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' REJOINDER ON JURISDICTIONAL OBJECTIONS

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17 November 2021

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I. INTRODUCTION

1. This round of briefing has confirmed that Respondent's objections are nothing but hot air. Respondent's strategy is simple: Turn the law on its head and make any argument imaginable regardless of merit. Anything counts.

2. In this Rejoinder, Claimants debunk Respondent's objections methodically, hoping that this Rejoinder will serve as a roadmap to the Tribunal and help simplify the Parties' positions and arguments.

3. *First*, many of Respondent's arguments lack *any evidence*. Respondent provides no evidence to show that Claimants were not citizens of their respective countries of origin. It provides no legitimate reason to believe that it was not properly notified of this arbitration. And it fails to provide any facts to support that some of the Claims are time-barred.

4. *Second*, Respondent's allegation that the Investments were "invalid" and "illegal" under Respondent's law ignores the basic fact that under the Agrarian Law, Claimants' Investments ***did not need to be ratified*** by the Ejido Assembly or registered with the Agrarian National Registry. Private Agreements, like the ones Claimants entered into, are expressly permitted in the Agrarian Law. Ratification and registration are only relevant where possessors want to obtain a land "title" that can be enforced against third parties. Many of Respondent's objections collapse after taking this into account.

5. Respondent's "restricted zone" laws are similarly irrelevant. They only apply when a foreign national obtains "ownership" of land in the restricted zone. Here, no such thing happened. The land was owned by the Ejido. And in any event, these restricted zone laws violate National

Treatment because they discriminate against Claimants compared to similarly-situated national investors. Respondent does not dispute this.

6. *Third*, Respondent's objections regarding multiparty arbitration fail again. Respondent adds nothing new. It continues to frame this as a consent issue. Consent to do what? To hear the Claims together. Why is consent needed to hear the Claims together when Respondent already consented to each Claim individually? Respondent has no answer. It cannot escape the fact that each Claimant perfected their consent to arbitrate with Respondent individually, and it is now up to this Tribunal to decide whether it would be more efficient to hear these similar claims together. Common sense dictates that they should. The claims are identical in every material respect.

7. *Fourth*, Respondent's objections regarding dominant and effective nationality and dual nationality are paper-thin. Dominant-and-effective nationality and dual nationality restrictions are not part of the Treaties, and these restrictions are not part of customary international law. Respondent tries to assemble some quotes from some cases out of context, but even a cursory analysis of those cases shows that they do not say what Respondent wants them to say.

8. Respondent's "waiver" of nationality and treaty rights objections strain credulity. Respondent again provides no evidence that Claimants waived their nationalities with their respective countries of origin. And Respondent fails to provide any jurisprudence whatsoever to rebut the notion that waivers of investment treaty rights must be direct, clear, and convincing, which is not the case here.

9. Respondent's domicile objection is also strained. Respondent stretches the meaning of the domicile provision in the Argentina-Mexico BIT to argue that it applies at the moment of the violations. But the plain text of the Treaty shows that the only logical conclusion is that the

provision applies at the moment of filing. Mr. Sastre was domiciled in Argentina at the moment of filing, so the provision does not apply.

10. And in any event, the domicile provision can be eliminated by virtue of the Most-Favoured-Nation clause ("**MFN**") clause in the Argentina-Mexico BIT. Investor-State jurisprudence is clear that MFN clauses must be analyzed individually according to their text. Respondent fails to do so. Claimants show that a clause-by-clause analysis shows no reason to believe that the domicile provision would not be covered by the MFN clause.

11. And *fifth*, Respondent's objection on abuse of process also falls through. Abuse of process cases in this context occur when a Claimant tries to obtain international protection for previously-unprotected investments only *after* the violation occurred. But this was not the case here. Mr. Sastre's HLSA investments were always protected by an investment treaty. In fact, they were always protected by the Argentina-Mexico BIT. Respondent points to no provision in this Treaty that prevents this. (In fact, this possibility is expressly permitted in Article 1 of the treaty's Annex).

12. Respondent's case thus collapses like a house of cards. With this Rejoinder, Claimants are one step closer to holding a $2.5 trillion-dollar economy (among the 15 largest in the world) to account for its grotesque violations of international law, elementary due process, and investment protection commitments.

13. These six individuals and their families originally fell in love with the beautiful Caribbean coast of Tulum, hauled from halfway around the world precious resources acquired over a lifetime to invest in Tulum, and dedicated over a *decade* of their lives to help build something truly special there – a world-class tourism destination. In less than a day, Respondent dispossessed Claimants of it all by force, without any notice or opportunity to defend themselves.

14. In the face of the public and international outcry, Respondent covers its ears and continues to do so today. Disgraceful. Respondent must be held to account. These are exactly the kinds of violations that the Treaties are meant to redress. After so much trauma and suffering, Claimants finally have a chance to get justice.

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15. This rejoinder is accompanied by a **Second Expert Report of Mr. Bonfiglio**, who answers several misconceptions by Respondent and its expert.

16. This rejoinder is structured as follows:

- **Section II** provides the relevant procedural history until today;
- **Section III** summarizes the facts of this case, starting with relevant information about Respondent's agrarian law system and the *ejido* framework;
- **Section IV** has relevant observations on burden of proof, including the standards that apply to Claimants' jurisdictional case and Respondent's objections
- **Section V** lays out why this Tribunal has jurisdiction ratione personae, ratione materiae, ratione temporis, and ratione voluntatis. It also answers Respondent's objections on these issues, to the extent it provides any; and
- **Section VI** explains why each of Respondent's objections to jurisdiction fails.

17. Finally, despite Respondent's employment of its vast resources to defend this case, it makes several concessions that prove fatal to many of its bogus arguments. This Rejoinder explains them in detail below. To the extent it intends to make any new arguments at the hearing that it failed to raise in its submissions, Respondent must be prevented from doing so. Otherwise, Respondent

would do so in violation of equality of arms against Claimants.[1] Procedural fairness requires that at the hearing Respondent is precluded from raising any theories it did not raise during this round of briefing.

II. PROCEDURAL HISTORY

A. NOTICES OF INTENT

18. On 15 June 2017, through his counsel, Mr. Sastre sent to Respondent a written notice of intent to submit this dispute to arbitration with respect to the Tierras del Sol investments "pursuant to the Treaties".[2] In this notice of intent, the "Treaties" are defined to include Respondent's BITs with Argentina and Spain.[3]

19. On 6 September 2017, again through his counsel, Mr. Sastre sent to Respondent a written notice of intent to submit this dispute to arbitration with respect to the Hamaca Loca investments "pursuant to the Treaties".[4] In this notice of intent, the "Treaties are defined to include Respondent's BITs with Switzerland, Spain, and Argentina.[5]

20. Thus, Mr. Sastre filed *both* notices of intent above pursuant to Respondent's BIT with Argentina.

[1] Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, CLA-0092.

[2] Sastre Notice of Intent, C-0032 at 1, 6.

[3] *Id.* at 1.

[4] Sastre Notice of Intent, C-0033 at 1, 5.

[5] *Id.* at 1.

21. On 29 December 2017, through his counsel, Mr. Sastre submitted a Notice of Arbitration to Respondent pursuant to the UNCITRAL Arbitration Rules concerning his Tierras del Sol and Hamaca Loca investments.

22. On 17 January 2019, through their counsel, Mr. Jacquet, Mr. Silva, Ms. Abreu, Ms. Galán, and Mr. Alexander sent a notice of intent to arbitrate to Respondent for the Behla Tulum, Uno Astrolodge, and Parayso investments. Their notice was sent pursuant to NAFTA and the France-Mexico and Portugal-Mexico BITs.[6]

23. On 14 June 2019, through his counsel, Mr. Sastre, together with the other Claimants in this arbitration, submitted an Amended Notice of Arbitration to Respondent pursuant to the UNCITRAL Arbitration Rules for the Investments. In this submission, Claimants nominated Dr. Charles Poncet as a member of the Tribunal.

24. On 7 October 2019, Respondent nominated Mr. Christer Söderlund to the Tribunal.

25. On 11 February 2020, after consultations with the ICSID Secretariat and consideration of the candidates proposed by the Secretariat, the Parties agreed to appoint Prof. Eduardo Zuleta as presiding arbitrator.

26. On 3 March 2020, ICSID expressed its acceptance of the Parties' appointment as the Administering Authority. ICSID designated Ms. Geraldine R. Fischer as Secretary of the Tribunal.

27. On 26 May 2020, the first session of the Tribunal was held by videoconference.

28. On 28 May 2020, upon consultation with the Parties, the Tribunal issued Procedural Order No. 1.

[6] Notice of Intent, 17 January 2019, C-0034.

29. Pursuant to Procedural Order No. 1, the Parties made two rounds of submissions on the issues of (a) bifurcation, (b) whether the proceeding is a multiparty arbitration or a consolidation of claims, and (c) any procedural or substantive implications. The submissions were made as follows:

30. On 10 June 2020, Respondent filed its Written Submission on Bifurcation ("Bifurcation Application").

31. On 24 June 2020, Claimants submitted their Written Submission in Opposition to Bifurcation and Brief in Support of a Multiparty Proceeding ("Claimants' Opposition").

32. On 1 July 2020, Respondent presented its Reply to the Claimants' Bifurcation Application ("Respondent's Bifurcation Reply").

33. On 8 July 2020, Claimants filed their Rejoinder in Opposition to Bifurcation and in support of a Multiparty Proceeding ("Claimants' Opposition Rejoinder").

34. On 13 August 2020, the Tribunal issued Procedural Order No. 2, bifurcating the proceedings to address the preliminary objections raised by Respondent in a preliminary phase.

35. On 17 September 2020, pursuant to the Parties' agreement, the Tribunal issued Procedural Order No. 3, which establishes that the proceedings will be governed by the 1976 version of the UNCITRAL Arbitration Rules, as well as the procedural calendar set out in Annex A.

36. On 23 December 2020, Respondent submitted its Memorial on Jurisdictional Objections.

37. On 31 March 2021, Claimants submitted their Counter-Memorial on Jurisdictional Objections.

38. On 21 April 2021, Claimants and Respondent submitted their Requests for Production of Documents. On 12 May 2021, the Parties produced the non-objected documents and submitted

their Objections to Requests for Production of Documents. On 26 May 2021, the Parties submitted their Replies to each other's Objections to Requests for Production.

39. On 16 June 2021, the Tribunal issued Procedural Order No. 4 with its Decision on Requests for Production of Documents.

40. On 7 July 2021, the Parties produced the documents ordered by the Tribunal. On the same day, Respondent asked Claimants for an extension until 14 July 2021 to produce certain documents pursuant to Procedural Order No. 4. Claimants granted the requested extension.

41. On 29 July 2021, Respondent submitted a letter to the Tribunal requesting a four-week extension for its Reply on Jurisdictional Objections. On 1 August 2021, Claimants deferred to the Tribunal. On 2 August 2021, the Tribunal granted the request for extension, and on 2 September 2021 the Tribunal adjusted the procedural calendar accordingly as Procedural Order No. 5.

42. On 31 July 2021, Respondent produced additional documents pursuant to Procedural Order No. 4.

43. On 13 September 2021, the Tribunal updated Procedural Order No. 5 to reflect its order of 2 August 2021 and, upon consultation with the Parties, to set the hearing on Jurisdictional Objections to the week of 28 March 2022.

44. On 1 September 2021, Respondent filed its Reply on Jurisdictional Objections.

45. Today, on 17 November 2021, Claimants hereby file their Rejoinder on Jurisdictional Objections pursuant to Procedural Order No. 5.

III. SUMMARY OF RELEVANT FACTS

46. For the Tribunal's benefit, Claimants summarize below the relevant facts of this case. Unless noted otherwise, each of the following facts is *uncontested* in the documentary record.

B. THE EJIDO JOSE MARÍA PINO SUÁREZ AND THE EJIDO REGULATORY FRAMEWORK

47. In this dispute, Claimants seek damages for Respondent's unlawful seizure of their Investments situated in beach front property located in the *Ejido José María Pino Suarez* (the "**Ejido**") in the Mexican state of Quintana Roo.

48. An ejido is a semiautonomous community created by decree. It is situated on a specified area of land and has legal personality, internal rules, governing bodies, and individual members.[7] This particular Ejido was created by the Mexican government on 8 October 1973.[8]

49. Ejidos are governed by Mexican law, including agrarian law.[9] The current Agrarian Law liberalized the legal framework governing agrarian land to promote increased economic development and investment in ejido lands.[10] In agrarian matters not regulated by the Agrarian Law, Mexican Civil law applies in supplementary fashion. [11]

[7] First Report of Mr. Bonfiglio, ¶¶ 36, 39.

[8] First Report of Sergio Bonfiglio, 31 March 2021, ¶¶ 3, 36, 76, 78.

[9] First Report of Sergio Bonfiglio, 31 March 2021, ¶¶ 2, 23, 73. The current Agrarian Law is a set of statutes that have been in effect since 1992, replacing the prior Agrarian Reform Law of 1971 and a prior Agrarian Law of 1915.

[10] First Report of Sergio Bonfiglio, 31 March 2021, ¶¶ 2, 23.

[11] First Report of Sergio Bonfiglio, 31 March 2021, ¶ 73.

50. The Ejido's governing bodies include: [12]

a. **The Commissariat**, which is the administrator and legal representative of the Ejido with respect to outside parties.

b. **The Assembly**, which is made up of the Ejido's individual members, each of whom has voting rights.

c. **The Oversight Council**, which is charged with ensuring that the Ejido is administered appropriately, which includes overseeing the activities of the Ejido Commissariat.

51. Among an ejido's most important assets is its land, which includes thousands of hectares. According to Respondent's public database and registry on agrarian information and demarcations (the "**PHINA**"), this particular Ejido includes a stretch of beachfront land where Claimants later established their Investments.[13] This stretch of land had direct access to the Caribbean Sea and was nestled close to unique tourism sites, including Mayan archeological ruins, underwater caves, and protected national parkland.[14]

52. An ejido's lands can belong to the following categories:[15]

a. Parceled Lands, which includes lands that an ejido has assigned to an individual ejido member.

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[12] First Report of Sergio Bonfiglio, 31 March 2021, ¶¶ 39, 51.

[13] Respondent maintains a database called the Registry and History of Agrarian Centers (the "PHINA", by its abbreviation in Spanish), available at www.phina.ran.gob.mx. This database is maintained by the RAN, and it includes visual representation of the records on ejido land boundaries. These records are maintained by the RAN and are the official information on this subject. First Report of Sergio Bonfiglio, 31 March 2021, ¶ 76, 77, 91, fn. 28; Second Report of Sergio Bonfiglio, 17 November 2021, ¶¶ 32-36.

[14] *See* The Mexican Government's Tourism Secretary's Things to Do in Tulum, https://www.visitmexico.com/en/quintana-roo/tulum (last visited 11 November 2021), C-0112.

[15] First Report of Mr. Bonfiglio, ¶¶ 62-75.

b. Human Settlement Lands, which include lands devoted for schools, playgrounds, and other community activities.

c. Common Use Lands, which includes lands that are neither parceled nor reserved for community activities. Common use lands can be allocated by the Ejido to individual ejido members, who can in turn enter into agreements with third parties regarding possessory interests in those lands.[16]

53. This particular Ejido has dozens of individual members and ("**Ejido Members**") who partake in rights to the land.[17] Under Agrarian Law, possessory rights to ejido lands can be held by ejido as well as non-ejido members ("**Possessors**").[18]

54. Similarly, under the Agrarian Law, agreements concerning possessory rights over ejido land can be executed among individuals (*acuerdos económicos* or "**Private Agreements**"), in which case they will be enforceable only among those parties.[19] Such agreements are permissible under the Agrarian Law.[20]

55. For an agreement to be enforceable against third parties, an Assembly Resolution is ratifying the agreement is required so the ejido can request its registration in the Agrarian National

[16] First Report of Mr. Bonfiglio, ¶ 68.

[17] First Report of Sergio Bonfiglio, 31 March 2021, ¶¶ 39, 76; Second Report of Mr. Bonfiglio, ¶ 31.

[18] First Report of Sergio Bonfiglio, 31 March 2021, ¶¶ 44-46.

[19] First Report of Sergio Bonfiglio, 31 March 2021, ¶ 40.

[20] First Report of Sergio Bonfiglio, 31 March 2021, ¶¶ 40 – 42; Segundo Informe de Perito Experto en Derecho Agrario Mexicano (Pablo Gutierrez), 1 September 2021, p.70 ("I agree that the lack of registration, by itself, does not cause illegality nor does it mean that an agreement lacks legal value, and that not having done so only implies that the contracts are not enforceable against third parties." (translation by counsel)) ("Estoy de acuerdo que la falta de inscripción, por sí misma, no provoca la ilegalidad ni significa que un acuerdo carezca de valor jurídico, y que no haberla hecho sólo implica que los contratos no son oponibles frente a terceros.").

Registry (the "**RAN**"); otherwise, the agreement remains enforceable between the contract parties.[21]

56. Concerning ownership by foreign nationals over the lands at issue in this case, the following points are relevant:

a. The Parties' experts disagree over whether foreign nationals can hold possessory rights over ejido lands. But both experts agree that the Agrarian Law does not contain any express provisions that prohibit possession by foreign nationals.[22]

b. Respondent's laws restrict "ownership" of land by foreign nationals within 100 kilometers from international borders and 50 kilometers from maritime boundaries.[23] Both experts agree that an ejido's common use lands are "owned" by that ejido.[24]

c. In any event, the Parties do not dispute that these laws (to the extent they apply) impose stricter requirements on foreign investors than national ones, thereby imposing a different treatment on foreign investors as compared to national investors who are similarly-situated.[25]

[21] First Report of Sergio Bonfiglio, 31 March 2021, ¶ 40.

[22] First Report of Mr. Bonfiglio, ¶¶ 7, 46; Second Report of Mr. Gutiérrez, pages 70-71; Second Report of Mr. Bonfiglio, ¶ 31.

[23] Mexican Constitution, Art. 27.

[24] Second Report of Mr. Bonfiglio, ¶ 11; Second Report of Mr. Gutiérrez, page 67 ("the property [rights] over common use lands belongs to the Ejido, not its members" (translation by counsel)).

[25] Cl. Counter-Mem., ¶ 214 and n. 264. In its Reply, Respondent does not contest this issue.

C. CLAIMANT'S ARRIVAL TO TULUM

57. Around the early 2000s, after observing the significant tourism potential of this stretch of beachfront land, Claimants negotiated and executed agreements with various Ejido members and individuals who were in possession of seven lots therein.[26]

58. For the following decade or longer, each Claimant made investments in these lots with funds from their business operations from their respective countries of origin, investing as well

[26] **Tierras del Sol**: Contrato de Cesión de Derechos (Transfer of Rights Agreement) between Mr. Novelo Pacheco and CETSA12 October 2000, C-0012.

Hamaca Loca: Contrato de Cesión de Derechos (Transfer of Rights Agreement) between Mr. Novelo Pacheco and HMSA (Hamaca Loca), 1 March 2001, C-0014.

Hotel Parayso: Contrato Privado de Cesión de Derechos (Transfer of Rights Agreement) between Mr. Novelo Balam and Ms. Galan (Parayso), 28 April 2004, C-0023.

Uno Astrolodge: Contrato Privado de Cesión de Derechos (Transfer of Rights Agreement) between Mr. Jiménez and Ms. Abreu (Uno Astrolodge), dated 22 October 2003, C-0020; Contrato Privado de Cesión de Derechos de Propiedad (Transfer of Rights Agreement) between Ms. Gutierrez and Ms. Abreu (Uno Astrolodge), 28 November 2003, C-0021 (Ms. Gutierrez previously acquired the lot from Mr. Jimenez through the Contrato Privado de Cesión de Derechos Ejidales (Transfer of Rights Agreement), 15 December 2000, NS-0003).

Behla Tulum: Commodatum Agreement between Mr. Jacquet and Mr. Román (North Lot), 10 January 2008, C-0053; Commodatum Agreement between Mr. Jacquet and Mr. Román (South Lot), 10 January 2008, C-0052. By way of background, when Mr. Jacquet became interested in purchasing these lands, they were in possession of Ms. Villarreal who had purchased them from Mr. Novelo Balam. Contrato Privado de Cesión de Derechos (Transfer of Rights Agreement) between Mr. Novelo Balam and Ms. Villarreal, 6 April 1999, with addendum dated 2 June 1999, RJ-0006. Mr. Jacquet, on behalf of AMSA, negotiated agreements with Ms. Villarreal and Mr. Román for the purchase of the two subject lots from these lands. ***North Lot:*** Addendum (Addendum to Transfer of Rights Agreement) between Ms. Villarreal and AMSA, 1 May 2006, RJ-0008; Contrato Privado de Cesión (Transfer of Rights Agreement) between AMSA and Mr. Román, 15 August 2007, RJ-0009; ***South Lot:*** Contrato Privado de Cesión de Derechos (Transfer of Rights Agreement) between Ms. Villarreal and Mr. Román, 2 January 2008, C-0051. By January 2008, both lots were in the possession of Mr. Román who then transferred the possession of the two lots to Mr. Jacquet via the two Commodatum Agreements mentioned above.

their time and effort through close supervision, operations management, and reinvestment of profits into the businesses.[27]

59. Claimants' possession of the lots and management of the investments went uninterrupted for over a decade, with the full consent of the Ejido and the relevant Ejido members. There is no evidence in the record suggesting that the Ejido, its governing organs, members of the Ejido, agrarian courts, or agrarian officials of Respondent ever objected to Respondent's possession.[28]

60. In fact the opposite was true. After Claimants reached their agreements with the respective members of the Ejido and relevant individuals, the Ejido offered to further formalize these agreements by issuing Certificates of Possession ("**Certificates of Possession**" or "**Certificates**") in exchange for a fee,[29] whereby the Ejido acknowledges that Claimants[30] are in legitimate possession of each corresponding lot of land.[31]

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[27] Witness Statement of Renaud Jacquet ¶ 10, 14, 32; Witness Statement of Nuno Silva ¶ 8, 11-12, 32; Witness Statement of Monica Galan ¶ 11, 33; Witness Statement of Carlos Sastre ¶ 4, 10.

[28] There is no evidence that Claimants "underpaid" anyone for their possessory interests, and no evidence concerning what the market price of the lots would have been in the 2000s, in the years of the purchases. There is likewise no evidence, including testimony, by any Ejido members or Ejido officials alleging abuse by Claimants. Finally, there is no evidence in the record that Claimants acquired, established, or operated their businesses in a non-transparent manner

[29] *E.g.*, Receipt from Treasurer of Ejido Commissariat for 94,983.18 MN payment of Certificate of Possession (Uno Astrolodge), 1 August 2006, NS-0008; Receipt from Treasurer of Ejido Commissariat for 38,229.14 MN payment of Certificate of Possession (Behla Tulum), 5 August 2006, RJ-0010; Receipt from Treasurer of Ejido Commissariat for 42,000 MN payment of Certificate of Possession (Parayso), 1 August 2006, C-0078.

[30] In the case of Behla, the Ejido issued a Certificate in the name of Mr. Román, who was the legitimate holder of possession rights and leased them out to Mr. Jacquet through commodatum agreements.

[31] Witness Statement of Renaud Jacquet ¶ 11, 12; Witness Statement of Nuno Silva ¶ 17-19; Witness Statement of Monica Galan ¶ 16-19; Witness Statement of Carlos Sastre ¶ 12, 33; Constancia (Certificate of Possession) issued to Alvaro Urdiales, 24 May 2006, C-0015.

61. Thus, through various certificates of possession, Assembly Resolutions, and registered Possessors' Rosters, the Ejido certified on multiple occasions that each of the three Ejido members from whom the rights derived had been lawfully assigned possession of the lots, and that Claimants or persons who acquired possession from the Ejido members did so legitimately.[32] (Respondent's expert questions the probative value of such Certificates, but his own exhibit confirms that they have presumptive value that Certificate beneficiaries are in lawful possession of the lots).[33]

62. Throughout this time, on multiple occasions Respondent acknowledged Claimants' Investments. In the months and years of construction and development, Claimants sought and obtained multiple licenses and permits from various agencies of Respondent. For example, each Claimant obtained a Land Use License and a Business Operations License from the Municipality or the state of Quintana Roo.[34] To obtain these licenses, each Claimant submitted the agreements

[32] *E.g.,* Constancia de Possession (Certificate of Possession) to Lorenzo Novelo Pacheco, 30 April 1994, CS-0019; Constancia de Possession (Certificate of Possession) to Rogelio Novelo Balam, 30 April 1994, RJ-0007; Constancia (Certificate of Possession) to Mr. Sastre (Tierras del Sol), 21 December 2002, CS-0005; Constancia (Certificate of Possession) to Mr. Urdiales (Hamaca Loca), 24 May 2006, C-0015; Constancia (Certificate of Possession) to Ms. Galan (Parayso), 25 June 2006, C-0060; Constancia (Certificate of Possession) to Ms. Abreu (Uno Astrolodge), 25 June 2996, NS-0007; Constancia (Certificate of Possession) to Mr. Román (for Behla Tulum North Lot), 5 August 2006, C-0049; Registered Ejido Possessors Roster, C-0121. Asamblea Ejidal (Ejido Assembly Resolution), 28 April 1994, C-0045; Asamblea Ejidal (Ejido Assembly Resolution), 28 April 2005, C-0070. *See also* First Report of Sergio Bonfiglio, 31 March 2021, ¶¶ 98 -100, 102, 109 (Tierras del Sol); First Report of Sergio Bonfiglio, 31 March 2021, ¶¶ 117 – 119, 125 (Hamaca Loca); First Report of Sergio Bonfiglio, 31 March 2021, ¶¶ 178, 185, 186 (Parayso); First Report of Sergio Bonfiglio, 31 March 2021, ¶¶ 135, 142, 149 (Behla Tulum); First Report of Sergio Bonfiglio, 31 March 2021, ¶¶ 165, 169 – 170 and p. 69 (Uno Astrolodge).

[33] Supreme Court Decision and Holding Summary, 23 April 1996, PGPG-0087; Second Report of Mr. Bonfiglio, ¶¶ 24-25; *see also* Segundo Informe de Perito Experto en Derecho Agrario Mexicano (Pablo Gutierrez), 1 September 2021, page. 68, n.178; First Report of Sergio Bonfiglio, 31 March 2021, ¶ 5.

[34] **Behla Tulum**: Constancia de Uso de Suelo (Certificate of Land Use), 5 October 2012, RJ-0013; Licencia de Use de Suelo Comercial (Commercial Land Use License), 5 October 2012, RJ-0014; Licencia de Funcionamiento 2013 (Operating License), 31 December 2012, RJ-0017. **Uno Astrolodge**: Licencias de Uso de Suelo Comercial (Commercial Land Use Licenses), 4 April 2014, NS-0010; Licencias de Funcionamiento (Operating Licenses), 9 June 2014, NS-0013. **Hotel Parayso:** Constancia

reached with the individual Ejido members and the Certificates of Possession issued by the Ejido.[35] Upon submission of this documentation, the relevant agencies issued these licenses, often noting that the businesses are situated in the Ejido.[36] Claimants also obtained other licenses including liquor licenses, signage permits, and maritime and beachfront land use licenses from federal and state authorities.[37]

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de Uso de Suelo (Certificate of Land Use), 8 March 2006, MG-0009; Licencia de Uso de Suelo (Land Use License), 11 September 2009, MG-0012; Licencias de Uso de Suelo Comercial (Commercial Land Use Licenses), 10 September 2009, MG-0013; Constancia de Uso de Suelo (Land Use Certificate), 14 October 2015, MG-0015; Municipio de Tulum Licencias de Funcionamiento (Tulum Municipality Operating Licenses), 29 November 2010 and 19 August 2015, MG-0016; Licencias de Funcionamiento, Bebidas Alcohólicas (Operating License permitting liquor sale, 31 January 2011, MG-0017. **Tierras del Sol**: Operating License, 25 February 2011, CS-0009 p. 6; Operating License, 12 March 2010, CS-0009 p. 7; Operating License, 19 November 2004, CS-0009 p. 8; Operating License, 23 March 2004, CS-0009 p. 9; Commercial Land Use License, 6 April 2011, CS-0009 p. 10; *Cf*. Tulum Municipality Property Tax Receipt for CETSA, including construction, 12 August 2009, C-0119; **Hamaca Loca** Commercial Land Use License, 11 February 2011, C-0068; Land Use License, 24 April 2009, C- 0069; Operating License, 25 February 2011, C- 0108; Hamaca Loca Construction License, C-0069, at 3; Construction Regularization License, 5 Oct. 2012, RJ-0012.

[35] *E.g.*, Witness Statement of Renaud Jacquet ¶¶ 12, 21, 25, 26; Witness Statement of Nuno Silva ¶¶ 25; Witness Statement of Monica Galan ¶¶ 21, 22, 25, 28, 30;

[36] Witness Statement of Renaud Jacquet ¶¶ 21, 23, 26; Witness Statement of Nuno Silva ¶¶ 25, 27, 28, 30; Witness Statement of Monica Galan ¶¶ 20, 21, 25, 27, 28, 29; Witness Statement of Carlos Sastre ¶¶16, 17.

[37]. Witness Statement of Renaud Jacquet ¶ 21 (construction regularization license), 23 (alcoholic beverage permits), 26 (operating licenses, municipal sanitation license, civil protection license) (Behla Tulum); Witness Statement of Nuno Silva ¶ 27 (construction regularization and signage licenses), 28 (operating licenses, municipal permits for operating the hotel, spa and restaurant, civil protection license), 30 (Uno Astrolodge); Witness Statement of Monica Galan ¶ 20, 21 (construction regularization license), 22-23 (federal zone concession title), 25 (construction regularization license), 28 (construction regularization license), 29 (operating licenses, liquor license, signage license), 30 (Hotel Parayso); and Witness Statement of Carlos Sastre ¶ 16 (federal zone concession title) (Tierras del Sol), 17 (operating licenses) (Tierras del Sol); Construction License, 24 April 2009, C- 0069 (Hamaca Loca); Licencia Sanitaria Municipal, 5 April 2004, C- 0106 (Hamaca Loca); Receipt for payment of use of federal zone, Zofemat, 7 July 2010, C-0109 (Hamaca Loca); Tulum Municipality Receipt for Payment of Aportaciones [Hamaca Loca], 28 February 2007, C-0105 (Hamaca Loca).

63. There is no evidence in the record that any of Respondent's agencies rejected an application for a license or permit by Claimants due to insufficient or inadequate documentation to demonstrate their possessory interests.

64. As Claimants developed their hotel businesses on these lots tourism in the area skyrocketed thereafter. When Claimants first arrived in the early 2000s, the area was desolate and remote. Indeed, Claimants were among the first to build tourism ventures there.[38] A few years later, it became a tourism hotspot, celebrated by the international press, and attracted Hollywood actors, pop stars, fashion models, and thousands other high-income tourists from all over the globe.[39] And to this day Respondent has marketed the area of Claimants' hotels as a desirable tourism destination.[40] From 2000 to the date of filing, Tulum's tourism market capacity grew from approximately eight to over 230 hotels, attracting affluent tourists from mostly Europe and North America, with substantial occupancy rates, and commanding significant nightly room rates.[41]

[38] Witness Statement of Renaud Jacquet ¶ 6, 33; Witness Statement of Nuno Silva ¶ 4, 33; Witness Statement of Monica Galan ¶ 9, 38; Witness Statement of Carlos Sastre ¶ 7-9, 18 (Tierras del Sol), 28, 29.

[39] Witness Statement of Renaud Jacquet ¶ 33; Witness Statement of Nuno Silva ¶ 33; Witness Statement of Monica Galan ¶ 38; Witness Statement of Carlos Sastre ¶ 20-21.

[40] *See, e.g.*, The Mexican Government's Tourism Secretary's Things to Do in Tulum, https://www.visitmexico.com/en/quintana-roo/tulum (last visited 11 November 2021), C-0112. Respondent even continues to tout hotel Nomâde, which includes the facilities that belong to Tierras del Sol, The Mexican Government's Tourism Secretary's Tourism Businesses Certified in Sanitation Prevention and Protection, C-0111.

[41] Quintana Roo Tulum Hotel Occupancy Statistics, C-0122.

65. Claimants' Investments were extremely successful, in large part because they enjoyed a privileged location within Tulum itself.[42] They had direct beachfront access to the Caribbean and were a short distance away from ancient ruins, protected biospheres, underground water caves, and archeological sites.[43] The Investments' lodging facilities enjoyed high demand and were extremely profitable. In addition to room bookings, the Investments had other revenue streams from other facilities and activities, including restaurants, shops, a yoga studio, and weddings and special events.

D. ESTABLISHMENT OF CLAIMANTS' INVESTMENTS

1. Tierras del Sol

66. The Tierras del Sol investment belongs to Carlos Sastre. Mr. Sastre is an Argentine national.[44] He was born and raised in Argentina.[45] He attended university in Argentina and his

[42] The hotels' view on a map and from the street can be appreciated on Google Maps and its "street view" feature. The Tribunal can see these locations and a 360-degree view from the street by visiting maps.google.com, entering the below coordinates, and enabling the "street view" function:

Tierras del Sol: 20.134838686425, -87.46302768593493

Hamaca Loca: 20.135162773032288, -87.46306182488492

Parayso: 20.14992915758629, -87.45886990985343

Behla Tulum: 20.150246430684177, -87.45859632454061

Uno Astrolodge: 20.152640849136002, -87.45732719692681

(Other points of interest): Casa Magna: 20.133043654801227, -87.46439869834238

[43] Witness Statement of Renaud Jacquet ¶ 7, 33; Witness Statement of Nuno Silva ¶ 5, 33; Witness Statement of Monica Galan ¶ 10, 38; Witness Statement of Carlos Sastre ¶ 7-9, 15, 20 – 21 (Tierras del Sol), 28, 32 (Hamaca Loca).

