allegations to be true, until they are evaluated at a later stage,²⁹ and (2) evaluates jurisdictional allegations throughout the jurisdictional phase using the applicable evidentiary standard:

The only way in which, in the present case, it can be determined whether the claims of [Claimant] are sufficiently plausibly based upon the [Treaty] is to *accept pro tem the facts as alleged by [Claimant] to be true* and in that light to interpret Articles I, IV, and X [of the Treaty] for jurisdictional purposes—that is to say, to see if on the basis of [Claimant's] claims of fact there *could* occur a violation of one or more of them.

...

The Court should thus see if, on the facts as alleged by [Claimant], the [Respondent's] actions complained of might violate the Treaty articles. *Nothing in this approach puts at risk the obligation of the Court to keep separate the jurisdictional and merits phases...* and to protect the integrity of the proceedings on the merits.... What is for the merits—and which remains pristine and untouched by this approach to the jurisdictional issue—is to determine what exactly the facts are, whether as finally determined they do sustain a violation of [the Treaty] and if so, whether there is a defence to that violation.... In short, it is at the merits that one sees “whether there really has been a breach.”

...

[the Permanent Court of International Justice is] at liberty to adopt *the principle which it considers best calculated to ensure the*

²⁹ See also *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014 ¶ 143, CLA-0011 (“The *Oil Platforms* test, applied by tribunals in cases such as *Impregilo v. Pakistan*, requires the tribunal to ask, not whether the claims do disclose violations of the treaty, *but rather whether the claims are capable of amounting to violations of the treaty on the basis of the facts alleged by the claimant*, so that the tribunal has jurisdiction to entertain those claims.”) (emphasis supplied).

administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law.”³⁰

22. The reason for this approach is fairness. The purpose of the jurisdictional phase is to evaluate jurisdictional claims and objections. It would be counter to basic fairness to require claimants to prove the merits during the jurisdictional phase, just as it would be to require them to prove their jurisdictional claims at the moment they file a claim.³¹

23. For this reason, most investor-State tribunals have adopted and applied the Higgins test in the jurisdictional phase.³² Concerning the first step of the Higgins test, Tribunals have consistently applied it to assume merits allegations to be true during the jurisdictional phase.³³ For example, the tribunal in *Impregilo v. Pakistan* found it had jurisdiction to proceed to the merits after it “considered whether the facts as alleged by the Claimant in this case, if

³⁰ *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, 1996 ICJ 803, 856, ¶¶ 28-34, 12 December 1996 (Separate Opinion of J. Higgins), CLA-0030

³¹ *Id.*

³² See, e.g., *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Dec. on Jurisdiction and Rec. on Provisional Measures, 21 March 2007 ¶ 85 (citing the tribunals in *Impregilo* and *Bayinder* and asserting that it “agrees with this test, which is in line with the one proposed by Judge Higgins in her dissenting opinion in *Oil Platforms*”), CLA-0036.

³³ See, e.g., *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Dec. on Jurisdiction, 12 February 2010 ¶¶ 43-51 (“It is well accepted that, at the jurisdictional stage, Claimant need not prove the facts that it alleges in order to state a claim over which this Tribunal has jurisdiction. All Claimant needs to do is to allege facts that, if proven at the merits stage, could constitute a violation of Treaty protections.”), CLA-0037; *Jan de Nul N.V., et al. v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 2006 ¶¶ 69-71, CLA-0023; *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014 ¶ 143, CLA-0011; *Pan American Energy LLC v. Argentine Republic*, ICSID Case No. ARB/03/13 & ARB/04/8, Dec. on Preliminary Objections, 27 July 2006 ¶ 50 (“[A] claimant should demonstrate that *prima facie* its claims fall under the relevant provisions of the BIT for the purposes of jurisdiction of the Centre and competence of the tribunal (but not whether the claims are well founded).”), CLA-0032.

established, are capable of coming within those provisions of the BIT which have been invoked.”³⁴

24. The decision on jurisdiction in *Sistem v. Kyrgyzstan* is particularly illustrative for this case.³⁵ There, the claimant made a prima facie showing that it met the definition of “investor” and “investment” in connection with a hotel business. Yet, the respondent objected that the claimant’s underlying contract and share purchase agreement “were found retrospectively to be illegal” and that claimant did not make a “real contribution.” Thus, respondent argued, the tribunal should decline jurisdiction.³⁶

25. The *Sistem* tribunal rejected respondent’s analysis and instead applied the Higgins test. The tribunal reasoned that “[t]he equivalent step in the present case is to take the evidence put forward by the Claimant and to consider, in the light of the observations of the Respondent, whether those facts could disclose the existence of an “investment.”³⁷ The tribunal agreed with Higgins that “it is not necessary to determine that the facts actually do constitute a breach of the treaty when dealing with jurisdiction, and that no such determination could be made without venturing into the merits.”³⁸

26. Turning to the facts, the tribunal observed that “there is no suggestion that the [subject agreements] are forgeries.” Any dispute about their effect under Kyrgyz law “is a matter

³⁴ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Dec. on Jurisdiction, 22 April 2005 ¶ 254, CLA-0021.

³⁵ *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Decision on Jurisdiction, 13 September 2007, CLA-0058

³⁶ *Id.* ¶ 90.

³⁷ *Id.* ¶ 91 (internal quotations omitted).

³⁸ *Id.*

appropriate to be addressed during a consideration of the merits.”³⁹ The claimant made a showing that it was an investor—by virtue of its allegations substantiated by documentary evidence. The tribunal concluded that it was “sufficient for the Tribunal to determine that it may proceed to consider the merits of the case if there is an instrument that gives jurisdiction over investment disputes arising between Sistem and the Kyrgyz Republic.” The tribunal rejected Kyrgyzstan’s objections and Sistem was allowed to proceed to the merits after its prima facie showing.⁴⁰

27. Concerning the second step of the Higgins test, claimants need only make a prima facie showing for jurisdiction. If so, the allegations are accepted *pro tem*—they are presumed to be true. If Respondent counters with a central fact, then the Tribunal applies a balance of probabilities standard.⁴¹ The tribunal in *Bayinder v. Pakistan* concluded that “the Tribunal should be satisfied that, if the facts or the contentions alleged by [the claimant] are ultimately proven true, they would be capable of constituting a violation of the BIT.”⁴² After citing several investor-State cases that followed the Higgins test, the tribunal cited the formulation in *Plama v. Bulgaria*, which held that “if on the facts alleged by the Claimant, the Respondent’s actions

³⁹ *Id.* ¶ 92.

⁴⁰ *Id.* ¶¶ 92, 96.

⁴¹ See, e.g., *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006 ¶ 68 (“The onus is on the Claimant to show what is alleged to constitute expropriation is at least capable of so doing. There must, in other words, be a prima facie case that the BIT applies.”), CLA-0044; *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, 21 December 2012 ¶ 324 (“While Claimants must make a prima facie showing that their investment comes within the protections of the Treaty, Respondent has not, with this objection, raised any issue of fact to counter Claimants’ showing.”), CLA-0043.

⁴² *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Dec. on Jurisdiction, 14 November 2005 ¶ 194, CLA-0004.

might violate the [BIT], *then the Tribunal has jurisdiction* to determine exactly what the facts are and see whether they do sustain a violation of that Treaty.”⁴³

28. The *Bayinder* tribunal synthesized the plethora of decisions representing this majority view, and formulated the Higgins test as follows:

[T]he Tribunal will apply a *prima facie* standard, both to the determination of the meaning and scope of the BIT provisions and to the assessment whether the facts alleged may constitute breaches. If the result is affirmative, jurisdiction will be established, but the existence of breaches will remain to be litigated on the merits.⁴⁴

29. The Higgins test likewise applies here. Based on the above-cited jurisprudence, the analysis should proceed as follows:

30. First, Claimants’ merits allegations in this jurisdictional phase should be accepted *pro tem*. This means that the allegations are to be accorded a presumption of truth.⁴⁵

31. Second, each Claimant need only set forth a *prima facie* showing that the elements of jurisdiction are satisfied.⁴⁶ The Tribunal shall then review these facts to evaluate whether they

⁴³ *Id.* ¶ 195 (quoting *Plama v. Bulgaria*, ICSID Case No. ARB/03/24, Dec. on Jurisdiction 8 February 2005, ¶ 119) (emphasis supplied).

⁴⁴ *Id.* ¶ 197.

⁴⁵ See *Impregilo v. Pakistan* ¶ 263; *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010 ¶ 47 (“Claimant need not prove the facts that it alleges in order to state a claim over which this Tribunal has jurisdiction. All Claimant needs to do is to allege facts that, if proven at the merits stage, could constitute a violation of Treaty protections. That is, absent exceptional circumstances, the Tribunal will evaluate whether the acts and omissions of Respondent, taken as they are alleged by Claimant, are capable of making out a Treaty violation—*leaving it to the merits stage for Claimant to prove those allegations.*”) (emphasis supplied) (internal footnotes omitted), CLA-0037.

⁴⁶ That is, jurisdiction *ratione personae*, *ratione materiae*, *ratione temporis*, and *ratione voluntatis*.

would, if true, give rise to a cognizable treaty violation. If so, the Tribunal has jurisdiction over the dispute.⁴⁷

32. Third, after each Claimant makes his or her *prima facie* case, Respondent may present its own evidence to show whether any jurisdictional element is not met. The tribunal will then review any competing facts and arguments by the Parties and apply the preponderance of the evidence standard (or “balance of probabilities”) to determine if jurisdiction exists.

33. As set forth in this submission, Claimants proffer ample evidence beyond a mere preponderance that this Tribunal has jurisdiction *ratione personae*, *ratione materiae*, *ratione temporis*, and *ratione voluntatis*. This evidence includes (i) the allegations and documentary exhibits contained in the Amended Notice of Arbitration served on 14 June 2019, (ii) additional documentary exhibits attached to this submission, (iii) the Claimants’ witness statements, and (iv) an expert report on agrarian law prepared by Lic. Sergio Bonfiglio. Under the uncontested standard described above, this Tribunal has jurisdiction over these Claims.

B. RESPONDENT OMITTS ITS BURDEN OF PROOF FOR ITS JURISDICTIONAL OBJECTIONS AND DEFENSES

34. Respondent places the burden on Claimants to prove that none of Respondent’s objections are valid. For example, Respondent says that Claimants bear the burden to prove:

- a. That the claims are not precluded by illegality;
- b. That the claimants did not have a “dominant” Mexican nationality;

⁴⁷ Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic, LCIA Case No. UN 7927, Preliminary Objections to Jurisdiction, 19 September 2008 ¶¶ 59-66, CLA-0038 (asserting that the *prima facie* test is appropriate for evaluating jurisdictional allegations); SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Award on Jurisdiction, 6 August 2003 ¶ 145 (“[W]e consider that if the facts asserted by the Claimant are capable of being regarded as alleged breaches of the BIT, consistently with the practice of ICSID tribunals, the Claimant should be able to have them considered on their merits.”) (internal citation omitted), CLA-0059.

- c. That Mr. Sastre is not excluded from treaty protection because of domicile;
- d. That Mr. Sastre, Mr. Silva, and Ms. Abreu did not renounce their nationality, despite establishing their Argentine or Portuguese nationality.⁴⁸

35. Respondent is attempting to invert the burden of proof under the Higgins test by arguing that Claimants are required to “prove a negative.” Respondent has no basis for this position. Respondent also fails to articulate what burden it bears with respect to *its objections and defenses*. Claimants discuss Respondent’s correct burden and standard of proof below.

36. *First*, Respondent carries the burden to prove its jurisdictional objections and defenses. The maxim *onus probandi incumbit actori* (the party that asserts must prove) has been widely recognized by tribunals to determine which party bears the burden of proof. Respondent’s Memorial muddles any distinction between Claimants’ and its own burden. Respondent appears to argue that Claimants must prove all facts to prove conclusively each of their jurisdictional allegations, *and* disprove conclusively any conceivable defense by Respondent.

37. A brief glance of investment treaty decisions belies Respondent’s position. Tribunals have routinely ruled that respondents bear the burden to prove their jurisdictional objections and

⁴⁸ Respondent’s Memorial on Jurisdiction ¶ 26.

defenses, including but not limited to abuse of process,⁴⁹ illegality,⁵⁰ *ratione temporis* objections,⁵¹ and prescription period objections.⁵²

38. For example, in *Teinver v. Argentina*, the tribunal held that with respect to illegality, Respondent bears the burden of proof. Argentina argued that claimants and their investments were involved in an alleged fraudulent diversion of funds arising from bankruptcy proceedings.⁵³ These alleged acts embroiled claimants in an ongoing criminal investigation.⁵⁴ Yet the tribunal observed that the lack of relevant evidence as to whether claimants made the investment in violation of Argentine law required dismissal. “[W]here a *prima facie* showing of the legality of an investment is made, the onus is on the respondent to demonstrate that the investment was not made in accordance with the legislation of the state receiving the investment.”⁵⁵

⁴⁹ See, e.g., *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, 1 June 2012 ¶¶ 2.13-2.14, CLA-0060; *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019 ¶ 785, CLA-0061.

⁵⁰ See, e.g., *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018 ¶¶ 229-30 (“The Tribunal considers that the Respondent bears the burden of proving illegality.”), CLA-0111; *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016 ¶ 5.59 (holding that respondent failed to meet its burden to prove illegality), CLA-0062; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/01, Award, 21 July 2017 ¶ 362, CLA-0043.

⁵¹ See, e.g., *Lao Holdings N.V. v. Lao People’s Democratic Republic I*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014 ¶ 66 (observing that respondent conceded that it accepts the burden of proving that the dispute arose before the critical date), CLA-0110.

⁵² See, e.g., *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017 ¶ 307 (confirming that “the parties agree that Respondent has the burden of proof with respect to its affirmative defenses of collateral estoppel, *res judicata*, statute of limitations and abuse of process”), CLA-0109.

⁵³ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/01, Award, 21 July 2017 ¶ 360, CLA-0043.

⁵⁴ *Id.* ¶¶ 361-62.

⁵⁵ *Id.* ¶ 362.

39. Tribunals have held similarly for consent-based objections. In *Caratube and Hourani v. Kazakhstan*, Respondent asserted many objections, including that the claims fell beyond the prescription period (referred to in the decision as statute of limitations), and that Claimants committed an abuse of process.⁵⁶ The tribunal observed that “the parties agreed” that respondent bore the burden of proof for *all* of the referenced objections and defenses.

40. As such, Respondent here bears the burden to prove its purported jurisdictional objections raised in its memorial, namely:

- a. Its objection that the seized hotels do not constitute protected “investments” under each respective Treaty because of illegality;
- b. Its objection that there is no consent under the Treaties for a multiparty arbitration proceeding, or what Respondent has labeled an “auto-consolidation”;
- c. Its objection that certain Claimants did not adhere to a domicile requirement;
- d. Its objection that “dominant and effective nationality” somehow applies in this case;
- e. Its objection concerning treaty shopping or abuse of process;
- f. Its objection that certain Claimants did not comply with his or her respective Treaty’s prescription period; and
- g. Its objection that certain Claimants waived their nationality such that they do not meet the definition of “investor” in their respective Treaty.

41. Regarding the standard of proof, tribunals have consistently held that Respondent must prove its objections and defenses by the preponderance of the evidence or the balance of probabilities standard. For example, the *Glencore v. Colombia* tribunal referenced *actori*

⁵⁶ *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017 ¶ 307, CLA-0109.

incumbit probatio to explain how Colombia was subject to the preponderance of the evidence standard to sustain its objection.⁵⁷

42. For some objections, Respondent must meet an elevated standard. This is true for allegations of corruption.⁵⁸

43. As set forth in Section IV, Respondent falls short of meeting its burden with respect to its objections.

C. RESPONDENT CONFUSES THE UNCITRAL NOTICE OF ARBITRATION REQUIREMENTS WITH THE BURDEN TO PROVE JURISDICTION THROUGHOUT THE PROCEEDING

44. Respondent argues that Claimants were required to prove all jurisdictional elements in its Amended Notice of Arbitration.⁵⁹ This contention is extreme, and Respondent offers no relevant support for it. Respondent merely cites to three decisions,⁶⁰ which instead stand only for a different, uncontroversial principle—that a claimant may resubmit an arbitral claim after correcting a jurisdictional flaw.⁶¹ These cases simply do not support Respondent’s argument.

⁵⁷ Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6, Award, 27 August 2019 ¶¶ 668-70, CLA-0063.

⁵⁸ *See, e.g.*, Energoalians SARL v. Republic of Moldova, UNCITRAL, Award, 23 October 2013 ¶ 261 (confirming that the standard of proof for claims of corruption and fraud as grounds against claimants to challenge their jurisdiction is high), CLA-0064.

⁵⁹ Respondent’s Memorial on Jurisdiction ¶ 27.

⁶⁰ Respondent’s Memorial on Jurisdiction, n. 19.

⁶¹ *See, e.g.*, Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award, 22 August 2012 ¶ 281 (“The Claimant remains at liberty, however, upon satisfaction of the Treaty’s conditions precedent to arbitration, to assert any retrospective MFN claims it may have in any future arbitration proceeding....”), RL-022. The other two cases presented similar, correctable defects that the prospective claimants were allowed to remedy before refiled their claims.

45. The UNCITRAL Rules reject Respondent's position. Article 3(3) of the Rules outlines the seven requirements that a notice of arbitration must contain.⁶² All of these elements are present in Claimant's Amended Notice of Arbitration ("ANOA"). Claimants' ANOA goes even beyond these requirements by including numerous jurisdictional allegations and documentary exhibits to substantiate Claimants' status as protected investors with valid investments under each of their respective Treaties.

46. Article 3(3) also includes three *optional* elements that a claimant may include in the notice, two of which are present in the ANOA. Although a claimant *may* submit a full statement of claim together with their notice of arbitration as provided in Article 3(4)(c), the text of the rule plainly makes it optional, at the discretion of the claimant. Nowhere in Article 3 or anywhere else in the UNCITRAL Rules does it state that Claimants must prove all of its jurisdictional elements within the notice of arbitration.

47. Indeed, Respondent's position is untenable because such a requirement would obviate the need for this jurisdictional phase at all. There would be no purpose in undertaking two rounds of submissions, one round of document requests, and a hearing, if Claimants could not present their jurisdictional case supplemented by fact and expert witnesses and the relevant documents.

Likewise, Respondent's theory does not specify at which point Respondent would be required to discharge its burden for its jurisdictional objections and defenses. Respondent's theory is simply contrary to the UNCITRAL Rules and to common arbitral practice, whereby Claimants file

⁶² UNCITRAL Arbitration Rules (1976), Art. 3(3). ("The notice of arbitration shall include the following: (a) A demand that the dispute be referred to arbitration; (b) The names and addresses of the parties; (c) A reference to the arbitration clause or the separate arbitration agreement that is invoked; (d) A reference to the contract out of or in relation to which the dispute arises; (e) The general nature of the claim and an indication of the amount involved, if any; (f) The relief or remedy sought; (g) A proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon"), CLA-0050.

notice with a basic description of the claim, followed by one or more rounds of written submissions for the parties to present their substantive arguments and supporting evidence, and eventually a hearing.⁶³

48. Thus, each Claimant discharges its burden of proof *here in this jurisdictional phase*. In this submission, they set forth the jurisdictional facts,⁶⁴ substantiated through witness statements, documentary exhibits, and an expert report, that establish jurisdiction under his or her respective Treaty. Claimants also disprove each of Respondent’s objections. As such, this Tribunal has jurisdiction and Claimants deserve a hearing on the merits.

D. RESPONDENT MISCHARACTERIZES THE “ALL RELEVANT TIME PERIODS” REQUIREMENT WITH RESPECT TO CERTAIN JURISDICTIONAL ELEMENTS

49. Respondent discusses three “relevant time periods” for analyzing investor or host State conduct.⁶⁵ These time periods are (i) the moment of investment, (ii) the moment of the treaty violation, and (iii) the moment of filing an arbitral claim. Claimants agree that some of these time periods are relevant to certain jurisdictional questions. But Respondent goes too far in asserting that Claimants must show that *all* jurisdictional requirements apply at *all three* time periods.⁶⁶ This is another blanket proposition that is belied by investor-State practice.

⁶³ See generally Redfern and Hunter at 6.61 (describing how the UNCITRAL Rules recognize that the written submissions, submitted after the notice of arbitration, nonetheless reflect that “the initial written statements delivered by the parties are not to be considered as definitive of the parties’ respective positions,” because the Rules reference “documents or other evidence” to be submitted later in the proceedings), CLA-0065

⁶⁴ See Section III, *infra*.

