BEFORE THE HONORABLE TRIBUNAL ESTABLISHED UNDER CHAPTER XI OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA).

MARIO NORIEGA WILLARS
(CLAIMANT)

C.

UNITED MEXICAN STATES
(RESPONDENT)

(ICSID Case No. ARB/23/29)

MEMORIAL ON JURISDICTION

FOR THE UNITED MEXICAN STATES:
Alan Bonfiglio Ríos

ASSISTED BY:

Ministry of Economy
Alejandro Rebollo Ornelas
Geovanni Hernández Salvador
Rafael Rodríguez Maldonado
Sergio Alonso Patiño Reyes
Elizabeth Moctezuma Barreto
Rosa María Baltazares Gómez
Jesús Alberto Galván Madrigal

Pillsbury Winthrop Shaw Pittman LLP
Stephan E. Becker
Gary J. Shaw
Carolina Plaza

June 06, 2025

CONTENT

GLOSSARY

Abbreviation	Complete name
GATS	General Agreement on Trade in Services.
CFCM	Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V.
ICSID	International Centre for Settlement of Investment Disputes.
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
Commission or CNIE	National Commission on Foreign Investment.
Concession	"Concession with respect to the Chiapas and Mayab general railroad communication routes," issued by the Federal Government through the SCT in favor of Compañía de Ferrocarriles Chiapas Mayab S.A. de C.V., on August 26, 1999.
Consorcio	Consorcio de Desarrollo Intercontinental, S.A. de C.V.
[redacted]	[redacted]
Call for Bids	Call for bids with respect to the concession for the operation and exploitation of the short Chiapas and Mayab railroads and the rendering of the public railroad transportation service in the same, published in the DOF on March 24, 1999.
VCLT	Vienna Convention on the Law of Treaties.
Respondent, Mexico or Mexican State	United Mexican States.
Claimant or Mr. Willars	Mr. Mario Noriega Willars.
DOF	Official Gazette of the Federation.
LGSM	General Law of Mercantile Corporations.
Railroad Law	Regulatory Law of the Railroad Service.
LIE	Foreign Investment Law.
Railroad Regulation	Railroad Service Regulation.
LIE Regulation	Regulation of the Foreign Investment Law and the National Registry of Foreign Investments.
RNIE	National Registry of Foreign Investments.

SCT	Ministry of Communications and Transportation.
SICT	Ministry of Infrastructure, Communications and Transportation.
[redacted]	[redacted]
[redacted]	[redacted].
NAFTA or Treaty	North American Free Trade Agreement.
USMCA	Treaty between the United Mexican States, the United States of America and Canada.
Viabilis	Viabilis Holding, S.A. de C.V.

I. INTRODUCTION

1. Pursuant to Procedural Order No. 3 and the amended procedural calendar, Respondent submits this Memorial on Jurisdiction, demonstrating that the Tribunal lacks jurisdiction to hear this arbitration.

2. On June 29, 2023, Mr. Willars filed a Request for Arbitration on behalf of himself and on behalf of Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V. (CFCM) against the Mexican State. Subsequently, on December 5, 2024, he filed Claimant's Memorial, claiming to be a U.S. national[1] and alleged shareholder of CFCM.[2]

3. Mr. Willars has attempted to feign the Tribunal's jurisdiction under the North American Free Trade Agreement (NAFTA). However, his narrative contains serious and non-curable defects that preclude upholding the Tribunal's jurisdiction.

4. Thus, Respondent raises three objections to the Tribunal's jurisdiction.[3]

5. *First*: Claimant has not shown that he had ownership or control over CFCM at the time of the alleged breach of NAFTA or at the time of the initiation of the arbitration. The evidence demonstrates that its ownership interest in CFCM materialized only after the *rescate* declaration was issued. In an attempt to justify his standing, Claimant presents a narrative intended to artificially increase his shareholding in CFCM and demonstrate purported ownership and control over CFCM. However, the evidence presented by Claimant points to the contrary: his direct interest in CFCM is less than 16.38%, and his alleged indirect interest comes from Viabilis Holdings, S.A. de C.V. (Viabilis), an entity that he neither owns nor controls. Ownership and control cannot be divided or assumed by association. Accordingly, this Tribunal lacks jurisdiction under NAFTA Article 1117.

---

[1] Claimant's Memorial, ¶¶ 207, 208, 214.

[2] Claimant's Memorial, ¶ 19 ("Mr. Willars owns a 51.76% majority ownership interest in CFCM. That interest is exercised through: (i) ownership, in his personal capacity, of 16.38% of the outstanding shares of CFCM; and (ii) ownership of 48% of the outstanding shares in Viabilis Holding, S.A. de C.V., which owns 73.71% of the outstanding shares of CFCM.").

[3] These objections correspond to the Fifth, Sixth and Seventh objections, respectively, of the Request for Bifurcation. *See* Request for Bifurcation, ¶¶ 78-124.

6. *Second*: Claimant acquired his purported investment in violation of Mexican law by failing to obtain the required governmental approval for his foreign participation in CFCM—an entity he claims to control—under the Foreign Investment Law (LIE), the Regulatory Law of the Railroad Service (Railroad Law) and the Concession regarding the Chiapas and Mayab General Railroad Communication Lines (Concession). In addition, Claimant failed to notify the Mexican authorities of such participation, and didn't provide a single contemporaneous document evidencing his participation. To be clear, the State first learned of Mr. Willars' alleged investment only after he filed the Notice of Intent in 2023. To justify this omission, Claimant misrepresents the applicable legal framework and qualifies his breach as "trivial", when in fact it is a substantial breach, which strengthens Respondent's First Objection (the lack of ownership and/or control that Mr. Willars claims to have over CFCM). The rules transgressed share the purpose of the NAFTA: to facilitate foreign investment under legal and transparent conditions. Consequently, an investment acquired in open contravention of the law cannot benefit from the protection of the treaty.

7. *Third:* Claimant expressly agreed to consider himself Mexican with respect to his investment in CFCM, Viabilis and the Concession, and waived his right to invoke the protection of the U.S. Government, including under NAFTA Chapter 11. This agreement is valid and enforceable under Mexican law and the principle of *pacta sunt servanda*. Having entered into such agreement, Claimant cannot now disregard it in order to take advantage of his U.S. nationality to bring claims related to the Concession. Claimant attempts to minimize such obligation set forth in CFCM's By-Laws as a mere waiver of "diplomatic protection." However, the truth is that the commitments made were material and essential to his participation in CFCM and the Concession. Accordingly, the Tribunal lacks jurisdiction.

8. Respondent reserves the right to raise additional jurisdictional objections if the dispute proceeds to the merits of the case. Finally, Respondent requests the Tribunal to dismiss this ICSID Case No. ARB/23/29 with an award of costs in favor of the Mexican State.

II. FACTS

A. Commercial Legislation

1. Regulation of Corporations

9. Both CFCM and Viabilis are Sociedades Anónimas (S.A.). Therefore, it is important to present the general legal framework governing S.A.s.

10. S.A.s. in Mexico are mainly regulated by the General Law of Mercantile Corporations (LGSM).[4] This corporate form is one of the most widely used in domestic and international commerce due to the characteristics conferred by law, including the limitations on liability of the partners and the possibility of transferring their shares, subject to the restrictions set forth in the by-laws.

11. Pursuant to Article 87 of the LGSM, the capital stock of an S.A. is divided into fixed capital and variable capital shares, and the shareholders are only obliged to pay their contributions.[5] This means that the identity of the shareholders is, in principle, separate from that of the S.A.

12. The shares represent portions of the capital stock of the S.A. and confer upon their holders' economic rights (for example, receiving dividends) and corporate rights (for example, participating in the company's decisions), unless the by-laws provide specific restrictions for certain shares.

2. Sale of shares and share register in a S.A.

13. The shares of an S.A. are transferable, unless the by-laws or the articles of incorporation establish restrictions on their transfer.[6] Pursuant to Article 128 of the LGSM, all S.A.s. must keep a share registry, in which the following must be recorded: *i)* the name, nationality and domicile of each shareholder; *ii)* the types of shares owned; *iii)* the series and number of the shares; and *iv)* the transfers (or sales) made.

14. In order for the transfer of shares to be effective against the S.A., it must be recorded in the share register, which must be kept by the company itself.[7] In other words, a private contract between the parties transferring ownership of shares is not sufficient. Such registration has declarative effects vis-à-vis the S.A. and its organs. Therefore, until such registration is made, the transferor of the shares will continue to be a shareholder of the S.A. for all legal purposes, including the participation in meetings and the right to dividends.[8]

---

4 General Law of Mercantile Companies (LGSM). **R-0001.**

5 Article 87, LGSM. **R-0001.**

6 Articles 111 y 128, LGSM. **R-0001.**

7 In addition to the share register ledger, every S.A must have of minutes of meetings, a book of meetings of the board of directors and a book of capital variations.

8 Article 129, LGSM. **R-0001.** ("The company will consider as owner of the shares the person who appears registered as such in the registry referred to in the preceding article").

15. As explained in Section II.E.2, Claimant's acquisition of the CFCM shares was not recorded in the company's Share Registry until after the alleged breach of the NAFTA occurred in July 2016.

B. Foreign Investment Lay and Regulation of the Foreign Investment Law

16. Mexico's foreign investment policies have historically been a strategic component to foster economic growth, promote technological development and strengthen the country's competitiveness. In response to the trade liberalization process initiated in the 1980s and the need to establish a clear and reliable regulatory framework in accordance with Mexico's international commitments, the LIE was enacted on December 27, 1993.[9]

17. This legislation replaced the previous regime characterized by more severe restrictions, and it established the basis for regulating the participation of foreign capital in national economic activities, while guaranteeing the Mexican State's sovereign control over strategic sectors.

18. As a result, the LIE was created. The LIE is a law of public order and of general observance throughout the country, which means that it is mandatory for all persons, national and foreign. The purpose of the LIE is to "determine the rules for channeling foreign investment into the country and to encourage investment that contributes to national development."[10] The LIE establishes the economic sectors in which foreign investment is allowed in Mexico, the limits of foreign investment participation, and its regulation.

19. With the entry into force of the LIE, the need arose for a body to evaluate, authorize and supervise certain foreign investment projects in sectors considered sensitive to national security or the public interest. Thus, the National Commission on Foreign Investment (Commission or CNIE) was created as a collegiate body of a consultative and decisional nature whose main function is to analyze and decide on the participation of foreign investors in reserved activities or activities with limited participation as established by law. This Commission is chaired by the Ministry of

---

[9] Official Gazette of the Federation (DOF). Decree Promulgating the LIE, 27 December 1993. **R-0005**.

[10] Article 1, LIE. **R-0003**.

Economy and involves the participation of various agencies and entities of the federal public administration.[11]

20. In addition, the National Registry of Foreign Investment (RNIE) was established as a mandatory administrative unit intended to provide systematized, updated and verifiable information on the performance and evolution of foreign investment in the country. This Registry allows the government to collect data on direct investments, trusts with foreign participation and other forms of foreign capital, facilitating the design of evidence-based public policies and compliance with international obligations regarding transparency and statistics. The RNIE is subordinated to the Ministry of Economy, particularly to the General Directorate of Foreign Investment.[12]

21. The Regulation of the Foreign Investment Law and the National Registry of Foreign Investments (LIE Regulation) was published in the DOF on May 27, 1998.[13] Its creation responded to the need to establish clear rules and specific administrative procedures that would allow the correct application of the LIE.[14]

22. The purpose of the LIE Regulations is to regulate acts related to foreign investment in Mexico, particularly with respect to the registration, updating, filing of notices and cancellation of registrations in the RNIE, as well as the obligations of foreign investors to provide information and the conditions under which they may participate in reserved or restricted sectors.

1. Non-compliance with the Foreign Investment Law and the Regulation of the Foreign Investment Law

23. The Claimant has failed to comply with the applicable foreign investment regulations.

24. Assuming that Claimant has a controlling interest in CFCM directly and indirectly, as he alleges, then, by allegedly controlling CFCM and Viabilis, Claimant had an obligation to ensure

---

11 Article 24, LIE. **R-0003**.

12 Article 30, LIE Regulation. **R-0003**.

13 DOF. Decree Promulgating the LIE Regulation, 27 December 1993. **R-0005**

14 Under the Mexican legal system, as in other legal systems, some laws have regulations that provide further clarification. Laws and regulations are both legal norms, but the main difference is that laws take precedence over regulations.

their compliance with domestic regulation. Both companies had, and continue to have, two main obligations under the LIE.

25. *First*, Claimant had a duty to cause CFCM to obtain a favorable resolution from the Commission approving its shareholding in accordance with Article 8 of the LIE. *Second*, pursuant to Article 32 of the LIE, CFCM and Viabilis should have been registered in the RNIE, given Claimant's alleged participation in both companies as a foreign investor. Both requirements are essential to have foreign investment in Mexico, however, Claimant did not comply with either obligation.

26. Article 8 of the LIE establishes that a favorable resolution from the Commission is required when the percentage of foreign participation in certain economic activities is greater than 49%, for example, "the operation and exploitation of railroads that are general means of communication,"[15] as is the case of CFCM. Although not applicable in this case, Article 9 of the LIE separately requires a favorable resolution from the Commission when a foreigner intends to participate in a Mexican company, directly or indirectly, in a portion greater than 49% of its capital stock, but only when the total value of the Mexican company's assets at the time of the acquisition exceeds the amount determined annually by the Commission.

27. Articles 8 and 9 of the LIE apply in different situations, and the distinction is evident in the law. On the one hand, Article 8 requires that a favorable resolution be obtained from the Commission when the foreign investment participation in an enterprise engaged in a *particular* economic activity is greater than 49% (those listed in Article 8 itself). On the other hand, Article 9 applies to any Mexican enterprise in which foreign investment exceeds 49% of its capital stock, *regardless* of the economic activity carried out, as long as the total value of the enterprise's assets exceeds the amount determined annually by the Commission.

28. Claimant does not dispute that he did not obtain approval from the Commission after acquiring its alleged "51.76% majority ownership in CFCM."[16] Therefore, Claimant confirms that he did not comply with Article 8 of the LIE.

---

15 Section XII, Article 8, LIE. **R-0003**.

16 Claimant's Memorial, ¶ 19; Response to the Request for Bifurcation, ¶¶ 153-157.

29. Claimant alleges that he did not file an application for authorization with the Commission because it was not necessary, given that the value of his assets were less than the value determined by the Commission.[17] To justify this excuse, the Claimant points out that Article 8 "must be read in conjunction with the broader framework of the Foreign Investment Law, particularly article 9."[18] In Claimant's view, the asset limitation under Article 9 applies also to Article 8 of the LIE.