[44] *See* Birth Certificate of Carlos Sastre Exhibit CS-0001; Argentine passport of Carlos Sastre C-0004.

[45] Witness Statement of Carlos Sastre, ¶¶ 2, 4.

entire family lives in Argentina, where he has lived the majority of his life and where he continues to live today. His wife, Ms. Cerutti, met Mr. Sastre in the same city where they both grew up.[46]

67. In 1996, Mr. Sastre traveled to Mexico to explore business opportunities. He used the proceeds from the sale of his business interests in Argentina to do so.[47] He first established a marketing business for large companies that wanted to target advertisements to Cancun's beachgoers.[48] In 7 June 2000, Mr. Sastre obtained a FM3 visa to be able to stay in Mexico while he established and managed his investment.[49]

68. On 25 August 2000, Mr. Sastre and a minority partner created the Mexican Company Constructora Ecoturística S.A. de C.V. ("**CETSA**") to acquire, develop, operate, and commercialize tourism or ecological facilities.[50]

69. A few months later, on 12 October 2000, CETSA executed a transfer of rights agreement with Ejido member Lorenzo Novelo Pacheco for the use and enjoyment of Lot 19-A, a 1,873 square-meter oceanfront lot located in the Ejido, within the municipality of Tulum.[51] Mr. Sastre used funds from the sale of his other business interests, as well as funds borrowed from his family in Argentina, to pay for this lot.[52] Mr. Sastre hired several attorneys in Quintana Roo to advise

[46] Witness Statement of Carlos Sastre, ¶ 5, 22.

[47] Witness Statement of Carlos Sastre, ¶ 4.

[48] Witness Statement of Carlos Sastre, ¶ 4.

[49] Estados Unidos Mexicanos, Documento Migratorio, FM3 (United Mexican States, Migratory Document, FM3) (Carlos Esteban Sastre), 7 June 2000, R-0030.

[50] *See* CETSA Partnership Agreement, Exhibit C-0002; Witness Statement of Carlos Sastre, ¶ 11. The lot that Mr. Sastre acquired was within the Ejido's common use lands. C-0102.

[51] *See* Contrato de Cesión CETSA (CETSA Transfer of Rights Agreement), C-0012.

[52] Witness Statement of Carlos Sastre, ¶¶ 4, 10.

him during the establishment and operation of his investment, including Ms. Margarita León Rejón, and Álvaro López Joers, an agrarian law attorney who was working on protecting Mr. Sastre's possessory interests.[53]

70. Mr. Sastre developed the property and built a hotel named Tierras del Sol. The hotel eventually grew to contain four buildings that housed a total of eight private suites (seven of which had ocean views), a restaurant, a cellar, a warehouse, laundry facilities, gardens, a private parking lot, and several common areas with ocean views. The Tierras del Sol property also included a house for the Hotel Manager.[54] The hotel had six employees, including a manager, a receptionist, housekeeping, and a chef and his assistants.[55]

71. In 21 December 2002, in acceptance of an offer from the Ejido, Mr. Sastre obtained a Certificate of Possession from the Ejido whereby the Ejido Commissariat certified that he was the legitimate holder in possession of the specific lot.[56] Mr. Sastre paid the required fee for the certificate. The Ejido indicated that the Certificate would protect Mr. Sastre's possessory interests, and would be accompanied by an assembly resolution to be used to register Mr. Sastre's interest in the RAN.[57] Later, Mr. Sastre obtained various licenses and permits for the construction and

[53] Witness Statement of Carlos Sastre, ¶¶ 9, 12, 23, 24; Payment Receipt issued by Mr. López Joers, CS-0004.

[54] Witness Statement of Carlos Sastre ¶ 15.

[55] Witness Statement of Carlos Sastre ¶ 19.

[56] Witness Statement of Carlos Sastre, ¶ 12.

[57] Constancia (Certificate of Possession), 21 December 2002, CS-0005.

operation of his Investment, including a commercial land use license, business operation licenses, and a Federal Maritime-Land Zone Use Permit, among others.[58]

72. Throughout the development and operation of this investment for approximately one decade, no Ejido member, Ejido official, or agency of Respondent ever claimed that this investment was unlawfully established in the manner that Respondent now claims.

73. As tourism in the area exploded, Tierras del Sol enjoyed great success. The hotel was in very high demand and often had no vacancy. [59] The hotel was featured as a recommendation for all of Mexico in *Outside Magazine*,[60] and hosted international celebrities from North America, Europe, and South America.[61] Encouraged by his investment's success, Mr. Sastre engaged in talks with Mr. Novelo Pacheco to purchase the lot directly across the street from Tierras del Sol to expand his business.[62]

[58] Licencia de Uso de Suelo Comercial (Commercial Land Use License) (Tierras del Sol), 6 April 2011, CS-0008; Constancia (Certificate of Possession), 21 December 2002, CS-0005; Receipt for payment of Federal Maritime Zone Concession (Concesión de Zona Federal Marítima) (Tierras del Sol), 2 March 2010, CS-0007; Licencia de Funcionamiento (Operating License) 25 February 2011, CS-0009, p. 6; Licencia de Funcionamiento (Operating License), 12 March 2010, CS-0009, p. 7; Licencia de Funcionamiento (Operating License), 19 November 2004, CS-0009, p. 8; Licencia de Funcionamiento (Operating License), 23 March 2004, CS-0009, p. 9; Licencia de Uso de Suelo Comercial (Commercial Land Use License), 6 April 2011, CS-0009, p. 10;; *see generally*, Witness Statement of Carlos Sastre, ¶ 16, 17.

[59] Witness Statement of Carlos Sastre, ¶ 20.

[60] *Go like a Pro*, OUTSIDE MAGAZINE, 1 November 2003, CS-0011, pp. 7-8.

[61] Witness Statement of Carlos Sastre, ¶ 20.

[62] Witness Statement of Carlos Sastre, ¶ 21.

74. In May 2009, Mr. Sastre acquired Mexican nationality by naturalization.[63] As part of that naturalization process, Respondent requires applicants to submit to Mexican authorities exclusively a boilerplate waiver of any non-Mexican nationalities.[64]

75. However, the boilerplate language does not make any specific reference to the Argentina-Mexico BIT or to any of Mr. Sastre's investments. There is no evidence in the record that Mr. Sastre and officials of Respondent discussed Mr. Sastre's rights under the BIT or his investments. This is confirmed by Mr. Sastre.[65]

76. In 12 May 2011, Mr. Sastre acquired Spanish nationality, also by naturalization.[66] Nevertheless, Mr. Sastre has never renounced his Argentine citizenship before the Argentine government,[67] and there is no evidence in the record that Mr. Sastre did so. Under Argentine law it is impossible for Argentine nationals by birth to renounce their Argentine nationality.[68]

77. Despite Tierras del Sol's marked success and the tourism explosion in Tulum's beachfront, Mr. Sastre did not intend to stay in Mexico because he intended to return to Argentina with his family to raise his children. In particular, Mr. Sastre did not find that the Tulum region offered adequate schools for his children, particularly for his son [redacted] who has [redacted]. [redacted] condition requires special facilities, treatment, and the support of his extended family in

[63] Mexican Naturalization Letter (Carlos Esteban Sastre), 26 May 2009, R-0022.

[64] Letter from Carlos Sastre to Secretary of Foreign Relations (regarding waiver), 26 May 2009, R-0032.

[65] Witness Statement of Carlos Sastre, ¶ 6.

[66] Spanish Passport of Carlos Sastre, CS-0003; Message from Spanish Consulate to Carlos Sastre, CS-0002.

[67] Witness Statement of Carlos Sastre, ¶ 6.

[68] Cl. Counter-Mem. ¶151

Rio Cuarto, Argentina. Thus, Mr. Sastre's plan was to hire a manager for his investment, return to Rio Cuarto around 2014 when his children became of school age, and make periodic visits to Tulum to supervise and further expand his business.[69]

2. Cabañas Hamaca Loca

78. The Hamaca Loca Investment belongs to Carlos Sastre. On 2 February 2001, with a view to establish a beachfront tourism business in the same vicinity as Mr. Sastre, Swiss nationals Danila Marchetti, Dario Sartore, Reto Sartore, and Claudio Giobbi, created the company Hamaca Loca S.A. de C.V. ("**HLSA**").[70]

79. On 1 March 2001, HLSA executed a transfer of rights agreement with Mr. Lorenzo Novelo Pacheco, granting possessory rights to HLSA over 2,999 square meters of beachfront land within Lot 19, located in the Ejido.[71] HLSA executed this agreement with the advice of Ms. Margarita León Rejón, one of the same lawyers who advised Mr. Sastre earlier.[72]

80. Subsequently, the original HLSA members agreed with Mr. Urdiales, an Argentine national who is Mr. Sastre's friend, to incorporate him into the partnership. Mr. Urdiales was also born in Argentina, and he grew up with Mr. Sastre in the same city, Río Cuarto, Argentina.[73] On 24 May 2006, the Ejido Commissariat issued a Certificate of Possession in favor or Mr. Urdiales

[69] Witness Statement of Carlos Sastre, ¶ 22.

[70] Protocolización Acta Asamblea HLSA (Notarized HLSA Assembly Act), C-0013.

[71] Contrato de Cesión de Derechos Hamaca Loca (Hamaca Loca Transfer of Rights Agreement), C-0014.

[72] Witness Statement of Carlos Sastre, ¶ 30. Transfer of rights agreement on for HLSA, C-0014.

[73] Passport of Alvaro Urdiales, CS-0014; Witness Statement of Carlos Sastre, ¶ 33.

for the beachfront lot.[74] This lot was located a few meters away from Tierras del Sol. On 29 January 2008, Mr. Urdiales joined HLSA as a member.[75]

81. Throughout this time, HLSA developed the lot and built the Hamaca Loca hotel. The hotel included five bungalows, a bar-restaurant, a garden, a pool, and beachfront common areas.[76] HLSA obtained several permits for this development, including, for example, licenses for use of the land, for construction, for commercial use of the land, for operating and for municipal sanitation, and it paid for the use of the federal zone.[77] It also paid the municipality for yearly property taxes (*aportaciones*) for the lot.[78] The hotel had three employees, including a receptionist and housekeeping staff.[79]

82. Throughout the development and operation of this investment for approximately one decade, no Ejido member, Ejido official, or agency of Respondent ever claimed this investment was unlawfully established in the manner that Respondent now claims.

83. Similar to Mr. Sastre with Tierras del Sol, HLSA was constantly improving and expanding the hotel. Hamaca Loca was a successful business. Mr. Sastre had an excellent professional relationship with the Hamaca Loca shareholders, and often the two hotels referred clients to each

[74] Ejido Certificate of Possession in favor of Mr. Urdiales, C-0015.

[75] Protocolización Acta Asamblea Hamaca Loca, S.A., 29 de enero de 2008, CS-0015.

[76] Hamaca Loca Property Photos, C-0016; Witness Statement of Carlos Sastre, ¶ 32.

[77] Commercial Land Use License, 11 February 2011, C-0068; Land Use License, 24 April 2009, C- 0069; Operating License, 25 February 2011, C- 0108; Construction License, 24 April 2009, C- 0069; Municipal Sanitation License, 5 April 2004, C- 0106; Receipt for payment of use of federal zone, Zofemat, 7 July 2010, C-0109 (Hamaca Loca).

[78] *E.g.*, Receipt from Tulum Municipal Treasury, 16 January 2009, C-0114; Receipt from Tulum Municipal Treasury, 28 February 2007, C-0115.

[79] Witness Statement of Carlos Sastre, ¶¶ 32.

other whenever there was no vacancy at either hotel.[80] On 12 June 2017, HLSA and the HLSA Shareholders individually transferred their rights over the above lot and investment to Mr. Sastre.[81]

3. Behla Tulum

84. The Behla Tulum investment belongs to Renaud Jacquet. Mr. Jacquet was born in [redacted] in Auxerre, l' Yonne, France, and grew up and attended EDC Paris Business School in France.[82] He is exclusively a national of France.[83]

85. Mr. Jacquet decided to use funds from his international business operations to establish a tourism business in Mexico.[84] On 10 January 2008, Mr. Jacquet negotiated a commodatum agreement with Mr. José Mauricio Román Lazo for a beachfront lot (the North Lot) in Tulum, within the Ejido.[85] On 10 January 2008, Mr. Jacquet executed a second commodatum agreement with Mr. Román over a second beachfront lot (the South Lot).[86] Both commodatum agreements stipulated that Mr. Jacquet would return the lots to Mr. Román at the end of the term of the agreements, together with any improvements made to the land.[87] The lots that Mr. Jacquet

[80] Witness Statement of Carlos Sastre, ¶¶ 31-32.

[81] Resolución de Asamblea Especial de Accionistas de HLSA y Cesión de Derechos, 12 June 2017, C0003.

[82] Acte de Naissance (Birth Certificate) for Renaud Jacquet, C-0075.

[83] Witness Statement of Renaud Jacquet, ¶¶ 2, 3; French Passport, C-0005.

[84] Witness Statement of Renaud Jacquet, ¶ 10.

[85] Commodatum Agreement, 10 January 2008 (North Lot), Exhibit C-0053.

[86] Commodatum Agreement, 10 January 2008 (South Lot), C-0052.

[87] Commodatum Agreement, 10 January 2008 (North Lot), Exhibit C-0053, p. 2; Commodatum Agreement (South Lot), 10 January 2008, Exhibit C-0018, C-0052, p. 2.

acquired through the commodatum agreements were adjacent to each other.[88] Mr. Jacquet hired local attorneys to help with the execution of these agreements.[89]

86. By way of background, both lots were in the Ejido. The Ejido Assembly had assigned them to Ejido Member Rogelio Novelo Balam in 1994.[90] In 1999, Mr. Novelo Balam agreed to transfer a portion of his interest in these land holdings to Ms. Irma Villarreal, who later transferred (1) one lot (the North Lot) to AMSA, who later transferred it to Mr. Román, and (2) a second lot (the South Lot) directly to Mr. Román.[91]

87. Between 2005 and 2006, the Ejido Commissariat told Mr. Román and others in possession of Ejido land that, as part of its land survey efforts, they would issue Certificates of Possession for a fee.[92] In 2006, Mr. Román obtained a Certificate of Possession for the North Lot.[93] And on 2 January 2008, Mr. Román acquired his interest in the South Lot.[94] Mr. Román and Mr. Jacquet

[88] First Report of Sergio Bonfiglio, 31 March 2021, ¶¶ 152 – 154; Plano Constancia Norte Behla, SB-0014; Plano Comodato Sur Behla, SB-0015; Plan Ubicación Física Behla Fusion (Map, Combined Physical Location of Behla), SB-0016.

[89] Witness Statement of Renaud Jacquet, ¶ 5, 15.

[90] First Report of Sergio Bonfiglio, 31 March 2021, ¶ 135; Ejido Certificate of Possession in favor of Rogelio Novelo Balam, dated 30 April 1994, RJ-0007.

[91] Contrato Privado de Cesión de Derechos (Transfer of Rights Agreement), between Mr. Novelo Balam and Ms. Villarreal, 6 April 1999, with addendum dated 2 June 1999, RJ-0006; Addendum (Addendum to Transfer of Rights Agreement) (North Lot), between Ms. Villarreal and AMSA, 1 May 2006, RJ-0008; Contrato Privado de Cesión de Derechos (Transfer of Rights Agreement) (North Lot), between AMSA and Mr. Román, 15 August 2007, RJ-0009; Contrato de Cesión de Derechos (Transfer of Rights Agreement) (South Lot), between Ms. Villarreal and Mr. Román, 2 January 2008, C-0051.

[92] Witness Statement of Renaud Jacquet, ¶ 11, 12.

[93] Constancia (Certificate of Possession) to Mr. Román, 5 August 2006, C-0049.

[94] Contrato de Cesión de Derechos (Transfer of Rights Agreement), 2 January 2008, C-0051.

also hired an agrarian attorney, Mr. Álvaro López Joers, to work to ensure that their possessory interests were protected.[95]

88. Mr. Jacquet then built the business known commercially as Behla Tulum, which included luxury lodging facilities and a shop. To do this, Mr. Jacquet obtained various licenses, including operating licenses from the Urban Development office and the State of Quintana Roo, a permit to use the Federal Maritime-Land Zone for which he paid several times each year, and authorizations from Respondent's Federal Environmental Secretariat, among many others.[96]

89. Throughout the development and operation of this investment for approximately one decade, no Ejido member, Ejido official, or agency of Respondent ever claimed that this investment was unlawfully established in the manner that Respondent now claims. The only time when this investment was penalized for non-compliance was in 2013, when Environmental authorities suspended construction activities in Behla Tulum for failure to obtain an environmental permit. However, after visits by inspectors and payment of a fine, the matter was resolved, and in less than a month the agency lifted the suspension.[97]

90. On 23 April 2014, Mr. Jacquet's wife, Ms. Loree "Lori" Buksbaum, passed away, leaving behind Mr. Jacquet and their two children.[98] A U.S. attorney who previously worked at White &

[95] Witness Statement of Renaud Jacquet, n. 14.

[96] *E.g.*, Licencia de Funcionamiento 2013 (Operating License), 31 December 2012, RJ-0017; Tesorería Municipal, Recibos Municipales (Municipal Treasury, Receipts), 17 June 2016 and 18 June 2012 RJ-0020. Witness Statement of Renaud Jacquet, ¶¶ 26, 27; Acta de Levantamiento de Sellos de Clausura (Record of Lifting Closure Seals), 3 July 2013, RJ-0021. *See generally*, Witness Statement of Renaud Jacquet, ¶ 21, 23, 25 - 27.

[97] Witness Statement of Renaud Jacquet ¶ 29; Acta de Levantamiento de Sellos de Clausura (Record of Lifting Closure Seals), 3 July 2013, RJ-0021.

[98] Witness Statement of Renaud Jacquet ¶ 30; Report of Death of a U.S. Citizen Abroad, 6 May 2014, RJ-0002.

Case, LLP, in New York, she had been closely involved with the development of the investment by taking charge of its legal aspects, hiring and consulting with local attorneys as needed.[99]

91. By 2016, Behla Tulum became a luxury vacation property with five private villas that included thirteen bedrooms (eleven oceanfront), a pool, and commercial space that housed a highly successful bar-store named La Tente Rose.[100] Ever since it opened its doors for business, Behla Tulum and La Tente Rose were extremely successful for close to a decade. Behla Tulum attracted celebrity guests and high-level politicians from Europe and North America.[101] Behla Tulum enjoyed high demand for lodging, and Mr. Jacquet repeatedly had to decline reservation requests.[102]

4. Uno Astrolodge

92. The Uno Astrolodge Investment belongs to Ms. Abreu and Mr. Silva. They are both nationals of Portugal by birth, where they were born and raised, and where they attended university and worked in their adult years.[103] They have lived in Portugal for the majority of their lives.

[99] Witness Statement of Renaud Jacquet, ¶ 5, 14.

[100] Witness Statement of Renaud Jacquet, ¶¶ 23, 31; Danielle Pergament, *36 Hours in Tulum*, New York Times, 5 November 2014, Exhibit C-0019.

[101] Witness Statement of Renaud Jacquet, ¶ 33.

[102] Witness Statement of Renaud Jacquet, ¶ 33.

[103] Portuguese Embassy's Constancia (Certificate), 16 February 2021,NS-0001. See also Portuguese Passport (14 July 2017 through 14 July 2022), Nuno Silva, NS-0002; Portuguese Passport (23 August 2012 through 23 August 2017), Nuno Silva, C-0008. Portuguese Embassy's Constancia (Certificate), Maria Margarida Oliveira de Abreu, 16 February 2021, NS-0004; see also Portuguese Passport (27 October 2011 through 27 October 2016), Maria Margarida Oliveira de Abreu, C-0007; Witness Statement of Nuno Silva, ¶¶ 2, n. 5; Birth Certificate of Ms. Abreu, C-0125; Birth Certificate of Mr. Silva C-0126.

93. In 2000, Mr. Silva decided to use funds from his bank account in Portugal to open a hospitality business and decided to visit Mexico in his search for options.[104] He chose the beach area in Tulum within the Ejido, where he eventually purchased two adjacent lots to open a hotel and tourism business known commercially as Uno Astrolodge.[105]

94. On 22 October 2003, Ms. Abreu executed a notarized transfer of rights agreement with Ejido member Cástulo Jiménez for the southern lot.[106] On 28 November 2003, Ms. Abreu executed a transfer of rights agreement with Ms. Karla Gutierrez for the acquisition of the northern lot. Ms. Gutierrez, who was a friend of Mr. Silva, had previously acquired it (on 15 December 2000), with the assistance of her local attorney, from Mr. Jiménez, the same Ejido member.[107]

95. On 25 June 2003, Mr. Silva incorporated a Mexican company, O.m del Caribe S.A. de C.V. ("**OMDC**"), to operate a hotel on the property. Mr. Silva owned 85% of the Mexican company and Ms. Abreu owned the remaining 15% interest.[108] On 25 June 2006 , the Ejido Commissariat issued a Certificate of Possession in Ms. Abreu's name for both lots (now combined), indicating

Ms. Abreu is Mr. Silva's godmother. Witness Statement of Nuno Silva, ¶ 10. Ms. Abreu granted a general power of attorney to Mr. Silva to act on her behalf. Poder General (Power of Attorney), 30 April 2011, NS-0005.

[104] Witness Statement of Nuno Silva, ¶¶ 3, 7-8.

[105] First Report of Sergio Bonfiglio, 31 March 2021, ¶¶ 157 – 160, 165, 171 – 175; Witness Statement of Nuno Silva, ¶¶ 7 - 8, 11 – 13.

[106] Contrato de Cesión de Derechos (Transfer of Rights Agreement), 22 October 2003, C-0020.

[107] Contrato de Cesión de Derechos (Transfer of Rights Agreement), 28 November 2003, C-0021; Contrato Privado de Cesión de Derechos Ejidales (Transfer of Rights Agreement), 15 December 2000, NS-0003; Witness Statement of Nuno Silva, ¶¶ 6 – 8, 13.

[108] Constitución OMDC (OMDC Formation), C-0006.

that the Certificate would protect against any other person's claims to the lot including claims by the Ejido, and would be recognized by the RAN.[109]

96. In 25 June 2007, Mr. Silva hired an attorney in Mexico to execute a commodatum agreement between Ms. Abreu and OMDC for the combined north and south lots for a ten-year period, renewable without objection by either party.[110] Together with other hotel entrepreneurs, Mr. Silva also retained agrarian attorney Álvaro López Joers, to protect the interests in the investment.[111]

97. Throughout construction of Uno Astrolodge, Mr. Silva obtained multiple licenses and permits from Respondent's agencies, including construction permits and a land use certificate by the Urban Development Office, and a business operating license by the state of Quintana Roo, among many others.[112]

98. Throughout the development and operation of this investment for approximately one decade, no Ejido member, Ejido official, or agency of Respondent ever claimed that this investment was unlawfully established in the manner that Respondent now claims.

99. By 2009, Uno Astrolodge was operating a hotel with six bungalows, an office and reception area, a store, a spa and massage room, a yoga studio, and a performance stage. The hotel employed

[109] Witness Statement of Nuno Silva, ¶ 19.

[110] Witness Statement of Nuno Silva, ¶ 23; Contrato de Comodato (Commodatum Agreement), 25 June 2007, NS-0009.

[111] Witness Statement of Nuno Silva, ¶ 26.

[112] *E.g.*, Licencias de Uso de Suelo Comercial (Commercial Land Use Licenses), 4 April 2014, NS-0010; Regularización de Obra (Construction Regularization License), 8 July 2015, NS-0011; Constancia de Uso de Suelo (Land Use Certificate) 8 July 2015, NS-0012; Licencias de Funcionamiento (Operating Licenses), 2014, for purposes of (a) restaurant and (b) spa massage, 9 June 2014, NS-0013; *See generally* Witness Statement of Nuno Silva, ¶ 27, 28, 30.

two kitchen staff, at least one steward, two maintenance employees, one receptionist, two housekeepers, staff for the yoga studio and massage room, and various artists and musicians.[113]

100. In terms of nationality, in 2000, Ms. Abreu had acquired Mexican nationality by naturalization.[114] Mr. Silva did the same in 2015.[115] In the same naturalization process, Respondent requires applicants to submit a boilerplate waiver of their rights as foreign nationals.[116] However, the boilerplate language does not make any specific reference to the Portugal-Mexico BIT or to any of Ms. Abreu and Mr. Silva's investments. There is no evidence in the record that Ms. Abreu, Mr. Silva, or officials of Respondent discussed rights under this BIT or the Uno Astrolodge Investment. This is confirmed by Mr. Silva.[117] Ms. Abreu and Mr. Silva have never renounced their Portuguese citizenship before the Portuguese government,[118] and there is no evidence in the record that they did so. Under Portuguese law, renunciation of citizenship must be preceded by an application process and payment of a fee, neither of which occurred here.[119]

[113] Witness Statement of Nuno Silva, ¶ 31.

[114] Carta de Naturalization (Mexican Naturalization Letter), relating to Ms. Abreu, 2 October 2000, R-0023.

[115] Carta de Naturalization (Mexican Naturalization Letter), relating to Mr. Silva, 8 April 2016, R-0024; Witness Statement of Nuno Silva, ¶ 34.

[116] Waiver of non-Mexican nationality as to Mr. Silva, 6 May 2016, R-0037; Waiver of non-Mexican nationality as to Ms. Abreu, 2 October 2000, R-0041.

[117] Witness Statement of Nuno Silva, ¶ 34.

[118] Witness Statement of Nuno Silva, ¶ 6.

[119] Cl. Counter-Mem., ¶155.

101. For approximately one decade, Uno Astrolodge was extremely successful and profitable. In 2014, it was named the top retreat in Tulum by Yogascapes Journal.[120] The hotel was often fully booked, and it attracted celebrities from around the world.[121]

5. Hotel Parayso

102. The Hotel Parayso investment belongs to Ms. Galán and Mr. Alexander. Ms. Galán and Mr. Alexander are Canadian nationals. Mr. Alexander is a Canadian national by birth, and Ms. Galán became a Canadian national on 26 June 2015.[122] Mr. Alexander grew up and attended university in Canada, and has lived there the majority of his life.[123] Ms. Galán was born in Mexico and attended university there, and she has been living in Canada for almost half her life for the last 17 years.[124] Ms. Galán and Mr. Alexander were married in Canada in 26 February 2005.[125] They agreed to a marital separation in 10 September 2015 and divorced in 26 April 2016.[126] Both continue to live in Vancouver, where they are raising their daughter.[127]

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[120] *See* Ben Crosky, *Top 5 Retreat Centers in Tulum*, Yogascapes Journal (18 December 2014), C-0022.

[121] Witness Statement of Nuno Silva, ¶ 33.

[122] Certificate of Canadian Citizenship, Monica Alexander, 26 June 2015, MG-0005; Canadian Passport, Monica Alexander, 3 July 2015 – 3 July 2025, C-0010; Canadian Certificate of Registration of Birth Abroad for Graham Alexander, MG-0001; Canadian Passport for Graham Alexander, C-0009; British Columbia Voter Identification Card for Graham Alexander, MG-0002.

[123] Witness Statement of Monica Galán, ¶ 5, n. 1.

[124] Witness Statement of Monica Galán, ¶ 7.

[125] Witness Statement of Monica Galán, ¶ 7.

[126] Witness Statement of Monica Galán, ¶ 39, n. 23.

[127] Witness Statement of Monica Galán, n. 1.

103. In late 2003 and early 2004, Ms. Galán and Mr. Alexander decided to acquire land to open a tourism business in the beachfront area in Tulum.[128] On 28 April 2004, Ms. Galán executed a transfer of rights agreement with Ejido member Mr. Rogelio Novelo Balam for a beachfront lot.[129] The lot is situated within the Ejido.[130] On 28 May 2004, Mr. Alexander formed Rancho Santa Monica Developments, Inc. ("RSM"), a Nevada corporation. On 29 November 2004, he (on behalf of RSM) and Ms. Galan entered into a contract where she transferred the western half of the lot to RSM. After further conversations, Mr. Alexander and Ms. Galan agreed to rescind this agreement with RSM and continued to manage and operate their respective interests in the hotel.[131]

104. Ms. Galán and Mr. Alexander paid for this interest in the land using funds from Mr. Alexander's business account in Canada.[132] Over the next several years, they set out to build a hotel on the lot, which became known commercially as Hotel Parayso. They made improvements to the hotel by reinvesting the profits derived from the hotel business.[133] Throughout the acquisition, construction, and operations process, Ms. Galán and Mr. Alexander hired Mexican law attorneys as needed.[134]

[128] Witness Statement of Monica Galán, ¶¶ 8-10.

[129] Contrato Privado de Cesión de Derechos (Transfer of Rights Agreement), 28 April 2004, C-0023.

[130] First Report of Sergio Bonfiglio, 31 March 2021, ¶ 188 – 190; Plano Constancia Parayso, (Map Certificate of Possession Parayso), SB-0018.

[131] Witness Statement of Monica Galan, ¶ 14.

[132] Galán Witness Statement, ¶ 11.

[133] Witness Statement of Monica Galán, ¶ 23, 33, 34.

[134] Witness Statement of Monica Galán, ¶¶ 11, 35.

105. Years later, as part of a land survey conducted by the Ejido, the Ejido Commissariat invited land possessors to apply to obtain a Certificate of Possession from the Ejido, explaining that the survey would result in updated records in the RAN.[135] Ms. Galán and Mr. Alexander paid the Ejido the corresponding fee, and the Commissariat issued a Certificate indicating that Ms. Galán was in valid possession of the lot.[136]

106. Throughout the construction phase, Ms. Galán and Mr. Alexander obtained several licenses and permits from Respondent's agencies for the establishment and operation of the hotel. These included land use permits, maritime permits, and operations permits, among many others.[137]

107. During the development and operation of this investment for approximately one decade, no Ejido member, Ejido official, or agency of Respondent ever claimed that this investment was unlawfully established in the manner that Respondent now claims.

108. Hotel Parayso grew to contain a total of 24 rooms in the heart of Tulum. It had 11 oceanfront suites, thirteen cabanas, two retail spaces, two bars/restaurants, an outdoor grill, an office, a pool and spa, and paved parking, among other amenities.[138] The hotel employed two

[135] Witness Statement of Monica Galán, ¶¶ 16-19.

[136] Constancia (Certificate of Possession), 25 June 2006, C-0060; Witness Statement of Monica Galán, ¶¶ 19.

[137] *E.g.*, Constancia de Uso de Suelo (Certificate of Land Use), 8 March 2006, MG-0009; Título de Concesión SEMARNAT (Maritime Concession Title), 13 February 2007, MG-0010; Licencia de Uso de Suelo (Land Use License), 11 September 2009, MG-0012; Licencias de Uso de Suelo Comercial (Commercial Land Use Licenses), 10 September 2009, MG-0013; Municipio de Tulum Licencias de Funcionamiento (Tulum Municipality Operating Licenses), 29 November 2010, and 19 August 2015, MG-0016; *See generally* Witness Statement of Monica Galán, ¶ 21, 25, 27-29.

[138] Witness Statement of Monica Galán, ¶¶ 20-34.

housekeepers, two maintenance workers, two caretakers, three receptionists, a security guard, a plumber, and a driver.[139]

109. On 17 September 2015, Ms. Galán and Mr. Alexander executed a marital Separation Agreement in which they agreed, among other things, to divide the property equally.[140]

110. The hotel was a success, and drew celebrity guests from around the world. It remained highly profitable ever since it opened its doors for business, for approximately one decade.[141]

A. RESPONDENT'S UNLAWFUL SEIZURES OF CLAIMANTS' INVESTMENTS

111. As indicated below and as will be shown in greater detail in the merits phase of this proceeding, the record shows Respondent's courts seized Claimants' Investments without any form of due process and in violation of the Treaties.[142] Respondent's courts and their agents validated and executed decisions based on proceedings that were fraudulently procured through parties who were entirely unrelated to Claimants.

112. Among other reasons, these judicial proceedings were improper because they were incorrectly based on mercantile and landlord-tenant law.[143] Since the subject lots were located in

[139] Witness Statement of Monica Galán, ¶ 35.

[140] Galan and Alexander Separation Agreement (redacted), C-0024.

[141] Witness Statement of Monica Galán, ¶ 38.

[142] *See* Photographs of seizures of the Investments: Tierras del Sol, C-0132; Hamaca Loca C-0133; Behla Tulum C-0134; Uno Astrolodge C-0135; Parayso C-0136; *See* Newspaper Clippings Covering the Seizures, C-0137, C-0138, and C-0139.

[143] First Report of Sergio Bonfiglio, 31 March 2021, ¶ 194-97; Second Report of Sergio Bonfiglio, 17 November 2021, ¶ 40; *see also* Statement from Court Representative Luis Miguel Escobedo Pérez, C-0040; Written Declaration of Maria Elena Anaya Reyes, C-0041; Sentencia Definitiva, Juzgado Décimo de lo Mercantil del Primer Partido Judicial del Estado de Jalisco 1 October 2009, C-0100 (Jalisco Decision) and notarized transcription in C-0096; Exhorto No. 435/2011, Consejo de la Judicatura, Juzgado Décimo Mercantil, Playa Del Carmen, Quintana Roo, 17 June 2011, C-0099; Demanda (Complaint), Erik Castello Meraz, on behalf of C.C. Mauricio Esteban, Ciro Miguel, Jose Rafael and

the Ejido, legitimate judicial proceedings would have been based on Agrarian Law.[144] Moreover, neither of these judicial proceedings included any of Claimants or their Investments as parties. Indeed, neither of these proceedings make any mention of Claimants, the Investments, the Ejido, or the Ejido possessory documentation concerning the subject lots.