⁶⁵ Respondent’s Memorial on Jurisdiction ¶ 72.

⁶⁶ Respondent’s Memorial on Jurisdiction ¶ 71 (“La falta de evidencia por parte de las Demandantes para demostrar cualquiera de estos requisitos en cualquiera de estos momentos relevantes impedirá a este Tribunal tener jurisdicción....”).

50. For example, Respondent argues that a claimant must prove nationality at the moment of investment to avoid dismissal of the claim.⁶⁷ Yet we know that this is not so. Investors may change nationality during the course of an investment and obtain jurisdiction to arbitration under the new nationality. What matters is the nationality of the investor when the dispute arose.⁶⁸

51. Another example resides within the legality requirement, which Respondent insists must be proven by Claimants at the moment of investment, at the moment of breach, and at the moment of filing. Setting aside that Respondent’s proposal would impermissibly shift the burden from Respondent to Claimants as discussed in Section II.B, Respondent’s blanket “all relevant times” requirement concerning legality is incorrect. It is axiomatic in investment treaty law that

⁶⁷ Respondent’s Memorial on Jurisdiction ¶ 72.

⁶⁸ See, e.g., *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, 1 June 2012, CLA-0060 ¶¶ 2.96-2.110 (holding that a change in the claimant’s nationality should not be considered an abuse of process or affect jurisdiction if it was made in good faith before the occurrence of any event or measure giving rise to a later dispute); *Serafín García Armas and Karina García Gruber v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-03, Decision on Jurisdiction, 15 December 2014, CLA-0066 ¶¶ 214-18 (asserting that the nationality of the claimants at the time of the investment is *not relevant* to determine whether an investor has standing, because the only relevant dates are the date of the alleged violation and the date on which the arbitral proceeding commences); *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, CLA-0067 ¶ 191 (confirming that for ICSID jurisdiction, claimants must demonstrate their nationality on three dates: the date of the alleged breach, the date the claim was submitted to ICSID, and the date that ICSID registered the claim). See also *Ioan Micula and others v. Romania I*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008 ¶ 154, CLA-0068 (“[T]he Tribunal considers that the time at which the dispute arose is the relevant and decisive question for purposes of determining the scope of the Parties’ consent under Article 9 of the BIT and thus the Tribunal’s jurisdiction”); *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015 ¶ 149 CLA-0069 (“The determination of the critical date is thus essential for the assessment of the Tribunal’s jurisdiction *ratione temporis*. In the Tribunal’s view, the critical date is the one on which the State adopts the disputed measure, even when the measure represents the culmination of a process or sequence of events which may have started years earlier.”); *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015 ¶ 533 CLA-0070 (agreeing with *Gremcitel* and stating that “In conclusion, for purposes of the *ratione temporis* objection the critical date is the date when the State adopts the disputed measure”).

the Tribunal shall *only* assess the legality of the investment at the time in which the investment was made.⁶⁹

52. Further, Respondent’s position is unworkable in practice. Over the life of an investment, there could be certain optional or required formalisms under national law that an investor did not follow. For example, an inadvertent lapse to renew a license on time, or not completing an optional registration at a local records office. Under Respondent’s theory, these moments would result in a loss of investment protection because Claimants were not in compliance “at all relevant times.” These loopholes would allow host States to evade their BIT obligations entirely.

53. Thus, 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, as Respondent alleges. Respondent’s theory is an oversimplification. The times that are relevant vary by claim and objection, as shown by the two examples above, and must be analyzed more carefully than Respondent’s argument suggests.

III. THIS TRIBUNAL HAS JURISDICTION TO HEAR EACH OF THE CLAIMS

54. As discussed in this section, the Tribunal has jurisdiction *ratione personae*, *ratione materiae*, *ratione temporis*, and *ratione voluntatis*. Thus, Claimants *meet their burden to*

⁶⁹ See, e.g., Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, 28 July 2015, CLA-0071 ¶ 420 (confirming that the relevant time for the determination of the legality requirement is *when the investment is made*, and that any subsequent alleged breach of law would not affect whether the investment qualifies for treaty protection); Copper Mesa Mining Corporation v. Republic of Ecuador, PCA Case No. 2012-2, Award, 15 March 2016 [Redacted], CLA-0062 ¶ 5.54 (asserting that illegality constitutes, at most, a jurisdictional bar that applies to the time when the investment was made and *does not extend* to the subsequent operation, management or conduct of the investment); Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39, Award, 26 July 2018, CLA-0111 ¶ 303 (holding that the only relevant time at which legality is to be assessed for jurisdictional purposes is the time at which the alleged investment was made).

establish each of their jurisdictional claims. By contrast, Respondent fails to meet its burden regarding its jurisdictional objections and defenses, as discussed in Section IV.

A. THE TRIBUNAL HAS JURISDICTION *RATIONE PERSONAE* OVER EACH OF THE CLAIMS

55. As discussed below, each of the Claimants qualifies as an investor under his or her corresponding Treaty.

56. Article 1 of the BIT between Argentina and Mexico defines investment and investor as “every physical or legal person that makes or has made an investment and that, being a physical person, is a national of one of the Contracting Parties” or “being a legal person, is formed under the laws of a Contracting Party and is based in the territory of that Contracting Party.”⁷⁰

Likewise, the Annex to this BIT states that investors “can, on their own behalf or on behalf of an association, partnership, or company of the other Contracting Party that is a legal person that belongs to or is under the direct or indirect control of the Investor . . . submit a claim to arbitration” alleging breach of this BIT.

57. Mr. Sastre is an Argentine national,⁷¹ and thus a protected investor under this BIT.⁷² He may bring this arbitration “on his own account and on behalf of an association, partnership or company of [Mexico]” such as CETSA and HLSA, which is “under [...] direct or indirect control of” Mr. Sastre.⁷³

⁷⁰ Argentina Mexico BIT, Art. 1.

⁷¹ See passport of Mr. Carlos Sastre, Exhibit C-0004.

⁷² Mr. Álvaro Urdiales is also an Argentine national and as such he is an investor under this Treaty. Passport of Mr. Álvaro Urdiales, CS-0014.

⁷³ Though not required to show this under the Argentina-Mexico BIT, Mr. Sastre also committed significant resources from Argentina in the establishment of his investment. Witness Statement of Carlos Sastre ¶ 10.

58. The France-Mexico BIT allows an “investor” of one Contracting Party to submit a claim to international arbitration against the other Contracting Party.⁷⁴ The BIT defines “investors” as “nationals, i.e. physical persons possessing the nationality of either Contracting Party.”⁷⁵ Mr. Jacquet is a national of France.⁷⁶ He therefore is an “investor” of France eligible to submit a claim against Respondent under this Treaty.⁷⁷

59. The Portugal-Mexico BIT allows an “investor” of one Contracting Party to submit a claim to international arbitration against the other Contracting Party.⁷⁸ The BIT defines an “investor” as “natural persons having the nationality of either Contracting Party, in accordance with its laws and regulations.”⁷⁹ Ms. Abreu and Mr. Silva are nationals of Portugal.⁸⁰ They are thus each an “investor” of Portugal eligible to submit a claim against Respondent under this Treaty.⁸¹

60. Finally, NAFTA allows an “investor of a Party” to submit a claim to international arbitration.⁸² NAFTA defines an “investor of a Party” as “a national or an enterprise of such

⁷⁴ France-Mexico BIT, Art. 9.

⁷⁵ France-Mexico BIT, Art. 1(2).

⁷⁶ French passport of Mr. Jacquet, Exhibit C-0005.

⁷⁷ Though not required to show this under the France-Mexico BIT, Mr. Jacquet also committed significant resources from France in the establishment of his investment. Witness Statement of Renaud Jacquet ¶ 10.

⁷⁸ Portugal-Mexico BIT, Art. 9.

⁷⁹ Portugal-Mexico BIT, Art. 1(3).

⁸⁰ Portuguese Passports of Ms. Abreu and Mr. Silva, Exhibits C-0007, C-0008 and NS-0002.

⁸¹ Though not required to show this under the Portugal-Mexico BIT, Ms. Abreu and Mr. Silva also committed significant resources from Portugal in the establishment of their investment. Witness Statement of Nuno Silva ¶ 8.

⁸² NAFTA, Ch. 11, Art. 1116(1).

Party.”⁸³ NAFTA also defines a “national” as “a natural person who is a citizen or permanent resident of a Party.”⁸⁴ Ms. Galán and Mr. Alexander are citizens of Canada.⁸⁵ They therefore are each a “national” of Canada and thus an “investor of a [NAFTA] Party” eligible to submit a claim against Respondent under NAFTA.⁸⁶

61. Respondent alleges that Ms. Galán and Mr. Alexander’s investments “are property of” Rancho Santa Monica Developments Inc. (“RSM”), because Ms. Galán sold her interest to RSM. Respondent further alleges that Claimants did not inform the Tribunal of the existence of RSM, and that since RSM is not a Claimant, then the documents evidencing the investments “are materially deficient.”⁸⁷ Each of these statements is incorrect.

62. *First*, as shown by Claimants, Ms. Galán and Mr. Alexander, as representative of RSM, rescinded their agreement to transfer the investment to RSM and agreed to share equally in the investment.⁸⁸ Upon their marital separation, Ms. Galán and Mr. Alexander confirmed this understanding and expressly agreed to divide the investment equally, which they continued to own and control individually.⁸⁹

⁸³ NAFTA, Ch. 11, Art. 1139.

⁸⁴ NAFTA, Ch. 2, Art. 201(1).

⁸⁵ See Passports of Aguilar Alexander and Galan Rios, Exhibits C-0009 and C-0010.

⁸⁶ Though not required to show this under the NAFTA, Ms. Galán and Mr. Alexander also committed significant resources from Canada in the establishment of their investment. Witness Statement of Mónica Galán ¶ 11.

⁸⁷ Respondent’s Memorial on Jurisdiction ¶¶ 258-63.

⁸⁸ Witness Statement of Mónica Galán ¶ 14. RSM formally rescinded the purchase on 21 September 2015. Sole Director Resolution, MG-0024.

⁸⁹ Galán and Alexander Separation Agreement (redacted) 10 September 2015, Exhibit C-0024-Resubmitted.

63. *Second*, Claimants did not “fail to inform” the Tribunal of the existence of RSM, particularly as Respondent itself acknowledges that the power of attorney submitted by Claimants expressly references a power over RSM.⁹⁰ Respondent cannot have it both ways.

64. *Third*, 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*.”⁹¹ Respondent’s claim that indirect ownership is “deficient” has no merit, as the Treaty expressly protects these investments.

65. Hence, each of the Claimants is an “investor” under his or her respective Treaty.

B. THE TRIBUNAL HAS JURISDICTION *RATIONE MATERIAE* OVER EACH OF THE CLAIMS

66. As discussed below, each of the Claimants has a protected investment under the corresponding Treaty.

67. The Argentina-Mexico BIT broadly defines an “investment” as “every type of asset invested by investors of one Contracting Party in the territory of the other Contracting Party It includes in particular, but not exclusively . . . movable and immovable property, as well as other real property rights,” “shares . . . and any other type of participation in associations, partnerships, or companies,” and investments “made by associations, partnerships, or companies of one Contracting Party whose equity is majority owned by investors of the other Contracting Party.”⁹²

⁹⁰ Respondent’s Memorial on Jurisdiction ¶¶ 258-63.

⁹¹ NAFTA Art. 1139.

⁹² Argentina Mexico BIT, art. 1.

68. Mr. Sastre's business activities fall within the Treaty's definition of "investment." Mr. Sastre invested in CETSA and its assets, and held 98% of the company shares.⁹³ He negotiated and acquired the possession, use and enjoyment of a beachfront lot.⁹⁴ On that lot, he developed, owned, and controlled the hotel, restaurant, and tourism enterprise known commercially as *Tierras del Sol*.⁹⁵

69. Mr. Sastre also negotiated and acquired all of the assets and rights of HLSA from its shareholders including Mr. Urdiales.⁹⁶ Mr. Urdiales was the HLSA shareholder who acquired the possession, use, and enjoyment of a beachfront lot,⁹⁷ as HLSA developed, owned, and controlled the enterprise known commercially as *Cabañas Hamaca Loca* ("*Hamaca Loca*").⁹⁸ Thus, (i) the possession, use, and enjoyment of both hotel lots, (ii) the enterprise, business participation, and shares in CETSA and HLSA and (iii) the hotel and tourism enterprises are "assets" and thus "investments" under the Argentina-Mexico BIT.

70. The France-Mexico BIT broadly defines "investment" as "every kind of asset, such as goods, rights and interest of whatever nature, including property rights, acquired or used for the purpose of economic benefit or other business purposes, and in particular though not exclusively

⁹³ CETSA Partnership Agreement, Transitory Cl. 2, C-0002.

⁹⁴ See Assembly Resolution of 28 April 1994, C-0045; Ejido Certificate of Possession, Use, and Enjoyment in favor of Mr. Sastre, 21 December 2002, C-0046; CETSA Transfer of Rights Agreement, C-0012.

⁹⁵ Witness Statement of Carlos Sastre ¶¶ 7-27.

⁹⁶ Hamaca Loca Transfer of Rights and Resolution, 12 June 2017, C-0003.

⁹⁷ Assembly Resolution of 28 April 1994, C-0045; Ejido Certificate of Possession, Use, and Enjoyment in favor of Mr. Urdiales, 24 May 2006, C-0015; Hamaca Loca Transfer of Rights Agreement, 1 March 2001, C-0014-Resubmitted.

⁹⁸ Notarized HLSA Assembly Act, Cl. 2, CS-0013.

. . . [m]ovable and immovable property as well as any other right in rem such as mortgages, liens, usufructs, pledges and similar rights.”⁹⁹

71. Mr. Jacquet negotiated two commodatum agreements for the possession, use, and enjoyment of two contiguous beachfront lots.¹⁰⁰ He developed the facilities for a tourism enterprise known commercially as *Behla Tulum* and a specialty liquor shop known commercially as *La Tente Rose*.¹⁰¹ Thus, the possession, use, and enjoyment of the lots, the business interests in the hotel and tourism enterprise and in the liquor shop are "assets" and thus “investments” under the France-Mexico BIT.¹⁰²

72. The Portugal-Mexico BIT defines an “investment” expansively as “every kind of asset and rights invested,” including “[m]ovable and immovable property, acquired or used for economic purposes, as well as any other rights in rem, such as mortgages, liens, pledges and similar rights” and “shares, stocks, debentures, or other forms of interest in the equity of

⁹⁹ France-Mexico BIT, Art. 1.1.

¹⁰⁰ See Ejido Certificate of Agrarian Rights, 26 July 1990, and Certificate of Possession, Use, and Enjoyment in Favor of Rogelio Novelo, 30 April 1994, C-0047; Transfer of Rights Agreement Between Rogelio Novelo and Irma Villareal with Addendum, 6 April 1999 and 2 June 1999, RJ-0006, Ejido Certificate of Possession, Use, and Enjoyment in Favor of Mauricio Román, 5 August 2006, C-0049; Addendum to Transfer of Rights Agreement, 1 May 2006, RJ-0008; Transfer of Rights Agreement Between Mauricio Román and Abodes Mexico, 15 August 2007, RJ-0009; Transfer of Rights Agreement Between Irma Villareal and Mauricio Román, 2 January 2008, C-0051; Commodatum Agreement Between Mr. Román and Mr. Jacquet (North Parcel), 10 January 2008, C-0053; Commodatum Agreement Between Mr. Román and Mr. Jacquet (South Parcel), 10 January 2008, C-0052.

¹⁰¹ Witness Statement of Renaud Jacquet ¶¶ 17, 20.

¹⁰² Until 2007, Mr. Jacquet and his late wife used a business entity named Abodes Mexico S.A. de C.V. to manage the investment. However, in 2008 Mr. and Ms. Jacquet decided to manage the investment in Mr. Jacquet’s personal capacity. Witness Statement of Renaud Jacquet, ¶ 15, n. 17.

companies or other forms of participation and/or economic interests from the respective activity.”¹⁰³

73. Mr. Silva and Ms. Abreu negotiated and acquired possession, use, and enjoyment of two contiguous beachfront lots.¹⁰⁴ They developed the facilities for a hotel, yoga studio, and tourism enterprise known commercially as *Uno Astrolodge*.¹⁰⁵ Thus, the possession, use, and enjoyment of the lots, and the business interests in the hotel, yoga, and tourism enterprise are “assets” and thus constitute an “investment” in accordance with the Portugal-Mexico BIT.

74. NAFTA defines an “investment” to include among other things:

an enterprise; an equity security of an enterprise; a debt security of an enterprise where the enterprise is an affiliate of the investor . . . a loan to an enterprise where the enterprise is an affiliate of the investor . . . an interest in an enterprise that entitles the owner to share in income or profits of the enterprise [. . .] real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes” and “interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory.”¹⁰⁶

75. Ms. Galán and Mr. Alexander negotiated and acquired possession, use, and enjoyment of a beachfront lot.¹⁰⁷ They developed the facilities for a hotel, commercial spaces, and a tourism

¹⁰³ Portugal-Mexico BIT, Art. 1(1).

¹⁰⁴ Transfer of Rights Agreement Between Cástulo Jiménez and Karla Gutiérrez, 15 December 2000, C-0054; Transfer of Rights Agreement Between Cástulo Jiménez and Margarida Abreu, 22 October 2003, C-0020; Transfer of Rights Agreement Between Karla Gutiérrez and Margarida Abreu, 28 November 2003, C-0021; Ejido Certificate of Possession, Use, and Enjoyment in Favor of Margarida Abreu, 25 June 2006, C-0055; Commodatum Agreement Between Margarida Abreu and Nuno Silva, 25 June 2007, C-0056; General Power of Attorney from Margarida Abreu to Nuno Silva, 30 April 2011, C-0057.

¹⁰⁵ Witness Statement of Nuno Silva ¶ 14.

¹⁰⁶ NAFTA, Ch. 11, Art. 1139.

¹⁰⁷ Ejido Certificate of Agrarian Rights, 25 July 1990, and Certificate of Use, and Enjoyment in Favor of Rogelio Novelo, 30 April 1994, MG-0006; Transfer of Rights Agreement Between Rogelio

enterprise known commercially as *Hotel Parayso*.¹⁰⁸ Thus, the property interests, and the business interests in the hotel, commercial spaces, and tourism enterprise constitute an “investment” in accordance with the NAFTA.

* * *

76. Respondent alleges that Claimants have not shown that the Investments “existed.” But this is plainly refuted by the facts and the statements of Respondent’s own officials. Each of the hotels operated in their respective locations for *approximately one decade* in the territory of Respondent.¹⁰⁹ Claimants built their hotels within the property boundaries indicated in the documents issued by the ejido authority.¹¹⁰ Respondent also issued several licenses, permits, and other documents that confirm not only that the investments “existed,” but that Respondent *knew* of the existence, location, and nature of the investments.¹¹¹ And even the court representative

Novelo and Mónica Galán, 28 April 2004, C-0023; Ejido Certificate of Use, and Enjoyment in Favor of Mónica Galán, 25 June 2006, C-0060; Galan and Alexander Separation Agreement (Redacted), 10 September 2015, C-0024-Resubmitted (evidencing the agreement to divide ownership of the investment between Ms. Galán and Mr. Alexander).

¹⁰⁸ Witness Statement of Mónica Galán ¶ 20.

¹⁰⁹ See Witness Statement of Carlos Sastre ¶ 14; Witness Statement of Renaud Jacquet ¶ 30; Witness Statement of Nuno Silva ¶ 4; Witness Statement of Mónica Galán ¶ 47.

¹¹⁰ Expert Report of Lic. Sergio Bonfiglio ¶¶ 5, 91, n. 28, 111, 129, 153, 172, 189; see also Photos of Tierras del Sol, CS-0006, see also Photos of Hamaca Loca C-0016, see also Photos of Uno Astrolodge, C-0072, see also Photos of Behla Tulum, RJ-0022, see also Photos of Hotel Parayso, MG-002; Geographical Location of the Investments by Topographer, SB-0009.

