INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mario Noriega Willars

v.

United Mexican States

(ICSID Case No. ARB/23/29)

PROCEDURAL ORDER NO. 3
Decision on Bifurcation

Members of the Tribunal
Prof. Bernard Hanotiau, President of the Tribunal
Mr. Andrés Moreno Gutiérrez, Arbitrator
Prof. Hélène Ruiz Fabri, Arbitrator

Secretary of the Tribunal
Ms. Jara Mínguez Almeida

Assistant to the President
Mr. Juan Camilo Jiménez-Valencia

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24 March 2025

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1. This Procedural Order is issued in the context of the proceedings initiated by Mr. Mario Noriega Willars ("Mr. Willars" or "Claimant"), against the United Mexican States ("Mexico" or "Respondent").

I. PROCEDURAL BACKGROUND

2. On 5 December 2024, Claimant submitted his Memorial on the Merits in accordance with the revised procedural calendar.

3. On 16 January 2025, Respondent filed its Request for Bifurcation (the "**Request for Bifurcation**"). The Request was accompanied by factual exhibits R-0001-SPA through R-0004-SPA, and legal authorities RL-0001-ENG through RL-0047-ENG. Pursuant to Section 12.5 of Procedural Order No. 1, on 22 January 2025, Respondent filed an English translation of the Request.

4. On 27 February 2025, Claimant filed his Response to the Request for Bifurcation (the "**Response**"). The Response was accompanied by factual exhibits C-224-SPA through C-226-SPA, legal authorities CL-118-ENG through CL-187-ENG, previously submitted factual exhibits C-2-SPA through C-4-SPA, C-6-SPA, C-10-SPA, C-16-SPA, C-18-SPA, C-24-ENG, C-140-SPA, C-158-SPA through C-187-SPA, C-221-SPA, and C-222-SPA, and previously submitted legal authorities CL-3-ENG, CL-5-ENG, CL-6-ENG, CL-11-ENG, CL-17-ENG, CL-24-ENG, CL-56-ENG, CL-59-ENG, CL-60-ENG, CL-69-ENG, CL-71-ENG, CL-72-ENG, CL-74-ENG, and CL-75-ENG. Pursuant to Section 12.5 of Procedural Order No. 1, on 19 March 2025, Claimant filed a Spanish translation of the Response.

II. ABRIDGED FACTUAL BACKGROUND

5. The abridged factual background set out below is based on the Parties' submissions to date, and an incomplete record. It is useful only insofar as it provides the relevant context to decide Respondent's Request for Bifurcation. However, the Tribunal clarifies that it will decide on the facts of the case at the appropriate juncture of the procedure.

6. On 26 August 1999, the *Secretaría de Comunicaciones y Transportes* (now called the *Secretaría de Infraestructura, Comunicaciones y Transportes*) ("**SCT**") awarded a concession to Compañía de Ferrocarriles Chiapas-Mayab, S.A. de C.V. ("**CFCM**") for

the operation, exploitation, and maintenance of two of Mexico's major railroads, the Chiapas railroad and the Mayab railroad, which link the Yucatán Peninsula to the Pacific coast and the Guatemalan border (the "**Concession**").[1]

7. Under the Concession, Mexico granted CFCM the exclusive right to operate and exploit the Chiapas-Mayab Railway, along with a wide range of supporting assets, for a 30-year term. Additionally, Mexico granted CFCM an exclusive right to provide freight services on the Chiapas-Mayab Railway for 18 years.[2]

8. On 4 October 2005, Hurricane Stan struck the southeastern region of Mexico, and in the process, severely damaged key infrastructure of the Chiapas-Mayab Railway, including tracks and bridges, virtually halting CFCM's operations.[3]

9. In the years that followed, CFCM and SCT exchanged multiple correspondence regarding *inter alia*, how to repair the damaged infrastructure and the way forward for the former to continue to operate the Concession.[4]