113. The lack of due diligence in these judicial proceedings is disturbing. There is no evidence that Respondent's courts issued their decisions by conducting any due diligence to ensure that the alleged claims to these lots were not fraudulent. Before the takings, Respondent's courts provided no due process to Claimants, including any notice or opportunity to defend themselves. Respondent's court representatives simply appeared on the premises of each of the Investments and expelled everyone by force. Respondent cannot claim to be the victim here: on the date of the seizures, Respondent's Court representatives and security agents spoke with Claimants or their employees, saw that the premises were occupied by Claimants' businesses, ignored the signs of the Claimants' rightful possession, and proceeded to dispossess Claimants of their Investments by force.[145] This was not an "accident" – it was deliberate.

114. Indeed, in light of the recent decision in *Lion v. Mexico*, his would not be the first time that Respondent is found responsible for denial of justice due to fraudulent proceedings and gross violations of elementary due process by its courts (including mercantile courts in Jalisco, similar

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Francisco Saveria, all with the last name of Schiavon Magana v. Claudia Yvette Arzapalo Tejeda, Juzgado Civil Oral de Primera Instancia del Distrito Judicial de Solidaridad, Quintana Roo, File No. 324/2016, C-0098; Decision, Erik Castello Meraz, v. Claudia Yvette Arzapalo Tejeda, Juzgado Oral de Instrucción Itinerante de Primera Instancia del Distrito Judicial de Solidaridad, Quintana Roo, File No. 324/2016, 27 May 2016, C-0101.

[144] First Report of Sergio Bonfiglio, 31 March 2021, ¶ 194-97.

[145] 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.

to the fraudulent proceedings that victimized Mr. Sastre).[146] Respondent made a comparable, if not more egregious, violation against Claimants in the instant case.

1. Seizures of Tierras del Sol and Hamaca Loca

115. The seizures of the Tierras del Sol and Hamaca Loca investments stem from the actions of another state in Mexico. On 14 June 2011, in case number 1705/2009, a commercial court in Jalisco, a state on the Pacific Coast (Quintana Roo is on the Atlantic Coast) issued a decision against a man named Roberto López Chávez and in favor of another man named Carlos González Nuño.[147] The judgment in this case was recognized by a local Quintana Roo court on 17 July 2011 in Exhorto number 435/2011 [148] Neither of the two men noted above bear any relationship to Mr. Sastre nor any of the HLSA shareholders. And none of these proceedings made any mention of Mr. Sastre, the HLSA Shareholders, Tierras del Sol, Hamaca Loca, or the Ejido.

116. Based on the above, on 19 October 2011, without any notice, approximately twenty masked and heavily-armed agents of the Federal Attorney General's Office and Navy forces arrived at Tierras del Sol.[149] Upon arriving at the hotel, they told Mr. Sastre that the Tierras del Sol and other premises had been confiscated and that they had instructions to deliver possession of the lots to a

[146] Lion Mexico Consolidated L.P. v. United Mexican States, ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021, CLA-0128, ¶¶ 93, 420-21, 506-09, 446-48 (finding that a deprivation of right to appear, rushed proceedings, lack of basic due diligence, and denial of the right to allege victimization by fraud in proceedings before mercantile courts in Jalisco (similar to the fraudulent proceeding against Mr. Sastre)).

[147] Sentencia Definitiva, Juzgado Décimo de lo Mercantil del Primer Partido Judicial del Estado de Jalisco 1 October 2009, C-0096 and notarized transcription in C-0100 (Jalisco Decision).

[148] Exhorto No. 435/2011, Consejo de la Judicatura, Juzgado Décimo Mercantil, Playa Del Carmen, Quintana Roo, 17 June 2011, C-0099.

[149] Witness Statement of Carlos Sastre, ¶ 35.

third-party named Carlos González Nuño, who had no relation to Mr. Sastre.[150] Mr. Sastre asked to see a written document justifying their presence and the attempt to seize the hotel. The agents would not produce any documents and ultimately left the premises.[151]

117. A few days later, Mr. Sastre received a summons dated 24 October 2011 from the Attorney General's Office with instructions to appear at its offices in Mexico City in four calendar days.[152] Mr. Sastre traveled to these offices in Mexico City to comply with this order, where he was asked various questions concerning his acquisition of the Tierras del Sol lot.[153]

118. In the morning of 31 October 2011, once back in Quintana Roo, Mr. Sastre appeared before the Attorney General's Office in Quintana Roo to file a criminal complaint regarding what was happening.[154]

119. That same day in the afternoon, dozens of men, including police in riot gear, arrived once again at Tierras del Sol to seize the premises.[155] The men were led by Luis Miguel Escobedo Pérez, a representative (*actuario*) of a local court in Quintana Roo (the *Juzgado de Playa del*

[150] Witness Statement of Carlos Sastre, ¶ 35.

[151] Witness Statement of Carlos Sastre, ¶ 35.

[152] Witness Statement of Carlos Sastre, ¶ 36.; Citatorio to Carlos Sastre, Subprocuraduría de Investigación Especializada en Delincuencia Organizada (Summons to Carlos Sastre, Deputy Attorney General's Office Specialized in Organized Crime Investigation), 24 October 2011, C-0107

[153] Witness Statement of Carlos Sastre, ¶ 36.

[154] Witness Statement of Carlos Sastre, ¶ 37; Declaración del C. Carlos Esteban Sastre, Denunciante, Proc. Gral. De Just. Del Edo., Quintana Roo, Delito: Tentativa de Despojo y Lo Que Resulte, Averiguación Previa: PGJE/DRAPRM/AMP/TULUM/898/2011, 31 October 2011 (Criminal Complaint by Carlos Sastre), C-0097.

[155] Witness Statement of Carlos Sastre, ¶ 37.

Carmen).[156] Once again, Mr. Sastre and his wife asked the agents to provide an order or written justification indicating that Mr. Sastre needed to leave the premises, but they refused.[157] Mr. González Nuño was again present with the armed men, and the court representative.[158]

120. After several hours, Mr. Sastre and his family, including his wife and small children, were forcefully and violently removed from the premises by Respondent's security agents.[159] Mr. Sastre was handcuffed and place in a police patrol car, all in front of his hotel guests, and he was injured in the process.[160] Hamaca Loca, which was a few meters away from Tierras del Sol, was seized by the same court representative and armed security agents.[161]

121. The court representative indicated in the written statement dated that same day that he seized these two and other hotels pursuant to case number 449/2011, the same case as the enforcement proceedings in Quintana Roo resulting from the Jalisco commercial or "mercantile" court judgment.[162]

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[156] Witness Statement of Carlos Sastre, ¶ 43.

[157] Witness Statement of Carlos Sastre, ¶ 44, 47, 48.

[158] Witness Statement of Carlos Sastre, ¶ 47; Photograph of Mr. González Nuño on during the seizure of Tierras del Sol, 31 October 2011, C-0127; Picture Identification of Carlos González Nuño, C-0123

[159] Witness Statement of Carlos Sastre, ¶¶ 48-51.

[160] Witness Statement of Carlos Sastre, ¶ 49; Photograph of Mr. Sastre with Injury, C-0127; Video of Police Officer Breaking into Tierras del Sol, C-0130; Video of Police Breaking Windows at Tierras del Sol, C-0131.

[161] Written Declaration of Court Representative Luis Miguel Escobedo Pérez, 31 October 2011, C-0040; Video of Hamaca Loca Seizure, C-0128 (showing several dozen individuals entering the hotel accompanied by Mr. González Nuño and Mr. Escobedo Pérez); Video of Hamaca Loca Belongings removed, C-0129.

[162] Written Declaration of Court Representative Luis Miguel Escobedo Pérez, 31 October 2011, C-0040.

2. **Seizures of Behla Tulum, Uno Astrolodge, and Hotel Parayso**

122. In 2014, a lawyer named Patricio O'Farrill, who claimed to represent the Schiavon Magaña family, contacted Mr. Silva, demanding payment of USD $1.3 million for his hotel lot.[163] Mr. Silva never agreed to pay him anything because he saw no basis for the demand and pointed to his possession documents originating from the Ejido.[164]

123. However, on 24 May 2016, Erik Castello Meraz, on behalf of four individuals (possibly related) named Mauricio Esteban Schiavon Magaña, Ciro Miguel Schiavon Magaña, Jose Rafael Schiavon Magaña, and Francisco Saveria Schiavon Magaña filed a lawsuit in civil court in the *Juzgado Oral Civil de la Primera Instancia del Distrito Judicial de Playa del Carmen* (First Instance Civil Oral Court), Quintana Roo, against Claudia Yvette Arzapalo Tejeda, alleging breach of a landlord-tenant contract.[165] The case number for this proceeding was 324/2016. On 27 May 2016, the civil court decided in favor of the petitioners.[166] Just as with the proceedings in Jalisco that resulted in the seizures of Tierras del Sol and Hamaca Loca, none of the parties in these judicial proceedings bore any relationship to Claimants or their Investments, and Claimants were never given notice or the opportunity to participate or defend themselves before the local court.

[163] Witness Statement of Nuno Silva, ¶ 34; Email from Mauricio Schiavon to Nuno Silva urging Mr. Silva to sign contract promptly, 16 June 2015, C-0079; attachment to email including an unsigned contract for the sale of property by the Schiavon Magana family members, 5 June 2015, C-0080.

[164] Witness Statement of Nuno Silva, ¶ 34.

[165] Demanda (Complaint), Erik Castello Meraz, on behalf of C.C. Mauricio Esteban, Ciro Miguel, Jose Rafael and Francisco Saveria, all with the last name of Schiavon Magana v. Claudia Yvette Arzapalo Tejeda, Juzgado Civil Oral de Primera Instancia del Distrito Judicial de Solidaridad, Quintana Roo, File No. 324/2016, C-0098.

[166] Decision, Erik Castello Meraz, v. Claudia Yvette Arzapalo Tejeda, Juzgado Oral de Instrucción Itinerante de Primera Instancia del Distrito Judicial de Solidaridad, Quintana Roo, File No. 324/2016, 27 May 2016, C-0101.

124. On the morning of 17 June 2016, once again without any notice whatsoever, several dozen armed and masked men carrying guns, machetes, sticks, and pepper spray appeared at the premises of Behla Tulum, Hotel Parayso, and Uno Astrolodge.[167] As with the previous seizures, the men were led by a court representative who claimed to be implementing orders from *La Administración de Gestión Judicial de los Juzgados Orales y Mercantil de Primera Instancia del Distrito Judicial de Solidaridad, Quintana Roo* (Judicial Administration of the Oral and Commercial Courts of the First Instance of the Judicial District of Solidaridad, Quintana Roo), in case number 324/2016, the same case number referenced above.[168] Just like Mr. Gonzalez Nuño flanked the court representative in 2011, the court representative this time was flanked by Mr. O'Farrill.[169]

125. A few days after this wave of hotel seizures, Mr. O'Farrill – who represented the Schiavon Magana family – admitted in a video interview that the modus operandi of using fraudulent lawsuits between third parties who are unrelated to Claimants was part of his legal "strategy" to dispossess Claimants.[170]

3. Mr. Sastre's Proceedings Seeking the Return of Their Properties, and the Murder of Mr. López Joers

126. Subsequent to the seizure of the hotel, on 22 November 2011, Mr. Sastre, CETSA, and HLSA filed an *amparo* action (which is a Constitutional protection lawsuit) before the District

[167] Witness Statement of Renaud Jacquet, ¶ 34 - 35; Witness Statement of Nuno Silva, ¶ 35 - 37; Witness Statement of Monica Galan, ¶41 – 44.

[168] Written Declaration of Court Representative María Elena Anaya Reyes, 17 June 2016, C-0041.

[169] Photograph of Patricio O'Farrill talking to Nuno Silva, C-0038.

[170] Video interview of Patricio O'Farrill, July 2016 approx., minutes 9, 22, C-0039 (admitting to manufacturing the lawsuit 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 Silva, C-0038.

Court in Quintana Roo, a federal court in that state.[171] Claimants asserted violations of their rights under articles 14 (due process) and 16 (right to receive an order written by a competent authority before being deprived of their property) of Respondent's Constitution. Claimants alleged these breaches were committed by (i) the Mexican local courts and (ii) the authorities who dispossessed Claimants of their rights.

127. The following year, in the midst of representing Tierras del Sol, Hamaca Loca, Uno Astrolodge, and Behla Tulum in matters under agrarian law and others, on 17 May 2012, Mr. Álvaro Lopez Joers – their agrarian lawyer – was shot dead in his office.[172] Prior to this Mr. Lopez Joers had been asked by his clients to assist them in laying the groundwork to eventually purchase the Investment lots from the Ejido.[173] According to media coverage of his murder, officials from the Public Prosecutor's office in Quintana Roo suspected this lawyer, who also represented other hotels in the same area, was killed because of his representation of holders of beachfront possessory rights (such as Claimants).[174]

128. For nearly four years of *amparo* proceedings by Mr. Sastre, the court did not address the merits, instead focusing on determining the whereabouts of Roberto López Chávez (the fraudulent

[171] Demanda Inicial, Juicio de Amparo Indirecto, C. Juez de Distrito del Vigésimo Séptimo Circuito en Turno, Con Cede en Cancun, Quintana Roo (Constructora Ecoturística, S.A. de C.V.), 22 November 2011, C-0116; Demanda Inicial, Juicio de Amparo Indirecto, C. Juez de Distrito del Vigésimo Séptimo Circuito en Turno, Con Cede en Cancun, Quintana Roo (Hamaca Loca, S.A. de C.V.), 22 November 2011, C-0117.

[172] *See*, Sicario *Saluda, arrodilla y ejecuta a abogado en Tulum* (Hitman Greets, Brings to his Knees, and Executes Attorney in Tulum), La Policiaca (18 May 2012), Exhibit C-0028.

[173] Witness Statement of Carlos Sastre, ¶¶ 9, 12, 23, 24; Witness Statement of Mr. Jacquet, n. 14; Witness Statement of Mr. Silva, ¶ 26.

[174] Sicario *Saluda, arrodilla y ejecuta a abogado en Tulum* (Hitman Greets, Brings to his Knees, and Executes Attorney in Tulum), La Policiaca (18 May 2012), Exhibit C-0028.

judgment debtor from the Jalisco proceedings) and repeatedly deferring constitutional and expert hearings. To make matters worse, the court file does not contain the required records showing Mr. Sastre, CETSA, or HLSA were properly notified of all court hearings.

129. Then on 2 October 2015, the *Juzgado Segundo de Distrito* in Quintana Roo dismissed Mr. Sastre's *amparo*. The court stated that "it cannot be said" that the lots of the Claimants and the lots at issue in the fraudulent proceeding "are the same." It then stated that "[c]onsequently, it cannot be said that the official act that is complained of pertains to a right of the petitioners."[175] The court reached this conclusion despite the court representative's sworn acknowledgement on the record that the Jalisco order served as the purported basis for the seizures of *Tierras del Sol* and *Hamaca Loca*.[176]

* * *

130. Thus, after more than a decade of investment, hard work, generation of revenue and employment, (all with Respondent's full knowledge and acquiescence) Respondent destroyed it all in less than a day in the most grotesque manners imaginable. The public outcry reverberated in the national and international press.

131. Rule of law in Respondent's territory is seriously absent. Indeed, on 19 February 2020, several months after Claimants filed their Amended Notice of Arbitration, Respondent's President was asked about the instant case. He gave an earnest answer about the lack of rule of law in Respondent's territory:

[175] *See* Sobreseimiento Juzgado Segundo de Distrito en Quintana Roo (Federal Court Dismissal), Exhibit C-0029.

[176] Witten Declaration of Court Representative Luis Miguel Escobedo Pérez, 31 October 2011, C-0040.

> Precisely yesterday's meeting [with other foreign investors in the energy sector] was held in an atmosphere of trust towards the Government of Mexico. They know very well, because they have information, that there are healthy public finances in the country and that there is an authentic rule of law, that ***there are not, unlike before, preferred companies and that abuses are not committed, that the legal framework is respected***.
>
> Before, there was a lot of insistence, on the part of the businessmen there was mistrust and the issue was always the rule of law; ***Now there is no longer this concern, they already know that there are clear rules, they already know that their investments are guaranteed, they already know that there is no corruption, that has helped a lot. They already know that there is a level field for all companies, that there are no favorite companies that monopolize everything***.
>
> So, what comes from before we [the current administration] have to resolve it in accordance with the law and what they demand of us, in this case the Judicial Power, we have to comply with it. ***Even in the case of acts of corruption or abuses of authority by previous administrations, we have to take responsibility***.[177]

IV. CLAIMANTS MEET THEIR BURDEN OF PROOF

A. PARTIES' POSITIONS

1. Claimants' Position

132. Claimants burden of proof views are as follows:

a. The Tribunal should follow the majority view which originated in the *Oil Platforms* case and is known as the Higgins test. In short, because this proceeding bifurcated the jurisdictional phase, all merits-related allegations should be taken as true. Any jurisdiction related allegations should be evaluated under the "preponderance of the evidence" or "balance of probabilities" standard.

[177] Version Estenográfica de la Conferencia de Prensa Matutina del President Andres Manuel Lopez Obrador (Transcript of Morning Press Conference by Mexican President Andres Manuel Lopez Obrador), 19 February 2020, pp. 12 – 14, C-0110 (emphasis added) (translation by counsel).

b. This burden applies to Claimants in that they must show that they meet the requirements of their respective Treaty. In this same vein, Respondent must also meet this burden to sustain its jurisdictional objections that challenge Claimants' standing.

c. The Tribunal should apply this standard of proof to the collective submissions and evidence of the jurisdictional phase as a whole.

2. Respondent's Position

133. Respondent at various times has contended that:

a. Claimants must present "proof" for each of the four jurisdictional elements of the Treaties, and Claimants must also prove that none of the Respondent's potential defenses are present, whether or not Respondent has raised that defense or not.

b. Claimants must prove all jurisdictional elements upon filing a Notice of Arbitration. If not, the claims must be dismissed.

c. Claimants bear the burden to prove the necessary facts to establish their claims, and should not benefit from a prima facie standard, because that level of proof is unacceptable at this stage of the proceedings.

d. Respondent accepts that it is subject to the balance of probabilities standard of proof to sustain its jurisdictional objections.

B. RESPONDENT HAS REVERSED COURSE ON ITS INITIAL AND UNTENABLE BURDEN OF PROOF POSITIONS

1. Respondent Does not Contest That it Bears the Burden to Prove its own Objections

134. Respondent has backtracked from its original contention that Claimants must disprove every conceivable jurisdictional defense, whether or not it was raised by Respondent.

135. Instead, it is now uncontested that Respondent bears the burden to prove its jurisdictional objections. The principle of *probandi incumbit actori* applies equally to Claimants and Respondent. Just as Claimants must set forth their prima facie jurisdictional facts, so too must

Respondent bear the burden to prove its jurisdictional objections. Claimants have provided ample support that details Respondent's evidentiary burden.[178]

136. In light of Claimants' showing and Respondent's abandonment of its position, the Tribunal should apply the burden to Respondent to prove its objections to the requisite evidentiary standard.

2. It is Uncontested that Respondent Must Prove its "Illegality" to a "Clear and Convincing" Evidentiary Standard

137. Relatedly, Respondent does not contest that in order to prevail on corruption allegations, it must satisfy a "clear and convincing" standard as set forth by *Fraport v. Philippines II*.[179] As discussed further in Section VI.C.3.a, the same standard applies for comparably-serious allegations. The clear and convincing standard applies to legality of the investment as a whole, and not as to each formality under domestic law. Claimants have provided ample jurisprudence in support of a heightened standard for these objections.[180]

138. Thus the Tribunal should apply a clear and convincing standard, or at least an elevated standard of proof, to prove its illegality objections against Claimants.

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[178] *See, e.g.*, Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/13/1, Award, 22 August 2017 ¶ 497, CLA-0113 (confirming that respondent bore the burden to prove its allegations of corruption against the claimant); 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 (same with respondent's abuse of process objection).

[179] Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines II, ICSID Case No. ARB/11/12, Award, 10 December 2014 ¶ 479 (holding that respondent "failed to provide clear and convincing evidence regarding corruption and fraud" objections against claimant).

[180] *See, e.g., id.* (noting respondent's clear and convincing burden of proof); Karkey Karadeniz v. Pakistan, ICSID Case No. ARB/13/1, Award, 22 August 2017 ¶ 521 (observing that respondent cannot rely on "red flags" suggestive of corruption and must present "positive proof").

3. Respondent Abandons its Original Contention that Claimants Must Prove Jurisdiction at the Notice of Arbitration Stage

139. Respondent also abandons its position that confuses the UNCITRAL Notice of Arbitration requirements with the standard of proof for jurisdictional facts throughout this proceeding.

140. Claimants have provided ample support for this proposition, which has gone uncontested. The Notice of Arbitration need only set forth the broad facts underlying the claim. Claimants did not have to prove all jurisdictional facts (and absence of defenses) at that early stage. Instead, jurisdiction shall be determined by the Tribunal only after the parties have fully briefed these legal issues, together with witness statements and documentary evidence.

141. Thus the Tribunal should consider all of Claimants' submissions, exhibits, witness statements, and expert reports when evaluating whether Claimants have presented a prima facie showing during this jurisdictional phase.

4. Respondent Does not Contest That, During This Jurisdictional Phase, Merits Allegations Must be Taken as True

142. Claimants have provided ample support for this majority-view position.[181] The reason for this rule is so that Claimants are not prejudiced by having to prove merits-related issues in what is ostensibly supposed to be a jurisdictional determination.

[181] *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 ("[A] claimant should demonstrate that *prima facie* its claims fall under the relevant provisions of the BIT for the purposes of…competence of the tribunal (but not whether the claims are well-founded)."), CLA-0023; *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.

143. Thus the Tribunal should apply the Higgins test to evaluate Claimants' allegations at the jurisdictional stage. As observed by Claimants in the Counter-memorial, the *Bayinder* tribunal reviewed the body of decisions applying this standard and formulated its own succinct reading:

> [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.[182]

144. Based on the referenced jurisprudence, Claimants observe that the Tribunal may apply this majority view as follows:

e. *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.[183]

f. *Second*, each Claimant need only set forth a *prima facie* showing that the elements of jurisdiction are satisfied.[184] The Tribunal shall then review these facts to evaluate whether they would, if true, give rise to a cognizable treaty violation. If so, the Tribunal has jurisdiction over the dispute. [185]

g. *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

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[182] *Id.* ¶ 197.

[183] *See Impregilo v. Pakistan* ¶ 263.

[184] That is, jurisdiction *ratione personae*, *ratione materiae*, *ratione temporis*, and *ratione voluntatis*.

[185] 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.

preponderance of the evidence standard (or "balance of probabilities") to determine if jurisdiction exists.

145. This approach assigns to the Parties the requisite evidentiary and burden of proof standard in this jurisdictional phase.

C. DESPITE SOME CORRECTIONS, RESPONDENT CONTINUES TO MISCHARACTERIZE THE "ALL RELEVANT TIME PERIODS" REQUIREMENT WITH RESPECT TO CERTAIN JURISDICTIONAL ELEMENTS

146. Respondent acknowledges that its absolutist position on the "all relevant time periods" requirement outlined in its memorial was incorrect.[186] Respondent concedes that Claimants need only establish nationality at the moment of breach and at the moment of filing. And Respondent also admits that the investment's legality requirement need only be met at the time of investment for the Tribunal to have jurisdiction.

147. But Respondent continues to muddle the meaning of "all relevant times" by straying from the plain meaning of those words. The term literally means the moments of time that are logically relevant for certain particular events. Yet other than its referenced admissions regarding nationality and legality, Respondent defines "all relevant times" to *always* mean "the moment of investment, the moment of breach, and the moment of filing the arbitration claim." Respondent applies all three of these moments indiscriminately for every jurisdictional element, whether or not it makes conceptual sense.

148. Claimants observe that "relevant time periods" for any particular claim or defense are more specific and nuanced that Respondent's blanket proposition. In addition to the limited relevant times for nationality and legality elements already conceded by Respondent, yet another example

[186] *See* Resp. Reply ¶ 84.

is the domicile requirement in Article 2(3) of the Argentina BIT. The text and structure of the Argentina BIT set forth that the only relevant time applicable to its domicile consent requirement is the moment of filing. The moment of investment and the moment of breach are not applicable. A more fulsome analysis of this issue can be found in Section IV(B)(3) of Claimants' Counter-memorial and Section VI(B)(4) of this Rejoinder.

149. In sum, Claimants posit that the adjective "relevant" should be given meaning. Respondent's absolutist position that all three "moments" are always applicable for every element of this case is incoherent and does not withstand scrutiny. The Tribunal should separately determine which moments of time are relevant to Claimants' jurisdictional elements, and Respondent's defenses.

* * *

150. Claimants' positions regarding the standard of proof and the applicable relevant times are better supported and more logically consistent than Respondent's position. Respondent's constant backpedaling from its unprecedented arguments (*e.g.*, Claimants have the burden to disprove every conceivable jurisdictional defense; Claimants must prove all elements upon filing a notice of arbitration) has yet to yield a workable standard. Thus the Tribunal should apply the majority view Higgins test to evaluate the Parties' positions and consider the plain meaning of "all relevant times" for each particular claim and defense.

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

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

1. Claimants' Position

151. Under the four Treaties at issue, a natural person is plainly an "investor" of a State party if that person is a national of that State party.[187] There are no other nationality-based requirements in any of the Treaties.

152. As summarized below, Claimants have explained how jurisdiction *ratione personae* is met in each of the Claims here:

a. Mr. Sastre meets the definition of "investor" in Article 1 of the Argentina-Mexico BIT because he is an Argentine national. His Argentine nationality since before Respondent's breaches is demonstrated by his current Argentine passport and his Argentine birth certificate.[188] Thus, he is eligible to bring a claim against Respondent under this Treaty.[189]

b. Mr. Jacquet meets the definition of "investor" in Article 1 of the France-Mexico BIT because he is a national of France. His French nationality since before Respondent's breaches is shown by his current French passport and his French birth certificate.[190] He is thus eligible to bring a claim under this treaty.[191]

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[187] *See generally*, Cl. Counter-Mem., Sec. III.A.

[188] *See* Birth Certificate of Carlos Sastre, CS-0001; Argentine passport of Mr. Carlos Sastre C-0004.

[189] Cl. Counter-Mem., ¶¶ 56-57.

[190] *See* French Passport of Mr. Jacquet, C-0005; Birth Certificate of Mr. Jacquet, C-0075.

[191] Cl. Counter-Mem., ¶ 58.

c. Ms. Abreu and Mr. Silva meet the definition of "investor" in Article 1 of the Portugal-Mexico BIT because they are both nationals of Portugal. Their Portuguese nationality since before Respondent's breaches is demonstrated by Mr. Silva's current Portuguese passport and Ms. Abreu's passport and current certificate, which show they are Portuguese since birth and continue to be nationals of Portugal.[192] As such, they are eligible to bring a claim against Respondent under this treaty.[193]

d. Finally, Ms. Galán and Mr. Alexander meet the NAFTA definition of "investor" in Article 1139 because they are nationals of Canada. Their documents including current passports show they have been nationals of Canada since before Respondent's breaches until the present (Mr. Alexander is Canadian by birth).[194] As such, they are eligible to bring a claim against Respondent under this treaty.[195]

2. Respondent's Position

153. Respondent alleges that Claimants' nationalities "have not been demonstrated" with respect to Argentina, France, Portugal, and Canada respectively, and alleges that the documents provided by Claimants are "insufficient."[196]

[192] Portuguese Passport (14 July 2017 through 14 July 2022), Nuno Silva, NS-0002; Birth Certificate of Nuno Silva, C-0126; Portuguese Embassy's Constancia (Certificate), Maria Margarida Oliveira de Abreu, 16 February 2021, NS-0004; see also Portuguese Passport (27 October 2011 through 27 October 2016), Maria Margarida Oliveira de Abreu, C-0007; Birth Certificate of Margarida Abreu, C-0125; Portuguese Embassy's Constancia (Certificate), Maria Margarida Oliveira de Abreu, 16 February 2021, NS-0001.

[193] Cl. Counter-Mem., ¶¶ 59.

[194] Canadian Passport of Monica Galán, C-0010.

[195] Cl. Counter-Mem., ¶¶ 60-61.

[196] *E.g.*, Resp. Reply, ¶¶ 437-38; 487-97;

154. Respondent also alleges that Claimants have not shown that they were nationals of their respective countries "within the relevant time periods."[197]

155. Respondent does not dispute the authenticity or validity of the evidence presented by Claimants concerning nationality. Respondent also does not allege any facts or provide any evidence that Claimants were not nationals of Argentina, France, Portugal, and Canada respectively at any particular time.

156. Instead, while intermingling this issue with its objections related to dual nationality, Respondent argues that the Tribunal must analyze the "totality of the evidence" to determine whether Claimants were citizens of their respective countries.[198] Respondent's allegations concerning its dual nationality and dominant and effective nationality objections are addressed in Section VI.

3. Respondent Fails to Rebut Claimants' *Prima Facie* Showing That They Were Nationals of Their Countries of Origin at the Relevant Time Periods

157. As discussed in Section IV, Claimants bear the burden to make a *prima facie* showing that they were nationals of their respective countries at the relevant time periods. It is up to Respondent to adduce evidence to show otherwise. As shown in section IV.C, the relevant time periods for nationality are the moment of Respondent's breaches and the moment of filing the arbitration. As discussed below, Claimants have presented such evidence and Respondent has failed to present any evidence to counter it.

[197] *E.g.*, Memorial on Jurisdiction, ¶¶ 137-139.

[198] Resp. Reply, ¶ 94.

a. Claimants' Evidence Concerning Ratione Personae Jurisdiction is Uncontested.

158. As discussed above in Section V.A.1, Claimants have provided passports, birth certificates, and other documents to show that they were nationals of Argentina, France, Portugal, and Canada respectively at the relevant time periods.

159. Respondent has not provided any competing evidence. As admitted by Respondent, a person's nationality depends on the internal law of that country.[199] Thus, to show that a given Claimant is no longer a national of his or her respective country of origin, Respondent must to present evidence showing specifically a Claimant is not a national under the laws of that country. For example, to support an argument that Mr. Sastre is not Argentine, Respondent could have presented a document issued by an Argentine government organ showing that Mr. Sastre is not Argentine. Respondent could have also presented evidence showing that Mr. Sastre renounced his nationality *by operation of Argentine law* and that Argentina has accepted the renunciation.

160. Yet Respondent has not produced *any* evidence of the sort. As such, the only evidence in the record on Claimants' nationalities with respect to Argentina, France, Portugal, and Canada is the evidence presented by Claimants.

b. Respondent does not Seriously Contest Claimants' Evidence Showing That They Are Nationals of Their Respective Countries

161. Respondent also could have rebutted Claimants' prima facie showing by presenting evidence that Claimants' documents are invalid or not authentic. Yet Respondent does not contest the authenticity or validity of Claimants' exhibits.

[199] Resp. Reply, ¶ 96.

162. Instead, Respondent insinuates that Claimants' evidence is "insufficient." Puzzlingly, Respondent admits that passports "only constitute prima facie evidence, not conclusive evidence, of nationality as an international law question."[200] Respondent complains about the "insufficiency" of passports, yet with this statement it admits that Claimants' passports meets the prima facie standard applicable here. Claimants' nationality documents presented by Claimants are prima facie evidence, and Respondent has failed to rebut Claimants' case-in-chief with any of its own evidence.

163. Respondent's insistence on the wrong standard ("conclusive evidence") explains many of Respondent's most absurd arguments. For example, Respondent alleges that Mr. Sastre's 2016-2026 Argentine passport showing that he was born in Argentina "does not alone show that Sastre was an Argentine citizen on the dates of the investment."[201] Respondent again forgets that the standard is *prima facie*, which it must rebut. Or at worst the standard is preponderance of the evidence, or balance of the probabilities. But the standard is not "conclusive evidence."

164. Other arguments by Respondent are simply irrelevant. For example, regarding Ms. Galán, Respondent alleges that her Canadian nationality obtained in 2015 has not been demonstrated because "there is no prima facie evidence of the process followed by Ms. Galán Rios for the acquisition of Canadian Nationality."[202] But Respondent's musings about Canadian naturalization procedures are not rebuttal evidence. In the end, Respondent produces no witnesses or documents to challenge whether Ms. Galán became Canadian in 2015.

[200] Resp. Reply ¶ 94.

[201] Memorial ¶ 139

[202] Resp. Reply ¶ 495.

c. Claimants Meet Their Burden to Show That They Were Nationals of Their Respective Countries During the Relevant Time Periods

165. As indicated above, Claimants have presented *prima facie* evidence to show that they were nationals of their respective countries of origin during the relevant time periods. Respondent has presented no evidence in rebuttal. As a result, Claimants meet their burden to show that they are "investors" under the Treaties, giving this Tribunal *ratione personae* jurisdiction.

