(ICSID Case NO. ARB/23/29)

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

MARIO NORIEGA WILLARS,

Claimant,

v.

UNITED MEXICAN STATES,

Respondent.

CLAIMANT'S COUNTER-MEMORIAL ON JURISDICTION

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5 August 2025

Claimant, Mario Noriega Willars ("**Mr. Willars**," "**Investor**," or "**Claimant**"), on his behalf and on behalf of Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V. ("**CFCM**" or "**Company**"), serves this Counter-Memorial on Jurisdiction ("**Counter-Memorial**"), pursuant to the Tribunal's Procedural Order No. 3 and the Amended Procedural Calendar, and submits the following requests:[1]

REQUEST FOR RELIEF:

(i) That the Tribunal declares that the United Mexican States's ("**Mexico**," "**State**," or "**Respondent**") jurisdictional objections lack merit and accordingly are denied;

(ii) That the Tribunal orders the Parties to proceed to the merits, including damages;

(iii) The Tribunal award Claimant's costs and attorneys' fees incurred by Claimant during the jurisdictional phase; and

(iv) The Tribunal award such other and further relief as it deems just and necessary.

Claimant reserves the right to amend, supplement, or modify this Counter-Memorial as necessary and in accordance with the applicable rules throughout the course of these arbitral proceedings. Claimant further reserves the right to respond to any new arguments or facts presented by Respondent during the arbitration, and to submit additional evidence as appropriate.

[1] Capitalized terms have the meaning ascribed to them in the Claimant's Memorial.

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I.

INTRODUCTION

1. Through its jurisdictional objection, Mexico raises several issues that are not relevant to the Tribunal's jurisdiction, and are unsupported by the text of NAFTA, applicable case law, and Mexican law.

2. First, Mexico argues that Mr. Willars waived his right to pursue NAFTA arbitration due to a provision in CFCM's bylaws, whereby shareholders agree not to "*invoke the protection of their government*." Tellingly, Mexico relies on a selective citation to a single case (*Sastre v. Mexico*), which is distinguishable from the facts here, and fails to reference a decision where a tribunal has found a waiver based on a similar provision, as no such case exists.

3. The provision in the bylaws relied on by Mexico is plainly aimed at waiving ***diplomatic protection***, not international arbitration under NAFTA. Mr. Willars is not invoking diplomatic protection here. Moreover, the provision is a requirement under Mexican law for all companies open to foreign shareholders. If Mexico's position were accepted, nearly every foreign investor in Mexico would be barred from pursuing investor-state arbitration. As Mexico is aware, that is not the law. As such, Mexico's objection fails under NAFTA and under applicable Mexican law.

4. Second, Mexico argues that Mr. Willars' investment in CFCM is illegal because Mexico's National Commission of Foreign Investment ("**CNIE**") did not issue a resolution approving the investment.

5. As Mexico is aware, CFCM obtained a resolution from the CNIE allowing up to 99% of foreign investment in the company, so there was no breach of Mexican law. Even assuming that there had been a breach—which there was not—the effect of such breach would amount to a minor regulatory infraction punishable by a fine, which Mexico has not pursued in nearly a decade. Thus, it is not reasonable, proportionate, or legal to strip the Tribunal's jurisdiction over an infraction of this nature, and its sudden invocation by Mexico as a jurisdictional bar is opportunistic and unconvincing.

6. Third, Mexico disputes that Mr. Willars owns and controls CFCM, based on its flawed reading, in isolation, of a company resolution issued almost two years prior to Mr. Willars' acquisition of the company.

7. Mexico's argument here, also fails. CFCM's share ledger evidences the correct interest percentages in the company, and that Mr. Willars obtained a controlling interest when acquiring CFCM. Mexico ignores the share ledger. In fact, Mr. Willars owns and has owned a controlling interest in CFCM at all relevant times, and further controls CFCM through [redacted] with [redacted] which granted Mr. Willars control over the board of directors of Viabilis, CFCM's major direct shareholder. Mr. Willars' ownership and control over

CFCM (through both voting power and governance rights) grants him standing under Article 1117 of NAFTA.[2]

8. Lastly, Mexico suggests that certain shareholder disputes or post-investment conduct bar the Tribunal's jurisdiction. These arguments, however, address factual questions relevant only to the merits of the dispute and have no bearing on the Tribunal's jurisdiction. In short, all of Mexico's objections fail.

[2] In any event, Mr. Willars retains a claim for the damage he suffered on his own behalf under Article 1116 of NAFTA.

II.

FACTUAL BACKGROUND

9. Mexico's Memorial is replete with factual allegations that are irrelevant to the Tribunal's jurisdiction. These include internal disputes between shareholders, questions regarding rights of first refusal, and the timing of share registrations in the corporate books, among others. None of these issues bear on the jurisdictional questions before the Tribunal. This section sets out the facts that are relevant for the Tribunal's determination: how Mr. Willars owns and controls CFCM and Viabilis, how he complied with applicable Mexican law in doing so, and the context and legal significance of the waiver clause included in the companies' bylaws.

Proofs:

a. *See infra*, Sections II.A – II.G.

A. CFCM WAS INCORPORATED WITH A FOREIGNERS' ADMISSION CLAUSE

10. CFCM was incorporated in Mexico on 25 March 1999. At the time of incorporation, its shareholders were Genesee & Wyoming, Inc. ("**G&W**"), who held 49,999 shares, and Custodio Privado de Valores, S.A. de C.V., who held one share.

Proofs:

a. **C-4-SPA**, p. 19 (CFCM's Incorporation Deed) ("*Las acciones correspondientes al capital mínimo de la sociedad han quedado íntegramente suscritas y pagadas como sigue: Genesee & Wyoming, Inc., cuarenta y nueve mil novecientas noventa y nueve acciones de la serie 'B', sin valor nominal. Custodio Privado de Valores, Sociedad Anónima de Capital Variable, una acción de la serie 'A', sin valor nominal*");

b. **C-232-SPA**, p. 00 (CFCM's Shareholder Registry Book) (evidencing that G&W and Custodio Privado de Valores, S.A. de C.V. were the original shareholders of CFCM).

11. CFCM's bylaws included a "foreigners admission clause" (*cláusula de admisión de extranjeros*), which provides as follows:

> "DECIMA QUINTA.- Todo extranjero que en el acto de la constitución o en cualquier tiempo ulterior adquiera un interés o participación social en la sociedad, se considerará por ese simple hecho como mexicano respecto de dicho interés o participación, los activos, derechos, concesiones, participaciones o intereses de que sea titular la sociedad, y de los derechos y obligaciones que deriven de los contratos en que sea parte la sociedad con autoridades mexicanas, y se entenderá que conviene en no invocar la protección de su gobierno, bajo la pena, en caso de faltar a su convenio, de perder dicho interés o participación en beneficio de la Nación Mexicana.

Proofs:

a. **C-4-SPA**, Clause 15 (CFCM's Incorporation Deed).

12. The clause is ***required*** under Mexican law. A Mexican company may only be incorporated with one of two alternatives in its bylaws: (**a**) a clause *excluding* foreign shareholders entirely, whether directly or indirectly (*cláusula de exclusión de extranjeros*); or (**b**) a "foreigners admission clause" (*cláusula de admisión de extranjeros*), such as the one adopted by CFCM. The Regulation of Mexico's Foreign Investment Law provides as follows:

> **Artículo 14.** Cuando en los estatutos sociales ***no se pacte la cláusula de exclusión de extranjeros***, ***se debe celebrar un convenio o pacto expreso que forme parte integrante de los estatutos sociales***, por el que los socios extranjeros, actuales o futuros de la sociedad, se obligan ante la Secretaría de Relaciones Exteriores a considerarse como nacionales respecto de:
>
> I. Las acciones, partes sociales o derechos que adquieran de dichas sociedades;
>
> II. Los bienes, derechos, concesiones, participaciones o intereses de que sean titulares tales sociedades, y
>
> III. Los derechos y obligaciones que deriven de los contratos en que sean parte las propias sociedades.
>
> ***El convenio o pacto señalados deberán incluir la renuncia a invocar la protección de sus gobiernos bajo la pena, en caso contrario, de perder en beneficio de la Nación los derechos y bienes que hubiesen adquirido***.

Proofs:

a. **CL-188-SPA**, Article 14 (Mexico's Foreign Investment Law Regulation);

b. **CL-168-SPA**, Article 2, subsection VII (Mexico's Foreign Investment Law) ("*Cláusula de Exclusión de Extranjeros: El convenio o pacto expreso que forme parte integrante de los estatutos sociales, por el que se establezca que las sociedades de que se trate no admitirán directa ni indirectamente como socios o accionistas a inversionistas extranjeros, ni a sociedades con cláusula de admisión de extranjeros*");

c. **CER-3-SPA**, ¶77 (Expert Report-Carlos García Fernández-Counter-Memorial on Jurisdiction) ("*Las cláusulas anteriores -una u otra- son un requisito legal para la constitución de cualquier sociedad mexicana. Tal como lo señala el artículo 14 del Reglamento de la LIE, cuando no exista una cláusula de exclusión de extranjeros, debe incorporarse en los estatutos sociales la cláusula de admisión de extranjeros, en virtud de la cual se celebra un pacto expreso con el Estado Mexicano, en los términos ya precisados. Esta cláusula de admisión es conocida en el medio jurídico y empresarial, precisamente, como "Cláusula Calvo," en virtud de que el pacto incluye la renuncia de los extranjeros a invocar la protección de sus respectivos gobiernos*").

13. CFCM thus adopted ***the only legally available option*** that permitted foreign participation in its capital. As further explained in the legal section below, the inclusion of a "foreigners admission clause" does not constitute a waiver of the company's or its shareholders' rights under an investment treaty.

Proofs:

a. *See infra*, Section III.C.
b. **CER-3-SPA**, ¶80, i) (Expert Report-Carlos García Fernández-Counter-Memorial on Jurisdiction) ("*Primero, como expliqué, la Cláusula Calvo, desde sus orígenes, estipula la renuncia de los extranjeros a invocar la protección diplomática del gobierno del que son nacionales. Ese ha sido el entendimiento, también, en México. Sin embargo, la renuncia a invocar la protección diplomática no implica ni conlleva una renuncia a iniciar un procedimiento de arbitraje de inversión, que es un procedimiento distinto en el que, importantemente, bajo ninguna circunstancia participa el gobierno del que es nacional representando los intereses del inversionista extranjero. El arbitraje de inversión es un recurso directo del inversionista en contra del Estado anfitrión de la su inversión, sin la participación de su gobierno, ante un tribunal imparcial y bajo reglas previstas en el Capítulo de Inversión de un tratado internacional de libre comercio o de inversión (i.e. APPRI)*");
c. *Id*. ("*Así, bajo la línea argumentativa establecida en el Memorial de Jurisdicción presentado por México, la multicitada cláusula de admisión de extranjeros podría llegar a impedir al inversionista extranjero solicitar a su Estado de origen que interviniera en su favor, a título de protección diplomática, pero no puede impedir o limitar que dicho inversionista presente su reclamación en virtud de un tratado de inversión o, en este caso, del TLCAN*").

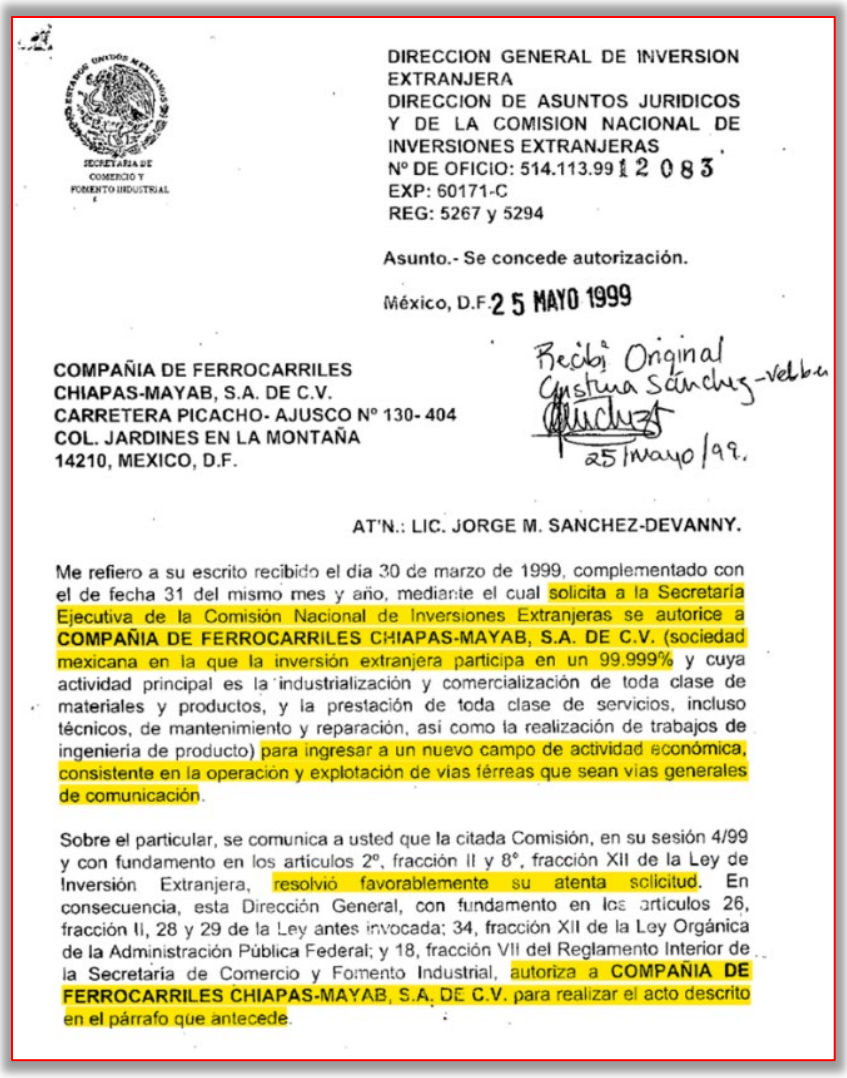
14. Accordingly, the inclusion of the "foreigners admission clause" (*cláusula de admisión de extranjeros*) in CFCM's bylaws was a legal requirement under Mexican law to allow foreign investment, not a voluntary or strategic choice by the company or its shareholders. Far from constituting a waiver of treaty rights, such clauses merely reflect Mexico's longstanding regulatory framework. They do not, and cannot, operate to bar international claims under investment treaties, particularly where, as here, no diplomatic protection is being invoked.

Proofs:

a. *See supra*, ¶¶10-13;
b. *See infra*, Section III.C.

B. CFCM OBTAINED THE REQUIRED FOREIGN INVESTMENT AUTHORIZATIONS

15. CFCM also obtained the required authorizations for foreign investment. On 25 May 1999, CFCM was granted authorization from the CNIE to operate and exploit railways, with a foreign investment of up to 99.999% ("**CFCM's Foreign Investment Authorization**"). Importantly, this authorization was granted ***directly to CFCM*** (not its shareholders), thereby allowing the company to receive foreign investment in excess of the 49% threshold:



SECRETARÍA DE COMERCIO Y FOMENTO INDUSTRIAL

DIRECCION GENERAL DE INVERSION EXTRANJERA
DIRECCION DE ASUNTOS JURIDICOS Y DE LA COMISION NACIONAL DE INVERSIONES EXTRANJERAS
Nº DE OFICIO: 514.113.99 12 083
EXP: 60171-C
REG: 5267 y 5294

Asunto.- Se concede autorización.

México, D.F. 25 MAYO 1999

COMPAÑIA DE FERROCARRILES CHIAPAS-MAYAB, S.A. DE C.V.
CARRETERA PICACHO- AJUSCO Nº 130- 404
COL. JARDINES EN LA MONTAÑA
14210, MEXICO, D.F.

Recibí Original
Cristina Sánchez-Vellebu
25/mayo/99.

AT'N.: LIC. JORGE M. SANCHEZ-DEVANNY.

Me refiero a su escrito recibido el día 30 de marzo de 1999, complementado con el de fecha 31 del mismo mes y año, mediante el cual solicita a la Secretaría Ejecutiva de la Comisión Nacional de Inversiones Extranjeras se autorice a **COMPAÑIA DE FERROCARRILES CHIAPAS-MAYAB, S.A. DE C.V.** (sociedad mexicana en la que la inversión extranjera participa en un 99.999% y cuya actividad principal es la industrialización y comercialización de toda clase de materiales y productos, y la prestación de toda clase de servicios, incluso técnicos, de mantenimiento y reparación, así como la realización de trabajos de ingeniería de producto) para ingresar a un nuevo campo de actividad económica, consistente en la operación y explotación de vías férreas que sean vías generales de comunicación.

Sobre el particular, se comunica a usted que la citada Comisión, en su sesión 4/99 y con fundamento en los artículos 2º, fracción II y 8º, fracción XII de la Ley de Inversión Extranjera, resolvió favorablemente su atenta solicitud. En consecuencia, esta Dirección General, con fundamento en los artículos 26, fracción II, 28 y 29 de la Ley antes invocada; 34, fracción XII de la Ley Orgánica de la Administración Pública Federal; y 18, fracción VII del Reglamento Interior de la Secretaría de Comercio y Fomento Industrial, autoriza a **COMPAÑIA DE FERROCARRILES CHIAPAS-MAYAB, S.A. DE C.V.** para realizar el acto descrito en el párrafo que antecede.

Imagen 1: CFCM's authorization to have foreign investment in the operation of railways [C-234-SPA]

Proofs:

a. **C-234-SPA** Official letter No. 514.113.9912083 (evidencing that the *Comisión Nacional de Inversiones Extranjeras* authorized CFCM to have a 99.9% foreign investment participation).

16. CFCM's Foreign Investment Authorization confirms that the Mexican government approved and accepted the level of foreign ownership in CFCM from the outset. There is no evidence—nor has Mexico provided such—that this authorization was revoked, modified, or challenged by the relevant Mexican authorities. The authorization granted ***in favor of CFCM*** is therefore still in force.

Proofs:

a. **C-234-SPA** Official letter No. 514.113.9912083 (evidencing that the CNIE authorized CFCM to have a 99.9% foreign investment participation).

17. CFCM's Foreign Investment Authorization continues to form part of the legal framework governing the company's operations. Mexico's current jurisdictional objections cannot be reconciled with the very authorization that its own government issued decades ago to permit the company's foreign capital structure. In short, there is no basis to question the legitimacy of the foreign investment in CFCM.

Proofs:

a. *See supra*, ¶¶15-16.

C. MR. WILLARS OWNS AND CONTROLS CFCM

1) Mr. Willars acquired a 16.38% direct interest in CFCM

18. Once the participation of foreign capital in CFCM was approved by the Mexican government, CFCM's shareholding structure underwent several changes until Mr. Willars ultimately acquired ownership and control as CFCM's controlling shareholder.

Proofs:

a. *See infra*, ¶¶19-42.

19. As noted above, CFCM's original shareholders were G&W and Custodio Privado de Valores, S.A. de C.V. On 13 June 2000, following a resolution by CFCM's shareholders to increase the company's variable capital,[3] GW Servicios, S.A. de C.V. acquired 1,392,019 shares in CFCM.

Proofs:

a. **C-232-SPA**, p. 01 (CFCM's Shareholder Registry Book) ("*Título No. 3, que ampara 1'392,019 (un millón trescientas noventa y dos mil diecinueve acciones), serie 'A' con valor contable de $255.26168 cada una, emitido en favor de GW Servicios, S.A. de C.V.…*).

20. Subsequently, on 19 June 2007, Custodio Privado de Valores, S.A. de C.V. transferred its single share to GW CM Holdings, Inc. As of that date, CFCM's shareholding structure was as follows:

Shareholder	Number of Shares
GW Servicios, S.A. de C.V.	1,392,019 ("A" Series)
Genesee & Wyoming, Inc.	49,999 ("B" Series)

[3] In Mexico, "variable capital" (*capital variable*) is a modality that can be adopted by commercial companies, which can be increased or reduced with fewer formalities than fixed capital (*capital fijo*). Increases and reductions of variable capital are registered in a private book called "*Libro de Registro de Variaciones de Capital*."

GW CM Holdings, Inc.	1 ("B" Series)

Table 1: CFCM's shareholding structure as of 19 June 2007 (C-232-SPA)

Proofs:

a. **C-232-SPA**, p. 05 (CFCM's Shareholders' Registry Book) ("*…con fecha 19 de junio de 2007 a través de un contrato de compraventa de acciones se transmitió la propiedad del Título No. 6 que ampara 1 (una) acción de la Serie A sin expresión de valor nominal emitido a favor de Custodio Privado de Valores, S.A. de C.V., el cual se endosa a favor de GW CM Holdings Inc. de nacionalidad norteamericana…*").

21. Later, G&W and its subsidiaries sought to transfer their participation in CFCM. As explained in the Claim Memorial, following the damage caused by Hurricane Stan, Mexico took no meaningful steps to repair the Chiapas-Mayab Railway. Instead, on 8 August 2007, it initiated sanction proceedings against CFCM, ordered the sequestration of its assets, and appointed FIT as the depositary (*depositario*). The SCT subsequently imposed a modality (*modalidad*) on the Concession, ordering FIT to use, operate, and maintain the Chiapas-Mayab Railway.

Proofs:

a. *See* Claim Memorial, ¶¶46-66;

b. **C-79-SPA**, p. 8 (Report of the Director General of FIT, dated 1 March 2007) ("*Promover ante la SCT la reconstrucción de la vía de la costa de Chiapas. **Ya se presentó presupuesto y programa, se espera la resolución que emita la SCT**… El desastre provocado en la costa de Chiapas por el Huracán STAN, durante el mes de octubre de 2005, ocasionó una pérdida en el manejo de carga por ferrocarril de un 33% con respecto a 2005 y de 43.7% con respecto a lo programado para 2006, situación que prevalece debido a que **aún no se reconstruye la vía férrea de la costa de Chiapas** que además conecta con la frontera de Guatemala*");

c. **C-85-SPA**, p. 22 (Official Letter 4.3.-1076/2007 dated 8 August 2007) ("*Por lo expuesto y fundado, es de resolverse y se resuelve: PRIMERO.- Se instruye procedimiento de imposición de sanciones a Compañía de Ferrocarriles Chiapas y Mayab, S.A. de C.V.…SEGUNDO.- A fin de garantizar la continuidad en la prestación del servicio público de transporte ferroviario de carga…se dispone el aseguramiento de bienes afectos a la prestación del servicio ferroviario y operación de las vías ferroviarias Chiapas y Mayab…TERCERO.- Se designa a la empresa Ferrocarril del Istmo de Tehuantepec, S.A. de C.V., como depositario de los bienes asegurados y…se designa también a esa empresa como verificador especial*");

d. **C-86-SPA**, p. 3 (Official Letter No. 4.3.-1081/2007 dated 10 August 2007) ("*…ante la necesidad de continuar la operación y explotación de las vías Chiapas y Mayab, y la prestación del servicio público de transporte ferroviario, se impone a FIT modalidad para que opere, explote y mantenga la vías Chiapas y Mayab y preste el servicio público de transporte ferroviarios…hasta que: i) se otorgue concesión respecto de las vías Chiapas y Mayab, o ii) esta Secretaría le notifique que han*

cesado las causas que motivan el presente oficio, o iii) el 31 de enero de 2008, lo que ocurra primero").

22. In light of these developments, G&W sought to divest its shares in CFCM and Viabilis Holding, S.A. de C.V. ("**Viabilis**") became interested in acquiring CFCM. After conducting a Technical Due Diligence, and relying on SCT's assurances that it would discontinue all judicial and administrative proceedings against CFCM, rebuild the Chiapas Line, return control of the Concession to CFCM in 2009, and extend the Concession's term, Viabilis and G&W (together with GW Servicios, S.A. de C.V., and GW CM Holdings, Inc.) executed an initial share purchase agreement for the sale of CFCM's shares on 4 July 2008.

Proofs:

a. *See* Claim Memorial, ¶¶68-73;

b. **CWS-5-SPA**, ¶6 (Witness Statement-[redacted] Counter-Memorial on Jurisdiction) ("*En el año 2009, y luego de una serie de conversaciones con la Secretaría de Comunicaciones y Transportes de México (la "SCT"), adquirí el control y la propiedad de CFCM del grupo Genesee & Wyoming. El principal activo de CFCM era la concesión ferroviaria de las vías de Chiapas y Mayab que había obtenido en 1999 (la "Concesión")*");

c. **C-90-SPA**, pp. 2-3 (Letter from Viabilis to the SCT dated 19 September 2008) ("*Durante los meses de enero, febrero y marzo de 2008, Genesee & Wyoming Inc. ('G&W'), empresa propietaria (directamente y/o a través de distintas subsidiarias o afiliadas) de acciones representativas del 100% (cien por ciento) del capital social de CFCM (las "Acciones"), y Viabilis Holding, S.A. de C.V. ("Viabilis"),* ***sostuvieron diversas reuniones de trabajo con usted y con otros servidores públicos de la SCT y del FIT, a fin de analizar la posibilidad y conveniencia de que Viabilis tomara el control del proyecto****, mediante la adquisición de las Acciones y la aportación de recursos frescos para el mejoramiento de la vía en la línea del Mayab. Para tales efectos,* ***la SCT se comprometió, entre otras cosas, a resolver definitivamente el Procedimiento de Sanción, terminar los procedimientos legales en contra de CFCM, reconstruir la Línea Chiapas y entregarla al concesionario durante el primer semestre de 2009, así como a autorizar una modificación a la Concesión****, de modo que los términos de esta fueran similares a los del resto de las concesiones otorgadas por la SCT*") (emphasis added);

d. **C-92-SPA** (Railroad Inspection and Report issued by Progress Rail Services de Mexico to Viabilis dated 29 July 2008) (demonstrating that Viabilis conducted a detailed technical due diligence on the state of the Mayab Line);

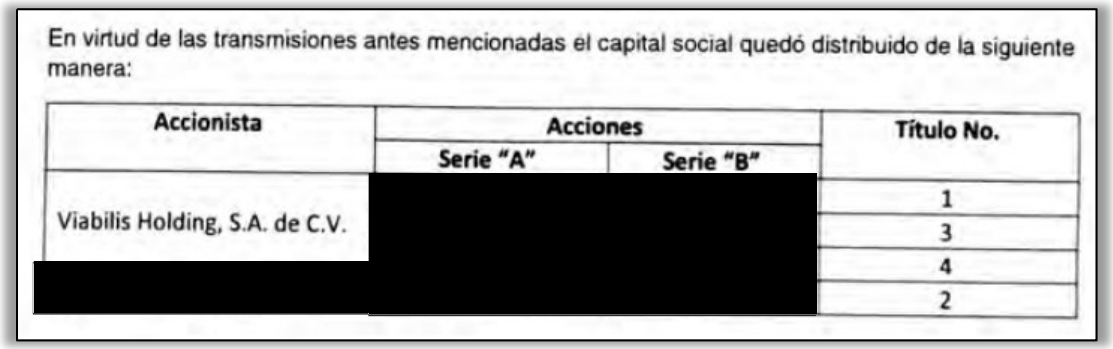
e. **C-93-SPA** (Railroad Inspection and Report issued by Progress Rail Services de Mexico to Viabilis dated 29 July 2008, Annex 1) (showing that the Technical Due Diligence thoroughly inspected the state of the Mayab Line);

f. **CWS-2-SPA**, ¶29 (Witness Statement-[redacted] Claim Memorial) ("*En 2008, Viabilis contrató los servicios de Progress Rail Services para realizar un dictamen sobre la situación de la Vía Mayab y efectuar una evaluación*

de la inversión necesaria para operar la misma a 30 kilómetros por hora. La línea de Chiapas no se incluyó en el estudio porque existía el compromiso de la SCT de reconstruir los daños que la misma sufrió tras el paso del Huracán Stan");

g. **C-95-SPA**, p. 4 (Amendment to the Conditional Share Purchase Agreement dated 7 November 2008) ("*Con fecha 4 de julio de 2008, las Partes celebraron este Contrato de Compraventa de Acciones sujeto a Condición Suspensiva (el 'Contrato')*").