30. Claimant's interpretation is incorrect. As explained above, Article 8 of the LIE focuses on specific economic activities, and Article 9 focuses on the total value of assets, regardless of economic activity. The two articles function separately and should not be read together, as the Claimant argues.

31. Furthermore, the application of Articles 8 and 9 of the LIE is governed by Article 3 of the LIE Regulation. Said article establishes that the participation regime referred to in Article 9 of the LIE applies to companies that *do not* carry out reserved activities or activities subject to specific regulation (such as those referred to in Article 8, including the operation and exploitation of railroads), and that in the event that such activities are carried out, the provisions of Article 8 of the LIE shall be applicable.[19]

32. In addition to the approval required by Article 8 of the LIE when the foreign investment exceeds 49% in certain economic activities, Article 32 of the LIE requires that *all* Mexican entities with foreign investment must be registered in the RNIE.[20] To be clear, this registration requirement is separate from the requirement to obtain approval under Article 8 of the LIE.

33. Registration under Article 32 must be made within 40 business days following the participation of the foreign investor,[21] and in the event of cancellation due to the absence of foreign investment, such cancellation must be made within 40 business days following such occurrence.[22]

34. Title Eight of the LIE establishes a series of sanctions for non-compliance with the law and its regulatory provisions. These sanctions range from the revocation of authorizations to the imposition

---

17 Response to the Request for Bifurcation, ¶¶ 153-157.

18 Response to the Request for Bifurcation, ¶¶ 153-157.

19 Section II, Article 3, LIE Regulation. **R-0002.**

20 Articles 32 and 35, LIE. **R-0003.**

21 Subparagraph (a), Section I, Article 32, LIE. **R-0003**. Article 37, LIE Regulation. **R-0002.**

22 Article 40, LIE. **R-0003.**

of fines that can reach more than half a million Mexican pesos.[23] In this case, the failure to register and the lack of authorization from the Commission carry the economic sanctions set forth in Article 38 of the LIE.[24]

35. Claimant did not cause CFCM to comply with the requirements of the LIE. By way of context, on March 30, 1999, Genesee & Wyoming, Inc. the former shareholder of CFCM, applied for authorization for CFCM to register as a company dedicated to the operation and exploitation of railroads that are general communication routes.[25] On May 25, 1999, the Commission resolved in favor of CFCM the authorization of such economic activity, and thus allowed Genesee & Wyoming, Inc. to participate in CFCM in a percentage of 99.99%.[26]

36. On September 23, 2010, [redacted] on behalf of CFCM and after Genesee & Wyoming's withdrawal, requested the cancellation of the registration of such company before the RNIE. Since that moment, CFCM's registration has been cancelled, which means that it has had no foreign investors since 2010.[27]

37. If the shares of CFCM and Viabilis were subsequently acquired by a foreigner, as Claimant alleges, then CFCM and Viabilis had two obligations. First, CFCM was required to re-request the authorization of the Commission, prior to the entry of foreign investment in its capital stock in terms of Article 8 of the LIE. Secondly, CFCM and Viabilis were required to register its foreign participation with the RNIE pursuant to Article 32 of the LIE. Despite this, there is no evidence that either occurred, and to date none of these obligations have been complied with.

---

23 Articles 37-39, LIE. **R-0003.**

24 Article 38, LIE ("I.- In case the foreign investment carries out activities, acquisitions or any other act that for its performance requires approval from the Commission, without such resolution having been previously obtained, a fine of one thousand to five thousand salaries will be imposed" and "IV.- In case of omission, untimely compliance, submission of incomplete or incorrect information regarding the obligations of registration, report or notice to the Registry by the obligated parties, a fine of thirty to one hundred salaries will be imposed;"). **R-0003.**

25 Commission's Authorization, 25 May 1999. **R-0006**.

26 Commission's Authorization, 25 May 1999. **R-0006**.

27 National Registry of Foreign Investment. Request for cancellation of CFCM's registration in the national registry of foreign investment, September 23, 2010. **R-0004.**

C. Railroad Legislation

38. Railroad service is a priority economic activity for the Mexican State.[28] As a result of the constitutional reform published on February 23, 1995, a structural change was introduced in the legal regime applicable to the Mexican railroad system.[29] Through this reform, Article 28 of the Mexican Constitution was modified, expressly eliminating the railroads as a strategic area reserved exclusively to the State, which opened the possibility that the provision of the public railroad service could be concessioned to private parties.

39. Out of this constitutional reform, the Mexican Congress issued the Railroad Law, published on May 12, 1995 in the Official Gazette of the Federation (DOF).[30] This law, also of public order and mandatory observance throughout Mexico, established a new regulatory framework applicable to the provision of railroad services by private parties through concessions granted by the State. The Railroad Law precisely defined the conditions, modalities and limitations under which the State could grant concession titles, also regulating aspects such as the assignment of tracks, rights of way, interconnection between concessionaires and supervision mechanisms.[31] Subsequently, on September 30, 1996, the Railroad Service Regulation (Railroad Regulation) was published in the DOF, with the purpose of detailing and complementing the provisions of the Railroad Law.

40. The new legal regime resulting from this reform implied a change of paradigm, where the State was the sole provider of the service, to a concession model with the participation of the private sector under State control. From then on, private parties are allowed to operate the federal railroad infrastructure, considered a public property of the Nation, as long as they have the corresponding concession or permit (as per the case may be), under the terms set forth in the Mexican Constitution, the Railroad Law and the Railroad Regulation.

41. This regulatory change is fundamental to understand the conditions under which railroad concessions currently operate in Mexico, which includes both the powers and limits of the Mexican State with respect to their regulation, supervision, modification or eventual rescue, as well as the obligations of the concessionaires in the Mexican regulatory framework. In the same sense, it is

---

28 Article 1, Railroad Law. **CL-0013**

29 DOF. Decree reforming Articles 28, 73 and 123 of the Political Constitution of the United Mexican States, 20 August 1993. **R-0007**.

30 Railroad Law. **CL-0013**.

31 Railroad Regulation. **CL-0014**.

important to point out that concessionaires are subject not only to the Railroad Law, but also to the provisions of the concession title granted to them, as will be explained *infra*.

42. One of the terms set forth in the Railroad Law in harmony with the provisions of the LIE is the third paragraph of Article 17, which establishes that foreign investment may only exceed 49% of the capital stock of companies with railroad concessions upon approval from the Commission. Before issuing such resolution and consistent with the new legal regime, the Commission must evaluate whether the foreign investment safeguards national integrity and sovereignty.

43. Failure to comply with the limits set forth in Article 17 of the Railroad Law constitutes a cause for revocation of the concession, pursuant to Article 21 of the same law.[32] Article 21 establishes that any non-compliance with the obligations or conditions established in the Railroad Law, in the Railroad Regulation and in the concession title are causes for revocation of a Concession.

44. By means of agreements published in the DOF on June 29, 1989 and August 23, 1999, the Ministry of Comptrollership and Administrative Development transferred to the then-Ministry of Communications and Transportation (SCT)[33] the properties that constitute the general railroad communication routes Chiapas and Mayab, with the purpose that the SCT would grant the respective concessions and permits over such properties in accordance with the aforementioned legislation.

45. On March 24, 1999, the SCT published in the DOF a call for bids to grant the concession for the operation and exploitation of the short Chiapas and Mayab railroad tracks, and the rendering of the public railroad transportation service that would be carried out therein (Call for Bids). In accordance with the Railroad Law, this Call for Bids, among other matters, indicated in numeral 4.1 that foreign investment could participate in the capital stock of the concessionaire in excess of 49% only if it had the Commission's authorization.[34] Specifically, Condition 4.1 of the Call for Bids stated that:

---

32 Section III, Article 21. Railroad Law. **CL-0013**.

33 By virtue of the Decree amending several provisions of the Organic Law of the Federal Public Administration, published in the DOF on October 20, 2021, the name of the Ministry of Communications and Transportation was modified, among others, to Ministry of Infrastructure, Communications and Transportation (SICT). **R-0008**.

34 Call for Bids, Condition 4.1. **C-0032.**

> Foreign investment may only participate in the capital stock of the legal entity to whom the concession is granted, with a percentage greater than 49 percent if it has the respective authorization of the National Commission on Foreign Investment.[35]

46. On August 26, 1999, the Federal Government, through the SCT, granted CFCM the concession for the Chiapas and Mayab railroads for a term of 18 years.[36] The Concession, as well as the Call for Bids, contain a series of conditions, including the limits on foreign investment. Condition 4.3 of the Concession establishes that foreign investment may not exceed, directly or indirectly, 49% of the capital stock of the concessionaire, except in the case of an approval of the Commission, and in accordance with Article 8 of the LIE described *supra*.

47. In addition, Condition 4.4 of the Concession establishes that CFCM expressly undertakes not to invoke the protection of any foreign government under penalty of losing the rights under the Concession for the benefit of the Mexican Nation, which will be further discussed in this Memorial on Jurisdiction.

1. Non-compliance with the requirements for foreign investment participation in the capital stock of a Mexican company

48. Claimant not only failed to comply with Article 17 of the Railroad Law, but also with his obligations under the Concession. Assuming that Mr. Willars holds 51.76% of the shares of CFCM, he had an obligation to obtain approval from the Commission. Since he never obtained the approval of the Commission, as he has acknowledged, there is a clear breach of Article 17 of the Railroad Law. As a result, the Concession is subject to revocation under Article 21. Respondent noted this omission in its Bifurcation Request,[37] and Claimant did not respond to this point.

49. In addition, Article 221 of the Railroad Regulation requires concessionaires to transmit the Commission's resolution/authorization to the SCT, which, in the absence of such authorization, was also not complied with.

2. Failure to notify a change in the capital stock of CFCM

50. Claimant not only failed to comply with the obligation to request and obtain approval from the Commission (an obligation contained in the Railroad Law, in the LIE and in the Concession

---

35 Call for Bids, Condition 4.1. **C-0032.**

36 Concession, Condition 1.4.2. **C-0010**.

37 Request for Bifurcation, ¶ 86.

itself) but also failed to inform the SCT that he had purchased the shares. CFCM's shares changed ownership several times between 2015 and 2016, but the SCT was not notified of these changes.

51. It should be noted that, according to Article 17 of the Railroad Law and Article 220 of the Railroad Regulation, Claimant was required to cause CFCM to give notice to the SCT of any change in its share capital greater than 5%, whether they were direct or indirect shareholders.

52. According to Claimant, Mr. Willars directly and indirectly acquired far more than the 5% threshold of CFCM's shares. Moreover, according to Claimant, he has exercised control over CFCM since he acquired the shares.[38] Accordingly, Claimant had an obligation to cause CFCM to give notice to the SCT when a shareholder change took place.

53. This omission is particularly serious considering that the railway regulatory framework is intended to ensure that concessions which are administrative acts granted by the State in priority sectors remain under the control of persons or entities that comply with the legal, technical and financial requirements established for the sector's regulation. The lack of prior notification and authorization deprives the SCT of the possibility of exercising its supervisory and control function over the legal and operational integrity of the concessionaire, thus compromising its legality and safety in the provision of the public railroad service.

54. Claimant clearly violated the provisions of Article 17 of the Railroad Law[39] as well as the provisions of Article 220 of the Railroad Regulations[40] by not informing the SCT about the modifications in the shareholding structure that, according to Claimant, exceed the 49% indicated in both provisions. The SCT had no knowledge of the existence of the referred shareholding

---

38 Claimant's Memorial, ¶¶ 12, 18.

39 Article 17, Railroad Law ("[…] Concessionaires must notify the Ministry of any amendments made to their by-laws regarding early dissolution, change of corporate purpose, merger, transformation, or spin-off. Likewise, they must report any change in direct or indirect participation in the relevant capital stock when such participation is equal to or greater than five percent.") [Emphasis added]. **CL-0013.**

40 Article 220, Railroad Regulation ("Concessionaires shall give notice to the Ministry of the change in the participation in their capital stock, within 30 calendar days after it takes place, when such change is equal to or greater than five percent of their capital stock in one or more simultaneous or successive operations. The Ministry, at any time, may request information on the new shareholders and on the changes in the percentage of shareholding, when these are legal entities, on the indirect participation that is given through them.") [Emphasis added]. **CL-0014**.

change, and there is no evidence that the SCT was notified of such shareholding transfer, which demonstrates the absolute lack of compliance with the applicable legal and regulatory provisions.[41]

55. This non-compliance cannot be considered a simple formal defect. Rather, it affects the validity of the Concession, since the notification constitutes an essential requirement of legality for the shareholding transfers that imply a change in the control of the concessionaire company.[42]

D. Viabilis' Shareholders

56. Mexico clarified in the Bifurcation Request, and elaborates further below, that Claimant does not exercise the necessary control or sufficient ownership over CFCM to bring claims on behalf of CFCM under NAFTA Article 1117.

57. Claimant bases much of his response regarding his alleged control over CFCM through his alleged shareholding in Viabilis, which is why it is important to clarify the shareholding structure of this company.[43]

58. According to the Claimant's Memorial, Mr. Willars acquired 48% of Viabilis' shares from [redacted] on December 14, 2015, through a Share Purchase Agreement,[44] and as a result, apparently, Viabilis' shareholding structure was distributed as indicated in Exhibit **C- 0003** and below:

41 Article 17, Railroad Law. **CL-0013**. Article 220, Railroad Regulation. **CL-0014**.

42 Article 21, Railroad Law. **CL-0013**.

43 Response to the Request for Bifurcation, ¶ 130.

44 *See* Claimant's Memorial, ¶¶ 136-139.