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

1. Claimants' Position

166. Under the four Treaties, an investor has a protected "investment" if they own or control, directly or indirectly, a protected asset listed under the Treaties.[203] Claimants' assets are recognized as "investments" in the Treaties, as summarized below:

a. Mr. Sastre had multiple assets in Mexico, all of which met the requirements of Article 1 of the Argentina-Mexico BIT. These assets included, among others, his shares in CETSA and HLSA and the *Tierras del Sol* and *Hamaca Loca* businesses. Each of these businesses consisted, among other things, of other assets such as physical facilities, contracts, accounts receivable, intangible assets, and licenses and permits for the operation of tourism businesses.[204]

b. Mr. Jacquet had multiple assets in Mexico, all of which met the requirements of Article 1 of the France-Mexico BIT. These assets included, among others, the *Behla Tulum* and *La Tente Rose* businesses. Each of these businesses consisted, among other things,

[203] *See generally* Cl. Counter-Mem., Sec. III.B

[204] *See* Cl. Counter-Mem., ¶¶ 67-69; Witness Statement of Mr. Sastre, ¶¶ 12-17, 29, 30, 32-33.

of other assets such as physical facilities, contracts, accounts receivable, intangible assets, and licenses and permits for the operation of tourism businesses.[205]

c. Ms. Abreu and Mr. Silva had multiple assets in Mexico, all of which met the requirements of Article 1 of the Portugal-Mexico BIT. These assets included, among others, their shares in OMDC and the *Uno Astrolodge* business. This business consisted, among other things, of other assets such as physical facilities, contracts, accounts receivable, intangible assets, and licenses and permits for the operation of tourism businesses.[206]

d. Ms. Galán and Mr. Alexander had an enterprise in Mexico that met the requirements of Article 1139 of the NAFTA. This enterprise included, among others, the *Hotel Parayso* business. This business consisted, among other things, of business property used for the purpose of economic benefit such as physical facilities, contracts, accounts receivable, intangible property, and licenses and permits for the operation of tourism businesses.[207]

2. Respondent's Position

167. Respondent challenges whether Claimants have shown that they owned the Investments. Its arguments are summarized below:

a. Respondent alleges that the Tribunal lacks *ratione materiae* jurisdiction because Claimants have not proven to have rights over the hotel Investments.[208]

b. Respondent argues that Claimants have not shown that their rights over the Investments "existed."[209]

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[205] *See* Cl. Counter-Mem., ¶¶ 70-71; Witness Statement of Mr. Jacquet, ¶¶ 21-31.

[206] *See* Cl. Counter-Mem., ¶¶ 72-73; Witness Statement of Mr. Silva, ¶¶ 27-31.

[207] *See* Cl. Counter-Mem., ¶¶ 74-75; Witness Statement of Ms. Galán, ¶¶ 20-25, 27-32.

[208] Resp. Reply ¶ 205.

[209] *E.g.*, Memorial ¶¶ 156, 176, 308-12, 332-37; Resp. Reply ¶¶ 216-223.

c. In its argument against *ratione materiae* jurisdiction, Respondent intermingles its objections concerning illegality and abuse of right. These arguments are addressed in Sections VI.C and VI.D.2 below.

3. Respondent Fails to Rebut Claimant's *Prima Facie* Showing That They Had Investments in Respondent's Territory

168. Once again, as discussed in Section IV, Claimants bear the burden to make a *prima facie* showing that they had investments in the territory of Respondent. Respondent must then adduce evidence to show that this is not the case. As discussed below, Claimants have presented such evidence. Respondent has neither questioned the authenticity of the evidence nor presented any evidence to counter Claimant's case in any meaningful way. Thus, Respondent fails to rebut Claimants' *prima facie* showing and this Tribunal has jurisdiction *ratione materiae*.

a. Claimants' Evidence Showing That Claimants Had Investments in Respondent's Territory Remains Uncontested

169. As discussed above in Section V.B.1, Claimants have provided evidence that shows that Claimants had various assets in Mexican territory. This includes, among others,[210]

a. Transfer of rights and commodatum agreements with Ejido members and other individuals where Claimants are a party;

b. Certificates of Possession negotiated with the Ejido and issued by the Ejido in the name of Claimants;

c. Company formation agreements that indicate that the respective Claimants owned shares in those companies (for those Claimants who used partnership agreements

[210] *See* Section V.B.1 *supra* (discussing each of these documents); *see also* Cl. Counter-Mem., n. 111 (sample licenses and permits).

instead of their individual names for the ownership and operation of their Investments, *i.e.* Mr. Sastre, Ms. Abreu, and Mr. Silva);

d. Various licenses and permits *issued by agencies of Respondent* naming, as the recipient, Claimants individually or the business entities they incorporated and owned;[211] and

e. Income-producing hotel and commercial facilities built by Claimants, with the approval of the relevant agencies of Respondent.[212]

170. Respondent does not challenge the authenticity of any of these asset documents. Respondent and its expert instead claim that the "identity" of the parties to some of these agreements "has not been proven." This is not a *rebuttal*. For example, Respondent presents no evidence to show that the parties identified in the agreements, certificates, formation documents, and licenses and permits did not execute these documents. Respondent simply does not contest the facts or authenticity of any of Claimants' asset documents.

b. Respondent Does not Seriously Challenge the "Existence" and Validity of Claimants' Investments

171. Respondent does not contest that Claimants had licenses and permits to build and operate their businesses. These licenses and permits were issued *expressly* to Claimants individually, or

[211] For example, although some of the licenses obtained concerning the Behla lot were made out to Mr. Román, licenses related to the operation of the Behla Tulum *business* were made out to Mr. Jacquet. Some of the licenses issued by Respondent to Mr. Jacquet include: Licencia de Uso de Suelo Comercial (Commercial Land Use License), 5 October 2012, RJ-0014; Quintana Roo, Provisional Permit for sale of beer, wine and liquor in closed containers, 20 December 2013 and 19 September 2014, RJ-0015; Licencia de Funcionamiento 2013 (Operating License), 31 December 2012, RJ-0017; Licencia Sanitaria Municipal (Municipal Sanitary License), La Tente Rose, 8 May 2014, RJ-0018; Letter from Director of Protección Civil (Civil Protection Director), to Mr. Jacquet dated 7 May 2014, RJ-0019. This was consistent with the commodatum agreement between them concerning the lot, whereby Mr. Román as the *comodante* and Mr. Jacquet was the *comodatario*. Cl. Counter-Mem., ¶ 71.

[212] *See, e.g.*, Photographs of the Investments, C-0072, RJ-0022; NS-0019; MG-0020, C-0016, CS-0006; Hamaca Loca Construction License, C-0069; Tierras del Sol Tax Contribution on Construction and Land Value, C-0119; Witness Statement of Mr. Jacquet, ¶ 21; Uno Astrolodge Construction Regularization License, NS-0011; Parayso Construction Regularization License, MG-0008.

their registered business entities.[213] Further, these licenses and permits were issued by Respondent itself through its own agencies. Respondent does not, because it cannot, question the existence of these assets or that Claimants possessed them.

172. Respondent also does not contest that Claimants constructed the Investment facilities (tourism and commercial). Indeed, they obtained multiple licenses and permits from Respondent to do so.[214]

173. Further, Respondent also not contest that those Claimants who used business entities owned shares in those businesses. As discussed above, Mr. Sastre, Ms. Abreu, and Mr. Silva executed partnership agreements that allocated shares among the members of each partnership.[215] Further, Mr. Sastre validly acquired the entirety of the rights belonging to HLSA.[216] As discussed immediately above, these partnerships held, among other assets, licenses, permits, and certificates for the operation of the respective Investments. Respondent does not, because it cannot, contest that Mr. Sastre, Ms. Abreu, and Mr. Silva owned their shares in CETSA, HLSA, and OMDC.

174. Lastly, on the rights derived from the transfer of rights and commodatum agreements and the Certificates of Possession, Respondent argues that these rights do not "exist" because these documents are invalid. Respondent is incorrect.

175. *First*, regarding the Certificates of Possession, the evidence supplied by Respondent's own expert shows that according to Respondent's courts such certificates *establish a presumption* that

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[213] *See* Section V.B.1 *supra.*

[214] *See* Section III *supra* (summarizing facts, testimony, and documentary evidence concerning the construction of the Investment facilities).

[215] *See* Section V.B.1 *supra.*

[216] *See* HLSA Transfer of Rights and Resolution, C-0003.

the beneficiaries are in valid possession of the lots.[217] Mr. Bonfiglio agrees, explaining that since the Ejido commissariat is the legal representative of the Ejido against third parties, its Certificates of Possession are evidence of *the Ejido's* agreement with the Certificate beneficiaries.[218] Respondent and its expert do not, because they cannot, dispute this point.

176. *Second*, as Mr. Bonfiglio has already confirmed, the agreements executed by Claimants with the individual ejido members and others from whom they acquired possession were valid under Respondent's law and met all the material requirements.[219] These Private Agreements are *expressly* permitted in the Agrarian Law and are enforceable amongst the private parties. [220]

[217] The Supreme Court explains that these certificates "deserve a presumptive value" because they are issued by the ejido commissariat, who is in charge of administering the agrarian asses and lands. The Court states that, although they are not the document that by itself shows possession, it does establish such a presumption, which must then be analyzed with "various evidence" to make the determination. Federal Judicial Report of the Supreme Court, May 1996, PCPG-0087.

[218] *E.g.*, First Report of Mr. Bonfiglio, ¶¶ 70-72; Second Report of Mr. Bonfiglio, ¶ 22.

[219] *See* Second Report of Mr. Bonfiglio, ¶¶ 2-6, 37-42; First Report of Mr. Bonfiglio, ¶¶ 40-42 (quoting and discussing Article 150 of the Agrarian Law).

Similarly, Respondent's argument that the 1994 Ejido Assembly is null, that a Special Assembly (AFE) was required to allocate common use lands, and that Ejido common use lands cannot be transferred by individual Ejido members is false. *First*, as Mr. Bonfiglio explains, an AFE Assembly is only required for Assembly ratification but not for private agreements. Second report of Mr. Bonfiglio, n.1. *Second*, even if the 1994 assembly did not have an agrarian authority attorney present, that does not render it null and it is still valid to allocate possessory rights to individual Ejido members as private agreements enforceable amongst the parties involved. Second report of Mr. Bonfiglio, ¶ 17. And as Mr. Bonfiglio has already confirmed, the Agrarian Law expressly permits agreements amongst private parties concerning these possessory rights. First Report of Mr. Bonfiglio, ¶¶ 40-43, 68-69.

[220] Respondent's argument that the maps contained in the transfer and commodatum contracts are inconsistent and not part of the agreement holds no water. Resp. Reply, ¶ 214, n. 336. Respondent cites to no authority or facts indicating that the maps accompanying these contract documents were not part of the agreements. In any event, the Ejido Commissariat conducted its own analysis of the chain of title prior to issuing a Certificate of Possession with the corresponding geographical coordinates.

Respondent presents no evidence to counter these facts. As such, the evidence in the record overwhelmingly supports that Claimants had investments situated in the lots identified in the agreements and certified by the Ejido Commissariat.

177. Respondent and its own expert does not dispute this.[221] Instead, they discuss *ad nauseam* the requirements applicable to ***ratification*** of these contracts by the Assembly, ***registration*** in the RAN, and ***sale*** of land ownership rights by the Ejido to private individuals.[222] None of these are relevant here.

178. Thus, Respondent cannot seriously claim that the Investments are invalid or did not exist.[223] Claimants have submitted evidence of the contracts, formation documents, Certificates, hotel and commercial facilities, and licenses and permits to construct and operate those facilities. Each of these assets were valid under Respondent's law. This includes Claimants' Private Agreements, which are expressly permitted under the Agrarian Law. [224]

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[221] *See, e.g.*, Second Report of Mr. Gutiérrez at 70, (admitting that the rights under these agreements "are generated only amongst the parties.")

[222] In its Reply, Respondent presents a new witness, Marcelino Miranda Aceves, who is presented as a purported fact witness, but who has no relevant personal knowledge of Claimants' Investments. His comments on Mexican law are akin to a legal expert opinion. His statement concerns Mexico's Restricted Zone law which he concludes renders Claimants' Investments "illegal" because foreigners are prohibited from owning ejido land. This testimony, and Respondent's reasoning, misses the point entirely. Claimants have not claimed an ownership interest in the land, which remains under the Ejido. And Respondent's "restricted zone" laws cannot be the basis of a defense because they violate Respondent's National Treatment obligations in the Treaties. *See* Cl. Counter-Mem., ¶ 214; Section VI.C.3 *supra*.

[223] In fact, even the local Mayor acknowledged in writing that Tierras del Sol "existed," and confirming the business' address. Certification from the Mayor of Tulum, 13 August 2006, C-0094; Certification from the Mayor of Tulum, 11 June 2004, C-0095.

[224] In yet another absurd argument, Respondent and its expert say that Claimants have not shown that the lots were in Ejido lands because this conclusion is derived from information in the PHINA database, which "does not have probative value" and is only for "statistical and informative" purposes. *E.g.*, Resp. Reply, ¶ 214; Second Report of Mr. Gutiérrez at 66. Respondent cannot seriously argue this.

As Mr. Bonfiglio explains, the information in the PHINA is based from official magnetic records maintained by the RAN, which are considered the official state of the law and land in this matter. Second Report of Mr. Bonfiglio, ¶¶ 32-36. Respondent's expert attempts to discredit the information in the PHINA by submitting some preliminary maps in the Ejido file that allegedly show that the Ejido had different boundaries than what its own PHINA database shows. Loose information in the Ejido file is irrelevant. What matters is the analysis of the documents as a whole. The PHINA reflects that analysis. And in any event Respondent fails to produce the official magnetic information in the RAN to show that

179. Moreover, Respondent benefitted from Claimants' Investments, contributions, tourism revenue, and employment, without objection for over a decade. International law is clear that States cannot blow "hot and cold" whenever it is convenient for them.[225] Claimants continued to build and expand their Investments based in part on Respondent's acquiescence.[226] Respondent is thus estopped from making its "inexistence" claims.

c. Respondent Does not Seriously Rebut the Origin of the Contractual Rights Acquired by Mr. Jacquet, Ms. Silva, and Mr. Abreu.

180. With regard to Mr. Jacquet's and Ms. Abreu and Mr. Silva's agreements, Respondent argues that Claimants have not shown that they executed these agreements with individuals who possessed the lots where the Investments were situated. This again is incorrect.

181. *First*, in the case of Mr. Jacquet, Respondent alleges that Mr. Jacquet has not demonstrated his individual rights over the Behla Tulum investment.[227] This is false. In addition to the licenses and permits issued to Mr. Jacquet by Respondent, Claimants have provided documents that show that Mr. Jacquet duly executed agreements to build his business on the Behla Tulum Lots. Mr. Jacquet initially formed Abodes Mexico S.A. de C.V. ("AMSA"), but as he explains in his witness

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the information in the PHINA is somehow inaccurate. As such, Respondent fails to discredit its own database.

[225] Bin Cheng, General Principles of Law As Applied by International Courts and Tribunals, CLA-0092, at 141-42 ("It is a principle of good faith that '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. In the international sphere, this principle has been applied in a variety of cases.").

[226] *See* Section III *supra* (discussing the testimony and documents showing the process by which Claimants built the Investments).

[227] Resp. Reply ¶ 527.

statement, he received conflicting legal advice on how to structure these acquisitions. Eventually, all parties to the transactions decided to re-structure the agreements as commodatum agreements, transferring rights over the lots into Mr. Jacquet's name instead. After executing the two Commodatum Agreements, Mr. Jacquet continued to operate his Behla Tulum business on the combined lot, undisturbed, for nearly eight and a half years.[228]

182. *Second*, in the case of Ms. Abreu and Mr. Silva, Respondent alleges that they have not shown that they held the rights to the Uno Astrolodge investment. This too is incorrect. In addition to the numerous licenses, permits, and business formation documents issued in the favor of Ms. Abreu and Mr. Silva, Claimants have provided documents that show that they acquired two lots upon which Mr. Silva built his Uno Astrolodge business and that Mr. Silva and Ms. Abreu formed O.M. Del Caribe S.A. de C.V. ("**OMDC**") to manage the hotel business.[229] Thereafter, Mr. Silva

[228] Witness Statement of Renaud Jacquet ¶¶ 8, 10, 14, 15, 17 n. 16. The AMSA formation document gave Renaud Jacquet, as sole administrator, the power to act on behalf of AMSA to acquire and develop property in Mexico. AMSA Formation, 24 March 2004, RJ-0003. By 5 August 2006, the ejido certified that Jose Mauricio Román Lazo ("**Mr. Román**") had valid possession of the North Lot. Certificate of Possession to Mr. Román, 5 August 2006, C-0049.

The possession of the North Lot was transferred from Mr. Román to AMSA on 15 May 2007, from AMSA to Mr. Román on 15 August 2007, and from Mr. Román to Mr. Jacquet on 10 January in 2008 via a Commodatum Agreement. *See* Purchase of Rights Agreement, 15 May 2007, C-0017; Transfer of Rights Agreement, 15 August 2007, RJ-0009; Commodatum Agreement (North), 10 January 2008, C-0053.

On 2 January 2008, Mr. Román acquired a second adjacent lot (the South Lot) from Irma Guadalupe Villarreal de Elias ("**Ms. Villarreal**"). Ms. Villarreal had acquired her property holdings from the Ejido member, Rogelio Novelo Balam, whose possession had been certified by the ejido through a Certificate of Possession. On 10 January 2008, Mr. Román transferred this second lot to Mr. Jacquet through a second Commodatum Agreement. *See* Transfer of Rights Agreement, 2 January 2008, C-0051. Certificate of Possession issued to Mr. Novelo Balam, 30 April 1994, RJ-0007; Commodatum Agreement (South), 10 January 2008, C-0052.

[229] Ms. Abreu acquired two lots, one directly from Ejido member Mr. Jiménez and the other from Ms. Gutierrez, had previously acquired the lot from Mr. Jimenez. Contrato Privado de Cesión de Derechos Ejidales (Transfer of Rights Agreement), 15 December 2000, NS-0003; Transfer of Rights

and O.M continued to operate the Uno Astrolodge business on this lot, undisturbed, for the next 9 years until the day of the seizure by Respondent.

d. Respondent Does not Seriously Rebut That Mr. Sastre Owned the HLSA Investments and Mr. Galán and Mr. Alexander Owned the Parayso Investments.

183. Respondent argues that Mr. Sastre's HLSA Investments are not covered by the Argentina-Mexico BIT because "the HLSA Investments were owned by Swiss nationals at the moment of investment and at the moment of the supposed treaty violations."[230] This argument misses the point, and Respondent abandons the argument in its Reply. In any event, as Claimants have demonstrated, the HLSA Investments included assets such as licenses, permits, and transfer agreements. Mr. Urdiales – an Argentine national – was a minority shareholder in HLSA. Mr. Urdiales also held an Ejido Certificate of Possession in his name for the lot where HLSA operated the Investment. In light of Mr. Urdiales' Argentine nationality, these investments were covered by the Argentina-Mexico BIT. And as discussed in Section VI.D.1, Respondent's allegations of abuse of process have no merit because the HLSA Investments were always afforded investment treaty protection. Mr. Sastre acquired these investments from all HLSA shareholders, including

Agreement, dated 22 October 2003, C-0020; Transfer of Rights Agreement, 28 November 2003, C-0021; Witness Statement of Nuno Silva, ¶¶ 6 – 14.

In 2006 the ejido certified that Ms. Abreu had valid possession over the combined lot and that the original owner of the Ms. Abreu's parcel had been Mr. Jimenez, Constancia (Certificate of Possession), 25 June 2006, NS-0007.

On 25 June 2007, Ms. Abreu transferred possession of the lot to O.M through a Commodatum Agreement, executed by Mr. Silva, O.M's sole administrator. Contrato de Comodato (Commodatum Agreement), 25 June 2007, NS-0009; Acta Constitutiva OMDC (OMDC Formation Document), Exhibit C-0006.

[230] *E.g.*, Memorial ¶ 184.

Mr. Urdiales. Respondent does not, because it cannot, point to a *single provision* in the Argentina-Mexico BIT to support that these investments are not covered by this Treaty.

184. Respondent also insists that "it has not been shown that RSM's rights over Hotel Parayso were cancelled" because Claimants' document has not been "officialized."[231] Once again, this is not a *rebuttal*. Respondent forgets that simply saying that something has not been formalized to *its* satisfaction is not the same as rebutting *prima facie* evidence. Respondent again fails to adduce any evidence to counter Claimants' evidence on this point.

185. In response to Claimants' point that Ms. Galán and Mr. Alexander would still own the assets concerning the *Parayso* Investment indirectly even if RSM owned Hotel Parayso (which it does not), Respondent claims that RSM is "an investment in Canada."[232] Respondent provides no support for this strange claim, and in any event it is irrelevant. Whether RSM is a company in Canada, the United States, or anywhere else does not change the fact that Ms. Galán and Mr. Alexander (both Canadian nationals) own the Parayso Investment assets "directly or indirectly" under the NAFTA.[233]

186. Finally, Respondent argues that "the rights of Mr. Alexander over the Parayso lot have not been demonstrated because the Galán-Alexander separation of property agreement "is not a valid or sufficient document to show that Ms. Galán acquired rights over [the Parayso lot]."[234] Respondent misses the point again. As discussed in Section V.B.1, Ms. Galán acquired assets in

[231] Resp. Reply at 516.

[232] Resp. Reply ¶ 517.

[233] NAFTA Art. 1139 (definition of "investment").

[234] Memorial ¶¶ 267-70; Resp. Reply ¶ 518.

Respondent's territory including licenses, permits, contractual rights, and an Ejido Certificate of Possession. These assets constituted, among other things, an "enterprise" and "tangible and intangible" property for economic benefit under the NAFTA.[235] Ms. Galán and Mr. Alexander agreed to divide this property and the enterprise equally between them.[236]

e. Claimants Meet Their Burden to Show, to a Preponderance, That They Made Investments In Respondent's Territory

187. As demonstrated in this Subsection, Claimants have presented ample evidence showing that they owned assets and property in the territory of Respondent, including but not limited to licenses, permits, contracts, shares, and certificates. Respondent has failed to rebut this prima facie showing with any evidence that Claimants did not own these investments, or that the investments belonged to someone else. As such, Claimants meet their burden to show that they owned "investments" in the territory of Respondent, and this Tribunal has jurisdiction *ratione materiae*.

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

188. Claimants have shown that the Treaties were in force on the date of Respondent's violations.[237] Respondent does not provide any evidence to the contrary or oppose this in any way. Respondent does not rebut Claimants' *prima facie* showing. Thus, this Tribunal has *ratione temporis* jurisdiction.

[235] NAFTA Art. 1139 (definition of "investment").

[236] *E.g.*, Separation of Property Agreement at 2-4, C-0024 (splitting between Ms. Galán and Mr. Alexander the profits derived from Parayso and its permits, and Ejido Certificate).

[237] Cl. Counter-Mem., ¶¶ 78-79.

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

1. Claimants' Position

189. Claimants have satisfied the notice requirements of each Treaty as follows:

a. On 15 June 2017 and on 6 September 2017, Mr. Sastre submitted two notices of intent to submit this arbitration with respect to the *Tierras del Sol* and *Hamaca Loca* investments, respectively. On 17 January 2019, the remaining Claimants sent a written notice of intent to submit this dispute to arbitration with respect to the Behla Tulum, Uno Astrolodge, and Hotel Parayso investments.[238]

b. Claimants have consented to this UNCITRAL arbitration. After waiting the required time period 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. Equally, after waiting the required time period under the NAFTA and the France-Mexico and Portugal-Mexico BITs, on 14 June 2019 Claimants amended the Notice of Arbitration to include the *Behla Tulum, Uno Astrolodge,* and *Hotel Parayso* investments.[239]

c. Claimants have met the prescription period requirements of the Treaties. In the case of Mr. Sastre specifically, the Argentina-Mexico BIT has a prescription period of four years, which start counting from the moment when an investor had actual or constructive knowledge of Respondent's breach plus the damages suffered. Mr. Sastre only gained actual or constructive knowledge in 2015 when allegations first emerged that it was Respondent's officials who conspired to take Tulum beachfront hotels, including his investment. Before 2015, Mr. Sastre reasonably believed that the entire scheme was orchestrated solely by a private individual.[240]

[238] Cl. Counter-Mem., ¶¶ 80-81.

[239] *Id.*

[240] Cl. Counter-Mem. ¶¶ 82-85.

d. Further, Mr. Sastre's claims relating to fair and equitable treatment (including denial of justice) and protection against unlawful expropriation (including expropriation by Respondent's courts) meet the prescription period of this Argentina-Mexico BIT because they crystallized in 2015. And finally, Mr. Sastre's claims relating to full protection and security meet the prescription period of this BIT because Respondent failed to investigate (and continues to fail to investigate) the criminal complaints filed by Mr. Sastre relating to the seizure of his Investment.[241]

2. Respondent's Position

190. Respondent does not contest that the Notices of Intent filed by Claimants pursuant to the Argentina (for the *Tierras del Sol* Investment), France, and Portugal BITs meet the notice requirements.

191. Respondent does not contest that the claims under the NAFTA and the Portugal and France BITs meet the prescription period requirements.

192. But Respondent argues that the Notices of Intent for the Hamaca Loca Investment under the Argentina-Mexico BIT and the Notice of Intent for the Parayso Investment under the NAFTA were insufficient.

193. Respondent agrees that Mr. Sastre's denial of justice claims for the *amparo* federal proceedings fall within the jurisdiction of the Tribunal.[242] But Respondent objects that every other claim falls outside the 4-year prescription period of the Argentina-Mexico BIT. These objections are addressed in Section VI.D.2.

[241] *Id.*

[242] Resp. Reply ¶¶ 364-66.

3. Respondent Fails to Rebut Claimants' *Prima Facie* Showing that This Tribunal Has *Ratione Voluntatis* Jurisdiction.

194. Respondent fails to rebut Claimants' case that they have satisfied the notice and prescription period requirements of the Treaties, as discussed below.

a. Respondent Fails to Rebut Claimants' Prima Facie Case That Claimants Complied With the Notice Requirements in the Treaties

195. Respondent does not contest that each of the Claimants provided a Notice of Intent to Respondent pursuant to the Treaties. Each Notice of Intent included among other things the names a factual background, a description of the dispute, and the provisions breached.[243] The Notice of Intent presented by Mmes. Galán and Abreu and Messrs. Alexander, Jacquet, and Silva also included the relief sought and approximate amount of damages claimed.[244]

196. Despite this, Respondent insists that Mr. Sastre's notice for the Hamaca Loca Investment and Ms. Galán's and Mr. Alexander's notice for the Parayso Investment were "insufficient." With respect to Mr. Sastre's Notice of Intent for the Hamaca Loca Investments, Respondent argues that the document gives notice with respect to the Switzerland-Mexico BIT and not the Argentina-Mexico BIT. This strains credulity.

197. The Notice of Intent expressly states that it is filed pursuant to the Argentina BIT in several places. Indeed, the *first paragraph* states:

> En referencia a nuestra Notificación de 15 de junio de 2017 (la "Primera Notificación"), y en apego al Acuerdo para la Promoción y Protección Recíproca de las Inversiones de los Estados Unidos Mexicanos con la Confederación Suiza, el Reino de España ***y la***

[243] *See* Notice of Intent 15 Jun. 2017, C-0032; Notice of Intent 6 Sept. 2017, C-0033; Notice of Intent 17 Jan. 2019, C-0034.

[244] Notice of Intent 17 Jan. 2019, C-0034.

> ***<u>República Argentina</u>*** (en conjunto, los "APPRIs"), hacemos llegar la presente notificación de arbitraje en base a los hechos descritos a continuación (la "Segunda Notificación").

198. With regard to Ms. Galán's and Mr. Alexander's Notice of Intent for the *Parayso* Investment, Claimants already explained that Respondent's objections are meritless because the Notice of Intent already indicates that the approximate amount of damages sought is $70 million, the document includes the investment protection standards at issue, and Respondent cannot claim prejudice because of timing.[245] Respondent adds nothing new in its Reply. It simply recants the importance of following NAFTA requirements and that it was "prevented from knowing the conditions of the claims."[246] Yet Respondent again fails to show how the $70 million dollar figure is not "an approximate amount of relief sought" and what prejudice it suffered, if any. Respondent's objection is nothing but frivolous.

199. Finally, in its Reply Respondent argues that Mr. Sastre did not authorize his counsel to file a claim for the Hamaca Loca investment under the Argentina-Mexico BIT because he signed a Power of Attorney authorizing his counsel to file a claim under the Switzerland-Mexico BIT only. This is false.

200. The Power of Attorney signed by Mr. Sastre to initiate an arbitration under the Argentina-Mexico BIT speaks for itself. On 15 June 2017, he signed a power of attorney authorizing his counsel to file an arbitration under the Argentina-Mexico BIT. This Power of Attorney gives his

[245] Cl. Counter-Mem., ¶¶ 221-22.

[246] Resp. Reply ¶ 486.

counsel "the widest possible powers" to implement the Power of Attorney. The document in no way limits which claims can be filed under the Argentina-Mexico BIT.[247]

201. Thus, the documentary record shows that Claimants satisfied their notice requirements in the Treaties. Respondent present no relevant evidence to challenge this fact. As a result, Respondent fails to rebut Claimants' case-in-chief that they met the notice requirements of the Treaties.

b. Respondent Fails to Rebut Claimants' Prima Facie Case That Their Claims Meet the Prescription Period Requirements in the Treaties

202. As indicated in subsection V.D.2 above, Respondent does not dispute that Mmes. Galán and Abreu, and Messrs. Jacquet, Silva, and Alexander, filed their claims within the requisite time period in the NAFTA and the Portugal and France BITs. Respondent also does not dispute that Mr. Sastre filed a timely claim for his denial of justice claim.

203. Despite the above, Respondent argues that only Mr. Sastre's claims for denial of justice the federal court proceedings can be considered timely. This objection is baseless, and it is addressed in detail in Section VI.D.3.

204. As a result, Respondent fails to rebut that the Claims meet the prescription period requirements in the Treaties.

[247] Power of Attorney by Mr. Sastre to his counsel, 15 June 2017, C-0124.

c. This Tribunal Has Ratione Voluntatis Jurisdiction

205. As discussed above, Respondent fails to rebut Claimants' case-in-chief that they satisfied the notice and prescription period requirements in the Treaties. Thus, the Tribunal has *ratione voluntatis* jurisdiction.

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

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

1. Respondent has Abandoned Its "Accumulation" Argument

206. Respondent introduced a novel "accumulation" theory in its Memorial that has no precedent in investment treaty cases. Respondent argued that in a multiparty proceeding, Claimants must each satisfy every jurisdictional requirement of all four Treaties in this arbitration.[248]

207. Respondent then posited that if a Claimant fails to meet a single requirement from *any* of the four Treaties, then the Tribunal must dismiss for lack of jurisdiction. Worse still, Respondent concluded that if any one claim fails at the jurisdictional stage, then the entire arbitration proceeding must be dismissed.[249] Respondent presented for its accumulation theory without citing a single award or treatise that recognized this purported rule. Instead Respondent points only to three interpretative maxims from the Vienna Convention, even though their connection to the accumulation theory is tenuous at best.

[248] Respondent's Mem. ¶¶ 66-68.

[249] *Id.* ¶ 68.

208. Claimants debunked this approach in the Counter-memorial. Claimants observed that the referenced Vienna Convention principles relied on by Respondent actually cut against accumulation.[250] Indeed, the principles of good faith, equality or proportionality between the parties, and *ut res magis valeat quam pereat*[251] are best served under the majority view that each individual claimant need only comply with the requirements of his or her respective Treaty. Finally, Claimants observed that not a single investment treaty award has even mentioned (much less applied) an accumulation requirement.[252]

209. Respondent has now abandoned its quixotic crusade to introduce a *sui generis* accumulation requirement to investment treaty law. Neither the term nor the underlying concept is even mentioned in its Reply, much less any attempt to rebut Claimants' textual and policy-based criticisms. Respondent has not met its burden with respect to this purported consent-based objection, and thus the Tribunal should decline any further consideration of this artificial construct.

2. Respondent's Arguments Against Multiparty Arbitration Fail

a. Claimants' Position

210. Claimants' views on Respondent's multiparty objection can be summarized as follows:

a. The Tribunal has jurisdiction *ratione voluntatis* to hear this multiparty arbitration. Each Claimant perfected his or her consent under their respective Treaty to bring an arbitration claim against Respondent. Claimants then nominated an arbitrator for the three-member Tribunal, because the underlying facts, legal claims, and violations by Respondent are largely identical.

[250] Cl. Counter-Mem. ¶¶ 91-97.

[251] *i.e.*, the terms of a treaty should be given meaning rather than assumed to be void.

[252] Cl. Counter-Mem. ¶ 96.

b. Because each Claimant has perfected his or her individual consent, the decision to hear a multiparty arbitration is a procedural matter. Article 15.1 of the UNICTRAL Rules gives the Tribunal broad powers to manage the proceedings.

c. The Tribunal should exercise its Article 15.1 authority to hear these claims in a multiparty proceeding. Doing so will promote procedural efficiency, avoid parallel proceedings, and enhance Claimants' access to justice.

d. Multiparty proceedings involving two or more claimants are ubiquitous—about forty percent of ICSID cases are multiparty arbitrations. By contrast, "consolidations" of multiple proceedings are rare, in part because they impact the autonomy of a claimant to appoint an arbitrator. Respondent's repeated use of an invented term ("auto-consolidation") to describe these proceedings is a red herring.

b. Respondent's Position

211. Respondent's multiparty objection can be summarized as follows:

e. The Tribunal does not have jurisdiction *ratione voluntatis* over these proceedings, because Respondent has not separately consented to an "auto-consolidation" of Claimants' claims. The text of the Treaties do not include consent for multiple investors to file their claims together.

f. The issue of auto-consolidation is a jurisdictional question, and not procedural in nature. Claimants cannot avail themselves of new rights or benefits like auto-consolidation that are not strictly provided for them in the Treaties.

g. The numerous arbitral decisions cited by Claimants are distinguishable because in those cases, Respondent's consent to arbitrate was express or implicit, and cites *Kruck* and *PV Investors* for support that multiparty arbitrations are not always permitted.

h. Even if the Tribunal decides this issue on procedural grounds, these claims involve multiple disputes, multiple investors, multiple government measures, with different investments and different damages. Claimants also have not proven that the takings were based on the same governmental scheme.

c. Respondent's Best New Authorities (Kruck and PV Investors) Favor Claimants' Position

212. Claimants have each perfected consent under their respective treaty, as set forth in Section III(D). Here, Respondent bears the burden of proving this consent-based jurisdictional objection. Respondent's Reply does not save its objection against multiparty arbitration.