10. Facing prolonged delays in restoring the Concession, CFCM's shareholders sought to sell their interests in the company. Ultimately, in 2009, Viabilis Holding, S.A. de C.V. ("**Viabilis**"), a company headed by Mr. [redacted] ("**Mr.** [redacted] and Mr. [redacted] himself, acquired "full control" of CFCM from Genesee & Wyoming, Inc , the initial owner.[5]

11. In the years that followed, CFCM and SCT continued to exchange correspondence regarding *inter alia*, how to repair the damaged infrastructure and the way forward for the former to continue operating the Concession.[6]

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1 Memorial on the Merits, para. 2; Request for Bifurcation, para. 16; **Exhibit C-10**, Concession Agreement, without exhibits, dated 26 August 1999.

2 Memorial on the Merits, para. 3; **Exhibit C-10**, Concession Agreement, without exhibits, dated 26 August 1999, Sections 1.2, 1.4.2, 5.

3 Memorial on the Merits, para. 5; **Exhibit C-68**, Letter from CFCM to the SCT, dated 5 October 2005.

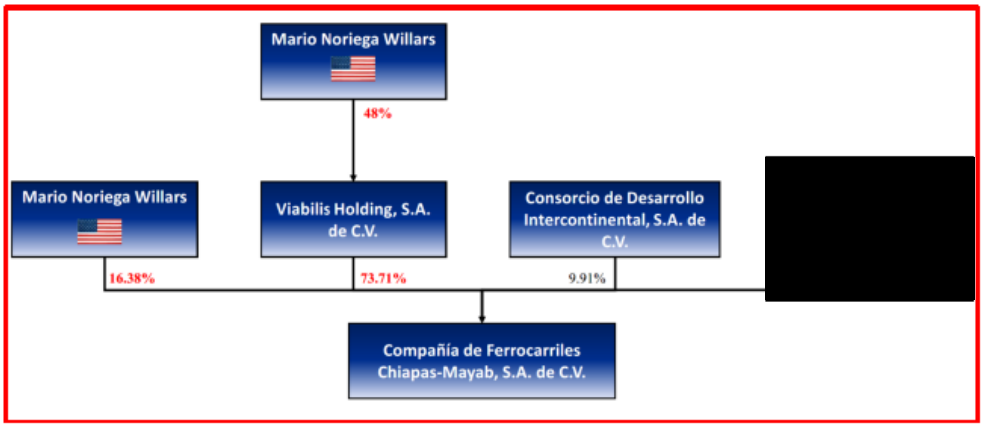
4 Memorial on the Merits, paras. 5, 48-66.

5 Memorial on the Merits, paras. 8, 56, 77; **Exhibit C-100**, Letter from Viabilis and G&W to the SCT, dated 21 August 2009.

6 Memorial on the Merits, paras. 78-131.

12. In 2015, Mr. [redacted] the then "main owner" of Viabilis, had to sell most of his shares in CFCM and Viabilis. As a result, on 14 December 2015, Mr. Willars and Mr. [redacted] signed a share purchase agreement (the "**SPA**") concerning the shares in CFCM and Viabilis. Under the terms of the SPA, Mr. Willars acquired 10,126,000 shares in CFCM (16.38%), and 24 shares in Viabilis (48%).[7]

13. The relevant corporate structure of CFCM is presented by Claimant as follows:[8]



14. On 13 July 2016, the SCT issued a resolution declaring the *rescate* of the Concession, thereby extinguishing the Concession and rendering it null and void (the "**Rescate Declaration**").[9]

15. In response to the Rescate Declaration, CFCM filed several appeals which were ultimately rejected by local courts in Mexico. The latest of these decisions was issued on 8 June 2022 by the Supreme Court.[10]

III. THE REQUESTS FOR RELIEF

A. RESPONDENT'S REQUESTS FOR RELIEF

16. Respondent frames its requests for relief as follows:

> "- To preliminarily hear the jurisdictional objections described in this Request, in a separate phase from the merits;

[7] Memorial on the Merits, paras. 12, 135-136; **Exhibit C-158**, Share Purchase Agreement between [redacted] and Mario Noriega Willars, dated 14 December 2015.