NOMBRE	NACIONALIDAD	DOMICILIO	RFC	ACCIONES
Mario Noriega Willars	Estadounidense (Estados Unidos de América)	2 Cayahoga CT, The Woodlands, 77389, Texas	N/A	24
[redacted]				

Image 1 – Excerpt from Viabilis' Shareholders' Book, p.3**, C-0003**

59. According to Claimant, Viabilis' shareholding is distributed among three individuals, [redacted] with 50% of the shares, Mr. Willars with 48%, and [redacted] with the remaining 2%.[45] To illustrate this, the following diagram is presented:

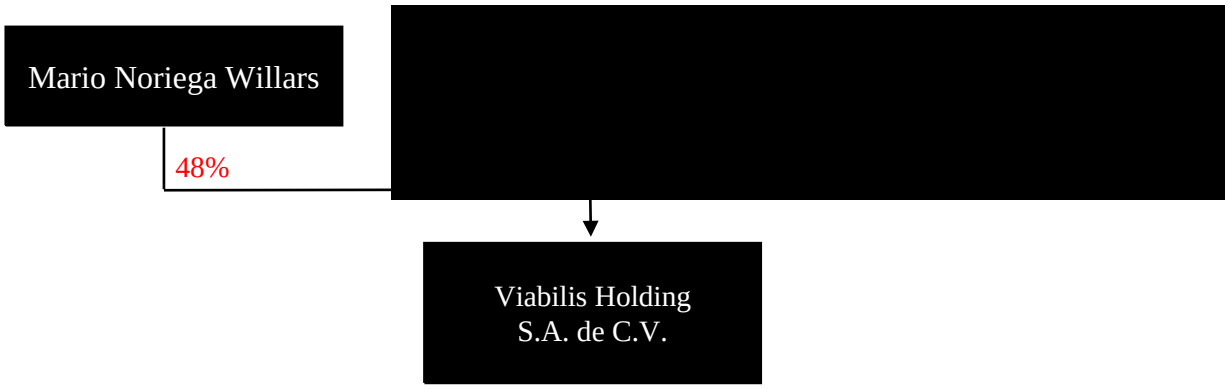

Table 1: Viabilis' Corporate Structure

60. Since [redacted] is the majority shareholder, with half of the shares of said company, her vote is necessarily required for Viabilis to perform any act. In other words, even if Claimant

[45] Shareholder's ledger of Viabilis, p. 3, **C-0003**.

alleges that he controls the votes of [redacted][46] both Claimant and [redacted] do not have the capacity to agree on anything without the participation of [redacted]

61. These facts are relevant because part of the alleged ownership or control that Claimant claims to have in CFCM is based on his shareholding in Viabilis. Since [redacted] owns half of the shares in Viabilis, the ownership or control that Claimant claims to exercise over Viabilis is shared, and, therefore, he cannot exercise corporate decisions on behalf of Viabilis unilaterally. This necessarily implies that Claimant has less ownership and control than he states.

62. Notably, in this arbitration, Claimant has not even presented a copy of the shares he purportedly owns.[47] Considering his complete failure to notify any authority of his shareholding in CFCM (which is confirmed by the lack of evidence in this regard), Mexico has serious doubts as to whether the Share Registers submitted by Claimant are authentic.

63. In this regard, it is worth emphasizing that the alleged purchase and sale of Viabilis' shares apparently made by Mr. Willars did not comply with the requirements set forth in Viabilis' Articles of Incorporation. Pursuant to Article 9 of the By-Laws, [redacted] had the right of first refusal (or "derecho del tanto") with respect to [redacted] shares. Under this provision of Mexican corporate law, [redacted] had a first right to purchase the shares in the event [redacted] decided to sell them.[48] The Mexican Supreme Court of Justice has explained that the "fundamental purpose" of the "derecho del tanto" is "to prevent the intrusion of an outsider into the community,

---

46 Response to the Request for Bifurcation, ¶ 131.

47 *See* Article 17, General Law of Credit Titles and Operations. ("Artículo 17.- The holder of a certificate is required to present it in order to exercise the right it embodies.") **R-0009.** Article 111, LGSM. ("The shares into which the capital stock of a corporation is divided shall be represented by registered certificates, which shall serve to evidence and transfer shareholder status and rights. Such certificates shall be governed by the provisions applicable to negotiable instruments, to the extent compatible with their nature and not otherwise modified by this Law.") **R-0001.**

48 Article 9, Viabilis' Articles of Incorporation, 23 October 2001. ("*The Shareholders shall have a preemptive right*, both to subscribe for new Shares that may be issued as a result of an increase in the capital stock, in proportion to the number of Shares they hold, as *in the case of a transfer of Shares*. In both cases, the Company, through the Board of Directors or the General Manager, as applicable, shall notify the shareholders so that they may exercise said preemptive right within a period of fifteen days.") [Emphasis added] **R-0010**.

avoiding a situation in which the participation of a third party in the jointly held property could create greater problems than those already inherent in the state of co-ownership."[49]

64. This is relevant because at no time has Claimant demonstrated that the alleged purchase and sale of Viabilis' shares complied with Article 9 of the Articles of Incorporation, since there is no evidence that these shares were first offered to [redacted] in accordance with her *derecho del tanto*.

E. CFCM

1. Corporate Statutes

65. Pursuant to CFCM's By-Laws, all foreign shareholders agreed to *i)* consider themselves as Mexican with respect to all of CFCM's operations,[50] including the Concession granted through the then SCT in favor of CFCM, and *ii)* waive the protection of their government with respect to the Concession, which includes the right to invoke the investor-State dispute settlement procedure under NAFTA and Annex 14-C of the USMCA. Clause 15 of the Articles of Incorporation provides as follows:

> Any foreigner who, at the time of incorporation or at any later time, acquires an interest or equity participation in the company shall, by that very act, be considered as a Mexican national with respect to such interest or participation, the assets, rights, concessions, holdings or interests held by the company, and the rights and obligations arising from contracts entered into by the company with Mexican authorities. It shall be understood that such foreigner agrees not to invoke the protection of his or her government, under penalty, in case of breach of such agreement, of forfeiting said interest or participation in favor of the Mexican Nation. [51]

66. This same commitment is also provided in Clause 2 of Viabilis' Articles of Incorporation, which establishes that:

> The Company shall be Mexican. The current or future foreign shareholders of this Company formally bind themselves before the Ministry of Foreign Affairs to be considered as nationals in respect to the shares of this Company that they acquire or hold, as well as the assets, rights, concessions, shares or interests owned by this Company, or the rights and

---

[49] Thesis 271250: "PREEMPTIVE RIGHT, PURPOSE OF." Sixth Era. Judicial Weekly of the Federation, Volume XL, Part Four, page 111. R-0011. The Supreme Court of Justice of the Nation is the highest court in Mexico, and its rulings may give rise to theses (which are guiding precedents) and jurisprudence (which are binding interpretative criteria and a source of law).

[50] Clause 15, CFCM's By-Laws, **C-0004.**

[51] Clause 15, CFCM's By-Laws, **C-0004**.

> obligations arising from contracts entered into by this Company with Mexican authorities, and therefore agree not to invoke the protection of their governments, under penalty, in the contrary case, of forfeiting to the Nation the equity participations they may have acquired.[52]

67. In 1999 Genesee & Wyoming, Inc., a U.S. company engaged in the railway industry,[53] unlike Claimant, incorporated CFCM.[54] CFCM was subsequently acquired by Viabilis and [redacted] in 2009.[55]

68. According to Claimant, after being presented by [redacted] with the opportunity to participate as a shareholder of CFCM, Mr. Willars, despite having no experience in the railroad industry, reviewed the relevant documentation and decided to commit to the project. As a result, on December 14, 2015, Mr. Willars supposedly acquired shares in CFCM.[56] At that time, under Mexican commercial law, Mr. Willars agreed to be bound by the provisions of CFCM's By-Laws.[57] Consequently, Mr. Willars must be considered Mexican with respect to his participation in CFCM—including the Concession—which consequently prohibits him from invoking the protections provided by NAFTA.

2. Register of Shareholders

69. Clause 6th of CFCM's Articles of Incorporation established the following:

> The certificates representing shares of the subscribed capital stock held by persons not included in the enumeration of Article 2, Section II of the Foreign Investment Law,[58] taking into account the provisions of Article 3 of the aforementioned law, shall constitute the "A" series shares, or Mexican shares, while the shares subscribed or acquired by the subjects referred to in Article 2, Section II of the said law shall constitute the "B" series shares, or

---

52 Article 2, Viabilis' Articles of Incorporation, October 23, 2001. **R-0010**.

53 American Journal of Transportation. Genesee & Wyoming Railroad anniversary: A 125th like no other, August 19, 2024. **CLEX-0015**.

54 CFCM's By-Laws, **C-0004.**

55 Communication from [redacted] on behalf of CFCM, to the SCT, 21 August 2009, **C-0100.**

56 Claimant's Memorial, ¶¶ 135-139.

57 Articles 6 and 92, LGSM. **R-0001**.

58 Article 2, Section II of the LIE is transcribed as follows: "Article 2.- For the purposes of this Law, the following definitions shall apply: […] II.- Foreign investment: a) The participation of foreign investors, in any proportion, in the capital stock of Mexican companies; b) Investment carried out by Mexican companies with a majority of foreign capital; and c) The participation of foreign investors in the activities and acts contemplated by this Law." **R-0003**.

> freely subscribeable shares, in which case the company must register with the National Registry of Foreign Investments.[59]

70. In this sense, the by-laws recognize the existing obligation for CFCM to register itself in the RNIE [60] regarding the participation of foreign investors in the company.

71. Furthermore, Clause 14 states that a transfer of shares will be valid once such transfer has been registered in the company's Share Registry:

> The company shall keep a Share Register Book in which all share issuances shall be recorded, as well as the name, address, and nationality of the holders thereof, whether the shares have been fully or partially paid, the payments made, and all transfers of shares. This register shall be kept by the company Secretary. Any transfer of shares shall be effective vis-à-vis the company as of the date such transfer has been entered in the company's Share Register. The Secretary shall be obliged to make the entries provided for in this clause. [61]

72. The Share Registry provided by the Claimant is incomplete because: *i)* it does not show the shareholding prior to the acquisition by Viabilis; and *ii)* it does not indicate whether the shares have been fully or partially paid, which is relevant for the purposes of the General Shareholders' Meeting of March 15, 2014, as explained in the following Section.

73. Moreover, CFCM's Share Registry demonstrates that the alleged share sale between [redacted] and Mr. Willars did not take effect until January 16, 2017, when this transfer was registered in the Share Registry, years after the *rescate* of the Concession. This demonstrates the lack of jurisdiction *ratione temporis* of this Tribunal, in addition to reinforcing the lack of legitimacy on the part of Mr. Willars,[62] since Claimant did not acquire his shares until January 2017, i.e., months after the alleged breach occurred in July 2016 when the declaration of *rescate* was issued.[63]

---

59 Clause 6, CFCM's By-Laws. **C-0004**.

60 *See* Article 32, LIE. **R-0003**. Article 38, LIE Regulation, **R-0002**. See also § II.B.

61 Clause 14, CFCM's Articles of Incorporation. **C-0004**.

62 Shareholder's ledger of CFCM, p. 4. **C-0002**.

63 *See,* for example. Vito G. Gallo v. Government of Canada, CPA Case No. 55798, Award, 15 September 2011, ¶¶ 325-326. ("[…] the Claimant must have owned or controlled [the investment at the time the measure which allegedly violates the Treaty was adopted]… the Claimant has failed to marshal the evidence necessary to prove such ownership and control at the relevant time, [hence] the necessary consequence is that his claim must fail for lack of jurisdiction ratione temporis.]"). **RL-0048**; *Westmoreland Mining Holdings, LLC v. Government of Canada*, ICSID Case No. UNCT/20/3**,** Award, January 31, 2022, ¶ 209 ("[Under] Articles 1101(1), 1116(1) and 1117(1), only the party which owned the investment at the time of the alleged treaty breach has jurisdiction ratione temporis to bring a claim…"). **RL-0049.**

74. In addition, the date the shares were registered demonstrates that since the alleged change in CFCM's shareholding occurred after the *rescate* was issued, the present claim was foreseeable to Claimant, as Claimant acquired its shares knowing that the *rescate* had been issued.[64] These changes in the structure of a company to access investment arbitration have been rejected by arbitral tribunals as an abuse of rights.[65] Scholars in the field support this principle as well.[66] The foreseeability of the investor-State claim is evident from the very documents provided by Claimant in this arbitration, which demonstrate that at least since 2016, compensation was claimed based on

---

[64] *See Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 554. **RL-0050.** *Vito G. Gallo v. The Government of Canada*, PCA Case No. 2008-03, Award, 15 September 2011, ¶ 327. ("…if the obtaining of control or ownership is made after the alleged breach of the Treaty, the acquired enterprise cannot be 'nursing a nascent NAFTA claim'…"). **RL-0048.**

[65] *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 539 ("… Under the case law, the abuse is subject to an objective test and is seen in the fact that an investor who is not protected by an investment treaty restructures its investment in such a fashion as to fall within the scope of protection of a treaty in view of a specific foreseeable dispute… if the dispute already exists, then a tribunal would normally lack jurisdiction ratione temporis") **RL-0050.** *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, 1 June 2012, ¶ 2.99 ("…In the Tribunal's view, the dividing-line [between legitimate restructure and an abuse of process] occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy...") **CL-0070.** *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶ 205 ("With respect to pre-existing disputes…the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute …. 'an abusive manipulation of the system of international investment protection under the ICSID convention and the BITs'.") **RL-0051.**

[66] *See, for example* Gaillard, E., *Abuse of Process in International Arbitration*, ICSID Rev. Vol. 32(1) (2017), p. 19-22. ("An investment treaty tribunal will lack jurisdiction ratione temporis where an investor who is not protected by an investment treaty restructures its investment in order to fall within the scope of protection after the date on which the challenged act of the host State occurred. Abuse of process will arise where a corporate claimant makes or restructures its investment in order to gain access to a dispute with the host State that is foreseeable but may not yet have crystallized…"). **RL-0052.** McLachlan C, Shore L. et al., Nationality, in Campbell McLachlan, Laurence Shore, et al., *International Investment Arbitration: Substantive Principles (Second Edition)*, Oxford International Arbitration Series, Volume (Campbell McLachlan, Laurence Shore, and Matthew Weiniger 2017; Oxford University Press 2017), ¶ 5.160 ("…if the restructuring occurs after the dispute has arisen, so that the investor may take advantage of access to an arbitration provision in a treaty, a tribunal may deem this restructuring to be a misuse of the treaty system and an abuse of process or of right, leading to a denial of jurisdiction…"). **RL-0053.**

the "mechanisms to calculate these compensations by the International Centre for Settlement of Investment Disputes (ICSID)".[67]

75. Mexico reserves the right to pursue this issue further at a later stage of the proceedings, if necessary.

F. Inconsistencies of the Shareholders

76. Respondent noted inconsistencies between what Claimant argues in this arbitration and what was contemporaneously indicated to Mexican authorities regarding CFCM's shares.[68] This is relevant as it affects the percentage of Claimant's shareholding in CFCM, which in turn relates directly to the dispute over Mr. Willars' ownership and control of CFCM.