¹¹¹ See, e.g., Witness Statement of Carlos Sastre ¶ 16; Witness Statement of Renaud Jacquet ¶¶ 12, 17; Witness Statement of Nuno Silva ¶¶ 19, 27; Witness Statement of Mónica Galán ¶¶ 21-30; see also Construction Regularization License [Parayso], 8 March 2006, MG-0008; Certificate of Land Use [Parayso], 8 March 2006, MG-0009; Federal Concession Title [Parayso], 13 February 2007, MG-0010; Operating License [Parayso], 31 January 2011, MG-0017; Construction Regularization License [Uno Astrolodge], 8 July 2015, NS-0011; Certificate of Land Use [Uno Astrolodge], 8 July 2015, NS-0012; Operating License [Uno Astrolodge], 9 June 2014, NS-0013; ZOFEMAT, Municipal Treasury, Federal Zone Office Receipt [Uno Astrolodge], 10 March 2016, NS-0016; Construction Regularization License [Behla], 5 October 2012, RJ-0012; Certificate of Land Use [Behla], 5 October 2012, RJ-0014; Operating License [Behla], 31 December 2012, RJ-0017; ZOFEMAT, Municipal Treasury, Federal Zone Office Receipt [Tierras del Sol], 2 March 2010, CS-0009, p. 1; Certificate of Land Use [Tierras del Sol], 6 April

conducting the seizures in 2011 and 2016 stated in his written declaration that each the hotels “existed” before taking them from Claimants.¹¹²

77. Thus, each of the Claimants has an “investment” under the corresponding Treaty.

C. THE TRIBUNAL HAS JURISDICTION *RATIONE TEMPORIS* OVER EACH OF THE CLAIMS

78. All of the Investment Treaties were in force on the date of the violation of the Treaties, as summarized below:¹¹³

Treaty	Date of Entry into Force	Duration of Treaty Violations ¹¹⁴
Argentina-Mexico BIT	22 June 1998	2011-2015
France-Mexico BIT	12 October 2000	2016-2019
Portugal-Mexico BIT	4 September 2000	2016-2019
NAFTA	1 January 1994	2016-2019

79. The temporal requirements are met here. All of the Investment Treaties were in force at the moment of Respondent’s violations.¹¹⁵

2011, CS-0008; Operating License [Tierras del Sol], 19 November 2004, 23 March 2004, CS-0009, p. 8-9; Commercial Land Use License [Hamaca Loca], 11 February 2011, C-0068; Land Use License [Hamaca Loca], 24 April 2009, C-0069; Construction License [Hamaca Loca], 24 April 2009, C-0069.

¹¹² Written Declaration Court Representative of Luis Miguel Escobedo Pérez, 31 October 2011, C-0040; Written Declaration of Court Representative María Elena Anaya Reyes, 17 June 2016, C-0041.

¹¹³ Respondent alleges that under the Treaties Claimants are required to prove that they were investors, had investments, and the investments were legal under Respondent’s law at the moment of establishment of the investments, date of the violations, and the date of filing the claim. Respondent’s Memorial on Jurisdiction ¶ 71. As discussed in Section II.D, this is incorrect.

¹¹⁴ As discussed in Section IV.D.3, Claimants obtained knowledge of Treaty violations several years after the seizures, due to publication of investigative reports alleging involvement and planning by officials of Respondent.

¹¹⁵ Each of the Treaties continues to be in force including NAFTA, which will be in force until 1 July 2023 after it was replaced by the USMCA. United States, Mexico, Canada Agreement (“USMCA”), *entered into force* 1 July 2020, Annex 14-C para. 3 (A Party’s consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.”).

D. THE TRIBUNAL HAS JURISDICTION *RATIONE VOLUNTATIS* OVER EACH OF THE CLAIMS

80. Each of the Claimants satisfied the notice requirements of each Treaty. On 15 June 2017 and on 6 September 2017, Mr. Sastre sent in writing a notice of intent to submit this dispute to arbitration with respect to the *Tierras del Sol* and *Hamaca Loca* investments, respectively.¹¹⁶ On 17 January 2019, the remaining Claimants sent in writing a notice of intent to submit this dispute to arbitration¹¹⁷ with respect to the *Behla Tulum*, *Uno Astrolodge*, and *Hotel Parayso* investments.¹¹⁸

81. After waiting the requisite time period after sending the notice of intent under the Argentina-Mexico BIT, on 29 December 2017 Mr. Sastre delivered the Notice of Arbitration under the UNCITRAL Rules for the *Tierras del Sol* and *Hamaca Loca* investments. On 14 June 2019 Claimants amended the Notice of Arbitration to include the *Behla Tulum*, *Uno Astrolodge*, and *Hotel Parayso* investments.

82. Claimants have met the prescription period requirements of the Treaties and consented to this UNCITRAL arbitration. Respondent does not object that Claimants have met the prescription period requirements under the France-Mexico BIT, the Portugal-Mexico BIT, and the NAFTA.

¹¹⁶ Sastre Notices of Intent, C-0032 and C-0033.

¹¹⁷ Abreu, Silva, Jacquet, Alexander, and Galán Notices of Intent to Arbitrate, C-0034.

¹¹⁸ Respondent claims that Mr. Sastre, Ms. Galán, and Mr. Alexander have not adequately notified Respondent of their intent to submit a claim. Respondent's arguments lack merit and contradict documents in the record, as detailed in Section IV.D.1.

83. Mr. Sastre has also met the prescription period requirements under the Argentina-Mexico BIT. Under Article 1(2) of the Annex to the BIT, the prescription period is four years counted from the date of knowledge (actual or constructive) of a Treaty violation:

The investor must submit a claim under this Agreement, as soon as the investor has knowledge of the alleged breach, as well as knowledge of losses or damages suffered, or at the latest within a period of four years from the date on which the investor should have had knowledge of it.¹¹⁹

84. As elaborated in Section IV.D.3, Mr. Sastre's claims meet this requirement. *First*, it was not until 2015 that Mr. Sastre gained actual or constructive knowledge of intent and planning by Respondent's officials to take his investment. At the time of the physical seizure of *Tierras del Sol* in 2011, Mr. Sastre believed that the scheme was orchestrated solely by a private individual.¹²⁰ *Second*, 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. *Third*, Respondent through its courts violated the obligation to accord fair and equitable treatment (including denial of justice) and protection against unlawful expropriation under the Treaty. These violations crystallized with the Federal *Juzgado Segundo de Distrito* in Quintana Roo decision in 2015. Under any of these independent bases, Mr. Sastre's claims fall squarely within the prescription period included in the Argentina-Mexico BIT.

¹¹⁹ The original Spanish language provision reads: "El inversor deberá presentar una reclamación conforme a este Acuerdo, tan pronto como haya tenido conocimiento del presunto incumplimiento, así como de las pérdidas o daños sufridos, o a más tardar en un período de cuatro años contados a partir de la fecha en la cual debió haber tenido conocimiento de ello."

¹²⁰ Witness Statement of Carlos Sastre ¶ 58.

85. Finally, Respondent has consented to UNCITRAL arbitration pursuant to each of the Investment Treaties.¹²¹ Consent is thus perfected in this arbitration.

IV. RESPONDENT FAILS TO MEET ITS BURDEN FOR ITS JURISDICTIONAL OBJECTIONS

86. As noted in Section II.B, Respondent bears the burden of proving its objections; and as discussed in Section II.C, Respondent must meet that burden to the appropriate evidentiary standard.

87. Respondent has set forth several objections to jurisdiction. Yet Respondent fails to either present any legitimate basis for the objection, misses the legal point at issue, or simply fails to present the evidence required to support the objection. As such, *every* objection by Respondent fails. Claimants address each of these objections in turn.

A. RESPONDENT FAILS TO SHOW THAT THE TRIBUNAL LACKS THE AUTHORITY TO HEAR THE CLAIMS TOGETHER AS A PROCEDURAL MATTER

88. Respondent presents two objections targeting the authority of this Tribunal to hear the Claims in a single proceeding. First, it argues that each Claimant must satisfy the requirements of his or her Treaty *and the requirements of the other three Treaties*. Second, it persists in characterizing this proceeding as an “auto-consolidation.” Neither of these claims has any basis as discussed here.

1. Mexico’s “Accumulation” Argument Is Entirely Unsupported

89. Respondent argues that, because this is a multiparty proceeding, then Claimants must *each* satisfy every jurisdictional requirement of *all four* Treaties invoked in this arbitration.¹²²

¹²¹ See Argentina-Mexico BIT at Art. 10; France-Mexico BIT at Art. 9; Portugal-Mexico BIT at Art. 10; NAFTA at Art. 1122.

¹²² Respondent’s Memorial on Jurisdiction ¶¶ 66-68.

Consequently, Respondent contends, if a Claimant fails to meet a single requirement from any of the four Treaties, then the Tribunal must dismiss for lack of jurisdiction. Respondent goes even further—if any one claim fails at the jurisdictional stage, then the entire arbitration proceeding must be dismissed.¹²³ This contention has no basis in law, fact, or logic.

90. Respondent presents this “cumulative requirement” theory without pointing to a single arbitral decision or treatise that recognizes this purported rule. Instead, Respondent contorts the Vienna Convention and names three principles without any citations or analysis:

- a. The maxim *ut res magis valeat quam pereat* (the terms of a treaty should be given meaning rather than assumed to be void);
- b. the principle of equality or proportionality between the parties; and
- c. the principle of good faith.

91. Respondent’s superficial analysis is actually contrary to the principles Respondent invokes. In fact, this reading of the Vienna Convention supports Claimants’ position that each individual claimant need only comply with the requirements of his or her *respective* Treaty.

92. *First*, Claimants’ position preserves *ut res magis valeat quam perea* by giving meaning to the terms of each Treaty. Each Treaty’s requirements are given full effect with respect to *the nationals of that Contracting State*. For example, Claimant Galán is a Canadian national. Each of NAFTA’s requirements are given full effect with respect to Ms. Galán, as she must meet NAFTA’s definition of “investor” with a qualifying “investment” and must satisfy NAFTA’s notice of intent and other consent requirements in order to bring an arbitration claim. In this same vein, Claimant Jacquet must satisfy the requirements of the France-Mexico BIT in order to

¹²³ *Id.* ¶ 68.

bring his claim. The terms of each Treaty are given full effect for the individual Claimant who is invoking its protection.

93. Respondent’s theory would force Claimant Galán to comply with the requirements of all four Treaties in this dispute, even though Ms. Galán is not a national of Argentina, France, or Portugal. This approach is nonsensical, and it is not how investor-State arbitration works.

94. *Second*, Respondent’s argument that the principle of equal treatment is threatened if Claimants are allowed to bring their claims together is incoherent. Respondent’s ability to present its defenses remains unchanged whether Claimants bring their claims in a single proceeding or separately. Respondent’s demand to create new consent requirements for each Claimant simply has no basis in investor-State practice.

95. *Third*, Respondent’s argument regarding the principle of good faith misses the mark.¹²⁴ Respondent’s position that Claimants would be “evading their obligations” in “bad faith” and in a manner that “harms” Respondent is based on a false assumption. None of the Claimants are “evading obligations” because each Claimant must satisfy the requirements of his or her respective Treaty. No more, no less.

96. *Finally*, Respondent’s position cannot be reconciled with the numerous decisions on the merits arising from multiparty, multi-treaty arbitrations.¹²⁵ These tribunals asserted jurisdiction without reference to any “cumulative requirements” as Respondent proposes here. Respondent

¹²⁴ See Respondent’s Memorial on Jurisdiction ¶¶ 67.

¹²⁵ See, e.g., *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, ¶¶ 334-47, (finding in a dispute involving the Bolivian BITs with the United States and the United Kingdom that the UNCITRAL 1976 tribunal has jurisdiction to hear a multi-treaty arbitration because each claimant perfected its consent individually), CLA-0019; *EDF International S.A. and others. v. Argentine Republic*, Award, ICSID Case No. ARB/03/23, 11 June 2012 (involving three claimants invoking two separate treaties, the France-Argentina BIT and the Luxembourg-Argentina BIT), CLA-0013.

does not provide a single case where a tribunal has imposed a cumulative requirement on a group of claimants.

97. Thus, Respondent fails to meet its burden with respect to this objection, or even show that such a “cumulative requirement” even exists. Respondent’s objection is meritless and is counter to the practice followed by multiple investor-State tribunals conducting multiparty and multi-treaty proceedings.

2. Respondent Continues to Mischaracterize This Multiparty Proceeding

98. In its memorial, Respondent clings to its position that this Tribunal somehow lacks jurisdiction in this proceeding because Respondent has not consented to a so-called “auto-consolidation.” Despite devoting over twelve pages of its Memorial to this objection, Respondent raises the same arguments as before, with no new case law and a strained interpretation of the Vienna Convention. Respondent’s arguments do not seriously challenge Claimants’ showing of jurisdiction *ratione voluntatis*, much less carry the burden to sustain an objection.

99. Claimants’ prior submissions provide ample legal support for the proposition that this Tribunal has jurisdiction *ratione voluntatis* to hear this multiparty arbitration.¹²⁶ Claimants invite the Tribunal to consult these materials that examine the interplay between the express consent requirements of the Treaties, and the Tribunal’s plenary authority over procedural matters.

100. Claimants’ analysis is straightforward. Each Claimant perfected his or her consent under their respective Treaty to bring an arbitration claim against Respondent. Upon completing this jurisdictional milestone, the Claimants nominated an arbitrator for the three-person Tribunal of this multiparty proceeding. Claimants did so because the underlying facts, legal claims, and

¹²⁶ See Cl. Submission in Opp. To Bifurcation and Supp. of a Multiparty Proceeding ¶¶ 14-51.

violations by Respondent are largely identical. Respondent followed suit with its own nomination, and the full Tribunal was impaneled soon after.

101. Because the decision to hear a multiparty arbitration is a procedural matter, the Tribunal retains the ultimate authority to decide whether to adjudicate the claims in one proceeding or several. This authority arises from Article 15.1 of the UNCITRAL Rules, which gives the Tribunal broad powers to manage the proceedings. Because the shared nexus of law and fact among the Claims in this dispute favor a multiparty arbitration, Claimants respectfully request that this Tribunal adjudicate these Claims together in a hearing on the merits.¹²⁷

102. The tribunal in *PV Investors v. Spain* faced a similar objection, and its *ratione voluntatis* analysis is instructive:¹²⁸

The fact that claims are brought in one arbitration by multiple claimants without the need for a respondent’s “specific” or “additional” consent is rather the natural consequence of the peculiar nature of consent in investment treaty arbitration.¹²⁹

103. The *PV Investors* tribunal described this consent as “arbitration without privity” which is “a standing offer to arbitrate [that] is extended by the host state in a treaty to an indefinite number of previously unidentified investors.” Finding agreement with *Abaclat* and *Ambiente*, the tribunal held:

¹²⁷ See *id.* ¶ 33 (outlining the shared factual and legal issues linking the Claimants, investments, and Claims in this proceeding).

¹²⁸ *PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14, Preliminary Award on Jurisdiction, 13 October 2014 ¶¶ 100-14, CLA-0072.

¹²⁹ *Id.* ¶ 100.

a *joint acceptance of the state's offer* by a multitude of claimants cannot result in the tribunal losing jurisdiction that it would have if the claimants had commenced separate arbitrations.¹³⁰

104. The *PV Investors* tribunal highlights that “[n]o valid analogy can be made between *ab initio* aggregate proceedings and *ex post* consolidation.”¹³¹ The tribunal also noted that it was not aware of “a single case where a tribunal has declined jurisdiction based on the fact that there was more than one claimant. To the contrary, investment treaty arbitration practice is replete with examples of proceedings which have involved more than one claimant.”¹³²

105. The same is true here. Put simply, Respondent demands that this Tribunal be the first ever to decline jurisdiction because Claimants brought their claims under a single proceeding. The arguments mustered by Respondent do not seriously challenge Claimants’ *ratione voluntatis* position, much less carry the burden for its jurisdictional objection. Claimants address each of Respondent’s stated grounds below.

106. *First*, Respondent’s adoption of the self-styled catchall term “auto-consolidation” to describe multiparty arbitrations is inherently misleading.¹³³ Consolidation is a term of art for a situation where two or more *already-existing* tribunals and proceedings are dissolved and merged into one. Respondent uses the term “auto-consolidation” to describe a consolidation made without Respondent’s consent.¹³⁴ But that is not what happened here. There has been no consolidation. Instead, as described above, Claimants have filed their claims *together*, making

¹³⁰ *Id.* (emphasis added).

¹³¹ *Id.* ¶ 102.

¹³² *Id.* ¶ 103.

¹³³ Respondent’s Memorial on Jurisdiction ¶ 40.

¹³⁴ Respondent’s Memorial on Jurisdiction ¶ 30.

this a multiparty proceeding. In its Working Paper on rule proposals on consolidation, the ICSID Secretariat explained the relationship between consolidation, joinder, and multiparty claims:

Consolidation is the joinder of two or more ongoing proceedings that were commenced separately. ***Consolidation differs from multiparty claims*** mainly in respect of timing: consolidation brings together two or more pending claims, whereas multiparty claims are initiated by multiple claimants or against multiple respondents from the start....¹³⁵

107. Multiparty proceedings involving two or more claimants are ubiquitous—about forty percent of ICSID cases are multiparty arbitrations.¹³⁶ On the other hand, consolidations are rare—presumably because they impact the party autonomy of a *claimant* to appoint an arbitrator.

108. Viewed in this light, these proceedings neatly fit the definition of a multiparty proceeding. Claimants have agreed to bring their treaty claims together as part of a single proceeding. They agreed on a single party-appointed arbitrator, choice of counsel, and the management of shared costs. At the moment the Claimants filed the Amended Notice of

¹³⁵ ICSID Secretariat, Proposals for Amendment of the ICSID Rules – Working Paper at 835-36, CLA-0049.

¹³⁶ See, e.g., ICSID Secretariat, Proposals for Amendment of the ICSID Rules – Working Paper, at 833 (2018); see also Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad, ICSID Case No. ARB/05/12, ¶¶ 14-15, 188-207 (finding that the tribunal has jurisdiction to hear in a single proceeding multiple claims brought by various claimants under various legal instruments, including a treaty, an investment agreement, and a contract), CLA-0028; Funnekotter and others v. Zimbabwe (ARB/05/6), Award (April 22, 2009) (unrelated investors alleging expropriation due to land acquisition legislation), CLA-0112; OKO Pankki Oyj and others v. Estonia (ARB/04/6), Award, (proceedings brought under the Estonia - Germany 1992 and Estonia - Finland 1992 BITs), CLA-0031; Suez et al v. Argentina, ARB/03/19, Decision on Liability, July 30, 2010 (multiparty proceeding brought by unrelated joint venture investors), CLA-0042. See also von Pezold and others v. Zimbabwe (ARB/10/15), Award (July 28, 2015), CLA-0045; Ioan Micula, Viorel Micula and others v. Romania (I), ICSID Case No. ARB/05/20, Award, 11 December 2013, CLA-0027; Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine, ICSID Case No. ARB/08/8, Award, 1 March 2012, CLA-0022; Teinver and others v. Argentina, ICSID Case No. ARB/09/1, Award, 21 July 2017, CLA-0043; Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Dec. on Jurisdiction, 8 March 2017, CLA-0024; Cube Infrastructure v. Spain, ICSID Case No. ARB/15/20, Award, 15 July 2019, CLA-0010; Magyar Farming and others v. Hungary, ICSID Case No. ARB/17/27, Award, 13 November 2019, CLA-0026.

Arbitration, there was no other constituted tribunal, no procedural order, and no statement of claim. The *only* tribunal that has ever existed to hear these Claims is *this Tribunal*.

109. As detailed in Section III.D, each Claimant has perfected his or her consent under their applicable Treaty to initiate an arbitration claim against Respondent. Now that each Claimant has accepted Respondent's standing offer for arbitration in accordance with his or her Treaty, the decision to adjudicate these claims as a multiparty proceeding is a procedural matter that rests with the Tribunal.

110. *Second*, Respondent cites to Articles 31 and 33 of the Vienna Convention and argues that the principles of *pacta sunt servanda* and *pacta tertiis* bar a third party from creating new rights or obligations without the consent of a party. Respondent stretches these concepts to conclude that Claimants cannot add any obligations to host States, particularly since the Treaties are "silent concerning auto-consolidation."¹³⁷

111. Respondent's erroneous application of the Vienna Convention misses the mark. If anything, *Respondent* is trying to impose additional conditions and consent requirements outside of the four corners of the Treaties. Claimants have each accepted Respondent's standing offer to consent. Respondent cannot now create new rights (for itself) or obligations (against Claimants) to rewrite the requirements under the Treaties.

112. As it did for the bifurcation briefs, Respondent again relies on one arbitral award, *Alemanni v. Argentina*, to support its position.¹³⁸ But even *Alemanni* rejected Respondent's theory, and ordered a multiparty hearing on the merits for all claimants who properly alleged claims against Argentina. The only claimants excluded from the multiparty proceeding were

¹³⁷ Respondent's Memorial on Jurisdiction ¶ 52.