23. Due to SCT's conduct, the initial share purchase agreement could not be performed. On 7 November 2008, Viabilis and G&W amended the initial share purchase agreement (the "**Viabilis SPA**"), which ultimately closed on 21 August 2009. Through this agreement, Viabilis and [redacted] assumed full control of CFCM:



En virtud de las transmisiones antes mencionadas el capital social quedó distribuido de la siguiente manera:

Accionista	Acciones		Título No.
	Serie "A"	Serie "B"	
Viabilis Holding, S.A. de C.V.	[redacted]		1
			3
[redacted]			4
			2

Image 2: CFCM's shareholding structure after the Viabilis SPA [C-232-SPA]

Proofs:

a. *See* Claim Memorial, ¶¶74-75;

b. **C-95-SPA**, Section Two (Amendment to the Conditional Share Purchase Agreement dated 7 November 2008) (demonstrating that Viabilis agreed to pay USD $2.3 million for CFCM's control);

c. **C-100-SPA** (Letter from Viabilis and G&W to the SCT dated 21 August 2009) (indicating that Viabilis and [redacted] assumed full control of CFCM);

d. **C-232-SPA**, p. 06 (CFCM's Shareholders' Registry Book) (evidencing CFCM's capital structure after the Viabilis SPA);

e. **CWS-5-SPA**, ¶6 (Witness Statement-[redacted] Counter-Memorial on Jurisdiction) ("*…Entre el 2009 y el 2015, tuve y ejercí el control de CFCM por vía de mi participación directa en la compañía, y a través de mi control de Viabilis*").

24. As explained in the Claim Memorial, following Viabilis' acquisition, the SCT agreed to return the Concession and its assets to CFCM, and extend the term of the Concession Agreement for an additional twenty years. CFCM and the SCT also agreed on an inspection process for the Concession's assets. The agreed inspection revealed that the Concession's assets were in poor condition and required additional investments.

Proofs:

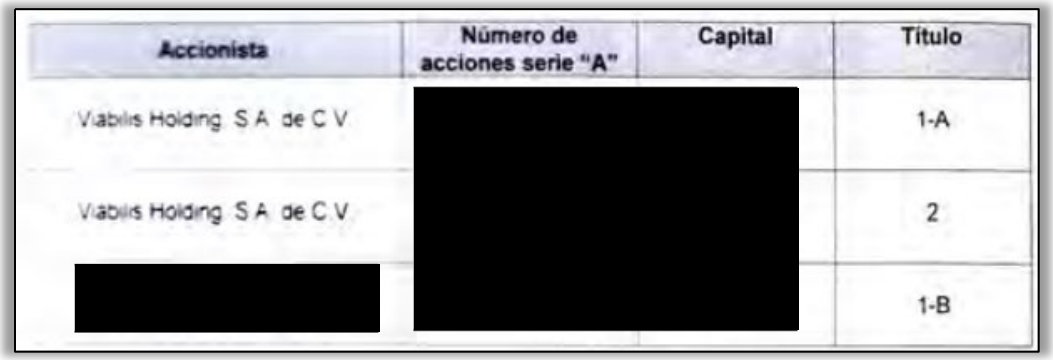
a. *See* Claim Memorial, ¶¶78-124.

25. To obtain this additional investment, CFCM and the SCT negotiated an agreement which included a commitment by the SCT to provide funds totaling MXN $4.1 billion to restore the Chiapas-Mayab Railway. CFCM agreed to provide funds totaling MXN $2.3 billion, in line with the investments it committed to make in the 2012 Business Plan. The final draft of this agreement was concluded on 14 March 2014 (the "**2014 Convenio**").

Proofs:

a. *See* Claim Memorial, ¶¶114-124;
b. **CWS-2-SPA**, ¶61 (Witness Statement-[redacted]Claim Memorial) ("*...Inicialmente, la SCT propuso comprometer recursos federales por MXN$4,100 millones durante los primeros cinco años...*");
c. *Id*., ¶62 ("*Después de varias discusiones e intercambios para formalizar la aportación de la SCT de recursos federales a la Concesión, finalmente en una reunión mantenida en febrero de 2014, CFCM dio su visto bueno a un borrador de convenio propuesto por la SCT... El documento aprobado lo envió la SCT a CFCM por escrito en un oficio de 14 de marzo de 2014*");
d. **C-137-SPA**, p. 3 (Draft "convenio" prepared by the SCT dated 2 December 2013) (indicating that the SCT agreed to commit MXN $4.1 billion to restore the Chiapas-Mayab Railway);
e. **C-13-SPA**, p. 1 (Official Letter 4.3.286/2014 dated 14 March 2014) ("*Sobre el particular, como es de su conocimiento, se han llevado a cabo diversas reuniones entre su representada y esta Dirección General a efecto de precisar los alcances del Convenio de mérito, asimismo, siendo en la última reunión del día 12 de febrero del año en curso, donde* ***su representada emitió visto bueno a la última versión del Convenio, la cual se adjunta para pronta referencia***...") (emphasis added).

26. On 15 March 2014, CFCM's shareholders approved the cancellation of all shares and the issuance of new shares to correct an imbalance between the book value of fixed capital and variable capital shares. The resulting shareholding structure of CFCM was as follows:



Accionista	Número de acciones serie "A"	Capital	Título
Viabilis Holding S A de C V	[redacted]		1-A
Viabilis Holding S A de C V			2
[redacted]			1-B

Image 3: CFCM's shareholding structure [C-232-SPA]

Proofs:

a. **C-232-SPA**, p. 07 (CFCM's Shareholders' Registry Book) (evidencing CFCM's capital structure on 30 April 2015).

27. As explained in the Claim Memorial, to implement the 2014 Convenio, the SCT requested and CFCM sought and obtained equity contributions from Consorcio de Desarrollo Intercontinental, S.A. de C.V. ("**Consorcio**"), and [redacted].

Proofs:

a. *See* Claim Memorial, ¶121;

b. **C-140-SPA**, p. 1 (Letter FCCM-DGTFM-0005/14 dated 7 April 2014) ("*…adjunto al presente encontrará copia del acta de la Asamblea General Ordinaria de Accionistas de Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V. (FCCM), de fecha 15 de marzo de 2014 (Anexo 1), en la que se aprobaron diversos actos que fortalecen la capacidad financiera de FCCM, mismos que fueron acordados previamente con su Dirección General de cara a la celebración del Convenio que se indica en el propio oficio de referencia… se han incorporado como accionistas de FCCM las personas morales Consorcio de Desarrollo Intercontinental, S.A. de C.V. y* [redacted]");

c. **C-96-SPA** (Letter from Viabilis to the SCT dated 5 September 2008) (reflecting that Viabilis secured financing and technical support to take over CFCM's control).

28. Consorcio and [redacted] contributions, however, were conditional on the SCT returning operational control of the Concession to CFCM. As a result, CFCM [redacted] in an effort to provide funding to CFCM ***while the company awaited the return of the Concession from the SCT***. [redacted] Through this process, [redacted] and Consorcio became direct shareholders in CFCM, and Viabilis increased its participation to a total of 45,567,550 shares, or a 73.71% interest.

Proofs:

a. **C-140-SPA**, p. 5 (Letter FCCM-DGTFM-0005/14) ("*ÚNICA. Se aprueba* [redacted] *representativas de la parte variable del capital social de la Sociedad,* [redacted] *de conformidad con lo establecido en el siguiente punto del Orden del Día*");

b. *Id*., pp. 5-6 ("[redacted] *mantenía un pasivo* [redacted] *cuyo monto ascendía, a la fecha de la presente Asamblea, a la cantidad* [redacted] *por lo que propuso que se aprobara* [redacted] *manifestó que* [redacted] *mantenía un adeudo con él, a la fecha de la presente Asamblea, por la cantidad* [redacted]

[redacted] *mantiene un pasivo, en favor* [redacted]*, por un monto que, a la fecha de la presente Asamblea, asciende a la cantidad* [redacted]

29. The remaining [redacted] contingent on the SCT's return of the Concession within 12 months.

Proofs:

a. **C-140-SPA**, p. 6 (Letter FCCM-DGTFM-0005/14) ("*...Lo anterior, en el entendido que* [redacted] *(i) [E]n este acto y por partes iguales,* [redacted] *es decir, la cantidad de* [redacted]*; y (ii) en un plazo que no exceda de 12 (doce) meses contados a partir de la fecha do celebración de la presente Asamblea,* ***en función de la fecha efectiva en la cual la SCT devuelva a la Sociedad la operación de las vías cortas Chiapas y Mayab*** *y de los compromisos de inversión asumidos por la Sociedad frente a la SCT, por partes iguales,* [redacted]").

30. [redacted]

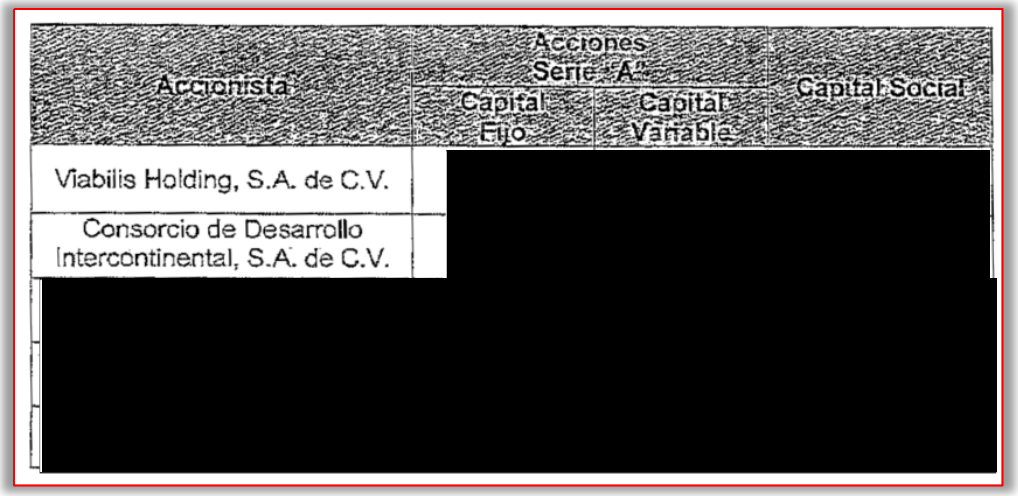


Image 4: Letter FCCM-DGTFM-0005/14 [C-140-SPA]

Proofs:

a. **C-140-SPA** (Letter FCCM-DGTFM-0005/14).

31. The corresponding shareholder percentages were correctly reported to the SCT on 7 April 2014, in a letter sent by CFCM to the SCT:

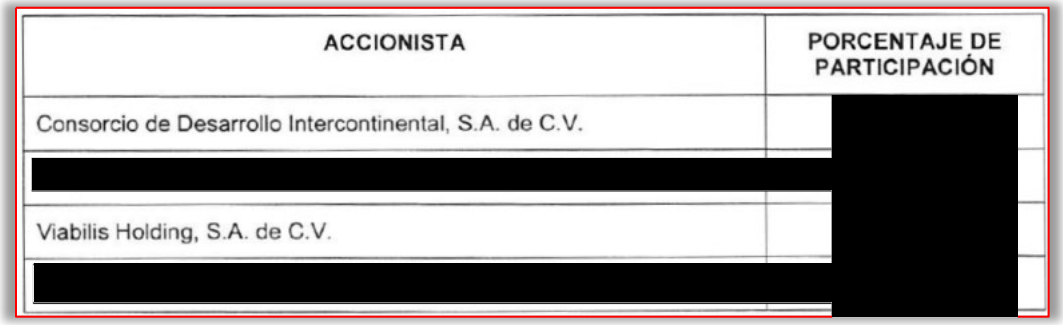
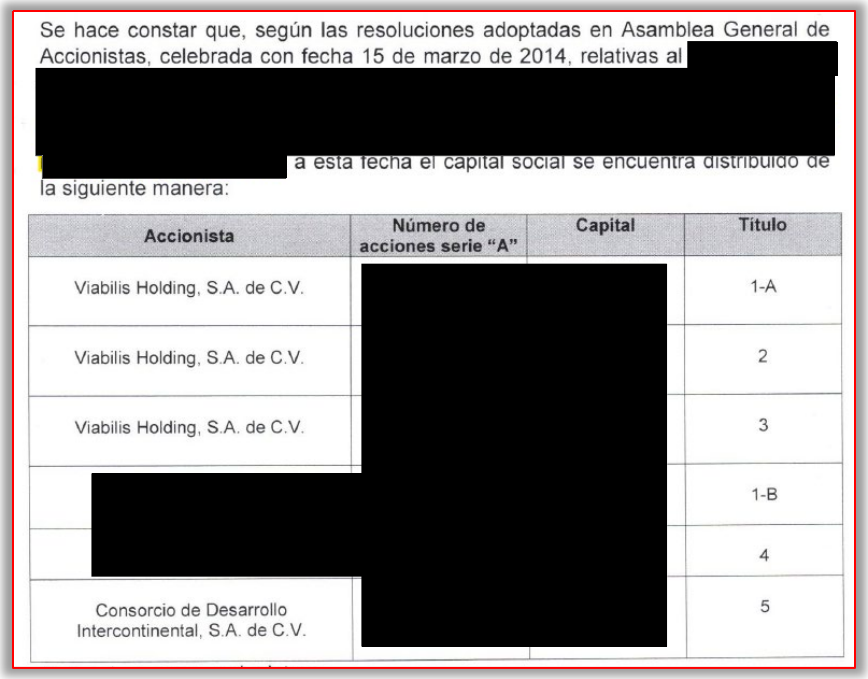


Image 5: Letter FCCM-DGTFM-0005/14 [C-140-SPA]

Proofs:

a. **C-140-SPA**, p. 1 (Letter FCCM-DGTFM-0005/14).

32. Despite CFCM's shareholders' significant efforts, the SCT failed to return the Concession to CFCM within the 12-month period that followed the shareholders' meeting. Consequently, [redacted] ***did not complete payment*** [redacted]. The 30 April 2015 shareholders' registry—more than 12 months after the shareholders' meeting approved the capital increase—***reflected*** [redacted]. In fact, the registry specifically noted that it reflected a list of shareholders [redacted]:



Se hace constar que, según las resoluciones adoptadas en Asamblea General de Accionistas, celebrada con fecha 15 de marzo de 2014, relativas al [redacted] a esta fecha el capital social se encuentra distribuido de la siguiente manera:

Accionista	Número de acciones serie "A"	Capital	Titulo
Viabilis Holding, S.A. de C.V.	[redacted]		1-A
Viabilis Holding, S.A. de C.V.			2
Viabilis Holding, S.A. de C.V.			3
[redacted]			1-B
			4
Consorcio de Desarrollo Intercontinental, S.A. de C.V.			5

Image 6: CFCM's Shareholding Structure as of 30 April 2015 [C-232-SPA]

Proofs:

a. **C-2-SPA**, p. 2 (CFCM's Shareholder Registry);
b. **C-232-SPA**, p. 07 (CFCM's Shareholders' Registry Book) (evidencing CFCM's capital structure on 30 April 2015).

33. As a result, [redacted]

Proofs:

a. **C-2-SPA**, p. 2 (CFCM's Shareholder Registry);
b. **C-232-SPA**, p. 07 (CFCM's Shareholders' Registry Book) (evidencing CFCM's capital structure on 30 April 2015).

34. This operation—including its contingent nature—was explained and evidenced in Claimant's Response to the Request for Bifurcation. Despite that explanation and the evidence provided, Mexico continues to allege that [redacted] is a shareholder of CFCM, and that Consorcio has a higher number of shares than it does. Mexico's allegations ignore all the facts and evidence described above.

Proofs:

a. *See* Claimant's Response to the Request for Bifurcation, ¶¶141-146;
b. Memorial on Jurisdiction, ¶86.

35. Later, in 2015, [redacted] Viabilis' owner and controller—decided to divest most of his interest in both CFCM and Viabilis. [redacted] reached out to Mr. Willars to invite him to participate in CFCM's business.

Proofs:

a. *See* Claim Memorial, ¶133;
b. **CWS-1-ENG**, ¶9 (Witness Statement-Mario Noriega Willars-Claim Memorial) ("*In 2015,* [redacted] *presented me with the opportunity to become involved in the Mexico rail transport industry by investing in two Mexican companies, which were part of the same corporate group: (1) Viabilis Holding, S.A. de C.V. ("Viabilis") and (2) Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V. ("CFCM"), a subsidiary of Viabilis*");
c. **CWS-4-ENG**, ¶3 (Witness Statement-Mario Noriega Willars-Counter-Memorial on Jurisdiction-Second Statement) ("*As described in my first witness statement, in 2015,* [redacted] *presented me with the opportunity to become involved in the Mexican rail transport industry by investing in two companies that were part of the same corporate group: Viabilis Holding, S.A. de C.V. ("Viabilis", together with CFCM, the "Companies") and CFCM, a subsidiary of Viabilis*");
d. **CWS-5-SPA**, ¶8 (Witness Statement-[redacted] Counter-Memorial on Jurisdiction) ("*A inicios de 2015, le presenté la oportunidad al Sr. Willars de entrar al negocio de CFCM. En ese contexto, tuvimos una serie de reuniones en las que le expliqué al Sr. Willars la estructura corporativa de CFCM, el estado del negocio de CFCM, el plan de negocios suscrito entre CFCM y la SCT en 2012 para la operación de la Concesión, y las declaraciones de México apoyando el desarrollo de la Concesión, incluyendo el compromiso de más de MXN $6,000 millones realizado en el Plan Nacional de Infraestructura para reparar las vías Chiapas y Mayab, entre otros documentos*").

36. After reviewing information about CFCM, the Concession, and the SCT's commitments, Mr. Willars decided to invest in Viabilis and CFCM. On 14 December 2015, [redacted] and Mr. Willars executed a share purchase agreement ("**Willars SPA**") for the purchase of shares in CFCM and Viabilis. Under the Willars SPA, Mr. Willars acquired 10,126,000 shares in CFCM (representing a 16.38% direct interest in the company), and 24 shares in Viabilis (representing a 48% interest in that entity). Mr. Willars' shares amount to a 51.76% interest in CFCM (a 16.38% direct interest, plus the Viabilis' shares that represent a 35.38% indirect interest in CFCM).

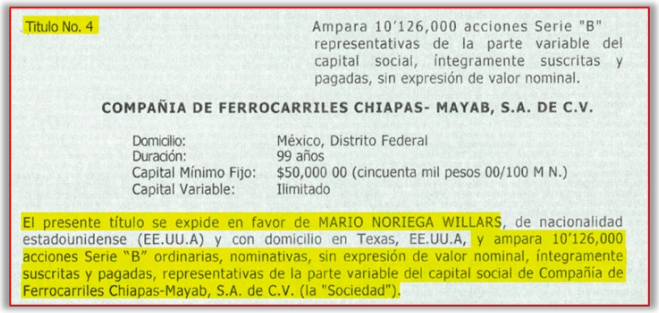
Proofs:

a. *See* Claim Memorial, ¶136;
b. **C-158-ENG**, p. 17 (Share Purchase Agreement between [redacted] and Mario Noriega Willars) (evidencing that Mr. Willars acquired an interest in CFCM in 2015);
c. *Id.*, p. 24 ("The Directly Owned CFCM Shares represent 16.38% of the total CFCM outstanding stock shares, and the indirectly Owned CFCM Shares represent 35.38% of the total CFCM outstanding stock shares. Therefore, the Directly Owned CFCM Shares and the Indirectly Owned CFCM Shares, together, represent approximately 51.76% of the total CFCM outstanding stock share");
d. **CWS-4-ENG**, ¶6 (Witness Statement-Mario Noriega Willars-Counter-Memorial on Jurisdiction-Second Statement) ("On 14

December 2015, [redacted] and I executed a share purchase agreement for the sale of his participation in CFCM and Viabilis (the "SPA"). Through the SPA, I acquired a 51.76% controlling interest in CFCM");

e. **CWS-5-SPA**, ¶10 (Witness Statement-[redacted] Counter-Memorial on Jurisdiction) ("*…el Sr. Willars y yo suscribimos un contrato de compraventa de acciones el 14 de diciembre de 2015 (el "SPA"), en virtud del cual vendí al Sr. Willars 24 acciones ordinarias de Viabilis, y 10,126,000 acciones ordinarias serie B de CFCM, por medio del cual le transferí una participación accionaria en CFCM de 51.76%*").

37. On the same day, [redacted] signed Bills of Sale transferring the agreed 10,126,000 CFCM shares (or 16.38% of outstanding shares) and 24 Viabilis shares (or 48% of outstanding shares) to Mr. Willars, for which he received share certificates reflecting his participation in both companies. These transactions gave Mr. Willars a 51.76% majority ownership interest in CFCM: (i) a 16.38% direct interest in CFCM; and (ii) a 35.38% indirect interest through its participation in Viabilis, which owned 73.31% of the outstanding shares of CFCM.



Titulo No. 4

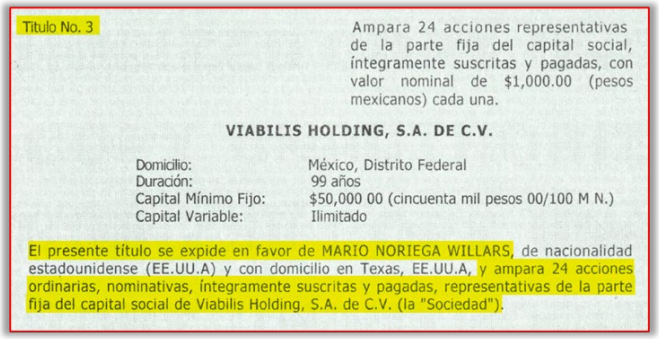
Ampara 10'126,000 acciones Serie "B" representativas de la parte variable del capital social, íntegramente suscritas y pagadas, sin expresión de valor nominal.

COMPAÑIA DE FERROCARRILES CHIAPAS- MAYAB, S.A. DE C.V.

Domicilio:	México, Distrito Federal
Duración:	99 años
Capital Mínimo Fijo:	$50,000 00 (cincuenta mil pesos 00/100 M N.)
Capital Variable:	Ilimitado

El presente título se expide en favor de MARIO NORIEGA WILLARS, de nacionalidad estadounidense (EE.UU.A) y con domicilio en Texas, EE.UU.A, y ampara 10'126,000 acciones Serie "B" ordinarias, nominativas, sin expresión de valor nominal, íntegramente suscritas y pagadas, representativas de la parte variable del capital social de Compañia de Ferrocarriles Chiapas-Mayab, S.A. de C.V. (la "Sociedad").

Image 7: Mr. Willars' Share Certificate in CFCM [C-227-SPA]



Titulo No. 3

Ampara 24 acciones representativas de la parte fija del capital social, íntegramente suscritas y pagadas, con valor nominal de $1,000.00 (pesos mexicanos) cada una.

VIABILIS HOLDING, S.A. DE C.V.

Domicilio:	México, Distrito Federal
Duración:	99 años
Capital Mínimo Fijo:	$50,000 00 (cincuenta mil pesos 00/100 M N.)
Capital Variable:	Ilimitado

El presente título se expide en favor de MARIO NORIEGA WILLARS, de nacionalidad estadounidense (EE.UU.A) y con domicilio en Texas, EE.UU.A, y ampara 24 acciones ordinarias, nominativas, íntegramente suscritas y pagadas, representativas de la parte fija del capital social de Viabilis Holding, S.A. de C.V. (la "Sociedad").

Image 8: Mr. Willars' Share Certificate in Viabilis [C-228-SPA]

Proofs:

a. **CWS-4-ENG**, ¶7 (Witness Statement-Mario Noriega Willars-Counter-Memorial on Jurisdiction-Second Statement) ("I received share certificates for my interests in the Companies, which were duly recorded in the corresponding share ledgers");

b. **C-227-SPA** (CFCM Share Certificate No. 4 of Mario Willars) (showing that Mario Willars owns 10,126,000 shares in CFCM, equivalent to 16.38% of the outstanding shares of CFCM);

c. **C-228-SPA** (Viabilis Share Certificate No. 3 of Mario Willars) (showing that Mario Willars owns 24 shares in Viabilis, equivalent to 48% of the outstanding shares in Viabilis);

d. **C-159-ENG** (Bill of Sale of CFCM executed by [redacted] dated 14 December 2015) (evidencing that Mr. Willars acquired an interest in CFCM in 2015);

e. **C-160-ENG** (Bill of Sale of Viabilis executed by [redacted] dated 14 December 2015) (evidencing that Mr. Willars acquired an interest in Viabilis in 2015);

f. **C-2-SPA** (CFCM's Shareholder Registry) (reflecting that Mr. Willars directly owns a 16.38% interest in CFCM and that Viabilis directly owns a 73.71% interest in CFCM);

g. **C-3-SPA** (Viabilis Holding, S.A. de C.V.'s Shareholder Registry) (evidencing that Mr. Willars owns a 48% interest in Viabilis).

38. Because Consorcio's and [redacted] additional shares were not subscribed or paid due to SCT's failure to return the Concession to CFCM, CFCM's shareholding structure after Mr. Willars' acquisition became the following:

Shareholder	Number of Shares	Percentage
Viabilis Holding, S.A. de C.V.	49,999 ("A" Series)	0.0808%
Viabilis Holding, S.A. de C.V.	40,769,912 ("A" Series)	65.9526%
Viabilis Holding, S.A. de C.V.	4,747,639 ("B" Series)	7.6801%
[redacted]	[redacted]	[redacted]
Mario Noriega Willars	10,126,000 ("B" Series)	16.3806%
Consorcio de Desarrollo Intercontinental, S.A. de C.V.	6,123,349 ("B" Series)	9.9056%
Total:	**61,816,900**	**100%**

Table 2: CFCM's shareholding structure after Mr. Willars' acquisition

Proofs:

a. **C-2-SPA** (CFCM's Shareholder Registry) (reflecting that Mr. Willars directly owns a 16.38% interest in CFCM and that Viabilis directly owns a 73.71% interest in CFCM).

39. Mr. Willars's direct participation in CFCM was reflected in CFCM's Shareholder Registry and the resulting structure has remained unchanged since Mr. Willars' acquisition. Mr. Willars confirms in his Second Declaration that he has not transferred, pledged, or otherwise diminished his interest in CFCM since the Willars SPA.

Accionista	Número de acciones y serie	Capital	Título
MARIO NORIEGA WILLARS	10'126,000 "B"	Variable	4

Datos del nuevo accionista:

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

Image 9: CFCM's Shareholder Registry reflecting Mr. Willars' acquisition [C-2-SPA]

Proofs:

a. **CWS-4-ENG**, ¶15 (Witness Statement-Mario Noriega Willars-Counter-Memorial on Jurisdiction-Second Statement) ("Since the date of the acquisition of CFCM on 14 December 2015, I have not transferred, pledged, or otherwise diminished my shareholding in CFCM or Viabilis. I have retained my ownership over CFCM and exercised control over the decisions of the company");

b. **C-2-SPA** (CFCM's Shareholder Registry) (reflecting that Mr. Willars directly owns a 16.38% interest in CFCM and that Viabilis directly owns a 73.71% interest in CFCM).

2) Mr. Willars acquired a 48% interest in Viabilis

40. Mr. Willars' participation in Viabilis is also relevant to his indirect participation in CFCM. Like CFCM's, Viabilis' shareholding structure also underwent changes before Mr. Willars ultimately acquired ownership of 48% of its shares.

Proofs:

a. *See infra*, ¶¶44-48.

41. Viabilis is a Mexican company incorporated in 2001. At the time of its incorporation, its shareholders were [redacted] who held 17 shares, [redacted], who held 17 shares, and [redacted] who held 16 shares.

Proofs:

a. **C-233-SPA** (Viabilis's Shareholder Registry Book) (evidencing Viabilis original shareholding structure);

b. **C-229-SPA** (Viabilis's Incorporation Deed) (evidencing Viabilis original shareholding structure).

42. On 19 July 2007, a share transfer altered the ownership structure. [redacted] and [redacted] sold their shares to [redacted] and Ms. [redacted] resulting in the latter two holding 25 shares each.

Proofs:

a. **C-233-SPA** (Viabilis's Shareholder Registry Book) (evidencing that, as of July 2007, [redacted] and [redacted] each held 50% of Viabilis' shares).