77. Claimant argues that there is no inconsistency or contradiction in the evidence provided.[69] According to Claimant, the inconsistencies alleged by Mexico are fully explained by the fact that [redacted].[70]

78. However, Mexico has been able to confirm that [redacted]. As explained below, [redacted]. As a result, Claimant has less interest in CFCM than he claims to have.

79. Specifically, and according to Claimant, on March 15, 2014, CFCM [redacted][71] Claimant alleges that [redacted]

---

67 Communication filed on I December 1, 2016 by CFCM with the SCT, p. 17**, C-0017**. Nullity lawsuit filed on January 10, 2017 by CFCM before the Federal Court of Administrative Justice, p. 59, **C-0182.** *Amparo Directo* 175/2020 filed on March 13, 2020 by CFCM before the Federal Judiciary, p. 43, **C-0185**.

68 Request for Bifurcation, ¶¶ 88-93.

69 Response to the Request for Bifurcation, ¶ 139.

70 Response to the Request for Bifurcation, ¶ 145.

71 Response to the Request for Bifurcation, ¶ 141.

[redacted][73] According to the Claimant, [redacted][74].

80. Contemporaneous documents clearly indicate that Claimant's allegations are incorrect. For the Tribunal's clarity, Respondent explains [redacted].

81. According to the documents filed by Claimant's witness before the SCT on April 7, 2014, Mr. [redacted], the following can be concluded:

- [redacted]

  [redacted][76].

82. Based on this, on March 14, 2015, [redacted].

83. In fact, [redacted] clearly recognizes this:

> NINTH. As a consequence of the above, [redacted]

72 Response to the Request for Bifurcation, ¶ 141.

73 Response to the Request for Bifurcation, ¶ 145.

74 Response to the Request for Bifurcation, ¶ 145.

75 Seventh Resolution, Written submission of April 7 2014 of CFCM, p. 8. **C-0140**.

76 Eighth Resolution, Written submission of April 7 2014 of CFCM, p. 8. **C-0140**.

[…][77]

84. These . Thus, contrary to Claimant's assertion, .

85. As a result, **Exhibit C-0002**, prepared for this arbitration, has at least two problems: *i)* i .

86. Taking into account , CFCM's shareholding would be as follows from 2014 to date:

Shareholder	**Capital Stock in Exhibit C-0002**	**Percentage of Shares according to Annex C-0002**	**Capital Stock Exhibit C-0140**	**Percentage of Shares as per Exhibit C-0140**
Viabilis Holding, S.A. de C.V.		73.71%		56.383%
		16.38%		12.529%

[77] Ninth Resolution, Written submission of April 7 2014 of CFCM, p. 8, [Emphasis added]. **C-0140**.

Consorcio de Desarrollo Intercontinental, S.A. de C.V.	[redacted]	9.91%	[redacted]	19.331%
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Total	[redacted]	100%	[redacted]	100%

87. Claimant has not explained the differences pointed out by Respondent in its Request for Bifurcation,[78] among which are the following*: i)* Claimant has submitted in this arbitration documents that differ significantly from what was contemporaneously reported to the SCT; *ii)* the shareholding register submitted by Claimant in this arbitration completely ignores [redacted] in CFCM and [redacted] in CFCM; and *iii)* as a result, [redacted] shareholding percentage in CFCM would be 12.529%, not 16.38%; and Viabilis' shareholding percentage would be 56.383%, not 73.71%.

88. Based on the foregoing, and notwithstanding the fact that there is no evidence that Mr. Willars acquired shares of CFCM, much less that they have been formalized in compliance with the foreign and railway investment regulations, the alleged shareholding in CFCM would be as follows:

[78] Request for Bifurcation, ¶¶ 90-93.

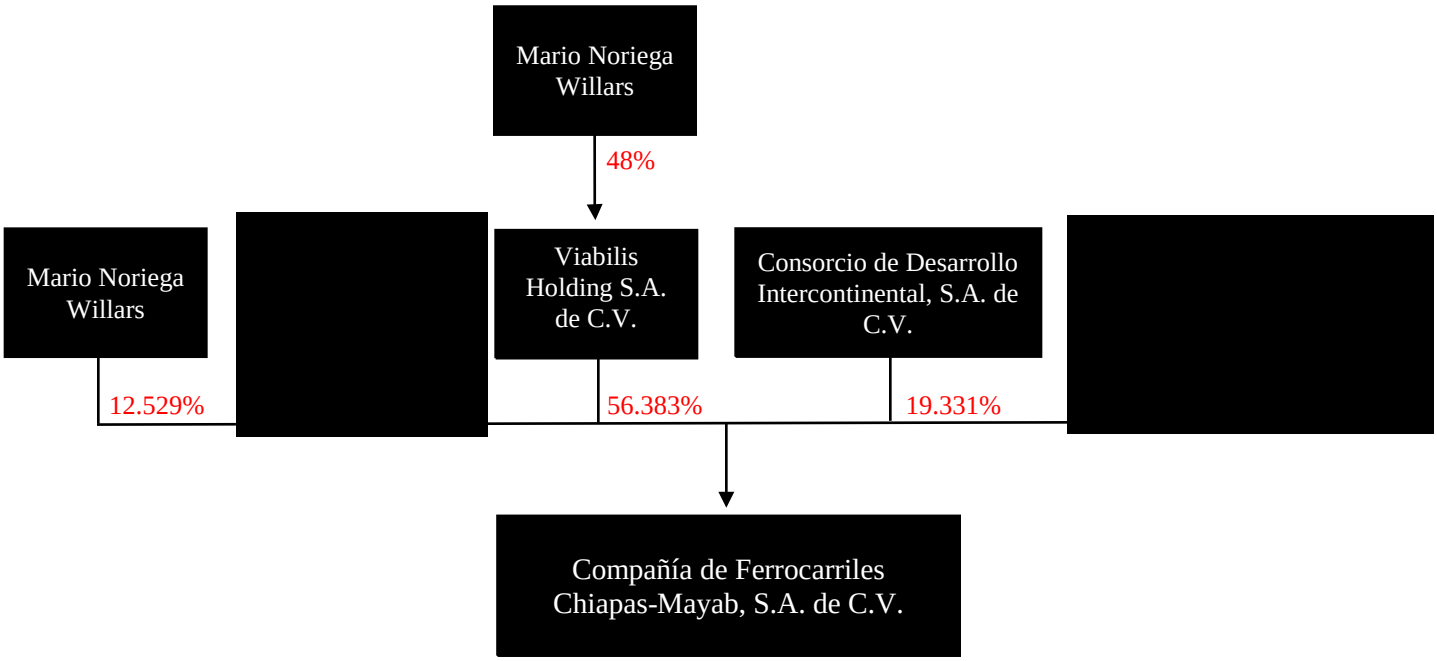

Table 2: CFCM Corporate Structure

89. As mentioned *supra*, these changes are relevant to the percentage of Claimant's shareholding in CFCM, and thus to the amount of control he exercises over CFCM. According to the Claimant's Memorial, Mr. Willars acquired his shares in CFCM on December 14, 2015, when he signed and executed a share purchase and sale agreement with [redacted] However, according to Exhibit C-0002, CFCM was only informed on January 16, 2017, that Mr. Willars was a shareholder of the company:[79]


Datos del nuevo accionista:

Mario Noriega Willars (nacional de ESTADOS UNIDOS DE AMÉRICA)
2 Cayahoga CT
The Woodlands
77389 Texas
Estados Unidos de América

Fecha del registro: 16 de enero de 2017

Image 2 – Excerpt from CFCM's Shareholder's Book, p.4, **C-0002.**

[79] Shareholder's ledger of CFCM, p. 4, **C-0002**.

90. Notwithstanding the fact that there is no evidence that Mr. Willars actually acquired those shares, much less their formalization before the SCT and the RNIE in accordance with the regulations on foreign and railway investment matters, [redacted] apparently sold [redacted] shares he held to Mr. Willars, granting him "a 16.38% direct interest in CFCM."[80] The reality is that the amount is lower because, as explained, [redacted] did not have a 16.38% interest in CFCM at the time of the purported sale; rather, [redacted] owned only 12.529%. Assuming that the purchase of [redacted] shares had occurred, based thereon, Claimant acquired shares of CFCM amounting to only 12.529%.

G. The relationship between the Claimant and [redacted]

91. In order for the Tribunal to have the necessary context to understand the claim raised by Claimant, it is necessary to provide an overview of [redacted]

92. [redacted] is a key figure in the Claimant's narrative. He owned 50% of Viabilis when he "assumed full control of CFCM" in 2009.[81] Moreover, when CFCM acquired the Concession, Viabilis and [redacted] were "known player[s] in the infrastructure sector in Mexico."[82] Both had previously acquired 50% of the shares of a concession for the construction and operation of a highway near Mexico City.[83]

93. Claimant refers to the Río de los Remedios road concession in its Memorial.[84] After [redacted] and [redacted] created Viabilis Infraestructura, S.A. de C.V., this company partnered with a subsidiary of Grupo ICA for the purpose of transferring the highway concession.[85]

94. In this regard, [redacted] was accused [redacted][86] The person who reported said event was [redacted] the other shareholder in Viabilis. In fact, she initiated various legal

---

80 Witness Statement of Sr. Willars, ¶ 30.

81 Claimant's Memorial, ¶ 77.

82 Claimant's Memorial, ¶ 68,

83 Claimant's Memorial, ¶ 68.

84 Claimant's Memorial, ¶ 68.

85 SDPNOTICIAS, "After losing the Chiapas-Mayab Railway, [redacted] is accused of dispossession", August 25, 2016, **R-0012**.

86 Crónica Global, "[redacted] is implicated in another fraudulent operation in Mexico.", March 24, 2016. **R-0013**.

proceedings in the United States against [redacted] to enforce her claim, including a case before the federal court in Florida in 2011.[87]

95. In addition, after the *rescate* in 2016, [redacted] made her allegations against [redacted] public.[88]

96. [redacted] has also been accused of diverting funds [redacted] for evasion purposes.[89]

97. Another press report comments as follows:

> [redacted].[90]

98. Whether or not these various allegations are true, [redacted] ongoing disputes with [redacted] and other controversies raise questions about the circumstances underlying the transfer of [redacted] shares to Mr. Willars; the failure to make proper formalizations of those transfers; and whether the shareholder changes were legitimate or made for other reasons. However, the Tribunal needs not to address these issues in order to decide on the Respondent's jurisdictional objections.

---

[87] Verified Complaint, [redacted] *v.* [redacted], *S.A.B de C.V.*, No. 1:11CV23898, ECF No. 1, (S.D. Fla. October 28, 2011) (dismissed for *forum non conveniens*). **R-0014**.

[88] Quadratin, "Viabilis Holding Partner Distances Herself from Complaint Against Head of SCT," October 25, 2016. **R-0015**. [redacted] *in* [redacted] Decl., Attach 1 to Pl.'s Mot. For Recons., [redacted] *v.* [redacted], *S.A.B. de C.V.*, No. 1:11CV23898, ECF No. 132, at ¶ 12 (S.D. Fla. November 14, 2013) (dismissed for *forum non conveniens*). **R-0016**. *See also* Ex. 2 to [redacted] Decl., Attach 1 to Pl.'s Mot. For Recons., [redacted] *v.* [redacted], *S.A.B. de C.V.*, No. 1:11CV23898, ECF No. 132 (S.D. Fla. November 14, 2013) (dismissed for *forum non conveniens*). **R-0016**.

[89] Entérate México, "[redacted] brother-in-law, a trusted associate involved in money laundering operations," April 4, 2016. **R-0017.**

[90] Impacto.mx "[redacted]", April 3, 2016; *in* Pl.'s Resp. to Def.'s Mot. to Dismiss Am. Compl. & to Strike Req. for Att'y's Fees, [redacted] *v.* [redacted], *S.A.B de C.V.*, No. 2017-015382-CA-01, at p. 85, (Fla. 11th Cir. Ct. Aug. 14, 2018). **R-0018**. In fact, this same company, Villa Rey, is mentioned by the Claimant himself in his testimony. Mr. Willars's Witness Statement, ¶¶ 7-8.

III. THE TRIBUNAL LACKS JURISDICTION TO HEAR THIS DISPUTE

99. As explained in the Request for Bifurcation, the Tribunal lacks jurisdiction over claims brought on behalf of CFCM because the Claimant (A) does not have standing to bring a claim on behalf of CFCM, due to lack of ownership and control over the company. In addition, the Tribunal lacks jurisdiction over all claims because the Claimant (B) failed to comply with Mexican law when he acquired its investment and (C) the Claimant agreed to consider itself Mexican in relation to its shareholding in CFCM and the Concession, and further agreed not to invoke the dispute resolution mechanism under NAFTA. Respondent addresses each of these issues below.

A. The Claimant does not have legal standing to bring a claim under NAFTA Article 1117 on behalf of CFCM.

100. To establish its standing, the Claimant must demonstrate that he owns or exercises control over CFCM, either directly or indirectly, as the Claimant has acknowledged.[91] NAFTA Article 1117 explicitly states that:

> 1. An investor of a Party, on behalf of an enterprise of another Party *that is a juridical person that the investor owns or controls directly or indirectly*, may submit to arbitration under this Section a claim that the other Party has breached an obligation under […][92]

101. The concepts of "ownership" and "control" are distinct and cannot be interpreted in an interchangeable or relaxed manner. The Claimant must demonstrate either "ownership" or "control" within the meaning of Article 1117 at two different times: *i)* at the time the breach occurs (July 25, 2016)[93] and *ii)* at the time the claims are submitted to arbitration (June 29, 2023).[94] Failure to prove ownership or control at either of these times results in a lack of the Tribunal's jurisdiction.[95]

---

91 Response to the Request for Bifurcation, ¶ 128.

92 NAFTA Chapter 11, Article 1117, paragraph 1 [Emphasis added]. **RL-0008.**

93 *Vito G. Gallo v. Government of Canada*, CPA Case No. 55798, Award, 15 September 2011, ¶ 325. ("[…] Accordingly, for Chapter 11 of the NAFTA to apply to a measure relating to an investment, that investment must be owned or controlled by an investor of another party, and ownership or control must exist at the time the measure which allegedly violates the Treaty is adopted or maintained[…]"). **RL-0048**.