[8] Memorial on the Merits, para. 19.

[9] Memorial on the Merits, paras. 13, 192; Request for Bifurcation, para. 18; **Exhibit C-16**, *Rescate* declaration, served on CFCM on 26 July 2016, dated 13 July 2016.

[10] Memorial on the Merits, paras. 13, 153-193; Request for Bifurcation, para. 19.

- Suspend the proceedings on the merits;

- Adopt the timelines provided in Scenario 1 of Annex B of PO1; and

- Rule on the objections raised in this Request as a preliminary matter".[11]

B. CLAIMANT'S REQUESTS FOR RELIEF

17. Claimant states his requests for relief in the following terms:

> "(a) The Tribunal deny the Request for Bifurcation;
>
> (b) The Tribunal order the Parties to proceed immediately to the merits stage, including damages, where any objections to the Tribunal's jurisdiction raised by Respondent would be resolved;
>
> (c) The Tribunal award Claimant's costs and attorneys' fees incurred in preparing this Answer; and
>
> (d) The Tribunal award such other and further relief as it deems just and necessary".[12]

IV. THE PRELIMINARY OBJECTIONS RAISED BY RESPONDENT

18. In its Request for Bifurcation, Respondent submitted the following seven preliminary objections (the "**Preliminary Objections**"):

> "*First Objection*. The Tribunal lacks jurisdiction *ratione temporis* since the Claimant knew of the identified acts and losses in 2016, well in advance of the critical date established by NAFTA Articles 1116 and 1117, and therefore the claim is time-barred.
>
> *Second Objection*. The Tribunal lacks *ratione temporis* and *ratione voluntatis* jurisdiction to resolve this dispute, since many of the challenged acts occurred after the termination of the NAFTA. Annex 14-C of the Agreement the [sic] between the United States of America, the United Mexican States, and Canada (USMCA), on which the Claimant bases its claim, only extends the NAFTA Parties' consent to arbitrate for a period of three years, and it in no way extends the substantive obligations for a period of three years.
>
> *Third Objection*. The Claimant has not shown that it has a legacy investment, which is a necessary condition to accept the Respondent's offer to arbitrate, and thus, this Tribunal lacks jurisdiction *ratione voluntatis*.

[11] Request for Bifurcation, para. 125.

[12] Response, para. 195.

> *Fourth Objection*. The Tribunal lacks jurisdiction over the claims brought under Article 1116 because Mr. Willars has not presented any direct loss arising out of the alleged violations. Mr. Willars only claims losses of CFCM, or reflective loss, which are not compensable under Article 1116.
>
> *Fifth Objection*. The Claimant has not provided sufficient evidence to prove that it has the alleged ownership or control over CFCM. By not being able to demonstrate that the Claimant has control or ownership of CFCM, this Tribunal lacks jurisdiction over claims brought under Article 1117.
>
> *Sixth Objection*. Taking as true the alleged facts by the Claimant, Mr. Willars ignored the restrictions provided for in the Mexican legislation at the moment of investing in Mexico, therefore his claims are inadmissible.
>
> *Seventh Objection*. There is, in the CFCM bylaws, an agreement by Mr. Willars to consider himself as Mexican as regards to the 'Concession granted by the Federal Government through the then [SCT] in favor of [CFCM], in respect of the general railroad communication routes' of 16 August 1999 (Concession). Additionally, in accordance with these bylaws and in the Concession itself, Mr. Willars obliged himself to not invoke the protection of his government and, therefore, to not initiate this arbitration. Consequently, the Tribunal lacks jurisdiction *ratione personae*. […]".[13] [italics in the original].