43. On 14 December 2015, through the Willars SPA described above, Mr. Willars acquired 24 shares in Viabilis, while [redacted] retained a single share. The resulting shareholding structure of Viabilis was as follows:

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

Image 10: Viabilis' shareholding structure after the Willars SPA [C-233-SPA]

Proofs:

a. **C-233-SPA** (Viabilis's Shareholder Registry Book) (evidencing that Mr. Willars acquired an interest in Viabilis in 2015);

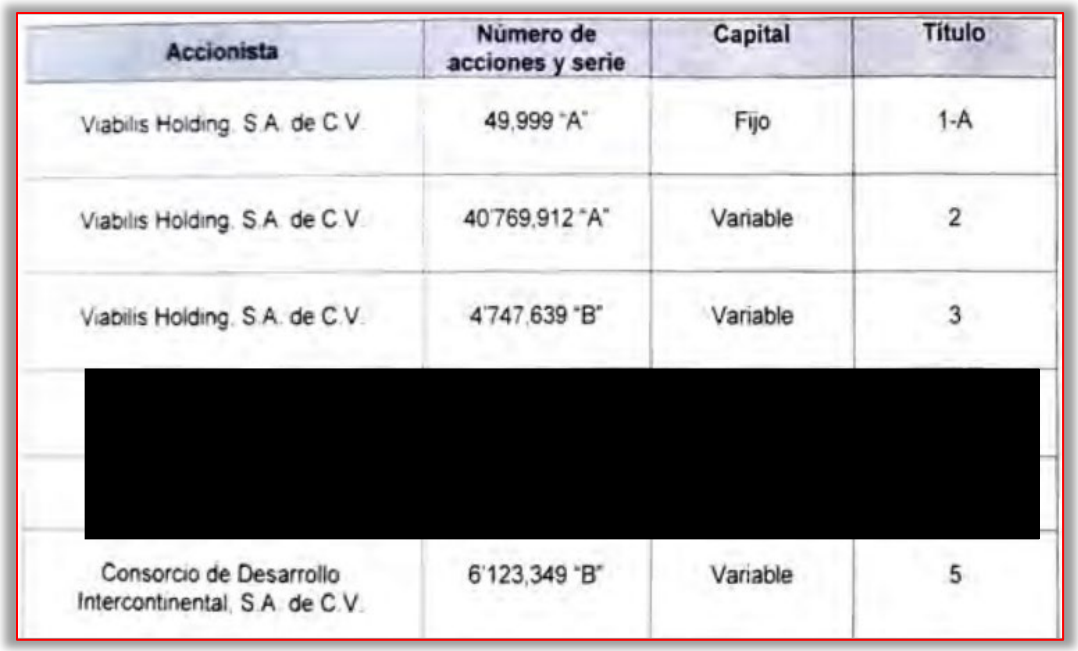
b. **C-158-ENG**, p. 17 (Share Purchase Agreement between [redacted] and Mario Noriega Willars) (evidencing that Mr. Willars acquired an interest in Viabilis in 2015).

44. This structure has been duly registered in Viabilis' Shareholder Registry and has remained unchanged since Mr. Willars' acquisition.

Proofs:

a. **C-233-SPA** (Viabilis's Shareholder Registry Book) (reflecting that Mr. Willars owns a 48% interest in Viabilis).

45. Mr. Willars has also not transferred, pledged, or diminished his interest in Viabilis. Since, as explained, Viabilis holds a 73.71% direct interest in CFCM, Mr. Willars became the controlling shareholder of CFCM through (i) his 16.38% direct shareholding in CFCM; and (ii) his 48% interest in Viabilis, which combined, give him a ***51.76% majority ownership*** interest in CFCM.



Accionista	Número de acciones y serie	Capital	Título
Viabilis Holding, S.A. de C.V.	49,999 "A"	Fijo	1-A
Viabilis Holding, S.A. de C.V.	40'769,912 "A"	Variable	2
Viabilis Holding, S.A. de C.V.	4'747,639 "B"	Variable	3
[redacted]			
Consorcio de Desarrollo Intercontinental, S.A. de C.V.	6'123,349 "B"	Variable	5

Image 11: CFCM's Shareholding registry reflecting Viabilis' interest [C-232-SPA]

Accionista	Número de acciones y serie	Capital	Título
MARIO NORIEGA WILLARS	10'126,000 "B"	Variable	4

Datos del nuevo accionista:

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

Image 12: CFCM's Shareholder Registry reflecting Mr. Willars' interest [C-232-SPA]

Proofs:

a. **CWS-4-ENG**, ¶15 (Witness Statement-Mario Noriega Willars-Counter-Memorial on Jurisdiction-Second Statement) ("*Since the date of the acquisition of CFCM on 14 December 2015, I have not transferred, pledged, or otherwise diminished my shareholding in CFCM or Viabilis. I have retained my ownership over CFCM and exercised control over the decisions of the company*");

b. **C-232-SPA** (CFCM's Shareholder Registry Book) (reflecting that Mr. Willars directly owns a 16.38% interest in CFCM and that Viabilis directly owns a 73.71% interest in CFCM);

c. *See supra*, ¶¶18-47.

D. MR. WILLARS ENTERED INTO [redacted] TO SECURE CONTROL OVER CFCM

46. As explained, Mr. Willars decided to invest in Viabilis and CFCM on 14 December 2015. His willingness to invest was, however, conditioned on the exercise of control over CFCM.

Proofs:

a. **CWS-5-SPA**, ¶9 (Witness Statement-[redacted] Counter-Memorial on Jurisdiction) ("*El Sr. Willars decidió entrar al negocio de CFCM sujeto a dos condiciones: (i) que él pudiese adquirir y ejercer el control de CFCM, y (ii) que yo me mantuviese dentro de las compañías para asegurar la continuidad operativa y administrativa de las mismas. Con esto en mente, estructuramos la venta de CFCM bajo dos instrumentos principales*").

47. With this condition in mind, Mr. Willars and [redacted]. As set forth in [redacted] Mr. Willars entered into the Willars SPA on the express understanding that he would have control over CFCM:

> **WHEREAS,** the Majority Shareholder executed the Stock Purchase Agreement based on the understanding that he would have direct control over CFCM's major decisions.

Image 13: [redacted] **[C-230-ENG]**

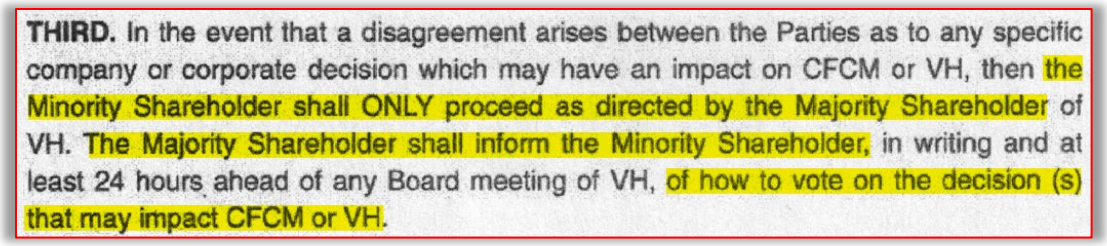
Proofs:

a. **C-230-ENG**, p. 1 ([redacted] between Mr. Willars and [redacted]

b. **CWS-4-ENG**, ¶8 (Witness Statement-Mario Noriega Willars-Counter-Memorial on Jurisdiction-Second Statement) ("*Concurrently, [redacted] and I executed [redacted] (the "[redacted] The purpose of the [redacted] was to transfer the control over Viabilis's board of directors to me, which would allow me to control any decision with respect to CFCM*");

c. **CWS-5-SPA**, ¶11 (Witness Statement-[redacted] Counter-Memorial on Jurisdiction) ("*...el Sr. Willars y yo también suscribimos [redacted] ...La finalidad [redacted] era asegurar el traspaso del control de Viabilis y CFCM al Sr. Willars*").

48. The [redacted] provides that, in the event of any a disagreement between Mr. Willars and [redacted] regarding any company or corporate decision, [redacted] ***must proceed as directed by Mr. Willars***. Moreover, Mr. Willars has the right to direct [redacted] on how to vote on any matter or decision that may impact CFCM or Viabilis:



THIRD. In the event that a disagreement arises between the Parties as to any specific company or corporate decision which may have an impact on CFCM or VH, then the Minority Shareholder shall ONLY proceed as directed by the Majority Shareholder of VH. The Majority Shareholder shall inform the Minority Shareholder, in writing and at least 24 hours ahead of any Board meeting of VH, of how to vote on the decision (s) that may impact CFCM or VH.

Image 14: [redacted] **[C-230-ENG]**

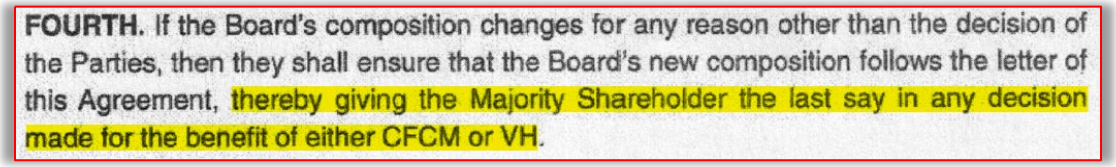
Proofs:

a. **C-230-ENG**, p. 2 ([redacted] between Mr. Willars and [redacted]

b. **CWS-4-ENG**, ¶8 (Witness Statement-Mario Noriega Willars-Counter-Memorial on Jurisdiction-Second Statement) ("*Pursuant to Viabilis's bylaws, the decisions of the board of directors, composed of three members, are taken by a majority vote. … Thus,* [redacted] *agreed to transfer control over the two directors he controlled on Viabilis's board. Specifically, the* [redacted] *gave me the right to inform* [redacted] *how to vote on board decisions that affected CFCM or Viabilis in case of disagreement*");

c. **CWS-5-SPA**, ¶11(i) (Witness Statement-[redacted] Counter-Memorial on Jurisdiction) ("*Dado que yo originalmente ejercía el control sobre CFCM a través de mi control sobre dos de los tres miembros del Consejo de Administración de Viabilis, el* [redacted] *tenía por objetivo asegurar el control del Sr. Willars sobre estos dos miembros. Por ello, en caso de que existiese un desacuerdo entre nosotros sobre alguna materia que impactara a Viabilis o CFCM,* ***yo asumí la obligación de proceder de acuerdo con las instrucciones del Sr. Willars, y acatar las instrucciones sobre la forma de votar en el Consejo de Administración***") (emphasis from original).

49. The [redacted] further provides that the composition of CFCM's Board of Directors must be structured so as to ensure that Mr. Willars has the "***the last say***" in any decision made for the benefit of CFCM or Viabilis:



FOURTH. If the Board's composition changes for any reason other than the decision of the Parties, then they shall ensure that the Board's new composition follows the letter of this Agreement, thereby giving the Majority Shareholder the last say in any decision made for the benefit of either CFCM or VH.

Image 15: [redacted] **[C-230-ENG]**

Proofs:

a. **C-230-ENG**, p. 2 ([redacted] between Mr. Willars and [redacted]

b. **CWS-4-ENG**, ¶9 (Witness Statement-Mario Noriega Willars-Counter-Memorial on Jurisdiction-Second Statement) ("*The* [redacted] *also protected my control over the Companies against changes to the board of directors…*");

c. **CWS-5-SPA**, ¶11(ii) (Witness Statement-[redacted] Counter-Memorial on Jurisdiction) ("*También adquirí la obligación de asegurar que cualquier cambio al Consejo de Administración de Viabilis no afectara o vulnerara la capacidad del Sr. Willars de controlar dicho órgano y las decisiones relacionadas con Viabilis o CFCM*").

50. To this end, the [redacted] grants Mr. Willars the authority to instruct [redacted] appointed director at Viabilis to vote exclusively in accordance with Mr. Willars' instructions. Through this structure, Mr. Willars exercises both formal and *de facto* control over Viabilis and CFCM. Specifically, under the [redacted]

a) Mr. Willars controls 50% of the voting shares at Viabilis' shareholders' meeting;
b) Mr. Willars controls two out of three directors in Viabilis' board of directors;
c) Mr. Willars holds a 16.38% direct voting interest in CFCM's shareholders' meeting.

Proofs:

a. **C-230-ENG** ([redacted] between Mr. Willars and [redacted] (evidencing that Mr. Willars owns and controls CFCM);
b. **CWS-5-SPA**, ¶11 (Witness Statement-[redacted] Counter-Memorial on Jurisdiction) (evidencing thar Mr. Willars owns and controls CFCM).

51. Accordingly, Claimant exercises control over Viabilis' 73.71% shareholding in CFCM (via control of Viabilis' Board of Directors). When combined with his direct 16.38% interest in CFCM, ***Claimant controls over 90% of the outstanding shares in CFCM***. The [redacted] thus confirms that Claimant is the owner and controlling shareholder of CFCM.

Proofs:

a. *See supra*, ¶¶49-53;
b. **C-230-ENG** ([redacted] between Mr. Willars and [redacted] (evidencing that Mr. Willars owns and controls CFCM).

E. MR. WILLARS HAS EFFECTIVELY EXERCISED CONTROL OVER VIABILIS AND CFCM SINCE 2015

52. Since Mr. Willars' acquisition and the execution of the [redacted] he has exercised effective control over all corporate decisions of these companies.

Proofs:

a. *See infra*, ¶¶56-57;
b. **CWS-4-ENG**, ¶15 (Witness Statement-Mario Noriega Willars-Counter-Memorial on Jurisdiction-Second Statement) ("*I have*

> *retained my ownership over CFCM and exercised control over the decisions of the company*");

53. As [redacted] explains, while there have been no major disagreements between him and Mr. Willars, Mr. Willars has had the last say in all matters affecting both CFCM and Viabilis:

> *Desde que cedí el control de Viabilis y CFCM, el Sr. Willars ha ejercido el control de ambas compañías. Si bien hemos realizado esfuerzos para colaborar en las decisiones que afectan a Viabilis y CFCM,* ***el Sr. Willars ha tenido la última palabra en la forma en que se dirigen las compañías***.

Proofs:

a. **CWS-5-SPA**, ¶12 (Witness Statement-[redacted] Counter-Memorial on Jurisdiction).

54. Mr. Willars' control over these companies has been displayed on several occasions. Among other instances:

a) Mr. Willars decided to initiate court proceedings against the Rescate Declaration to obtain compensation before Mexican courts;
b) Mr. Willars decided to initiate this Arbitration to obtain compensation, including proceeding with the filing of the Notice of Intent, the initiation of the Arbitration on his own behalf and on behalf of CFCM, and the waiver to discontinue local proceedings before Mexican courts; and
c) Mr. Willars personally participated (without objection) in a meeting held with Mexico's Ministry of Economy to discuss the Notice of Intent, prior to the filing of the Arbitration.

Proofs:

a. **CWS-4-ENG**, ¶¶16-19 (Witness Statement-Mario Noriega Willars-Counter-Memorial on Jurisdiction-Second Statement) (evidencing all the instances where Mr. Willars has exercised effective control of CFCM);
b. **CWS-5-SPA**, ¶¶13-15 (Witness Statement-[redacted] Counter-Memorial on Jurisdiction) (evidencing all the instances where Mr. Willars has exercised effective control of CFCM);
c. **C-24-ENG** (Claimants' Written Waiver in compliance with Article 1121 of NAFTA) (evidencing that Mr. Willars exercised control by waiving the right to continue CFCM's local proceedings before Mexican courts);
d. **C-25-ENG** (Mr. Willars' Notice of Intent) (evidencing that Mr. Willars decided to serve a formal Notice of Intent to Mexico under NAFTA);
e. **C-231-ENG** (Correspondence between Hogan Lovells and Mexico's Secretaría de Economía regarding the meeting held on 6 June 2023) (evidencing that Mr. Willars attended personally to the meeting with Mexico to discuss the Notice of Intent);
f. **C-27-SPA** (CFCM's internal authorization to file the Request for Arbitration) (evidencing that Mr. Willars exercised control and authorized the filing of the Request for Arbitration);

g. *See* Request for Arbitration dated 29 June 2023.

F. MEXICO HAS FAILED TO PROTEST OR SANCTION MR. WILLARS' INVESTMENT IN OVER NINE YEARS

55. As explained above, Mr. Willars acquired his shares in Viabilis and CFCM pursuant to the Willars SPA ***nearly a decade ago***. Mexico nonetheless now argues that the transaction is invalid due to an alleged lack of approval by the CNIE, and the lack of registration of the foreign investment. While the acquisition was entirely lawful, as further addressed in Section III.B *infra*, if Mexican authorities had considered the transaction to be in breach of any legal requirement, they had full authority and opportunity to investigate or prosecute any such alleged violation, which they have failed to do.

Proofs:

a. **C-158-ENG** (Share Purchase Agreement between [redacted] and Mario Noriega Willars) (evidencing that Mr. Willars acquired an interest in CFCM and Viabilis in 2015);
b. *See infra*, ¶¶59-60.

56. Pursuant to Mexico's Foreign Investment Law, the Ministry of Economy is authorized to impose economic sanctions for the breaches of its provisions.

Proofs:

a. **CL-168-SPA**, Art. 38 (Mexico's Foreign Investment Law) ("…*Corresponderá a la Secretaría la imposición de las sanciones, excepto por lo que hace a la infracción a la que se refiere la fracción V de este artículo y las demás relacionadas con los Títulos Segundo y Tercero de esta Ley, que serán aplicadas por la Secretaría de Relaciones Exteriores*…").

57. Since the date of Mr. Willars' acquisition, however, Mexican authorities have failed to object, protest, prosecute or even investigate any alleged violation of Mexican law by Mr. Willars. To the contrary, more than nine years have elapsed without any such action. Notably, under Mexican law, the authority to impose administrative sanctions lapses five years after the alleged violation. Accordingly, even assuming *arguendo* that a violation had occurred (which is denied), Mexico's window for enforcement has long since expired.

Proofs:

a. **CWS-4-ENG**, ¶15 (Witness Statement-Mario Noriega Willars-Counter-Memorial on Jurisdiction-Second Statement) ("*In addition, I have not been subject to any fines, sanctions, or claims in Mexico related to the acquisition of my interests in Viabilis or CFCM*");
b. **CL-193-SPA**, Art. 79 (Mexico's Federal Law of Administrative Procedure) ("*La facultad de la autoridad para imponer sanciones administrativas* ***prescribe en cinco años****. Los términos de la prescripción serán continuos* ***y se contarán desde el día en que se cometió la falta o infracción administrativa*** *si fuere consumada o, desde que cesó si fuere continua*") (emphasis added).

G. VIABILIS' SHAREHOLDERS HAVE NOT OBJECTED TO MR. WILLARS' ACQUISITION

58. As previously explained, Mexico has raised a number of allegations that are irrelevant to the jurisdictional questions before the Tribunal. Among these is the claim that certain shareholders of Viabilis were deprived of a right of first refusal. While this allegation has no bearing on the Tribunal's jurisdiction, Claimant addresses it for the sake of accuracy and completeness.

Proofs:

a. *See infra*, ¶¶62-64.

59. Viabilis' bylaws contain a right of first refusal (*derecho de preferencia*) allowing shareholders to acquire Viabilis' shares before they are transferred to third parties. Mr. Willars' acquisition of shares in Viabilis did not breach such right, and no Viabilis shareholder has ever objected to the transaction.

Proofs:

a. **C-229-SPA**, Article 9 (Viabilis's Incorporation Deed);
b. *See infra*, ¶¶63-64.

60. As confirmed by [redacted]—the other shareholder of Viabilis—was aware of the Willars SPA at the time of its execution and did not object to the sale or exercise her right of first refusal. Further, in the over nine years since the Willars SPA, and although [redacted], she has never challenged the Willars SPA, nor has she commenced any legal action alleging a violation of her preemptive rights:

> *Por último, considero importante abordar el argumento de México según el cual el SPA no habría cumplido con los requisitos del Acta Constitutiva de Viabilis, ya que* [redacted] *tenía un derecho preferente para adquirir mis acciones en Viabilis.*
> *Aclaro que* [redacted] *tuvo conocimiento de la venta de las acciones al Sr. Willars y no ejerció dicho derecho de preferencia. Además, a pesar de que han transcurrido más de nueve años desde el SPA,* [redacted] *tampoco ha ejercido acciones legales para reclamar la supuesta violación a su derecho de preferencia.*

Proofs:

a. **CWS-5-SPA**, ¶¶16-17 (Witness Statement-[redacted] Counter-Memorial on Jurisdiction).

61. Mexico's allegations concerning a right of first refusal are factually incorrect and legally irrelevant. No such right was violated, and in any event, the existence or breach of private contractual obligations between third parties has no bearing on the Tribunal's jurisdiction under NAFTA.

Proofs:

a. *See supra*, ¶¶61-63.

III.

LEGAL ANALYSIS: THE TRIBUNAL HAS JURISDICTION TO HEAR THIS CASE

62. Mexico raises three jurisdictional objections. All are without merit. Contrary to Mexico's assertions, Mr. Willars owns and controls CFCM and is therefore entitled to bring claims under Article 1117 of NAFTA. Further, Mr. Willars investment was legal and he did not waive his right to initiate arbitration.

Proofs:

a. *See infra*, Section III.A – III.C.

A. CLAIMANT HAS STANDING TO BRING CLAIMS UNDER ARTICLE 1117 OF NAFTA

63. Mr. Willars established in the Claim Memorial that the Tribunal has jurisdiction to resolve this dispute. Specifically, Mr. Willars demonstrated ownership and control of CFCM for the purposes of asserting a claim on behalf of CFCM under Article 1117 of NAFTA. Indeed, Mexico agreed to arbitrate disputes brought by an investor of a Party on behalf of a juridical person that the investor owns or controls directly or indirectly:

> 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…

Proofs:

a. **CL-5-ENG**, Article 1117 (North American Free Trade Agreement).

64. Mexico does not dispute that standing under Article 1117 is available to an investor who owns or controls a local enterprise. Mexico also does not dispute that Mr. Willars must only prove that he owns ***or*** controls CFCM in order to have standing. Instead, Mexico argues that Mr. Willars neither owned nor controlled CFCM at the time of the treaty breach or at the time of the Notice of Arbitration, which allegedly deprives him of standing to sue under Article 1117 of NAFTA on behalf of CFCM.[4] Mexico's argument is unfounded.

Proofs:

a. Memorial on Jurisdiction, Sección III.A (El Demandante no tienen legitimación procesal activa para presentar una

[4] This bifurcated proceeding does not address Mr. Willars' independent legal standing to bring claims on his own behalf against Mexico under Article 1116 of NAFTA. As a consequence, even if Mexico's objection succeeded—*quod non*—, Mr. Willars would still have standing in his own right to submit a claim to arbitration related to the treaty breaches suffered as a shareholder in CFCM.

reclamación bajo el Artículo 1117 del TLCAN en nombre de CFCM).

65. Mr. Willars both owned ***and*** controlled CFCM at all relevant times. He acquired a majority interest and control over CFCM on 14 December 2015, more than one year before Mexico's failure to provide compensation for the *rescate* of CFCM's Concession. He has maintained that control and ownership continuously to the present. Accordingly, Mr. Willars has standing to bring this arbitration on behalf of CFCM under Article 1117 of NAFTA.

Proofs:

a. Memorial on Jurisdiction, Sección III.A (El Demandante no tienen legitimación procesal activa para presentar una reclamación bajo el Artículo 1117 del TLCAN en nombre de CFCM).

1) Claimant owns CFCM

66. Mexico argues that Mr. Willars does not "own" CFCM because he does not own 100% of its shares. Mexico's interpretation is incorrect.

Proofs:

a. Memorial on Jurisdiction, ¶105 ("*En consecuencia, la "propiedad" a que se refiere el Artículo 1117 debe interpretarse como la propiedad de todo el capital social en circulación de dicha empresa*").

67. Article 1117 of NAFTA requires foreign investors to own a local enterprise, which can be held directly or indirectly (through intermediary companies). There is no requirement of 100% ownership. Applying customary rules of treaty interpretation under the Vienna Convention of the Law of Treaties, arbitral tribunals have held that ***majority ownership*** of a local enterprise is sufficient to establish standing under Article 1117 of NAFTA. For example, in *Nelson v. Mexico*, the tribunal held that corporate control of a company was defined by "*ownership of more than 50% of the shares in a corporation*."

Proofs:

a. **CL-5-ENG**, Article 1117 (North American Free Trade Agreement) ("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");

b. **CL-40-ENG** (*Joshua Dean Nelson v. Mexico,* ICSID Case No. UNCT/17/1, Award, 5 June 2020), ¶188.

68. This position was reaffirmed last year by the tribunal in *Odyssey v. Mexico*. In that case, Mexico similarly argued that a majority indirect interest that the investor-claimant had over a Mexican enterprise was insufficient to establish standing under Article 1117 of NAFTA. The tribunal rejected Mexico's argument and confirmed that a ***53.89% indirect majority ownership*** created a rebuttable presumption of standing under Article 1117 of NAFTA:

> The Tribunal is of the view that, on the basis of the evidence before it in this case, ***the majority ownership creates a rebuttable presumption of control***, and what remains to be seen is whether Mexico provided evidence to rebut that presumption.

Proofs:

a. **CL-194-ENG**, ¶181 (*Odyssey Marine Exploration, Inc on their own behalf and on behalf of Exploraciones Oceanicas S. de R.L. de C.V. v. United Mexican States*, ICSID Case No. UNCT/20/1, Award, 17 September 2024 [Redacted]).

69. Mexico ignores this subsequent case law, instead relying on *B-Mex v. Mexico*, issued prior to *Nelson* and *Oddysey*, to support its failed jurisdictional objection. The *B-Mex* decision, however, is in any case inapplicable here because it involved a highly unusual fact pattern. Unlike the present case, where there is only ***one*** foreign investor claimant, with a clear chain of ownership over ***one*** local entity, the *B-Mex* tribunal faced ***38 different claimants*** submitting claims on their own behalf, and on behalf of ***seven Mexican companies***. Moreover, the claimants' share-registers and corporate books in *B-Mex* had allegedly been destroyed in a fire, so exact share interests of claimants in the local entities were disputed. The tribunal in that case adopted a higher standard of proof due to these exceptional circumstances. Subsequent tribunals, including *Nelson* and *Odyssey*, have declined to follow *B-Mex* on this point, as should this Tribunal.

Proofs:

a. **CL-182-ENG** (*B-Mex, LLC and others v. United Mexican States,* ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019), ¶1 ("*The Request was filed by 39 Claimants. All the Claimants are U.S. nationals. After the filing of the Request, one Claimant—EMI Consulting, LLC—notified the Tribunal that it withdrew from the arbitration. The Claimants pursue claims both under Article 1116 of the Treaty and, on behalf of seven Mexican Companies, 3 under Article 1117 of the Treaty*");

b. ¶¶168, 171 ("*The Claimants contend, and have submitted witness evidence affirming, that many of the corporate documents that would have evidenced the extent of their shareholdings in the Mexican Companies were either destroyed in a May 2017 fire… The manner in which that evidence was eventually marshalled by the Claimants, however, was less than ideal*").

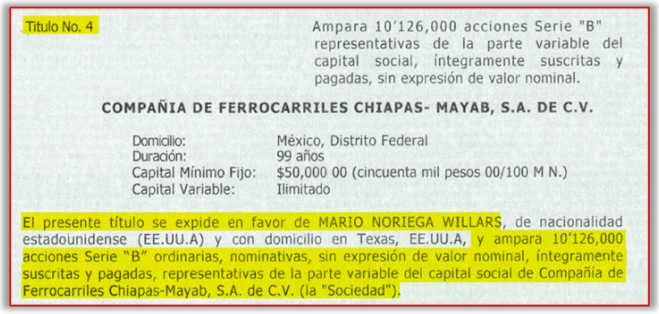
70. In contrast, in this case, Mr. Willars owns CFCM for purposes of Article 1117 of NAFTA. Under the Willars SPA, Mr. Willars acquired a ***51.76% majority ownership*** interest in CFCM, exercised through: (i) 16.38% direct shareholding in CFCM; and (ii) 48% interest in Viabilis, which in turn owns 73.71% of CFCM.