213. Respondent clings to its own invented term "auto-consolidation" in its Reply. Respondent argues that their use of that term is derived from the use of "autoacumulado" in *Alemanni*. Yet this assertion underscores that Respondent has coined a new term (that it admits appears nowhere in *Alemanni* or any other award), only to rely on the circular logic that because its own invented term does not appear in treaties or case law, then "auto-consolidation" cannot be allowed.

214. Respondent's strongest argument revolves around two new cases analyzed in its Reply: *Kruck* and *PV Investors*. But none of them rescue Respondent's theory.

215. *Kruck* involves a multiparty arbitration. The tribunal used textual analysis of the ECT, and found agreement with *Alemanni* to hold that an arbitration can only involve one dispute.[253] The *Kruck* tribunal split the 116 claimants into two groups, to reflect the two separate disputes at issue. Paragraphs 207-08 provide the key considerations:

> In a case such as the present, multiple claims can generally be said to constitute a single dispute where, in the case put before the tribunal, all of the claimants (i) have invested in the same project or group of related projects, and (ii) have made their investments on the basis of the same terms and representations, and (iii) advance their claims on the basis of the same legal arguments, and (iv) do so against the same respondent, who maintains the same defences against each claimant. There will usually be a significant connection between the members of the group of claimants at the times when

[253] Kruck and others v. Spain, ICSID Case No. ARB/15/23, Dec. on Juris. and Admissibility, 19 April 2021 ¶ 199.

> they make their respective investments. The Respondent used the concept of 'homogeneity' to refer to such multiple claims within a single dispute, and the Tribunal adopts that convenient usage.
>
> This approach to the determination of whether there is a single dispute or multiple disputes is essentially a matter of procedural justice. If a member of what purports to be a single group of claimants is in a materially different factual position from the others, or relies upon or is met with materially different legal arguments in their claim or in the defence to their claim, their claim cannot properly be decided by saying that they are in the same position as the other members of the purported group: plainly, they are not.

216. Two points here merit further attention. First, even this outlier holding rejects Respondent's main argument—that Respondent must consent separately for a multiparty arbitration to proceed. In *Kruck*, the tribunal merely divided the 116 claimants by separating forty-three claimants from the larger group of seventy-three claimants, the latter of whom the tribunal allowed to proceed in a multiparty arbitration.[254] In the face of a consent-based objection, *Kruck*'s outcome repudiates Respondent's theory that special consent to multiparty arbitration is necessary.

217. Second, even if the Tribunal were to follow *Kruck* (which itself is an outlier case), the cited factors still favor hearing all Claimants together here. Claimants all invested in the "same group of related projects." They were all vacation rental businesses within walking distance from one another on the same strip of Tulum beachfront. Claimants also "made their investments on the basis of the same terms and representations" in that they all navigated Respondent's *ejido* regulatory framework to obtained licenses and rights agreements to operate their businesses. Claimants have also "advance[d] their claims on the basis of the same legal arguments" as they

[254] Respondent also references *LSG Building Solutions* and *Adamakopoulos* for the narrow proposition that for the claimants to be heard together, the nature of the dispute should be "in all essential respects identical" and "similar in their essence." Consistent with the holdings affirming multiparty proceedings in both decisions, the Claimants here are similarly situated.

have each brought claims under the same treaty protection standards (albeit from their respective Treaties). Finally, these arguments are all against the same Respondent.

218. *Kruck* elaborates on the "commitments" aspect by detailing why those particular claimants required division. "In circumstances where, as here, a respondent's alleged liability depends upon…representations on which investors are said to have relied, it is obvious that *if different commitments or representations were made to different individual claimants*, the individual claimants cannot all be grouped together for the purposes of determining liability."[255]

219. Here, Claimants differ markedly from the *Kruck* investors. They all invested in their subject hotel businesses in the same *Ejido*. All obtained rights either directly or indirectly from *ejidatarios* following the same regulatory framework, and assurances from the same Ejido officials, the same three *ejidatarios*, the municipality of Tulum, the state of Quintana Roo, and Federal agencies that their businesses were legally recognized. These shared factual and legal bases are fit for adjudication under a single multiparty proceeding.

220. The second new case relied upon by Respondent is *PV Investors*. Respondent cites to it multiple times to assert that procedural efficiency and consistency in decisions "could not justify the admission of aggregate proceedings if it were not permitted under the framework of the ECT as a matter of law."[256] Respondent relies on *PV Investors* to argue that the Treaties cannot "add new rights" to Claimants.[257]

[255] *Id.* ¶ 206 (emphasis supplied).

[256] Resp. Reply ¶ 31 (citing PV Investors v. Kingdom of Spain, PCA Case No. 2012-14, Preliminary Award on Jurisdiction, 13 October 2014 ¶ 124).

[257] Resp. Reply ¶¶ 33-34.

221. Yet Respondent misreads *PV Investors*. That tribunal expressly rejected Spain's consent-based objection to multiparty proceedings. Its analysis affirms this Tribunal's ability to hear this multiparty arbitration.[258]

222. To be fair, the *PV Investors* tribunal dismissed three claimants in its preliminary award on jurisdiction. All three were Spanish companies. But crucially, they were dismissed for reasons unrelated to multiparty arbitration. They lost on jurisdiction because Article 26 of the ECT did not grant standing to Spanish companies to bring claims against the Kingdom of Spain.[259] Not surprisingly, the tribunal allowed the remaining twenty-six claimants in *PV Investors* to proceed as a multiparty arbitration.[260]

223. Respondent's remaining points rely largely on the recycled authorities it has already cited, without meaningfully addressing Claimants' arguments. Respondent continues to depend on *Alemanni*, even as that tribunal ruled in favor of claimants' multiparty proceeding and rejected Argentina's consent-based objection.

224. Respondent's repeated invocation of the Vienna Convention on the Law of Treaties ("**VCLT**"), and the doctrines of *pacta sunt servanda* and *pacta tertiis*, continue to miss the mark.[261] As does Respondent's view that that none of the Contracting States to the Treaties have consented to extend rights to a "third state" for purposes of invoking the particular consolidation mechanisms

[258] *See PV Investors* ¶¶ 220-38.

[259] *Id.* ¶¶ 252-80.

[260] *Id.* ¶ 375.

[261] Resp. Reply ¶ 29.

within those Treaties.[262] Again, Respondent hides the ball behind its "auto-consolidation" shell game by trying to conflate the rarely-applied consolidation procedures found in some treaties, with the ubiquitous practice of multiparty arbitration. These procedural concepts are not the same.

225. Finally, Respondent's attempted dismissal of *Guaracachi* is unconvincing, and misstates that tribunal's conclusions. Respondent selectively quotes paragraph 344 by stating that the tribunal's reference to "procedure and not jurisdiction" pertained only to procedural efficiency and not to the validity of multiparty arbitration.[263] In doing so, Respondent conveniently ignores that subsection where the *Guaracachi* tribunal details precisely why and how the decision to administer a multiparty arbitration is procedural and not jurisdictional.[264]

226. In other words, Respondent's Reply to Claimants' previous review of *Guaracachi* was to nitpick the meaning of a single "procedural, not jurisdictional" reference found in one paragraph, while ignoring the rest of *Guaracachi* that refutes the foundation of Respondent's purported jurisdictional objection.

227. The overwhelming consensus position is that tribunals hear multiparty claims all the time. Investors each meet their individual treaty requirements and tribunals agreed to hear claims with shared law and facts together for procedural efficiency reasons. Respondent acknowledges the lack of decisions that either (i) reject multiparty arbitrations or (ii) involve the truly rare consolidation mechanism to dissolve one or more tribunals in favor of a single panel. But Respondent refuses to accept the logical conclusion of this utter lack of support for its fringe position. Once each claimant

[262] *Id.*

[263] Resp. Reply ¶¶ 22-23 (quoting *Guaracachi* ¶ 344).

[264] *See Guaracachi* ¶¶ 334-47 (analyzing the multiparty arbitration analysis in full)

has perfected consent to arbitrate under their respective treaty, the decision to conduct a multiparty arbitration is procedural, not jurisdictional in nature. As the next section confirms, the shared law and facts among the claims here merit a multiparty proceeding.

d. Respondent's Attempt to "Overcomplicate" this Dispute Conceals the Shared Nexus of Law and Facts on the Record

228. Respondent's Reply strains to magnify any and all purported differences between the Claims brought here, to the point of absurdity.[265] For example, Respondent highlights every contract entered into by Claimants as a separate "sub-investment." Each fact in each Claimant's witness statement is given a separate bullet point. Respondent concludes that this cannot be a multiparty arbitration because there are too many differences between the investors to adjudicate all of their claims in a single proceeding.

229. Nonsense. First, Respondent highlights "differences" that are utterly immaterial to this analysis. For example, the objection that this proceeding cannot continue because it involves four different investment treaties is nonsensical. There are many recorded multitreaty, multiparty arbitrations, including certain cases cited by Respondent.[266]

230. Another purported difference is that each Claimant's lot involved a different ejido member from whom they obtained their rights to operate their business. This too is an irrelevant distinction. The dispute arises not from any individual ejido member, but from the sham lawsuits that expropriated Claimants' investments under identical (or near-identical) circumstances and timeframes.

[265] Resp. Reply ¶¶ 59, 62.

[266] *See, e.g.*, *Guaracachi*.

231. The shared nexus of law and facts in this case is quite straightforward, and explains why Claimants chose to bring their claims together in one proceeding. Claimants have already outlined these commonalities in the Counter-memorial.[267]

232. Finally, Respondent argues that the allegations about disgraced former Governor Roberto Borge "is not a common element" between the Claimants. But Respondent goes too far in asserting that Borge's involvement should be characterized as "incidental" based on the record evidence.[268] Respondent forgets that this proceeding is bifurcated. Claimants' factual allegations detail the Borge administration's infamous pillaging of *ejido* lands in Quintana Roo for the benefit of him and his political allies.[269] These details are all *merits*-related allegations, which must be accepted as *pro tem* in this stage of the bifurcated jurisdictional phase.[270] Respondent cannot demand a bifurcated jurisdictional phase, only to then attack Claimants' merits-based allegations on Respondent's breaching conduct as insufficient.

233. Respondent fails to meet its burden to establish this consent-based jurisdictional objection. Because the decision to hear a multiparty arbitration is procedural and not jurisdictional, the Tribunal has the discretion to hear these claims together. Claimants' shared facts and legal claims warrant this solution.

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[267] Cl. Counter-Mem. ¶ 119.

[268] Resp. Reply ¶ 72.

[269] Am. Notice of Arb. ¶¶ 20, 40-44, 53, 54, 59-60, 67-73, 92-99, 106-108; *see also* articles at C-0001 (Tierras de Ambiciones); C-0026 (Evictions by Armed Men Rattle a Mexican Tourist Paradise, 7 March 2017), C-0027 (Owners of Hotels Illegally Stripped in Tulum Seek to Recover Them, 8 February 2017.

[270] *See supra* Section IV.

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

1. Respondent's "Dominant and Effective Nationality" Objection Does Not Apply Here, and in any Event the Objection Fails

a. Claimants' Position

234. Claimants' position on Respondent's objection can be summarized as follows:

a. The dominant and effective nationality test is a creature of diplomatic protection jurisprudence. In the field of investment treaty law, the test is *lex specialis* as a handful of treaties expressly include the test in their definition of "investor" or "national" to exclude certain individuals from investment protection.

b. Each Claimant meets the definition of "national" or "investor" found in his or her respective Treaty. None of the Treaties here bar dual nationals from investment protection. Nor do any of the Treaties restrict consent to only those investors whose dominant and effective nationality is that of the other Contracting State. Indeed, none of the four Treaties contain the term "dominant and effective nationality."

c. Respondent cannot now add additional restrictions to the definition of "national" or "investor" or otherwise impose additional consent requirements outside of the four corners of the Treaties. Respondent has signed other treaties with Uruguay and Panama that include restrictions against dual national investors or impose a dominant and effective nationality test. But none of the four Treaties here include those restrictions. If the Contracting States had intended to bar dual national claimants, or impose a dominant and effective nationality requirement, they would have done so. Respondent cannot rewrite its treaty obligations after the fact.

d. Even if the Tribunal takes the extraordinary step of imposing the dominant and effective nationality test on Claimants, the objection nonetheless fails because the record evidence shows that none of the Claimants are predominantly Mexican.

b. Respondent's Position

235. Respondent contends that certain Claimants do not have a right to arbitration in this dispute, because the dominant and effective nationality test deems them as Mexican. Respondent's argument in favor of applying this test can be summarized as follows:

a. Even though the Treaties do not reference dual national investors, the principles of dominant and effective nationality still exist and are profoundly engrained in customary international law.

b. Even though the *Feldman v. Mexico* tribunal upheld that claimant's jurisdiction, its analysis of *Nottebohm* proves that dominant and effective nationality analysis is appropriate, even though NAFTA does not include that restriction in its definition of investor. Each of the Claimants here are predominantly Mexican.

c. Certain tribunals barred the claims of dual nationals even though the treaty did not exclude them from the definition of investor (*Rawat v. Republic of Mauritius* and *Heemsen v. Venezuela*). Because those treaties reference ICSID arbitration, and the ICSID Convention denies jurisdiction to dual national claimants, so too must the Treaties here bar all dual national Claimants from arbitration.

c. There is No Legal Basis to Apply the Dominant and Effective Nationality Test Here

236. Respondent puts the cart before the horse by insisting that certain Claimants do not have a right to arbitration because the dominant and effective nationality test deems them as Mexican. The test has no place here.

237. If the Contracting States of the four Treaties had meant to bar dual national investors from treaty protection, or limit access with a dominant and effective nationality test, they would have done so. Respondent cannot claim ignorance of this treaty practice. For example, Article 1(3) of the Mexico-Uruguay BIT defines an investor as a natural person ("personal fisica") as a "national

of one of the Contracting States, in accordance with its laws….Nevertheless, this Agreement does not apply to investments made from natural persons who are nationals of both Contracting States."[271] In this same vein, the Mexico-Panama FTA expressly imposes the dominant and effective nationality test upon dual national investors seeking arbitration under that instrument.[272] The four Treaties here impose none of these restrictions against their respective investors.

238. Respondent's first argument that the idea dominant and effective nationality is "profoundly engrained" in customary international law, and thus must be imported into this dispute is misleading. First, there is no consensus as to whether dominant-and-effective nationality analysis is part of customary international law. The concept exists and has primarily applied only in diplomatic protection cases, and in specialized U.S.-Iran Claims Tribunal cases. The doctrine's inclusion in investment treaty law is largely limited to disputes involving treaties that expressly include a dominant and effective nationality limitation to their definition of investors.[273] Claimants observe that this doctrine falls short compared to the ubiquity of other established concepts considered as part of customary international law, such as a right to due process, and a right to physical safety.

[271] Mexico-Uruguay BIT at Art. 1(3), CLA-0132. The relevant restrictive clause reads as follows in its original language: "Sin embargo, este Acuerdo no se aplicará a inversiones realizadas por personas físicas que sean nacionales de ambas Partes Contratantes."

[272] Mexico-Panama FTA at Art. 10(1), CLA-0133 (restricting the definition of investor, in relevant part, by adding "considerando, sin embargo, que una persona natural que tiene doble nacionalidad ***se considerará exclusivamente un nacional del Estado de su nacionalidad dominante y efectiva***") (emphasis supplied).

[273] *See, e.g.*, *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Award, 3 September 2019; *Carrizosa v. Colombia*, PCA Case No. 2018-56, Award, 7 May 2021, RL-143.

239. Respondent next points to *Feldman* as evidence that tribunals can and should embark on dominant and effective nationality tests even when the underlying treaty (NAFTA) is silent on the issue. But *Feldman* does not do that. That tribunal was tasked with evaluating an objection to "standing" arising in part because of NAFTA's peculiar definition of "national" which includes both citizens and permanent residents of a Contracting State.[274] The tribunal noted that Mexico's repeated reference to *Nottebohm* was "not precisely to the point" because that case was about the conferment of nationality to Mr. Nottebohm "in exceptional circumstances of speed and accommodation and without any substantial bond."[275] The *Feldman* tribunal concluded that *Nottebohm* was irrelevant because "here there is no doubt about the genuine and regular conferral by birth of the U.S. citizenship to Claimant."[276]

240. Respondent's curious reliance on *Feldman* to justify the application of *Nottebohm* here is noteworthy for two reasons. First, the *Feldman* tribunal discussed (and dismissed) *Nottebohm* only because it was raised and repeatedly referenced by Mexico, the same Respondent in this dispute. Respondent does itself no favors by pointing to its own erroneous misapplication of *Nottebohm* as an example of the doctrine's widespread adoption as a part of customary international law. Second, even if this Tribunal were to apply *Nottebohm*'s central holding of "improper conferral of citizenship" as *Feldman* did, Claimants would prevail anyway. Respondent has not proven, or even alleged, any facts challenging Claimants' "genuine and regular conferral of citizenship" from Argentina, Canada, or Portugal.

[274] *Feldman* ¶¶ 24-38.

[275] *Id.* ¶ 32 (internal quotations omitted).

[276] *Id.*

241. Finally, Respondent cites *Rawat* and *Heemsen* to argue that a restriction against dual nationals is proper even without express treaty language barring dual nationals from the definition of investor. This is because the treaties in these disputes, as the Treaties here, "mention" ICSID arbitration, which bars dual nationals under Article 25.

242. But *Rawat* and *Heemsen*, and the treaties they interpret, can be distinguished from the facts here in one fell swoop. The treaties in those two cases each *mandated* ICSID arbitration over any other venue. *Rawat* was brought under the France-Mauritius BIT (1973). Article 8 requires all "arbitration agreements relating to investments" brought under that treaty to include a clause requiring ICSID arbitration. Crucially, ICSID is the *only* dispute resolution forum provided in that treaty. So the *Rawat* tribunal considered the unique framework of that treaty and concluded that neither France nor Mauritius contemplated investment protection for dual national investors.

243. *Heemsen* involved a similar ICSID-only arbitration clause. Article 10 of the Germany-Venezuela BIT only gives investors access to arbitration under the ICSID Convention. Section 4 of the Protocol expands the dispute clause a bit further by providing for arbitration under the ICSID Additional Facility Rules "so long as the Republic of Venezuela has not become a Contracting Party to the ICSID Convention."[277] It also provides for ad-hoc arbitration under the UNCITRAL Rules "in case that it was not possible to resort to arbitration" under the Additional Facility Rules."

244. The *Heemsen* tribunal sustained Venezuela's *ratione voluntatis* objection, concluding that the arbitral forums in Article 10.2 and the Protocols were not intended to be optional among each other.[278] The two forums referenced in the Protocols (ICSID Additional Facility and ad-hoc

[277] *See* Germany-Venezuela BIT

[278] *Heemsen* ¶ 367.

UNCITRAL) were available to prospective claimants only *before* Venezuela entered the ICSID Convention. Under the terms of the treaty, this mandatory forum assignment that required ICSID arbitration (and the application of Article 25) thus doomed the claimant's jurisdictional standing.

245. *Rawat* and *Heemsen* bear no resemblance to this case. The four Treaties here each contain optional forum selection clauses that allow investors to file a claim under the ICSID Convention, the ICSID Additional Facility Rules, or under the UNCITRAL Rules. None have a mandatory ICSID forum provision akin to the treaties applied in *Rawat* and *Heemsen*. Thus there is no reason to infer a restriction against dual national claimants when the Treaties do not include those restrictions in their definition of investor or national.

d. Even if the dominant and effective test applies, Claimants have provided ample evidence that Respondent fails to rebut.

246. The *lex specialis* of the Treaties in this dispute does not provide for a dominant and effective nationality test. Yet even if the Tribunal chooses to impose this nationality requirement on Claimants, the record evidence shows that none of the Claimants' dominant and effective nationality is Mexican.

247. Mr. Alexander and Ms. Galan are predominantly Canadian. Ms. Galan moved permanently from Mexico to British Columbia, Canada in 2004 and has lived there ever since.[279] After marrying Mr. Alexander in 2005, a Canadian resident and citizen by birth, Ms. Galan became a permanent resident of Canada on 22 February 2007, and became a citizen on 26 June 2015.[280] Throughout this time period, from 2004 until 2006, Mr. Alexander and Ms. Galan coordinated construction of

[279] Galan Witness Statement ¶ 7.

[280] *Id.*

Hotel Parayso while living in Canada.[281] They negotiated with the *ejido* authorities for the certificate of possession for the lot while living in Canada.[282] They operated the Hotel Parayso investment remotely, mostly from Canada.[283] They pay annual income taxes in Canada, and do not pay income taxes in Mexico.[284]

248. Mr. Silva and Ms. Abreu are predominantly Portuguese. Mr. Silva and Ms. Abreu have been citizens of Portugal from birth to the present.[285] They both went to grade school, high school, and college in Portugal.[286] After working briefly in Rome and attending a hospitality management school in France, Mr. Silva returned home to Portugal.[287] He visited Tulum in 2000, and purchased the rights to the lot for Uno Astrolodge, after which he returned to Portugal.[288] Beginning in 2001, he managed the construction of Uno Astrolodge from his home in Portugal, until 2003 when he visited Mexico to form a local holding company to manage the business.[289] A few months after Respondent's agents illegally seized Uno Astrolodge, Mr. Silva moved back to Portugal.[290]

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[281] *Id.* ¶ 15.

[282] *Id.* ¶ 19.

[283] *Id.* ¶¶ 25, 37.

[284] *See* Canadian Tax Filings of Ms. Galán and Mr. Alexander, C-0113.

[285] Silva Witness Statement ¶ 2 (citing NS-0001, NS-0002, C-0008); n. 5.

[286] *Id.*

[287] *Id.* ¶ 3.

[288] *Id.* ¶¶ 8-9.

[289] *Id.* ¶ 10.

[290] *Id.* ¶ 40.

249. Mr. Sastre is predominantly Argentine. He was born in Rio Cuarto, Córdoba, Argentina in [redacted] He is an Argentine citizen by birth and continues to be Argentine until the present.[291] He attended primary and secondary school in Argentina, and in 1982, served his mandatory military service in the Fourteenth Airborne Regiment in La Calera, Córdoba, Argentina.[292] From 1994 to 1996, he enrolled at the National University of Rio Cuarto, and owned and operated a food and cleaning products distributor.[293] Mr. Sastre arrived in Mexico in 1996, and ran a number of businesses including an advertising company.[294] After Tierras del Sol was seized, and the courts denied his petitions for *amparo* relief, Mr. Sastre moved back to his home in Rio Cuarto, Argentina with his wife and children.[295]

250. Claimants observe that Respondent has proffered no fact witnesses to challenge or refute Claimants' testimony and factual showing. Nor has Respondent presented any documents relevant to this analysis. Respondent has produced no Mexican income tax records filed or paid by Claimants. Nor any Mexican voting records for any Claimant. Nor any evidence that any of the above Claimants kept a habitual residence in Mexico after their investments were expropriated. Nor any evidence of Claimants' "personal attachment to Mexico" other than predictably slanted naturalization applications and wild conjecture.

251. Finally, Respondent's frequent references to the above Claimants' Mexican naturalization papers are not relevant to this analysis. As explained more fully in Section VI(B)(2), none of the

[291] Sastre Witness Statement ¶ 2.

[292] *Id.* ¶ 3.

[293] *Id.*

[294] *Id.* ¶ 4.

[295] *Id.* ¶ 57.

Claimants renounced their non-Mexican nationality, and Respondent presents *zero* evidence that these renunciations were effective by operation of Argentine, Portuguese, or Canadian law.

252. Even if this Tribunal chooses to navigate uncharted waters by applying a dominant and effective nationality analysis to an investment dispute where *none* of the underlying Treaties (i) provide for the test, (ii) restrict dual national investors, or (iii) mandate ICSID arbitration only, Claimants nonetheless prevail.

2. Respondent Fails to Prove its "Waiver of Nationality and Treaty Rights" Objection with Respect to Ms. Abreu and Messrs. Sastre and Silva

a. Claimants' Position

253. Claimants' position on Respondent's jurisdictional objection is summarized as follows:[296]

a. Respondent bears the burden of proving this jurisdictional objection.

b. The referenced Claimants have not waived their Argentine or Portuguese nationality, or any rights associated with their nationality, by operation of the law of Argentina and Portugal. Argentine law is clear that nationality can never be renounced or waived, so it is impossible for Mr. Sastre to renounce his Argentine nationality. Portuguese law provides a strict procedure that a national must follow in order to renounce their rights. Mr. Silva presents evidence that neither he nor Ms. Abreu undertook this procedure to renounce their nationality.

c. Respondent's reliance on Mexican law and Mexican naturalization documents is misplaced, because Mexican law does not control over the nationality rules of Argentina and Portugal. Respondent proffers no analysis of Argentine or Portuguese

[296] Cl. Counter-Memorial, ¶¶ 139-56.

law, nor any evidence that these Claimants waived their nationality in accordance with the laws of their home country.

d. Under Investor-State jurisprudence, waiver of international treaty rights carries a demanding burden, and some tribunals do not consider that private parties can waive such rights. In any event, such a waiver, would need to reference the specific treaty rights waived and the investments covered by those treaty rights. Here, the boiler-plate language in Respondent's naturalization forms does not meet the required specificity.

b. Respondent's Position

254. Respondent's argument can be summarized as follows:[297]

a. Mr. Sastre, Mr. Silva, and Ms. Abreu waived their rights as nationals of Argentina and Portugal when they became naturalized Mexican citizens. The naturalization papers included a renunciation clause that requires each Claimant to renounce their current nationality upon becoming Mexican nationals.

b. Each Claimant signed the Mexican naturalization documents containing the renunciation clause. This in effect waives the privileges afforded to them as Argentine and Portuguese nationals, and they therefore may not invoke BIT protection.

c. Investors can waive treaty rights because the treaties confer rights to them. This was recognized in *SGS v. Philippines* and *Aguas del Tunari v. Bolivia*.

[297] Resp. Reply ¶¶175-83.

c. Respondent Cannot Rely on Mexican Law to Define the Nationality Rules of Argentina and Portugal

255. It is axiomatic that the applicable law of the nationality of a given State is the law of that State.[298]

256. Respondent's position fails because it looks only to its own domestic law to redefine whether Mr. Sastre is Argentine, or whether Mr. Silva and Ms. Abreu are Portuguese.

257. Claimants have presented testimony and documentary evidence (including passports) to establish their jurisdiction *ratione personae* in Section III(A).

258. Respondent has not presented any evidence to refute these factual assertions. For example, Respondent could have discussed Portuguese or Argentine law on nationality. It could have also provided evidence of Claimants' statements or actions vis-a-vis Portugal or Argentina renouncing their citizenship under those domestic laws. Instead, Respondent obfuscates by pointing to Mexican nationality law (irrelevant), and Claimants' Mexican naturalization forms which contain renunciation clauses.

[298] *See, e.g., Lanco v. Argentina*, ICSID Case No. ARB/97/6, Prelim. Dec.: Juris. Of the Arbitral Tribunal, 8 December 1998 § 46 (explaining that "the ICSID Convention does not define the term "nationality," *which leaves in the hands of each State* the power to determine whether a company does or does not have its nationality") (emphasis supplied); *Soufraki v. UAE*, ICSID Case No. ARB/02/7, Award, 7 July 2004 ¶ 55 ("It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality.").

259. The State has the final say in defining who is or is not a national of that state.[299] As explained by Schreuer, "[t]he nationality of a natural person is determined primarily by the law of the State whose nationality is claimed."[300]

260. The reason for this rule in investment law is self-evident. If the other Contracting State (here Mexico) wielded the power to accept or reject the nationalities of foreigners, it could abuse its authority to do what Respondent is trying to do here—arbitrarily strip an investor's foreign nationality to deny treaty protection. For example, Respondent could unilaterally decide that Mr. Sastre does not meet *Respondent's* purported definition as to whether Mr. Sastre is an Argentine national.

261. Respondent relies heavily on *Soufraki v. UAE* to support its authority to renounce the non-Mexican nationality of others. Respondent points to *Soufraki*'s finding that international tribunals are not bound by passports and official certificates of nationality issued by a given State. Instead, tribunals must weigh the totality of the circumstances when evaluating nationality claims. Respondent observes that the analysis in *Soufraki* is echoed by multiple investment tribunals when determining nationality.[301]

262. Yet Respondent's reliance on *Soufraki* is misplaced. The investor in *Soufraki* was a *jus soli* and *sanguinis* Italian national who became a naturalized Canadian.[302] Under ***Italian domestic law***,

[299] *See, e.g.*, *Oostergetel v. Slovak Republic*, UNCITRAL, Dec. on Juris., 30 April 2010 ¶ 130 ("[T]he BIT merely requires an investor to have 'nationality of one of the Contracting Parties' which is moreover conferred upon such investor in accordance with the Contracting Party's national law.").

[300] Schreuer, The ICSID Convention: A Commentary at 554-55, § 5, CLA-0131.

[301] Resp. Reply ¶ 95.

[302] *Soufraki* ¶¶ 48-49, RL-135.

the claimant lost his Italian nationality when he acquired Canadian nationality and residence in Canada.[303] He could have cured his lost Italian nationality by petition or by living in Italy for one year. The investor admitted to never filing the petition, and could not present adequate evidence that he lived in Italy for one year.[304]

263. The *Soufraki* tribunal concluded that because the investor could not meet the residency requirements of Article 13(1)(d) of Italian law No. 91 of 1992, he "was not an Italian national under the laws of Italy at the two relevant times" *i.e*. the date of consent to arbitration and the date of ICSID registration.[305]

264. *Soufraki* confirms the primacy of the domestic law of a State to control its own nationality rules. Here, Claimants have shown that, unlike the Italian law in *Soufraki*, Argentine nationality law does not recognize renunciations of any kind upon acquiring a new nationality. And Portuguese law requires a formal application process and payment of a fee to Portuguese authorities—none of which has occurred here.

265. Against this evidence, Respondent's argument falls apart. Respondent relies solely on *Mexican* domestic law to determine the status of the respective Claimants' Argentine and Portuguese nationality. Respondent has presented *no* evidence of Argentine or Portuguese law showing that any of the Claimants lost their original nationality. Put another way, Respondent's domestic nationality law, and its "forced renunciation" policy imposed on dual nationals, is moot if the other State does not recognize the renunciation. Respondent cannot unilaterally force

[303] *Id.* ¶ 52

[304] *Id.* ¶ 81.

[305] *Id.* ¶¶ 82, 84.

Argentina to strip the nationality of an Argentine dual national, especially when Argentina's own domestic law bars such renunciations.

266. In sum, Respondent fails to adduce any evidence relevant to whether Messrs. Sastre and Silva and Ms. Abreu renounced their citizenships to Portugal or Argentina. These Claimants have produced testimony and exhibits evidencing their Argentine and Portuguese nationalities since birth. They point to Argentine and Portuguese domestic nationality laws that reject renunciation under these facts. On the other side, Respondent's argument focuses only on Mexican domestic law, which is deemed irrelevant by Respondent's own legal support. Respondent is nowhere close to meeting a preponderance burden to sustain its objection.

d. Respondent Does not Seriously Challenge Claimants' Argument on Waiver.

267. Claimants already established that some investment tribunals question whether a private individual can "waive" the protections contained in the Treaties, which are negotiated by States Parties. And Claimants have also shown that investment tribunals demand that, due to the harshness of their consequences, such waivers must meet a very high bar. They demand that such waivers be "clear" and proven with "direct and convincing evidence." Such waivers are not "lightly assumed."[306]

268. Respondent does not seriously contest this. It argues that the U.S. Claims Commission has recognized that private individuals can waive treaty rights.[307] This is irrelevant. Whether a separate body created under a separate agreement like the U.S. Claims Commission considers

[306] *See* Cl. Counter-Memorial, ¶¶ 145-48 (Discussing *Nissan* and *SGS v. Paraguay*).

[307] Resp. Reply, ¶ 182.

treaty rights to be waiveable by private parties has no bearing on whether Investment Treaty protections as the ones here can be waived.

269. Respondent argues that this "recognized and applied" by *SGS v. Philippines* and *Azurix*. Nonsense. In the language in *SGS v. Philippines* cited by Respondent, the tribunal noted that it should not exercise jurisdiction over a contractual claim because the parties "have already agreed how such a claim is to be resolved" in an exclusive jurisdiction clause in a contract.[308] No such agreement exists here.

270. In *Azurix*, the tribunal noted that the U.S. Claims Commissions cases relied on by Respondent mean only that the private parties could waive *contractual* disputes, and in any event the tribunal found no need to comment on the issue of waiver by treaty rights by private individuals because the waiver in that case did not cover the claim by Azurix. The very paragraph that Respondent cites says so:

> The significance of the cases for this Tribunal is that the private parties ***could waive access to the Commissions to settle contractual disputes with a State with which they had contracted***. In the dispute before the present Tribunal, as has been affirmed by the Respondent, the State is not a party to any of the Contract Documents, and there was no waiver commitment made by the Claimant in favor of Argentina. ***Since the Tribunal has found that the waiver does not cover the claim of Azurix in the dispute before it, the Tribunal does not need to comment further on the issue of renunciation by individuals of rights conferred upon them by treaty***.[309]

[308] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, ¶¶ 137, 155, CLA-0078.