¹³⁸ *Id.* ¶¶ 43-47.

those who failed to allege a valid dispute.¹³⁹ That is not the case here. As discussed in Section III, each Claimant has alleged a valid dispute. After multiple attempts, Respondent again fails to identify a single arbitral decision sustaining a jurisdictional objection because the claims were brought by multiple claimants in a multiparty proceeding.

113. As discussed below, this Tribunal can hear the Claims together because this is a procedural decision. There are many legal and factual similarities among the Claims that favor a multiparty proceeding, and Respondent’s “numerosity” contention is unpersuasive.

a. The Decision to Conduct a Multiparty Arbitration is Procedural, and not Jurisdictional

114. Respondent next argues that the procedural rules of the Treaties trump those of the UNCITRAL Rules. Claimants agree that if a Treaty provision conflicts squarely with the UNCITRAL Rules, the Treaty governs. But that situation is not present here. It bears no relation to whether multiparty arbitration is permitted under the Treaties. The Treaties are silent as to multiparty arbitrations because it is a procedural issue, and not jurisdictional in nature.¹⁴⁰ The UNCITRAL Rules plainly contemplate multiparty arbitrations, and Article 15.1 empowers the tribunal to manage the proceedings as it sees fit.

115. Respondent has no answer to the plain fact that this Tribunal has the authority granted by Article 15.1. Instead, all Respondent can do is try to frame this as a “consent” issue. It is not. Because this decision is procedural and not jurisdictional, and because of the shared similarities

¹³⁹ See *Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8, ¶ 327, CLA-0001.

¹⁴⁰ See, e.g., *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014 ¶¶ 343-44 (confirming that multiparty arbitrations do not require any additional consent from Respondent “beyond the general requirements” in the treaty, and that the issue is procedural, not jurisdictional), CLA-0019.

between the Claims as explained in greater detail below, this Tribunal should rule in favor of maintaining this multiparty arbitration.

b. The Tribunal Should Hear These Claims Together, Because It Promotes Efficiency and Other Policy Considerations

116. Investor-State tribunals often weigh several policy considerations when deciding whether to hear disputes brought by multiple claimants in a single proceeding. In a working paper, the ICSID Secretariat summarized the main policy considerations with respect to “consolidated” proceedings. Even though this case is a standard multiparty arbitration, and *not* a consolidation, the pros and cons highlighted in relevant part below are informative:

The policy arguments most often raised in favor of consolidation include the following:

- Avoidance of inconsistent or contradictory awards: a single Tribunal deciding cases on a consolidated basis will apply similar logic and outcomes will be consistent;
- Avoidance of parallel proceedings: consolidation avoids parallel proceedings [. . .]
- The time and cost of consolidated proceedings should be less than for multiple, individual proceedings, assuming the cases are sufficiently connected;
- By reducing time and cost, consolidation can enhance access to justice, especially for small and medium sized investors and developing States;
- Consolidation may promote better decision-making because the arbitrators have a more complete set of facts as context for their Award[.]

The main arguments made against consolidation are that:

- Consolidation, especially mandatory consolidation, limits a party’s autonomy to decide how and with whom to arbitrate a dispute ...;
- Consolidation may put parties at a strategic disadvantage by having to agree on common rules, strategy, arbitrators, schedules, witnesses, and legal argument ...;

- Consolidation may raise other complex case management issues, especially where numerous cases are consolidated. These include scheduling, how to hear the evidence of numerous parties, and how to assess damages and liability on an individual basis;
- Parties may have concerns about maintaining confidentiality in a consolidated case....;
- Consolidation can slow the progress of cases, especially at the beginning when the terms of consolidation are being established. However, once established, consolidation ought to reduce the time and cost overall of deciding the claims;
- It is virtually impossible to include every relevant party in any single consolidated case¹⁴¹

117. One commentator observed why multiparty arrangements in investor-State arbitration can be achievable and desirable:

Interpreting and applying different international investment agreements is achievable for two main reasons: First, modern international investment law and investment treaties, while they cannot be described as forming a fully consistent regime, *all share the same purpose and feature a certain degree of uniformity with respect to their core provisions and standards of protection. Second, such uniformity is more likely to exist among the investment treaties of the same State*

[. . .]

Because in multiparty proceedings involving shareholders there will typically be a single respondent (the host State), consistency among the different treaties that are invoked is more likely, thus potentially allowing the tribunal to coherently interpret and apply all the treaties.¹⁴²

118. As can be seen from the list compiled by the ICSID Secretariat, the drawbacks of consolidation (or a multiparty arbitration like this one) disproportionately harm the *claimants*.

¹⁴¹ ICSID Secretariat, Proposals for Amendment of the ICSID Rules – Working Paper at 836-37 (2018) (emphasis in original), CLA-0049.

¹⁴² Lukas Vanhonnaeker, Shareholders' Claims for Reflective Loss in International Investment Law at 334-35 (2020), CLA-0048.

Yet paradoxically, it is Respondent who here opposes hearing the Claims together. Respondent seeks to divide Claimants into individual proceedings, which inevitably will multiply each Claimant's costs and severely impair efficiency.

119. Each of the arguments in favor of hearing the Claims together is applicable here. *First*, it will result in significant time and cost savings, thus enhancing Claimants' access to justice.

Because the Claims share so many issues of law and fact, the time and cost of a combined proceeding will certainly be less than for multiple, individual proceedings forced to reinvent the wheel each time:

- 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;¹⁴³
- 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.

120. *Second*, hearing the Claims together will provide the Tribunal with greater information on the facts that led up to the dispute, including for example testimony and evidence provided by each of the Claimants as to Respondent's pattern of unlawful actions both before and during the seizures of the hotel investments at issue.

121. *Third*, consistency of awards and the avoidance of parallel proceedings is desirable here, in particular because all of the hotel properties that gave rise to this dispute were located within a few meters from each other and were unlawfully taken in two waves of seizures by Respondent. Inconsistent awards or parallel proceedings could lead to further confusion, especially given the geographic proximity among the Investments.

¹⁴³ Written Declaration of Court Representative Luis Miguel Escobedo Pérez, 31 October 2011, C-0040; Written Declaration of Court Representative María Elena Anaya Reyes, 17 June 2016, C-0041.

c. Respondent's reasons to not hear the same claims together fail

122. Respondent's contention that the claims are too dissimilar for a multiparty arbitration strains credulity. Respondent generally references "fourteen different investments" and "twenty-four different government measures" as evidence of the complexity of these Claims.¹⁴⁴

Claimants observe that some of these figures do not comport with the facts, and are not explained by Respondent. Also, the number of claims is irrelevant.¹⁴⁵ It bears no relationship to whether the claims have *factual and legal similarities*. Beyond the bare, unsupported numbers cited by Respondent, it cannot identify any material reasons that would warrant separate proceedings for the Claims. Instead, the plethora of shared legal and factual issues makes a multiparty arbitration ideal for efficiency reasons and to avoid inconsistent results.

123. This Tribunal clearly has the authority to hear the Claims before it in a single proceeding. The law governing this proceeding—the Treaties, the UNCITRAL Rules, and investor-State jurisprudence—confirm this Tribunal's discretionary power. Furthermore, the policy considerations on this issue overwhelmingly favor hearing the Claims in a single proceeding.

124. For the above reasons, Respondent fails to meet its burden to prove that this Tribunal lacks the authority to hear the Claims together.

B. RESPONDENT FAILS TO MEET ITS BURDEN TO PROVE ITS NATIONALITY AND DOMICILE-RELATED OBJECTIONS

125. Respondent argues that certain Claimants are not entitled to treaty protection because (i) they are predominantly Mexican, (ii) they renounced their nationality of origin, and effectively

¹⁴⁴ Respondent's Memorial on Jurisdiction ¶ 28.

¹⁴⁵ Indeed, the numbers referenced by Respondent pale in comparison to the approximately 60,000 claimants who participated in *Abaclat v. Argentina*. *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 ¶ 294, CLA-0051.

waived their treaty rights, and (iii) they were purportedly domiciled in Mexico. As set forth below, Respondent falls short of meeting its burden.

1. Respondent’s “Dominant and Effective Nationality” Objection is Inapplicable Here, and in any Event It Fails

126. Respondent’s next objection is that certain Claimants are dual nationals who must prove that their “dominant and effective nationality” was of the other Contracting State in order for this Tribunal to hear their claims. Respondent cannot possibly meet its burden because the Treaties do not invoke (or even mention) this limitation to nationality. As such, a “dominant and effective nationality” analysis has no place here.

127. The concept of “dominant and effective nationality” is a defined term of art in public international law that exists *outside* of investor-State jurisprudence. As such it has no relevance here unless a Treaty expressly includes it.

128. The term has its origins in an International Court of Justice (“ICJ”) decision, the *Nottebohm* case, and the subsequent *Mergé* case.¹⁴⁶ The *Nottebohm* tribunal held that Mr. Nottebohm could not obtain diplomatic protection from Liechtenstein because of a lack of “effective nationality.” That is, “the absence of any bond of attachment between Nottebohm and Liechtenstein” prevented Liechtenstein from taking up his claim before the ICJ. The Court reasoned that it was improper to allow Nottebohm to “substitute for his status as a national of a belligerent State [Nazi Germany] that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein.”¹⁴⁷

¹⁴⁶ *Nottebohm Case (Liechtenstein v. Guatemala)*, 1955 ICJ 1, CLA-0073; *Mergé Case*, Decision No. 55, June 10, 1955, Italian-United States Conciliation Commission, CLA-0074.

¹⁴⁷ *Nottebohm* at p. 26.

129. In the *Mergé Case*, the Italian-United States Conciliation Commission analyzed similar issues in determining whether a dual citizen of the two nations should be considered a United States national as defined by Article 78 of the Treaty of Peace, in order to assert claims for property damaged during World War II. The tribunal raised the issue of “effective and dominant” nationality, and asserted that the U.S. government shall be entitled to submit claims on behalf of dual nationals against Italy “whenever the United States nationality is the effective nationality.”¹⁴⁸ After applying a multi-factor test, the claims tribunal concluded that Mrs. Mergé could not be considered a U.S. national, and therefore the U.S. government was not entitled to present a claim against Italy on her behalf.¹⁴⁹

130. In recent years, the test has migrated into investment treaty law through its express inclusion by contracting States (most notably the United States) in a handful of bilateral investment treaties and trade protection agreements.¹⁵⁰

131. Even now, there are hardly any investor-State arbitration decisions that involve the dominant and effective nationality test. The reason why is simple—the analysis is *only* applicable if the subject investment treaty expressly includes the dominant and effective nationality test in its definition of “investor.”¹⁵¹

¹⁴⁸ *Mergé Case* at p. 247.

¹⁴⁹ *Mergé Case* at p. 248.

¹⁵⁰ *See, e.g.*, USA Model BIT, Section A, Art. 1, Definitions. (2004); CAFTA-DR, Art. 10.28; Colombia-USA TPA, Art. 10.28 (limiting the definition of “investor of a Party” by explaining that “a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality”).

¹⁵¹ *See Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 27 October 2015 ¶ 266 (applying the US-Oman FTA which expressly limits claims based on dominant and effective nationality), CLA-0075; *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Award, 3 September 2019 ¶ 553 (finding the dominant and effective nationality test applies in DR-CAFTA because it is expressly included in the Treaty), CLA-0076.

132. Against this jurisdictional backdrop, Respondent demands that this Tribunal take the unprecedented step to apply the dominant and effective nationality test when the subject Treaties make no mention of the standard. There is no legal or factual basis for the Tribunal to accept this dubious invitation.

133. As explained in greater detail in Section III(A), the four Treaties here define investors broadly as nationals of the Contracting State. And none of the four Treaties bar dual nationals from filing investment claims. 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*.¹⁵² Respondent is also no stranger to the dominant and effective test, as it negotiated its express inclusion in the Panama-Mexico FTA.¹⁵³

134. And to complete the analysis, Claimants observe that the UNCITRAL Rules are likewise silent as to the dominant and effective nationality test. The test simply does not apply in this case.

135. Respondent's Memorial does not point to a single award that applies this rule against an investor. Respondent instead musters two non-adjudicative sources to support its objection, neither of which are relevant to this analysis.

136. First, Respondent cites and block quotes a self-serving Contracting State Party Submission from the Government of the United States in connection with *Feldman v. Mexico*.¹⁵⁴ The cited language references the *Mergé Case* but otherwise does not explain how the test could

¹⁵² See, e.g., Mexico-Uruguay BIT (1999), Art. 1(3)(b) (“Sin embargo, este Acuerdo no se aplicará a inversiones realizadas por personas físicas que sean nacionales de ambas Partes Contratantes.”).

¹⁵³ Panama-Mexico FTA (2014), Art.10.1 (“una persona natural que tiene doble nacionalidad se considerará exclusivamente un nacional del Estado de su nacionalidad dominante y efectiva.”).

¹⁵⁴ Respondent's Memorial on Jurisdiction ¶ 77.

be applicable when not referenced in the treaty text. Tellingly, Respondent’s memorial neglects to reveal that the *Feldman* tribunal *rejected* this unorthodox approach to the dominant and effective test.¹⁵⁵ *Feldman* instead based its analyses on two grounds: (i) the definition of “national” in Chapter 11 and Article 201 of NAFTA is expansive, and grants protection to citizens and permanent residents of a Party, and (ii) the object and purpose of NAFTA is to promote investments and provide protection to foreign investors.¹⁵⁶ Thus, the *Feldman* tribunal refused to apply the dominant and effective test. *Feldman* actually supports Claimants’ position and cuts against Respondent’s position.

137. Second, Respondent cites to Professor Zachary Douglas who briefly references the dominant and effective nationality test in his treatise.¹⁵⁷ However, Prof. Douglas’ analysis focuses on the language of the USA Model BIT, which expressly includes the dominant and effective requirement as a limitation to the definition of investor.¹⁵⁸ As explained above, none of the four Treaties in this dispute includes such a requirement.

138. Respondent fails to meet its burden to sustain this objection concerning Claimants’ nationality. It asks the Tribunal to break with investor-State jurisprudence and become the first to sustain a dominant and effective nationality objection even though the Treaties give no textual reason to do so. And unlike other investments treaties signed by Respondent, the Treaties include no limitations on dual nationals. Again, Respondent cannot “write in” additional requirements

¹⁵⁵ Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Decision on Jurisdiction, 6 December 2000 ¶¶ 34-35, CLA-0077 (dismissing Respondent’s preliminary defense challenging nationality).

¹⁵⁶ *Id.*

¹⁵⁷ Respondent’s Memorial on Jurisdiction ¶ 78.

¹⁵⁸ RL-084, Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press (2009) at 322 ¶ 601.

that are not in the text of the Treaties. Respondent fails to meet its burden to prove this objection.

2. Respondent’s Waiver of Nationality and Rights with Respect to Ms. Abreu and Messrs. Sastre and Silva Fail

139. As a preliminary matter, Respondent alleges that Claimants bear the burden of proving that Messrs. Sastre and Silva and Ms. Abreu “have not waived their right to arbitrate against Respondent.”¹⁵⁹ This is incorrect. As explained in Section II.B, Respondent bears the burden to prove this allegation as the moving party.¹⁶⁰

140. In its Memorial, Respondent also alleges that Messrs. Sastre and Silva and Ms. Abreu have renounced their original nationalities and their respected treaty rights because they signed a boilerplate form letter before Mexican authorities.¹⁶¹ Both statements are based on a flawed understanding of nationality law in investor-State practice, and in any event Respondent fails to prove them. In this subsection, Claimants discuss the relevant law on waivers of nationality and treaty rights, and how Respondent fails to make its showing.

a. Applicable Law on Waiver of Nationality and Investor-State Treaty Rights

141. Under the Argentina-Mexico and Portugal-Mexico BITs, the nationality of an investor is determined by the laws of investor’s State of origin. Article One of the Argentina-Mexico BIT reads in relevant part:

3. “Investor” designates any natural or legal person who, makes or has made an investment, and who

¹⁵⁹ *E.g.*, Respondent’s Memorial on Jurisdiction ¶¶ 1, 9, 26, 70, 133.

¹⁶⁰ *See* Section II.B, *supra*.

¹⁶¹ Respondent’s Memorial on Jurisdiction ¶¶ 248, 359.

a) being a natural person, is a national of one of the Contracting Parties, *in accordance with its legislation*.¹⁶²

142. Similarly, Article 1 of the Portugal-Mexico BIT reads in relevant part:

3. “Investor” means:

a) natural persons having the nationality of either Contracting Party, *in accordance with its laws and regulations*.¹⁶³

143. Thus, to determine whether an investor is a national of his home State, one must analyze that country’s law.

144. The Treaties are silent on whether investors can waive the rights conferred to them by the Treaties. Tribunals 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, because they are the ones who negotiate the investment treaties. For example, the tribunal in *SGS v. Paraguay* stated that “there is a serious question whether individuals are capable of waiving rights conferred upon them by a treaty between two States.”¹⁶⁴

145. Tribunals have also been concerned with the serious effects that such waivers would have on investors’ rights, refusing to accept them unless they meet a very high bar. In *SGS v. Paraguay*, the tribunal focused on whether the investor knew the consequences of waiving its rights, especially given that the host State is presumed to know its own treaty obligations. The tribunal found no evidence of such intent by the investor and emphasized that silence in the purported waiver concerning the investment treaty at issue is not enough. The tribunal applied a

¹⁶² Argentina-Mexico BIT, Article 1, CLA-0003 (emphasis added) (translation by counsel).

¹⁶³ Portugal-Mexico BIT, Article 1, CLA-0034 (emphasis added).

¹⁶⁴ *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, n. 108, CLA-0037.

presumption: had such intent existed, the investor and the State would have made an express exclusion of rights under that particular treaty:

The *BIVAC* tribunal reasoned that because the claimant’s contract post-dated the BIT, it should take precedence: “[t]he parties could have included a provision in [the forum selection clause] to the effect that the obligations it imposed were without prejudice to any rights under the BIT, including the possible exercise of jurisdiction by” a treaty tribunal under the umbrella clause. While the same sequence is in play here—the Switzerland-Paraguay BIT entered into force in 1992, while the Contract was concluded in 1996—*we would reverse the presumption. Given the significance of investors’ rights under the Treaty, and of the international law “safety net” of protections that they are meant to provide* separate from and supplementary to domestic law regimes, *they should not lightly be assumed to have been waived.* Assuming arguendo that the parties to the later-in-time Contract could have expressly excluded the right to resort to arbitration under the extant BIT, at least as to Contract-based claims under Article 11, they did not do so—and *we would not take their silence as effecting that same waiver of Treaty rights.*

...

In the instant case, *there is no showing that the parties to the Contract clearly intended to exclude the jurisdiction of a tribunal formed under the Treaty* to review SGS’s Treaty claims. Paraguay, at least, must be deemed to have known the content of its own Treaty at the time its Ministry of Finance entered into the Contract; it either did not try, or did not obtain SGS’s agreement, to clearly waive SGS’s rights to seek separately arbitration of claims under the Treaty (necessarily including claims under Article 11 thereof).¹⁶⁵

146. Similarly, the tribunal in *SGS v. Philippines* rejected the view that such waiver can be made by private parties:

The jurisdiction of the Tribunal is determined by the combination of the BIT and the ICSID Convention. *It is, to say the least, doubtful that a private party can by contract waive rights or dispense with*

¹⁶⁵ *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010 ¶¶ 178-80, CLA-0037 (emphasis added).

the performance of obligations imposed on the States parties to those treaties under international law. Although under modern international law, treaties may confer rights, substantive and procedural, on individuals, they will normally do so in order to achieve some public interest.¹⁶⁶

147. The focus of the analysis is thus on whether the investor freely, clearly, and *specifically intended* to waive his rights, being aware of the possibility of a future treaty dispute and his right to arbitrate against Respondent in a neutral forum. As the tribunal in *Nissan v. India* stated:

While the Tribunal does not exclude the possibility that parties might by clear contract agree to opt-out of international arbitration of treaty claims, there must be persuasive evidence of any such opt-out, *including that the parties had in mind the possibility of future treaty claims and knowingly waived the right to arbitrate such claims in a neutral international forum.* The Tribunal thus agrees with prior tribunals that the right to access a particular dispute resolution forum offered in a treaty “should not lightly be assumed to have been waived.” Rather, there would have to be *direct and convincing evidence* that a party *intended* to do so, for example through an express waiver rather than one merely by inference or implication.¹⁶⁷

¹⁶⁶ SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004 ¶¶ 154, CLA-0078 (emphasis added).