19. The Tribunal will continue to refer to these objections, as defined by Respondent, throughout the Procedural Order.

V. SUMMARY OF THE PARTIES' POSITIONS

A. RESPONDENT'S POSITION

1. The Legal Standard

20. According to Respondent, the Tribunal is empowered to order bifurcation pursuant to Rule 44 of the 2022 International Centre for Settlement of Investment Disputes Arbitration Rules (the "**ICSID Arbitration Rules**").[14]

21. Respondent submits that Rule 44 of the ICSID Arbitration Rules provides three main criteria for granting bifurcation: (i) whether bifurcation would materially reduce the time and cost of the proceeding; (ii) whether determining the preliminary objection would

[13] Request for Bifurcation, paras. 6-12.

[14] Request for Bifurcation, para. 23.

dispose of all or a substantial portion of the dispute; and (iii) whether the preliminary issues to be dealt with are capable of being separated from the rest of the dispute.[15]

22. Respondent further avers that "the Tribunal is not strictly bound by the above three criteria and has discretion to consider any other circumstances it deems relevant".[16]

2. Bifurcation is Warranted

23. Respondent requests the Tribunal to bifurcate its Preliminary Objections for the reasons set out below.

a. *The First Objection*

24. Respondent submits that pursuant to paragraph two of NAFTA Articles 1116 and 1117, respectively, an investor "may not make a claim […] if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage".[17]

25. Respondent argues that since the Request for Arbitration was filed on 29 June 2023, Claimant should have first become aware of the alleged breach and resulting losses underlying his claim after 28 June 2020.[18]

26. Respondent avers that Claimant's claims are based on the contention that SCT expropriated the Concession through the Rescate Declaration in 2016. Therefore, the claim is time-barred because Claimant first became aware of SCT's decision in 2016, shortly after the Rescate Declaration was issued.[19]

27. Respondent contends that to avoid the statute of limitations, Claimant advances two legal arguments. First, that the failure to pay full compensation is an ongoing breach that continuously renews the limitation period. Second, that Claimant and CFCM could not

[15] Request for Bifurcation, para. 26.

[16] Request for Bifurcation, para. 29.

[17] Request for Bifurcation, para. 34.

[18] Request for Bifurcation, para. 35.

[19] Request for Bifurcation, para. 41.

have had actual or constructive knowledge of the occurrence of the losses resulting from Mexico's refusal to pay full compensation until the issuance of a decision by the Supreme Court in 2022.[20]

28. It is Respondent's case that these arguments are legal in nature and do not require an examination of the merits of the dispute. Therefore, the Tribunal can address these arguments (and the time-bar objection) at a preliminary stage without duplicating a review of the merits in a subsequent phase. Furthermore, it would be efficient to bifurcate this objection given that, if successful, Claimant's claims would be dismissed in their entirety.[21]

b. *The Second Objection*

29. Respondent explains that on 1 July 2020, the United States-Mexico-Canada Agreement entered into force (the "**USMCA**"). Annex 14-C provides that "[e]ach Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under: (a) Section A of Chapter 11 (Investment) of NAFTA 1994 […]".[22]

30. It is Respondent's position that this consent only extends to breaches that occurred while Section A of Chapter 11 of NAFTA was in force *i.e.*, until 30 June 2020. Therefore, any action claimed by Claimant which took place after 1 July 2020 is beyond Mexico's consent and cannot be the basis of a claim under NAFTA.[23]

31. Respondent contends that this objection has already been bifurcated by several NAFTA tribunals.[24] Moreover, it argues that the analysis of this objection does not require a review

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[20] Request for Bifurcation, para. 42.

[21] Request for Bifurcation, paras. 43-44.

[22] Request for Bifurcation, para. 48.

[23] Request for Bifurcation, paras. 48-49.