Proofs:

a. **C-2-SPA** (CFCM's Shareholder Registry) (reflecting that Mr. Willars directly owns a 16.38% interest in CFCM and that Viabilis directly owns a 73.71% interest in CFCM);

b. **C-3-SPA** (Viabilis Holding, S.A. de C.V.'s Shareholder Registry) (evidencing that Mr. Willars owns a 48% interest in Viabilis);
c. **C-28-SPA** (CFCM's Corporate Chart) (reflecting Mr. Willars' controlling interest in CFCM);
d. **C-158-ENG** (Share Purchase Agreement between [redacted] and Mario Noriega Willars) (evidencing that Mr. Willars acquired an interest in CFCM in 2015);
e. **CWS-4-ENG**, ¶6 (Witness Statement-Mario Noriega Willars-Counter-Memorial on Jurisdiction-Second Statement) ("On 14 December 2015, [redacted] and I executed a share purchase agreement for the sale of his participation in CFCM and Viabilis (the "SPA"). Through the SPA, I acquired a 51.76% controlling interest in CFCM…");
f. **CWS-5-SPA**, ¶10 (Witness Statement-[redacted] Counter-Memorial on Jurisdiction) ("*…el Sr. Willars y yo suscribimos un contrato de compraventa de acciones el 14 de diciembre de 2015 (el "SPA"), en virtud del cual vendí al Sr. Willars 24 acciones ordinarias de Viabilis, y 10,126,000 acciones ordinarias serie B de CFCM, por medio del cual le transferí una participación accionaria en CFCM de 51.76%*").

71. Contrary to the facts in *B-Mex*, Mr. Willars has put forward sufficient evidence to demonstrate that he paid for his shares and received share certificates that record his participation in CFCM and Viabilis, which were duly recorded in the corresponding share ledgers. His interest is confirmed by his own witness statement and that of [redacted] Since acquiring his shares in CFCM on 14 December 2015, Mr. Willars has not transferred, pledged, or otherwise diminished his interest in either CFCM or Viabilis, thereby retaining his ownership and control over CFCM.


Titulo No. 4

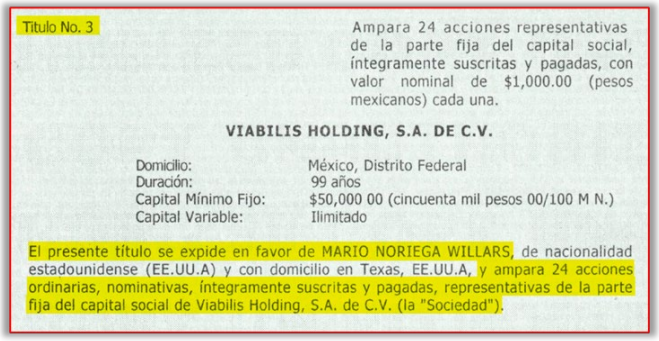
Ampara 10'126,000 acciones Serie "B" representativas de la parte variable del capital social, íntegramente suscritas y pagadas, sin expresión de valor nominal.

COMPAÑIA DE FERROCARRILES CHIAPAS- MAYAB, S.A. DE C.V.

Domicilio:	México, Distrito Federal
Duración:	99 años
Capital Mínimo Fijo:	$50,000 00 (cincuenta mil pesos 00/100 M N.)
Capital Variable:	Ilimitado

El presente título se expide en favor de MARIO NORIEGA WILLARS, de nacionalidad estadounidense (EE.UU.A) y con domicilio en Texas, EE.UU.A, y ampara 10'126,000 acciones Serie "B" ordinarias, nominativas, sin expresión de valor nominal, íntegramente suscritas y pagadas, representativas de la parte variable del capital social de Compañia de Ferrocarriles Chiapas-Mayab, S.A. de C.V. (la "Sociedad").

Image 7: Mr. Willars' Share Certificate in CFCM [C-227-SPA]


Titulo No. 3

Ampara 24 acciones representativas de la parte fija del capital social, íntegramente suscritas y pagadas, con valor nominal de $1,000.00 (pesos mexicanos) cada una.

VIABILIS HOLDING, S.A. DE C.V.

Domicilio:	México, Distrito Federal
Duración:	99 años
Capital Mínimo Fijo:	$50,000 00 (cincuenta mil pesos 00/100 M N.)
Capital Variable:	Ilimitado

El presente título se expide en favor de MARIO NORIEGA WILLARS, de nacionalidad estadounidense (EE.UU.A) y con domicilio en Texas, EE.UU.A, y ampara 24 acciones ordinarias, nominativas, íntegramente suscritas y pagadas, representativas de la parte fija del capital social de Viabilis Holding, S.A. de C.V. (la "Sociedad").

Image 8: Mr. Willars' Share Certificate in Viabilis [C-228-SPA]

Proofs:

a. **CWS-4-ENG**, ¶7 (Witness Statement-Mario Noriega Willars-Counter-Memorial on Jurisdiction-Second Statement) ("I received share certificates for my interests in the Companies, which were duly recorded in the corresponding share ledgers");
b. **CWS-5-SPA**, ¶10 (Witness Statement-[redacted] Counter-Memorial on Jurisdiction) ("*…el Sr. Willars y yo*

suscribimos un contrato de compraventa de acciones el 14 de diciembre de 2015 (el "SPA"), en virtud del cual vendí al Sr. Willars 24 acciones ordinarias de Viabilis, y 10,126,000 acciones ordinarias serie B de CFCM, por medio del cual le transferí una participación accionaria en CFCM de 51.76%");

c. **C-2-SPA** (CFCM's Shareholder Registry) (reflecting that Mr. Willars directly owns a 16.38% interest in CFCM and that Viabilis directly owns a 73.71% interest in CFCM);

d. **C-3-SPA** (Viabilis Holding, S.A. de C.V.'s Shareholder Registry) (evidencing that Mr. Willars owns a 48% interest in Viabilis);

e. **C-227-SPA** (CFCM Share Certificate No. 4 of Mario Willars) (showing that Mario Willars owns 10,126,000 shares in CFCM, equivalent to 16.38% of the outstanding shares of CFCM);

f. **C-228-SPA** (Viabilis Share Certificate No. 3 of Mario Willars) (showing that Mario Willars owns 24 shares in Viabilis, equivalent to 48% of the outstanding shares in Viabilis);

g. **C-158-ENG** (Share Purchase Agreement between [redacted] and Mario Noriega Willars) (evidencing that Mr. Willars acquired an interest in CFCM in 2015).

72. Despite evidence to the contrary, Mexico has alleged that Mr. Willars' participation in CFCM is lower because, at the time of the Willars SPA, Viabilis could only transfer a 56.38% interest in CFCM, and [redacted]. Mexico alleges this by artificially inflating the shareholding of two other entities: Consorcio (the fourth shareholder in CFCM) and [redacted] thus falsely diluting Viabilis and [redacted] participation. According to Mexico, Consorcio's and [redacted] participation is derived from their purchase of 9,500,000 of shares each in CFCM before the Willars SPA. Below is Mexico's incorrect chart found in paragraph 86 of its Memorial on Jurisdiction, with distortions manufactured by Mexico in red.

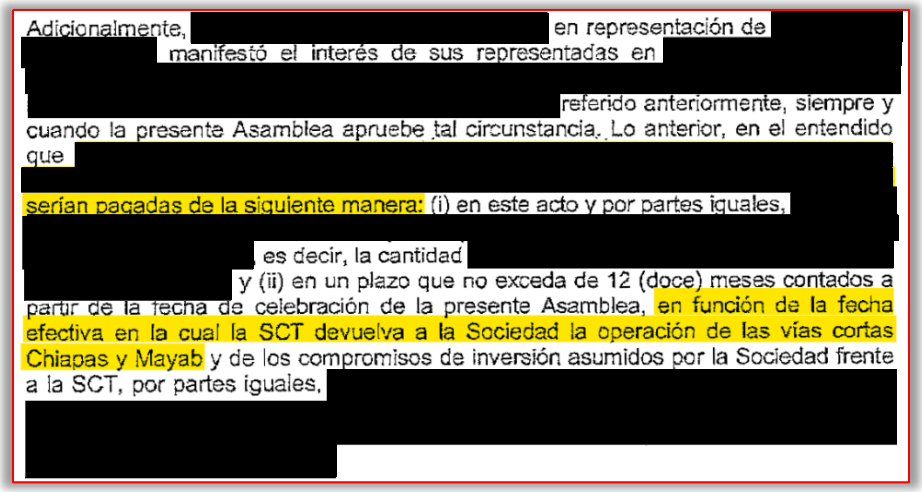
Shareholder	Interest in CFCM	%	Interest according to Mexico	%
Viabilis Holding, S.A. de C.V.	[redacted]	73.71%	[redacted]	[redacted]
[redacted]		16.38%		
Consorcio de Desarrollo Intercontinental, S.A. de C.V.		9.91%		
[redacted]				
		100%		

Proofs:

a. Memorial on Jurisdiction, ¶86.

73. Consorcio and [redacted] however, [redacted]. Consorcio and [redacted], subject to the return of the Concession to CFCM. Thus, ***only if*** the SCT returned the Concession within 12 months, Consorcio

and [redacted].



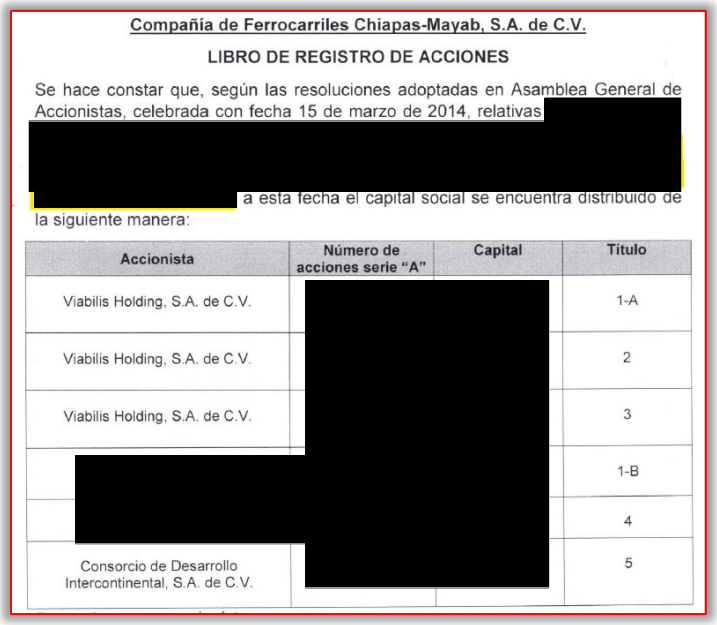
Adicionalmente, [redacted] en representación de [redacted] manifestó el interés de sus representadas en [redacted] referido anteriormente, siempre y cuando la presente Asamblea apruebe tal circunstancia. Lo anterior, en el entendido que [redacted] serían pagadas de la siguiente manera: (i) en este acto y por partes iguales, [redacted] es decir, la cantidad [redacted] y (ii) en un plazo que no exceda de 12 (doce) meses contados a partir de la fecha de celebración de la presente Asamblea, en función de la fecha efectiva en la cual la SCT devuelva a la Sociedad la operación de las vías cortas Chiapas y Mayab y de los compromisos de inversión asumidos por la Sociedad frente a la SCT, por partes iguales, [redacted]

Image 16: Letter FCCM-DGTFM-0005/14 dated 7 April 2014 [C-140-SPA]

Proofs:

a. **C-140-SPA** (Letter FCCM-DGTFM-0005/14 dated 7 April 2014), p. 6.

74. Given that Mexico failed to return the Concession, the [redacted], including those paid on 15 March 2014, [redacted], as reflected on the 30 April 2015 entry in CFCM's share ledger.



Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V.

LIBRO DE REGISTRO DE ACCIONES

Se hace constar que, según las resoluciones adoptadas en Asamblea General de Accionistas, celebrada con fecha 15 de marzo de 2014, relativas [redacted] a esta fecha el capital social se encuentra distribuido de la siguiente manera:

Accionista	Número de acciones serie "A"	Capital	Título
Viabilis Holding, S.A. de C.V.	[redacted]		1-A
Viabilis Holding, S.A. de C.V.			2
Viabilis Holding, S.A. de C.V.			3
[redacted]			1-B
			4
Consorcio de Desarrollo Intercontinental, S.A. de C.V.			5

Image 17: CFCM's Shareholding Structure as of 30 April 2015 [C-2-SPA]

Proofs:

a. **C-2-SPA** (CFCM's Shareholder Registry), p. 2 (reflecting that Consorcio and [redacted]).

75. As a result, [redacted] ceased to be a shareholder in CFCM, and Consorcio reverted to its original participation, without the additional unpaid shares. Therefore, the shares transferred to Mr. Willars under the Willars SPA were validly owned by Viabilis and [redacted] giving Mr. Willars a controlling 51.76% interest in CFCM.

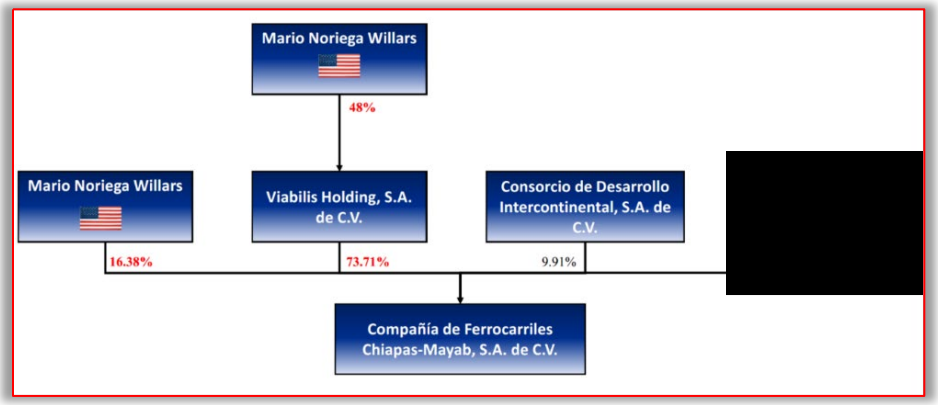


Image 18: CFCM's Corporate Chart [C-28-SPA]

Proofs:

a. **C-28-SPA** (CFCM's Corporate Chart) (reflecting Mr. Willars' controlling interest in CFCM);
b. *See supra*, ¶¶69-77.

2) Claimant controlled CFCM at all relevant times

76. Mexico further argues that Claimant did not prove that he controlled CFCM at the time of Mexico's *rescate* of the Concession, or at the time the Request for Arbitration was submitted. This argument also fails.

Proofs:

a. Memorial on Jurisdiction, ¶¶113-132.
b. *See infra*, ¶¶80-94.

a. Claimant has legal and de facto control over CFCM

77. Under Article 1117 of NAFTA, "control" includes any ability to "exercise restraining or directing influence over" or to "have power over" a company, and there is no specific manner or form that "control" must take. As explained by the tribunal in *B-Mex v. Mexico*—upon which Mexico relies—compliance with Article 1117 is satisfied if the investor either has the legal capacity to control, ***or*** *de facto* control over the company.

Proofs:

a. **CL-182-ENG** (*B-Mex, LLC and others v. United Mexican States,* ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019), ¶212 ("*In the context of Article 1117, any ability to "exercise restraining or directing influence over" or to "have power over" a company would satisfy the ordinary meaning of control. There is no specific manner or form that "control" must take*").

78. The *Odyssey* tribunal confirmed that legal control, or a majority ownership over the local enterprise, creates a presumption of control in favor of the investor.

Proofs:

a. **CL-194-ENG**, ¶181 (*Odyssey Marine Exploration, Inc on their own behalf and on behalf of Exploraciones Oceanicas S. de R.L. de C.V. v. United Mexican States*, ICSID Case No. UNCT/20/1, Award, 17 September 2024 [Redacted]) ("The Tribunal is of the view that, on the basis of the evidence before it in this case, the majority ownership creates a rebuttable presumption of control, and what remains to be seen is whether Mexico provided evidence to rebut that presumption").

79. Tribunals have also found that *de facto* control is sufficient, as is the ability of the investor to influence the decisions of the local enterprise. In *Thunderbird v. Mexico*, the tribunal had to determine whether the foreign investor controlled certain local entities over which it owned less than 50% of their outstanding shares. The tribunal in that case decided that a showing of *de facto* control would suffice to satisfy the standard of control under Article 1117 of NAFTA. To prove *de facto* control, the investor could furnish ***proof of equity interest in the enterprise, the ability to exercise substantial influence over the management and operation of the enterprise, or the ability to exercise substantial influence over the selection of members of the board of directors or any other managing body***.

Proofs:

a. **CL-195-ENG**, (*International Thunderbird Gaming Corporation v. The United Mexican States*, Arbitral Award, 26 January 2006), ¶¶104-106, ("*On the other hand, Thunderbird had acknowledged that it had only a partial ownership of EDM-Matamoros (36.67%), EDM-Laredo (33.3%), and EDMReynosa (40.1%) (jointly the "Minority EDM Entities"). Therefore, the present discussion turns on whether Thunderbird exercised control over the Minority EDM Entities… a showing of effective or 'de facto' control is, in the Tribunal's view, sufficient for the purposes of Article 1117 of the NAFTA…* ");

b. *Id*., footnote 3 ("…***control of an Investment means control in fact, determined after such an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's (a) financial interest, including equity interest, in the Investment; (b) ability to exercise substantial influence over the management and operation of the Investment; and (c) ability to exercise substantial influence over the selection***

of members of the board of directors or any other managing body");

c. *Id.*, ¶108 ("*It is quite common in the international corporate world to control a business activity without owning the majority voting rights in shareholders meetings. Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise*");

d. **CL-182-ENG** (*B-Mex, LLC and others v. United Mexican States,* ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019), ¶¶209-210 ("*The Respondent submits that 'control' can only mean legal capacity to control. The Claimants submit that 'control' can mean both legal capacity to control and de facto control. In the Tribunal's view, the ordinary meaning of 'control' favours the Claimants' position*").

80. Here, Mr. Willars exercised both legal and *de facto* control. Mr. Willars acquired legal control of CFCM on 14 December 2015, at least seven months prior to the notification of the Rescate Declaration on 26 July 2016, when it acquired a 51.76% majority ownership interest in CFCM. Following the decision in *Odyssey*, this majority ownership over CFCM creates a presumption of control that Mexico has failed to rebut.

Proofs:

a. **C-2-SPA** (CFCM's Shareholder Registry) (reflecting that Mr. Willars directly owns a 16.38% interest in CFCM and that Viabilis directly owns a 73.71% interest in CFCM);

b. **C-3-SPA** (Viabilis Holding, S.A. de C.V.'s Shareholder Registry) (evidencing that Mr. Willars owns a 48% interest in Viabilis);

c. **C-227-SPA** (CFCM Share Certificate No. 4 of Mario Willars) (showing that Mario Willars owns 10,126,000 shares in CFCM, equivalent to 16.38% of the outstanding shares of CFCM);

d. **C-228-SPA** (Viabilis Share Certificate No. 3 of Mario Willars) (showing that Mario Willars owns 24 shares in Viabilis, equivalent to 48% of the outstanding shares in Viabilis).

81. Even though Mr. Willars' majority ownership over CFCM is enough to dismiss Mexico's jurisdictional objection, Mr. Willars also exercised *de facto* control over CFCM. Mr. Willars and [redacted] who collectively control two of the three directors of Viabilis—entered into the [redacted] expressly setting out a control structure of Viabilis and CFCM in favor of Mr. Willars.

WHEREAS, the Majority Shareholder executed the Stock Purchase Agreement based on the understanding that he would have direct control over CFCM's major decisions.

WHEREAS, the Minority Shareholder acknowledges that when the Majority Shareholder purchased VH's outstanding stock shares, it was done under the understanding that the Minority Shareholder would have the Director he named to be on the Board to vote his seat **ONLY** in accordance to the Majority Shareholder's wishes.

Image 19: [redacted] **[C-230-ENG]**

Proofs:

a. **CWS-4-ENG**, ¶5 (Witness Statement-Mario Noriega Willars-Counter-Memorial on Jurisdiction-Second Statement) ("Given that the return of the operation of the Concession meant a lucrative, long-term opportunity for CFCM, I decided to acquire the controlling interest of CFCM");

b. *Id*., ¶8 ("Concurrently, [redacted] and I executed [redacted] (the "[redacted] The purpose of the [redacted] was to transfer the control over Viabilis's board of directors to me, which would allow me to control any decision with respect to CFCM");

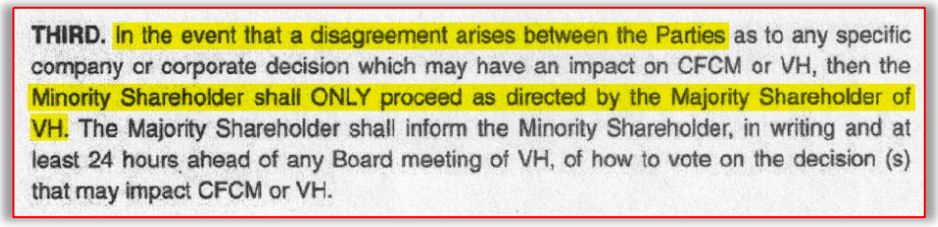
c. **CWS-5-SPA**, ¶9 (Witness Statement-[redacted] Counter-Memorial on Jurisdiction) ("*El Sr. Willars decidió entrar al negocio de CFCM sujeto a dos condiciones: (i) que él pudiese adquirir y ejercer el control de CFCM, y (ii) que yo me mantuviese dentro de las compañías para asegurar la continuidad operativa y administrativa de las mismas. Con esto en mente, estructuramos la venta de CFCM bajo dos instrumentos principales*");

d. *Id*., ¶11 ("*...el Sr. Willars y yo también suscribimos* [redacted] *el 14 de diciembre de 2015* [redacted] *...La finalidad del* [redacted] *era asegurar el traspaso del control de Viabilis y CFCM al Sr. Willars*");

e. **C-230-ENG** ([redacted] between Mario Noriega Willars and [redacted] dated 14 December 2015), p. 1 ("the Majority Shareholder executed the Stock Purchase Agreement based on the understanding that he would have direct control over CFCM's major decisions").

82. For that reason, the [redacted]

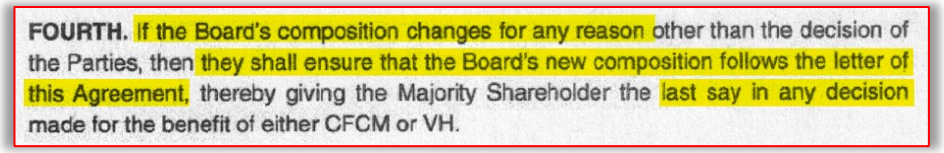
a) Granted Mr. Willars the power to direct [redacted] director in Viabilis to vote only in accordance with Mr. Willars' instructions;



THIRD. In the event that a disagreement arises between the Parties as to any specific company or corporate decision which may have an impact on CFCM or VH, then the Minority Shareholder shall ONLY proceed as directed by the Majority Shareholder of VH. The Majority Shareholder shall inform the Minority Shareholder, in writing and at least 24 hours ahead of any Board meeting of VH, of how to vote on the decision (s) that may impact CFCM or VH.

Image 20: [redacted] **[C-230-ENG]**

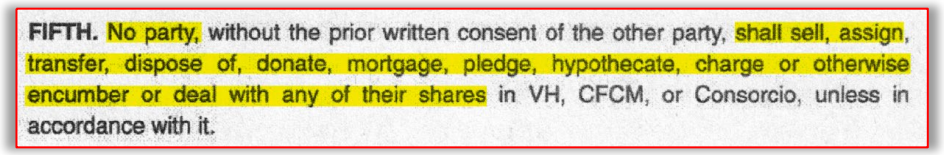
b) Protected Mr. Willars' control over CFCM against changes to the board of directors of Viabilis; and



FOURTH. If the Board's composition changes for any reason other than the decision of the Parties, then they shall ensure that the Board's new composition follows the letter of this Agreement, thereby giving the Majority Shareholder the last say in any decision made for the benefit of either CFCM or VH.

Image 21: [redacted] **[C-230-ENG]**

c) Subjected any sale, assignment, encumbrance, or dealing of the shares in CFCM and Viabilis to his prior written consent:



FIFTH. No party, without the prior written consent of the other party, shall sell, assign, transfer, dispose of, donate, mortgage, pledge, hypothecate, charge or otherwise encumber or deal with any of their shares in VH, CFCM, or Consorcio, unless in accordance with it.

Image 22: [redacted] **[C-230-ENG]**

Proofs:

a. **C-230-ENG** ([redacted] between Mario Noriega Willars and [redacted] dated 14 December 2015), pp. 2-3 (evidencing that Mr. Willars exercises *de facto* control over CFCM);

b. **CWS-4-ENG**, ¶8 (Witness Statement-Mario Noriega Willars-Counter-Memorial on Jurisdiction-Second Statement) ("Pursuant to Viabilis's bylaws, the decisions of the board of directors, composed of three members, are taken by a majority vote. … Thus, [redacted] agreed to transfer control over the two directors he controlled on Viabilis's board. Specifically, the [redacted] gave me the right to inform [redacted] how to vote on board decisions that affected CFCM or Viabilis in case of disagreement");

c. *Id*., ¶9 ("The [redacted] also protected my control over the Companies against changes to the board of directors…");

d. **CWS-5-SPA**, ¶11(i) (Witness Statement-[redacted] Counter-Memorial on Jurisdiction) ("*Dado que yo originalmente ejercía el control sobre CFCM a través de mi control sobre dos de los tres miembros del Consejo de Administración de Viabilis, el* [redacted] *tenía por objetivo asegurar el control del Sr. Willars sobre estos dos miembros. Por ello, en caso de que existiese un desacuerdo entre nosotros sobre alguna materia que impactara a Viabilis o CFCM, yo asumí la obligación de proceder de acuerdo con las instrucciones del Sr. Willars, y acatar las instrucciones sobre la forma de votar en el Consejo de Administración*");

e. *Id*., ¶11(ii) ("*También adquirí la obligación de asegurar que cualquier cambio al Consejo de Administración de Viabilis no afectara o vulnerara la capacidad del Sr. Willars de controlar dicho órgano y las decisiones relacionadas con Viabilis o CFCM*").

83. Given that Viabilis owns 73.71% of the outstanding shares of CFCM, control over the board of directors of Viabilis granted Mr. Willars effective control over CFCM. Combined with his 16.38% direct share participation in CFCM, the [redacted] granted Mr. Willars control over 90% of CFCM's outstanding shares. Given that the shareholders' meeting is the "supreme organ" of the company, Mr. Willars's is the only party entitled to pass binding resolutions, as well as other prerogatives detailed in CFCM's by-laws.

Proofs:

a. **C-2-SPA** (CFCM's Shareholder Registry) (reflecting that Mr. Willars directly owns a 16.38% interest in CFCM and that Viabilis directly owns a 73.71% interest in CFCM);

b. **C-3-SPA** (Viabilis Holding, S.A. de C.V.'s Shareholder Registry) (evidencing that Mr. Willars owns a 48% interest in Viabilis);

c. **C-28-SPA** (CFCM's Corporate Chart) (reflecting Mr. Willars' controlling interest in CFCM);

d. **C-4-SPA** (CFCM's Deed of Incorporation), Clause 16 ("*Los accionistas, reunidos en asamblea o mediante acuerdos tomados por ellos fuera de asamblea en los términos que más* ***adelante se señalan, constituyen*** *el órgano supremo de la sociedad y sus resoluciones serán obligatorias para todos los accionistas y en el caso de resoluciones tomadas en asamblea, aún para los ausentes o disidentes*");

e. *Id*., Clause 18, item a) ("*las asambleas de ·accionistas podrán celebrarse, cuando lo juzgue conveniente el Consejo· de Administración, el Presidente del consejo, o a solicitud de cualquier Comisario, o de* ***accionistas que posean, en total, un número de acciones que por lo menos represente el treinta y tres por ciento del capital suscrito y pagado*** *de la sociedad*");

f. *Id*., Clause 18, item m) ("*Para considerar legalmente instalada a una asamblea ordinaria de accionistas celebrada en primera convocatoria,* ***deberán estar presentes o representados los tenedores de por lo menos el cincuenta por ciento de las acciones emitidas con derecho a voto***");

g. *Id*., Clause 18, item n) ("*Para considerar legalmente instalada a una asamblea extraordinaria de accionistas celebrada en primera convocatoria;* ***deberán estar presentes o representados los tenedores de por lo menos el setenta y cinco por ciento de las acciones emitidas con derecho a voto***");

h. *Id*., Clause 18, item s) ("*Para la validez de las resoluciones adoptadas en cualquier asamblea ordinaria de accionistas, celebrada en primera ulterior convocatoria,* ***se requerirá el voto afirmativo de los tenedores de por lo menos una mayoría de las acciones con derecho a voto presentes o representadas***");

i. *Id*., Clause 18, item t) ("*Para la validez de las resoluciones adoptadas en cualquier asamblea extraordinaria de accionistas, celebrada en primera o ulterior convocatoria,* ***se requerirá el voto afirmativo de los tenedores de por lo menos el cincuenta por ciento de las acciones con derecho a voto***").