[309] Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award on Jurisdiction, 8 December 2003, ¶ 85, RL-205.

271. Lastly, Respondent's citation to *Aguas del Tunari* misses the point. Respondent quotes that case for the proposition that "an explicit waiver by an investor of its rights to invoke the jurisdiction of ICSID pursuant to a BIT could affect the jurisdiction of an ICSID tribunal."[310] Respondent misses the key word in that sentence: ***explicit***. Claimants have already established that such waivers need to show the party's clear and direct intent with respect to the specific rights waived and the investment covered by the waiver. A boilerplate waiver does not meet these requirements especially when the purported waiver does not mention the Investments at issue, the BIT, or investment treaty arbitration.

3. Respondent's "Domicile" Objection With Respect to Mr. Sastre Fails

a. Claimants' Position

272. The domicile exclusion in Article 2(3) does not apply to Mr. Sastre because the Article only applies at the moment of filing a claim (or when making currency transfers); Mr. Sastre is not and was not "domiciled" in Mexico; and in any event Article 2(3) is excluded by the Argentina BIT's MFN clause.

273. Respondent's "domicile" objection is based on a flawed interpretation of Article 2(3) of the Argentina BIT:[311]

a. This Article does not indicate the time when it applies, but expressly limits its scope of application to Articles Four (on currency transfers) and Ten (on dispute resolution procedure). The Article does *not* make reference to Articles Three and Five, which

[310] Resp. Reply, ¶ 183.

[311] *See generally* Cl. Counter-Mem., Sec. IV.B.3.

contain the substantive protections on FET, FPS, non-impairment, and expropriation.[312]

b. Under Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("**VCLT**"), treaties shall be interpreted in good faith, according to ordinary meaning, and in light of the treaty's object and purpose, and the text and context of the treaty including its preamble and annexes. Resort may be had to supplementary means of interpretation, including preparatory work.[313]

c. The only other treaty found with a domicile exclusion is the Italy-Argentina BIT. Notably, unlike the Argentina-Mexico BIT, the Italy-Argentina BIT expressly states that it applies "at the time of making the investment."[314]

d. But the Argentina-Mexico BIT does not include such a time reference. Instead it limits its scope of application to currency transfers and dispute resolution procedure. Under the VCLT, this lack of time reference and limitation in scope must be given a meaning – that the domicile exclusion applies only when the investor makes a currency transfer or the date when the investor files an arbitration claim.[315]

e. Respondent's attempt to tie Article 2(3) to the date of the violation by stating that an investor "can" invoke dispute resolution immediately after the violation is unsupported by any evidence, including preparatory work or jurisprudence.[316]

f. Respondent's claim that Article 2(1)'s text saying that it applies to "all measures" is irrelevant because this Article is entirely independent from Article 2(3). Respondent's "proximate context" argument is similarly bogus because the two Articles are entirely

[312] Cl. Counter-Mem. ¶¶ 159-61.

[313] Cl. Counter-Mem. ¶ 162.

[314] Cl. Counter-Mem. ¶ 163.

[315] Cl. Counter-Mem. ¶¶ 162, 174.

[316] Cl. Counter-Mem. ¶ 168.

unrelated. Indeed, Article 2(3) *begins* by limiting its scope to currency transfers and the procedure concerning *submission* of a claim.[317]

g. The only substantive provision in the BIT referenced by Article 2(3) is the one on currency transfers. The Article does not reference Articles Three and Five, which contain the provision on FET, FPS, non-impairment, and expropriation. This absence must mean that the domicile exclusion does *not* apply at the moment of the violations contained in Articles Three and Five.[318]

h. The Decision on Jurisdiction in *Ambiente Ufficio* is informative, which is one of the few decisions that has examined this issue. That tribunal examined a similar domicile provision in the Italy-Argentina BIT. The Tribunal concluded that the burden to prove the objection lies with Respondent.[319]

i. Respondent fails to prove that Mr. Sastre was domiciled in Mexico under Respondent's own definition of "domicile" (which focuses on the intent of the person to remain at a place permanently) because Respondent has not shown that Mr. Sastre intended to remain in Mexico permanently. Conversely, Mr. Sastre has presented uncontested evidence that he would not remain there permanently. He found no adequate schools for his children and no adequate facilities, services and family support for his son [redacted] who has [redacted]. Respondent's cited documents are not informative on this issue because they make no reference to intent.[320]

j. In any event, Article 2(3) is excluded by the MFN clause in the Argentina BIT, which broadly guarantees to "investors and investments" "treatment no less favorable than treatment accorded to investors from other States." Treatment includes access to dispute settlement, which is consistent with the intent of the Contracting Parties as expressed in the Preamble to the BIT aiming to "promote and protect investments."

[317] Cl. Counter-Mem. ¶¶ 169-70.

[318] Cl. Counter-Mem. ¶ 174.

[319] Cl. Counter-Mem. ¶¶ 164, 176.

[320] Cl. Counter-Mem. ¶¶ 175-79.

This reasoning is confirmed by the Decision on Jurisdiction in *Siemens v. Argentina*, which analyzed a similarly-worded MFN clause, and several other decisions.[321] As such, Mr. Sastre invokes the MFN protection in the Argentina BIT to import the same "treatment" afforded to investors through other investment treaties of Respondent, such as the France-Mexico BIT that does not include a domicile exclusion.

b. Respondent's Position

274. Regarding the interpretation of the domicile provision in Article 2(3) of the Argentina BIT, Respondent argues that the Article applies "at the moment of the violation", as summarized below:

a. Article 1(1) of the Annex of the Argentina BIT shows that Article 2(3) applies at the moment of the violation because it states that investors may file a claim in arbitration based on the host State's "breach of an obligation in this Agreement."[322]

b. Article 2(3) must apply at the moment of the violation because otherwise an Argentine national "could simply change his domicile from Mexico to Argentine after the violation but before filing an arbitration claim," making the language in the Article "meaningless and useless."[323]

c. Although not clear, Respondent appears to argue that just because an Article contains procedural elements does not mean that it pertains only to procedure. It cites two unrelated dissenting opinions that question whether there is a distinction between substantive and procedural provisions for the purposes of MFN clause interpretation.[324]

[321] Cl. Counter-Mem. ¶¶ 181-84.

[322] Resp. Reply ¶¶ 390-91.

[323] Resp. Reply ¶ 392.

[324] Resp. Reply ¶ 393.

d. The above "clearly" shows that the domicile exclusion applies on the date of the violations, so analysis of *travaux préparatoires* is not required under the VCLT.[325]

e. The observations in *Ambiente Ufficio* are not complimentary means of interpretation under the VCLT. And the decision in that case on burden of proof deviates from "well established international practice and must not be followed." The correct test is stated by the Abaclat tribunal, which states that all conditions for jurisdiction must be proven by Claimants.[326]

275. With respect to Mr. Sastre's domicile, Respondent argues that Mr. Sastre was domiciled in Mexico at the time of the violations, as summarized below: [327]

a. Respondent does not dispute that an investor's domicile is the place where the investor "intends to remain permanently."

b. According to *Nottebohm* and *Ballantine* the fact that Mr. Sastre naturalized as a Mexican are an "important indication" that Mr. Sastre's residence was not temporary.

276. Finally, regarding the Most-Favoured-Nation ("**MFN**") clause contained in the Argentina BIT, Respondent argues as follows:

a. Mr. Sastre cannot invoke the MFN clause in the Argentina BIT to exclude the domicile provision in Article 2(3) because doing so would change the terms of consent to arbitrate.

b. Respondent cites to *A11Y v. Czech Republic*, *Doutremepuich v. Mauritius*, *ST-AD v. Bulgaria*, and *Tecmed v. Mexico*, as well as dissenting opinions in other cases, to support its position. [328]

[325] Resp. Reply ¶ 395.

[326] Resp. Reply ¶¶ 396, 398.

[327] Resp. Reply ¶¶ 399-404.

[328] Resp. Reply ¶¶ 405-10.

c. Respondent's Interpretation of Article 2(3) Lacks any Merit.

277. The Parties disagree on the moment of application of Article 2(3). For ease of reference, Articles 2(1) through 2(3) are reproduced below:

> 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)

278. The Parties agree that Article 2(3) does not include a temporal reference, unlike for example the domicile provision in the Italy-Argentina BIT, which states that the restriction applies at the moment of Respondent's violations. Resort must be made then to interpretation.

279. It is plainly evident that Article 2(3) begins by limiting its application to Articles Four and Ten. And it is plainly evident that the substantive provisions including FET, FPS, and Expropriation are contained in Articles Three and Five. Why? In their Counter-Memorial, Claimants asked this simple question:

> 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. (emphasis added)[329]

280. Remarkably, Respondent *still* does not have an answer. The only logical answer is a plain reading of the text: Article 2(3) applies only to at the moment when Articles Four and Ten take place, *i.e.*, when an investor makes a currency transfer or at the *moment of* investor-State dispute resolution, which begins when the investor *files* the arbitration claim.

281. Even worse, Claimants observe that Respondent abandons two arguments it raised in its Memorial, which is unsurprising because both of them were groundless and contrary to even a basic reading of Article 2(3).

282. *First*, Respondent abandons its argument that Article 2(1) applies to all violations and it informs Article 2(3) by "proximity."[330] As Claimants discussed in their Counter-Memorial, this argument is meritless. Article 2(1) is entirely independent of Article 2(3). The first discusses the scope of application of the entire BIT, whereas the latter discusses the scope of application of the domicile provision. Indeed, all while Article 2(1) makes express reference to the entire treaty ("This Agreement…"), Article 2(3) begins by *expressly limiting* its application to Articles Four and Ten. [331] Respondent has no answer to this point, and as such it abandons this theory.

[329] Cl. Counter-Mem., ¶ 174.

[330] Memorial, ¶ 218.

[331] Cl. Counter-Mem. ¶ 168.

283. *Second*, Respondent also abandons its argument that Article 2(3) applies to the moment of the violation because an investor "could" file an arbitration immediately on the date of the violation.[332] As Claimants pointed out, this is irrelevant. Just because an investor "can" file a claim immediately does not mean that an investor will.[333] And in any event, even Respondent's own argument unwittingly admits that Article 2(3) is tied to the moment of *filing* – not to the moment of violation. Respondent abandons this theory too.

284. In its Reply, Respondent makes several new arguments that again defy even a basic reading of the Treaty. Claimants address each argument in turn.

285. *First*, Respondent argues that Article 1(1) of the Annex states that investors may file a claim in arbitration based on the host State's "breach of an obligation established in this Agreement," and so this must mean that Article 2(3) applies at the moment of the violations.[334] This is incorrect, and Respondent's observations about Article 1(1) of the Annex are entirely irrelevant.

286. To begin, Article 2(3) does not even make reference to the Annex. If the drafters had wanted to make it apply to the Annex, they would have expressly said so just like they did by tying Article 2(3) to Articles Four and Ten. But they did not do so.

287. Worse, even if Article 2(3) applied to the Annex, the text of Article 1(1) simply does not mean what Respondent wants it to. Annex Article 1(1) says:

[332] Memorial, ¶ 217.

[333] Cl. Counter-Mem. ¶¶ 169-70.

[334] Resp. Reply ¶¶ 390-91.

ANNEX

Resolution of Disputes between an Investor and a Contracting Party that Receives the Investment

ARTICLE ONE

Resolution of Disputes between a Contracting Party and an Investor of the other Contracting Party

> 1- The investor of a Contracting Party shall be able to, on his own account or in representation of an association, partnership or enterprise of the other Contracting Party that is a legal person owned by the investor or under his direct or indirect control, pursuant to the laws and rules of the Contracting Parties, submit a claim to arbitration, whose basis is that the other Contracting Party ***has breached an obligation*** established in this Agreement. (emphasis added) (translation by counsel).

288. Respondent's argument again defies a basic reading of the Treaty. Indeed, the Annex and Article 1 of the Annex are *titled* "Resolution of disputes." When does the resolution of disputes begin? At the moment of filing – *not* at the moment of breach.

289. *Second*, Respondent argues that if the domicile provision applied at the moment of filing, then an Argentine national "could simply change his domicile from Mexico to Argentina after the violation but before filing an arbitration claim," making the language in the Article "meaningless and useless." [335] This is beside the point.

290. To begin, the clause would not be rendered "meaningless and useless". It would have a meaning, namely, that Argentine nationals can only file an arbitration if they are living outside Mexican territory at the moment of filing. Respondent's argument that such a clause could be circumvented by an Argentine national by changing his domicile from Mexico to Argentina makes

[335] Resp. Reply ¶ 392.

no difference. In fact, the same argument could be made against Respondent's proposed interpretation (*i.e.*, that the article would be "useless and meaningless" because an Argentine national could avoid it by simply changing his domicile from Mexico to Argentina after establishing the investment and before the violation). Respondent's argument does not withstand this minimum scrutiny.

291. *Third*, to the extent Respondent argues that Article Ten is not a procedural Article, again this argument defies a basic reading of the Treaty.[336] Article Ten concerns how investors file claims. It is *titled* "Dispute Resolution between an Investor and the Host Contracting Party." The entire article is about the procedure to file a claim. Notably, Respondent does not, because it cannot, cite to a single substantive provision in Article Ten. Respondent cannot escape the fact that Article 2(3) makes express reference to one substantive article (Article Four) and not Articles Three and Five (containing FET, FPS, non-impairment, and expropriation). The treaty drafters did this for a reason, and that reason has to be that they intended the domicile provision to apply at the moment of filing.

292. *Fourth*, Respondent claims an analysis of the Treaty's *travaux préparatoires* is not required because Respondent has "clearly" proven its case.[337] For all the reasons discussed above, this is hardly believable. Respondent's stretched theories do not withstand the slightest scrutiny.

293. Unlike Respondent's strained reading, Claimant's interpretation is in line with the rules of interpretation in the VCLT. As discussed in Section VI.B.4.a above, the ordinary meaning of the terms of Article 2(3) expressly indicate that it applies to currency transfers and filing of claims,

[336] Resp. Reply ¶ 393.

[337] Resp. Reply ¶ 395.

but not to violations of FET, non-impairment, FPS, and expropriation. This interpretation is in line with the context of Article 2(3), because it is an article independent from Article 2(1) that contains its own express limitations on its scope of application. Also, this interpretation is in line with the object of the treaty, stated in its Preamble, which is to promote and protect foreign investment between the two Contracting Parties. This is a good faith interpretation because, as shown above, it is consistent with the text and object of the Treaty and does not conflict with any of its provisions.

294. Claimants' interpretation makes sense. Article 2(3) says that Argentine nationals domiciled in Mexico "can only avail themselves of treatment afforded by [Mexico] to its own nationals." If Respondent prevented an Argentine investor domiciled in Mexico from transferring currency from his Investment outside Mexican territory, then it would make sense that the Contracting Parties wanted to have that investor seek relief in Respondent's courts instead of filing an international arbitration claim all while the investor is *already in Mexico*.

295. Similarly, if Respondent expropriated an investment of a hypothetical Argentine investor, it would make sense that the Contracting Parties wished to have that investor file his claim before Mexican courts if the investor was living in Mexico at the time of filing the claim. Otherwise, if the investor were living outside of Mexico, that investor would need to travel (from Nepal, Argentina, or wherever that investor lives at the moment of filing) to Mexico to file his claim before Mexican courts. This would be a clearly onerous result that is not in line with the goal of "promotion and protection" of investments stated in the Treaty Preamble.

296. *Finally*, Respondent argues simply that *Ambiente Ufficio* must not be followed because it is not a complimentary means of interpretation under the VCLT and deviates from "well

established international practice."[338] Respondent's first argument is a "strawman" argument, and the second one is false. Claimants have never argued that past jurisprudence is a means of interpretation under the VCLT, only that they are informative and persuasive to investor-State tribunals. Regarding the second argument, as amply discussed by Claimants, the well-established international practice is that the party who raises the objection must prove it.[339] And here, this is especially the case because that Respondent has better access to documents to aid in the interpretation of the Treaty. Respondent, as one of the Contracting Parties, would presumably have access to the Treaty's *travaux préparatoires*. But Respondent fails or refuses to produce them, as evident from its insistence that an analysis of the *travaux préparatoires* is "not required."

297. For this reason, the conclusion that Respondent bears the burden to prove the scope of application of Article 2(3) does not merely follow international practice – *it makes sense*.

298. For these reasons, Claimants' analysis is consistent with the principles of interpretation in the VCLT. Respondent's proposed interpretation does not withstand scrutiny and is inconsistent with the good faith interpretation of the plain treaty terms in their context and in line with the object and purpose of the Treaty. As such, Respondent fails to meet its preponderance burden to prove that the domicile provision in Article 2(3) applies at the moment of the violations. As Claimants have shown, the domicile provision applies at the moment of filing. And as the next subsections will show, Mr. Sastre was domiciled in Argentina at the moment of filing his claim.

[338] Resp. Reply ¶¶ 396, 398.

[339] *See, e.g.*, Section IV *supra*; Cl. Counter-Mem., Sec. II.B.

d. Respondent fails to show that Mr. Sastre was "Domiciled" in Mexico.

299. The Parties do not dispute that an investor's domicile is the place where that investor "intends to remain permanently." The Parties do disagree, however, on whether Mr. Sastre was "intended to remain in Mexico permanently" at the moment of the violations.

300. Respondent's argument in its Reply boils down to a citation to two entirely unrelated cases: *Nottebohm* and *Ballantine*. Respondent claims that pursuant to these cases, the fact that Mr. Sastre became a naturalized Mexican citizen is an "important indication" that Mr. Sastre's residence was not temporary. This is incorrect.

301. *First*, *Nottebohm* and *Ballantine* are irrelevant to the issue at hand. Neither case discusses domicile. In fact, the paragraphs from *Ballantine* cited by Respondent discuss residence for purposes of *dominant and effective nationality and not for domicile*.[340] Neither case provides any guidance on where Mr. Sastre intended to reside in permanently.

302. *Second*, even if one took Respondent's analysis of *Nottebohm* and *Ballantine*, Respondent would still fail to show to a preponderance that Mr. Sastre "intended to remain permanently" in Mexico. Although naturalization is a significant step in a person's life, as anyone who has acquired a new nationality knows, simply because a person obtains nationality of a country does not mean that this person "intends to remain permanently" in that country. It is plainly obvious that one can naturalize in one State and still intend to remain permanently somewhere else.

[340] Michael Ballantine and Lisa Ballantine v. Dominican Republic, PCA Case No. 2016-17, Award, 3 September 2019, CLA-0076 ¶¶ 558, 579 (for example, "The Claimants have argued that they qualified as investors at the moment of the submission of the claim since they were at all times dominantly and effectively U.S citizens `from their birth until today").

303. *Third*, the evidence in the record regarding Mr. Sastre's "intent to remain permanently" weighs against Respondent. Mr. Sastre has provided testimony and documents showing he did not "intend to remain permanently in Mexico." This includes his testimony that even while building and expanding his investment, he intended to return to Argentina and appoint a manager for the daily operation for his Investments. This was particularly the case because Tulum did not offer adequate schools and facilities for his children, especially for [redacted] who has [redacted] and needs special services and the support of Mr. Sastre's extended family in Argentina.[341] Respondent does not present any evidence to rebut the evidence provided by Claimants that Mr. Sastre did not "intend to remain permanently" in Mexico. As such, Respondent fails to meet its burden to a preponderance.

e. The Record Overwhelmingly Supports that Mr. Sastre Was Domiciled in Argentina.

304. In addition to failing to prove that Mr. Sastre "intended to remain permanently" in Mexico at the moment of the violations, Respondent adduces *zero* evidence that Mr. Sastre was not domiciled outside of Mexico at the moment of filing his claim on 29 December 2017. Indeed, Respondent does not dispute this fact.

305. Claimants provide ample evidence showing that, while he was investing in Mexico, he intended to move to Argentina and remain there permanently with his wife and children so they could go to school there and so [redacted] could get adequate infrastructure and family support. Mr. Sastre has presented testimony and documents showing that his children would become of school

[341] Witness Statement of Carlos Sastre, ¶ 22. *See also* Children's Birth Certificates, C-0087, C-0088, C-0089; Children's School Registration, C-0090; [redacted] Certificate of [redacted] C-0084.

age around 2015, that Mr. Sastre and his wife did in fact enroll his children in school in Argentina, that his son [redacted] has been diagnosed with [redacted], and that Mr. Sastre has situated his economic life in Argentina through the start of new business ventures in that country.[342]

306. For these reasons, the uncontested evidence in the record overwhelming shows that Mr. Sastre "intended to remain permanently" in Argentina at the moment of filing this arbitration.

f. Respondent's Attempt to Restrict the MFN Clause Lacks any Merit.

307. Respondent disagrees with Claimants that the MFN clause in the Argentina BIT can be applied to the domicile provision in the Argentina BIT.

308. But in doing so, Respondent makes certain concessions. First, Respondent does not dispute that the text of the MFN clause does not limit the clause's applicability. Second, Respondent does not dispute that the right to bring a claim is part of the "treatment" afforded to investors and their investments. Thus, the right to bring a claim is covered by the MFN clause, as confirmed by the *Siemens* tribunal.

309. Moreover, Respondent does not provide any jurisprudence or authority that analyzes the applicability of MFN clauses to domicile provisions specifically. This is understandable because such jurisprudence is not known to exist.

[342] Witness Statement of Carlos Sastre, ¶ 22. *See also* Children's Birth Certificates, C-0087, C-0088, C-0089; Children's School Registration, C0090; [redacted] Certificate of [redacted] C-0084; Letter from the administration of the Rio Cuarto Golf Club Certifying Mr. Sastre has been a member of the Rio Cuarto Golf Club in Argentina since 2015 , C-0103; Tax Registration in Argentina of Mr. Sastre, C-0091.

310. Respondent's cites to a number of cases discussing the importance of a Party's consent to arbitrate.[343] These cases are entirely irrelevant. Respondent repeatedly misquotes and takes them out of context to serve its own theory. Claimants address each of these cases below:

311. *First*, Respondent cites to *A11Y v. Czech Republic* for the proposition that the domicile provision is a consent provision that cannot be modified with an MFN clause. This is incorrect.

312. *A11Y* is not at all informative to the issue at hand because the relevant facts in *A11Y* are entirely different from the case here. In *A11Y*, the relevant U.K.-Czech Republic BIT expressly limited its scope of application to exclude certain types of *substantive* claims including expropriation, fair and equitable treatment, and full protection and security.[344]

313. Here, the issue is different. Mr. Sastre is *not* seeking to expand the BIT to cover substantive protections that would have been excluded otherwise.

314. More importantly, in that case the tribunal noted that the U.K. model treaty, and in "most treaties" concluded by the U.K., the MFN clause included a sub-paragraph indicating that "For avoidance of doubt, it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles1 to 11 of this Agreement." This was critical for the tribunal to reach the view that there was no consent. The absence of a "for avoidance of doubt" clause in the UK-Czech BIT, "demonstrates the clear intention of the contracting parties to give its full application" to the exclusion of FET and FPS claims in Article 8(1) of that treaty.[345]

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[343] Resp. Reply ¶ 406.

[344] A11Y Ltd. v. Czech Republic, ICSID Case No. UNCT/15/1, Decision on Jurisdiction, 9 February 2017, ¶¶ 64-69, 89-90, RL-221.

[345] A11Y Ltd. v. Czech Republic, ICSID Case No. UNCT/15/1, Decision on Jurisdiction, 9 February 2017, ¶¶ 105-06, RL-221.

315. Here, Respondent fails to show that there are any such "for the avoidance of doubt" provisions in the MFN clause in the Argentina-Mexico BIT or any of the investment treaties signed with any other States. As such, Respondent's own cited case supports the conclusion that Argentina and Respondent did *not* intend to exclude the domicile provision from the scope of application of the MFN clause.

316. Respondent then cites *Doutremepuich v. Mauritius* for the same proposition.[346] But *Doutremepuich* is entirely irrelevant because in that case the tribunal applied the MFN clause in the France-Mauritius BIT that is entirely different from the one found in the Argentina-Mexico BIT. To begin, the France-Mauritius BIT contains an obligation for the Contracting State to include an arbitration agreement in any ***possible*** investment contract they execute with nationals of the other Contracting State:

> Agreements concerning investments to be made in the territory of one of the Contracting States made by nationals, companies or other corporate bodies of the other Contracting State ***shall contain a clause*** providing that, in cases where an amicable settlement cannot be reached within a short time, disputes arising in connection with such investments shall be brought before the International Centre for Settlement of Investment Disputes ***so that they may be settled by means of arbitration*** in accordance with the Convention on the settlement of investment disputes between States and nationals of other States." (emphasis added) (translation by counsel)[347]

[346] Resp. Reply, ¶ 407.

[347] France-Mauritius BIT, Article 9, CLA-0116 ("Les accords relatifs aux investissements à effectuer sur le territoire d' un des Etats contractants, par les ressortissants, sociétés ou autres personnes morales de l'autre Etat contractant, comporteront obligatoirement une clause prévoyant que les différends relatifs à ces investissements devront être soumis, au cas où un accord amiable ne pourrait intervenir à bref délai, au Centre international pour le règlement des différends relatifs aux investissements, en vue de leur règlement par arbitrage conformément à la Convention sur le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats.")

317. The MFN clause in that treaty was also fundamentally different:

> With respect to ***matters governed by this Treaty*** other than those referred to in article 7, the investments of nationals, companies or other corporate bodies of one Contracting State ***shall also benefit from any more favorable provisions*** than those in this Treaty which may result from international undertakings already entered into or hereafter entered into by the other Contracting State with the first-mentioned Contracting State or with third States. (emphasis added) (translation by counsel) [348]

318. Unlike the MFN clause in the Argentina-Mexico BIT, this clause does not make reference to "treatment." And equally as important, as the *Doutremepuich* tribunal observed, the clause limits the application to "matters governed by this Treaty," which the tribunal found to mean that the MFN clause could not cover "future" arbitration agreements that the Contracting Parties committed to execute. The tribunal there stated:

> Despite its broad wording in principle, Article 8(2) contains an important limitation. ***It applies only to matters governed by the France-Mauritius BIT*** other than those referred to in its Article 7 ("matières régies par la présente Convention autres que celles visées à l'article 7"). In other words, the beneficiary of the MFN clause can only benefit from a more favourable provision in a third State treaty if the matter of that provision is also governed by the France-Mauritius BIT, and if it does not fall within Article 7.[349]

[348] France-Mauritius BIT, Article 8(2), CLA-0116 ("Pour les matières régies par la présente Convention autres que celles visées à l'article 7, les investissements des ressortissants, sociétés ou autres personnes morales de l'un des Etats contractants bénéficient également de toutes les dispositions plus favorables que celles du présent Accord qui pourraient résulter d'obligations internationales déjà souscrites ou qui viendraient à être souscrites par cet autre Etat avec le premier Etat contractant ou avec des Etats tiers.").

[349] Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius, PCA Case No. 2018-37, Award on Jurisdiction, 23 Aug. 2019, ¶ 210, CLA-0115.

319. This is not at all applicable to the present case. Respondent again cherry-picks quotes arbitrarily from decisions that are irrelevant to the dispute at hand.

320. *ST-AD* is also irrelevant to this dispute. There, the tribunal analyzed the Germany-Bulgaria BIT, which has an MFN clause that reads:

> In matters governed by this article, the investments and investors of either Contracting Party ***shall enjoy treatment in the territory*** of the other Contracting Party that is no less favourable than that enjoyed by investments and investors of those third States that receive most favourable treatment in this respect.

321. The Tribunal's analysis focused on the words "shall enjoy treatment in the territory of the other Contracting Party." The tribunal concluded that this phrase excludes international arbitration because it does not take place in the territory of the host State. The Tribunal cited the reasoning in *Daimler*:

> Where an MFN clause applies only to treatment in the territory of the Host State, the logical corollary is that ***treatment outside the territory of the Host State does not fall within the scope of the clause***.
>
> This observation is of critical importance. It is noteworthy that the resolution of an investor-State dispute within the domestic courts of a Host State would constitute an activity that takes place within its territory. Thus, if a Host State were to accord to the investors of some third State more favorable rights in relation to domestic dispute resolution than the rights accorded to the investors of the other contracting State party to the BIT, this could give rise to a violation of the MFN clause. …
>
> ***The same cannot be said, however, of international arbitration, which almost without exception takes place outside the territory of***

> ***the Host State*** and which per definition proceeds independently of any State control.[350]

322. The Argentina-Mexico BIT does not have a "shall enjoy treatment in the territory of the other Contracting Party" clause. Respondent again pulls a quote out-of-context from a case that does not inform this dispute.

323. Indeed, quite remarkably, Respondent quotes a "string citation" in the middle of a paragraph *ST-AD* to suggest that "various Tribunals have rejected Claimants' argument."[351] But Respondent leaves out the beginning of the paragraph it cites, which states that the many cases provided by the parties "clearly reveal that there is no clear arbitral consensus on this issue," even among cases where there are no "differences between the terms of the BITs involved." As such, the tribunal found it necessary to avoid relying on prior decisions and instead conducted its own analysis "of the ordinary meaning of the text" "as required by rules of interpretation of international treaties."[352]

324. Respondent's citation to *Tecmed* is again irrelevant. First, as Respondent itself admits, the *Tecmed* tribunal did not analyze whether the MFN clause in the Spain-Mexico BIT at issue there applied to a domicile provision. Instead, it analyzed whether the MFN clause could apply to a prescription period provision.[353] Second, the MFN clause in the Spain-Mexico BIT was different

[350] ST-AD GmbH v. Republic of Bulgaria, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013, ¶¶ 393-96, RL-222.

[351] Resp. Reply, ¶ 409.

[352] ST-AD GmbH v. Republic of Bulgaria, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013, ¶¶ 386-87, 393, RL-222.

[353] Tecnicas Medioambientes Tecmed, SA v. Estados Unidos Mexicanos, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003,Tecmed, ¶¶ 72-74, RL-223.

because it limited "treatment" to the territory of Respondent.[354] Third, to the extent Respondent stretches the analysis in *Tecmed* to argue that the domicile provision in Article 2(3) is part of the "núcleo de cuestiones que debem presumirse como especialmente negociadas entre las Partes Contratantes" ("the nucleus of issues that must be presumed to be specially negotiated between the Contracting Parties"), Respondent's point falls short.[355]

325. Respondent includes *no analysis or argument* explaining why the domicile provision is "specially negotiated" compared to the remaining provisions. What makes the domicile provision special and immune from the application of the MFN clause? Respondent provides no answer and no evidence, even though it is the Party in this proceeding that *negotiated the treaty*.[356]

326. Thereafter, Respondent merely cites a string of dissenting opinions. Respondent does this without providing any analysis of the *treaty text* in each of those cases and how it compares to the text of the Argentina-Mexico BIT.[357] Respondent cannot meet its burden in this manner. As stated by the tribunal in *ST-AD*, there is no clear line of reasoning in the jurisprudence regarding the applicability of MFN clauses. An analysis of the text is required.[358] A "collage" of quotes taken out of context is not a replacement for textual analysis.

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[354] Spain-Mexico BIT, CLA-00129, Art. III.

[355] Resp. Reply, ¶ 408.

[356] Similarly, to the extent that Respondent contends that applying the MFN clause to the domicile provision would displace jurisdictional requirements of the Treaty misses the point too. Again, despite being one of the Contracting Parties to the Treaty, Respondent provides no evidence that the Treaty drafters intended the MFN clause to distinguish between jurisdictional and non-jurisdictional requirements. To the extent Respondent argues for this distinction, it is arbitrary and has no support in the record.

[357] Resp. Reply, n. 642.

[358] ST-AD GmbH v. Republic of Bulgaria, PCA Case No. 2011-06 (ST-BG), Award on Jurisdiction, 18 July 2013, ¶¶ 386-87, 393, RL-222.

327. As such, Respondent fails to meet its burden to show that the MFN clause does not apply to the domicile provision in the Argentina-Mexico BIT.

328. The correct interpretation of the MFN clause is as follows. Pursuant to the VCLT, Claimants discuss *the good faith ordinary meaning of the terms of the clause in their context in light of its object and purpose*.[359] The clause again reads:

> 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 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.

329. The ordinary meaning of each of these clauses is as follows:

a. **"Each Contracting Party, once it has admitted investments from investors of the other Contracting Party into its territory":** In this case, the investments were "admitted" at the moment when they were established, including at the moment of obtaining contractual rights and certificates, obtaining various licenses and permits, and building tourism and commercial facilities.[360] Respondent has shown no evidence that the Investments were not "admitted." Indeed, Respondent itself issued some of these assets to Claimants and their companies directly. Thus, Claimants satisfy this component of the MFN clause to the corresponding "preponderance" standard.

b. **"Shall provide full legal protection to such investors and their investments":** This clause is known as the FPS clause, and is not relevant for MFN analysis.

c. "**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**": Claimants observe first that the word "treatment" here is not linked to Respondent's

[359] VCLT, art. 31, CLA-0084.

[360] *See, e.g.*, Section V.B *supra* (discussing the investments made by Claimants).

territory, as in *Doutremepuich*. Thus, the MFN clause does not exclude the ability to file an international arbitration. Moreover, the clause's use of the word treatment is not limited to substantive or procedural matters, and it is not limited to the dates of the violation or to the submission of a claim to arbitration. The clause does not limit "treatment" to exclude any conditions, requisites, or any other provisions of the Treaty. Instead, the word "treatment" is used in a broad sense and refers to treatment to both investors *and* investments. As such, the word treatment applies to the domicile provision in Article 2(3).

330. The context of the MFN clause in the Argentina BIT also supports Claimants' position. As discussed in this subsection above, none of the provisions in the Argentina BIT suggest that the MFN clause could not apply to the domicile provision in Article 2(3).