¹⁶⁷ Nissan Motor Co., Ltd. v. Republic of India, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019 ¶ 271, CLA-0079. *See also* Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, 18 August 2008 ¶ 159, CLA-0080 (“It is true that the situation would be different had the Claimants *specifically* waived their right to invoke *the* Treaty. However, such a waiver, as the Claimants’ expert, Professor Dolzer, notes, would have to be explicit and this is not the case.” (emphasis added)); TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award, 19 December 2008 ¶ 58, CLA-0081 (“Thus, if the contract contains a specific clause on dispute settlement, this does not exclude recourse to the settlement procedure in the treaty, unless there is a *clear indication in the contract itself or elsewhere that the parties to the contract intended in such manner to limit the application of the treaty*”) (emphasis added); 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 ¶ 119, CLA-0082 (“the Tribunal will not imply a waiver or modification of ICSID jurisdiction without *specific indications of the common intention* of the Parties.” (emphasis added)).

Other tribunals have indicated that any compulsion or form of pressure by the State at the moment of the purported waiver would invalidate it. *Ulysseas, Inc. v. Ecuador*, Interim Award, 28 September 2010 ¶ 149, CLA-0083.

148. Respondent has shown none of the above, as discussed below.

b. Respondent Fails to Meet Its Burden to Prove that Mr. Sastre Renounced his Argentine Nationality or his Treaty Rights as a National of Argentina

149. Respondent alleges that in the ANOA Mr. Sastre has failed to “disprove” Respondent’s objection because he renounced his Argentine nationality and his Treaty rights.¹⁶⁸ This is incorrect.

150. *First*, as discussed in Section II.B, as the objecting party it is Respondent, not Mr. Sastre, who bears the burden to prove this objection.

151. *Second*, Respondent presents no relevant legal analysis showing that Mr. Sastre waived his Argentine nationality. To do so, Respondent would need to analyze Argentine law on renunciation of nationality and set forth sufficient facts proving that Mr. Sastre waived his nationality *under Argentine law*. Respondent provides neither. Nor can it. Argentina’s jurisprudence unequivocally establishes that Argentine nationality by birth cannot be waived.¹⁶⁹

152. *Third*, Respondent presents no facts showing that Mr. Sastre intended to waive his rights under the Argentina-Mexico BIT.¹⁷⁰ Respondent puts forth no evidence, as required by past investor-State tribunals referenced in the preceding subsection, that (1) Mr. Sastre and Respondent specifically discussed the Argentina-Mexico BIT or his investments, (2) Mr. Sastre and Respondent contemplated the possibility of a dispute, or (3) Mr. Sastre intended to waive his

¹⁶⁸ Respondent’s Memorial on Jurisdiction ¶¶ 246-47.

¹⁶⁹ Caso Simoliunas, Argentina National Election Chamber Court, C-0063. Thus, even if Mr. Sastre had surrendered his passport, or even if he had tried to waive his Argentine nationality before agencies of the Argentine State, neither of which he ever did, this would not be sufficient for a nationality waiver. Witness Statement of Carlos Sastre ¶ 6.

¹⁷⁰ See Section IV.2.a, *supra*.

rights. As Respondent concedes, the purported waiver document is a blanket boilerplate statement that is *silent* on these issues.¹⁷¹ Thus, the purported waiver has no legal effect on Mr. Sastre's Treaty rights. Silence is not enough,¹⁷² and as such Respondent's objection fails.

c. Respondent Fails to Meet Its Burden to Prove that Ms. Abreu and Mr. Silva Renounced their Portuguese Nationality or their Treaty Rights as Nationals of Portugal

153. Respondent alleges that Ms. Abreu and Mr. Silva failed to show that they are not excluded from jurisdiction because they renounced their Portuguese nationality and their Treaty rights.¹⁷³ Like with Mr. Sastre, this too is incorrect.

154. *First*, as discussed in Section II.B, as the objecting party it is Respondent, not Ms. Abreu and Mr. Silva, who bears the burden to prove this objection.

155. *Second*, Respondent presents no relevant legal analysis showing that Ms. Abreu and Mr. Silva waived their Portuguese nationality. Respondent makes no reference to *Portuguese law*, as it is required to do, on renunciation of nationality. Nor does Respondent present *any facts* proving that Ms. Abreu and Mr. Silva waived their nationality under Portuguese law. In fact, Portuguese law requires nationals seeking to waive their nationality to (1) apply before the relevant Portuguese government agencies and (2) pay a corresponding fee.¹⁷⁴ Respondent has not shown that Ms. Abreu and Mr. Silva have done either.

¹⁷¹ See R-032. See also Respondent's Memorial on Jurisdiction ¶¶ 243-45.

¹⁷² *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010 ¶¶ 178-80, CLA-0037 ("Given the significance of investors' rights under the Treaty . . . they should not lightly be assumed to have been waived . . . we would not take their silence as effecting that same waiver of Treaty rights.").

¹⁷³ Respondent's Memorial on Jurisdiction ¶¶ 246-47.

¹⁷⁴ See Lei n.º 37/81 de 3 de Outubro [Act no. 37/81 of 3 October], arts. 12, 16, C-0064 (declarations of loss of nationality must be recorded in central registry; effects of loss of nationality only take place after registration); Decreto-Lei n.º 237-A/2006 de 14 de Dezembro [Decree-Law no. 237-

156. *Third*, Respondent presents no facts showing that Ms. Abreu and Mr. Silva intended to waive their rights under the Portugal-Mexico BIT.¹⁷⁵ Respondent puts forth no evidence, as required by past investor-State tribunals as discussed above, that (1) Ms. Abreu or Mr. Silva discussed with Respondent the Portugal-Mexico BIT specifically or their investments, (2) Ms. Abreu and Mr. Silva contemplated the possibility of a dispute, or (3) that Ms. Abreu and Mr. Silva intended to waive their Treaty rights. As Respondent concedes, the purported waiver document is a blanket boilerplate statement that is *silent* on these issues. Thus the purported waiver has no legal effect on their Treaty rights.¹⁷⁶ As the *SGS v. Paraguay* tribunal found, silence is not enough,¹⁷⁷ and thus Respondent’s objection fails.

3. Respondent’s “Domicile” Objection With Respect to Mr. Sastre Fails

157. In its Memorial, Respondent alleges that Mr. Sastre is precluded from filing his claim because Article 2(3) of the Argentina-Mexico BIT excludes investors who are domiciled in Mexico on the date of the violations. This is incorrect. As the Treaty text makes clear, the domicile limitation on consent applies *only* on the date of filing. Because Mr. Sastre was residing in Argentina when he filed his claim, Respondent’s objection fails.

158. Below, Claimants discuss the law applicable to Article 2(3) and the reasons why it does not apply to Mr. Sastre.

A/2006 of 14 December], art. 32, no. 3, C-0066 (declarations only considered to be made on date of receipt at registry office); Decreto-Lei n. 237-A/2006 de 14 de Dezembro [Decree-Law no. 237-A/2006 of 14 December], art. 44, no. 1, C-0037 (emoluments must be paid for acts related to loss of nationality).

¹⁷⁵ See Section IV.2.a, *supra*.

¹⁷⁶ See R-032. See also Respondent’s Memorial on Jurisdiction ¶¶ 243-45.

¹⁷⁷ *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010 ¶¶ 178-80, CLA-0037.

a. *The Law Relevant to Article 2(3)*

159. Article 2(3) reads as follows:

ARTICLE TWO

SCOPE OF APPLICATION

1.- This Agreement applies to the measures adopted or maintained by a Contracting Party regarding investors of a Contracting Party regarding their investments and the investments of said investors, made in the territory of the other Contracting Party.

2.- This Agreement applies throughout the territory of the Contracting Parties as defined in Article One, paragraph (6). The provisions of this Agreement shall prevail over any incompatible rule that may exist in the internal laws of the Contracting Parties.

3.- *Regarding the provisions set forth in Articles Four [Transfers] and Ten [Investor-State Dispute Resolution]*, natural persons who are nationals of a Contracting Party and who have their domicile in the territory of the other Contracting Party where the investment is located, may only take advantage of the treatment granted by this Contracting Party to their own nationals. (Emphasis added) (translation by counsel)

160. Importantly, Article 2(3) does not indicate the time when it applies, but it states unequivocally that it applies to Articles Four and Ten of the same Treaty, which deal with currency transfers and *initiation* of an investor-State claim:

- a. **Article Four** protects investors' rights to make transfers related to an investment freely and without delay.
- b. **Article Ten** covers the procedure by which an investor may *initiate* investor-State dispute resolution proceedings against the host State. Article Ten reads: "This Article and the corresponding Annex establish a *mechanism for the resolution* of controversies in investment matters" (emphasis added).

- c. For its part, the **Annex** also covers how an investor may *initiate* investor-State dispute resolution. The first part of the Annex reads: “An investor of a Contracting Party may . . . *submit* a claim to arbitration” (emphasis added).

161. Thus, Article Four (Transfers) is the *only* substantive provision referenced by Article 2(3). The Treaty’s substantive provisions covering the claims that Mr. Sastre brings (*e.g.*, fair and equitable treatment, full protection and security, non-impairment, expropriation) are contained in Article Three and Article Five. But *notably these substantive provisions are not referenced by Article 2(3)*.

162. Mexico and Argentina are signatories to the Vienna Convention on the Law of Treaties (the “Vienna Convention” or “VCLT”).¹⁷⁸ Article 31 and Article 32 provide the rules of treaty interpretation, focusing on good faith, the ordinary meaning of words, the text and context of the treaty including the preamble and annexes, and its object and purpose:

Article 31

General rule of interpretation

1. 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*.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, *including its preamble and annexes*:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

¹⁷⁸ Status of the Vienna Convention on the Law of Treaties, United Nations Treaty Collection, CLA-0084.

3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

163. Domicile exclusions are rare in investment treaties. One other treaty containing a domicile exclusion is the BIT between Italy and Argentina, Additional Protocol to Article 1.

Unlike Article 2(3) of the Argentina-Mexico BIT, the Italy-Argentina BIT expressly makes clear that it applies to those investors *who were domiciled at the time of making the investment*:

- a) Natural persons of each Contracting Party who, ***at the time of making the investment***, had had their domicile for more than two years in the territory of the Contracting Party where the investment was made may not avail themselves of this Agreement.
- b) In the event that a natural person of a Contracting Party has, simultaneously, registered residence in his country and domicile for more than two years in that of the other Contracting Party, it will be treated equally, for the purposes of this Agreement, to natural

persons that are nationals of the Contracting Party in whose territory the investment was made.

c) The domicile of an investor will be determined in accordance with the laws, regulations and provisions of the Contracting Party in whose territory the investment was made.

(Translation by counsel)

164. The Italy-Argentina treaty was analyzed by the tribunal in *Ambiente Ufficio*. After noting the general rule in international law that “the burden of proof lies with the party asserting a fact, whether it being the claimant or the respondent,”¹⁷⁹ the Tribunal concluded that it was up to the Respondent to prove that the domicile exclusion applied to the investors:

In the light of this, the present Tribunal concludes that the burden of proof that the Claimants are Italian nationals falls on the Claimants themselves, while the burden to disprove the negative elements – i.e. of not being Argentine (or, for that matter, dual) nationals and of *not having been domiciled in Argentina for more than two years – would fall on the Respondent’s side*.¹⁸⁰

165. The tribunal then concluded that, “due to the lack of relevant concrete submissions and documentation from the respondent’s side,” the Tribunal has jurisdiction.¹⁸¹

166. Consistent with *Ambiente Ufficio* and as discussed in Section II.B, Respondent here bears the burden to prove this jurisdictional objection. Respondent fails to do so. As discussed below, Respondent fails to prove its claim that Article 2(3) applies on the date of violation and that Mr. Sastre was “domiciled” in Mexico. And in any event, the Argentina-Mexico BIT’s Most-

¹⁷⁹ *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, ¶ 309, CLA-0052.

¹⁸⁰ *Id.* ¶ 312 (emphasis added).

¹⁸¹ *Id.* ¶ 321.

Favored-Nation Clause (MFN) grants Mr. Sastre the same protection provided in other treaties to investors from other countries.

b. Respondent's Claim That the Domicile Provision Applies at the Moment of the Violation is groundless

167. As Respondent itself acknowledges, Article 2(3) does not expressly specify the date when the domicile provision applies.¹⁸² Under Article 31 of the Vienna Convention, to determine the temporal application of Article 2(3), one must interpret the treaty in good faith for the ordinary meaning of its text, its context, and its object and purpose.¹⁸³ Claimants and Respondent agree on these points.¹⁸⁴

168. However, Respondent alleges that Article 2(3)'s domicile provision applies at the moment when the violations occurred because Article 2(1) is a "proximate context" for Article 2(3).¹⁸⁵ Respondent also claims that Article 2(3) references Article Ten on investor-State dispute resolution, which "can be invoked immediately after" an investor knows of the violation.¹⁸⁶ But Respondent does not provide any *travaux préparatoires* or cases to support its theory. And in any event Respondent's interpretation does not withstand any scrutiny.

¹⁸² Respondent's Memorial on Jurisdiction ¶ 216.

¹⁸³ VCLT, Art. 31., CLA-0084.

¹⁸⁴ Respondent's Memorial on Jurisdiction ¶ 216.

¹⁸⁵ Respondent's Memorial on Jurisdiction ¶ 218.

¹⁸⁶ Respondent's Memorial on Jurisdiction ¶ 217.

169. *First*, Respondent’s reference to Article 2(1) is irrelevant. Respondent claims Article 2(3) applies at the moment of the violations because Article 2(1) serves as its “proximate context”.¹⁸⁷ This is baseless, and it defies even a basic reading of the two provisions.

170. Article 2(1) does not qualify, modify, or even inform Article 2(3). Besides being in the same Article, the two provisions are unrelated and serve different purposes. Article 2(1) is a *general scope* clause that says that *the entire Treaty* applies to measures by a State regarding investments within its territory, whereas Article 2(3) is a specific provision that only applies to Articles Four and Ten. Indeed, Article 2(3) even begins with the qualifying words: “[r]egarding the provisions in Articles Four and Ten, [. . .],” which plainly contradicts Respondent’s assertion. Proximity alone does not provide context when the two provisions are discussing separate matters.

171. *Second*, Article 2(3)’s reference to Article Ten suggests that Article 2(3) applies at the moment of filing the claim. Article Ten covers how an investor can *bring a claim* in case of a dispute. It discusses what investors can do *at the moment* of filing that claim, not before. It is thus a *procedural* article – not a substantive one.

172. The articles that discuss what takes place before the filing of a claim, *i.e.* the *substantive* provisions that contain the standards applicable to violations by a State, are other articles such as Articles Three and Five – but not Article Ten.

173. Respondent asserts that Article 2(3)’s reference to Article Ten means that Article 2(3) applies at the moment of the violations because investor-State dispute resolution “can” be invoked immediately. This too is irrelevant. Simply because an investor “can” bring a claim immediately after a violation does not mean that the domicile requirement *must* apply at the

¹⁸⁷ Respondent’s Memorial on Jurisdiction ¶ 218.

moment of the violation. If that were the intent of Article 2(3), then the Contracting States could have written that Article 2(3) applies to substantive provisions covering such violations, like Article Three and Article Five *instead of* Article Ten. Alternatively, the Contracting States could have included language indicating that Article 2(3) applies to the moment when the investments are made like in the Italy-Argentina BIT. *But Argentina and Mexico did neither. They negotiated the BIT without any such language.*

174. There is indeed one substantive provision that Article 2(3) references: Article Four. But as discussed above, it covers currency transfers, which are not at issue here. And more importantly, this begs the question: If Article Four, a substantive provision, is expressly referenced, why are other substantive provisions like Article Three and Article Five not expressly included too? Respondent's Memorial does not provide an answer. Words, and the absence of words, all have a meaning. The plain reality is that the domicile exclusion in Article 2(3) is meant to apply to *currency transfers* and to the *moment of filing a claim*, nothing else. It does not apply at the moment of the violation.¹⁸⁸

¹⁸⁸ Respondent's interpretation would yield to a redundancy. If Article 2(3) applied to the moment of *all* substantive violations by virtue of reference to Article Ten, then Article 2(3) would have only made reference to Article Ten. In other words, a reference to Article Four would not be needed. But again, the reality is that the drafters made Article 2(3) make express reference to Article Four, excluding any reference to any other substantive provision. This shows that the Contracting Parties did not intend for Article 2(3) to apply to Articles Three or Five.

Further, Respondent's interpretation is counter to the Treaty's express "object and purpose, including its preamble and annexes." VCLT Art. 31. The Argentina-Mexico BIT's Preamble states that the State parties entered into the Agreement to "intensify the economic relationship" between the Contracting Parties, recognizing that an agreement to "promote and *protect* investments is necessary", and "hoping to create *favorable conditions* to investments of investors of one party in the territory of the other Contracting Party". Argentina-Mexico BIT, Preamble, CLA-0003. Respondent's proposed interpretation, which would enable States to deny treaty protection simply because a foreign investor is domiciled in their territory, is plainly counter to the goals of "intensifying economic relationships," "protecting foreign investment," and "creating favorable conditions" for foreign investment.

c. Respondent Fails to Prove that Mr. Sastre was “Domiciled” in Mexico

175. The above reasons alone are sufficient to reject Respondent’s misconceived objection because Article 2(3) only applies at the moment of filing, and Mr. Sastre was living in Argentina at the moment of filing his claim in 29 December 2017.¹⁸⁹ However, there are even more reasons to reject Respondent’s objection.

176. Respondent claims that Mr. Sastre has not “demonstrated that [he] was not domiciled in Mexico.”¹⁹⁰ Respondent again mischaracterizes the burden. As the *Ambiente Ufficio* tribunal stated above¹⁹¹ and as discussed in Section II.B, Respondent bears the burden to establish this objection.

177. Respondent acknowledges that Article 2(3) does not define the term “domicile,” thus it must be interpreted under its ordinary meaning under the Vienna Convention. Citing the Royal Academy of Language (Spain), and the Merriam-Webster dictionary, Respondent admits that domicile is a place of *fixed and permanent residence*.¹⁹² Respondent concludes that under the Treaty, domicile is “the place where the physical person lives with the *intent to remain there permanently*.”¹⁹³ Thus, it is *not* a place of *temporary* residence. Claimants agree.

178. As Mr. Sastre explains in his witness statement, he only went to Mexico to develop and establish his business ventures. He intended to return to Argentina once this was complete, particularly because of the needs of his children. His son [REDACTED] who has [REDACTED], has

¹⁸⁹ Witness Statement of Carlos Sastre ¶ 57.

¹⁹⁰ Respondent’s Memorial on Jurisdiction, p. 74.

¹⁹¹ Section IV.B.3 *supra*.

¹⁹² Respondent’s Memorial on Jurisdiction ¶¶ 221-23.

¹⁹³ Respondent’s Memorial on Jurisdiction ¶ 223 (emphasis added).

special needs for which Tulum did not have the infrastructure and public services to accommodate. Nor did Mr. Sastre have any extended family in Mexico for support. For these reasons, Mr. Sastre planned to return to Argentina once his businesses could run independently and once his children were old enough to attend school.¹⁹⁴ This plan did not come to fruition because of Respondent's breaches.

179. Respondent cites to visa paperwork and conclusory statements that Mr. Sastre was "domiciled" in Tulum.¹⁹⁵ But none of them answer the key issue as set forth in Respondent's own definition, *i.e.*, whether Mr. Sastre *intended* to remain in Mexico *permanently*. Respondent provides no evidence of such intent, and as discussed above, the only evidence presented on this issue shows that Mr. Sastre did not intend to remain in Mexico permanently. Indeed, he left Mexico in 2015.¹⁹⁶ Respondent has failed to prove that Mr. Sastre was "domiciled" in Mexico, and thus its objection has no merit.

d. In any Event, by Virtue of the MFN Clause in the Treaty, Mr. Sastre can Access Dispute Settlement

180. The Most-Favored Nation ("MFN") clause in Article 3(2) of the Argentina-Mexico BIT broadly guarantees treatment no less favorable than treatment afforded to investors and investments from other States:

ARTICLE THREE

...

2. Each Contracting Party, once it has admitted investments from investors of the other Contracting Party into its territory, shall provide full legal protection to such investors and their investments

¹⁹⁴ Witness Statement of Carlos Esteban Sastre ¶ 22.

¹⁹⁵ Respondent's Memorial on Jurisdiction ¶ 226.