94 *B-Mex, LLC et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶¶ 145-150. **RL-0039.**

95 *B-Mex, LLC et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶¶ 145-146. ("Claimants must establish that they owned or controlled the Mexican Companies

102. This was recently confirmed by the tribunal in *Alicia Grace and others v. Mexico*, where the claimants failed to establish ownership or control over the entity for which they sought to claim under Article 1117 of NAFTA. The tribunal concluded that, by failing to establish such elements, the claimants "could not … bring a claim on behalf of [that entity] under Article 1117(1)," and accordingly, it declared that it lacked jurisdiction to hear all the claimants' claims.[96]

103. The Claimant has not met its burden because it has not shown that he owned CFCM or that he exercises —or exercised— control over the company.

1. The Claimant never owned CFCM

104. The term "ownership" refers to total or practically total possession of the enterprise.[97] A shareholder or group of shareholders with a controlling interest in an enterprise is not an owner of that enterprise for purposes of Article 1117. The two concepts —an enterprise and shares— are treated separately throughout NAFTA Chapter 11,[98] which confirms the distinction in Article 1117.

105. The NAFTA tribunal in *B-Mex* adopted this position by stating that Article 1117 refers to owning "an enterprise," not merely "equity securities of an enterprise...."[99] According to that tribunal, the NAFTA Parties "envisaged a shareholding threshold that must *always*, regardless of applicable law or bylaws, be sufficient to confer the legal capacity to control the enterprise […and] [t]he only equity holding that will *always*, independently of the circumstances, confer the legal capacity to control is ownership of *all* or virtually all of the outstanding stock."[100]

---

at the time of the treaty breaches [and] must also establish that they owned or controlled the Mexican Companies at the time of the submission of the claim…"). **RL-0039.**

96 *Alicia Grace and others v. United Mexican States*, ICSID Case No. UNCT/18/4, Final Award, 19 August 2024, ¶¶ 544-545. **RL-0034**.

97 The *Diccionario de la lengua española* defines property ("propiedad") as: "The right or power to own something and to dispose of it within legal limits.." Diccionario de la lengua española. propiedad | Definición | Diccionario de la lengua española | RAE - ASALE. **R-0019.**

98 Article 1139 defines investment as (a) an enterprise, (b) shares of an enterprise, among others.

99 *B-Mex, LLC et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶¶ 198-200. **RL-0039.**

100 *B-Mex, LLC et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶¶ 202-203 [Emphasis in original]. **RL-0039.**

Accordingly, the "ownership" referred to in Article 1117 must be interpreted as ownership of all of the outstanding capital stock of such enterprise.

106. Claimant did not own CFCM at any of the relevant times. As explained *supra*, CFCM's By-Laws clearly state that: "[a]ny transfer of shares shall be effective with respect to the company as of the date on which such transfer has been recorded in the company's Share Register."[101] There is no dispute that the Claimant registered its shares in CFCM's Shareholders' Registry on January 16, 2017, *after* the alleged violation occurred in July 2016:

Image 2 – Excerpt from CFCM's Shareholders' Book, p.4, **C-0002.**


Datos del nuevo accionista:

Mario Noriega Willars (nacional de ESTADOS UNIDOS DE AMÉRICA)
2 Cayahoga CT
The Woodlands
77389 Texas
Estados Unidos de América

Fecha del registro: 16 de enero de 2017

107. Based on this fact alone, Claimant cannot satisfy the ownership requirement of Article 1117 because he did not own CFCM at the time of the alleged breach. Moreover, the fact that the Claimant did not own an investment at the time of the alleged breach in July 2016 renders the

---

101 *See* supra § II.E.2. Fourteenth Clause, CFCM's Articles of Incorporation. [Emphasis added]. **C-0004**. See also Supreme Court Decision 1a. LXXXVII/2016 (10th): "COMMERCIAL COMPANIES. ARTICLE 129 OF THE GENERAL LAW DOES NOT CONTAIN A RESTRICTION ON THE HUMAN RIGHT TO PRIVATE PROPERTY." Tenth Era. Gazette of the Weekly Federal Judicial Reporter. Book 29, April 2016, Volume II, page 1149. ("That is, the legal relationship arising from the transfer of shares from the previous to the new holder, *is established solely between these two parties at the moment they reach an agreement of wills*, as the property is transferred and, in turn, the purchaser pays for the acquisition; furthermore, the company is not a party to the share transfer transaction, which is why it must be notified so that it may record the transfer in the appropriate register for it to be enforceable against the company.") [Emphasis added] **R-0020**; Supreme Court Decision 1a. LXXXVII/2016 (10th): "COMMERCIAL COMPANIES. FOR THERE TO BE LEGITIMIZING EFFECT BETWEEN THE SHAREHOLDER AND THE COMPANY, THE TRANSFERS MUST BE REGISTERED IN THE APPROPRIATE SHARE REGISTER." Tenth Era. Gazette of the Weekly Federal Judicial Reporter. Book 29, April 2016, Volume II, page 1150. **R-0021.** ("[T]he registration of the share transfers in the share register is the legally established method of corporate legitimization of the holder of nominative shares and grants legitimizing effect in favor of the company with respect to the registered party.")

Tribunal lacking jurisdiction *ratione temporis*.[102] Mexico reserves the right to elaborate on this point if necessary at a later stage in the proceedings.

108. Claimant alleges that he is the "unquestionable owner" of CFCM because allegedly, "[b]ased on the Coordination Agreement, Claimant controls the totality of Viabilis' 73.71% share participation in CFCM which, combined with his 16.38% direct share participation in CFCM, grants Claimant exclusive control over 90% of CFCM's outstanding shares."[103] Even taking Claimant's assertions as true, Claimant himself acknowledges that he does not have and has never had ownership of the *entire* capital stock of CFCM at any time.

109. In any event, it is incorrect for the Claimant to claim 90% control of CFCM. The evidence presented establishes that the Claimant's actual shareholding in CFCM is less. The Claimant does not account [redacted], which effectively reduces Viabilis' and the Claimant's shareholding in CFCM as explained above.[104] Notwithstanding the fact that there is no evidence of Mr. Willars ever acquiring CFCM's shares, let alone that the acquisition was never formalized and complied with the applicable foreign investment and railroad regulations, according to the documents submitted by Claimant the percentages of CFCM shareholders would be as follows, as shown in Table 2:[105]

- Viabilis: 56.383%.
- Consorcio: 19.331%.
- [redacted].
- Mario Noriega Willars: 12.529%.

---

102 *See, for example, Vito G. Gallo v. Government of Canada*, CPA Case No. 55798, Award, 15 September 2011, ¶¶ 325-326. ("[…] the Claimant must have owned or controlled [the investment at the time the measure which allegedly violates the Treaty was adopted]… the Claimant has failed to marshal the evidence necessary to prove such ownership and control at the relevant time, [hence] the necessary consequence is that his claim must fail for lack of jurisdiction ratione temporis."). **RL-0048**; *Westmoreland Mining Holdings, LLC v. Government of Canada*, ICSID Case No. UNCT/20/3**,** Award, January 31, 2022, ¶ 209 ("[Under] Articles 1101(1), 1116(1) and 1117(1), only the party which owned the investment at the time of the alleged treaty breach has jurisdiction ratione temporis to bring a claim…"). **RL-0049.**

103 Response to the Request for Bifurcation, ¶ 131.

104 *See* § II.F.

105 *See* § II.F.

110. Claimant contends that he and [redacted] allegedly entered into [redacted], which grants the Claimant the power [redacted][106] Assuming [redacted] is relevant —*quod non*—, Respondent has not had access to this document and reserves its right to comment on it at the appropriate procedural time.

111. In addition, Claimant has not provided any evidence demonstrating its shareholding in CFCM or Viabilis when the arbitration was initiated in 2023. There are no records of shareholders of CFCM after 2017 or of Viabilis after 2015.

112. Regardless of the control that Claimant allegedly now exercises over Viabilis (which is unknown), Claimant has never owned all or substantially all of the shares of CFCM. Consequently, Claimant does not have standing to bring a claim under NAFTA Article 1117 on the basis that he owns CFCM.

2. Claimant does not control CFCM

113. The term "control" in the context of Article 1117 means to have and exercise exclusive power to the exclusion of all other powers or influence. Different NAFTA tribunals have described "control" as "the legal capacity to control" or "*de facto* control."[107]

114. "Legal control" refers to the "legal capacity to control" a company based on "the percentage of shares held,"[108] while "*de facto* control" refers to "the power to effectively decide and implement the key decisions of the business activity of an enterprise."[109] Applying these two definitions, arbitrator Mr. Vinuesa has clarified that:

> [T]he term "control" may be classified as legal control or de facto control, but this characterization does not alter the content and scope of the term "control," i.e., the exercise of exclusive power in the management of an enterprise to the exclusion of any other power. Control must be contextualized

---

106 Response to the Request for Bifurcation, ¶ 131.

107 *B-Mex, LLC et al. v. United Mexican States,* ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶¶ 209-210. **RL-0039.**

108 *B-Mex, LLC et al. v. United Mexican States,* ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶¶ 216, 220. **RL-0039.**

109 *International Thunderbird Gaming Corporation v. United Mexican States,* UNCITRAL, Arbitral Award, 26 January 2006, ¶ 108. **RL-0054.**

> in time. Only the investor exercising "effective control" at any given time may resort to arbitration pursuant to Article 1117(1).[110]

115. This definition of "control" ―power in the management of an enterprise, exclusively and to the exclusion of other power― is based on *i)* the ordinary meaning of the term "control" and *ii)* the award in *Thunderbird v. Mexico*.[111]

116. With regard to the first premise, the ordinary meaning of "control" implies "the exercise of power, decisive influence or discretionary management over something."[112] Control "means to have and exercise an exclusive power to the exclusion of any other power or influence."[113] The term "control" in Spanish is defined as a dominion, command or preponderance over something.[114] Similarly, in English, the term "control" means "to exercise restraining or directing influence over," or "to have power over" something to the exclusion of others.[115]

117. "Power" and "determining influence" have been accepted as definitions of control. For example, the tribunal in *Kuntur Wasi v. Peru*, endorsing Professor Schreuer's opinion, stated that "control [was] the 'actual power to steer the investment' of an enterprise through whatever power (including blocking power) and authority that party may possess."[116]

---

110 *B-Mex, LLC et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Dissenting Opinion of Arbitrator Raul E. Vinuesa, 6 July 2019, ¶ 144. **RL-0040.**

111 *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, ¶ 108. **RL-0054.**

112 *B-Mex, LLC et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Dissenting Opinion of Arbitrator Raul E. Vinuesa, 6 July 2019, ¶ 139. **RL-0040.**

113 *B-Mex, LLC et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Dissenting Opinion of Arbitrator Raul E. Vinuesa, 6 July 2019, ¶ 139. **RL-0040.**

114 Definition of Control. Diccionario de la lengua española. control | Definición | Diccionario de la lengua española | RAE - ASALE. **R-0022.**

115 Merriam-Webster. Definition of control. Available in: https://www.merriam-webster.com/dictionary/control. **R-0023**.

116 *Sociedad Aeroportuaria Kuntur Wasi S.A. and Corporación América S.A. v. Republic of Peru*, ICSID Case No. ARB/18/27, Decision on Jurisdiction, Liability and Certain Aspects on Quantum, with Further Directions on Quantum, 11 August 2023, ¶ 254. **RL-0055**. Later on, the tribunal stated that "control" "[…] is a flexible standard that looks at all the relevant facts and circumstances concerning the operation and management of the enterprise, including expertise and know-how that may lead to operational control." *Sociedad Aeroportuaria Kuntur Wasi S.A. and Corporación América S.A. v. Republic of Peru*, ICSID Case No. ARB/18/27, Decision on Jurisdiction, Liability and Certain Aspects on Quantum, with Further Directions on Quantum, 11 August 2023, ¶ 255. **RL-0055.**

118. In turn, scholars say that "to truly own or control property connotes the ability to do with it as one pleases; to have dominion or control over it. Dominion/control in a substantive sense is the very essence of ownership of an asset; the owner has the right to use and enjoy a thing as against others who have a duty not to do so."[117]

119. With respect to the second premise, the tribunal in *Thunderbird* defined control as:

> Ownership and legal control may assure that the owner or legally controlling party has the ultimate right to determine key decisions. However, if in practice a person exercises [that position] … one can conceive the existence of a genuine link yielding the control of the enterprise to that person....[118]

120. In this sense, a party exercising "control exclusively and to the exclusion of another power" is equivalent to that party having, in the words of the *Thunderbird* tribunal, "the ultimate right to determine key decisions"[119] without interference from anyone else.[120]

121. In this case, Claimant has not proved that he controlled CFCM at these two relevant moments.

a. The lack of control over CFCM at the time the alleged violation occurred

122. Claimant has argued that the date on which the violation occurred is in July 2016.[121] Thus, the Claimant must prove that he had "control" over CFCM at this time. However, as explained above, the Claimant was not a shareholder of CFCM in July 2016. The acquisition of shares by

---

117 Simon Foote, *Giving Substance to a Substantive Approach 1: The Problems with Control and Substantial Business Activity*, in Simon Foote, *The Bona Fide Investor: Corporate Nationality and Treaty Shopping* in Investment Treaty Law, International Arbitration Law Library, Volume 63 (Kluwer Law International 2021), p. 132. **RL-0056.**

118 *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, 26 January, 2006, ¶ 108. **RL-0054.**

119 *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, ¶ 108. **RL-0054.**

120 *See also Vento Motorcycles, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, 6 July 2020, ¶ 221. **CL-0039.**

121 Claimant's Memorial, ¶ 243 ("the *rescate* [date 13 July 2016] entailed a direct expropriation of the assets that CFCM had acquired to operate the Concession."). *Ibid*. ¶ 244 ("the *rescate* expropriated CFCM's contractual rights in the Concession."). *Ibid*. ¶ 342 ("Claimant has instructed Messrs. De Marco and Medvedeff (Compass Lexecon) to compute the damages that Claimant suffered using 25 July 2016 as the date of valuation ("Valuation Date"), reflecting the circumstances prevailing just prior to Mexico's *rescate* of the Concession.").

the Claimant was not recorded in the Share Register until January 16, 2017, so Claimant could not have exercised *any* control until January 2017.

123. Claimant also has not provided any evidence that he had *de facto* control of CFCM when the July 2016 *rescate* of the concession occurred. There is no evidence of his participation in the administrative bodies, his capacity to make decisions on strategic matters, or his effective exercise of influence in the company's decision making. Once again, the [redacted] between the Claimant and [redacted] has not been presented.