331. Similarly, the Treaty's object and purpose to "protect and promote" investments between Argentina and Mexico supports Claimants' position. Respondent's position would lead to diminished promotion and protection, *which goes against the object and purpose of the Treaty.*

332. Finally, Claimants' interpretation is consistent with good faith. There are no indications that the Contracting Parties intended to limit the scope of the MFN clause in the manner that Respondent suggests. As detailed above, there is no jurisprudence or authority that is counter to Claimants' interpretation, and Claimants' interpretation is better aligned with the Treaty's object and purpose.

333. Finally, Respondent, as one of the Contracting Parties to the Treaty, presumably has access to evidence, including *travaux préparatoires,* to refute Claimants' interpretation of the MFN clause. Yet Respondent produces no such evidence. Respondent's interpretation has no support in the record, including its contention that the MFN clause distinguishes between jurisdictional and non-jurisdictional requirements.

g. Respondent Fails to Prove its "Domicile" Exception

334. For the reasons above, Respondent's "domicile" exception fails. First, it fails to prove that the domicile provision in the Argentina BIT applies at the moment of Respondent's violations. Second, and in any event, Respondent fails to show *any evidence* that Mr. Sastre "intended to remain permanently" in Mexico at the moment of Respondent's violations. Third, Respondent fails to rebut that Mr. Sastre "intended to remain permanently" in Argentina at the moment of filing his claim. And fourth, Respondent in any event fails to show that the MFN clause in the Argentina BIT does not apply to the domicile provision in Article 2(3).

335. For all these reasons, Respondent's fails to prove its domicile objection to the required preponderance standard.

C. RESPONDENT FAILS TO MEET ITS BURDEN TO PROVE ITS "ILLEGALITY" OBJECTION

1. Claimants' Position

336. Respondent fails to meet its burden to prove that Claimants' Investments were illegal.[361] Claimants summarize the international law that applies to illegality objections:

a. Respondent as the moving party bears the burden to prove this objection.[362]

b. Because each of the Treaties incorporates international law as a source of law for investment disputes, this case is governed by international law, including the principles of estoppel and good faith as part of its general principles of law.[363]

[361] Cl. Counter-Mem., ¶ Sec. IV.C.

[362] Cl. Counter-Mem., ¶ 187.

[363] Cl. Counter-Mem., ¶ 189.

c. In the context of deciding illegality objections investment tribunals have considered (1) whether the objecting party is estopped from claiming illegality (*ADC v. Hungary*, *Desert Line Projects v. Yemen, RDC v. Guatemala*, and *Fraport v. Philippines,* and others);[364], (2) whether the claimants acted in good faith (*Fraport v. Philippines* and *Vestey Group v. Venezuela).*[365], (3) whether the alleged illegality concerns deficiencies that are not serious or central enough to warrant denial of treaty protection. (*Tokios Tokeles v. Ukraine* and *Convial Callao v. Peru* as examples)[366]

d. Finally, to determine whether the allegation of illegality warrants dismissal investment tribunals now frequently apply a proportionality analysis.. Claimants cite to and discuss several cases, including the following list of factors to be considered in applying the proportionality analysis according to *Kim v. Uzbekistan*: (a) the importance of the obligation, (b) whether the investor's conduct was serious, and (c) the interest of the host State in having the obligation observed.[367]

337. Claimants did not engage in any "illegality." Even if the Ejido failed to register Claimants' possessory interests, this does not mean that Claimants engaged in any illegality.[368]

338. Claimants always obtained the consent of all the parties involved to build their investments in the ejido lots. This is reflected in: [369]

a. Agreements with the individual Ejido members and the individuals who acquired possession of the lots from those Ejido members, and

[364] Cl. Counter-Mem., ¶¶ 190-95.

[365] Cl. Counter-Mem., ¶ 196.

[366] Cl. Counter-Mem., ¶ 197.

[367] Cl. Counter-Mem., ¶ 198.

[368] Cl. Counter-Mem., ¶ 203.

[369] Cl. Counter-Mem., ¶¶ 205-06.

b. Agreements with the Ejido itself, who was represented by the Ejido Commissariat pursuant to Respondent's Agrarian law. As Claimants' expert indicates, these agreements were enforceable before Respondent's courts.

339. Respondent's "illegality" objections are irrelevant and fundamentally misguided:

a. Respondent admits that RAN registration is only required for enforcement of rights against *third* parties and the lack of RAN registration, by itself, does not entail "illegality."[370]

b. Also, Respondent ignores that RAN registration is not something that Claimants could have done themselves. RAN registration was a decision that belonged to the Ejido. Even without registration, this does not warrant dismissal due to "illegality."[371]

340. Some of Respondent's allegations of "illegality", even if they applied (which they do not), concern minor formalisms. For example, among Respondent's formalistic objections are the purported lack of "official identification" of contract signers and notarization. Among Respondent's frivolous objections are its allegations of Claimants' failure to produce a certified copy of the Ejido file, or to provide a copy of the Ejido internal rules. In any event, these objections are not relevant, and even if they were they do not warrant dismissal.[372]

341. Claimants invested in good faith. They negotiated and obtained agreements with the relevant individual Ejido member and individual, as well as the Ejido authorities and representatives. They also hired attorneys to advise them in the process.

[370] Cl. Counter-Mem., ¶ 206.

[371] Cl. Counter-Mem., ¶ 207.

[372] Cl. Counter-Mem., ¶ 208.

342. Respondent is estopped from alleging illegality at this stage. Respondent and its agencies and officials issued numerous licenses and permits without ever alleging at the time that the investments were "illegal." The process of issuance of these licenses and permits included:[373]

a. Examining the documentation by Claimants (including the contracts and Ejido possession certificate negotiated by Claimants);

b. Visiting and inspecting the Investment sites; and

c. Collecting the corresponding fees and contributions for these licenses and permits.

343. Respondent benefitted from the Investments because it received increased revenue from the international tourism attracted by the Investments. Respondent cannot succeed on its last-minute allegation of illegality when it is convenient for Respondent.[374]

344. In addition, Respondent is responsible for the prior assurances and acknowledgements by the Ejido and its organs because the Ejido and its organs are an agency of Respondent.[375]

345. Respondent's allegation of illegality fails the proportionality test in *Kim v. Uzbekistan*:[376]

a. **"Significance of the obligation"**: There is no "obligation" here because registration is not required for Claimants to obtain authorization to situate their investments in Ejido lands, and in any event RAN registration is formalistic. As Claimants' expert observes, possession of Ejido land without RAN registration is widespread in Respondent's territory. Respondent cannot point to any penalties for failure to register. Even if RAN registration was an obligation, which it was not, registration could only be sought by

[373] Cl. Counter-Mem., ¶ 211.

[374] Cl. Counter-Mem., ¶ 211.

[375] Cl. Counter-Mem., n. 248.

[376] Cl. Counter-Mem., ¶¶ 212-13.

the Ejido. Nothing in the law indicates that Claimants would have been required to discontinue their investments while registration was pursued by the Ejido.

b. **"Seriousness of the investor's conduct"**: Claimants acted in good faith. They negotiated and reached agreements with Ejido members, the relevant individuals, and the Ejido through its Commissariat (the legal representative of the Ejido under Agrarian law). These agreements were entered freely. Claimants retained counsel to advise them during this process, including specialized agrarian law counsel until the day he was murdered in his office. None of the Ejido members, relevant parties, or the Ejido ever complained of any prejudice because all the parties involved consented to the underlying transactions.

c. **"The interest of the host State in having the obligation observed"**: Registration is a lesser State interest under *Kim*. The legal consequences of the alleged "illegalities" do not involve criminal penalties and are minor. Respondent's citation to a presidential statement concerning the agrarian framework as a "national priority" is irrelevant to the alleged failure of *registration*, and in any event it is not sufficient evidence of a higher interest with respect to RAN registration.

346. Finally, Respondent's allegation that Claimants violated its "restricted zone policy" prohibiting foreign investors from "owning" land 50 kilometers from the shore is baseless.[377]

a. The "restricted zone policy" is irrelevant because Claimants did not "own" lands in this area, and they do not claim to "own" them.

b. In any event, Respondent cannot point to this "restricted zone" policy to allege illegality against Claimants because the policy violates international law. The policy discriminates against foreign investors and affords them discriminatory treatment compared to similarly-situated domestic investors.

[377] Cl. Counter-Mem., ¶ 214.

2. Respondent's Position

347. Respondent alleges that the Investments were illegal according to Mexican law:

a. It claims that Investment treaties only protect property rights in the host State, [378] but it is the law of Respondent that governs the "existence, validity, content, and legality of the rights" claimed.[379]

b. Respondent's law restricts the ways in which foreign nationals can make investments, including investments in ejido lands. Foreign nationals cannot acquire ownership of ejido land through agreements. Possessors of ejido lands must be Mexican nationals only.[380] Moreover, Claimants do not demonstrate that their ownership is permitted by the "restricted zone" laws which prohibit foreign nationals from owning land. [381]

c. None of the treaties protect investments that are contrary to Respondent's law, and they limit consent to investments made pursuant to its law, including the NAFTA which has an "implicit" legality requirement.[382] The Investments are incompatible with Respondent's law because Claimants did not meet the requirements for obtaining ejido land rights.[383]

d. Investment tribunals have denied protection to investments made through fraud, false information, misrepresentation, disregard for domestic laws, or inauthentic documents.[384]

[378] Resp. Reply, ¶¶ 200-203

[379] Resp. Reply, ¶¶ 198-199.

[380] Resp. Reply, ¶ 218.

[381] Resp. Reply, ¶ 218.

[382] Resp. Reply, ¶¶ 233-40.

[383] Resp. Reply, ¶¶ 480, 521, 534, 581, 583-84.

[384] Resp. Reply, ¶¶ 241-52; 258-262.

e. Claimants established the Investments in violation of Respondent's constitution, foreign investment laws including "restricted zone laws", and international good faith. Under Respondent's law, only Mexican nationals can own ejido lands and lands within the "restricted zone". Foreign nationals can only own such lands under strict limits, or else their ownership is void *ab initio*.[385]

f. Claimants "intentionally" structured their investments to obtain an indirect legal interest and "simulated" their transactions "defrauding the prohibitions" in Respondent's laws.[386]

348. Respondent also argues that estoppel does not apply in this case:

a. Estoppel cannot remedy illegality, create rights, or create jurisdiction.[387]

b. Claimants' cited cases where tribunals applied estoppel against the States' allegations of illegality are legally and factually different from this case. Some of the illegalities alleged in those cases were minor, and others involved direct contracts with the State.[388]

349. Next, Respondent argues that the Claims do not meet the proportionality test in *Kim v. Uzbekistan*:

a. The "restricted zone" laws and the agrarian laws restricting ownership of land by foreign nationals are fundamental and protect public interests because they are based on constitutional provisions. Lack of Foreign Relations Secretariat ("**SRE**") registration is a serious violation and means the land rights are void.[389]

b. Lack of RAN registration is also a serious violation. Registration would provide a "presumption of legality" and would amount to evidence in a court proceeding. RAN

[385] Resp. Reply, ¶¶ 253-55.

[386] Resp. Reply, ¶¶ 256-57.

[387] Resp. Reply, ¶¶ 271-76.

[388] Resp. Reply, ¶ 284-301.

[389] Resp. Reply, ¶¶ 318-24; 325-27.

registration serves to "confirm" origin of title. Without RAN registration, the assets acquired would not be "cognizable" by Respondent's law. Lack of RAN registration means the contracts are void.[390]

c. Agrarian laws are important to protect the rights of historically disadvantaged groups and their autonomy. [391] Even if lack of RAN registration does not carry criminal liability or fines, lack of registration is "serious" enough to deny jurisdiction.[392] The violations are sanctioned with absolute nullity. [393]

d. Claimants acted in bad faith. Claimants avoided "legal scrutiny that is typically generated through registration before authorities." Respondent also suggests that Claimants did not follow the advice of their legal counsel, but provides no evidence for this proposition.[394] There are some inconsistencies in Claimants' documents regarding the limits of the lots used.[395] Claimants' investment contained various "red flags" that show that Claimants did not conduct adequate due diligence, that the lands did not "belong" to them, that they avoided scrutiny of authorities and courts, and that they paid too little for the lands[396]

e. Respondent points to *Álvarez y Marín v. Panama*, a case concerning land "purchase," and urges the Tribunal to apply the same framework in that case and reach the same conclusion.[397]

[390] Resp. Reply, ¶¶ 328-29.

[391] Resp. Reply, ¶¶ 481-82, 523-24, 535-36,

[392] Resp. Reply, ¶¶ 330-35.

[393] Resp. Reply, ¶¶ 298, 481-82, 522-24, 535-36, 582.

[394] Resp. Reply, ¶ 349.

[395] Resp. Reply, ¶¶ 481-82, 523-24, 535-36.

[396] Resp. Reply, ¶¶ 343-47.

[397] Resp. Reply, ¶¶ 261-62, 316-17.

f. With regard to the Behla Tulum Investments, they are illegal also because Mr. Jacquet did not become a Mexican national as he said he would, the lot is not situated in Ejido land, and it is "not possible to confirm" the price paid for the lots.[398]

g. Respondent states that had the contracts been registered with the RAN, the seizures would not have occurred.[399]

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

350. At the outset, Respondent does not dispute several of Claimants' points:

a. Respondent does not dispute that the investor-State jurisprudence submitted by Claimants indicates that the burden to establish illegality rests with Respondent.

b. Respondent does not dispute that the standard of proof to establish corruption is an elevated one, such as "clear and convincing" evidence.[400] As discussed further in the next subsection, an elevated burden also applies to "illegality" objections as a whole.

c. Respondent does not allege that the licenses and permits it issued to each of the Claimants were "illegal." The same is true for the shares that Mr. Sastre, Ms. Abreu, and Mr. Silva owned in the CETSA, HLSA, and OMDC business entities, respectively.

351. Although the third point alone is sufficient to conclude that Respondent's illegality objection fails to strip this Tribunal of jurisdiction over this arbitration, Claimants address the remainder of this objection below.

[398] Resp. Reply, 537-538.

[399] Resp. Reply, ¶ 342.

[400] Claimants do not dispute, as Respondent mistakenly suggests, that NAFTA contains an implicit legality requirement. Resp. Reply, ¶¶ 238-40. Claimants only observed that the provision is not written in the Treaty, as with the other three Treaties. Cl. Counter-Mem., ¶ 188.

352. Respondent focuses its "illegality" objections on the contractual rights and certificate of possession rights that Claimants negotiated with the Ejido and relevant Ejido members and individuals.

353. Respondent does not dispute five central points:

354. *First*, Respondent's expert agrees that an absence of RAN registration of Claimants' contracts and certificates of possession does not mean that they were illegal. It only means that Claimant's contracts and certificates were not enforceable against third parties:[401]

> I agree that the lack of registration, by itself, ***does not cause illegality*** and does not mean that an agreement lacks legal value, and that [the absence of registration] only means that the contracts are not enforceable against third parties." (translation by counsel)

355. *Second*, Respondent does not dispute that agreements between parties or concerning the use and enjoyment of land the Ejido Assembly has not ratified are not "illegal." In fact, they are expressly contemplated in the Agrarian law.[402]

356. *Third*, Respondent does not dispute that, for its "illegality" objection, it cannot rely on its own laws that discriminate against foreign nationals. As Claimants explained in their Counter-Memorial, these laws violate Respondent's national treatment obligations contained in the Treaties, to the extent such laws would otherwise apply to Claimants.[403]

[401] *E.g.*, Second Report of Mr. Gutiérrez at 70 ("Estoy de acuerdo que la falta de inscripción, por sí misma, no provoca la ilegalidad ni significa que un acuerdo carezca de valor jurídico, y que no haberla hecho sólo implica que los contratos no son oponibles frente a terceros").

[402] Second Report of Mr. Gutiérrez at 11-13.

[403] Cl. Counter-Mem., ¶ 214.

357. *Fourth*, neither Respondent nor its expert alleges that the Ejido Possession Certificates presented by Claimants are "illegal." [404]

358. *Fifth*, neither Respondent nor its expert alleges that Claimants' construction of the facilities *per se* was illegal.[405]

359. These five points alone are devastating to the remainder of Respondent's "illegality" objection. The remaining arguments by Respondent are either irrelevant (because they confuse the requirements for "legality" with the requirements for assembly-ratification and RAN-registration) or unsubstantiated (as in the case of allegations that Claimants entered into their contracts in bad faith).

360. Regarding the international law that is applicable to illegality allegations, the Parties agree that investment treaty tribunals apply estoppel and proportionality in their analysis.

361. Thus, the only issues left unresolved is whether Respondent meets its burden to prove that the contracts and certificates failed to meet any applicable requirements and whether Claimants procured them in bad faith.

[404] At best, Respondent's expert states that "in his opinion" these certificates of possession "lack probative" value that Claimants had the consent required to use the land where the Investments were situated, but as Mr. Bonfiglio observes, this contradicts the Supreme Court holding supplied by Respondent's expert himself. That holding states that although such Certificates do not alone prove possession, they must be given "presumptive value, given that [they are issued by] internal decision organs of the ejido" and must be "corroborated" with the rest of the evidence in the record. Second Report of Mr. Bonfiglio, ¶ 25; *see also* Valor Probatorio de las Constancias de Posesión Emitidas por el Comisariado Ejidal y el Consejo de Vigilancia, Federal Judicial Weekly Report of the Supreme Court, Vol. III, May 1996, p. 717, PCPG-0087.

[405] In fact, on multiple occasions Respondent issued licenses and permits to Claimants authorizing the construction of the facilities. *See generally* Sec. III, *supra*.

362. Claimants address these points below. This Section begins by discussing the applicable standard of proof in illegality allegations. Then it addresses the illegality allegations as it pertains to Claimants' contracts, including Respondent's mischaracterization and application of illegality principles in international law. It concludes with an analysis of *Álvarez y Marín v. Panama*, demonstrating that Respondent fails to liken the facts in that case with those here.

a. Respondent Does not Dispute that It Bears the Burden to Prove its "Illegality" Allegation to a Heightened Standard

363. As discussed in Section VI.C.1 above, Claimants indicated and submitted investor-State jurisprudence to show that the burden to prove allegations of illegality in investment treaty disputes is born by Respondent. Respondent has not presented any authority to counter this well-established principle.

364. As to standard of proof, Respondent does not contest Claimants' position that the standard of proof for corruption allegations is an elevated one. Respondent also does not take a position on the standard of proof concerning illegality allegations generally.

365. Although the jurisprudence on standard of proof for illegality allegations is sparse, the available decisions and commentary point to an elevated standard of proof.

366. In *Energoalians v. Moldova,* the tribunal stated that only "material," "deliberate" and "gross" violations by investors, such as corruption and fraud, can deprive an investment of jurisdiction. Citing *Andrew Newcombe,* the tribunal held that such allegations must be "duly proved" and "affirmed by the competent court judgements that came into force."[406]

[406] Energoalians TOB v. Republic of Moldova, UNCITRAL, Award, 23 October 2013, CLA-0120, ¶ 261. The award was annulled by the Paris Court of Appeal on different grounds. Komstroy v. Republic of Moldova, Paris Court of Appeal Set-Aside Ruling, 12 April 2016, CLA-0122, ¶ 6 (setting

367. In *Hamester v. Ghana*, in *dictum* concerning allegations of illegality, the tribunal indicated that it could only decide on "substantiated facts, and cannot base itself on inferences." It found no "conclusive evidence" that the investment was made illegally.[407]

368. In *Chemtura v. Canada*, the tribunal agreed with *Bayindir v. Pakistan I* that a charge of bad faith or disingenuous behavior needs a "demanding" standard of proof:

> Although the Claimant has avoided formulating this allegation in such terms, the underlying idea is that the PMRA acted in bad faith and launched a review process for reasons unrelated to its mandate and to the international obligations of Canada. The burden of proving these facts rests on the Claimant, in accordance with well established principles on the allocation of the burden of proof, and ***the standard of proof for allegations of bad faith or disingenuous behaviour is a demanding one***. [emphasis added] [408]

369. Since the consequence of finding a serious illegality could be dismissal of the claim, it is unsurprising that tribunals place a high standard on such allegations. As Judge Rosalyn Higgins stated in her famous Separate Opinion in *Oil Platforms*, "the graver the charge, the more confidence there must be in the evidence relied on."[409]

370. Investment tribunals view the decision to place a claim outside the jurisdiction of a tribunal as a harsh consequence. For example, the *Kim* tribunal stated:

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aside the award because the Court found that a debt pursuant to an energy contract did not involve a contribution, which is a requirement element of an "investment" under the ECT).

[407] Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, 18 June 2010, CLA-0121, at 134-35.

[408] Chemtura Corp. (f/k/a Crompton Corp.) v. Government of Canada, PCA Case No. 2008-01, Award, 2 August 2010, ¶ 137, CLA-0119.

[409] Case Concerning Oil Platforms (Iran v. U.S.), 1996 I.C.J. Rep. 856, (Separate Opinion of Judge Rosalyn Higgins), CLA-0123, ¶ 33.

> Third, the Tribunal must evaluate whether the combination of the investor's conduct and the law involved results in a compromise of a significant interest of the Host State to such an extent that the ***harshness of the sanction of placing the investment outside of the protections of the BIT is a proportionate consequence for the violation examined***. The primary indication of such a compromised significant interest is whether the legal consequence of the violation under the Host State's law manifests a gravity to the act of noncompliance that is proportional to the harshness of denying access to the protections of the BIT. [emphasis added] [410]

371. Here, Respondent's allegations of illegality seek the harsh consequence of striping this Tribunal of jurisdiction over some of the Claims. As such, Respondent must prove its allegations to an elevated standard.

b. Respondent Fails to Substantiate its Allegations that Claimants' Contracts and Certificates Were "Illegal."

372. As discussed in Section VI.C.3 above, Respondent and its expert agree that a lack of registration does not render Claimants' contracts and Certificates of Possession "illegal."

373. Nevertheless, Respondent's expert points to "requirements" for the contracts that simply have no basis in the law. For example, he states that the Agrarian law requires that the RAN "be notified" of Claimants' contracts, otherwise the agreements are "invalid."[411] Mr. Gutiérrez cites to no authority for this proposition, and does not indicate who must conduct this supposed

[410] Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017 ¶¶ 408, CLA-0067. *See also* Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29, Award, 22 October 2018, CLA-0118, ¶ 351 (citing *Kim*).

[411] Second Report of Mr. Gutiérrez at 70.

obligation. As Mr. Bonfiglio confirms, there is no such obligation in the Agrarian Law or any other relevant body of law of Respondent.[412]

374. Respondent's expert also claims that Claimants contracts did not comply with certain requirements:

a. They must be signed by the Ejido Commissariat;

b. They must be approved by the Ejido Assembly;

c. They must be limited to a 30-year term, extendable by the parties; and

d. They must correctly identify the plot of land at issue.

375. As Mr. Bonfiglio confirms, "requirements" a. and b. are plainly not contained in the Agrarian Law or elsewhere. Respondent's expert does not provide the source for these claims.[413]

376. Regarding requirements c. and d., as Mr. Bonfiglio explains, an absence of the talismanic words "30-year limit, extendable" does not invalidate the rest of the agreement.[414] Also, under Respondent's law and international law, a good-faith mistake, even if true, as to the exact location of the land does not make the agreement unenforceable.[415] Respondent adduces no evidence that any mistakes were committed in bad faith by either party to the contracts. The record shows that Claimants occupied the lots of land for approximately one decade without a single complaint by Ejido members or the Ejido itself. As such, Respondent fails to support its claim that the contracts were invalid or "illegal."

[412] Second Report of Mr. Bonfiglio, ¶¶ 2-3.

[413] Second Report of Mr. Bonfiglio, ¶ 2-3.

[414] Second Report of Sergio Bonfiglio, ¶ 3

[415] *See* discussion *infra* on the proportionality factors contained in *Kim v. Uzbekistan*; Second Report of Mr. Bonfiglio, n.3.

377. Regarding the remaining "requirements" for the contracts discussed by Respondent and its expert, none of these are relevant because they apply to agreements and lands different from the ones where the Investments were situated. For example, the right of first option applies only to "sales" of "parcels," neither of which applies here because there was no sale and the Investments were situated in Ejido common use lands. Similarly, a Special Formalities Assembly ("AFE") would have been required only for ratification or registration purposes, but not for private agreements such as Claimants' contracts. As Mr. Bonfiglio explains, no other requirement in the Agrarian Law applied to Claimants' contracts.[416]

378. As such, Respondent does not, because it cannot, substantiate its allegation that Claimants' contracts and certificates were "illegal."

c. Respondent's Estoppel Analysis is Irrelevant, and in any Event Flawed

379. As discussed in Section VI.C.1, Claimants have already observed that the well-established international law principle of estoppel prevents Respondent from alleging that the contracts and certificates are illegal, after treating them as legal up until Respondent's breaches. Respondent argues that estoppel does not apply in this case, raising a number of arguments and distinctions between the instant case and the cases cited by Claimants in their Counter-Memorial. As Claimants show below, each of these arguments are misguided or irrelevant.

380. Respondent begins by alleging that property rights cannot be "created" by estoppel.[417] Respondent appears to suggest that Claimants seek to create Ejido "land rights" through, for

[416] Second Report of Mr. Bonfiglio, ¶¶ 2-3.

[417] Resp. Reply, ¶¶ 264-68.

example, business operation licenses issued by a municipality. Respondent implies a disagreement where there is none.

381. Claimants are not "creating" any property rights through estoppel. As discussed in Section V.B., Claimants' Investments consisted of, among other things, assets that were derived from private agreements, business formation documents, licenses and permits issued by Respondent, and income-producing facilities built by Claimants. Claimants agree that their contract rights are created by agreement of the contract parties and not by licenses and permits. But this is immaterial to the uncontested fact that Respondent never once alleged that the contracts and Certificates were invalid, even after many site visits and inspections of Claimants' documents. Instead, Respondent approved the licenses and permits sought by Claimants and repeatedly charged fees and contributions from Claimants and their businesses.

382. Respondent then argues that Claimants cannot make an estoppel argument because Respondent did not make any representations to Claimants, and Claimants cannot show that their positions changed as a result of those representations.[418] Respondent again misses the point.

383. Respondent's statement that the Claimants did not change their positions has no merit. The record establishes that Claimants changed their positions by continuing to invest, expand, and operate businesses in those areas following the many contract and possession certificate inspections and site visits by Respondent.[419] Respondent's claim of no detriment defies common sense.

[418] Resp. Reply, ¶¶ 302-15.

[419] *See* Section III, *supra*.

384. As a result, Respondent's arguments that estoppel does not apply to Respondent's allegations of illegality lacks any merit. In the next subsection, Claimants address Respondent's attempts to distinguish the instant case from the jurisprudence cited by Claimants.

d. Respondent Fails to Meaningfully Distinguish the Instant Case from the Jurisprudence on Estoppel Cited by Claimants.

385. Next, Respondent attempts to draw distinctions between the instant case and the cases Claimants cited for their estoppel claim. None of these "distinctions" are relevant.

386. For example, Respondent argues that *Inmaris v. Ukraine* is distinguishable from the instant case because that was a mere instance where lack of registration meant that claimants did not have access to some privileges and guarantees, and the tribunal "rejected the argument that that estoppel prevented the State from making illegality allegations.[420] Respondent mischaracterizes the decision in *Inmaris*.

387. The *Inmaris* tribunal never rejected estoppel due to illegality of the investments. In fact, the tribunal only stated that it did not need to "rely" on estoppel, and the tribunal was informed by the State's acquiescence at the time ("we ***do*** view [Ukrainian representatives' statements] as indicating that Respondent ***did not at that time consider those contracts*** (or the payment scheme contained in them) ***to be illegal*** under Ukrainian law." (emphasis added)). [421]

[420] Resp. Reply, ¶¶ 280-82.

[421] Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, RL-183, ¶ 140.

388. Respondent then argues *Karkey v. Pakistan* is different from this case because Pakistan had argued that the contracts were lawful before the Pakistani Supreme Court.[422] Once again, this distinction is immaterial.

389. Respondent appears to suggest that for estoppel to apply, a State must have argued previously before its courts that the investments were legal. But there is no such requirement in investment disputes or international law. In *Karkey*, the State had at one point conducted itself in a manner that validated the investment, and was estopped from arguing later that the investment was invalid. The same is true in the instant case. Here, the consequences of Respondent's conduct caused not only a validation of the contracts and certificates, but also caused Claimants to expand their Investments in reliance on the licenses and permits issued by Respondent.

390. Respondent then tries to distinguish *ADC v. Hungary*, claiming that case involved public contracts that had lasted longer than seven years and were voluntarily entered into by the Hungarian government.[423] But even under Respondent's own summary, the key facts in *ADC* match the facts in this case. For example, like in *ADC*, the licenses and permits were issued by Respondent voluntarily, and Respondent issued such licenses for several years. Indeed, the Investments here were in operation for close to a decade.[424]

[422] Resp. Reply, ¶ 283.

[423] Resp. Reply, ¶¶ 286-87.

[424] *See generally* Section III, *supra*.

391. Finally, Respondent claims that *RDC v. Guatemala* is different from this case because *RDC* involved a series of contracts between the investor and the State, whereas here the contracts are among private parties.[425] This point is irrelevant.

392. Respondent's argument again assumes without justification that estoppel can only apply when a Claimant contracts directly with the State. Again, there is no such limitation in investor-State jurisprudence or international law. For example, in *Pezold v. Zimbabwe*, the investment concerned agricultural farms expropriated by the State, as opposed to public contracts. The Tribunal found, that with regard to the State's allegations that the investor breached the Zimbabwe Stock Exchange Rules requiring that listed companies list 30% of their shares as fee-floating, the state should have acted at the moment it had an opportunity to deal with them:

> It is evident that any breach of the free float rule ***should have been dealt with by the ZSE [Zimbabwe Stock Exchange] itself***, which had the power to invoke certain sanctions if it considered that the free float rule had not been complied with.[426]

393. The tribunal considered this as part of the reasons why it should dismiss the State's illegality objections.[427] In the instant case, Respondent had multiple opportunities during its visits, inspections, and document evaluations to "invoke sanctions . . . if it considered that [its laws] had not been complied with."

[425] Resp. Reply, ¶¶ 297-98.

[426] Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, ¶¶ 419, CLA-0124.

[427] Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, ¶¶ 416-22, CLA-0124.

394. Thus, Respondent's "distinctions" are entirely immaterial. The fact is that for close to ten years of documentary and physical inspections Respondent never alleged any form of illegality. Respondent must be estopped from raising illegality as a defense only now when it is expedient.

e. Respondent Mischaracterizes International Law on Proportionality, and Misapplies It in the Instant Case

395. At the outset, Respondent appears to argue that prior to application of estoppel and proportionality in illegality objections, tribunals must first determine the investments to be "valid" under Respondent's law.[428] This notion is entirely unsupported.

396. There are no cases that apply such a two-step framework. The reasons are obvious. If Respondent had its way, then the proportionality analysis in *Kim* would be superfluous. Put another way, if an investment must be deemed to comply with every aspect of Respondent's law before a proportionality analysis can be applied, then the whole purpose of the proportionality analysis would be moot.

397. In any event, as discussed in Section V.B, Claimants had valid investments (several of them issued by Respondent directly), so Respondent's point again makes no difference.

398. Respondent then argues that the Claims do not meet the proportionality test in *Kim v. Uzbekistan* because the laws allegedly violated by Claimants were fundamental and Claimants conduct was serious. Respondent's analysis is flawed.

[428] Resp. Reply, ¶¶ 233-40.

399. Respondent begins by claiming that agrarian laws are fundamental and protect public interests because they are based on constitutional provisions.[429] This argument is irrelevant.

400. Respondent confuses the importance of a legal order, such as the agrarian system, with the specific provisions about which it objects. The issue is not the importance of the agrarian system. The issue is the alleged "illegalities" – namely that the contracts did not contain an (extendable) limit for 30 years and that the geographic coordinates in the contracts might have been slightly transposed from their physical location. As Mr. Bonfiglio confirms, these are hardly a breach of Respondent's fundamental laws because minor, good-faith omissions such as these are curable and immaterial.[430] Moreover, the Ejido and Ejido members (and Respondent) never objected to the location of the lands or the term of the contracts precisely, once again showing the good faith of the parties.

401. Respondent then argues that a lack of RAN registration is a serious violation because registration would provide a "presumption of legality" and without it contracts are void.[431] This argument has no merit. As shown at the beginning of Section VI.C.3, and as indicated by Mr. Bonfiglio, the contracts and the possession certificates were not subject to any registration requirements.[432]

[429] Resp. Reply, ¶¶ 318-24.

[430] Second Report of Mr. Bonfiglio, n.3, ¶ 3. Moreover, Respondent provides no evidence that these "illegalities" are widely enforced, or that enforcement is not widespread due to a lack of prosecutorial resources.

[431] Resp. Reply, ¶¶ 328-29.

[432] Second Report of Mr. Bonfiglio, ¶¶ 2-3.

402. Respondent then argues that lack of criminal liability for the alleged "violations" does not mean that the acts are not illegal under international law.[433] This misses the point.

403. Every case where illegality has resulted in dismissal of a treaty claim has involved grave, punishable acts such as fraud and corruption. As discussed later in this Section, even the case that Respondent urges the Tribunal to follow, *Álvarez y Marín v. Panama*, involved criminal complaints and a criminal investigation involving government prosecutors with the potential for criminal liability.

404. Turning to Respondent's allegations that Respondent's conduct was seriously inappropriate, Respondent begins by alleging that Claimants did not heed the advice of their counsel.[434] But respondent presents no evidence for this accusation.