¹⁹⁶ Witness Statement of Carlos Sastre ¶ 57.

and shall accord them *treatment no less favorable* than that accorded to *investors and the investments* of its own investors or investors from other States.

181. Unlike similar articles in other treaties, Article 3(2) contains no wording that limits its applicability. It applies to “investors” without limitation and the “treatment” accorded to them.

182. Even if Article 2(3) applied to Mr. Sastre, and even if Mr. Sastre were “domiciled” in Mexico (neither of which is true), the broad language in Article 3(2) concerning legal “protection” enables Mr. Sastre to avail himself of the same “treatment.” Treatment here includes access to investor-State dispute settlement accorded to investors from other States and their investments. This is consistent with the Contracting Parties’ intent, as expressed in the Preamble to the Treaty to “promote and protect investments”.

183. The Decision on Jurisdiction in *Siemens v. Argentina* is one of several examples. There, the tribunal considered an MFN clause that similarly referenced “treatment” to investors and their investments. Argentina objected to the application of the MFN clause, saying it should only apply for substantive matters. But the tribunal rejected that argument, finding that “treatment” includes access to dispute settlement:

[T]he Tribunal finds that the Treaty itself, together with so many other treaties of investment protection, has as a distinctive feature special dispute settlement mechanisms not normally open to investors. *Access to these mechanisms is part of the protection offered under the Treaty.* It is part of the treatment of foreign investors and investments *and of the advantages accessible through a MFN clause.*¹⁹⁷

¹⁹⁷ Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 ¶ 85, 102 CLA-0085.

184. The relevant decisions by past tribunals analyzing text similar to Article 3(2) arrive at the same conclusion.¹⁹⁸

185. Thus, Mr. Sastre invokes the MFN protection standard in Article 3(2) of the Argentina BIT to import the same “treatment” afforded in Respondent’s other treaties, for example the France-Mexico BIT, which does not include a domicile exclusion.

186. In conclusion, even if Article 2(3) were to apply on the date of the breach, and Mr. Sastre was “domiciled” in Mexico, neither of which is true, Respondent’s objection still does not survive. Mr. Sastre can access international arbitration without a domicile restriction by virtue of the broad language of the MFN clause in Article (3)2.

C. RESPONDENT FAILS TO MEET ITS BURDEN TO PROVE ITS “ILLEGALITY” OBJECTION

187. Respondent alleges that this Tribunal lacks jurisdiction because Claimants have failed to show that their investments were legal. This is incorrect. *First*, as discussed in Section II.B, Claimants have established that their investments give this Tribunal jurisdiction *ratione materiae* over this dispute.¹⁹⁹ Respondent now as the moving party bears the burden to prove this illegality objection.²⁰⁰ *Second*, Respondent fails to meet its burden for several reasons, including among

¹⁹⁸ See, e.g., Hochtief Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011 ¶ 71, CLA-0086, (reaching a similar conclusion to *Siemens*); National Grid P.L.C. v. Argentine Republic, UNCITRAL, Decision on Jurisdiction, 20 June 2006 ¶ 93, CLA-0087 (“treatment” includes access to arbitration to resolve investment disputes); Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013 ¶ 96, CLA-0088 (Agreeing with the Tribunal in National Grid v. Argentina that access to dispute resolution is part of “treatment”); RosInvestCo UK Ltd. v. Russia, SCC Case No. Abr. V 079/2005, Award on Jurisdiction, 5 October 2007 ¶ 130, CLA-0089 (stating in relation to the applicability of an MFN clause that “the submission to arbitration forms a highly relevant part of the corresponding protection for the investor”).

¹⁹⁹ Section III.B, *supra*.

²⁰⁰ Section II.B, *supra*.

others that Respondent fails to address the law that governs this issue. This Section discusses the relevant law on illegality objections in investment treaty arbitration, and how Respondent’s objection misses the mark.

1. The Applicable Law on Illegality

188. The Argentina-Mexico and the Portugal Mexico BITs define “investments” in relevant part as those which are made in accordance with the law of the host State.²⁰¹ The France-Mexico BIT likewise covers investments made in accordance with the law of the host State.²⁰² The NAFTA does not contain similar language.²⁰³

189. Each of the Treaties expressly includes international law as a source of law for investment disputes.²⁰⁴ Estoppel, known as the *actos propios* doctrine in some legal systems and

²⁰¹ Argentina-Mexico BIT, Art. 1, CLA-0003; Portugal-Mexico BIT, Art. 1, CLA-0034.

²⁰² France-Mexico BIT, Art. 2, CLA-0015.

²⁰³ Respondent asserts that “the tribunals in investment matters have determined that legality of an investment is a condition for protection . . . even in the absence of express language in the treaties.” Respondent’s Counter-Memorial, ¶ 132. While Claimants have no need to address whether international law covers “illegal” investments, Claimants note that Respondent’s characterization of the law is incorrect. Several tribunals have refused to read into the treaties a legality “condition” for jurisdiction. *See, e.g.*, Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Award, 30 November 2017 ¶¶ 320-23, CLA-0005 (finding that even where a treaty that “identifies the legality requirement as a ‘special formality’ that the host State is entitled to adopt if it so wishes . . . since nowhere in the FTA or otherwise in the record is there an express or implied provision of law to the effect that Peru made use of this option, ***it can only be concluded that there is no jurisdictional requirement that Claimant’s investment was legally constituted*** under the laws of Peru.”). Further, Respondent’s characterization of the law ignores the principles of proportionality discussed *infra*, under which relatively minor deficiencies do not bar investment protection entirely. Thus legality in such cases is not a “condition” as Respondent’s statement suggests.

²⁰⁴ Argentina-Mexico BIT, Art. 10(5), CLA-0003; Portugal-Mexico BIT, Art. 15(1), CLA-0034 France-Mexico BIT, Art. 11(5), CLA-0015; NAFTA, Art. 1131(1), CLA-0029.

held as part of good faith or *bonne foi* in others, provides that a party cannot make an assertion at one time and deny it at another. This principle is firmly established in international law.²⁰⁵

190. Investment treaty tribunals have repeatedly applied estoppel,²⁰⁶ including in particular to reject allegations of illegality by States.²⁰⁷ In *ADC v. Hungary*, the State alleged that the investments concerning airport construction and operation contracts were invalid because they failed to comply with national corporations law. Hungary identified at least four grounds: (i) the investment used the wrong corporate form, (ii) the shareholders had not approved the contracts,

²⁰⁵ See, e.g., *Legal Status of Eastern Greenland*, Judgment (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, 1 186 (Apr. 5), CLA-0090 (illustrating application of estoppel by the Permanent Court of International Justice against Norway because Norway had previously affirmed that it Greenland is Danish, thereby barring Norway from contesting Danish sovereignty over Greenland). See generally Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, § 2.5 (9th ed. 2019) 31-34 (2019) CLA-0091 (“[T]he [PCIJ] has frequently relied on the principles of acquiescence and estoppel. At other times, references to abuse of rights and to good faith may occur.”); Bin Cheng, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS*, p. 141-42, CLA-0092 (“[A] man shall not be allowed to blow hot and cold-to affirm at one time and deny at another.... Such a principle has its basis in common sense and common justice, and whether it is called 'estoppel,' or by any other name, it is one which courts of law have in modern times most usefully adopted.”).

²⁰⁶ See, e.g., *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic and BP America Production Company, Pan American Sur SRL, Pan American Fuegoina, 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 ¶ 159, CLA-0032 (“Estoppel is a recognised general principle of law that has been applied by many international tribunals. Of the essence to the principle of estoppel is detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party.”); *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, 26 June 2000 ¶ 111, CLA-0093 (“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.”).

²⁰⁷ See also *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010 ¶ 302, CLA-0094 (approval of State Tourist Administration was relevant to find that tourism-related contracts were not “illegal” under Ukrainian Law); *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010 ¶ 140, CLA-0022 (distinguishing the case from *Fraport* because State officials had reviewed some of the contracts for the upkeep of a sailing vessel at issue, and had not previously considered them at issue to be illegal. This is even if related the officials had not reviewed some related intra-company agreements); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 ¶ 628, CLA-0113 (Pakistan is estopped from alleging illegality given that Pakistani agencies elsewhere maintained that Karkey’s investment was established in accordance with Pakistani laws).

(iii) the Hungarian Civil Code invalidated agreements with a “gross unfair difference in value,” and (iv) the terminal management agreement was invalid because it did not follow a public procurement as required by law.²⁰⁸

191. The tribunal dismissed these objections because Hungary raised them too late. The tribunal noted that Hungary had “rested on [its] rights,” taking “full benefit” from the investments.²⁰⁹ The tribunal found that Hungary benefited from the investments and “led the Claimants over a long period of time to assume” that the investments were valid.²¹⁰ The tribunal observed that “[a]lmost all systems of law prevent parties from blowing hot and hold,” and held that Hungary was estopped from challenging the legality of the investments by its “own conduct.”²¹¹

192. The tribunal in *Desert Line Projects v. Yemen* also applied estoppel to reject the State’s allegation of illegality. Yemen argued that the claimant failed to obtain an “investment certificate” as required by the BIT. The tribunal focused on the State’s acceptance of the investment, and held that formalistic requirements are not reason enough to deny protection to an investment:

It would be preposterous in the circumstances to require or expect the Head of State or the Prime Minister to issue formalistic qualifications to their encouragements and approvals, such as explicitly referring to the BIT (or even technical regulations of Yemeni law); when they welcomed and approved the Claimant’s investment, they did so with all that it entailed. ***It would offend the***

²⁰⁸ ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, 2 October 2006, CLA-0095.

²⁰⁹ *Id.* ¶ 475.

²¹⁰ *Id.*

²¹¹ *Id.*

*most elementary notions of good faith, and insulting to the Head of State, to imagine that he offered his assurances and acceptance with his fingers crossed, as it were, making a reservation to the effect “that we welcome you, but will not extend to you the benefits of our BIT with your country.”*²¹²

193. In *RDC v. Guatemala*, the State alleged that the investment was illegal because the contracts related to the development of a rail system “were not let through public bidding and did not receive Presidential and Congressional approval.”²¹³ The tribunal disagreed, observing that the State and the investor had “conducted themselves substantially as if the terms of Contract 41 has been in effect” and dismissed Guatemala’s objection:

Even if [the State railroad enterprise’s] actions with respect to Contract 41/143 and in its allowance to FVG to use the rail equipment were ultra vires (not “pursuant to domestic law”), *“principles of fairness” should prevent the government from raising violations of its own law as a jurisdictional defense when in this case, operating in the guise of FEGUA, it knowingly overlooked them and effectively endorsed an investment* which was not in compliance with its law.²¹⁴

194. Some tribunals have sustained illegality objections despite an estoppel argument by the investor, but only in extreme scenarios such as when the investor engaged in criminal conduct and misled the State. *Fraport v. Philippines* is one such unusual case. There, the State alleged illegality because the investor had engaged in conduct punishable by imprisonment by the Philippines’ Anti-Dummy Law.

²¹² *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 ¶ 119, CLA-0096.

²¹³ *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.

²¹⁴ *Id.* ¶¶ 144, 146-47 (internal quotation marks and brackets omitted).

195. Fraport claimed estoppel because the State had knowingly approved a concession to build and operate an airport. The tribunal accepted that estoppel bars States from alleging illegality²¹⁵ but the tribunal disagreed with Fraport. Importantly, the tribunal noted that Fraport’s structuring of its investment was punishable under national law by imprisonment of no less than five years,²¹⁶ and the Tribunal found that the investor had acted “egregiously” by knowingly concealing its criminal violations from the State.²¹⁷

196. Some tribunals have dismissed similar allegations of illegality based on the claimant’s good faith.²¹⁸ For example, the *Fraport* tribunal gave two examples of good faith mistakes by the investor that would not lead to exclusion from BIT protection:

When the question is whether the investment is in accordance with the law of the host state, considerable arguments may be made in favour of construing jurisdiction *ratione materiae* in a more liberal way which is generous to the investor. In some circumstances, ***the law in question of the host state may not be entirely clear and mistakes may be made in good faith.*** An indicator of a good faith error would be the ***failure of a competent local counsel's legal due diligence report to flag that issue.*** Another indicator that should work in favour of an investor that had run afoul of a prohibition in local law would be that ***the offending arrangement was not central to the profitability of the investment,*** such that the investor might have made the investment in ways that accorded with local law

²¹⁵ Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines I, ICSID Case No. ARB/03/25, Award, 16 August 2007 ¶ 346, CLA-0098 (“Principles of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law.”).

²¹⁶ *Id.* ¶ 395.

²¹⁷ *Id.* ¶¶ 397-98.

²¹⁸ See also Vestey Group Ltd v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/06/4, Award, 15 April 2016 ¶ 205, CLA-0099 (even a failed but good faith attempt to acquire land does not make an investment illegal under national law in a way to deprive jurisdiction).

without any loss of projected profitability. This would indicate the good faith of the investor.²¹⁹

197. Some tribunals have rejected illegality objections because the alleged deficiencies were not serious or central enough.²²⁰ In *Tokios Tokeles v. Ukraine*, the State alleged that the investment was illegal under Ukrainian law because it used the incorrect corporate form and the investor's asset management documents failed to meet certain formalities including bearing certain signatures and notarization. The tribunal held that investments failing to meet such minor formalities nonetheless are protected under the treaty, and pointed to the State's prior registration of the investments:

Even if we were able to confirm the Respondent's allegations, which would require a searching examination of minute details of administrative procedures in Ukrainian law, ***to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty.*** In our view, 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.²²¹

198. Importantly, tribunals now frequently apply a proportionality test when respondents allege illegality. The test seeks to avoid unduly harsh consequences to the investor by comparing the alleged noncompliance with the State's interest in enforcing the obligation. The tribunal in *Kim v. Uzbekistan* elaborated on the three-step analysis, summarized below:

²¹⁹ *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.

²²⁰ *See also Convia Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award, 21 May 2013 ¶ 410, CLA-0100 (even assuming that claimants failed to meet certain requirements, unless they are serious enough to affect a fundamental principle of the State, thus legality of the investment is not affected).

²²¹ *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 ¶¶ 83-86, CLA-0101.

- a. **The significance of the obligation.** Smaller sanctions, lack of enforcement (unless prosecutorial resources are shown to be low), decisions to not enforce, and widespread noncompliance are factors tending to show lower significance. Curable deficiencies are not sufficient to deny jurisdiction.²²²
- b. **The seriousness of the investor’s conduct.** Unintentional or accidental conduct; unclear, evolving, or incoherent law; due diligence attempts by the investor to be in compliance; failure of the State to prosecute when it knew or should have known of the noncompliance; and continued investment in the asset by the investor in good faith are factors tending to show minor acts of noncompliance;²²³ and
- c. **The interest of the host State in having the obligation observed.** Noncompliance leading to relatively minor legal consequences under the law of the host State are the “primary” indication of a lesser State interest.²²⁴

199. As discussed in the remainder of this Section, Respondent’s objection fails to discuss any of the above principles and as such fails to meet its burden.

²²² *E.g.*, Achmea B.V. (formerly Eureko B.V.) v. Slovak Republic I, PCA Case No. 2008-13, Final Award, 7 December 2012, ¶ 177, CLA-0102 (no violation of fundamental principles of probity or public policy found, such as investors acting corruptly or in bad faith, so there is no basis for denial of protection under the treaty); 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-0025 (voidable but not invalid transfers do not fall outside of consent to jurisdiction); Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award dated 30 March 2015 ¶¶ 483-94, CLA-0103 (shortcomings that are minor, related to formalities, or curable are not sufficient to deprive of jurisdiction); Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India, PCA Case No. 2016-07, Award, 21 December 2020 ¶ 713, CLA-0104 (even if the corporate restructuring to avoid taxes were illegal, the tribunal would still have jurisdiction national law would not void the investor’s shares in the investment).

²²³ Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017 ¶¶ 405-08, CLA-0067.

²²⁴ *Id.*

2. Respondent Fails to Meet its Burden to Prove That This Tribunal Lacks Jurisdiction due to Illegality

200. Respondent alleges that Claimants' investments are "illegal" and should be denied jurisdiction because Claimants have not shown that the lots were in possession of the corresponding *ejido* member or the *ejido*.²²⁵ Respondent also argues that the transactions entered into by Claimants did not show "at all relevant times" that they met certain formalities to (i) register their interests before the Agrarian National Registry (the "RAN")²²⁶ and (ii) register "ownership" of land within fifty kilometers from the coast under a trust.²²⁷ Respondent's arguments miss the point at issue.

201. Before engaging with the substance of Respondent's objection, Claimants make the following preliminary observations. As discussed in Section II.B, Respondent as the moving party bears the burden to prove this objection.²²⁸ Thus, Respondent cannot pass its burden onto Claimants. Also, as discussed in Section II.D, Respondent's blanket assertion that compliance with every formality must be shown at all times is incorrect. Investor-State jurisprudence is more nuanced than what Respondent suggests. Tribunals are loathe to deny treaty protection to qualified investments as long as the shortcomings are not serious and investors act in good faith.²²⁹

²²⁵ E.g., Respondent's Memorial on Jurisdiction ¶¶ 149, 173, 208, 305, 329.

²²⁶ E.g., *id.* ¶¶ 149, 173, 208, 265, 268, 300, 305, 329.

²²⁷ E.g., *id.* ¶¶ 119-130, 151, 175, 270, 303, 331.

²²⁸ Section II.B, *supra*.

²²⁹ See Section IV.C.1, *supra* (discussing cases such as *Tokios Tokelés v. Ukraine*, *Convial Callao v. Peru*, and *Vestey Group Ltd v. Venezuela*, where the tribunals refused to deny jurisdiction due to minor or good faith deficiencies by the investor).

202. Turning to the substance, Respondent’s objection lacks any merit for the following reasons.

203. *First*, Claimants did not engage in *any* “illegality.”²³⁰ Respondent and Mr. Gutierrez are unable to point to a *single* provision establishing that Claimants engaged in an illegal act, much less a criminal one. An absence of RAN or trust registration is not an illegal act. National law prescribes no civil or criminal penalties for failure to register.²³¹

204. Claimants always acted within the bounds of Mexican law and always obtained the required consent from the relevant parties. Claimants have established that the investments were situated within *ejido* land. As part of their jurisdictional case, Claimants submit an expert report from Mr. Bonfiglio on this precise issue, which confirms that the investments were situated within the *ejido*.²³² Mr. Bonfiglio based his findings on a topographical study that used information published by Respondent’s own agencies to support this conclusion.²³³

205. Claimants negotiated and secured agreements with the relevant *ejido* parties to build their investments there, and those agreements were enforceable:

- a. Claimants’ agreements with the *ejido* members were enforceable. As Mr. Bonfiglio observes, the agreements were binding on the parties to the agreement and they were enforceable for damages in a court of civil jurisdiction.²³⁴

²³⁰ Expert Report of Sergio Bonfiglio ¶¶ 6, 205.

²³¹ *Id.* ¶¶ 5, 61, 80.

²³² *See* Section III.B *supra*; *see also* Expert Report of Sergio Bonfiglio, ¶¶ 5, 111, 129, 153, 172, 199.

²³³ Expert Report of Sergio Bonfiglio ¶¶ 91, n. 28.

²³⁴ *See, e.g., id.* ¶¶ 5, 43.

b. Claimant's agreement with the *ejido* was also enforceable. As Respondent's own expert admits and national law stipulates, the *Ejido* Commissariat is the authorized representative of the *Ejido* for external matters including the signing of contracts.²³⁵ Claimants negotiated and paid for the approval of their possession directly with the *ejido*, and obtained *ejido* statements certifying their possession of the land.²³⁶

206. Further, as Respondent itself admits,²³⁷ RAN registration is only required for enforcement *against third parties*. Claimants agree. This means that RAN registration is not relevant to the real question: whether Claimants made protected investments under their respective Treaty. As Mr. Bonfiglio explains, Claimants negotiated private agreements that were enforceable amongst the parties to the agreements.²³⁸ Even without registration, those agreements allowed Claimants to build and operate their hotel businesses in those lands.²³⁹ Respondent's overreliance on registration is simply a red herring.

207. Worse for Respondent, as Mr. Bonfiglio explains, registration is *at the option of the ejido alone*.²⁴⁰ The ultimate decision to pursue registration belongs to the *ejido*. Claimants cannot

²³⁵ Agrarian Law of 1992, Art. 33, SB-0006; Expert Report of Sergio Bonfiglio ¶¶ 5, 48, 51; Expert Report of Pablo Gutiérrez ¶ 37.

²³⁶ Expert Report of Sergio Bonfiglio ¶¶ 5, 114, 131, 156, 175, 192, 202.