84. Mr. Willars exercised his control over CFCM. Among other acts, he: (i) instructed CFCM to pursue all legal avenues to object and oppose to the *rescate*, and to ensure that CFCM

receive compensation for the value of the lost Concession; (ii) initiated an international arbitration against Mexico to protect his rights and those of CFCM enshrined in NAFTA, (iii) submitted a notice of intent to arbitrate the dispute to Mexico and personally met with Mexico's representatives on 6 June 2023 to seek an amicable resolution to this dispute; (iv) waived his rights to pursue further litigation in Mexico against Mexico for its failure to pay compensation for the *rescate* of the Concession; (v) filed the Request for Arbitration that gave rise to this proceeding, and (vi) has pursued and will continue to pursue it until effective relief is granted for Mexico's evident treaty breaches, thus confirming that he effectively controlled and continues to control CFCM.

Proofs:

a. **CWS-4-ENG**, ¶¶16-19 (Witness Statement-Mario Noriega Willars-Counter-Memorial on Jurisdiction-Second Statement) (evidencing all the instances where Mr. Willars has exercised effective control of CFCM);
b. **CWS-5-SPA**, ¶¶13-15 (Witness Statement-[redacted]Counter-Memorial on Jurisdiction) (evidencing all the instances where Mr. Willars has exercised effective control of CFCM);
c. **C-24-ENG** (Claimants' Written Waiver in compliance with Article 1121 of NAFTA) (evidencing that Mr. Willars exercised control by waiving the right to continue CFCM's local proceedings before Mexican courts);
d. **C-25-ENG** (Mr. Willars' Notice of Intent) (evidencing that Mr. Willars decided to serve a formal Notice of Intent to Mexico under NAFTA);
e. **C-231-ENG** (Correspondence between Hogan Lovells and Mexico's Secretaría de Economía regarding the meeting held on 6 June 2023) (evidencing that Mr. Willars attended personally to the meeting with Mexico to discuss the Notice of Intent);
f. **C-27-SPA** (CFCM's internal authorization to file the Request for Arbitration) (evidencing that Mr. Willars exercised control and authorized the filing of the Request for Arbitration);
g. *See* Request for Arbitration dated 29 June 2023.

b. Claimant's control of CFCM preceded Mexico's Treaty Breaches

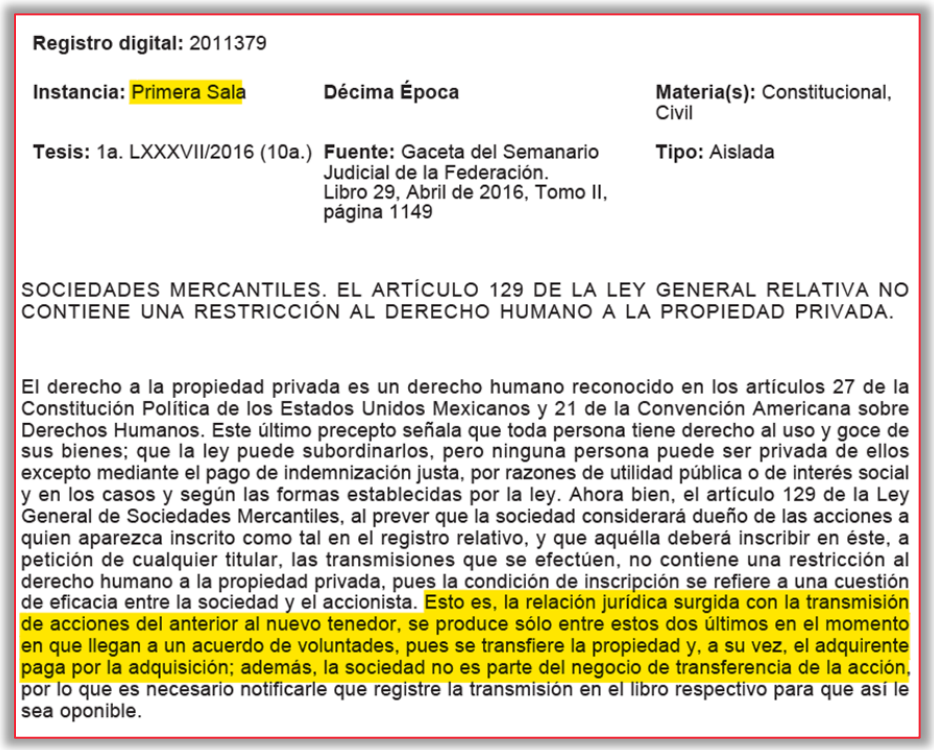
85. Mr. Willars obtained control over CFCM on 14 December 2015—before Mexico's treaty breaches—and has retained it continuously since. Given that Mr. Willars enjoyed legal and *de facto* control both at the time of Mexico's treaty breaches and at the time of the submission of this dispute to arbitration, he has standing to submit a claim to arbitration on behalf of CFCM under Article 1117 of NAFTA.

Proofs:

a. *See infra*, ¶¶89-94.

86. Under Mexican law, the transfer of ownership of shares in a "*Sociedad Anónima de Capital Variable*" such as Viabilis or CFCM, takes place the moment those shares are sold, not upon registration in the company's ledger. That is, transfer of ownership of the shares is ***not***

contingent upon registration of the sale. Instead, the registration only serves as notice to the company that a transfer of shares has taken place, as reflected in the very sources Mexico cites to support its jurisdictional objection. Mexico's claim that Mr. Willars' interest in CFCM took effect on the date of the registration of his shares in CFCM's share ledgers is wrong. The Mexican Supreme Court has confirmed this in a precedent cited by Mexico:



Registro digital: 2011379

Instancia: Primera Sala | **Décima Época** | **Materia(s):** Constitucional, Civil

Tesis: 1a. LXXXVII/2016 (10a.) | **Fuente:** Gaceta del Semanario Judicial de la Federación. Libro 29, Abril de 2016, Tomo II, página 1149 | **Tipo:** Aislada

SOCIEDADES MERCANTILES. EL ARTÍCULO 129 DE LA LEY GENERAL RELATIVA NO CONTIENE UNA RESTRICCIÓN AL DERECHO HUMANO A LA PROPIEDAD PRIVADA.

El derecho a la propiedad privada es un derecho humano reconocido en los artículos 27 de la Constitución Política de los Estados Unidos Mexicanos y 21 de la Convención Americana sobre Derechos Humanos. Este último precepto señala que toda persona tiene derecho al uso y goce de sus bienes; que la ley puede subordinarlos, pero ninguna persona puede ser privada de ellos excepto mediante el pago de indemnización justa, por razones de utilidad pública o de interés social y en los casos y según las formas establecidas por la ley. Ahora bien, el artículo 129 de la Ley General de Sociedades Mercantiles, al prever que la sociedad considerará dueño de las acciones a quien aparezca inscrito como tal en el registro relativo, y que aquélla deberá inscribir en éste, a petición de cualquier titular, las transmisiones que se efectúen, no contiene una restricción al derecho humano a la propiedad privada, pues la condición de inscripción se refiere a una cuestión de eficacia entre la sociedad y el accionista. Esto es, la relación jurídica surgida con la transmisión de acciones del anterior al nuevo tenedor, se produce sólo entre estos dos últimos en el momento en que llegan a un acuerdo de voluntades, pues se transfiere la propiedad y, a su vez, el adquirente paga por la adquisición; además, la sociedad no es parte del negocio de transferencia de la acción, por lo que es necesario notificarle que registre la transmisión en el libro respectivo para que así le sea oponible.

Image 23: Mexico's Supreme Court confirmation that the transfer of ownership takes place on the moment of the sale of those shares [R-20-SPA]

Proofs:

a. **R-20-SPA** (Tesis 1a. LXXXVII/2016 (10a.), dated 1 April 2016) ("*...la relación jurídica surgida con la transmisión de acciones del anterior al nuevo tenedor,* ***se produce sólo entre estos dos últimos en el momento en que llegan a un acuerdo de voluntades, pues se transfiere la propiedad y, a su vez, el adquirente paga por la adquisición***") (emphasis added);

b. **CL-189-SPA**, (Ejecutoria del Amparo Directo en Revisión 2336/2014), ¶45 ("*Es decir, la relación jurídica que surge con la transmisión de acciones del anterior al nuevo tenedor, es precisamente entre estos dos* ***en el momento en que llegan a un acuerdo de voluntades, se transfiere la propiedad y su vez el adquirente paga por la adquisición****. Se parte de la base de que la sociedad no es parte en el negocio de transferencia de la acción, sólo se le notifica para que registre la transmisión y de esta manera sea oponible a la sociedad; es decir, la transmisión y adquisición es un acto extraño a la sociedad, en el que ésta no interviene para nada limitándose a realizar la toma de nota correspondiente en el libro de registro de acciones*") (emphasis added);

c. **CL-190-SPA** (Tesis 271428, Semanario Judicial de la Federación. Volumen XXXVI, Cuarta Parte), p. 103 ("*En la transmisión de la titularidad de las acciones nominativas emitidas por una sociedad anónima, hay dos períodos cuyos efectos son diferentes.* ***El primero comprende el pacto por el que el accionista enajena sus derechos al comprador o cesionario, nombrado o por nombrar, y surte efectos entre ellos desde luego, porque desde entonces nacen derechos y obligaciones de lo pactado***") (emphasis added).

87. Therefore, Mr. Willars became the ***owner*** of the shares purchased through the Willars SPA on 14 December 2015, the date on which the parties agreed on the sale, and payment of the shares was confirmed. From that moment, Mr. Willars exercised control over CFCM through his majority ownership interest.

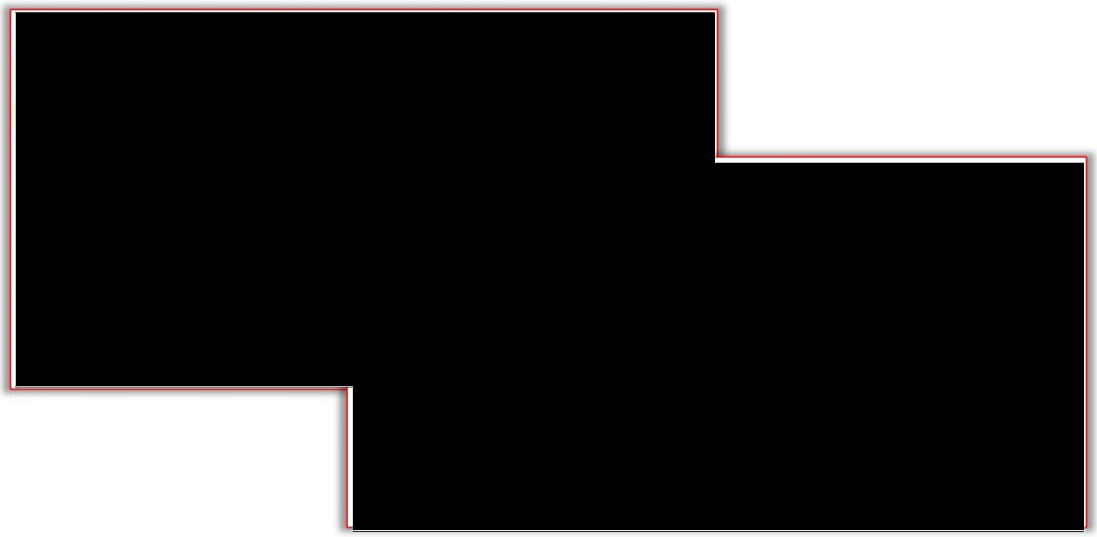


Image 24: Bills of Sale of CFCM and Viabilis [C-159-ENG, C-160-ENG]

Proofs:

a. **C-158-ENG** (Share Purchase Agreement between [redacted] and Mario Noriega Willars) (evidencing that Mr. Willars acquired an interest in CFCM in 2015);

b. **C-159-ENG** (Bill of Sale of CFCM executed by [redacted] dated 14 December 2015) (evidencing that Mr. Willars acquired an interest in CFCM in 2015);

c. **C-160-ENG** (Bill of Sale of Viabilis executed by [redacted] dated 14 December 2015) (evidencing that Mr. Willars acquired an interest in Viabilis in 2015).

88. Moreover, Mr. Willars' share participation in Viabilis was registered in the company's share ledger on 15 December 2015, one day after the execution of the Willars SPA and the [redacted] Since then, he has exercised control over the board of directors of Viabilis and, as a consequence, over 73.71% of the shares in CFCM. As such, since at least 15 December 2015, Mr. Willars has exercised legal and *de facto* control over CFCM, well before the *rescate* of the Concession in July of 2016.

Proofs:

a. **C-3-SPA** (Viabilis Holding, S.A. de C.V.'s Shareholder Registry), p. 3 (evidencing that Mr. Willars owns a 48% interest in Viabilis).

89. In any event, Mexico misconstrues Claimant's position in this arbitration. Claimant's claims in this arbitration relate to Mexico's continuing breach of its obligation to provide compensation following its expropriation of Mr. Willars' and CFCM's investments, a ***breach that, at the earliest, started on 1 March 2017***, when the SCT failed to compensate CFCM following the *rescate* of the Concession. As Mr. de la Peña explained in his legal expert report, CFCM submitted documentation proving the value of its expropriated investment to the SCT on 1 December 2016, in accordance with Mexican law. Mexico had 90 days from that date (*i.e.*, until 1 March 2017) to determine the amount of compensation owed to CFCM for the *rescate* of the Concession, which it failed to do. So, even if the registration of Mr. Willars' shares in CFCM were at all relevant to determine Mr. Willars' control over CFCM (which it is not), the registration would have ***preceded*** Mexico's treaty breaches at issue in this arbitration.

Proofs:

a. Claim Memorial, ¶311 ("…*Claimant's claims in this arbitration relate to Mexico's continuing breach of its obligation to provide compensation following its expropriation of Mr. Willars' and CFCM's investments. This conduct predates the termination of NAFTA on 1 July 2020.* ***Indeed, Mexico's continuing breach started on 1 March 2017, when the SCT failed to pay compensation owed to CFCM due to the rescate of the Concession***");

b. **CWS-4-ENG**, ¶14 (Witness Statement-Mario Noriega Willars-Counter-Memorial on Jurisdiction-Second Statement) ("*In any case, Mexico misconstrues my position in this arbitration. There is no dispute that the Concession's rescate was declared on 26 July 2016. My claim, however, is related to Mexico's failure to pay compensation for the rescate of the Concession, which was breached on 1 March 2017—90 days after CFCM submitted the relevant documentation proving its investments in the Concession. At that point in time, my share participation in CFCM was already registered in the company's share ledger*");

c. **CER-2-SPA**, ¶68 (Expert Report-Marco Antonio de la Peña Claim Memorial) ("*La obligación de indemnización de la SCT bajo el Rescate es una obligación prevista en ley. Nació a partir de que se notificó a CFCM la resolución administrativa del Rescate el 26 de julio de* ***2016 y se incumplió a partir del 1 de marzo de 2017***").

90. Mr. Willars retains his ownership and control over CFCM. As Mr. Willars declared in his second witness statement, since the date of the acquisition of CFCM on 14 December 2015, Mr. Willars has not transferred, pledged, or otherwise diminished his shareholding in CFCM or Viabilis. And copies of the share registries of Viabilis and CFCM confirm that there have been no sales, dispositions, or transfers of Mr. Willars' or Viabilis' interests in CFCM.

Proofs:

a. **CWS-4-ENG**, ¶15 (Witness Statement-Mario Noriega Willars-Counter-Memorial on Jurisdiction-Second Statement) ("Since the date of the acquisition of CFCM on 14 December 2015, I have not transferred, pledged, or otherwise diminished my shareholding in CFCM or Viabilis. I have retained my ownership over CFCM and exercised control over the decisions of the company").

91. Based on the above, Mr. Willars owned and controlled CFCM at all relevant times, thereby granting him standing to submit a claim to arbitration on behalf of CFCM under Article 1117 of NAFTA.

Proofs:

a. *See supra*, ¶¶66-93.

B. CLAIMANT'S INVESTMENT WAS LEGAL

92. Contrary to Mexico's allegations, Claimant did not acquire his investment "illegally."

Proofs:

a. *See infra*, Sections III.B.1) – III.B.4).

1) NAFTA does not limit protected investments to those made in accordance with the host State's law

93. Unlike other treaties, NAFTA does not contain a provision that limits qualifying investments to those made in accordance with the host State's law. In the absence of such qualifying language, several investment tribunals have denied reading such an implied condition into the treaty's text.

Proofs:

a. *See infra*, ¶¶97-104.

94. Several investment treaties contain ***express*** provisions that limit qualifying investments to those made "in accordance with the laws" of the host State. For example, Article 1(1) of the Agreement between the Government of the Republic of Finland and the Government of the Socialist Republic of Viet Nam on the Promotion and Protection of Investments provides that "[t]he term 'investment' means any kind of asset, invested by an investor of one Contracting Party in the territory of the other Contracting Party, provided that the investment has been made ***in accordance with the laws and regulations*** of the other Contracting Party . . . ." Similarly, Article 1(1) of the Agreement Between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments sets forth that "[t]he term 'investment' shall mean any kind of asset accepted ***in accordance with the respective laws and regulations*** of either Contracting State . . . ."

Proofs:

a. **CL-158-ENG**, Article 1(1) (Agreement between the Government of the Republic of Finland and the Government of the Socialist Republic of Viet Nam on the Promotion and Protection of Investments);

b. **CL-159-ENG** Article 1(1) (Agreement Between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments).

95. In contrast, NAFTA does not contain a similar provision. The definition of "investment" under Article 1139 of NAFTA is not limited to investments made "in accordance with" the laws of a contracting party. That qualification is not present anywhere else in NAFTA's text.

Proofs:

a. **CL-5-ENG**, Article 1139 (North American Free Trade Agreement).

96. Several tribunals have denied reading such "legality" condition into the treaty text, where the treaty contains no such qualifying language. For instance, the tribunal in *Bear Creek Mining v. Peru* reasoned that "under international law, ***the tribunal may not import a requirement that limits its jurisdiction when such a limit is not specified by the parties***." Specifically dealing with a "legality" requirement, the tribunal in *Stati v. Kazakhstan* reasoned that:

> [T]he ECT contains no requirement in this regard. Indeed, ***if the contracting states had intended there to be such a requirement, they could have written it into the text of the Treaty***…. ***This consideration is even more valid in view of the extremely detailed definition of investment and other details regulated in the ECT***. At least with regard to jurisdiction, the Tribunal does not see where such a requirement could come from.

Proofs:

a. **CL-160-ENG**, ¶320 (*Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017);

b. **CL-161-ENG**, ¶812 (*Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan (I)*, SCC Case No. V 116/2010, Award, 19 December 2013).

97. The tribunal in *Achmea v. Slovak Republic* determined that "[t]he definition of an investment … does not expressly stipulate that the investment must have been made in accordance with the laws of the host State in order that the investment be protected by the Treaty" and that "***it is … entirely reasonable to interpret the terms of Article 1(a) without reading in a requirement that there must be no infraction of the host State's law*** in the course of the making of the investment, if the investment is to be within the scope of the Treaty protection."[5]

[5] The award in this case was annulled for unrelated reasons.

Proofs:

a. **CL-162-ENG**, ¶¶170-171 (*Achmea B.V. v. Slovak Republic, UNCITRAL, PCA Case No. 2008-13*, Award, 7 December 2012).

98. This view is not only shared by arbitral tribunals, but by national courts. For example, the Hague Court of Appeal has reasoned that "there is [no] … generally accepted principle of law which implies that an arbitral tribunal must (always) decline jurisdiction where it concerns the making of an 'illegal' investment."

Proofs:

a. **CL-163-ENG**, ¶5.1.11.5 (*Veteran Petroleum Ltd., Yukos Universal Ltd. And Hulley Enterprises Ltd. v. The Russian Federation*, Case 200.197.079/01, Judgment of the Hague Court of Appeal, 18 February 2020).

99. Here, there is no "legality" requirement. Like the treaty in *Stati v. Kazakhstan*, NAFTA contains an "extremely detailed definition of investment." Despite that careful and detailed definition, the Parties decided ***not*** to include an express provision qualifying investments only to those made "in accordance with" the host State's laws. Given that "there is [no] … generally accepted principle of law which implies that an arbitral tribunal must (always) decline jurisdiction where it concerns the making of an 'illegal' investment," the most reasonable interpretation is to read Article 1139 of NAFTA "without reading in a requirement that there must be no infraction of the host State's law."

Proofs:

a. **CL-5-ENG**, Article 1139 (North American Free Trade Agreement);
b. **CL-161-ENG**, ¶812 (*Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan (I)*, SCC Case No. V 116/2010, Award, 19 December 2013);
c. **CL-163-ENG**, ¶5.1.11.5 (*Veteran Petroleum Ltd., Yukos Universal Ltd. And Hulley Enterprises Ltd. v. The Russian Federation*, Case 200.197.079/01, Judgment of the Hague Court of Appeal, 18 February 2020);
d. **CL-162-ENG**, ¶¶170-171 (*Achmea B.V. v. Slovak Republic, UNCITRAL, PCA Case No. 2008-13*, Award, 7 December 2012).

100. This conclusion is further supported by the fact that Mexico and the United States of America had the opportunity to amend the definition of "investment" in the USMCA to include an express legality provision. Given the case law above, if Mexico and the United States of America wanted to limit the tribunals' jurisdiction, they would have included an express requirement in a carefully negotiated treaty such as the USMCA. However, even when presented with such opportunity, the parties to the Treaty decided—again—***not*** to include a legality provision in the definition of "investment."

Proofs:

a. **CL-3-ENG**, Article 14.1 (United States-Mexico-Canada Agreement, Chapter 14).

101. Based on the above, Mexico cannot now argue that a requirement absent from NAFTA is applicable, particularly given that the USCMA confirms the intentionality of such absence.

Proofs:

a. *See supra*, ¶¶96-103.

2) Mr. Willars did not breach Mexican Law

102. Even if the Tribunal found a legality requirement under NAFTA—*quod non*—Mr. Willars made his investment legally.

Proofs:

a. *See infra*, Sections III.B.2).a – III.B.2).b.

a. Mexico authorized CFCM to have foreign shareholders in excess of 49%

103. As explained, and as admitted by Mexico in its Memorial on Jurisdiction, on 25 May 1999, CFCM obtained from the CNIE an authorization to operate and exploit railways, with a foreign investment ***of 99.999%***.

Proofs:

a. *See supra*, ¶¶15-17;
b. **C-234-SPA**, Official letter No. 514.113.9912083 (evidencing that the *Comisión Nacional de Inversiones Extranjeras* authorized CFCM to have a 99.9% foreign investment participation);
c. *See* Memorial on Jurisdiction, ¶35 ("*El 25 de mayo de 1999, la Comisión resolvió* ***a favor de CFCM*** *la autorización de dicha actividad económica, y con ello permitió que Genesee & Wyoming, Inc* ***participara en CFCM en un porcentaje de 99.99%***").

104. Mexico misrepresents the facts regarding this authorization. Mexico asserts that ***G&W*** requested the authorization for CFCM to have foreign capital. This assertion is inaccurate. As evidenced in CFCM's Foreign Investment Authorization and as explained by Mr. García Fernández, an expert in Mexico's foreign investment regime and Mexico's former Director of Foreign Investment the authorization was requested by and granted in favor of ***CFCM*** (not G&W). CFCM is thus authorized to have foreign investment up to 99.9%, regardless of who the foreign investor is.

Proofs:

a. *See* Memorial on Jurisdiction, ¶35 ("*…el 30 de marzo de 1999, Genesee & Wyoming, Inc., el antiguo accionista de CFCM, solicitó la autorización para que CFCM ingresara como empresa dedicada a la operación y explotación de vías férreas que sean vía general de comunicación*");

b. **C-234-SPA** Official letter No. 514.113.9912083 (evidencing that the *Comisión Nacional de Inversiones Extranjeras* authorized CFCM to have a 99.9% foreign investment participation);

c. **CER-3-SPA**, ¶44, i) (Expert Report-Carlos García Fernández-Counter-Memorial on Jurisdiction) ("*En este caso, en su oportunidad CFCM obtuvo esa autorización para contar con inversión extranjera, como lo evidencia el oficio No. 514.113.9912083, de fecha 25 de mayo de 1999, Exp. 60171-C, Reg. 5267 y 5294, emitido por la Dirección General de Inversión Extranjera de la -entonces- Secretaría de Comercio y Fomento Industrial, de 25 de mayo de 1999, mediante el que se comunicó a CFCM (sociedad mexicana en la que la inversión extranjera ya participaba por medio de la sociedad estadounidense Genesee & Wyoming, Inc., en un 99.999%), la autorización de la Comisión -en su sesión 4/99, y con fundamento en los art. 2º, frac. II y 8º, frac. XII de la LIE- para ingresar a un nuevo campo de actividad económica, consistente en la operación y explotación de vías férreas que sean vías generales de comunicación. …De lo anterior se sigue que la autorización por parte de la Comisión fue conferida a la sociedad mexicana CFCM para ingresar a un nuevo campo de actividad económica consistente en la operación y explotación de vías férreas de comunicación, teniendo capital extranjero en un 99.999%. Éste es, también, el caso de la concesión que la -entonces- Secretaría de Comunicaciones y Transportes otorgara a CFCM, de 26 de agosto de 1999, para el mismo efecto: la concesión fue otorgada a la sociedad mexicana CFCM…*").

105. CFCM's authorization remains in force. It has not been revoked, annulled, or suspended. Therefore, even if a separate authorization was required for Mr. Willars investment—*quod non*—CFCM's Foreign Investment Authorization would suffice to allow Mr. Willars to participate in CFCM's capital.

Proofs:

a. **CER-3-SPA**, ¶44, i) (Expert Report-Carlos García Fernández-Counter-Memorial on Jurisdiction) ("*Por lo anterior, en mi interpretación de la LIE, CFCM no requería una nueva autorización por parte de la Comisión para permitir que el Demandante adquiriera sus acciones en CFCM o Viabilis Holding, S.A. de C.V. La autorización que, en su oportunidad, fue emitida en favor de CFCM, le autoriza a operar en el sector de operación y explotación de vías férreas de comunicación, con hasta un 99.999% de participación extranjera en su capital social*").

106. The fact that CFCM's Foreign Investment Authorization authorizes any future foreign shareholder in CFCM is supported by Mexico's conduct in this case. As explained, on 19 June 2007, Custodio Privado de Valores, S.A. de C.V. transferred its share in CFCM to GW CM Holdings, Inc.—a foreign entity. This was a ***new foreign shareholder*** different from G&W. The SCT knew of GW CM Holdings, Inc.'s participation in CFCM and made no objection regarding any lack of authorization for a new foreign shareholder, even when the foreign participation in CFCM exceeded 49%.

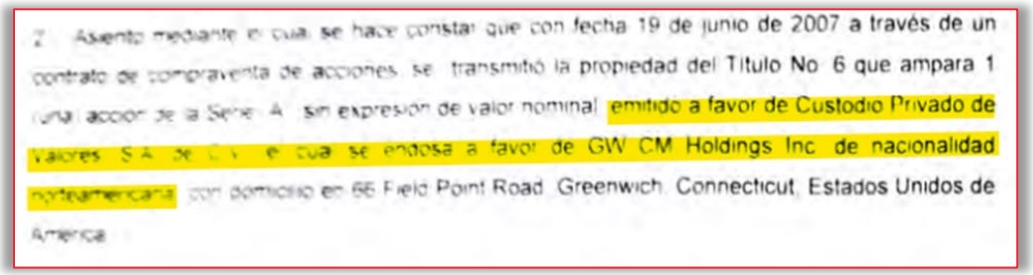

2 Asiento mediante el cual se hace constar que con fecha 19 de junio de 2007 a través de un contrato de compraventa de acciones se transmitió la propiedad del Título No. 6 que ampara 1 (una) acción de la Serie A sin expresión de valor nominal emitido a favor de Custodio Privado de Valores S.A. de C.V. el cual se endosa a favor de GW CM Holdings Inc. de nacionalidad norteamericana con domicilio en 66 Field Point Road Greenwich Connecticut Estados Unidos de America

Image 25: CFCM's Shareholders' Registry Book reflecting the transfer to GW CM Holdings Inc. [C-232-SPA]

Proofs:

a. *See supra*, ¶20;

b. **C-232-SPA**, p. 05 (CFCM's Shareholders' Registry Book) ("*…con fecha 19 de junio de 2007 a través de un contrato de compraventa de acciones se transmitió la propiedad del Título No. 6 que ampara 1 /una) acción de la Serie A sin expresión de valor nominal emitido a favor de Custodio Privado de Valores, S.A. de C.V., el cual se endosa a favor de GW CM Holdings Inc. de nacionalidad norteamericana…*").