[24] **Exhibit RL-4**, *Doups Holdings LLC c. Estados Unidos Mexicanos,* Caso CIADI No. ARB/22/24, Resolución Procesal No. 3. Decisión sobre Bifurcación, 16 de octubre de 2024; **Exhibit RL-5**, *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America,* ICSID Case No. ARB/21/63, Procedural Order No. 2, dated 13 April 2023; **Exhibit RL-23**, *Alberta Petroleum Marketing Commission v. United States of America,* ICSID Case No. UNCT/23/4, Procedural Order No. 4 on Application for Bifurcation, dated 7 August 2024; **Exhibit RL-24**, *Access Business Group LLC v. United Mexican States,* ICSID Case No. ARB/23/15, Procedural Order No. 3. Bifurcation, dated 29 August 2024.

of the merits, and if successful, the scope of the arbitration would be significantly reduced.[25]

c. *The Third Objection*

32. Respondent submits that Claimant does not have a legacy investment as required by Annex 14-C of the USMCA.[26]

33. Annex 14-C clearly defines "legacy investment" as an "investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement".[27]

34. Respondent argues that a tribunal would not have jurisdiction over claims brought by an investor whose investment ceased to exist before 1 July 2020. However, according to Claimant, Respondent allegedly expropriated the Concession through the Rescate Declaration in 2016. Therefore, there would be no "existing investment" as required under Annex 14-C of the USMCA.[28]

35. Respondent contends that this objection does not require an analysis of the merits, and that bifurcating it would be efficient. If successful, Claimant's claims would be dismissed in their entirety.[29]

d. *The Fourth Objection*

36. Respondent submits that read together, NAFTA Articles 1116 and 1117 authorize two different types of claims: (i) those brought by an investor on its own behalf (direct loss) and (ii) those brought by an investor on behalf of an enterprise (reflective loss). However,

[25] Request for Bifurcation, paras. 51-56.

[26] Request for Bifurcation, para. 57.

[27] Request for Bifurcation, para. 58.

[28] Request for Bifurcation, paras. 59-61.

[29] Request for Bifurcation, paras. 63-65.

Articles 1116 and 1117 do not overlap, meaning that investors cannot bring claims for reflective loss under Article 1116.[30]

37. Respondent argues that Claimant has brought claims in his own name pursuant to Article 1116 and exactly the same claims on behalf of CFCM under Article 1117. In its view, however, the only losses are those of CFCM. Therefore, since Article 1116 does not confer jurisdiction over breaches indirectly affecting an investor (reflective loss), the Tribunal lacks jurisdiction over the claims brought under Article 1116.[31]

38. Respondent contends that this objection does not require an analysis of the merits, and that bifurcating it would be efficient. If the Fourth and Fifth Objections were successful, Claimant's claims would be dismissed in their entirety, and even if the former were considered on its own, this objection would resolve a substantial part of the case, specifically the claims raised under NAFTA Article 1116, or at the very least, bring clarity to the case as presented by Claimant.[32]

e. *The Fifth Objection*

39. Respondent submits that for Claimant to bring claims on behalf of CFCM under NAFTA Article 1117, Mr. Willars must demonstrate that he "owned or controlled" CFCM "directly or indirectly", which is not the case.[33]

40. Respondent explains that according to Claimant's Memorial, Mr. Willars acquired, in December 2015, 16.38% of the shares of CFCM and 48% of the shares of Viabilis — another CFCM shareholder— which would allegedly give Mr. Willars a 51.76% controlling interest in CFCM that he supposedly continues to hold today (see paragraph 13 above).[34]

41. Respondent argues *inter alia* that there is no evidence that Mr. Willars ever exercised control over CFCM that would allow him to bring claims on its behalf. The majority of

[30] Request for Bifurcation, paras. 67-70.

[31] Request for Bifurcation, paras. 71-72.

[32] Request for Bifurcation, paras. 73-74.

[33] Request for Bifurcation, paras. 78-80.

[34] Request for Bifurcation, para. 82.