²³⁷ *E.g.*, Respondent's Memorial on Jurisdiction ¶¶ 149, 173, 208, 300, 305, 329.

²³⁸ *See, e.g.*, Expert Report of Sergio Bonfiglio ¶¶ 5, 43, 72.

²³⁹ Respondent's objections regarding the formalities of RAN registration focus only on the lots of land and not the *tourism investments* built and operated there. As Mr. Bonfiglio explains, Claimants negotiated and obtained the consent from the relevant parties, the *ejido*, and the *ejido* members, to build and operate their investments there. Expert Report of Sergio Bonfiglio ¶¶ 5, 114, 131, 156, 175, 192, 202. Even if Claimants' possession of the lots was unauthorized (which it was not, as Claimants negotiated the consent of all relevant parties in binding agreements), Respondent's objections do not challenge the legality of the tourism enterprises built on those lots, again with the consent of all relevant parties.

²⁴⁰ Expert Report of Sergio Bonfiglio ¶¶ 6, 201.

cause RAN registration to occur.²⁴¹ Respondent's illegality argument thus boils down to an accusation against Claimants that they did not do something they were not capable of doing.

208. *Second*, even if Claimants could have registered, many of the objections proffered by Respondent concern issues that are either minor or outside Claimants' control. Respondent focuses on formalistic provisions and attempts to blame Claimants for any purported deficiencies. For example, Respondent's expert lists the following "documentary deficiencies":

- a. A purported lack of "official identification" of the individuals signing the agreement;
- b. A purported lack of notarization in documents;
- c. A purported lack of evidence that Mr. Sastre represented his own company, CETSA, at the moment of signing with the *ejido* member, Mr. Novelo;
- d. Claimants' purported failure to produce a "certified" copy of the *ejido* file;
- e. Claimants' purported failure to provide a copy of the *ejido* internal rules;
- f. Proof that the *ejido* members with whom Claimants negotiated were not taken advantage of by Claimants.²⁴²

209. None of these purported deficiencies warrant dismissal due to illegality. A purported lack of official identification or a lack of notarization, even if true, is rendered moot because Claimants have produced the relevant documentation evidencing that they made their investments in good faith.²⁴³ Respondent's objections (d) and (e) are frivolous because those documents are internal to the *ejido* and are not within Claimants' control. Claimants negotiated

²⁴¹ *Id.*

²⁴² Expert Report of Pablo Gutiérrez, pp. 41-43.

²⁴³ *See* Section III.B *supra*.

in good faith with the individual *ejido* members and the *Ejido* Commissariat, which is the official representative of the *ejido*, as Respondent's own law stipulates and its own expert admits.²⁴⁴

210. *Third*, Claimants always acted in good faith and tried to the extent possible to obtain the authorization that was within their reach. They negotiated with the individual *ejido* members and *ejido* authorities, and operated with the written consent of each.²⁴⁵ Claimants hired attorneys to be in compliance.²⁴⁶ Respondent is unable to point to a single requirement for which Claimants had standing that Claimants failed to meet.

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.²⁴⁷ Multiple levels of

²⁴⁴ Agrarian Law of 1992, Art. 33, SB-0006; Expert Report of Sergio Bonfiglio ¶¶ 5, 51; Expert Report of Pablo Gutiérrez ¶ 37; *see also* Witness Statement of Carlos Sastre ¶¶ 9, 12; Witness Statement of Renaud Jacquet ¶¶ 9, 11-15; Witness Statement of Nuno Silva ¶¶ 4, 8, 11-12, 17-19; Witness Statement of Mónica Galán ¶¶ 11-12, 16-18.

²⁴⁵ *See, e.g.*, Expert Report of Sergio Bonfiglio ¶¶ 5, 43; Agrarian Law of 1992, Art. 33, SB-0006; Expert Report of Sergio Bonfiglio ¶¶ 5, 48, 51, 114, 131, 156, 175, 192, 202.

²⁴⁶ Witness Statement of Carlos Sastre ¶¶ 9, 12, 29-30, 36, 53; Witness Statement of Renaud Jacquet ¶¶ 2, 8-9, 11-15, 28; Witness Statement of Nuno Silva ¶¶ 4, 8, 11-12, 17-19, 23, 26; Witness Statement of Mónica Galán ¶¶ 11-12, 16-18, 35.

²⁴⁷ *See, e.g.*, Section II.B *supra* note 113; *see also e.g.*, Witness Statement of Carlos Sastre ¶ 16; Witness Statement of Renaud Jacquet ¶¶ 11-12, 21, 23, 25-26; Witness Statement of Nuno Silva ¶¶ 18-19, 27-28; Witness Statement of Mónica Galán ¶¶ 17, 19, 21-23, 25, 27-29; Expert Report of Sergio Bonfiglio ¶ 198; *see also* Construction Regularization License [Parayso], 8 March 2006, MG-0008; Certificate of Land Use [Parayso], 8 March 2006, MG-0009; Federal Concession Title [Parayso], 13 February 2007, MG-0010; Operating License [Parayso], 31 January 2011, MG-0017; Construction Regularization License [Uno], 8 July 2015, NS-0011; Certificate of Land Use [Uno], 8 July 2015, NS-0012; Operating License [Uno], 9 June 2014, NS-0013; ZOFEMAT, Municipal Treasury, Federal Zone Office Receipt [Uno], 10 March 2016, NS-0016; Construction Regularization License [Behla], 5 October 2012, RJ-0012; Certificate of Land Use [Behla], 5 October 2012, RJ-0014; Operating License [Behla], 31 December 2012, RJ-0017; ZOFEMAT, Municipal Treasury, Federal Zone Office Receipt [Tierras], 2 March 2010, CS-0009, p. 1; Certificate of Land Use [Tierras], 6 April 2011, CS-0008; Operating License [Tierras], 19 November 2004, 23 March 2004, CS-0009, p. 8-9; Commercial Land Use License [Hamaca Loca], 11 February 2011, C-0068; Land Use License [Hamaca Loca], 24 April 2009, C-0069; Construction License [Hamaca Loca], 24 April 2009, C-0069.

Respondent's government, including Federal, State, Municipal, and *ejido* authorities, acknowledged the legitimacy of Claimants' hotel businesses.²⁴⁸ 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.²⁴⁹ Respondent's eleventh-hour illegality allegation simply comes too late.

212. *Sixth*, even if Claimants engaged in any non-compliance (which they did not), Respondent's allegation fails the *Kim* proportionality test:

a. The alleged shortcomings are minor and formalistic:

- i. As Mr. Bonfiglio explains, possession of *ejido* land without RAN registration is widespread.²⁵⁰ Respondent is unable to point to any civil or criminal penalties for the alleged noncompliance. There is no possibility of sanctions here.

²⁴⁸ As Mr. Bonfiglio explains, the *ejido* is a semi-autonomous entity in Mexican law. Expert Report of Sergio Bonfiglio ¶¶ 3, 36. It has wide public powers, including the power to issue and assign rights and who its members can be. As Mr. Gutiérrez admits, the Assembly is the supreme organ of the *ejido*. Expert Report of Pablo Gutiérrez p. 30. Respondent has adopted this position as well. Respondent's Memorial on Jurisdiction ¶ 99. Certain *ejido* lands are inalienable. Expert Report of Pablo Gutiérrez ¶ 38. The Assembly thus has full authority over the *ejido* in all matters not prohibited by law. At the same time, the *ejido* organs and the agencies of Respondent are closely intertwined, and Respondent has discretionary power over several acts of the *ejido*. Expert Report of Sergio Bonfiglio ¶ 51, n. 10. *Ejid*os are also created and regulated by Respondent. As such, the *ejido* organs are an agency of Respondent, under their regulation and even direct control, with full authority over *ejido* matters. Respondent cannot thus distance itself from the acts and omissions of the *ejido* organs, which it created and directly or indirectly controls.

²⁴⁹ See discussion Sec. IV.C.1, *supra* (discussing the decision in *ADC v. Hungary*).

²⁵⁰ Expert Report of Sergio Bonfiglio ¶ 61.

- ii. As Respondent contends, the alleged noncompliance concerns registration formalities.²⁵¹ The *ejido* and the *ejido* members gave their consent to Claimants in writing.²⁵²
- iii. Claimants were not required to discontinue their investments while registration was pursued by the *ejido*.²⁵³
- iv. The purported non-compliance was not attributable to Claimants. But even if it was, it would have been curable by the *ejido* in any event.²⁵⁴

b. *Claimants acted in good faith:*

- i. Claimants negotiated and reached agreement with the *ejido* members and subsequent conveyors freely and voluntarily, and retained Mexican counsel to do so.²⁵⁵

²⁵¹ *E.g.*, Respondent's Memorial on Jurisdiction ¶¶ 119-130, 151, 175, 270, 303, 331.

Respondent's RAN office in Quintana Roo, which is the holder of the registered *ejido* records, is closed. For that reason, Claimants have been unable to confirm whether their interests were indeed registered. Expert Report of Sergio Bonfiglio ¶ 210; Acuerdo DOF 31/07/2020, SB-0007.

²⁵² Expert Report of Sergio Bonfiglio ¶¶ 5, 114, 131, 156, 175, 192.

²⁵³ *Id.* ¶¶ 6, 199-201.

²⁵⁴ As Mr. Bonfiglio explains, Claimants could have asked the *ejido* to pursue RAN registration. Expert Report of Sergio Bonfiglio ¶¶ 6, 199-201.

²⁵⁵ Witness Statement of Carlos Sastre ¶¶ 9, 12, 29-30, 36; Witness Statement of Renaud Jacquet ¶¶ 2, 8-9, 11-15, 28; Witness Statement of Nuno Silva ¶¶ 4, 8, 11-12, 17-19, 23, 26; Witness Statement of Mónica Galán ¶¶ 11-12, 16-18, 35.

- ii. Claimants negotiated and reached agreement with the *Ejido* Commissariat,²⁵⁶ who Mr. Gutiérrez admits is the legal representative of the *ejido* for the signing of agreements.²⁵⁷
 - iii. Claimants retained specialized agrarian counsel to protect their Investments before agrarian authorities and to obtain RAN registration (until counsel was murdered in his office).²⁵⁸
 - iv. Claimants continued to develop and improve the Investments after reaching a good faith agreement with the *ejido* members and *ejido* itself.²⁵⁹
- c. *Registration is a lesser State interest as instructed by Kim:*
- i. According to the *Kim* Tribunal, minor legal consequences under the law of the host State are a primary indication of a lesser State interest.²⁶⁰
 - ii. Respondent only vaguely suggests that the *ejido* framework is “a national priority,” citing a statement by a former president who makes a historical reference to why land was redistributed.²⁶¹

²⁵⁶ Witness Statement of Carlos Sastre ¶¶ 9, 12; Witness Statement of Renaud Jacquet ¶¶ 9, 11-15; Witness Statement of Nuno Silva ¶¶ 4, 8, 11-12, 17-19; Witness Statement of Mónica Galán ¶¶ 11-12, 16-18.

²⁵⁷ Expert Report of Pablo Gutierrez ¶ 37; see also Agrarian Law of 1992, Art. 33, SB-0006.

²⁵⁸ Witness Statement of Carlos Sastre ¶¶ 27, 53; Witness Statement of Renaud Jacquet ¶ 28; Witness Statement of Nuno Silva ¶ 26. *See generally* Expert Report of Sergio Bonfiglio ¶¶ 2, 6, 23-75 (explaining the complexities of law governing *ejido* land and indicating that whether to register is a decision that belongs with the *ejido* and not with the Claimants).

²⁵⁹ *See, e.g.*, Witness Statement of Carlos Sastre ¶ 14; Witness Statement of Renaud Jacquet ¶ 30; Witness Statement of Nuno Silva ¶ 4; Witness Statement of Mónica Galán ¶ 47.

²⁶⁰ Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017 ¶¶ 4008, CLA-0067.

²⁶¹ Respondent’s Memorial on Jurisdiction ¶ 95.

- iii. There are no legal consequences associated with lack of registration, much less major ones.²⁶²

213. Thus, pursuant to the *Kim* factors, even if Claimants engaged in some noncompliance, which they did not, the nature of their lack of registration is minor in proportion to the interest of Respondent.

214. Similarly, Respondent alleges that its “restricted zone” policy which requires registration and discriminates against foreign investors, is rooted in a loss of national territory over fifty years ago.²⁶³ This again misses the point at issue. This loss of national territory bears no relationship to the Investments, nor does it address whether the alleged lack of registration before the Foreign Relations Secretariat affects a substantial interest. In any event, Respondent’s discriminatory “restricted zone” policy on its face violates Respondent’s National Treatment obligations.²⁶⁴ Respondent also fails to address whether the alleged formalistic noncompliance

²⁶² Expert Report of Sergio Bonfiglio ¶¶ 5, 61, 80.

²⁶³ Respondent’s Memorial on Jurisdiction ¶¶ 119-30.

²⁶⁴ Argentina-Mexico BIT Art. 3(2) (“Each Contracting Party . . . shall accord treatment [to investors and investments] no less favorable than that accorded to investors and investments of its own investors”); France-Mexico BIT Art. 4(2) (“Each Contracting Party shall extend in its territory . . . to the investors of the other Contracting Party, with respect to their investments, and to the operation, management, maintenance, use, enjoyment or disposal of such investments, treatment not less favourable than that granted to its investors”); Portugal-Mexico BIT (“Both Contracting Parties shall accord to investors of the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments made in their territory, treatment which is . . . not less favourable than the one the latter Contracting Party accords to its own investors”); NAFTA Art. 1102 (“Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”).

By its own admission, Respondent’s law violates the National Treatment provisions in the Treaties. First, Respondent admits that the provision prohibits foreign investors from acquiring land in the “restricted zone.” Respondent’s Memorial on Jurisdiction ¶ 119. Respondent and its law does not take into consideration any circumstances of the investor; it simply imposes a blanket prohibition based in the investor’s nationality. Thus, it discriminates against foreign investors, including those who are similarly-situated with domestic investors. Thus, Respondent admits that its law on “restricted zones”

was curable – which it was.²⁶⁵ And it entirely fails to address whether opening the national territory of Respondent, including *ejido* lands, is a substantial policy interest of Respondent – which it was, as Mr. Bonfiglio explains.²⁶⁶

215. Thus, far from establishing its burden, Respondent has failed to address the applicable factors outlined by investment treaty tribunals. Respondent’s illegality objection holds no water.

D. RESPONDENT FAILS TO PROVE ITS OTHER OBJECTIONS

216. Respondent’s remaining objections concern unfounded allegations of abuse of process, lack of notice, and expiration of a prescription period. As discussed in this subsection, Respondent plainly ignores the facts in the record and the text of the Treaties.

1. Respondent’s Notice Objections Hold no Water Because Respondent was Duly Notified

217. Respondent’s next objection contends that three Claimants (Mr. Alexander, Ms. Galan, and Mr. Sastre) did not fulfill the notice of intent to arbitrate requirements contained in NAFTA and the Argentina BIT respectively. Respondent’s objection is unfounded, as each Claimant complied with their respective notice of intent requirements as outlined in Section III.D. These notices of intent are unambiguous and in the record. For the avoidance of doubt, set forth below are the relevant details for the referenced Claimants.

provides “treatment” that is “less favorable than that accorded to [Respondent’s] own nationals” who are “situated in like circumstances”. As such, Respondent admits that its “restricted zone law” violates the Treaties. Respondent cannot hide behind its own law to avoid its international law obligations. ILC Draft Articles on State Responsibility, Art. 3 and Commentary (“The characterization of an act of a State as internationally wrongful is governed by international law. *Such characterization is not affected by the characterization of the same act as lawful by internal law.*”). Thus, Respondent’s attempt to invoke its “restricted zone” law to avoid its National Treatment obligations under international law is without merit.

²⁶⁵ Expert Report of Sergio Bonfiglio ¶¶ 6, 199-201.

²⁶⁶ See Argentina-Mexico BIT, pmbl.; France-Mexico BIT, pmbl.; Portugal-Mexico BIT, pmbl.; NAFTA, pmbl.; Expert Report of Sergio Bonfiglio ¶¶ 2, 16, 60, n. 20.

218. Mr. Alexander and Ms. Galán are Canadian investors bringing their claims under NAFTA. Article 1119 provides the four requirements Claimants should include in a notice of intent to arbitrate:

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

219. In accordance with Article 1119, Claimants submitted a joint notice of intent to arbitrate on 17 January 2019 that amply satisfies the elements required by NAFTA.²⁶⁷

220. Respondent complains that the notice of intent to arbitrate is deficient for three reasons. Each of these stated grounds either ignore Claimants' assertions contained in the notice, or demand facts and evidence beyond the express requirements of Article 1119.

221. *First*, Respondent claims that the Notice of Intent “does not mention the NAFTA provisions that Respondent violated.” Yet, page 4 of the Notice of Intent articulates precisely which investment protection standards were at issue: (i) the obligation to provide fair and equitable treatment, (ii) the prohibition against unlawful expropriation, (iii) the obligation to not impair the investments through arbitrary, unreasonable, or discriminatory measures, and (iv) the obligation to provide MFN treatment.²⁶⁸ As Respondent is no doubt aware, these protections are all found in Chapter 11.

²⁶⁷ See Notice of Intent, 17 January 2019, C-0034.

²⁶⁸ *Id.*

222. *Second*, Respondent argues that Mr. Alexander and Ms. Galan’s notice is defective because although it alleges approximate total damages of \$70 million, a detailed breakdown of their damages is not included.²⁶⁹ But Respondent’s objection is belied by the text of the treaty itself. Article 1119 requires only that the notice of intent include “the relief sought and the approximate amount of the damages claimed.” The notice of intent specifies that Claimants are seeking relief in the form of damages. The approximate amount of damages claimed is \$70 million.²⁷⁰

223. Claimants’ notice of intent fulfills all of the requirements outlined in NAFTA Article 1119. Respondent’s sole legal authority in support of this objection is a passing reference, without further analysis or even a formal citation, to the Statement of the Free Trade Commission on Notices of Intent to Submit a Claim to Arbitration. This statement by the NAFTA Contracting States suggests a potential format of notices of intent under Article 1119. But the document expressly states that the proposal is *only a recommendation* to investors, and *not* a legal obligation.²⁷¹

224. Respondent’s objection contesting the sufficiency of Claimants’ notice is frivolous, and is another attempt to impose additional consent hurdles not found in the four corners of the Treaty.

225. Respondent’s other objection that Mr. Sastre did not submit a notice of intent regarding the *Hamaca Loca* investment pursuant to the Argentina-Mexico BIT ignores the evidence. Mr.

²⁶⁹ Respondent’s Memorial on Jurisdiction ¶¶ 285-90.

²⁷⁰ See Notice of Intent, 17 January 2019 at 4, C-0034.

²⁷¹ See Statement of the Free Trade Commission on notices of intent to submit a claim to arbitration, CLA-0105. Claimants observe that Respondent referenced this document by name in paragraph 288 of its Memorial, but did not provide a citation, nor was it included among Respondent’s legal authorities.

Sastre delivered his initial notice of intent on 15 June 2017. He then submitted a second notice of intent dated 6 September 2017 that expressly relates back to the initial notice.²⁷² The second notice expanded upon the original claims, by adding additional causes of action arising from Respondent’s same treaty violations under the Argentina-Mexico BIT, and involving the same issues of fact and law as the claims of the initial notice. 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.

226. Respondent’s objection to form against Mr. Sastre holds no water on two grounds. *First*, Respondent was notified about the applicability of the Argentina-Mexico BIT at all relevant times. Mr. Sastre filed his initial Notice of Arbitration on 29 December 2017, well beyond the 90-day cooling off period mandated by the Argentina-Mexico BIT. The Second Notice of Intent *expressly references* and expands upon the same investment protection breaches committed by Respondent.²⁷³

227. Indeed, 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.”²⁷⁴ The second Notice of Intent expressly defines the term “Investment Protection Treaties” to include Respondent’s investment protection treaties with

²⁷² See Sastre’s Second Notice of Intent, 6 September 2017 at 1, C-0036.

²⁷³ Mr. Sastre’s Second Notice of Intent, 6 September 2017, pp. 1, 3, C-0036 (“[U]nder the Bilateral Investment Treaties between the Swiss Confederation, the Kingdom of Spain, and the Argentine Republic, we submit this notice...”; “the government of Mexico initiated a number of serious measures against the investors of Hamaca Loca, in violation of the obligations contained in the treaties between Mexico and Switzerland, Spain, and Argentina.”).

²⁷⁴ *Id.* at 4.