124. Claimant cannot obtain ownership or control of CFCM after the alleged breach occurred. As pointed out by the Tribunal in *Vito G. Gallo*, "there cannot be any enterprise nursing such a nascent claim, *if* the enterprise is not already at the time of the acquisition *under the control or in the ownership* of a NAFTA-protected person."[122] This conclusion becomes even more relevant in the present case, where the shareholder change in CFCM occurred after the *rescate* constituting the alleged violation was issued, making the claim fully foreseeable to the Claimant at the time of its acquisition.[123] When a corporate restructure is carried out with knowledge of the existence of a dispute subject to a Treaty, for the sole purpose of obtaining access to the jurisdiction of that Treaty, such action constitutes "an abusive manipulation of the system of international investment protection under the ICSID convention and the BITs"[124] and must be rejected by this Tribunal.

---

122 *Vito G. Gallo v. The Government of Canada*, PCA Case No. 2008-03, Award, 15 September 2011, ¶ 327. [Emphasis added]. **RL-0048.**

123 *See*, *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 554. **RL-0050.** *Vito G. Gallo v. The Government of Canada*, PCA Case No. 2008-03, Award, 15 September 2011, ¶ 327. ("…if the obtaining of control or ownership is made after the alleged breach of the Treaty, the acquired enterprise cannot be 'nursing a nascent NAFTA claim'…"). **RL-0048.**

124 *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶ 205 ("With respect to pre-existing disputes…the Tribunal considers that to restructure investments only in order to gain jurisdiction under a BIT for such disputes would constitute …. 'an abusive manipulation of the system of international investment protection under the ICSID convention and the BITs'.") **RL-0051.** *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 144 ("If it were accepted that the Tribunal has jurisdiction to decide [claimant]'s claim, then any pre-existing national dispute could be brought to an ICSID tribunal by a transfer of the national economic interests to a foreign company in an attempt to seek protections under a BIT…. It is the duty of the Tribunal not to protect such an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs."). **RL-0042.**

b. The lack of control over CFCM at the time the claims were submitted to arbitration.

125. The arbitration claim was submitted on June 23, 2023. At this date, Claimant did not control CFCM.

126. As mentioned *supra*, the Claimant has not established its shareholding in Viabilis and CFCM as of June 2023. The latest shareholders' register for CFCM is dated January 16, 2017[125] and December 15, 2015 for Viabilis.[126] Mr. Willars refers to these shareholders' register in his witness statement, but does not say whether those records reflect the status of his shareholding as of June 2023. In the absence of any further evidence or explanation from the Claimant, there is no basis to establish his legal control over CFCM as of June 2023.

127. Assuming that the shareholding has remained the same since January 2017, the percentages of CFCM shareholders are as follows if one considers [redacted] that Claimant ignores in its Exhibit C-0002, which are shown in Table 2.

- Viabilis: 56.383%.
- Consorcio: 19.331%.
- [redacted].
- Mario Noriega Willars: 12.529%.

128. It is evident that Mr. Willars does not control CFCM with only 12.529% of its shares. Thus, even assuming that it is true that Mr. Willars owns 48% of Viabilis' shares, as alleged by Claimant,[127] this would mean that he would only own 27.06% of the indirect shares of CFCM. Adding the "indirect" (27.06%) and direct (12.529%) ownership of CFCM, Claimant would only own 39.59% of CFCM's shares. Clearly, this is not sufficient to establish control of the company to the exclusion of other shareholders.

129. Furthermore, assuming that Claimant controls [redacted] interest (2%) in Viabilis [redacted],[128] there is no evidence to conclude that Claimant exercises sufficient control over Viabilis to finally determine CFCM's acts. If the interests of

125 Shareholder's ledger of CFCM, p. 4, **C-0002**.

126 Shareholder's ledger of Viabilis, p. 3, **C-0003**.

127 Claimant's Memorial, ¶ 19.

128 Response to the Request for Bifurcation, ¶ 131.

Claimant and [redacted] are combined, this equates to 50% of the shares of Viabilis, while the other 50% is controlled by [redacted] Such division in the ownership does not give Claimant dominion over Viabilis or the authority to exercise control over CFCM exclusive of [redacted]

130. Claimant has never had exclusive power over CFCM.[129] There is no evidence that verifies the existence of special voting rights that would allow him to exclusive control over CFCM's decisions, which would establish *de facto* control. Nor is there any evidence that Claimant has the ability to determine or manage CFCM's strategy, operations or day-to-day management.

131. The foregoing eliminates any possibility of asserting "ownership" or "control" under Article 1117 of NAFTA.[130] The lack of documentary evidence to support these assertions makes any claim of standing under NAFTA Article 1117 by Claimant untenable.

132. By failing to establish ownership or control at the relevant time, Claimant lacks active standing under Article 1117, the Tribunal lacks jurisdiction, and the claims must be dismissed in their entirety.

B. The Claimant acquired its investment illegally

1. NAFTA legality requirement

133. Foreign investors must make or acquire their investments in accordance with the domestic laws of the host State if they expect to receive the protections afforded by NAFTA. This is especially true in the case of laws regulating the procedures foreign investors must follow to register their investments with the host government. This is even more true when the investment relates to a specific industry that is heavily regulated by the host State.[131]

---

129 *B-Mex, LLC y others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Dissenting Opinion of Raúl E. Vinuesa, 6 July 2019, ¶ 144. **RL-0040.**

130 Any claimant seeking to make a claim on behalf of an enterprise under Article 1117 must demonstrate that it is an "investor of a Party" and that such enterprise is 'owned' or subject to its "direct or indirect control". As will be explained in the next section, it is clear that, in fact, Mr. Willars at no time invested in Mexico, but rather has presented in this arbitration a simulation of an investment in Mexico.

131 *See Alasdair Ross Anderson and others v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, ¶¶ 54-55. (In this case, the investor owned an investment in the financial services sector without the necessary authorizations required by law, therefore the property violated the law and, therefore, the investment could not access the protection of the treaty.). **RL-0057**

134. Contrary to what Claimant argues,[132] the absence of an express provision in international treaties requiring the legality of investments does not imply that such a requirement does not exist for investments to be protected and subject to arbitral jurisdiction. This requirement "is implicit even when not expressly stated in the relevant BIT."[133] It is "based on the general principle of law that limits international legal protection to investments made *without* violating the host country's laws,"[134] and this general principle "exists independently of specific language to this effect in the Treaty."[135] This position is shared by a large number of investment tribunals as a general proposition in investment dispute settlement.[136]

135. In the specific case of NAFTA, the legality requirement has been confirmed by the Parties thereto. The United States considers this requirement to be implicit;[137] according to Canada, protecting illicit investments would be contrary to the object and purpose of the agreement, relying on principles of international law such as good faith and respect for public order;[138] and Mexico

---

132 Response to the Request for Bifurcation, ¶ 158.

133 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 101. **RL-0042**.

134 *Álvarez y Marín Corporación S.A. and others v. Panamá Republic*, ICSID Case No. ARB/15/14, Award, October 12, 2018, ¶ 140. [Emphasis added]. **RL-0058.**

135 *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 124. **RL-0059**.

136 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶¶ 138-139. **RL-0041**. *SAUR International SA v. Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, ¶ 308. **RL-0060**. *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, ¶ 706. **RL-0061**. *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016, ¶ 301. **RL-0062**. *Getma International and others v. Republic of Guinea*, ICSID Case No. ARB/11/29, Award, 16 August 2016, ¶ 174. **RL-0063**. *UAB Garsų Pasaulis v. Kyrgyzstan*, PCA Case No. 2020-59, Award, 8 April 2024, ¶ 193. **RL-0064**. *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, ¶ 264. **RL-0065**. *Saluka Investments BV v. Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006 ¶ 204. **RL-0066**.

137 *Espíritu Santo Holdings, LP and L1bre Holding, LLC v. United Mexican States*, ICSID Case No. ARB/20/13, Submission of the United States of America, 21 March 2023, ¶ 2. (**"**While Article 1139 does not expressly provide that each type of investment must be made in compliance with the laws of the host state, it is implicit that the protections in Chapter Eleven only apply to investments made in compliance with the host state's domestic law at the time that the investment is established or acquired."). **RL-0067**. *Carlos Sastre and others v. United Mexican States*, ICSID Case No. UNCT/20/2, Submission of the United States of America, 17 December 2021, ¶ 28. **RL-0068.**

138 *Espíritu Santo Holdings, LP and L1bre Holding, LLC v. United Mexican States*, ICSID Case No. ARB/20/13, Non-Disputing Submission of the Government of Canada pursuant to NAFTA Article 1128, 21 March 2023, ¶¶ 3-4. (Stating that, although NAFTA does not explicitly require that investments be made

asserts that a tribunal lacks jurisdiction when there is evidence that the investment was made in violation of domestic law, which would imply an improper use of the arbitration mechanism.[139]

136. Such statements by the NAFTA Parties in the context of legal disputes constitute an unequivocal manifestation of subsequent practice, fully recognized by the United Nations International Law Commission:

> 18) Subsequent practice under article 31, paragraph 3 (b) [of the VCLT], must be conduct "in the application of the treaty". This includes [inter alia,]…statements [of the Parties] in the course of a legal dispute, or judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing a treaty even before any specific act of application takes place at the internal or at the international level.[140]

137. Consequently, and in accordance with Article 31(3)(b)[141] of the Vienna Convention on the Law of Treaties (VCLT), in interpreting whether NAFTA incorporates an investment legality requirement—which it implicitly does, as evidenced by the context of the treaty, as well as by its object and purpose—the Tribunal must necessarily consider the concurring positions of the United States, Canada and Mexico, which clearly support the existence of such a requirement.

---

in accordance with the host State's domestic legislation, it would be contrary to the object and purpose of the treaty to extend protection to illegally established investments. Investment tribunals have consistently held that compliance with domestic law at the time of establishment is a prerequisite for treaty protection, in line with international legal principles such as good faith and the prohibition of invoking one's own wrongdoing **RL-0069**. *Carlos Sastre and others v. United Mexican States,* ICSID Case No. UNCT/20/2, Non-Disputing Submission of the Government of Canada pursuant to NAFTA Article 1128, 17 December 2021, ¶ 14. ("While the NAFTA does not expressly provide that protected investments are only those made "in accordance with the laws of the host state", it would be contrary to the object and purpose of the agreement to expand the Agreement's protection to an investment that is in contravention of a host state's domestic law at the time that the investment is established or acquired"). **RL-0070.**

139 *Espíritu Santo Holdings, LP y L1bre Holding, LLC v. United Mexican States*, ICSID Case No. ARB/20/13, Counter-Memorial, May 13, 2022, ¶ 393 ("[T]he Tribunal lacks jurisdiction due to evidence of the Claimants' investment being unlawful. Allowing a tribunal constituted under NAFTA to assert jurisdiction over an illegal investment would amount to a misuse of the international arbitration system, as it would enable investors to obtain an improper benefit from investments made in conditions contrary to the host State's legislation and general principles of international law.") **RL-0071**.

140 Report of the International Law Commission, 70th Session, UN Doc. A/73/10, Chapter VI, p. 33, paragraph 18. [Added Emphasis]. **RL-0072.** *See also, Alicia Grace & others v. United Mexican States,* ICSID Case No. UNCT/18/4, Final Award, 19 August 2024, ¶ 473. **RL-0034.**

141 Vienna Convention on the Law of Treaties, Article 31. **RL-0012.**

138. This is particularly relevant, as the legality of the investment is a jurisdictional issue related to the terms of the Respondent's consent to arbitrate.[142]

139. Investments made in violation of Mexican legislation regulating foreign investment, *i.e.*, the LIE and the relevant provisions of the Railroad Law, are particularly lacking in NAFTA protection because the object and purpose of those laws are the same as those of NAFTA. Both are intended to attract and increase foreign investment.[143] Foreign investment is not one-way only. If the foreign investor does not comply with the host State's laws designed to facilitate its investment, including laws on registration of foreign investments, then the legal protections designed for foreign investments are not available to the investor; and this Tribunal should not protect these illegalities.

2. Claimant did not comply with Mexican regulations.

a. Violations of the limits established in Mexican regulations

140. As explained *supra*, Condition 4.3 of the Concession indicates that foreign investment may not exceed, directly or indirectly, 49% of the capital stock of the concessionaire, unless there is a favorable resolution by the Commission. Specifically, the Concession established the following:

> The foreign investment may not exceed, directly or indirectly, 49% of the capital stock of the concessionaire, unless a favorable resolution is issued by the National Commission on Foreign Investment, in accordance with the third paragraph of Article 17 of the Law and paragraph 4 of the Call for Bids.[144]

141. The Call for Bids stated the same:

---

142 *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/11/12, Award, 10 December 2014, ¶ 467, **RL-0073**. *Inceysa Vallisoletana, S.L. c. República de El Salvador*, Caso CIADI No ARB/03/26, Award, 2 August 2006, ¶ 207. **RL-0074**. *Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/ 20, Award, 14 July 2010, ¶¶ 114-11. **RL-0075**. *Georg Gavrilovic and Gavrilovic d.o.o. v Republic of Croatia*, ICSID Case No ARB/12/39, Award, 26 July 2018, ¶ 221. **CL-0048**. *Anglo-Adriatic Group Limited v Republic of Albania*, ICSID Case No ARB/17/6, Award, 7 February 2019, ¶ 287, **RL-0076**

143 NAFTA, Article 102, ("c) increase substantially investment opportunities in the territories of the Parties;"); Article 1, LIE. ("This law is of public policy and for general adherence throughout the Republic. Its purpose is to establish rules to attract foreign investment to the country and promote its contribution to national development.") **R-0003**. Article 1 of the Railroad Law. ("Railway service is a priority economic activity and it is the State's responsibility to guide its development.") **CL-0013**.