CFCM's shares are reportedly owned by Viabilis, a company in which Mr. Willars has only a 48% interest. His minority interest in Viabilis does not give him any control over CFCM. Mr. Willars cannot simply combine his own shares in CFCM (16.38%) with 48% of Viabilis' shares in CFCM to claim that he owns 51.76% of CFCM. It is Respondent's case that "the partners' shareholdings cannot be 'combined' to assume that a single partner has control of the company, unless there is a specific corporate structure or agreement (e.g., through voting agreements or controlling shareholder agreements)".[35] In any event, by Respondent's own calculations of the contemporaneous shareholder ledger of CFCM submitted to the Mexican authorities, it seems that Mr. Willars would only hold 20.54% of CFCM.[36]

42. Respondent contends that this objection does not require an analysis of the merits, and that bifurcating it would be efficient. As mentioned above, if the Fourth and Fifth Objections were successful, Claimant's claims would be dismissed in their entirety, and even if the latter were considered on its own, this objection would resolve a substantial part of the case, specifically the claims raised under NAFTA Article 1117.[37]

f. *The Sixth Objection*

43. Respondent submits that according to the Call for Bids for the Concession and the Concession itself, "foreign investment may not directly or indirectly, exceed 49% of the concessionaire's equity except with a favorable resolution from the National Foreign Investment Commission, in accordance with the third paragraph of Article 17 of the [Railway Services Regulation] and Section 4 of the Call for Bids".[38]

44. Notwithstanding the clear restrictions on foreign investment in railroad companies, according to Claimant, Mr. Willars himself owns 51.76% of CFCM. Thus, assuming Claimant's arguments to be true, Mr. Willars clearly violated Mexican law by failing to

[35] Request for Bifurcation, paras. 83-84.

[36] Request for Bifurcation, paras. 87-94.

[37] Request for Bifurcation, paras. 96-97.

[38] Request for Bifurcation, paras. 98-99.

respect the limits established therein. In any case, there is no record that Claimant requested authorization from the National Foreign Investment Commission.[39]

45. Respondent argues that various tribunals have held that the protections granted by international investment treaties cannot apply to investments made in violation of the laws of the host State. Therefore, Claimant's claims are inadmissible.[40]

46. Respondent contends that this objection does not require an analysis of the merits, and that bifurcating it would be efficient. Notably, if successful, Claimant's claims would be dismissed in their entirety.[41]

g. *The Seventh Objection*

47. Respondent submits that the fifteenth clause of the Bylaws of CFCM clearly recognizes that Mr. Willars agreed to consider himself as Mexican with respect to his participation in CFCM, and to refrain from invoking the protections under NAFTA. This waiver is also present in "one of the conditions present in the Concession".[42]

48. Therefore, Respondent avers that Claimant expressly waived the protection of his government regarding the Concession, which includes the right to invoke the investor-State dispute resolution procedure under NAFTA and Annex 14-C of the USMCA.[43]

49. Respondent contends that this objection does not require an analysis of the merits, and that bifurcating it would be efficient. Notably, if successful, Claimant's claims would be dismissed in their entirety.[44]

[39] Request for Bifurcation, para. 100.

[40] Request for Bifurcation, paras. 104-106.

[41] Request for Bifurcation, paras. 108-110.

[42] Request for Bifurcation, paras. 116, 119.

[43] Request for Bifurcation, para. 118.

[44] Request for Bifurcation, paras. 123-124.