107. Mexico further misrepresents the facts and confuses two distinct requirements by stating that "*el 23 de septiembre de 2010 el* [redacted] *en representación de CFCM, solicitó la cancelación de la inscripción de dicha sociedad ante el RNIE*." Mexico's assertion regarding the inscription in the National Registry of Foreign Investment ("**RNIE**") is irrelevant for purposes of CFCM's Foreign Investment Authorization.

Proofs:

a. *See* Memorial on Jurisdiction, ¶35.

108. As explained by Mr. García Fernández, the registration of a Mexican company in the RNIE is a distinct requirement, unrelated to the authorization to have foreign investment of over 49%. Mexico acknowledges this in its Memorial on Jurisdiction. The registration is governed by article 32 of Mexico's Foreign Investment Law. Further, that registration is required ***after*** a foreign investor has already become a shareholder in a Mexican entity.

Proofs:

a. **CER-3-SPA**, ¶50 (Expert Report-Carlos García Fernández-Counter-Memorial on Jurisdiction) ("*Por su parte, la obligación de sociedades mexicanas de inscribirse en el RNIE es un requisito distinto e independiente de las autorizaciones*

que puedan requerirse de la Comisión. La inscripción en el RNIE, de acuerdo con el artículo 32 de la LIE, debe realizarse dentro de los 40 días hábiles contados a partir de la fecha… de participación de la inversión extranjera." Es decir, es una obligación que surge una vez que ya se realizó la inversión extranjera en el capital social de una sociedad mexicana");

b. *See* Memorial on Jurisdiction, ¶19 ("*De esta manera, con la entrada en vigor de la LIE, se consolidó la necesidad de una instancia que permitiera evaluar, autorizar y supervisar determinados proyectos de inversión extranjera en sectores considerados sensibles para la seguridad nacional o el interés público. En este contexto, se creó la Comisión Nacional de Inversiones Extranjeras (Comisión o CNIE), órgano colegiado de carácter consultivo y resolutivo, cuya función principal es analizar y resolver sobre la participación de inversionistas extranjeros en actividades reservadas o con límites de participación establecidos por ley. Esta Comisión está presidida por la Secretaría de Economía y cuenta con la participación de diversas dependencias y entidades de la administración pública federal*");

c. *Id*., ¶20 ("*Asimismo, para contar con información sistematizada, actualizada y verificable sobre el comportamiento y evolución de la inversión extranjera en el país, se instituyó el Registro Nacional de Inversiones Extranjeras (RNIE) como un instrumento administrativo obligatorio. Este Registro permite a la autoridad económica recabar datos sobre las inversiones directas, los fideicomisos con participación extranjera y otras formas de capital extranjero, facilitando el diseño de políticas públicas basadas en evidencia y el cumplimiento de obligaciones internacionales en materia de transparencia y estadísticas. El RNIE está adscrito a la Secretaría de Economía, particularmente a la Dirección General de Inversión Extranjera*");

d. **CL-168-SPA**, Article 32 (Mexico's Foreign Investment Law) ("*Deberán inscribirse en el Registro: I.- Las sociedades mexicanas en las que participen, incluso a través de fideicomiso: a) La inversión extranjera…*").

109. Moreover, the fact that [redacted] cancelled CFCM's ***registration*** before the RNIE has no bearing on CFCM's Foreign Investment Authorization. Such authorization remains in force to this date and has not been cancelled, annulled, or suspended by CFCM or by any Mexican authority. Consequently, CFCM continues to have authorization to have up to 99.99% in foreign capital.

Proofs:

a. *See* Memorial on Jurisdiction, ¶35 ("*A diferencia de lo realizado por Genesee & Wyoming, el 23 de septiembre de 2010 el* [redacted] *en representación de CFCM, solicitó la cancelación de la inscripción de dicha sociedad ante el RNIE*");

b. **CER-3-SPA**, ¶44, i) (Expert Report-Carlos García Fernández-Counter-Memorial on Jurisdiction) ("*Por lo anterior, en mi interpretación de la LIE, CFCM no requería una nueva autorización por parte de la Comisión para permitir que el Demandante adquiriera sus acciones en CFCM o Viabilis*

> *Holding, S.A. de C.V. La autorización que, en su oportunidad, fue emitida en favor de CFCM, le autoriza a operar en el sector de operación y explotación de vías férreas de comunicación, con hasta un 99.999% de participación extranjera en su capital social*").

110. Based on the above, Mr. Willars' acquisition of his shares in CFCM and Viabilis was legal.

Proofs:

a. *See supra*, ¶¶106-112.

b. Mr. Willars was not required to obtain authorization

111. In any event, Mexican law did not require Mr. Willars to obtain prior authorization from the CNIE to acquire more than 49% of CFCM.

Proofs:

a. *See infra*, ¶¶115-120.

112. Article 8, Section XII of Mexico's Foreign Investment Law requires ***Mexican companies*** (not foreign investors) in the sectors of construction, operation, and exploitation of railways to obtain an authorization from the CNIE in order to have foreign investment in a percentage over 49%. This restriction is likewise reflected in article 17 of Mexico's Railway Law and Condition 4.3 of the Concession. Mexico alleges a supposed breach of all these provisions.

Proofs:

a. **CL-168-SPA**, Article 8 (Mexico's Foreign Investment Law) ("*Se requiere resolución favorable de la Comisión para que la inversión extranjera participe en un porcentaje mayor al 49% en las actividades económicas y sociedades que se mencionan a continuación:… XII.- Construcción, operación y explotación de vías férreas que sean vía general de comunicación, y prestación del servicio público de transporte ferroviario*");
b. **CL-13-SPA**, Article 17 (Mexico's Railway Service Law) ("*La inversión extranjera podrá participar hasta el cuarenta y nueve por ciento en el capital social de las empresas concesionarias a que se refiere esta Ley. Se requerirá resolución favorable de la Comisión Nacional de Inversiones Extranjeras para que la inversión a que se refiere el párrafo anterior participe en un porcentaje mayor. Dicha Comisión deberá considerar al resolver, que se propicie el desarrollo regional y tecnológico, y se salvaguarde la integridad soberana de la Nación*");
c. **C-10-SPA**, Condition 4.3 (Concession) ("*La inversión extranjera no podrá exceder directa o indirectamente, del 49% del capital social del concesionario, salvo resolución favorable de la Comisión Nacional de Inversiones Extranjeras…*");
d. *See infra*, ¶¶116-120.

113. Article 8, Section XII of Mexico's Foreign Investment Law, however, is qualified by Articles 4 and 9 of Mexico's Foreign Investment Law. The last paragraph of Article 4 of Mexico's

Foreign Investment Law sets forth that, when determining the participation percentage of foreign investment in economic activities subject to maximum participation limits, foreign investment that is indirectly made through Mexican companies with majority-Mexican capital shall not be counted. Mr. Willars' ownership and control of Viabilis exists through a combination of his shares (48%) and the [redacted] Mr. Willars is not, however, the majority shareholder of Viabilis. Thus, Mr. Willars' participation in Viabilis (a Mexican company with a 52% majority-Mexican capital) is not counted towards the participation percentage of foreign investment in CFCM. Consequently, Mexican law does not require an authorization for his 16.38% ***direct*** participation in Viabilis.

Proofs:

a. **CL-168-SPA**, Article 4 (Mexico's Foreign Investment Law) ("*Para efectos de determinar el porcentaje de inversión extranjera en las actividades económicas sujetas a límites máximos de participación,* ***no se computará la inversión extranjera que, de manera indirecta, sea realizada en dichas actividades a través de sociedades mexicanas con mayoría de capital mexicano****, siempre que estas últimas no se encuentren controladas por la inversión extranjera*") (emphasis added);

b. **CER-3-SPA**, ¶¶44, ii), 45 (Expert Report-Carlos García Fernández-Counter-Memorial on Jurisdiction) ("*En términos del artículo 4° de la LIE, la inversión extranjera indirecta no se contabiliza para efectos de determinar el porcentaje de inversión extranjera en CFCM, a condición de que se encuadre en lo previsto en el tercer párrafo de dicho artículo. ...En términos de la disposición anterior, la participación del Sr. Mario Noriega Willars en Viabilis (una sociedad mexicana con mayoría de capital mexicano) es una inversión extranjera indirecta en CFCM que, al ser menor al 49% (i.e. de tan solo el 35.38%, esto es, minoritaria en lo tocante a la LIE y al Reglamento de la LIE), no se computa para efectos de determinar el porcentaje de inversión extranjera en las actividades económicas sujetas a límites máximos de participación*").

114. Article 8 of Mexico's Foreign Investment Law is also qualified by Article 9, which clarifies that such authorization is ***only*** required when the total value of the assets of the companies involved exceeds the threshold set annually by the CNIE.

Proofs:

a. **CL-168-SPA**, Article 9 (Mexico's Foreign Investment Law) ("*Artículo 9. Se requiere resolución favorable de la Comisión para que en las sociedades mexicanas donde la inversión extranjera pretenda participar, directa o indirectamente, en una proporción mayor al 49% de su capital social,* ***únicamente cuando el valor total de activos de las sociedades de que se trate, al momento de someter la solicitud de adquisición, rebase el monto que determine anualmente la propia Comisión***") (emphasis added).

115. In December 2015—when Mr. Willars entered into the Willars SPA—the CNIE set this threshold at MXN $26.9 billion. The value of the assets underlying Mr. Willars' acquisition was below this amount. Therefore, under Mexico's Foreign Investment Law, upon which Mexico relies, no prior authorization from the CNIE was required.

Proofs:

a. **C-226-SPA** (General Resolution number 16, that determines the updated amount of the total value of assets referred in article 9 of Mexico's Foreign Investment Law) (evidencing that the CNIE set a threshold of MXN $26.9 billion to obtain an authorization).

116. Even if Mexico's reading of Mexico's Foreign Investment Law was correct in the sense that Articles 8 and 9 are read separately, the same Article 9 leaves this open to interpretation, by establishing that an authorization to exceed 49% of the capital ***is only*** (*únicamente*) required when the threshold set annually by the CNIE is surpassed. Mexico has provided no precedent on the interpretation of these articles, and Claimant has been unable to identify any that state whether these articles are to be read separately or together.

Proofs:

a. **CER-3-SPA**, ¶¶38-39 (Expert Report-Carlos García Fernández-Counter-Memorial on Jurisdiction) ("*Por lo que hace a la primera de las cuestiones señaladas, no es extraño que pueda prestarse a confusión, por distintos motivos: i) En primer lugar, en virtud de la redacción del artículo 9° de la LIE. Como señalé, dicha disposición establece que se requiere autorización favorable de la Comisión para que la inversión extranjera participe en más del 49% del capital de una sociedad mexicana "únicamente cuando el valor total de activos de las sociedades de que se trate, al momento de someter la solicitud de adquisición, rebase el monto que determine anualmente la propia Comisión" (el énfasis es nuestro). La interpretación gramatical o literal de los artículos 8° y 9° de la LIE implica determinar el sentido del adverbio de modo "únicamente" que se utiliza en el artículo 9°. La utilización del adverbio "únicamente" (que significa sólo, precisa o exclusivamente) puede conducir a interpretar que la autorización se requiere "solamente" o "exclusivamente" en caso de que el valor total de los activos rebase el monto determinado, anualmente, por la Comisión. Ello, a pesar de que la sociedad mexicana respectiva se encuentre en alguno de los supuestos del artículo 8° de la Ley. Los adverbios son palabras que califican el sentido o alcance de un verbo o un adjetivo. La palabra "únicamente" cumple, así, esa función al especificar que algo (en este caso, la autorización de la Comisión) debe hacerse de una manera exclusiva, sin incluir otras. ii) En segundo lugar, mientras los artículos 6º y 7º de la LIE son paralelamente taxativos, los artículos 8º y 9º dejan abierta la posibilidad para que la inversión extranjera participe de manera mayoritaria, lo que haría suponer que operan, también, en paralelo. 39. La confusión anterior se ha resuelto, históricamente, por la Comisión y por la Dirección*

> *General de Inversión Extranjera de forma casuista, mediante lo que se suele denominar "confirmación de criterio", formulada por los particulares. Sin embargo, hasta donde es de mi conocimiento, no existe un criterio público que lo aclare (por ejemplo, a través de una Resolución General de la Comisión), ni existe jurisprudencia de algún tribunal mexicano que interprete dichos artículos de la LIE*").

117. Based on the above, Mr. Willars was not required to obtain any authorization. In any case, it is CFCM who would have had to obtain such authorization. CFCM, however, was not required to obtain such authorization because Mr. Willars' ***direct*** participation in CFCM does not exceed 49%, and because the value of the assets underlying Mr. Willars' acquisition was well below the amount established by the CNIE for 2015. Regardless, CFCM did obtain such authorization, which remains in force, and which covers Mr. Willars' investment.

Proofs:

a. *See supra*, ¶¶105-119.

3) Even if Mr. Willars had failed to comply with the authorization and registration, the Tribunal has jurisdiction

118. Even if the Tribunal concludes that, as Mexico asserts, Mr. Willars somehow failed to secure the authorization—despite CFCM's authorization and the registration of his foreign investment—such irregularity does not strip the Tribunal of its jurisdiction. Not every failure to comply with local law leads to a lack of jurisdiction; only violations that are severe enough to render the establishment of the investment void may do so. Further, only violations during the acquisition or establishment of the investment are relevant for purposes of jurisdiction.

Proofs:

a. *See infra*, Sections III.B.3).a – III.B.3).b.

a. The alleged violation is not severe enough to render the investment void or invalid

119. Several tribunals have recognized that if a given violation is not severe enough to render the acquisition or the establishment of the investment ***void*** or ***invalid***, then a State cannot argue that such violation places the investment outside the scope of the investment treaty. For example, the tribunal in *Álvarez y Marín v. Panama*—on which Mexico relies[6]—reasoned that:

> Un principio general del Derecho exige que exista proporcionalidad entre la naturaleza de la infracción y la gravedad del castigo. La pérdida de la protección jurídica ius-internacional es un castigo severo, que además no permite modulación. Una sanción de este tipo sólo debe imponerse si la infracción cometida por el inversor extranjero es trascendente. ***Cuando la***

[6] Memorial on Jurisdiction, p. 39, fn 134.

> ***infracción sea nimia, el Estado podrá aplicar las sanciones previstas en su ley nacional, pero resultaría desproporcionado privar al inversor de protección iusinternacional***.
>
> …***no toda ilegalidad puede conllevar la pérdida de protección iusinternacional, pues éste es un castigo severo y no modulable***, que solo se debe imponer si constituye una respuesta proporcional ante un inversor que al invertir haya incumplido ***gravemente*** el ordenamiento jurídico del Estado receptor. (emphasis added).

Proofs:

a. **CL-154-SPA**, ¶¶151; 156 (*Álvarez y Marín Corporación S.A. and others v. Republic of Panama*, ICSID Case No. ARB/15/14, Final Award, 12 September 2018).

120. Similarly, in *Lee-Chin v. The Dominican Republic*, the tribunal determined that:

> [T]he violations adduced by Respondent are not severe enough so as to reach, even if established, the highest threshold mentioned in the preceding paragraph. ***The Tribunal must necessarily distinguish between different levels of breaches, as ultimately each regulation, at least indirectly, can be linked to a legitimate and genuine public purpose***. In the present case, assuming that the alleged illegality of the investment—as described by Respondent—is established, it cannot justify declining jurisdiction over the case. …[T]he sanction would be disproportionate.

Proofs:

a. **CL-164-ENG**, ¶187 (*Michael Anthony Lee-Chin v. Dominican Republic*, ICSID Case No. UNCT/18/3, Final Award, 6 October 2023).

121. Several tribunals have likewise decided that a State cannot argue that a violation of its laws deprives the tribunal of jurisdiction when the violation is not severe enough to render the investment void or invalid.

Proofs:

a. **CL-165-ENG**, ¶266 (*Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012) ("The Tribunal considers that the BIT's legality requirement has both subject-matter and temporal limitations. The subject-matter scope of the legality requirement is limited ***to (i) non-trivial violations of the host State's legal order (Tokios Tokelés, LESI and Desert Line)***, (ii) violations of the host State's foreign investment regime (Saba Fakes), and (iii) fraud – for instance, to secure the investment (Inceysa, Plama, Hamester) or profits (Fraport)");

b. **CL-166-ENG**, ¶187 (*Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of the Award, 22 June 2010) ("*Taking into account the above contentions of the Parties, the Tribunal*

considers that the scope of Respondent's consent to jurisdiction must be understood to extend also to those investments in respect of which the underlying transaction was made in breach of Kazakh law and was therefore voidable. ***Since the transfer of the Licence was not invalid, but only voidable, Claimants' investment does not fall outside the scope of Respondent's consent to jurisdiction****. But even in the case of an investment finally found to be in breach of Kazakh law from the very beginning it could be argued that an investment had still been made and consequently that a dispute over such an investment regarding an alleged breach of the ECT would fall within the jurisdiction of this Tribunal*");

c. **CL-196-ENG**, ¶310 (*Worley International Services Inc. v. Republic of Ecuador*, PCA Case No. 2019-15, Final Award, 22 December 2023) ("*The Tribunal considers it generally recognized that illegality affecting the making of the investment may deprive an investment treaty tribunal of jurisdiction. It recalls, however,* ***that only illegalities of a particularly serious nature are capable of meeting this threshold****. … However, the cases in which tribunals have found that they are without jurisdiction on the basis of illegality, on analysis, have all concerned* ***illegality of a particularly serious nature connected with the initial making of the investment, such as corruption, or fraud***") ;

d. **CL-197-SPA**, ¶404 (*Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Laudo Final, 21 May 2013) ("*No todas las violaciones del sistema legal del Estado anfitrión conllevan la ilegalidad de la inversión, afectando la jurisdicción del tribunal que conoce del caso*");

e. **CL-198-ENG**, ¶86 (*Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004) ("*The Respondent now alleges that some of the documents underlying these registered investments contain defects of various types, some of which relate to matters of Ukrainian law. Even if we were able to confirm the Respondent's allegations, which would require a searching examination of minute details of administrative procedures in Ukrainian law,* ***to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty****. In our view, the Respondent's registration of each of the Claimant's investments indicates that the 'investment' in question was made in accordance with the laws and regulations of Ukraine*");

f. **CL-199-ENG**, ¶104 (*Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008) ("*In State practice in the BIT area, the phrase 'according to its laws and regulations' is quite familiar. Moreover, it has been well traversed by arbitral precedents… which make clear that such references are* ***intended to ensure the legality of the investment by excluding investments made in breach of fundamental principles of the host State's law, e.g. by fraudulent misrepresentations or the dissimulation of true ownership****. No such illegality has been alleged, let alone proved, in this case*");

g. **CL-200-ENG**, ¶7.3.20 (*Tekfen-TML Joint Venture, Tekfen İnşaat ve Tesisat A.Ş. and TML İnşaat A.Ş. v. State of Libya*, ICC Case No. 21371/MCP/DDA, Final Award, 11 February 2020) ("*The scope of broadly similar "legality" clauses has frequently been considered by other tribunals. The findings on the point in Salini, Inmaris, ECE Projectktmanagement, Desertline, Tokios and Kim all require a finding of what might be described as a "fundamental illegality" of the investment in order for the relevant treaty not to apply to the investment in question*");

h. **CL-201-ENG**, ¶348 (*Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018) ("*Still, the Tribunal shares the concern of numerous investment tribunals that such a requirement should not unduly restrict the protective scope of a BIT. It thus affirms the existing jurisprudence on "in accordance with host State law"-clauses to the effect that the violations of host State law must have been sufficiently serious and that minor errors and infractions of host State law do not lead to an exclusion of investment treaty protection*").

122. When assessing whether an alleged illegality meets the heightened threshold to deny international protection, tribunals often look at the proportionality of the sanction. For example, the tribunal in *Vladislav Kim v. Uzbekistan* determined that:

> [T]he interpretive task is guided by the principle of proportionality. The Tribunal must balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of entirely denying the application of the BIT when the investment is not made in compliance with legislation. ***The denial of the protections of the BIT is a harsh consequence that is a proportional response only when its application is triggered by noncompliance with a law that results in a compromise of a correspondingly significant interest of the Host State***.

Proofs:

a. **CL-167-ENG**, ¶20 (*Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017).

123. The jurisprudence confirms that the illegality of investments can only defeat jurisdiction when the consequence of the illegality is the ***voidance*** of the investment or acquisition. Any lesser consequence would not justify depriving a claimant of its investment protections.

Proofs:

a. **CL-154-SPA**, ¶156 (*Álvarez y Marín Corporación S.A. and others v. Republic of Panama*, ICSID Case No. ARB/15/14, Final Award, 12 September 2018) ("*…no toda ilegalidad puede conllevar la pérdida de protección iusinternacional, pues éste es un castigo severo y no modulable, que solo se debe imponer si constituye una respuesta proporcional ante un inversor que al invertir haya incumplido gravemente el ordenamiento jurídico del Estado receptor*");

b. **CL-164-ENG**, ¶¶186-187 (*Michael Anthony Lee-Chin v. Dominican Republic*, ICSID Case No. UNCT/18/3, Final Award, 6 October 2023) ("[T]he violations adduced by Respondent are not severe enough so as to reach, even if established, the highest threshold mentioned in the preceding paragraph. The Tribunal must necessarily distinguish between different levels of breaches, as ultimately each regulation, at least indirectly, can be linked to a legitimate and genuine public purpose. In the present case, assuming that the alleged illegality of the investment—as described by Respondent—is established, it cannot justify declining jurisdiction over the case. …[T]he sanction would be disproportionate").

124. In this case, the consequence of the violations alleged by Mexico—the alleged lack of authorization by the CNIE and the alleged lack of registration before the RNIE—is merely a fine. Mexico admits this in its Memorial by explaining that "*[e]n este caso, la no realización del registro y la falta de autorización de la Comisión conllevan las sanciones económicas establecidas en el Artículo 38 de la LIE*." This is further confirmed by Mr. García Fernández, who explains that the consequence is not the voidance of the investment or the Concession, but an economic sanction:

> *Como puede verse, ni la falta de autorización de la Comisión ni la falta de inscripción en el RNIE tienen efectos constitutivos por lo que hace a la transacción u operación en cuestión. Por ello, la ausencia de autorización o inscripción no invalida la inversión extranjera que pretende participar o de facto participa en el capital social de una sociedad mexicana al momento de su constitución, o en una empresa previamente existente. Se trata de temas que, de incumplirse, simplemente pueden generar la imposición de las sanciones pecuniarias antes descritas*.

Proofs:

a. *See* Memorial on Jurisdiction, ¶34;
b. **CER-3-SPA**, ¶56 (Expert Report-Carlos García Fernández-Counter-Memorial on Jurisdiction);
c. **CL-168-SPA**, Article 38 (Mexico's Foreign Investment Law) ("*Las infracciones a lo establecido en esta Ley y sus disposiciones reglamentarias, se sancionarán de acuerdo a lo siguiente: I.- En caso de que la inversión extranjera lleve a cabo actividades, adquisiciones o cualquier otro acto que para su realización requiera resolución favorable de la Comisión, sin que ésta se haya obtenido previamente, se impondrá multa de mil a cinco mil salarios*").

125. In fact, the fine established in Article 38 of Mexico's Foreign Investment Law for lack of authorization is ***the lowest fine of all the sanctions set forth in that provision***. In other words, of all infractions and violations to Mexico's Foreign Investment Law, investing without prior authorization from the CNIE has the least serious consequence. Thus, a consequence such as the denial of NAFTA protection would not be a proportional response to the violation alleged by Mexico.

Proofs:

a. **CL-168-SPA**, Article 38 (Mexico's Foreign Investment Law) ("*Las infracciones a lo establecido en esta Ley y sus disposiciones reglamentarias, se sancionarán de acuerdo a lo siguiente: I.- En caso de que la inversión extranjera lleve a cabo actividades, adquisiciones o cualquier otro acto que para su realización requiera resolución favorable de la Comisión, sin que ésta se haya obtenido previamente, se impondrá multa de mil a cinco mil salarios*");

b. **CL-167-ENG**, ¶20 (*Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017);

126. Mexico acknowledges the minor consequence of breaching the provisions it invokes. To portray these minor violations as significant, however, Mexico alleges that the breach of any obligation established in the Railway Service Law is grounds for revocation of the Concession, which, according to Mexico, deprives this tribunal of jurisdiction. Mexico's argument is flawed on several levels.

Proofs:

a. *See* Memorial on Jurisdiction, ¶34 ("*En este caso, la no realización del registro y la falta de autorización de la Comisión conllevan las sanciones económicas establecidas en el Artículo 38 de la LIE.*");

b. *Id*., ¶149 ("*La autorización proveniente de la Comisión es un requisito de ley indispensable y una condición expresa dentro de la Concesión. Específicamente, el Artículo 21 de la Ley Ferroviaria indica que es una causal de revocación de concesiones '[…]incumplir cualquiera de las obligaciones o condiciones establecidas en esta Ley, sus reglamentos y en el título de concesión o permisos respectivos.' El Demandante articuló el siguiente test, con referencia a 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.' Suponiendo que ese test sea aplicable, la no obtención de una resolución favorable de la Comisión cumple ese test porque justificaría la revocación de la concesión*");

c. *See infra*, ¶¶130-138.

127. *First*, CFCM obtained CFCM's Foreign Investment, ***which authorized CFCM to operate and exploit railways, with a foreign investment of 99.999%***. Thus, the Railway Service Law and the Concession were not breached, and no revocation was warranted.

Proofs:

a. *See supra*, ¶¶15-17;

b. **C-234-SPA** Official letter No. 514.113.9912083 (evidencing that the *Comisión Nacional de Inversiones Extranjeras* authorized CFCM to have a 99.9% foreign investment participation);

c. **CER-3-SPA**, ¶44, i) (Expert Report-Carlos García Fernández-Counter-Memorial on Jurisdiction) ("*Por lo anterior, en mi interpretación de la LIE, CFCM no requería una nueva*

> *autorización por parte de la Comisión para permitir que el Demandante adquiriera sus acciones en CFCM o Viabilis Holding, S.A. de C.V. La autorización que, en su oportunidad, fue emitida en favor de CFCM, le autoriza a operar en el sector de operación y explotación de vías férreas de comunicación, con hasta un 99.999% de participación extranjera en su capital social*").

128. *Second*, the test established by the overwhelming jurisprudence, which Mexico seems to accept in its Memorial, is that the illegality of investments can only destroy jurisdiction when the consequence of the illegality is the ***voidance*** of the investment or acquisition. To "void" is to nullify, annul, or vacate. To "revoke" means to bring or call back, which does not imply annulment or vacatur. Therefore, even if revocation of the Concession was possible, it does not meet the test required to deprive this Tribunal of jurisdiction.

Proofs:

a. *See supra*, ¶¶125-126;
b. *See* Memorial on Jurisdiction, ¶149 ("*El Demandante articuló el siguiente test, con referencia a 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****.' Suponiendo que ese test sea aplicable, la no obtención de una resolución favorable de la Comisión cumple ese test porque justificaría la revocación de la concesión*");
c. **CL-166-ENG**, ¶187 (*Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of the Award, 22 June 2010) ("…***Since the transfer of the Licence was not invalid, but only voidable, Claimants' investment does not fall outside the scope of Respondent's consent to jurisdiction***") (emphasis added).