405. Respondent next discusses a number of investment treaty decisions where tribunals have also denied protection to investments made fraudulently or through falsehoods and misrepresentations.[435] None of these cases are applicable here.

406. Respondent does not, because it cannot, point to a single piece of evidence showing that Claimants defrauded, misrepresented, or provided any information that was false in the establishment or operation of their Investments. Respondent once again makes accusations without any support.

407. Respondent then accuses Claimants of "intentionally" structuring their investments to "defraud[] the prohibitions" in Respondent's laws seeking Mexican nationality later only to cure

[433] Resp. Reply, ¶¶ 330-35.

[434] Resp. Reply, ¶¶ 349.

[435] Resp. Reply, ¶¶ 241-52.

the illegality. According to Respondent, Claimants abuse the arbitral system to present false property claims.[436] It is not clear which specific laws Respondent refers to, but to the extent it refers to Mexican laws restricting "ownership" by foreign nationals, Respondent again misses the point. First, Claimants did not "own" the lands, so this is irrelevant. Second, as discussed in Section VI.C.1, even if those laws applied here, they violate Respondent's National Treatment obligations in the Treaties. Respondent cannot point to local laws that violate international law. And third, Respondent has yet to provide any evidence of any "fraud" whatsoever.

408. In sum, Claimants have provided testimony and evidence showing that they acted in good faith. They operated businesses for close to a decade. They hired lawyers. The operated their businesses openly. They continuously strived to comply with legal requirements. [437]

409. By contrast, Respondent fails to produce a single witness, such as a member from the Ejido control organs, an Ejido member, or any government employee with first-hand knowledge to support that Claimants acted in bad faith or fraudulently. Respondent does not provide any evidence to substantiate its claims that there were any "illegalities," much less that they were "serious," and Respondent adduces no evidence of bad faith or impropriety by Claimants.

410. As such, its accusations do not come close to satisfying its burden to show that dismissal for illegality is proper under the proportionality test in *Kim*.

[436] Resp. Reply, ¶¶ 256-57.

[437] *See generally* Section III.

f. Respondent's other "Distinctions" From Claimants' Cited Jurisprudence Hold no Water

411. Respondent mischaracterizes the ICSID annulment panel's decision in *Fraport v. Philippines*, alleging that the award was annulled due to the tribunal's findings on the exceptions to illegality claims. In that decision, the panel found that the tribunal's failure to hear evidence that the Philippine special prosecutor decided not to charge Fraport officials with violations of the Anti-Dummy Law was a serious departure from a fundamental rule of procedure.[438] The basis of the *ad-hoc* committee's decision was *not* the *Fraport* tribunal's "exceptions to illegality" as Respondent states.

412. More importantly, the facts in *Fraport* were fundamentally different because they involved illegality that was punishable by imprisonment. This was central to the tribunal's finding in that case.[439] As discussed throughout this Section, here Claimants did not engage in any "illegality", much less expose themselves to criminal liability.

413. Respondent also tries to distinguish the instant case from *Desert Line Projects v. Yemen*, arguing that the illegalities here are more serious than in that case because they include violations to "fundamental" laws of the Respondent, included in the Mexican constitution, and restrictions to foreign investment, which make the void *ab initio*.[440] Respondent's analysis is meritless and irrelevant. As already discussed at the start of Section VI.C.3 and in Section VI.C.3.b *supra*,

[438] Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I), (ICSID Case No. ARB/03/2, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010, ¶¶ 218-47, RL-161.

[439] Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines I, ICSID Case No. ARB/03/25, Award, 16 August 2007, CLA-0098, ¶ 395.

[440] Resp. Reply, ¶ 294.

Claimants have not committed any illegality, and Respondent has not proven how these specific laws (*i.e.*, the 30-year renewable time-limit requirement) are "fundamental" to deserve special treatment.

414. Finally, Respondent argues that *Tokios Tokeles v. Ukraine* is different from the instant case because the facts here do not involve minor illegalities. According to Respondent, the instant case involves contracts that were void because they were opposite to Respondent's laws.[441] Respondent's analysis is again conclusory and unsupported.

415. Indeed, that facts here mirror *Tokios* significantly. The "illegalities" alleged in *Tokios* included a lack of notarization, lack of signatures, and using a different corporate form for an investment. The only relevant "illegalities" Respondent complains of in the instant case are similarly minor (and curable): a lack of a clause limiting the term of the agreement to "thirty years, extendable" and slight deviations in geographic coordinates that nobody ever complained about for a decade until after Respondent's violations.[442]

g. The Instant Case is Materially Different from Álvarez y Marín v. Panama

416. Respondent points to *Álvarez y Marín v. Panama* and urges the Tribunal to apply the same framework in that case and reach the same conclusion.[443] In that case, the tribunal found that a land ***purchase*** was illegal, and the claimants did not act in good faith because they knowingly

[441] Resp. Reply, ¶¶ 300-01.

[442] *See* Section III *supra*; *see also* Second Report of Mr. Bonfiglio, n.3, ¶ 3.

[443] Resp. Reply, ¶¶ 261-62, 316-17.

broke a law and paid an "exorbitant" sum to an intermediary.[444] The relevant Panamanian law at issue required that before land is sold to anyone else, a preferential first option must be offered to a native community.[445] An analysis of the seriousness of the investor's conduct and the importance of the laws violated led the tribunal to find that the investments did not meet the proportionality test in *Kim v. Uzbekistan*.

417. The instant case is entirely distinguishable from *Álvarez.*

418. *First*, the *Álvarez* tribunal found that there was a clear legal requirement regarding the preferential right to buy at a lower price, and a "clear ***violation***" of that specific provision. The tribunal was largely troubled by the "scandalous" commission paid to an intermediary, which it found to be a ""clear red flag" due to its "exorbitant" amount.[446] Here, as discussed in Section VI.C.3, the "violations" boil down to the absence of a 30-year-renewable term limit clause and a slight discrepancy between geographic coordinates in the contracts and in the physical location of the lots.

419. *Second*, in *Álvarez* the purported acts resulted in a ***criminal*** and administrative investigation. The criminal proceedings resulted in a seizure order to prevent their sale. The complaints also resulted in criminal charges against the sellers and intermediaries for fraud,

[444] Álvarez y Marín Corporación S.A. and others v. Republic of Panama, Caso CIADI No. ARB/15/14, Award, 12 Oct. 2018, RL-094, pages 71-74.

[445] Álvarez y Marín Corporación S.A. and others v. Republic of Panama, Caso CIADI No. ARB/15/14, Award, 12 Oct. 2018, RL-094, pages 71-74.

[446] Álvarez y Marín Corporación S.A. and others v. Republic of Panama, Caso CIADI No. ARB/15/14, Award, 12 Oct. 2018, RL-094, ¶¶ 108, 279-84, 253-54, 270-74, 309, 340, 345, 347.

forgery, and conspiracy.[447] In the instant case, no such criminal complaint, investigation, or charges have occurred at any point against Claimants or parties with whom they entered into agreements.

420. *Third*, in *Álvarez* the indigenous communities and other members of the community ***objected*** to the sale, even occupying the land in indignation.[448] Here, there was no such complaint *at any point* by Ejido members or the Ejido itself, and instead the Ejido and Ejido members confirmed the validity of the agreements and their consent. There were no objections after close to a decade of operation. Here, the only one objecting is Respondent but only because Claimants started this arbitral proceeding.

421. *Fourth*, in *Álvarez* an asset seizure order was issued by a court following the criminal complaints and investigations against the individuals involved in the land sale.[449] No such order, or criminal proceedings have taken place here.

422. *Fifth*, in *Álvarez* there is no discussion of whether the obligations were curable, or whether the claimants were in the process of curing. Here, Claimants could have easily resolved the alleged "illegalities" by attaching an amendment to their contracts adding the 30-year-renewable term clause and updating the geographic coordinates in the contracts.[450]

[447] Álvarez y Marín Corporación S.A. and others v. Republic of Panama, Caso CIADI No. ARB/15/14, Award, 12 Oct. 2018, RL-094, ¶¶ 13, 256-57, 293, 335

[448] Álvarez y Marín Corporación S.A. and others v. Republic of Panama, Caso CIADI No. ARB/15/14, Award, 12 Oct. 2018, RL-094, ¶¶ 16, 290,

[449] Álvarez y Marín Corporación S.A. and others v. Republic of Panama, Caso CIADI No. ARB/15/14, Award, 12 Oct. 2018, RL-094, ¶ 257.

[450] *Cf.* Second Report of Mr. Bonfiglio, n.3, ¶ 3.

423. *Sixth*, *Álvarez* involved the ***sale*** of land, unlike the instant case.[451] Here, the lands where the Investments were situated were common use lands, which always belonged to the Ejido.

424. *Seventh*, *Álvarez* involved a case where a breach of the relevant obligation by Claimants led to absolute nullity.[452] As explained by Mr. Bonfiglio, here there is no reason for absolute nullity, and no nullity can occur until an agrarian or competent tribunal declares Claimants' contracts illegal or void.[453]

425. *Eighth*, in *Álvarez* the claimants did not heed the advice of their attorneys,[454] unlike the instant case where Claimants hired and worked with their attorneys to enhance the protection of their Investments.[455]

426. Finally, Respondent tries to draw an equivalence between the *Álvarez* "red flags" analysis and the facts in this case. Respondent alleges that Claimants have shown no evidence of using legal counsel; Claimants admit in testimony that they knew of underlying Ejido litigation; Claimants used third parties to establish their investments; A responsible investor would have sought RAN registration; Claimants never went sought assistance of agrarian tribunals; The certificates of possession were not accompanied by an Assembly resolution; Ms. Galán stated that she was in "negotiations with the owner of the parcel"; Ejido rights belonged to Mr. Román and

[451] Álvarez y Marín Corporación S.A. and others v. Republic of Panama, Caso CIADI No. ARB/15/14, Award, 12 Oct. 2018, RL-094, ¶¶ 210-17.

[452] Álvarez y Marín Corporación S.A. and others v. Republic of Panama, Caso CIADI No. ARB/15/14, Award, 12 Oct. 2018, RL-094, ¶ 333.

[453] Second Report of Mr. Bonfiglio, ¶ 38.

[454] Álvarez y Marín Corporación S.A. and others v. Republic of Panama, Caso CIADI No. ARB/15/14, Award, 12 Oct. 2018, RL-094, ¶¶ 219, 342.

[455] *See* Section III, *supra*

not Mr. Jacquet; Mr. Silva and Mr. Jacquet used third parties to acquire their interests; Neither Claimant has shown to be an ejido member or an "*avencidado*" in this proceeding; and CETSA paid Ejido member Lorenzo Novelo Pacheco $53 per square meter.[456]

427. Respondent's scattershot "red flags" allegations are again baseless.

428. *First*, whether Claimants knew of underlying ejido litigation is irrelevant. Respondent provides no evidence that Claimants knew of it *at the time of making* the Investments. It would be beside the point if Claimants learned about such litigation afterwards. Respondent also does not provide any evidence that the litigation involved the Claimants' Investment lots at the time of establishment. And in any event, Respondent ignores that in *Álvarez* the "red flag" was the existence of an outrageous 95% commission on a land sale.[457] Here, as already explained at the beginning of this Section, there is no such commission to anyone.

429. *Second*, Respondent's allegation that negotiating agreements with individuals who in turn previously negotiated with Ejido members is a "red flag" lacks any merit. If Respondent had its way, everyone who has previously negotiated an agreement with an Ejido member would be a suspect of acting in bad faith. In *Álvarez*, the tribunal was troubled that the rule requiring a first option to sell for lower price to the indigenous community was broken *and* the ultimate sale resulted in a 95% commission to the intermediary that was utterly disproportionate to the sums

[456] Resp. Reply, ¶¶ 343-47.

[457] Álvarez y Marín Corporación S.A. and others v. Republic of Panama, Caso CIADI No. ARB/15/14, Award, 12 Oct. 2018, RL-094, ¶ 340.

ultimately received by the native community members.[458] Again, Claimants paid no commissions to any intermediaries. The facts are plainly and fundamentally different.

430. *Third*, Respondent's point that Claimants never sought to appear before an Agrarian Tribunal is irrelevant. Appearance before an agrarian tribunal is not required for Private Agreements,[459] and in any event Claimants hired an agrarian attorney to add protection to Claimants' possessory interests (until he was killed in his office before he could finish that matter).

431. *Fourth*, Respondent's representation of Ms. Galan's statements, even if true, are irrelevant. And in any event, the alleged statement is accurate. Until the Ejido sells the property to a third party outright and complies with all the relevant requirements, the owner is still the Ejido.

432. *Fifth*, Respondent's observation that Mr. Román had Ejido rights is irrelevant. Mr. Román negotiated a commodatum with Mr. Jacquet to grant him access to land whose possession the Ejido had agreed belonged to Mr. Román. The fact that Mr. Román negotiated a lesser possessory interest with Mr. Jacquet proves nothing.

433. *Sixth*, the fact that Claimants are not Ejido members or "*avecindados*" is irrelevant. Respondent does not even attempt to explain how this could be a "red flag". The Agrarian Law does not prohibit private agreements by the Ejido or its members with parties outside the Ejido.[460]

434. *Seventh*, Respondent shows no evidence that the price negotiated between CETSA and Ejido member Lorenzo Novelo Pacheco – or the price paid by any other Claimant – was below

[458] Álvarez y Marín Corporación S.A. and others v. Republic of Panama, Caso CIADI No. ARB/15/14, Award, 12 Oct. 2018, RL-094, ¶ 340-41.

[459] *See* Second Report of Mr. Bonfiglio, ¶¶ 2-3.

[460] *See* Section VI.C.3, *supra*; *see generally* Second Report of Sergio Bonfiglio, Section I.

market at the time of the transaction. This is especially true considering that Claimants were among the first investors to arrive in the area, which as Claimants have testified was entirely desolate and remote.[461]

435. *Finally*, Respondent's allegation that Claimants failed to use counsel is completely unsupported by any evidence, and it contradicts the testimony and documents presented by Claimants.[462]

436. As a result, Respondent's comparison of the instant case with *Álvarez* actually shows that the two cases are entirely and fundamentally different. Indeed, a comparison of *Álvarez* to this case shows that Respondent's illegality objection is devoid of any merit and must be dismissed.

h. Respondent Fails to Prove that the Investments Were "Illegal"

437. For the above reasons, Respondent fails to show that the Investments were illegal. Respondent's "illegality objection" does not even cover Respondent's licenses and permits, the rights derived from their business formation documents, the Certificates of Possession issued by the Ejido, and the construction of the hotel and commercial facilities. With respect to the only asset it can attack, Claimants' contracts, Respondent's allegations of illegality are entirely irrelevant and unsupported. Under the law of Respondent, Claimants had no duty (or ability) to register their privately-negotiated contracts. Respondent's only remaining allegations regarding the contracts boil down to nothing more than the absence of a 30-year term limit clause and slight variations in geographic coordinates in those documents. None of these omissions survive

[461] *See* Section III *supra* (discussing the arrival of Claimants to the beachfront area of the Ejido).

[462] *See* Section III *supra* (discussing the testimony and evidence in the record showing that Claimants retained various attorneys throughout the establishment of their Investments).

proportionality because they are not serious or in bad faith, and they are entirely curable. Moreover, none of these objections survive an estoppel analysis because Respondent investigated and acknowledged the contracts multiple times over the course of a decade without ever placing any objections with Claimants until now. Respondent again comes nowhere close to meeting its (elevated) burden of proof for its illegality objection, and the Tribunal should dismiss it.

D. RESPONDENT FAILS TO PROVE ITS OTHER OBJECTIONS

1. Respondent's Abuse of Process Defense Fails Because *Hamaca Loca* Was an International Investment Under the Argentina BIT at All Relevant Times

a. Claimants' Position

438. Claimants' position on Respondent's abuse of process objection are as follows:

a. Respondent bears the burden of proving this jurisdictional objection.

b. Abuse of process is found when investors engage in "treaty shopping" to gain access to arbitration. But none of the elements of "treaty shopping" are present here. The illegal seizure of HLSA's investment in *Hamaca Loca* never a purely domestic dispute. The business was owned by Swiss and Argentine investors during all relevant times.

c. Nor did the relevant nationality change after the dispute crystallized to take advantage of a more favorable BIT protection. HLSA and *Hamaca Loca* were cloaked within the protection of the Argentina BIT before, during, and after Respondent's investment protection breaches.

b. Respondent's Position

439. Respondent's position regarding its jurisdictional objection can be summarized as follows:

a. The *Hamaca Loca* investment are not protected under the Argentina BIT, and this claim constitutes an abuse of process.

b. Claimants do not support their theory that Hamaca Loca was an international investment under the protection of investment treaties.

c. The findings of abuse of process in cases like *Mihaly*, *Phoenix Action*, and *Philip Morris* are comparable to Mr. Sastre's interest in *Hamaca Loca*, so the Tribunal should likewise sustain this objection.

c. Respondent has Abandoned All Accusations of "Treaty Shopping" in this Objection

440. Respondent peppered its Memorial with claims that Mr. Sastre engaged in treaty shopping upon filing his Hamaca Loca claim. Perhaps after concluding that Respondent could identify no material advantage for this claim to be brought under the Argentina BIT over any other instrument, Respondent has erased all references to treaty shopping in its Reply. Yet Respondent still clings to a diminished "abuse of process" objection despite Claimant's evidence that Hamaca Loca was a foreign investment at all relevant times.

d. There Is No Abuse of Process Because Hamaca Loca Was an International Investment at All Relevant Times Under the Argentina BIT

441. Respondent points to *Mihaly*, *Phoenix Action*, and *Philip Morris* as comparable to this case. All three are easily distinguishable.

442. *Mihaly* involved the assignment of a treaty claim from a Canadian company to a U.S. company, so that the latter could file an ICSID claim against Sri Lanka. At the time, Canada was not a signatory to the ICSID Convention. The Tribunal ruled that this transfer was impermissible without Sri Lanka's consent, because the U.S. claimant could not create ICSID jurisdiction out of

thin air, *i.e.* from a dispute involving a Canadian company. Here, the original shareholders of HLSA and Hamaca Loca were of Swiss and Argentine nationalities. Either group of claimants enjoyed investment treaty protection and Respondent's consent to UNCITRAL arbitration.

443. *Phoenix Action* was already distinguished in Claimants' Counter-Memorial. Respondent argues that *Phoenix Action*'s analysis of *bona fide* versus bad faith investments is somehow relevant to this case. It is not. This investment was deemed to be in bad faith precisely because the claimant internationalized a purely domestic dispute. The Czech Republic took certain actions against two domestic companies. The owner of those companies fled the Czech Republic and obtained Israeli nationality.[463] He then created an Israeli company to buy the two Czech companies that he owned when he was a Czech citizen, well after the Czech Republic's actions against those companies. The owner then used his newfound Israeli nationality to initiate an investment treaty claim against the Czech Republic.[464] The tribunal held that the transaction to internationalize a crystallized domestic dispute to try to obtain ICSID jurisdiction was not a *bona fide* investment.[465]

444. Likewise, Claimants have already explained why *Philip Morris* is inapposite. There, the Australian subsidiaries at issue were owned by Philip Morris' Dutch parent company when its dispute arose with the Australian government.[466] There are *no investment treaties* between Australia and the Netherlands. Sometime after the dispute crystallized, the claimant undertook a corporate restructuring that reorganized the Australian subsidiaries under Philip Morris' Hong

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

[464] *Id.*

[465] *Id.* ¶ 142.

[466] 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.

Kong company.[467] Hong Kong did have a bilateral investment treaty with Australia at the time. Yet this claim was also held to be an abuse of process. The claimant restructured its investment *after* the dispute arose in order to seek access to BIT arbitration.

445. The twin facts underpinning the reasoning of *Phoenix Action* and *Philip Morris* are that (i) an investment with no investment treaty protection was subject to a dispute involving state action, and (ii) the investment was later transferred after the dispute crystallized to a foreign company that could claim treaty protection.

446. *Neither* of those essential facts exist here. First, the Hamaca Loca investment was subject to investment protection from the Argentina BIT during all relevant times (i.e. before, during, and after Respondent's breaching conduct, including the time of filing). Second, the assignment to Mr. Sastre in 2017 did not change its access to treaty protection. The original shareholders (including Argentine national Alvaro Urdiales) had access to investment arbitration under the Switzerland BIT and the Argentina BIT.

447. Likewise, Respondent tries to distinguish *Ryan and Schooner* by arguing that (i) those claims involved a transfer of shares between affiliated companies and (ii) Respondent did not contest jurisdiction over the subject matter of the dispute. Respondent's dismissal of *Ryan and Schooner* is strained.

448. First, the relationship between Claimant and its affiliated companies is not material to the Tribunal's decision. The assignment of assets and claims of an "effectively bankrupt" investment from one U.S. company to another U.S. company was valid, because the U.S.-Poland BIT's

[467] *Id.*

protections were ever-present.[468] The *Ryan and Schooner* tribunal rejected a comparison to *Phoenix Action* because those investors sought relief "by way of after-the event acquisition of assets *from non-protected investors* in order to obtain BIT protection."[469]

449. Second, the argument that Poland did not contest jurisdiction is both factually incorrect and irrelevant. The respondent in *Ryan and Schooner* argued four objections to jurisdiction, including the above *ratione personae* objection on the assignment of treaty claims. That tribunal denied this objection to assignment. And even if the host State had not contested jurisdiction, the reasoning underpinning *Ryan and Schooner*'s analysis would still be relevant here.

450. Respondent's argument against relying on *Africa Holding* hinges on three points (i) Mr. Sastre has not proven the legality of Hamaca Loca, (ii) the transfer to Mr. Sastre does not involve affiliated entities, and (iii) Mr. Sastre has not proven that the original investors could have brought claims on their own. Respondent's position misses the point.

451. Respondent's first point attacking the legality of Hamaca Loca is a non-sequitur. The merits (or lack thereof) of Respondent's illegality objection are addressed in section VI(C). The second point that Mr. Sastre's assignment does not involve affiliated entities is also irrelevant. *Africa Holding* did not turn on that issue at all. The tribunal instead found it was appropriate because the transfer "did not take place to gain access to international arbitration."[470] Respondent's

[468] 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, CLA-0106 ¶¶ 195-98.

[469] *Id.* ¶ 200 (emphasis supplied).

[470] African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo, ICSID Case No. ARB/05/21, Decision on Jurisdiction and Admissibility, 29 July 2008 ¶¶ 60, 63.

position ignores *Africa Holding*'s reasoning entirely by pretending the decision was reached on other grounds. It was not.

452. Respondent's third point goes too far when demanding that Mr. Sastre "prove" that the original investors could have brought their own claims. The record evidence is more than sufficient. Mr. Sastre has presented testimony and exhibits showing multiple references that HLSA's (Hamaca Loca's corporate owner) ownership structure was comprised of Argentine and Swiss shareholders. He has even tendered a copy of Mr. Urdiales' Argentine passport that confirms his nationality designation in the HLSA corporate records.

453. Respondent's weak objections do not outweigh the facts and law presented by Claimants. Respondent cannot point to a single provision of the Argentina treaty that prevents assignment to Mr. Sastre.[471] Nor does Respondent present competing facts to negate or even challenge Mr. Sastre's case-in-chief. HLSA and Hamaca Loca were foreign investments subject to the Argentina BIT at all relevant times. Mr. Urdiales was granted possession by the Ejido Commissariat, and was a shareholder of HLSA. And Mr. Urdiales was an Argentine national before, during, and after the moment of breach.

[471] In fact, the Argentina BIT allows Investors to bring Claims on behalf of companies formed in the host state that are the property of the Investor. It states that "El inversor de una Parte Contratante podrá, por cuenta propia o en representación de una asociación, sociedad o empresa de la otra Parte Contratante que sea una persona jurídica de su propiedad o bajo su control directo o indirecto, de acuerdo a las leyes y reglamentaciones de las Partes Contratantes, someter una reclamación a arbitraje, cuyo fundamento sea el que la otra Parte Contratante ha incumplido una obligación establecida en el presente Acuerdo." ("The investor of a Contracting Party may, on his own account ***or on behalf of an association, society or company of the other Contracting Party that is a legal person owned or under his direct or indirect control***, in accordance with the laws and regulations of the Contracting Parties, submit a claim to arbitration, the basis of which is that the other Contracting Party has breached an obligation established in this Agreement." (translation by counsel). Argentina-Mexico BIT, Annex Art. 1.

Here, HLSA is a "company of the other Contracting Party [Mexico]" that is "owned or under the direct or indirect control" of Mr. Sastre. Thus, Mr. Sastre's HLSA claims are permitted under this provision.

454. After abandoning its wayward "treaty shopping" claim, Respondent cannot meaningfully distinguish *Ryan and Schooner* and *Africa Holding* which plainly allow the assignment of treaty claims under these facts. Nor can Respondent point to any cases other than textbook treaty shopping examples (i.e. a post-dispute change of nationality to gain BIT protection when none existed before). Nor does Respondent present any facts that challenge Mr. Sastre's showing.

455. Because Respondent falls well short of its burden of proof here, the Tribunal should dismiss this jurisdictional objection.

2. Respondent's Prescription Period Objections Fail Because the Limitations Period Had Not Expired Before the Date of Filing

a. Claimants' Position

456. Claimants' position on the prescription period objection can be summarized as follows:

a. Respondent bears the burden of proving this jurisdictional objection.

b. The prescription period in the Argentina BIT is four years, beginning on the date when the investor knew or should have known about both (i) the host State's treaty violation, and (ii) the damages.

c. Mr. Sastre knew he suffered damages on 31 October 2011 when his hotel investment was seized. But the record evidence shows he did not know that Respondent's treaty violations were responsible for those damages until no earlier than 2015. Respondent has proffered ***no evidence*** showing that Mr. Sastre knew or should have known that Respondent's breaching conduct caused the taking of his hotel.

d. Because the four-year prescription period did not commence until 2015 at the earliest, Mr. Sastre's Notice of Arbitration dated 29 December 2017 was timely filed.

b. Respondent's Position

457. Concerning the prescription period requirements in the Argentina BIT:

a. Respondent argues that only Mr. Sastre's denial of justice claims against amparo courts meet the prescription period requirement.[472] However, Respondent does not explain why such claims would be excluded concerning the amparo court's conduct.[473]

b. The prescription period expired for Mr. Sastre's criminal complaints because they were filed in 2008 and 2011.[474]

c. The prescription period for the breaches by Respondent's government officials expired because there is "no evidence … that Sastre did not know or should not have known" of the breaches, and "Mr. Borge could not have been a factor" in the judicial proceedings leading to the takings.[475]

d. Mr. Sastre had actual or constructive knowledge of the mercantile proceedings originating in the state of Jalisco because he was ousted by the court representative the day he appeared on the premises.[476]

c. Denial of Justice Cannot Be Limited to the Amparo Proceedings, Because It Is a Systemic Claim

458. Respondent tries to limit Mr. Sastre's denial of justice claim by asserting that the initial commercial court and criminal complaint investigations are separable from the subsequent *amparo* proceedings. Respondent insists that the Tribunal only has jurisdiction to consider the latter for

[472] Resp. Reply ¶¶ 364-66.

[473] Respondent appears to contradict itself when it admits that the measures by the amparo court are within this Tribunal's jurisdiction (which could presumably include claims for FET, FPS, and unlawful expropriation). Resp. Reply ¶ 369.

[474] Resp. Reply ¶ 371

[475] Resp. Reply ¶¶ 373-74

[476] Resp. Reply ¶ 368

denial of justice, because the other proceedings fall beyond the prescription period. Respondent's view is misguided.

459. A denial of justice claim must evaluate Respondent's judiciary as a whole. One of the fundamental cornerstones of denial of justice jurisprudence is that specific judicial acts or judgments cannot be independently scrutinized in a vacuum.[477] Rather, as Paulsson explains, denial of justice is a systemic claim.[478]

460. This is because, under public international law, a state generally cannot be held responsible for a single errant court ruling. A national judiciary system must be given every opportunity to correct any material legal errors, particularly when the rights to procedural and substantive due process are challenged.

461. Here, Mr. Sastre alleges that Respondent's officials, along with private actors, engineered sham lawsuits as a pretense to illegally deprive Mr. Sastre of his investments. Mr. Sastre was not given any due process, and was not even aware of the court action or the default judgment until 31 October 2011 when he was forcibly removed from *Tierras del Sol*. Mr. Sastre then challenged the legality of his ouster by seeking amparo relief, which the Mexican courts dismissed with finality in 2015. Respondent has not presented any evidence to challenge these allegations. In any event,

[477] *See, e.g.*, Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador II, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018 ¶ 8.40 ("The Tribunal emphasizes that the legal test for denial of justice requires…the failure by the 'national system as a whole to satisfy minimum standards.'"); Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award, 8 April 2013 ¶ 345 ("In a claim for denial of justice, the conduct of the *whole judicial system* is relevant….") (emphasis supplied).

[478] Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW at 107-09 (Cambridge Univ. Press 2005), CLA-0130

the Higgins test prescribes that merits-related allegations must be given a presumption of truth at this jurisdictional phase of the proceedings.

462. It was not only proper—but required—for Mr. Sastre to exhaust all reasonable opportunities for amparo relief before bringing his denial of justice claim. Respondent's theory that only certain judicial actions fall within Mr. Sastre's denial of justice claim clashes with the vast denial of justice jurisprudence.

d. Respondent Presents No Evidence Showing that Mr. Sastre Knew of a Treaty Breach Before 2015

463. Respondent next argues that Mr. Sastre should have known about the "commercial proceedings" by 31 October 2011, the night he was forced out of his property. Thus, Respondent contends that his knowledge of the physical taking and the court judgment in 2011 automatically triggered the four-year prescription period, which would have expired on October 2015.

464. Respondent continues to misread the essential prescription period elements in the Argentina BIT. The period begins to run only after an investor has (i) knowledge of damages, ***and*** (ii) knowledge of Respondent's breach:

> The investor must file a claim in accordance with this Agreement, as soon as he has knowledge of the alleged breach, as well as of the 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.[479] [translation by counsel]

[479] Argentina-Mexico BIT, Annex Art. 1 ("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.")

465. Respondent's contention that "there is no evidence…that Sastre did not know or should not have known" of the breaches is belied by the record. Mr. Sastre testified that he thought his property was taken from a private action initiated by a private party—Carlos Gonzalez Nuño. He did not know of Respondent's treaty breach (*i.e.*, malfeasance by Respondent's agents) until news reports of the Borge administration's misdeeds involving *ejido* lands in Tulum were reported on or around 2015.

466. If anything, it is *Respondent* who lacks evidence to sustain this objection. Respondent presents no evidence that shows Mr. Sastre knew of the government's breaching activity at any time before 2015. Nor does Respondent point to any evidence already in the record that supports its theory that Sastre should have known back in 2011 about Respondent's complicity in the taking of the Tierras del Sol and Hamaca Loca hotel investments. In fact, the record evidence shows only that the first investigative articles about the Borge administration's illegal land schemes were published in 2015. But Respondent presents no new evidence to prove any part of its contrary argument.

467. Respondent instead quibbles about minor facts regarding disgraced former Governor Borge. Respondent notes that (i) his illicit activities consisted of "dubious labor lawsuits" and not the other type of sham lawsuits that victimized Mr. Sastre, and (ii) Borge could not have been part of the 2011 action against Mr. Sastre because he started his term as governor after the fake lawsuit commenced.

468. These facts do not save Respondent's objection. First, Governor Borge's (and other state and local officials') infamous use of "dubious labor lawsuits" as reported by domestic and international media outlets, logically does not (and did not) preclude those same government

officials from committing other judicial and executive abuses of power, including the separate offenses for which Borge was eventually indicted by Respondent.

469. Second, it is undisputed that Governor Borge was in power when the 2011 judgments were rendered and executed upon, leading to the first of many waves of land seizures orchestrated by Borge and his administration.

470. Third, Respondent again seeks to improperly challenge Claimants' merits-related allegations concerning the Borge administration's (and Respondent's) various treaty breaches during the jurisdictional phase. Respondent cannot now attack those same merits allegations without the benefit of full briefing by the Parties. In accordance with the Higgins test, all merits-related allegations are taken as true during this jurisdictional phase.

471. Mr. Sastre has presented substantial evidence showing that his denial of justice claim which crystallized in 2015 was timely filed in 2017, well before the four-year prescription period. In any event, Mr. Sastre had no knowledge (nor could he have known) of Respondent's complicity in the loss of his investments until sometime in 2015. Once Mr. Sastre was aware of Respondent's connivance, he timely filed his consent to arbitration.

472. Finally, Respondent argues that Mr. Sastre can only bring a claim for denial of justice in relation to the federal amparo proceedings. This is groundless. Respondent provides no evidence to suggest why Mr. Sastre's treaty claims regarding the amparo proceeding must be limited in that way. For example, Mr. Sastre can bring judicial expropriation claim concerning the amparo proceedings, and this claim would fall within the Treaty's prescription period.

e. Respondent Presents no Evidence to Show that its Full Protection and Security Obligations Ceased to Exist on the Date of Mr. Sastre's Criminal Complaints

473. Respondent alleges that the only claim that Mr. Sastre can bring is a denial of justice claim for the amparo proceedings. Respondent again forgets its full protection and security ("**FPS**") obligations. FPS is a due diligence obligation on Respondent. Respondent's position assumes incorrectly that its obligation to investigate Mr. Sastre's criminal complaints ceases on the day Mr. Sastre filed his criminal complaints. Nonsense. As Claimants will show in the merits phase of this proceeding, Respondent has a continuing duty to investigate such complaints under the FPS standard.

474. Because Respondent has failed to meet its burden for its prescription period objections, the Tribunal should dismiss them.

VII. REQUEST FOR RELIEF

475. 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.

Respectfully submitted,

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