Spain, Switzerland, and Argentina.²⁷⁵ Mr. Sastre later filed his arbitration claim under the Argentina-Mexico BIT, in keeping 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.

228. *Second*, even assuming that the second Notice of Intent did not mention the Treaty with Switzerland (which it did), the objection should nonetheless fail because Respondent has suffered no prejudice. Respondent's memorial does not—because it cannot—allege prejudice caused by either the substance of Mr. Sastre's initial and second notices of intent. The underlying facts and breaching conduct raised in Mr. Sastre's notices of intent are repeated in the notice of arbitration. The breaches were committed on the same dates against adjacent lots containing hotels, two of which were *Tierras del Sol* and *Hamaca Loca*.²⁷⁶

229. Nor can Respondent claim prejudice because of timing. If anything, Respondent arguably benefitted from the eighteen-month period between Mr. Sastre's notice of arbitration and the Claimants' amended notice of arbitration. This delay gave Respondent much more time to digest and consider Mr. Sastre's allegations than it would have enjoyed had Mr. Sastre pursued arbitration proceedings under the three or even six-month notice period typically found in investment treaties.

230. Respondent cites to one interim decision, *Merrill & Ring v. Canada*, to support this objection.²⁷⁷ But that tribunal's reasons for declining the addition of a new party do not apply

²⁷⁵ *Id.* at 1.

²⁷⁶ See Notice of Intent, 15 June 2017 at 3-6, C-0032; Second Notice of Intent, 6 September 2017 at 3-4, C-0033.

²⁷⁷ Respondent's Memorial on Jurisdiction ¶ 241.

here. The new claimant sought to be added after the tribunal was constituted, and after the parties submitted their statement of claim and statement of defense. That tribunal observed that not complying with the notice of intent requirement “deprive[s] the Respondent of the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim announced.”²⁷⁸

231. Here, none of those conditions are present. Respondent was not deprived of the right to be informed of Mr. Sastre’s grievances arising from Respondent’s breaching conduct. He outlined all of his investment claims in the initial and second notices of intent on June and September 2017. Mr. Sastre filed his notice of arbitration on 29 December 2017, *well beyond the 90-day minimum timeframe contained in the Argentina-Mexico BIT*.

232. Nor did Respondent miss the chance to “pursue any attempt to defuse the claim.” Respondent was well aware of Mr. Sastre’s allegations no later than 15 June 2017. Even after Mr. Sastre expanded upon his allegations with details concerning the *Hamaca Loca* investment in his 6 September 2017 notice, at no point did Respondent attempt to “defuse” Mr. Sastre’s claim by mediation, conciliation, or any other means. And again, even assuming that the second Notice of Intent did not refer to violations of the Argentina-Mexico BIT (which it did, repeatedly), Respondent fails to point to a single material difference between the Treaty with Argentina and the Treaty with Switzerland that would have put Respondent at a disadvantage. Respondent does not allege any prejudice, because it cannot.

²⁷⁸ *Id.* (quoting *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, RL-0099 ¶ 29); *see also Merrill & Ring* ¶ 32 (showing that the tribunal rejected claimant’s request to amend its statement of claim to add a new claimant).

233. Thus, Respondent cannot equate the essential facts and legal grounds in *Merrill & Ring* with this case. Claimant expressly stated that the measures violated the Argentina-Mexico BIT repeatedly.²⁷⁹ That should be the end of this analysis. But even so, Respondent knew of Mr. Sastre’s claims under the Argentina-Mexico BIT well before these proceedings commenced. A reference to the Treaties with Spain and Switzerland *does not negate* notice under the Treaty with Argentina for the *Hamaca Loca* investment.

234. For these reasons, Respondent’s notice-based objections against Mr. Alexander, Ms. Galán, and Mr. Sastre are meritless.

2. Respondent’s Abuse of Process Defense Fails Because None of the Elements of “Treaty Shopping” are Present

235. Respondent devotes two paragraphs in its Memorial objecting to this Tribunal’s jurisdiction of Mr. Sastre’s claim for the *Hamaca Loca* investment. Respondent frames this objection around two overlapping themes—that Mr. Sastre is a “bad faith” investor in *Hamaca Loca*,²⁸⁰ and that the assignment of that investment is an abuse of process akin to “treaty shopping.”²⁸¹ As explained below, Respondent fails to meet its burden to prove this objection.

236. Respondent musters only two arbitral decisions in as many footnotes to support its position: *Phoenix Action, Ltd. v. Czech Republic* and *Philip Morris Asia Limited v. Australia*. If anything, these awards buttress Mr. Sastre’s jurisdictional standing.

²⁷⁹ Sastre’s Second Notice of Intent, 6 September 2017 at 4, C-0036.

²⁸⁰ Respondent’s Memorial on Jurisdiction ¶ 185.

²⁸¹ Respondent’s Memorial on Jurisdiction ¶ 186.

237. First, Respondent cites to *Phoenix Action*²⁸² to point toward that tribunal’s analysis of *bona fide* versus bad faith investments, without explaining its reasoning or its relevance to this dispute. A careful reading reveals that Phoenix Action’s investment was not *bona fide* precisely because it internationalized a purely *domestic* dispute. Specifically, the principal (Vladimir Beňo) fled the Czech Republic and obtained Israeli nationality.²⁸³ After changing nationality, he “created an Israeli company to buy the two Czech companies he owned as a Czech citizen living in the Czech Republic, after the actions taken by the Czech Republic against these companies.”²⁸⁴ The tribunal held that the transaction to internationalize a domestic dispute was not a *bona fide* investment for purposes of obtaining ICSID protection.²⁸⁵

238. Respondent’s other authority was decided on similar grounds. There, Claimant’s Australian subsidiaries were owned by Philip Morris’ Dutch parent company when its dispute arose with the Australian government.²⁸⁶ Australia and the Netherlands do not have an investment treaty or any other investment protection instruments between them. Some time after the dispute arose, the claimant engineered a corporate restructuring that reorganized the Australian companies under the conglomerate’s Hong Kong entity.²⁸⁷ Unlike the Netherlands,

²⁸² Respondent’s Memorial on Jurisdiction, n. 177.

²⁸³ *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 ¶ 137, RL-024.

²⁸⁴ *Id.*

²⁸⁵ *Id.* ¶ 142.

²⁸⁶ *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 201212, Award on Jurisdiction and Admissibility 17 December 2015 ¶ 462, RL-096.

²⁸⁷ *Id.*

Hong Kong did have a bilateral investment treaty with Australia at the time.²⁸⁸ This dispute, too, was held to be an abuse of process because of the claimant's last-minute restructuring in order to gain access to BIT arbitration that it did not enjoy before the dispute.

239. In light of the evidence in the record, Respondent's objection falls apart. The 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*. From the formation of HLSA, through the construction and seizure of *Hamaca Loca*, the investment always enjoyed the protection of multiple investment treaties—namely the Switzerland-Mexico BIT and the Argentina-Mexico BIT.²⁸⁹ Respondent has not, because it cannot, present any evidence or facts that contest this.

240. The facts in *Phoenix Action* and *Philip Morris* bear no resemblance to Mr. Sastre's claim for the *Hamaca Loca* investment. During the years between the formation of HLSA in 2001,²⁹⁰ the physical seizure of the property in October 2011, and the various court proceedings that culminated in a denial of justice in June 2015, all of HLSA's shareholders were foreign nationals from either Switzerland or Argentina.²⁹¹ Mr. Sastre has presented evidence showing that HLSA and *Hamaca Loca* have been an international concern since their inception, cloaked under the protection of multiple investment treaties. The Certificate of Possession issued by the *Ejido* Commissariat that granted the possession, use, and enjoyment rights that was the genesis of the construction of *Hamaca Loca* is itself further evidence of this investment's international

²⁸⁸ According to the UNCTAD International Investment Agreements database, the Australia-Hong Kong, China SAR BIT (1993) was terminated on January 2020 as it was replaced by the Australia-Hong Kong Investment Agreement (2019).

²⁸⁹ See Protocolización Acta Asamblea HLSA (29 January 2008), C-0013; Passports of Hamaca Loca Investors, C-0050; Passport of Mr. Álvaro Urdiales, CS-0014.

²⁹⁰ Acta Constitutiva HLSA, 2 February 2001, CS-0013.

²⁹¹ See Protocolización Acta Asamblea HLSA, 29 January 2008, C-0013.

character.²⁹² The *Ejido* authority conferred those benefits to Mr. Alvaro Urdiales, a minority shareholder in HLSA and an Argentine national.²⁹³ Respondent does not challenge any of these facts with its own documents or other evidence.

241. In short, the crucial distinction that proved pivotal in *Phoenix Action* and *Philip Morris* is not present here. 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.

242. Respondent’s distinguishable legal authorities and lack of competing facts *alone* thus doom this jurisdictional objection, as Respondent has not met its burden of proof to sustain dismissal of Mr. Sastre’s HLSA/Hamaca Loca claim on abuse of process or bad faith grounds. However, for the sake of completeness, Mr. Sastre presents additional legal authority for the Tribunal’s consideration that hews closer to the peculiar fact pattern in this dispute.

243. In *Ryan and Schooner Capital v. Poland*, the tribunal considered a similar objection after a U.S. company transferred its entire shareholding in the investment to the claimant, which was also incorporated in the United States.²⁹⁴ At the time of the transfer, the investment was “effectively bankrupt.”²⁹⁵ The original owner would have been able to bring its own claim under the U.S.-Poland BIT, but instead “assigned all its assets, including any legal claims relating to

²⁹² Constancia (Alvaro Urdiales) Hamaca Loca Ejido 2006, C-0015.

²⁹³ See Protocolización Acta Asamblea HLSA, 29 January 2008, C-0013; Passport of Mr. Álvaro Urdiales, CS-0014.

²⁹⁴ 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 ¶ 195, CLA-0106.

²⁹⁵ *Id.*

those assets” to the claimant.²⁹⁶ The claimant then filed its arbitration claim “on the basis of an investment made by its predecessor.”²⁹⁷

244. Poland objected, arguing that “allowing [claimant] to bring this claim would amount to an abuse of international investment law.”²⁹⁸

245. The tribunal surveyed the tribunal decisions raised by Poland in its defense (including *Phoenix Action*), and found them lacking. The tribunal observed that they all involve investors seeking relief “by way of after-the-event acquisition of assets *from non-protected investors* in order to obtain BIT protection.”²⁹⁹ Because the claimant and the assignor predecessor company were both U.S. companies, the tribunal reasoned that treaty shopping was not applicable.³⁰⁰

246. In another decision involving the assignment of rights, *African Holding v. DR Congo* offers further insight. The tribunal considered a similar assignment of all rights and claims to the claimant who had the same nationality as the assignor. The tribunal noted that the disputed assignment does not extinguish any outstanding debt owed by the host State to the assignor. Instead the claimant assignee takes the position of assignor as an investor.³⁰¹ The tribunal reasoned that the host State cannot be discharged of its obligation to satisfy its debts each time

²⁹⁶ *Id.* ¶ 198.

²⁹⁷ *Id.*

²⁹⁸ *Id.* ¶ 199.

²⁹⁹ *Id.* ¶ 200 (emphasis supplied).

³⁰⁰ *Id.* ¶ 208.

³⁰¹ *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 [French] ¶¶ 78, 81, CLA-0107.

that the rights are reassigned.³⁰² Again, a key consideration was that the nationality of the claimant was identical to that of the assignor. Thus, the tribunal found that the transfer did not take place to gain access to international arbitration.³⁰³

247. Claimants observe that *Ryan and Schooner Capital* and *African Holding* are more reflective of Mr. Sastre’s legal position than the two decisions raised in Respondent’s memorial. The assignment of all rights and legal claims from the original Swiss and Argentine investors to Mr. Sastre, an Argentine national, should be permitted to proceed to the merits. Respondent thus fails to meet its burden to prove its objection concerning Mr. Sastre’s claims for the *Hamaca Loca* investment.

3. Respondent’s Prescription Period Objections Fail Because the Breaching Conduct Occurred Within the Relevant Timeframe

248. Respondent next alleges that Mr. Sastre’s claims fall outside the four-year prescription period in the Argentina-Mexico BIT. But, as explained below, Respondent’s objection is fundamentally misguided.

249. The Treaty clause relevant to this objection is Article 1(2) of the Annex to the Argentina-Mexico BIT. It provides in relevant part that there is a four-year prescription period for all arbitration claims as follows:

The investor must submit a claim under this Agreement, as soon as the investor *has knowledge of the alleged breach*, as well as knowledge of losses or damages suffered, or at the latest within a period of four years from the date on which the investor *should have had knowledge of it*.³⁰⁴

³⁰² *Id.*

³⁰³ *Id.* ¶¶ 60, 63.

³⁰⁴ CLA-0003 (emphasis added). The original Spanish language provision reads: “El inversor deberá presentar una reclamación conforme a este Acuerdo, tan pronto como haya tenido conocimiento

250. Respondent’s objection depends entirely on its assumption that Mr. Sastre “knew or should have known” that Respondent committed a treaty breach on 31 October 2011 when his investment was physically taken and he was ousted from *Tierras del Sol*.³⁰⁵ That assumption is incorrect.

251. As explained by Mr. Sastre, at the time of the physical taking of *Tierras del Sol* and the other hotels subject to the wave of evictions that night, Mr. Sastre did not know or have reason to believe that government officials plotted to take his property.³⁰⁶ The court representative and armed agents that initially threatened to seize his property on 19 October 2011 told Mr. Sastre that they had instructions to deliver possession of the parcels to an individual named Carlos González Nuño, who had no relationship to or prior dealings with Mr. Sastre.³⁰⁷ The agents left the premises that night without specifying the nature of Mr. González Nuño’s claims or purported rights to the property.³⁰⁸

252. On 31 October 2011, a large group of security agents returned to *Tierras del Sol*, and wielded firearms and tear gas to oust the rightful occupants and hotel guests who were there at the time.³⁰⁹ As he was removed from his property, Mr. Sastre encountered Luis Miguel Escobedo Perez, a representative (*actuário*) of a local court in Quintana Roo (the *Juzgado de Playa del Carmen*). He told Mr. Sastre that the hotel seizure arose from a court decision issued in a

del presunto incumplimiento, así como de las pérdidas o daños sufridos, o a más tardar en un período de cuatro años contados a partir de la fecha en la cual debió haber tenido conocimiento de ello.”

³⁰⁵ Respondent’s Memorial on Jurisdiction ¶¶ 231-33.

³⁰⁶ Witness Statement of Carlos Sastre ¶ 58.

³⁰⁷ Witness Statement of Carlos Sastre ¶¶ 34-35.

³⁰⁸ Witness Statement of Carlos Sastre ¶ 35.

³⁰⁹ Witness Statement of Carlos Sastre ¶ 40-43.

commercial trial.³¹⁰ But Mr. Sastre had no notice or participation in any kind of court proceeding by any of the hotel owners or anyone connected to the Tulum hotels themselves.³¹¹

253. Crucially, Mr. Carlos González Nuño was the private individual who was present during both the 19 October 2011 seizure attempt and the 31 October 2011 physical seizure, and appeared to orchestrate both attempts.³¹² There was no indication at the time, and Mr. Sastre had no reason to believe, that members of the government in bad faith planned or were complicit in González Nuño's scheme.

254. Soon after Mr. Sastre was violently removed from his property, he retained legal counsel with a number of similarly situated co-plaintiffs and filed actions to seek relief from the Mexican courts.³¹³ At this point, Mr. Sastre remained under the impression that this offense was driven solely by González Nuño, and that he would be able to obtain relief through the national legal system.³¹⁴

255. Mr. Sastre persisted with his efforts in the Mexican courts. Those efforts ended after almost four years. On 2 October 2015, the Federal *Juzgado Segundo de Distrito* in Quintana Roo dismissed Mr. Sastre's *amparo* on logically inconsistent legal grounds that amounted to a complete failure of the Mexican judicial system.³¹⁵

³¹⁰ Witness Statement of Carlos Sastre ¶ 43.

³¹¹ *Id.* ¶ 52.

³¹² *Id.* ¶¶ 35-45, 58.

³¹³ *Id.* ¶ 59.

³¹⁴ *Id.* ¶¶ 58-59.

³¹⁵ Am. Notice of Arb. ¶ 65; Witness Statement of Carlos Sastre ¶¶ 57.

256. It was not until 2015 that Mr. Sastre was apprised of the suspected involvement of certain government officials in directing, causing, or allowing the waves of physical takings of Tulum's beachfront hotels. Mr. Sastre's acquired knowledge of accusations of certain Mexican government officials of malfeasance coincided with an era of greater scrutiny against corruption in Quintana Roo by the public and media watchdogs. By then, investigative reports from Mexican and international media outlets began to expose the illegal methods used by public figures to enrich themselves at the expense of the ousted hotel owners in the Tulum region.³¹⁶

257. It was at the time of these investigative reports between 2015 and 2016, compounded by his dismay at the failure of Respondent's courts to deliver even basic justice, that Mr. Sastre initiated his Treaty claim and perfected Mexico's offer to consent to arbitration on 29 December 2017.

258. Respondent's objection pertaining to the prescription period in the Argentina BIT thus fails on no less than two independent grounds. *First*, contrary to Respondent's assertions, Mr. Sastre did not and could not have known on 31 October 2011 of the suspected plotting by Respondent's officials. The Argentina BIT mandates that an investor must bring his claim within four years of "the investor [having] *knowledge of the alleged breach*, as well as knowledge of losses or damages suffered."

259. By all appearances at that time, the offenses appeared to have been perpetrated solely by a private party (Carlos Gonzalez Nuño) using the court system to achieve his illegitimate

³¹⁶ Witness Statement of Carlos Sastre ¶¶ 58. *See also*, Lydia Cacho, *Tulum: Land of Ambitions*, ARISTEGUI NOTICIAS (7 September 2015), (certified translation), C-0001.

goals.³¹⁷ Mr. Sastre had no reason to believe at the time that any government officials in bad faith plotted the heist that had victimized Mr. Sastre and numerous other Tulum hotel operators.

260. Under a plain reading of the Argentina-Mexico BIT, which requires that an investor have knowledge or constructive knowledge of the alleged breach, the prescription period did not begin to run until 2015 when Mr. Sastre learned of certain government officials' suspected involvement in the land capture scheme. By serving Respondent with a notice of arbitration on 29 December 2017, Mr. Sastre's claims fall well within the Argentina-Mexico BIT's four-year limitations period. Respondent proffers no additional facts nor presents any new documents to the contrary.

261. This ground alone warrants dismissal of Respondent's objection. For the sake of completeness, however, there is a separate independent reason why Respondent's prescription period objection must fail.

262. Certain Treaty violations by Respondent against Mr. Sastre only occurred well after the physical seizure of the hotels in 2011. These protections include denial of justice, breach of full protection and security, and the protection against unlawful judicial expropriation. As discussed in Section II.A, Mr. Sastre's merits allegations are taken as true during this jurisdictional phase.

263. It is axiomatic in investment treaty law that "denial of justice occasioned by judicial action occurs when the *final* judicial instance . . . has rendered its decision."³¹⁸ The tribunal in

³¹⁷ 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.

³¹⁸ ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award, 18 May 2010 ¶ 107, CLA-0108.

ATA Construction v. Jordan elaborates that “[t]he determination of this moment in time is important for determining whether the putative claimant has exhausted domestic remedies, which is a precondition in general international law for bringing a claim at the international level....”³¹⁹

264. Thus, for purposes of calculating the Argentina-Mexico BIT’s prescription period for Mr. Sastre’s claims, the operative date when his 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. Indeed, Mr. Sastre initiated his arbitration claim a little over two years after that final court dismissal, thus preserving his rights to initiate arbitration against Mexico under the Argentina-Mexico BIT.

265. Thus, since Mr. Sastre’s knowledge of Respondent’s violations occurred less than four years before Mr. Sastre’s Notice on 29 December 2017, Mr. Sastre’s claims do not fall outside the prescription period in the Argentina-Mexico BIT. Under either of these two independent grounds, Respondent fails to meet its burden to prove this objection.

V. REQUEST FOR RELIEF

266. Therefore, pursuant to the Treaties and the UNCITRAL Arbitration Rules of 1976, Claimants respectfully request that the Tribunal:

- a. Find that the Claims are within its jurisdiction;
- b. Dismiss all of Respondent’s jurisdictional objections;
- c. Award Claimants all professional fees and costs arising from these proceedings;
- d. Grant Claimants any other remedy that the arbitral tribunal deems appropriate.

³¹⁹ *Id.*

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