B. CLAIMANT'S POSITION

1. The Legal Standard

50. Claimant submits that the Tribunal may order bifurcation pursuant to Rule 44 of the ICSID Arbitration Rules, subject to the cumulative requirements set out therein.[45]

51. Claimant argues that in addition to the criteria established by the ICSID Arbitration Rules, several tribunals have also considered whether the objections are *prima facie* serious and substantial when deciding if an arbitration should be bifurcated.[46]

2. The Bifurcation Request Should be Denied

52. Claimant contends that the Tribunal should not bifurcate any of Respondent's Preliminary Objections for the reasons set out below.

a. *The First and Second Objections*

53. First, Claimant submits that the First and Second Objections are fundamentally flawed and inherently contradictory.[47]

54. Regarding the First Objection, Claimant argues that when breaches of an investment treaty are continuous acts or omissions, the statute of limitations does not begin to run until the treaty breaches cease. Claimant relies particularly on *UPS v. Canada*.[48]

55. Regardless of the Tribunal's legal characterization of Respondent's failure to pay compensation to CFCM following the Rescate Declaration as a continuing breach, Respondent's position is untenable. Indeed, Claimant had no reason to believe that Respondent would refuse to provide any compensation to CFCM upon the issuance of the Rescate Declaration.[49]

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[45] Response, para. 8.

[46] Response, para. 9; **Exhibit CL-119**, *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Procedural Order No. 8, dated 14 April 2014, para. 109.

[47] Response, para. 52.

[48] Response, paras. 56-63; **Exhibit CL-60**, *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, Award, dated 24 May 2007, para. 28.

[49] Response, paras. 65-66.

56. Moreover, if it were correct that Claimant became aware of Mexico's breaches and the resulting damages shortly after the issuance of the Rescate Declaration in 2016, as Respondent argues in support of its First Objection, then Respondent cannot simultaneously assert that most of those breaches occurred only after the termination of NAFTA on 1 July 2020, as it does in support of its Second Objection.[50]

57. Second, Claimant avers that the First and Second Objections are too intertwined with the merits of the dispute. In this regard, Claimant submits that the precedents relied upon by Respondent (see paragraph 31 above) do not support its position that the Second Objection should be bifurcated.[51]

58. Third, neither the First Objection nor the Second Objection has the potential to dispose of all or a substantial portion of the dispute. If the Tribunal were to uphold the First Objection, it would still retain jurisdiction over acts that occurred after the cut-off date (28 June 2020). Similarly, if the Tribunal were to dismiss the First Objection but uphold the Second Objection, it would still have jurisdiction over acts that occurred prior to NAFTA's termination on 1 July 2020.[52]

59. Fourth, Claimant contends that to assess the scope of Annex 14-C of the USMCA the Tribunal will need to review the *travaux préparatoires* of the USMCA, which may require a lengthy document production phase which would render bifurcating the Second Objection inefficient.[53]

b. *The Third Objection*

60. Claimant submits that the Third Objection lacks merit. The tribunal in *Westmoreland v. Canada (III)* rejected the same argument that Respondent is raising in this arbitration. Said tribunal has ruled that "paragraph 6(a) could not prevent the submission of a legacy

[50] Response, paras. 69-70.

[51] Response, paras. 71-82.

[52] Response, paras. 83-85.

[53] Response, paras. 38-44.

claim where the respondent State expropriates the investment prior to the time when the USMCA entered into force".[54]

61. Claimant further argues that the Third Objection does not have the potential to dispose of all or a substantial portion of the dispute. In this regard, Claimant considers that the Third Objection is limited to the existence of the Concession at the time when the USMCA entered into force, whereas Claimant's and CFCM's investments in this case extend beyond the Concession itself.[55]

62. Finally, Claimant contends that the Third Objection is too intertwined with the merits of the dispute, *inter alia*, because it would require the Tribunal to assess "the moment in which CFCM's investments were expropriated by Respondent's conduct, and the moment in which Respondent's obligation to pay prompt, adequate, and effective compensation emerged".[56]

c. *The Fourth Objection*

63. Claimant submits that the Fourth Objection lacks merit. Claimant explains that he is advancing: (i) claims for direct losses on behalf of CFCM under NAFTA Article 1117; and alternatively (ii) claims for direct losses of his own investments, including his 51.76% share participation in CFCM on his own behalf under NAFTA Article 1116.[57]

64. Additionally, Claimant argues that the Fourth Objection does not have the potential to dispose of all or a substantial portion of the dispute. Even if successful, the Tribunal would need to assess Claimant's claims on behalf of CFCM under NAFTA Article 1117.[58]

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[54] Response, paras. 87-95; **Exhibit CL-151**, *Westmoreland Coal Company v. Canada*, ICSID Case No. UNCT/23/2, Award, dated 17 December 2024, paras. 168-169.