144 Condition 4.3, Concession of August 26, 1999, **C-0010.**

> 4.1. Foreign investment may only participate in the capital stock of the legal entity to which the concession is granted, in a percentage greater than 49 percent, if it has the respective authorization of the National Commission Foreign Investment.[145]

142. The same is required by Article 17 of the Railroad Law which states that "foreign investment may participate up to forty-nine percent in the capital stock of the concession companies referred to in this Law."[146]

143. Moreover, in accordance with the LIE:

> Approval by the Commission is required for foreign investment to participate in a percentage higher than 49% in the economic activities and companies referred to hereafter: […]
>
> XII.- Construction, operation and exploitation of general railways, and public services of railway transportation.[147]

144. Assuming Claimant holds 51.76% of CFCM's shares directly and indirectly through Viabilis, there is clearly a violation of this legal limitation because CFCM did not acquire approval by the Commission prior to the entry of Claimant's alleged investment.[148]

145. Claimant does not dispute this. Rather, he relies on a misreading of the LIE, arguing that both Articles 8 and 9 of the LIE apply.[149] According to Claimant, in the combined reading of the articles, "Mexican legislation did not require Mr. Willars to obtain prior authorization from the CNIE" to acquire his interest in CFCM,[150] because the value of the assets underlying Mr. Willars' Stock purchase agreement was below the threshold established at that time by the Commission.[151]

---

145 Section 4 of the Call for the concession of the operation and exploitation of the short Chiapas-Mayab railroad tracks, as well as for the rendering of the public railroad transportation service and the sale of assets related thereto, which together constitute an economic unit with productive purposes., published in the Official Gazette on March 24, 1999, p.11, **C-0032**.

146 Article 17 of the Railroad Law, **CL-0013**.

147 Article 8 of the LIE, **R-0003**.

148 Response to the Request for Bifurcation, ¶ 101.

149 Response to the Request for Bifurcation, ¶ 155.

150 Response to the Request for Bifurcation, ¶ 153. ("Second, Mexico's argument regarding the alleged illegality of the investment is unfounded under Mexican law. Contrary to Mexico's argument, Mexican Law did not require Mr. Willars to obtain prior authorization from the National Commission of Foreign Investment ("CNIE") to acquire more than 49% of CFCM.")

151 Response to the Request for Bifurcation, ¶¶ 155-156.

146. This is not correct. As stated above, Article 8 and Article 9 operate separately.[152] The application of Articles 8 and 9 of the LIE is governed by Article 3 of the LIE Regulation. This article establishes that the participation regime referred to in Article 9 of the LIE applies to companies that do not carry out reserved activities subject to specific regulation (such as precisely those referred to in Article 8, including the operation and exploitation of railroads), and in the event that such activities are carried out, the Article 8 of the LIE will apply.[153]

147. Given that CFCM was engaged in activities expressly subject to specific regulation—such as construction, operation and exploitation of railroad tracks—Article 8 is undoubtedly applicable and regulates this situation. Therefore, Claimant was bound to obtain prior authorization from the Commission; authorization that, incontrovertibly, he never obtained. Thus, Claimant's alleged acquisition of CFCM shares, without authorization from the Commission, not only contravenes the Concession, but also the Call for Bids, the Railroad Law, and the LIE. As a result, Claimant does not have a protected investment under NAFTA, and the consequence is that the Tribunal lacks jurisdiction to decide the case.

148. Claimant argues that the violations are not sufficiently serious to entail the loss of jurisdiction, as they would only entail a fine.[154] This is incorrect and far from reality.

149. The authorization from the Commission is an indispensable legal *requirement* and an express *condition* of the Concession. Specifically, Article 21 of the Railroad Law states that the following is a cause for revocation of concessions "[…]failure to comply with any of the obligations or conditions established in this Law, its regulations and in the respective concession or permit title."[155] Claimant articulated the following test, with reference to *Vladislav Kim v. Uzbekistan*: "tribunals have ruled the illegality of investments to deny jurisdiction, when the consequence of the illegality is the voidance of the investment or acquisition."[156] Assuming that this test is applicable, the failure to obtain a favorable resolution from the Commission satisfies this test because it would justify the revocation of the Concession.

---

152 *See supra* § II.B.2.

153 Section II, Article 3, LIE Regulation. **R-0002**.

154 Response to the Request for Bifurcation, ¶ 168.

155 Article 21, section XI of the Railroad Service Law. [Emphasis added]. **CL-0013**.

156 Response to the Request for Bifurcation, ¶ 167.

150. Tribunals analyzing this same situation have concluded that in such cases, the investment cannot be protected under the ICSID system. For example, in *Phoenix Action v. Check Republic*, the tribunal pointed out that "ICSID arbitration cannot be granted to investments that are made contrary to law… If a State, for example, *restricts* foreign investment in a sector of its economy and a foreign investor *disregards* such restriction, the investment concerned *cannot* be protected under the ICSID/BIT system."[157] Here, multiple and different laws and regulations restrict foreign investment in the railroad sector unless authorized by the Commission. Such authorization was never obtained.

b. No notice was given of the purported stock purchase

151. In contravention of Mexican law, Mr. Willars never informed the Mexican State of his purported purchase of the shares in CFCM and Viabilis.

152. Pursuant to Article 32 of the LIE, all Mexican companies with foreign participation—regardless of the percentage of participation—must register in the RNIE.[158] This registration requires detailed information on foreign investors, including their identity, nationality, domicile and percentage of ownership.[159] This obligation, moreover, is expressly provided for in CFCM's Articles of Incorporation, as mentioned above.[160]

---

157 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 101, 142-143. **RL-0042**. *See also Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶ 372. [Emphasis added]. ("The Tribunal finds that an investment can be illegal and as a consequence not protected by investment conventions when it contravenes substantive law, in other words when it does not comply with material norms regulating investments. Norms may prohibit certain business activities, such as the production of drugs, or they may reserve certain sectors to national entities or protect certain sectorial or geographical areas, for example, by making an investment in a national park illegal.") **RL-0077.**

158 Article 32, section I, subsection a) of the LIE, **R-0003.**

159 Article 33, section I, subsection d) of the LIE, **R-0003.**

160 Sixth Clause, CFCM's By-Laws. ("The titles of the shares of capital stock subscribed by persons not included in the enumeration made in article two, section two of the Foreign Investment Law, taking into account the provisions of article three of said law, will constitute series 'A' or Mexican shares, and the shares subscribed or acquired by the persons referred to in article two, section two of said law, will constitute series "B" or free subscription shares, in which case the company must register in the National Registry of Foreign Investments.") [Emphasis added] **C-0004**.

153. Assuming the Claimant exercised ownership and control over CFCM, as he contends, then both CFCM and Viabilis should have been registered in the RNIE from the moment he acquired an interest in those companies. This did not happen.

154. In 2010, [redacted] formally requested the cancellation of CFCM's registration in the RNIE,[161] which implies that, from that year onward, the company no longer had any foreign shareholders. As for Viabilis, there is no record of any registration in the RNIE, which confirms that this legal obligation was never fulfilled.

155. Additionally, pursuant to the fourth paragraph of Article 17 of the Railroad Law, concessionaires must notify the SCT "[...] of any change in direct or indirect ownership interest in the relevant share capital, when such interest is equal to or greater than five percent."[162] In line with this, the Railroad Regulations establish that such notice must be submitted within thirty calendar days following the transaction, whether it involves one or several simultaneous or successive transactions that, in the aggregate, exceed that threshold.[163]

156. Changes in shareholding structure are not minor matters; on the contrary, they are strictly regulated precisely to ensure that new shareholders have the technical and financial capacity to comply with the obligations arising from the Concession. However, there is no evidence that the then SCT was notified of any change of shareholding whereby Mr. Willars acquired interest in CFCM.

157. Put plainly, the Mexican State cannot be expected to grant any treatment under NAFTA obligations to investors with the required nationality when the existence of such investor and investment was never communicated to Mexico through any channel. Moreover, Mr. Willars has not demonstrated any experience in the railway sector, which legitimately casts doubt on the truthfulness and legality of the alleged transaction, as well as his purported "control" over CFCM.

158. The first time Mr. Willars notified Mexico of his alleged investment in CFCM was when he submitted his Notice of Intent in 2023, that is, more than seven years after the events that Claimant characterizes as breaches of NAFTA. The Respondent does not have a single

---

161 National registry of foreign investment. Request for cancellation of CFCM's registration in the national registry of foreign investment **R-0004**.

162 Article 17, Railroad Law.[Emphasis added] **CL-0013**.

163 Article 220, Railroad Regulation. **CL-0013**.

document—other than those unilaterally produced for this proceeding—proving that Mr. Willars was a shareholder, partner, or participant in CFCM, Viabilis, or any other related entity.

159. The accumulation of violations and omissions of Mexican law by Claimant cannot be attributed merely to a lack of diligence. The truth is that Claimant failed to comply with all applicable legal obligations at the time of the alleged investment. Consequently, such investment was made in contravention of Mexican law, and the Tribunal should therefore dismiss Claimant's claims in their entirety.

C. Claimant is Mexican in All Aspects Related to His Shareholding in CFCM, Viabilis, and the Concession

160. The NAFTA and the ICSID Convention contain a nationality restriction under which nationals may not bring claims against the State of which they are nationals.[164] The drafters of the ICSID Convention clarified that "a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time he had the nationality of another State. This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent."[165]

161. Claimant is barred from bringing claims under Chapter 11 of NAFTA by virtue of three acts of law he voluntarily undertook:

1. Mr. Willars' commitment, pursuant to CFCM's By-Laws, to consider himself as a Mexican national and not to invoke the protection of his government.
2. Mr. Willars' commitment to the Mexican State to consider himself Mexican in relation to Viabilis and any rights derived therefrom, and not to invoke the protection of his government.
3. Mr. Willars' commitment to limit his legal remedies and not to invoke the protection of any foreign government with respect to CFCM and Viabilis.

162. These acts produce clear legal effects by precluding Mr. Willars from accessing the mechanism provided under the NAFTA. The first two acts render him unable to rely on his U.S.

---

164 Request for Bifurcation, ¶¶ 112-115. *See* Article 25 of the ICSID Convention

165 Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ¶ 29. **RL-0046**.

nationality to submit claims under Chapter 11 of NAFTA; and the third act—which applies to both CFCM and Viabilis—entails a waiver of the protection of any foreign government, including the protections afforded under the NAFTA. The first two acts are determinative, as the self-declaration of Mexican nationality with respect to the investment bars Claimant from accessing international arbitration in any form, whether under the ICSID Convention or under NAFTA, regardless of Claimant's mistaken comments about diplomatic protection.

1. Mr. Willars cannot submit a claim because he agreed to consider himself Mexican with respect to his interests in CFCM and Viabilis and committed not to invoke the protection of any foreign government under any circumstance.

163. Clause 15 of CFCM's By-Laws provides that any foreigner acquiring an interest in CFCM shall be considered Mexican in respect of that interest, participation, or concession held by the company, in the following terms:

> **FIFTEENTH**.-Any foreigner who, at the time of incorporation or at any later time, acquires an interest or shareholding in the company shall, by that very fact, be considered as a Mexican in respect of said interest or participation, the assets, rights, concessions, holdings, or interests held by the company, and the rights and obligations arising from contracts in which the company is a party with Mexican authorities, and shall be deemed to have agreed not to invoke the protection of their government, under penalty, in case of breach of said agreement, of forfeiting such interest or participation to the benefit of the Mexican Nation.[166]

164. Similarly, Article 2 (Nationality) of Viabilis' Articles of Incorporation establishes that the company shall be Mexican and expressly sets out how foreign shareholders shall be treated. That article states the following:

> **ARTICLE TWO. – NATIONALITY**. The Company shall be Mexican. The current or future foreign shareholders of this Company formally bind themselves before the Ministry of Foreign Affairs to be considered as nationals in respect to the shares of this Company they acquire or hold, as well as with respect to the assets, rights, concessions, shares, or interests held by this Company, or the rights and obligations arising from contracts in which this Company is a party with Mexican authorities, and consequently not to invoke the protection of their governments, under penalty, in the contrary case, of forfeiting to the benefit of the Nation the shareholding they may have acquired.[167]

165. Pursuant to Clause 15 of CFCM's By-Laws and Article 2 (Nationality) of Viabilis' Articles of Incorporation; Mr. Willars agreed to consider himself as Mexican in all aspects related to his

---

166 *See* CFCM's Articles of Incorporation dated March 25, 1999. **C-0004.**

167 *See* Viabilis' Articles of incorporation dated October 23, 2001. [Emphasis added]. **R-0010.**

interest or shareholding in CFCM and Viabilis. Furthermore, Mr. Willars pledged not to invoke the protection of his government, under penalty of forfeiting such interest or participation to the Mexican State; a commitment also included in the terms of the Concession, as explained below.[168]

166. Condition 4.4 of the Concession states:

> **4.4. Nationality.** The Concessionaire *shall have no rights beyond* those granted under Mexican law. Accordingly, the Concessionaire, in whose capital foreign investors participate, hereby expressly *agrees not to invoke* the protection of any foreign government, under penalty, otherwise, of forfeiting the rights granted under this title to the benefit of the Mexican Nation.[169]

167. Thus, Condition 4.4 of the Concession reiterates that Mr. Willars has no rights beyond those granted under Mexican law to protect his interests, and that he may not seek the protection of a foreign government in relation to any claims. This commitment was made before the SCT. Prior to that, the commitment was undertaken before the Ministry of Foreign Affairs, as reflected in Viabilis' Articles of Incorporation.

168. Neither Clause 15 of CFCM's By-Laws, nor Article 2 (Nationality) of Viabilis' Articles of Incorporation, nor Condition 4.4 of the Concession ties the phrase "the protection of their government" to the concept of "diplomatic protection," as Claimant suggests.[170] When read plainly, and in accordance with Mexican law, the protections of Claimant's government include NAFTA protections, since Claimant benefits from such protections through the United States of America's participation in the NAFTA.

169. As a result of these three acts of law undertaken by Mr. Willars, it is clear that he undertook to: *i)* consider himself a Mexican national and, consequently, waive investor-State arbitration; and *ii)* waive the protection of his government.

---

168 It should be noted that the use of the conjunction "and" implies that the shareholders included in this hypothesis committed themselves to both obligations. That is, the investor is not only obliged to consider itself a national with respect to its investment, but also not to invoke the protection of its government. This is relevant because Claimant wrongly confuses these two obligations, which both jointly and separately limit the rights of Claimant, treating them as one and reducing them to a mere waiver of diplomatic protection. *See* Response to the Request for Bifurcation, ¶ 184.

169 Concession of August 26, 1999 [Emphasis added]. **C-0010.** This condition, as explained above, if not complied with, constitutes grounds for revocation of the Concession.

170 Response to the Request for Bifurcation, ¶ 185.

2. The commitments undertaken by Mr. Willars are valid and enforceable under international law

170. Clause 15 of the CFCM By-laws, Article 2 (Nationality) of Viabilis' Articles of Incorporation, and Condition 4.4 of the Concession, explained above, are valid and enforceable in this arbitration. According to Professor Schreuer, such agreements "carry much weight,"[171] and their relevance increases when they are assumed on more than one occasion.[172] In this case, Mr. Willars undertook twice to consider himself a Mexican national with respect to his alleged investment, and on three separate occasions, he committed not to seek the protection of a foreign government.