129. *Third*, even if revocation was permissible, Mexico instead chose a "*rescate*" of the Concession. As [redacted] ([redacted] at the SCT) explains, a *rescate* declaration terminates a concession exercising a sovereign prerogative of the Mexican State, which can "only be declared for reasons of public interest, public utility and national security, ***not for breaches by the concessionaire*** that could justify a lack of compensation." If a breach had occurred, Mexico would have revoked the Concession, instead of issuing a *rescate*.

Proofs:

a. *See* Claim Memorial, ¶¶247-248;
b. **CWS-3-SPA**, ¶65-66 (Witness Statement-[redacted] Claim Memorial) ("*El rescate es una forma de terminación de las concesiones.* ***La declaratoria de rescate termina la concesión****, provoca que los bienes materia de la concesión vuelvan, de pleno derecho, desde la fecha de la declaratoria, a la posesión, control y administración del concesionante (en este caso la SCT) y que ingresen a su patrimonio los bienes, equipos e instalaciones destinados directamente a los fines de la concesión … El rescate de una concesión ferroviaria* ***solamente puede declararse por causas de utilidad pública, de interés público o de seguridad***

nacional. *Solamente esas razones son suficientes para que exista un rescate sobre una concesión. …* ***Otras causas como incumplimientos del concesionario o impedimentos para prestar el servicio podrían generar otras consecuencias como la revocación de la concesión, pero no un rescate***");

c. **C-16-SPA**, p. 67 (Rescate declaration dated 13 July 2016) (the first "Resolutivo" provides that "***[p]or causas de interés público, utilidad pública y seguridad nacional*** *se declara el rescate de la Concesión otorgada en favor de Compañía de Ferrocarriles Chiapas-Mayab, S.A de C.V., respecto de las vías generales de comunicación ferroviaria Chiapas y Mayab […]*");

d. **CWS-2-SPA**, ¶82 (Witness Statement-[redacted]Claim Memorial) ("*Un primer punto relevante sobre la decisión de rescate es que* ***la SCT no manifestó en momento alguno que CFCM hubiese incumplido con sus obligaciones o acuerdos***. *Por el contrario, la determinación del rescate se tomó, de acuerdo con la propia SCT, por razones de interés público, utilidad pública y seguridad nacional*");

e. **CER-2-SPA**, ¶61 (Expert Report-Marco Antonio de la Peña-Claim Memorial) ("*…el rescate debe estar* ***motivado por causas de utilidad, de interés público o de seguridad nacional***. *En cuanto a este punto,* ***el rescate se da con independencia del cumplimiento del concesionario a los términos de la concesión****, ya que estos no constituyen el fundamento del rescate…*").

130. The Rescate Declaration in this case does not refer to any breach of CFCM's obligations under the Concession, but rather makes clear that it was issued for reasons of "public interest, public utility and national security." This confirms that Mr. Willars' investment was legal and that neither CFCM nor Mr. Willars breached any provision that would justify a revocation of the Concession.

Proofs:

a. **C-16-SPA** (Rescate declaration dated 13 July 2016).

131. *Fourth*, the revocation of ***the Concession*** would not deprive Mr. Willars of his investment. Regardless of CFCM's Concession, Mr. Willars owns a controlling interest (51.76%) in CFCM, a Mexican company incorporated under the laws of Mexico. Mr. Willars' controlling interest in CFCM qualifies as: (i) an "equity security of an enterprise"; (ii) "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise"; and (iii) "an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution" under Articles 1139(a), (b), (e) and (f) of NAFTA.

Proofs:

a. *See* Claim Memorial, Sections II.A and IV.C;

b. **CL-5-ENG**, Article 1139(a)(b)(e)(f) (North American Free Trade Agreement);

c. **C-2-SPA** (CFCM's Shareholder Registry) (reflecting that Mr. Willars directly owns a 16.38% interest in CFCM and that Viabilis directly owns a 73.71% interest in CFCM);

d. **C-3-SPA** (Viabilis Holding, S.A. de C.V.'s Shareholder Registry) (evidencing that Mr. Willars owns a 48% interest in Viabilis);
e. **C-28-SPA** (CFCM's Corporate Chart) (reflecting Mr. Willars' controlling interest in CFCM).

132. Further, CFCM, on behalf of which Claimant is bringing this claim, qualifies as an "enterprise" for the purposes of Article 1139(a) of NAFTA, and has acquired or used several movable assets that are covered investments under Article 1139(g) of NAFTA. These include, among others: (i) all movable assets purchased upon the award of the Concession and of which CFCM acquired full ownership on 24 November 2003, when the SCT was satisfied that the rehabilitation of the Mayab Line had been successfully completed; (ii) the machinery and equipment necessary to operate the Chiapas-Mayab Railway that the SCT transferred to CFCM; and (iii) "claims to money" arising from the interests detailed in sections (a) to (h) of Article 1139 of NAFTA, including ***the claim to compensation owed to CFCM under the Rescate Declaration,*** which remains in force in Mexico to this day. This claim is directly related to the commitments of capital by CFCM and Mr. Willars in acquiring and developing their investment in Mexico.

Proofs:

a. *See* Claim Memorial, Section IV.C;
b. **C-42-SPA** (Payment Certificates issued to CFCM dated 17 August 1999) (indicating that CFCM paid the price of the Concession and the value of the movable assets purchased under the Concession);
c. **C-43-SPA** (Purchase agreement between the SCT and CFCM dated 17 August 1999) (indicating that CFCM purchased the movable assets related to the Concession);
d. **C-55-SPA** (Official Letter No. 5.-753 dated 24 November 2003) (showing the SCT transferred the full property of the movables assets purchased by CFCM together with the Concession, because CFCM successfully completed the rehabilitation works on the Mayab Line).

133. *Finally*, Mexico attempts to support its argument by making reference to only two cases which it purposefully misrepresents, that are markedly different form this case, and which do not actually support Mexico's position. Mexico cites *Phoenix v. The Czech Republic* to argue that when a State restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, such investment is not protected. *Phoenix* differs from Mr. Willars' case because foreign investment in the railway sector is not prohibited by Mexican law. The only limitation is the authorization required for foreign investment, which in this case was obtained. The *Phoenix* tribunal also found ***no violation*** of a rule of the Czech Republic legal order and not even of the principle of good faith. In fact, the tribunal clarified that this was not even argued by the Czech Republic. The only issue the *Phoenix* tribunal had with the investment in that case was that it was made "for the sole purpose of bringing international litigation against the Czech Republic." That is not Mr. Willars' case: he made his investment in 2015, when there had been no indication that the SCT would issue the Rescate Notice or the Rescate Declaration.

Proofs:

a. *See* Memorial on Jurisdiction, ¶150;
b. **CL-191-ENG**, ¶134 (*Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009) ("This question can be disposed of very quickly. In the present case, ***there is no violation of a rule of the Czech Republic legal order, and not even of the principle of good faith as embodied in the national legal order, as it has not been contended that the acquisition was against Czech laws, or was performed with dissimulation or otherwise contestable methods***. Phoenix duly registered its ownership of the two Czech companies in the Czech Republic. The investment could certainly be considered as an investment under the Czech legal order") (emphasis added);
c. *Id*., ¶142 ("The evidence indeed shows that the Claimant made an "investment" not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic. This alleged investment was not made in order to engage in national economic activity, it was made solely for the purpose of getting involved with international legal activity").

134. The only other case cited by Mexico in support of its objection is *Mamidoil v. Albania*. Mexico cites to paragraph 372 of the Award, where the tribunal reasoned that an investment is illegal where there is a ***prohibition*** against investing, "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." Certainly, the production of drugs or investing in areas reserved to the State cannot be seriously compared to Mr. Willars' acquisition. In addition, the *Mamidoil* tribunal also found no breach of Albania's law, because the illegality did not occur when the investment was made. In sum, the few precedents cited by Mexico do not support its position and, in fact, support Claimant's position.

Proofs:

a. *See* Memorial on Jurisdiction, fn. 157;
b. **CL-192-ENG**, ¶372 (*Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award) ("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");
c. *Id*., ¶375 ("The Tribunal rejects this argument. The decisive moment for the appreciation of the investment's substantive legality is when the investment is planned and made. When the Parties executed the lease and when the site was transferred into Claimant's possession, neither Party anticipated the changes and restrictions on the port of Durres");
d. *Id*., ¶377 ("For these reasons, the Tribunal is convinced that the investment is not tainted by illegality as a substantive matter and rejects the arguments to the contrary").

135. In this case, the consequence of the violations alleged by Mexico is the lowest fine of all the potential sanctions established under the controlling provision, and as such cannot tantamount to the Tribunal's lack of jurisdiction. Mexico's deceptive argument on the revocation of the Concession is entirely without merit. A consequence such as the denial of NAFTA protections, as Mexico intends, is not remotely a proportional response to the unsubstantiated breach alleged by Mexico.

Proofs:

a. *See supra*, ¶¶122-137.

b. The alleged violation did not occur in the making of the investment

136. Mexico also alleges certain violations to Mexican law that, even if true, are not relevant to the jurisdictional analysis, as violations to the host State's laws that occur ***after*** the investor has acquired or established the investment do not place such investment outside the scope of the treaty.

Proofs:

a. *See infra*, ¶¶140-144.

137. Mexico alleges that ***CFCM***—not Mr. Willars—breached Article 32 of Mexico's Foreign Investment Law and Article 17 of Mexico's Railway Law. According to Mexico, ***after*** Mr. Willars' acquisition, CFCM should have been registered before the RNIE and should have given notice to the SCT of the change in CFCM's shareholding structure.

Proofs:

a. *See* Memorial on Jurisdiction, ¶¶152; 155-156.

138. These obligations would not be Mr. Willars' but CFCM's under Mexican law. In any event, these obligations arise ***after*** the investment is made. An entity can only be registered before the RNIE ***after*** a foreign investor has acquired shared. And a notice to the SCT can only be made ***after*** the shareholding structure has changed. Thus, these alleged breaches are irrelevant to the jurisdictional analysis.

Proofs:

a. **CL-168-SPA**, Article 32 (Mexico's Foreign Investment Law) ("*Deberán inscribirse en el Registro: I.- Las sociedades mexicanas en las que participen, incluso a través de fideicomiso: a) La inversión extranjera…*");

b. **CL-13-SPA**, Article 17 (Mexico's Railway Service Law) ("*…Los concesionarios deberán dar aviso a la Secretaría de las modificaciones que realicen a sus estatutos, relativas a la disolución anticipada, cambio de objeto, fusión, transformación o escisión. Asimismo, deberán informar el cambio de participación, directa o indirecta, en el capital social de que se trate, cuando dicha participación sea igual o superior al cinco por ciento. …*");

c. **CER-3-SPA**, ¶50 (Expert Report-Carlos García Fernández-Counter-Memorial on Jurisdiction) ("*Por su parte, la obligación de sociedades mexicanas de inscribirse en el RNIE es un requisito distinto e independiente de las autorizaciones que puedan requerirse de la Comisión. La inscripción en el RNIE, de acuerdo con el artículo 32 de la LIE, debe realizarse dentro de los 40 días hábiles contados a partir de la fecha… de participación de la inversión extranjera." Es decir, es una obligación que surge una vez que ya se realizó la inversión extranjera en el capital social de una sociedad mexicana*").

139. Multiple investment tribunals have ruled that violations or breaches of the host State's laws that occur ***after*** the investor has acquired or established the investment do not deprive the tribunal of jurisdiction.

Proofs:

a. **CL-49-ENG**, ¶129 (*Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015) ("To the extent that the Respondent's allegations refer to the operation or performance of the investment (Bolivia's allegations of "ongoing illegality"), ***they are not relevant to the availability of the BIT's substantive protections***");

b. **CL-202-ENG**, ¶266 (*Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012) ("*Additionally, under this BIT, **the temporal scope of the legality requirement is limited to the establishment of the investment**; it does not extend to the subsequent performance. Indeed, the Treaty refers to the legality requirement in the past tense by using the words investments 'made' in accordance with the laws and regulations of the host State and, in Spanish, 'haya efectuado'*");

c. **CL-203-ENG**, ¶260 (*Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic,* ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012) ("*The Tribunal is also aware of the fact that the **illegal or irregular exercise of rights attached to assets representing an investment under the BIT cannot lead to a disqualification as a valid investment**, but must be dealt with through the pertinent mechanisms for the resolution of disputes that may be applicable under the circumstances. **The requirement for compliance with the laws of the Host State is focused on the entry and the initiation of the investment***") (emphases added);

d. **CL-197-SPA**, ¶399 (*Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Laudo Final, 21 May 2013) ("*El Tribunal no está de acuerdo con la posición de la Demandada. El Tribunal nota que del texto del artículo 1(1) del Tratado se desprende que **el requisito de validez que da acceso a la protección del Tratado aplica ab initio de la inversión**. …Al utilizarse las expresiones en pasado 'se realizó' e 'invertido' se muestra que **el elemento de la***

validez es requerido al momento en que la inversión fue hecha") (emphases added);

e. **CL-204-ENG**, ¶127 (*Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010) ("*The Tribunal considers that a distinction has to be drawn between (1) legality as at the initiation of the investment ("made") and (2) legality during the performance of the investment. Article 10 legislates for the scope of application of the BIT,* ***but conditions this only by reference to legality at the initiation of the investment. Hence, only this issue bears upon this Tribunal's jurisdiction****. Legality in the subsequent life or performance of the investment is not addressed in Article 10.* ***It follows that this does not bear upon the scope of application of the BIT (and hence this Tribunal's jurisdiction)*** *- albeit that it may well be relevant in the context of the substantive merits of a claim brought under the BIT. Thus, on the wording of this BIT,* ***the legality of the creation of the investment is a jurisdictional issue; the legality of the investor's conduct during the life of the investment is a merits issue***") (emphases added);

f. **CL-205-ENG**, ¶3.166 (*ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtungsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic*, PCA Case No. 2010-05, Final Award, 19 September 2013) ("*However, on the ordinary meaning of the terms, whatever the position may be under other, differently worded BITs, the Tribunal agrees with the Claimants that that requirement cannot be interpreted as conditioning the existence of an investment within the meaning of Article 1(1) upon compliance by the investor with all applicable rules of domestic law throughout the life of the investment…*");

g. **CL-206-ENG**, ¶420 (*Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015) ("The Tribunal also agrees with the Claimants that, for the purpose of the legality requirement, ***when determining whether an investment exists it is compliance with the laws at the time the investment is made that is pertinent***. Any subsequent alleged breach of law would not affect whether the investment qualifies for protection under the BIT") (emphasis added);

h. **CL-207-ENG**, ¶488 (*Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14, Award, 6 December 2016) ("Neither the ICSID Convention nor the BITs contain substantive provisions addressing the consequences of unlawful conduct by a claimant or its business associate during the performance of an investment. The BITs only contain admission requirements applying at the time of establishment of an investment, which are jurisdictional in nature").

140. The Tribunal in *Vanessa Ventures v. Venezuela* dealt with a very similar issue concerning the registration of foreign investment. In analyzing the alleged violation of Venezuelan law, the tribunal decided that registration of foreign investments is not relevant to the question of jurisdiction:

> The Tribunal considers that ***reporting obligations concerning the registration of foreign investments***, which do not entail any application for permission or approval and which are not expressed as conditions of the making of an investment, ***are not relevant to the question whether the investment exists***. Further, the jurisdictional significance of the "legality requirement" in the definition of an investment in Article I(f) is exhausted once the investment has been made. It accordingly rejects the jurisdictional challenge based on the provisions of Decree 2095. (emphasis added).

Proofs:

a. **CL-208-ENG**, ¶167 (*Vannessa Ventures Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013).

141. Here, the illegality alleged by Mexico—concerning the registration before the RNIE and the notice to SCT—likewise would have occurred ***after*** Mr. Willars' initial acquisition of his shares in CFCM and Viabilis. Therefore, these alleged irregularities are not relevant to the question of jurisdiction of this Tribunal, since these are not conditions to ***the making*** of the investment.

Proofs:

a. *See supra*, ¶¶139-143.

4) Mexico's failure to object to Mr. Willars' investment prevents Mexico from asserting an illegality defense

142. In addition, Mexico has failed protest or prosecute the illegalities it alleges occurred. This absence of protest or prosecution created legitimate expectations for Mr. Willars, estopping Mexico from asserting an illegality defense.

Proofs:

a. *See infra*, ¶¶146-151.

143. Several arbitration tribunals have analyzed the failure of the host State to prosecute or object to an alleged illegality, and have concluded that failure to prosecute prevents the host State from claiming illegality in the arbitration. In *MNSS v. Montenegro*, the tribunal considered that "in the instant case ***the Respondent has never before this arbitration claimed that the making of the investment of the Claimants was not in accordance with the law of Montenegro***." Similarly, in rejecting an illegality objection, the tribunal in *Stati v. Kazakhstan* took into account that "…as the timeline … demonstrates, while inspecting and monitoring Claimants' investments and their corporate structures for years, ***Respondent failed to allege that anything was illegal or improper*** . . . ."

Proof:

a. **CL-169-SPA**, ¶212 (*MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016);
b. **CL-161-ENG**, ¶812 (*Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan (I)*, SCC Case No. V 116/2010, Award, 19 December 2013).

144. Tribunals have concluded that this absence of protest or prosecution creates legitimate expectations for investors, estopping States from asserting an illegality objection that they have failed to make. In *Fraport v. Philippines (I)*, the tribunal considered that:

> There is, however, the question of estoppel. Principles of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law.

Proof:

a. **CL-170-ENG**, ¶346 (*Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007).

145. Several tribunals have decided similarly, concluding that failure to object or prosecute an alleged illegality prevents States from subsequently making that objection in the arbitration. Such conduct is contrary to principles of fairness and good faith.

Proof:

a. **CL-162-ENG**, ¶176 (*Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic (I)*, PCA Case No. 2008-13, Final Award, 7 December 2012) ("The fact that the Slovak Republic has not revoked Union Healthcare's licence is, in the view of the Tribunal, ***a highly significant indication that it regards the alleged violations as compatible with the continued existence of the investment*** and also powerful confirmation that a good faith interpretation of Article 1(a) of the Treaty does not require the exclusion of Claimant's investment from its scope");
b. **CL-199-ENG**, ¶105 (*Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008) ("*Under these circumstances the Respondent has not come close to satisfying the Arbitral Tribunal that the Claimant made an investment which was either inconsistent with Yemeni laws or regulations or failed to achieve acceptance by the Respondent. The contrary is established by overwhelming evidence of the lengthy dealings between the Parties at the highest level, namely the President of the Republic, the Prime Minister, the Minister of Finance, and the Minister of Public Works*");
c. **CL-69-ENG**, ¶146 (*Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010) ("Even if FEGUA's actions with respect to Contract 41/143 and in its allowance to FVG to use the rail equipment were ultra vires (not 'pursuant to domestic law'), ***'principles of fairness' should***

prevent the government from raising 'violations of its own law as a jurisdictional defense when [in this case, operating in the guise of FEGUA, it] knowingly overlooked them and [effectively] endorsed an investment which was not in compliance with its law'");

d. **CL-171-ENG**, ¶192 (*Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007) ("The Tribunal further observes that in the years following the execution of the JVA and the Concession by SakNavtobi and Transneft, respectively, Georgia never protested nor claimed that these agreements were illegal under Georgian law. In light of all of the above circumstances, ***the Tribunal is of the view that Respondent created a legitimate expectation for Claimant that his investment was, indeed, made in accordance with Georgian law and, in the event of breach, would be entitled to treaty protection***").

146. In this case, Mexico has failed to object, protest or even investigate any purported illegality of Claimant's investment ***in over nine years***. Mexico has also failed to prosecute or initiate any proceeding to sanction CFCM or Mr. Willars for the alleged illegality claimed. The Ministry of Economy is empowered to prosecute and impose economic sanctions for the breach of the provisions invoked by Mexico, but it has remained silent. Even today, more than two years after Mr. Willars served his Notice of Intent (on the Ministry of Economy itself), Mexico still has not prosecuted or sanctioned CFCM or Mr. Willars. Mexico is, therefore, estopped from raising an illegality defense after knowingly overlooking the alleged noncompliance.

Proof:

a. *See* **C-25-ENG** (Notice of Intent dated 30 March 2023);

b. **CL-168-SPA**, Art. 38 (Mexico's Foreign Investment Law) ("…*Corresponderá a la Secretaría la imposición de las sanciones, excepto por lo que hace a la infracción a la que se refiere la fracción V de este artículo y las demás relacionadas con los Títulos Segundo y Tercero de esta Ley, que serán aplicadas por la Secretaría de Relaciones Exteriores*…").

147. What is more, Mexico's power to prosecute any of the violations it alleges is time-barred. Under Mexican law, authorities have five years from the date of the violation to impose an administrative sanction. Five years provides ample time, and Mexico has failed to impose any sanctions.

Proof:

a. **CL-193-SPA**, Art. 79 (Mexico's Federal Law of Administrative Procedure) ("*La facultad de la autoridad para imponer sanciones administrativas* ***prescribe en cinco años****. Los términos de la prescripción serán continuos* ***y se contarán desde el día en que se cometió la falta o infracción administrativa*** *si fuere consumada o, desde que cesó si fuere continua*") (emphasis added);

b. **CER-3-SPA**, ¶57 (Expert Report-Carlos García Fernández-Counter-Memorial on Jurisdiction) ("*Asimismo, de conformidad con el penúltimo párrafo del artículo 38 de la LIE,*

> *la autoridad facultada para imponer las sanciones antes descritas es la Secretaría de Economía. Es de notar que la facultad de cualquier autoridad (incluyendo la Secretaría de Economía) para imponer sanciones administrativas, tal y como las sanciones que acarrea la falta de autorización o registro en comento, prescribe en 5 años*").

148. As has been established, Mr. Willars did not breach Mexican law in establishing his investment in Mexico. Even if any illegality was found by this Tribunal, Mexico's alleged breach would have occurred during the course of the investment and not in its establishment, and the consequence of such violation would not be the voidance or nullification of the investment but rather a (small) economic sanction. In any event, Mexico has failed to protest or prosecute the alleged illegalities in almost ten years, creating legitimate expectations for Mr. Willars and estopping Mexico from asserting an illegality defense.

Proofs:

a. *See supra*, ¶¶95-150.

C. CLAIMANT DID NOT WAIVE HIS RIGHTS UNDER CHAPTER 11 OF NAFTA

149. Claimant has not waived any right to invoke investment protections under NAFTA. Mexico asserts that Mr. Willars agreed to consider himself as a Mexican under CFCM's and Viabilis' bylaws, and that he waived the right to invoke the protection of his government, including NAFTA's protections. Mexico's assertions are baseless, and Claimant has not waived any of his rights as a foreign investor. Contrary to Mexico's assertions, Mr. Willars has not waived his right to initiate arbitration under NAFTA, and the provisions in CFCM's and Viabilis' bylaws are not waivers of any cause of action.

Proof:

a. *See* Memorial on Jurisdiction, ¶¶160-162;
b. *See infra*, Sections III.C.1) – III.C.3).

1) Mr. Willars did not waive its right to initiate the Arbitration

150. Mr. Willars has not waived, in any way, his right to initiate arbitration against Mexico or invoke NAFTA's investment protections.

Proofs:

a. *See infra*, ¶¶154-166.

151. Mexico invokes, as the basis of its objection, Clause 15 of CFCM's bylaws, Article 2 of Viabilis' bylaws, and Condition 4.4 of the Concession. Clause 15 of CFCM's bylaws provides the following:

> *Todo extranjero que en el acto de la constitución o en cualquier tiempo ulterior adquiera un interés o participación social en la sociedad, se*

> *considerará por ese simple hecho como mexicano respecto de dicho interés o participación, los activos, derechos, concesiones, participaciones o intereses de que sea titular la sociedad, y de los derechos y obligaciones que deriven de los contratos en que sea parte la sociedad con autoridades mexicanas, y se entenderá que conviene en no invocar la protección de su gobierno, bajo la pena, en caso de faltar a su convenio, de perder dicho interés o participación en beneficio de la Nación Mexicana*.
>
> **Proofs:**
>
> a. **C-4-SPA**, Clause 15 (CFCM's Incorporation Deed);
> b. *See* Memorial on Jurisdiction, ¶¶163-166.

152. Article 2 of Viabilis' bylaws provides:

> *La Sociedad será Mexicana. Los socios extranjeros actuales o futuros de esta Sociedad se obligan formalmente con la Secretaría de Relaciones Exteriores a considerarse como nacionales respecto a las acciones de esta Sociedad que adquieran o de que sean titulares, así como de los bienes, derechos, concesiones, participaciones e intereses de que sea titular esta Sociedad, o bien de los derechos y obligaciones que deriven de los contratos en que sea parte esta Sociedad con autoridades mexicanas, y a no invocar, por lo mismo, la protección de sus gobiernos, bajo la pena, en caso contrario, de perder en beneficio de la Nación las participaciones sociales que hubieren adquirido*.
>
> **Proofs:**
>
> a. **C-229-SPA**, Article 2 (Viabilis's Incorporation Deed).

153. Finally, Condition 4.4 of the Concession establishes that:

> *[E]l Concesionario en cuyo capital participen inversionistas extranjeros, en este acto se compromete expresamente a no invocar la protección de ningún gobierno extranjero, bajo la pena de perder, en caso contrario, los derechos objeto del presente título en beneficio de la Nación Mexicana*.
>
> **Proofs:**
>
> a. **C-10-SPA**, Condition 4.4 (Concession Agreement, without exhibits).

154. None of the provisions above constitute a waiver by Mr. Willars of the right to invoke NAFTA's protections or initiate an arbitration against Mexico. These provisions exist due to Mexico's history with the "Calvo Doctrine," which had the purpose of establishing that foreign investors must resolve any disputes arising from their investments exclusively before local courts and waive the right to invoke diplomatic protection from their home State. The Calvo Doctrine thus excludes the possibility of investors resorting to diplomatic channels or other mechanisms of state pressure, but it does not prevent their access to remedies provided for under international law.

Proofs:

a. **CER-3-SPA**, ¶¶67-68 (Expert Report-Carlos García Fernández-Counter-Memorial on Jurisdiction) ("*La Cláusula Calvo es el reflejo de la doctrina elaborada en materia contractual por los Estados latinoamericanos a lo largo del siglo XIX, y sistematizada por el jurista, diplomático e historiador argentino Carlos Calvo (1824-1906) en su obra "El derecho internacional teórico y práctico." Tal doctrina prescribe que los extranjeros (personas físicas o morales): i) han de sujetarse y someter cualquier diferencia a las leyes y a la jurisdicción del Estado donde residen o se encuentran sus bienes; y, ii) estipula la renuncia de los extranjeros a invocar la protección diplomática del gobierno del que son nacionales. Históricamente, México fue un firme partidario de la doctrina Calvo…*");

b. **CL-209-ENG**, ¶125 (*Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010) ("It also favoured the insertion in concession contracts of the Calvo clause ***under which the investor commits itself not to ask for diplomatic protection by its State of origin***") (emphasis added);

c. **CL-210-ENG**, ¶43 (*Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Objections to Jurisdiction, 25 August 2006) ("*Such a clause would prevent the investor from asking its home State to intervene in diplomatic protection; it cannot however bar a foreign investor from pursuing its claim under international law*").

155. The provisions above concern only the investor's right to seek diplomatic protection of its home State, which Claimant has not invoked here. This conclusion is supported by the ordinary meaning of the provision, the expert opinion of Mr. García Fernández, and doctrinal writing on Article 27(I) of Mexico's Constitution and Article 14 of the Regulation on the Foreign Investment Law—which are the sources of Clause 15 of CFCM's bylaws, Article 2 of Viabilis' bylaws, and Condition 4.4 of the Concession.