171. Under international law, an investor may waive its nationality for arbitration purposes, provided the host State agrees. For example, Article 25(2)(b) of the ICSID Convention allows this when a company of the host State agrees with the host State to consider itself a national of another State where its controlling investors are located. Applying the same principle, the foreign investor may agree with the host State to consider himself a national of that State for purposes of the investment. The fact that such an agreement may also include a waiver of arbitration rights does not render the agreement invalid or unenforceable. The key, according to Professor Schreuer, is the agreement with the host State.[173]

172. Moreover, these agreements must be enforced under the principle of *pacta sunt servanda*. The *pacta sunt servanda* principle, derived from the international obligation of good faith, means that parties to a contract must uphold the commitments they voluntarily assume. In most legal systems, it is well-established that individuals may voluntarily decide whether to contract, with whom, and under what conditions. The *pacta sunt servanda* principle guarantees the fulfillment of

---

171 C. Schreuer et al., *The ICSID Convention: A Commentary* (2009), ¶ 710; *see also* ¶ 657 ("an agreement on nationality will create a strong presumption in favour of the existence of the stipulated nationality.") **RL-0078**.

172 In determining nationality commitments, weight has been given to the reiteration of a nationality, see for example, *Michael Ballantine y Lisa Ballantine v. The Dominican Republic*, Case CPA No. 2016-17, Final Award, 3 September 2019, ¶¶ 590-594. **RL-0079.**

173 Christoph H. Schreuer, Stephan W. Schill, et al., *ICSID Convention, Article 25 [Jurisdiction]*, in Stephan W. Schill, Loretta Malintoppi, et al. (eds), *Schreuer's Commentary on the ICSID Convention* (3d ed.), (2022 Christoph H. Schreuer, Stephan W. Schill, Loretta Malintoppi, August Reinisch, Anthony Sinclair and Cambridge University Press; Cambridge University Press, 2022), p. 281. ("An agreement between the parties as to the nationality of the investor will carry a great deal of weight [...]"). **RL-0080.**

those voluntary decisions.[174] This principle is the cornerstone of contract law and a general principle of international law common to all legal systems.[175]

173. The *pacta sunt servanda* principle is also found in Mexican law. It is such a fundamental principle that it is enshrined in the Civil Codes of the Mexican States and the Federal Civil Code (FCC) regarding contracts, under which legally executed contracts must be duly fulfilled.

174. For instance, in the FCC, the *pacta sunt servanda* principle is reflected in Articles 1796 and 1797, which establish that contracts are perfected by mere consent, and once perfected, they bind the parties not only to what is expressly agreed but also to the consequences that, according to their nature, are consistent with good faith, custom, or the law.[176] Therefore, the validity and performance of contracts cannot be left to the discretion of one of the parties.[177]

175. In particular, the jurisprudence of the Mexican Supreme Court established an important criterion regarding the *pacta sunt servanda* principle, whereby this principle means that what has been agreed upon between the parties must be upheld. That is, legally executed contracts must be faithfully fulfilled, even if unforeseeable future events arise that may alter the performance of the obligation under the conditions prevailing at the time of its formation, without the judge being authorized to modify the terms of the contracts.[178]

---

174 *Amco Asia Corp. et al. v. Indonesia*, Caso CIADI No. ARB/81/1, Award, 20 November 1984, ¶ 248 ("Contracts as a principle of ordering rests on the proposition that individuals and legal entities make, for their own accounts and on their own responsibility significant decisions respecting resource utilization and allocation. The form of order which a society seeks to achieve by accepting that institution of contract thus depends upon the recognition that, in principle, pacta sunt servanda. It follows that the binding force of contractual duties for parties to a contract or agreement is recognized in every legal order that utilizes the institution of contract."). **RL-0081.**

175 *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984, ¶ 248. **RL-0081.**

176 Article 1795, Federal Civil Code. **R-0024.**

177 Article 1795, Federal Civil Code. **R-0024.**

178 *See* Thesis I.8º.C. J/14: "CONTRACTS. THOSE LEGALLY ENTERED INTO MUST BE FAITHFULLY FULFILLED, NOTWITHSTANDING THE OCCURRENCE OF UNFORESEEABLE FUTURE EVENTS THAT COULD ALTER THE PERFORMANCE OF THE OBLIGATION ACCORDING TO THE CONDITIONS EXISTING AT THE TIME IT WAS ENTERED INTO." Ninth Era. Judicial Weekly of the Federation and its Gazette. Volume XV, May 2002, page 951. **R-0025.**

176. Similarly, Mexican courts have interpreted the *pacta sunt servanda* principle in light of Article 78 of the Commercial Code.[179] They stated that this principle dictates that what is stipulated by the parties, in whatever form it is established, must be carried out.[180] In parallel, Mexican courts have characterized the *pacta sunt servanda* principle as a general principle of law, which dictates that the will of the contracting parties is the supreme law in the legal act they undertake.[181]

177. This principle applies equally to investors and States. In the words of Professor James Crawford, "*pacta sunt servanda* is not a one-way street."[182] Therefore, parties are barred from unilaterally freeing themselves from the commitments they have undertaken or modifying the stipulations, except with the consent of the other party.[183] Thus, investors cannot escape the commitments they make with the host government when undertaking their investments, and the State has the right to enforce those commitments. Various tribunals established under investment treaties have declared claims inadmissible due to agreements between the investor and the State to

---

179 Commercial Code, Article 78. ("In commercial agreements, each party is bound in the manner and terms in which it appears that he wished to be bound, without the validity of the commercial act depending on the observance of certain formalities or requirements."). **R-0026.**

180 *See* Thesis III.2º.C.13 C: "THEORY OF UNFORESEEABILITY. INAPPLICABILITY OF SUCH, IN CASES INVOLVING COMMERCIAL ACTS." Ninth Era. Judicial Weekly of the Federation and its Gazette. Volume VIII, September 1998, page 1217. **R-0027.**

181 *See* Thesis IV.3º.T. J/95: "Vacation and Vacation Bonus of Employees of the Mexican Social Security Institute. The Statute of Limitations Defense Raised Regarding These Benefits Must Comply with the Special Rule Established in the Collective Bargaining Agreement." Ninth Era. Judicial Weekly of the Federation and its Gazette. Volume XXXIV, August 2011, page 1256. **R-0028.**

182 James Crawford, Treaty and Contract in Investment Arbitration (Freshfields Lecture on International Arbitration 2007), p. 13. **RL-0082.**

183 Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals*, Grotius, p. 113. **RL-0083.**

resolve disputes before local courts.[184] The "basic principle" underlying the inadmissibility of such claims is that a binding agreement between the parties must be respected.[185]

178. For example, a tribunal recently applied the same principle to a series of similar facts. In *Sastre v. Mexico*, the claimants had accepted in writing to consider themselves Mexican for all purposes related to their investments in Mexico. Subsequently, the claimant initiated an investment arbitration against Mexico under the Argentina–Mexico BIT, alleging that its investments had been expropriated.

179. The tribunal declined jurisdiction, citing the *pacta sunt servanda* principle and the Claimant's agreement to consider himself Mexican.[186] The tribunal held that *pacta sunt servanda* "is one of the oldest and most basic principles that applies in international law."[187] Based on this principle, the tribunal found that the claimant "cannot escape from the obligations acquired under his agreement with Mexico, much less after having taken advantage of his Mexican nationality for purposes of his investment."[188] Fundamentally, the tribunal considered that the obligation not to invoke his former nationality "remains valid and binding and must be complied with."[189]

180. The same applies here. Clause Fifteen of the CFCM By-laws, Article 2 (Nationality) of Viabilis' Articles of Incorporation, and Condition 4.4 of the Concession are valid and binding and must be fulfilled. Under these provisions, Mr. Willars agreed to consider himself Mexican in all

---

184 *SGS v. Philippines, I*CSID Case No. ARB/02/06, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, ¶ 138 ("In accordance with general principle, courts or tribunals should respect such a stipulation in proceedings between those parties, unless they are bound *ab exteriore*, i.e., by some other law, not to do so."). **RL-0084.** *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. República del Paraguay*, ICSID Case No. ARB/07/09, Decision on Objections to Jurisdiction, 29 May 2009 ¶ 148 ("If the parties to a contract have freely entered into commitments, they must respect those commitments, and they are entitled to expect that others, including international courts and tribunals, also respect them, unless there are powerful reasons for not doing so".). **RL-0085.**

185 *SGS v. Philippines*, ICSID Case No. ARB/02/06, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, ¶ 138. **RL-0084.**

186 *Carlos Sastre et al v. United Mexican States*, ICSID Case No. UNCT/20/2, Award on Jurisdiction, 21 November 2022, ¶¶ 263, 272. **RL-0043.**

187 *Carlos Sastre et al v. United Mexican States*, ICSID Case No. UNCT/20/2, Award on Jurisdiction, 21 November 2022, ¶ 257. **RL-0043.**

188 *Carlos Sastre et al v. United Mexican States*, ICSID Case No. UNCT/20/2, Award on Jurisdiction, 21 November 2022, ¶ 266. **RL-0043.**

189 *Carlos Sastre et al v. United Mexican States*, ICSID Case No. UNCT/20/2, Award on Jurisdiction, 21 November 2022, ¶ 266. **RL-0043.**

matters related to his interest or participation in CFCM and Viabilis and also committed to limiting his remedies in the event of any dispute arising from the concession and not to invoke the protection of his government under any circumstance, under penalty of losing such interest or participation in favor of the Mexican State. These agreements are binding under Mexican law and are also binding in this arbitration as matters related to his participation in CFCM, Viabilis, and the Concession.

181. The commitment not to seek the protection of a foreign government was made not only to the private company CFCM, but also to the Ministry of Foreign Affairs—that is, directly to the Mexican State—which reinforces the formal, express, and binding nature of Mr. Willars' obligation.[190]

182. In this regard, the words of Professor Zachary Douglas are relevant. He has stated that a company's standing and capacity to act in an investment arbitration depend both on the law under which it was incorporated and on what is provided in its constitutive documents.[191] Thus, when the Articles of Incorporation impose restrictions on the possibility of initiating legal proceedings—as is the case here—such limitations are fully binding and cannot be overridden either by the applicable treaty or by rules of international law. These restrictions, which apply to CFCM and Viabilis, necessarily extend to their investors, such as Mr. Willars, who are subject to the same conditions.

183. Various tribunals have established that "prudent investment practice requires that any investor exercise due diligence before committing funds to any particular investment proposal"[192] Mr. Willars, described as a *"*successful businessman*"*,[193] had the obligation to exercise such due diligence regarding his alleged investment in CFCM, Viabilis, and the Concession—an obligation that Claimant himself does not dispute.

---

190 *Carlos Sastre et al v. United Mexican States*, ICSID Case No. UNCT/20/2, Award on Jurisdiction, 21 November 2022, ¶¶ 263-272. **RL-0043.**

191 *See* Douglas, *The International Law of Investment Claims, 2009,* pp. 312-313. **RL-0086.**

192 *Alasdair Ross Anderson et al. v. Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, ¶ 58. **RL-0057**. *See also SunReserve Luxco Holdings SRL v. Italy*, SCC Case No. 132/2016, Final Award, 25 March 2020, ¶ 714. **RL-0087**. *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021, ¶ 293. **RL-0088.**

193 Claimant's Memorial, ¶ 133.

184. The restrictions contained in CFCM's By-Laws, Viabilis' Articles of Incorporation, and the Concession were in force prior to any alleged investment. Therefore, it was Claimant's sole responsibility to be aware of and assess these conditions. If Mr. Willars fulfilled this duty, then he was fully aware of the terms and conditions applicable to becoming a shareholder in Viabilis and CFCM, as well as of the obligations arising from the Concession, which he accepted freely and knowingly. Accordingly, Claimant cannot now argue that such restrictions did not exist or were not applicable.

3. Effects of the Commitments Made by Mr. Willars

185. In light of the foregoing, Mexico reiterates that it never consented to arbitration with an individual who, based on his own conduct and the commitments freely made with CFCM, Viabilis, and the Ministry of Foreign Affairs, must be regarded as a Mexican national. This circumstance constitutes an absolute and insurmountable bar to Mr. Willars' ability to bring claims under ICSID.[194]

186. If this Tribunal were to disregard valid and binding commitments made by an investor upon acquiring his investment, it would undermine the integrity of State consent and the balance of the arbitral system, granting an undue advantage to a party that fails to comply with its own obligations, to the detriment of due process and in violation of the Mexican legal framework. Accordingly, the appropriate conclusion for the Tribunal is that it lacks *ratione personae* jurisdiction, given that Mr. Willars cannot bring a claim under NAFTA or the ICSID Convention, having accepted to be considered a Mexican national in connection with his involvement in CFCM and Viabilis.

IV. COSTS

187. The Respondent respectfully requests that the Tribunal order the Claimant to pay the costs and expenses incurred by Mexico as a result of this arbitration, including:

i) the costs of the Tribunal;

ii) the administrative costs of ICSID;

[194] This limitation is in turn replicated in Articles 1139 (Definitions) 1116 (Claim by an Investor of a Party on Its Own Behalf) and 1117 (Claim by an Investor of a Party on Behalf of an Enterprise) which legitimize only the investor of another party.

iii) the legal fees of the Respondent's counsel;

iv) any additional expenses incurred by the Respondent.

188. The Respondent is entitled to an award of costs in its favor for the following reasons:

i) the Tribunal clearly lacks jurisdiction.

ii) the Respondent has not breached any of its obligations under NAFTA.

iii) the Claimant has brought baseless claims with the sole intent of obtaining an unwarranted benefit.

189. The Respondent submits that, in deciding on costs, the Tribunal should take into account the evidence provided by the Respondent and the serious and unfounded allegations made against the Mexican State—particularly the jurisdictional deficiencies of the case brought by the Claimant, which the Mexican State has explained in great detail.

V. REQUEST FOR RELIEF

190. For all the foregoing reasons, the Respondent respectfully requests that this Tribunal dismiss in full the Claimants' claims for lack of jurisdiction, with a corresponding award of costs in favor of the Respondent.

Respectfully submitted,

General Council for International Trade

[Signed in the original version]

Alan Bonfiglio Ríos