Proofs:

a. **CER-3-SPA**, ¶80, i) (Expert Report-Carlos García Fernández-Counter-Memorial on Jurisdiction) ("*…como expliqué, la Cláusula Calvo, desde sus orígenes, estipula la renuncia de los extranjeros a invocar la protección diplomática del gobierno del que son nacionales. Ese ha sido el entendimiento, también, en México. Sin embargo, la renuncia a invocar la protección diplomática no implica ni conlleva una renuncia a iniciar un procedimiento de arbitraje de inversión, que es un procedimiento distinto en el que, importantemente, bajo ninguna circunstancia participa el gobierno del que es nacional representando los intereses del inversionista extranjero. El arbitraje de inversión es un recurso directo del inversionista en contra del Estado anfitrión de la su inversión, sin la participación de su gobierno, ante un tribunal imparcial y bajo reglas previstas en el Capítulo de Inversión de un tratado internacional de libre comercio o de inversión (i.e. APPRI)*");

b. **CL-179-SPA**, pp. 14-16 (F. Cárdenas González, *Inversión Extranjera*, Editorial Porrúa, 2015 (Sixth Edition)) ("*La doctrina Calvo dio origen en nuestro país al llamado convenio Calvo regulado en la fracción I del artículo 27 de la Constitución…*") ("*Por esa razón el Reglamento de la Ley de Inversión Extranjera y el Registro Nacional de Inversiones Extranjeras redactó la cláusula de admisión de extranjeros a efecto de que las sociedades que tengan o puedan tener accionistas o socios extranjeros la incluyan en su estatuto social*") ("*Este asunto de la cláusula se refiere, especialmente, a que en caso de que el Gobierno de México quiera expropiar sus bienes en beneficio público o acto semejante de la soberanía nacional legalmente estipulado, el extranjero no puede pedir la ayuda de su gobierno…*");

c. **CL-180-SPA**, p. 125 (L. Pereznieto Castro, *Derecho Internacional Privado – Parte General*, "Textos Jurídicos Universitarios", Oxford University Press 2015 (10th edition)) ("*El art. 27, fracc. I, de la Constitución establece dos supuestos: que los extranjeros convengan en considerarse como nacionales respecto de los bienes inmuebles que adquieran en México y que no invoquen la protección de sus gobiernos por lo que corresponde a dichos bienes. …En cuanto al procedimiento internacional que se instaura en beneficio del inversionista extranjero, no se relaciona con la institución de la protección diplomática, que es la protección unilateral que brinda un Estado cuando existe una violación flagrante de los derechos de un nacional suyo por parte de otro Estado, el cual no le otorga la oportunidad de defender esos derechos ante los tribunales internos. Un caso distinto ocurre cuando los Estados instauran el mecanismo de común acuerdo y queda abierto para que los particulares (sus nacionales) lo utilicen. Se trata, en todo caso, de un sistema opcional*");

d. **CL-181-ENG**, pp. 2663-2664 (Jacob S. Lee, *No 'Double-Dipping' Allowed: An Analysis of Waste Management, Inc., v. United Mexican States and the Article 1121 Waiver Requirement for Arbitration under Chapter 11 of NAFTA*, Fordham Law Review Vol. 69, No. 6 (2001)) ("*Mexico became one of the leading supporters of the Calvo Doctrine, enacting a provision in its constitution that expressly 'exclude[d] diplomatic protection under any circumstance.' …Mexico attempted to inoculate the ideals of the Calvo Doctrine into its own negotiations with potential investor States, as the United States tried to do with diplomatic protection…. Naturally, this led to a long period of division between the United States and Mexico …which set the stage for a monumental breakthrough with the signing of NAFTA and the adoption of Chapter 11*");

e. *Id*., pp. 2665-2666 ("*In sum, the Chapter 11 dispute resolution mechanism established 'predictability and certainty' for United States invertors conducting business in Mexico by virtually neutralizing the requirement of local proceedings central to the Calvo Doctrine, thereby minimizing the need for the United States to rely on traditional notions of diplomatic protection*").

156. As explained by Mr. García Fernández, provisions such as Clause 15 of CFCM's bylaws and Article 2 of Viabilis' bylaws are ***required*** in the incorporation documents of Mexican

entities with foreign ownership. A Mexican company can only be incorporated by including one of two options in its bylaws: (**a**) a clause *excluding* entirely the possibility of having foreign shareholders, whether directly or indirect (*cláusula de exclusión de extranjeros*); or (**b**) a "foreigners admission clause" (*cláusula de admisión de extranjeros*), such as the one included by CFCM in its bylaws:

> *Las cláusulas anteriores -una u otra- son un requisito legal para la constitución de* ***cualquier sociedad mexicana****. Tal como lo señala el artículo 14 del Reglamento de la LIE, cuando no exista una cláusula de* ***exclusión*** *de extranjeros,* ***debe*** *incorporarse en los estatutos sociales la cláusula de admisión de extranjeros, en virtud de la cual se celebra un pacto expreso con el Estado Mexicano, en los términos ya precisados. Esta cláusula de admisión es conocida en el medio jurídico y empresarial, precisamente, como "Cláusula Calvo," en virtud de que el pacto incluye la renuncia de los extranjeros a invocar la protección de sus respectivos gobiernos.* (emphasis from original).

Proofs:

a. **CER-3-SPA**, ¶77 (Expert Report-Carlos García Fernández-Counter-Memorial on Jurisdiction);
b. **CL-168-SPA**, Article 2, subsection VII (Mexico's Foreign Investment Law) ("*Cláusula de Exclusión de Extranjeros: El convenio o pacto expreso que forme parte integrante de los estatutos sociales, por el que se establezca que las sociedades de que se trate no admitirán directa ni indirectamente como socios o accionistas a inversionistas extranjeros, ni a sociedades con cláusula de admisión de extranjeros*");
c. **CL-188-SPA**, Article 14 (Mexico's Foreign Investment Law Regulation) ("*Cuando en los estatutos sociales no se pacte la cláusula de exclusión de extranjeros, se debe celebrar un convenio o pacto expreso que forme parte integrante de los estatutos sociales, por el que los socios extranjeros, actuales o futuros de la sociedad, se obligan ante la Secretaría de Relaciones Exteriores a considerarse como nacionales…. El convenio o pacto señalados deberán incluir la renuncia a invocar la protección de sus gobiernos bajo la pena, en caso contrario, de perder en beneficio de la Nación los derechos y bienes que hubiesen adquirido*"):
d. **CL-179-SPA**, pp. 279 (F. Cárdenas González, *Inversión Extranjera*, Editorial Porrúa, 2015 (Sixth Edition)) ("*El artículo 15 de la Ley de Inversión Extranjera dispone que debe insertarse en el estatuto de la sociedad mexicana la cláusula de exclusión de extranjeros, o bien, la de admisión, esto es, el convenio previsto en la fracción I del artículo 27 constitucional*")
e. *Id*., p. 302 ("*La cláusula Calvo aparece en el artículo 14 del Reglamento y la cláusula de exclusión de extranjeros en el artículo 2, fracción VII de la ley*");
f. **CL-183-SPA**, p. 802 (J. Barrera Graf, Instituciones de Derecho Mercantil, Editorial Porrúa (2010)) ("*En cuanto a la Cláusula Calvo, el art. 31 expresa su contenido…*").

157. Therefore, if Mexico's objection were to be taken seriously, the requirement to include such provisions in Mexican entities' bylaws would prevent most foreign investors in Mexico from initiating investment claims against Mexico. Foreign investors would be unable to initiate investment claims either because their locally incorporated companies prohibit foreign shareholding (*cláusula de exclusion de extranjeros*) or because the foreign investors "waived" their right under a "*cláusula de admission de extranjeros*." Of course, this is not the case. Mexico is among the most recurrent respondent States in investment arbitration due to its consistent breaches of international obligations, with over 50 investment-treaty arbitrations initiated against it. Most of these arbitrations would not have been possible if Mexico's argument here had any merit.

Proofs:

a. **CER-3-SPA**, ¶80, iii) (Expert Report-Carlos García Fernández-Counter-Memorial on Jurisdiction) ("*Tercero, si la postura que ha presentado México fuera correcta, ello implicaría que, en la práctica, la totalidad de los arbitrajes de inversión que se han presentado contra México hubiesen sido ab origine inadmisibles. Como lo expliqué supra, ampliamente, todas las sociedades mexicanas deben incluir una cláusula que excluya a los extranjeros (en cuyo caso no podría presentarse ni, por ende, existir un arbitraje de inversión, al no haber inversionistas extranjeros de por medio) o una cláusula que admita extranjeros que, no por renunciar a la protección de su gobierno (como en el caso que nos ocupa), abdican o precluyen su derecho a presentar una reclamación a arbitraje, en los términos y condiciones contemplados en los capítulos de inversión de los TLC's y en los APPRI's. De acuerdo con México, en ambos supuestos, no procedería el arbitraje de inversión. Como confirman los múltiples arbitrajes que se han resuelto, ya sea a favor o en contra de México, ése no es el caso*").

158. Mexico's jurisdictional objection is premised on the faulty analogy that an investor's right of ***direct*** recourse under an investment treaty—like under Chapter 11 of NAFTA—constitutes "invok[ing] the protection of its Government"—which is putatively waived in Clause 15 of CFCM's bylaws and Article 2 of Viabilis' bylaws. Mexico's analogy is incorrect in several ways. *First*, there is no protection of the U.S. government here. Mr. Willars has exercised a ***direct*** claim against Mexico, without any protection from the United States of America. *Second*, Article 27 of the ICSID Convention expressly distinguishes "diplomatic protection" from investor-state disputes submitted to arbitration under the Convention. Claimants who resort to ICSID arbitration forego their right to seek diplomatic protection. Therefore, Mexico cannot seriously contend that resorting to ICSID arbitration is a form of diplomatic protection when the ICSID Convention makes clear that the two remedies are mutually exclusive.

Proofs:

a. **CL-6-ENG**, Article 27 **(**ICSID Convention) (prohibiting diplomatic protection in connection with a dispute to be arbitrated under the ICSID Convention);

b. **CL-185-ENG**, p. 416 (C. Schreuer, *The ICSID Convention: A Commentary*, 2nd ed. (2009)) ("As a condition of submission to ICSID arbitration, the parties not only relinquish resort to national and international judicial remedies but also forego resort to the political remedy of diplomatic protection").

159. *Third*, investment tribunals have also acknowledged the distinction between diplomatic protection and the individual rights of recourse afforded to investors under investment treaties. Accordingly, in explaining why the Calvo Doctrine was irrelevant to its inquiry, the *AES v. Argentina* tribunal reasoned that "[s]ince under the ICSID system of settlement of disputes, exercise of diplomatic protection is per definition put aside, it is irrelevant to compare it with a clause [*i.e.*, the Calvo clause] the rationale of which is inseparable from diplomatic protection."

Proofs:

a. **CL-187-ENG, ¶¶**92; 98-99 (*AES v. Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005).

b. *See also* **CL-59-ENG**, ¶169 (*Corn Products v. Mexico*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008) ("*In the case of Chapter XI of the NAFTA, the Tribunal considers that the intention of the Parties was to confer substantive rights directly upon investors. That follows from the language used and is confirmed by the fact that Chapter XI confers procedural rights upon them. The notion that Chapter XI conferred upon investors a right, in their own name and for their own benefit, to institute proceedings to enforce rights which were not theirs but were solely the property of the State of their nationality is counterintuitive*");

c. *Id*., ¶173 ("*What these two rules actually demonstrate is that when a State claimed for a wrong done to its national it was in reality acting on behalf of that national, rather than asserting a right of its own. The pretence that it was asserting a claim of its own was necessary, because the State alone enjoyed access to international dispute settlement and claims machinery. However, there is no need to continue that fiction in a case in which the individual is vested with the right to bring claims of its own. In such a case there is no question of the investor claiming on behalf of the State. The State of nationality of the Claimant does not control the conduct of the case.70 No compensation which is recovered will be paid to the State. The individual may even advance a claim of which the State disapproves or base its case upon a proposition of law with which the State disagrees…*");

d. *See also* **CL-186-ENG**, ¶69 (*Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010) ("*The Tribunal notes that treaties for the promotion and protection of investments, as well as the ICSID Convention, establish a separate mechanism of direct recourse to international arbitration against the host State. Pursuant to Article 27(1) of the ICSID Convention, Contracting Parties have waived their right to grant diplomatic protection to, or bring an international claim on behalf of, their nationals who pursue arbitration under the auspices of the Centre. The rules of customary international law applicable in the context of diplomatic protection do not apply as such to investor-State arbitration*");

e. *See also* **CL-210-ENG**, ¶43 (*Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Objections to Jurisdiction, 25 August 2006) ("*Such a clause would prevent the investor from asking its home State to intervene in diplomatic protection; it cannot however bar a foreign investor from pursuing its claim under international law*").

160. *Fourth*, commentators analyzing the Calvo Doctrine under Mexican law have also distinguished between the waiver of diplomatic protection and separate rights of direct recourse provided under investment treaties. For instance, one of the leading textbooks on private international law in Mexico explains that rights of direct recourse that investors have under investment treaties like Chapter 11 of NAFTA "*no se relaciona[n] con la institución de la protección diplomática*."

Proofs:

a. **CL-180-SPA**, p. 125 (L. Pereznieto Castro, *Derecho Internacional Privado – Parte General*, "Textos Jurídicos Universitarios", Oxford University Press 2015 (10th edition));

b. **CL-184-ENG**, pp. 155-156 (Wenshua Shan, "Is Calvo Dead," American Journal of Comparative Law Vol. 55, No. 1 (2007)) ("*Special recourse for foreign investors, however, is envisaged only in the dispute settlement sections of free trade treaties or BITs to which Mexico is a party. In this context, it must be noted that in 1992 Mexico ratifies the North America Free Trade Agreement (NAFTA), the Chapter 11 of which contains a very liberal investment regime. …Some commentators believe that this law has cleared 'any doubts about the scope of the Calvo Clause in the Constitution'*").

161. *Lastly*, even Mexico's representatives in this arbitration know of and have opined on the difference between diplomatic protection and investor-State arbitration, and the scope of the Calvo Doctrine. In a recent article authored by Mr. Alan Bonfiglio—who signed Mexico's Memorial on Jurisdiction—he explains that in "the old days," foreign investment disputes were resolved through diplomatic protection. He goes on to explain that foreign investment protection regimes evolved to reach investment treaties. Specifically in the context of NAFTA, Mr. Bonfiglio explains that "NAFTA Chapter XI was one of the most debatable sections of the treaty from the start of the negotiations" and that "Mexico had been an ardent supporter of the Calvo Doctrine." However, according to Mr. Bonfiglio, that position changed "radically."

Proofs:

a. **CL-211-ENG**, pp. 212-218 (A. Bonfiglio and J. Escalona, "Mexico's International Investment Law Framework: Bilateral and Multilateral Investment Treaties," in Gloria M. Alvarez and Carlos Alvarado (eds), *Arbitration in Mexico* (Kluwer Law International, 2025)).

162. Mr. García Fernández, who personally negotiated several FTAs and BITs on behalf of Mexico, confirms that, when negotiating these international agreements, Mexico never

understood the Calvo clause as preventing any foreign investor from initiating arbitration under these treaties:

> *ii) Segundo, los mecanismos de solución de controversias inversionista-Estado (i.e. el arbitraje internacional de inversión) previstos en los Capítulos de Inversión de los Tratados de Libre Comercio ("TLC's"), así como en los APPRI's" que el Estado mexicano ha suscrito y aprobado, justo lo que pretenden es brindar, sobre bases de reciprocidad, un espacio legítimo de defensa en favor del inversionista extranjero al que el gobierno receptor de su inversión le ha violado alguno de los principios en ellos contenidos. Ello, en observancia y con pleno apego a la Constitución mexicana, en general, y a su artículo 27 (Cláusula Calvo), en particular. Precisamente, al establecerse este recurso al arbitraje de inversión, se evita que una reclamación o conflicto inversionista-Estado se torne en uno de carácter diplomático Estado-Estado, en virtud del cual el Estado del inversionista se vea en la necesidad de intervenir en favor de sus ciudadanos o empresas, socavando, en consecuencia, una y otro. Es decir, la celebración de TLC's y APPRI's por parte de México funciona para evitar la protección diplomática y, así, se da cabal cumplimiento a lo dispuesto en la Constitución y a los compromisos internacionales de México.*
>
> *Habiendo participado. Personalmente, en la negociación de los capítulos de inversión de una multiplicidad de TLC's y diversos APPRI's en representación de México, puedo afirmar que, durante dichas negociaciones,* ***México jamás consideró o entendió que la presentación de un arbitraje de inversión conforme a dichos tratados sería violatoria de la Cláusula Calvo establecida en la Constitución o de las cláusulas de admisión de extranjeros requeridas por el Reglamento de la LIE****.*
>
> ***En el caso específico del TLCAN, su Capítulo de Inversión y el mecanismo de solución de controversias inversionista-Estado previsto en la sección B de dicho capitulo, son enteramente conformes con la Constitución mexicana y, en particular, con la cláusula Calvo prevista en su artículo 27****, pues estos capítulos no permiten o avalan la posibilidad de que el inversionista extranjero acuda a buscar la protección de su gobierno sino, en su caso, que acuda a los mecanismos de solución de controversias y paneles arbitrales internacionales, bajo reglas previstas en el propio TLCAN.* (emphases added).
>
> **Proofs:**
>
> a. **CER-3-SPA**, ¶80, ii) (Expert Report-Carlos García Fernández-Counter-Memorial on Jurisdiction).

163. Thus, Mexico's argument fails under the ordinary meaning of Clause 15 of CFCM's bylaws, Article 2 of Viabilis' bylaws, and Condition 4.4 of the Concession. As Mr. García

Fernández confirms, these provisions concern only a waiver of diplomatic protection, which Claimant has not invoked, and does not extend to rights of direct recourse under investment protection treaties. This is not a serious, but a frivolous objection raised by Mexico, who has raised a debate that has long been settled. In the past, Mexico has rarely made this objection, despite the fact that all Mexican companies are required to include a provision similar to CFCM's and Viabilis'. Mexico has only recently started to make this objection in different cases, and has not been successful even once. Accordingly, the Tribunal should reject Mexico's objection.

Proofs:

a. *See supra*, ¶¶153-165.

2) Any waiver does not meet the high bar required for pre-dispute waivers of a cause of action

164. Further, tribunals have expressed doubts as to whether pre-dispute waivers of causes of action under an investment protection treaty are possible, and have established a high bar for such waivers. This high bar means that there would have to be an explicit waiver through which the parties agree to limit the tribunal's jurisdiction.

Proofs:

a. **CL-175-ENG**, ¶¶159-160 (*Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008) ("The Tribunal finds that the fact that the parties agreed to submit some of their investment disputes to ICSID arbitration in the Arbitration Agreement, does not in and of itself preclude the Claimants from availing themselves of the Treaty for additional claims outside the scope of the Arbitration Agreement. It is true that the situation would be different had the Claimants specifically waived their right to invoke the Treaty. However, such a waiver, as the Claimants' expert, Professor Dolzer, notes, would have to be explicit and this is not the case");

b. **CL-176-ENG**, ¶¶58-66 (*TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, 19 December 2008) ("…*if the contract contains a specific clause on dispute settlement, this does not exclude recourse to the settlement procedure in the treaty, unless there is a clear indication in the contract itself or elsewhere that the parties to the contract intended in such manner to limit the application of the treaty") ("Furthermore, in a more general manner, the Arbitral Tribunal observes that Argentina's interpretation, if generally applied, would make it possible for governments to avoid their treaty obligations as regards important matters such as expropriation by the simple expedient of inserting clauses in their contracts that vitiated the right to international arbitration, thereby effectively rendering the arbitration provisions of a bilateral investment treaty a nullity. This would seem inconsistent with a state's basic obligation under international law to implement its treaty obligations in good faith*");

c. **CL-177-ENG**, ¶¶111-123 (*Aguas del Tunari, S.A., v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005) ("*The Tribunal is of the view that it is not the existence of the exclusive forum selection clause that would be given effect by an ICSID tribunal, but rather that the tribunal could, at most, give effect to a waiver implied from the existence of an exclusive forum selection clause. The Tribunal does not find the authority under the ICSID Convention for it to abstain from exercising its jurisdiction simply because a conflicting forum selection clause exists. To the contrary, it is the Tribunal's view that an ICSID tribunal has a duty to exercise its jurisdiction in such instances absent any indication that the parties specifically intended that the conflicting clause act as a waiver or modification of an otherwise existing grant of jurisdiction to ICSID. A separate conflicting document should be held to affect the jurisdiction of an ICSID tribunal only if it clearly is intended to modify the jurisdiction otherwise granted to ICSID. As stated above, an explicit waiver by an investor of its rights to invoke the jurisdiction of ICSID pursuant to a BIT could affect the jurisdiction of an ICSID tribunal. However, the Tribunal will not imply a waiver or modification of ICSID jurisdiction without specific indications of the common intention of the Parties*").

165. In *SGS v. Paraguay*, the tribunal reasoned that "[g]iven the significance of invertors' rights under the Treaty, and of the international law 'safety net' of protections that they are meant to provide separate from and supplementary to domestic law regimes, ***they should not lightly be assumed to have been waived***."

Proofs:

a. **CL-17-ENG**, ¶178 (*SGS v. Paraguay, ICSID Case No.* ARB/07/29, Decision on Jurisdiction, 12 February 2010).

166. Similarly, in *Nissan Motor v. India*, the tribunal, in rejecting an argument that the claimant waived its treaty rights, explained that, for any such waiver to be valid and enforceable, "there must be persuasive evidence of any such put-out, including that the parties had in mind the possibility of future treaty claims ***and knowingly waived the right to arbitrate such claims in a neutral international forum***." The tribunal clarified that "there would have to be ***direct and convincing evidence that a party intended to do so***, for example, through an ***express waiver*** rather than one merely by inference or implication."

Proofs:

a. **CL-178-ENG**, ¶271 (*Nissan v. India*, PCA No. 2017-37, Decision on Jurisdiction, 29 April 2019).

167. Thus, even if Clause 15 of CFCM's bylaws, Article 2 of Viabilis' bylaws, and Condition 4.4 of the Concession could be interpreted as a waiver, they do not meet the high threshold of an ***explicit*** waiver demonstrating that the parties ***knowingly*** waived the right to arbitrate. There is nothing in the wording of Clause 15 of CFCM's bylaws, Article 2 of Viabilis'

bylaws, or Condition 4.4 of the Concession, that concerns causes of action that foreign investors—like Mr. Willars—might have directly against Mexico under investment treaties like NAFTA. Instead, these provisions contain a narrow and specific waiver providing that no shareholder of CFCM would "invoke the protection of its Government."

Proofs:

a. **C-4-SPA**, Clause 15 (CFCM's Incorporation Deed);
b. **C-229-SPA**, Article 2 (Viabilis's Incorporation Deed);
c. **C-10-SPA**, Condition 4.4 (Concession Agreement, without exhibits).

3) The single precedent invoked by Mexico does not support its conclusion

168. In support of its position, Mexico makes reference to a single award in a single case: *Sastre v. Mexico*. The lack of jurisprudential support demonstrates the frivolity of Mexico's objection. Mexico cites *Sastre*, and purposefully misrepresents that case to contend that "*un tribunal recientemente aplicó el mismo principio a una serie de hechos similares. En Sastre c. México, las demandantes habían aceptado por escrito considerarse mexicano a todos los efectos relacionados con sus inversiones en México*."

Proofs:

a. *See* Memorial on Jurisdiction, ¶178.

169. Mexico's characterization of *Sastre*'s facts as "similar" to this case is disingenuous. These cases are ***not*** similar: the *Sastre* case ***does not*** support Mexico's conclusions, and the case is in no way analogous to this case. The *Sastre* claimants were natural persons who held Argentine and Portuguese nationality and applied for Mexican nationality. Consistent with Article 19 of Mexico's Nationality Law, and before the dispute arouse, the claimants signed a document "expressly renounc[ing] the Argentine/Portuguese nationality and any other nationality" and "renounced any rights granted to foreigners by treaties or international conventions." The tribunal concluded that "[t]his is not merely a waiver of treaty rights or a factual debate on dominant and effective nationality, ***but an agreement by investor not to invoke his/her original nationality against a sovereign State*** in exchange for that sovereign State accepting the investor as its own national." This last quote from the *Sastre* tribunal is the one that Mexico cites and misleadingly attempts to pass as support for its objection, which it is not.

Proofs:

a. **RL-0043-SPA**, ¶¶214, 245, 248 (*Sastre v. Mexico*, ICSID Case No. UNCT/20/2, Award, 21 November 2022).

170. No credible analogy to *Sastre* can be drawn here. Mr. Willars has not waived his United States nationality. Clause 15 of CFCM's bylaws and Condition 4.4 of the Concession contain no waiver of nationality—only an agreement to be treated as Mexican for the sole purpose of foregoing diplomatic protection—and no language here comes close to resembling the waiver at issue in *Sastre*.

Proofs:

a. **RL-0043-SPA**, ¶¶214, 245, 248 (*Sastre v. Mexico*, ICSID Case No. UNCT/20/2, Award, 21 November 2022);
b. **C-4-SPA**, Clause 15 (CFCM's Incorporation Deed);
c. **C-229-SPA**, Article 2 (Viabilis's Incorporation Deed);
d. **C-10-SPA**, Condition 4.4 (Concession Agreement, without exhibits).

171. Other than *Sastre*, Mexico only makes reference to cases in support of the principle of *pacta sunt servanda*, but Mexico has been unable to provide a single precedent in which a tribunal, interpreting a clause similar to Clause 15 of CFCM's bylaws, has decided that the claimant waived its right to resort to international arbitration.

Proofs:

a. *See* Memorial on Jurisdiction, ¶¶178-179.

172. Accordingly, Claimant has not waived in any capacity his entitlement to bring claims under NAFTA and initiate an investment arbitration against Mexico. Mexico's objection should therefore be dismissed.

Proofs:

a. *See supra*, ¶¶152-174.

IV.

RESPONDENT SHOULD BEAR THE COSTS AND FEES INCURRED DURING THE JURISDICTIONAL PHASE

173. Pursuant to Article 61(2) of the ICSID Convention, this Tribunal has the authority to allocate the costs of these arbitration proceedings, including the fees and expenses of the Tribunal members, the parties' legal costs, and charges for the use of the ICSID facilities.

Proofs:

a. **CL-6-ENG**, Article 61(2) (ICSID Convention) ("In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award").

174. In this case, Respondent's jurisdictional objections are frivolous and lack any substantive or legal merit. As demonstrated throughout this Counter-Memorial, Mexico has advanced a series of baseless arguments—ranging from alleged waivers and supposed illegality to ownership and control issues—that have been refuted with legal authority and evidence. These objections appear to be raised not in good faith but rather as tactics to cloud the proceedings with irrelevant claims, misrepresent facts, and distract the Tribunal from the core issues at hand.

Proofs:

a. *See supra*, Section III.

175. Moreover, Mexico's submissions include repeated misrepresentations of material facts and selective citations of precedents, often taken out of context or inapplicable to the present case.

Proofs:

a. *See supra*, Section III.

176. Given these circumstances, it would be inequitable for Claimant to bear the costs occasioned by Respondent's conduct. Accordingly, Claimant respectfully requests that the Tribunal order Respondent to bear all costs and fees incurred during the jurisdictional phase, including Claimant's legal fees and expenses.

Proofs:

a. *See supra*, ¶¶176-178.

V.

CONCLUSION

177. In light of the above, this Tribunal has jurisdiction over the present dispute under Chapter 11 of NAFTA. Mr. Willars is a qualified investor; he made a protected investment in Mexico; and the measures challenged fall squarely within the scope of the Treaty's protections. The jurisdictional requirements have been met in full, and the Tribunal is empowered to hear and decide this case.

178. Mexico's jurisdictional objections are wholly without merit. They rest on a series of arguments that are irrelevant, factually incorrect, or legally unfounded. Mexico's attempt to raise issues of ownership and control, alleged illegality, and purported waiver of rights fail both legally and factually. These objections are not only baseless but also raise concerns about their purpose, as they appear to be tactical attempts to distract from the core merits of the case and delay the case's resolution.

179. Given the nature of Mexico's jurisdictional objections, Mexico should bear the costs associated with this phase of the proceedings. The Tribunal should reject these objections in their entirety and confirm its jurisdiction to hear the merits of the dispute.

VI.

REQUEST FOR RELIEF

180. Based on the above, Claimant requests that the Arbitral Tribunal:

(i) Declare that Mexico's jurisdictional objections lack merit and accordingly reject them;

(ii) Order the Parties to proceed to the merits stage, including damages;

(iii) Award Claimant's costs and attorneys' fees incurred by Claimant during the jurisdictional phase; and

(iv) Award such other and further relief as it deems just and necessary.

Claimant reserves the right to amend, supplement, or modify this Counter-Memorial as necessary and in accordance with the applicable rules throughout the course of these arbitral proceedings. Claimant further reserves the right to respond to any new arguments or facts presented by Respondent during the arbitration, and to submit additional evidence as appropriate.

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