[55] Response, paras. 96-103.

[56] Response, paras. 104-107.

[57] Response, paras. 111-113.

[58] Response, paras. 115-119.

65. Finally, Claimant contends that the Fourth Objection is too intertwined with the merits of the dispute, *inter alia*, because it would require the Tribunal to "conduct an enquire of the damages resulting from Mexico's treaty breaches".[59]

d. *The Fifth Objection*

66. Claimant submits that the Fifth Objection lacks merit since Mr. Willars owns and controls CFCM.[60]

67. Claimant explains that on 14 December 2015, Mr. Willars and Mr. [redacted] entered into the SPA [redacted]. It is Claimant's case that those shares, combined with his 16.38% shares in CFCM (see paragraph 13 above), grant him exclusive control over 90% of CFCM's shares, which makes Mr. Willars the "unquestionable owner and controlling shareholder" of CFCM.[61] Moreover, Claimant avers that Respondent's interpretation of CFCM's shareholder ledger is flawed.[62]

68. Additionally, Claimant argues that even if successful, the Fifth Objection would not have the potential to dispose of all the dispute.[63]

69. Finally, Claimant contends that the Fifth Objection is too intertwined with the merits of the dispute because it would require the Tribunal to assess "Mr. Willars' rights under CFCM's corporate structure to own and control the company".[64]

e. *The Sixth Objection*

70. Claimant submits that the Sixth Objection lacks merit because: (i) Mexican Law did not require Mr. Willars to obtain prior authorization from the National Foreign Investment Commission to acquire more than 49% of CFCM; (ii) Mexico cannot raise this argument

[59] Response, paras. 120-124.

[60] Response, paras. 126, 131.

[61] Response, para. 131.

[62] Response, paras. 137-146.

[63] Response, para. 29.

[64] Response, para. 22.

for the first time in this arbitration after nine years of local litigation; (iii) NAFTA does not contain a legality requirement; and in any event (iv) not any illegality would affect the Tribunal's jurisdiction.[65]

71. Additionally, Claimant argues that even if successful, the Sixth Objection would not have the potential to dispose of the entire dispute.[66]

72. Finally, Claimant contends that the Sixth Objection is too intertwined with the merits of the dispute. In Claimant's view, to decide this objection the Tribunal would need to assess *inter alia*: (i) the acquisition of Mr. Willars' investment; (ii) Mexico's conduct during the last 9 years, where it failed to claim the alleged illegality; and (iii) the effects and impact, if any, of the alleged illegality.[67]

f. *The Seventh Objection*

73. Claimant submits that the Seventh Objection lacks merit because the express language of the documents invoked by Respondent only refers to a waiver not to invoke "diplomatic protection", whereas Mr. Willars has never waived his rights to bring an arbitration under NAFTA.[68]

VI. THE TRIBUNAL'S ANALYSIS

A. THE LEGAL STANDARD

74. This Procedural Order sets out the reasons for the Tribunal's decisions on Respondent's Request for Bifurcation, which is without prejudice to its ultimate decisions on the substance of Respondent's Preliminary Objections and the Parties' submissions on the merits.

75. The Tribunal's power to rule on Respondent's Request for Bifurcation is enshrined in the ICSID Convention and in the ICSID Arbitration Rules. Article 41(2) of the ICSID Convention reads as follows:

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65 Response, paras. 149-172.

66 Response, para. 178.

67 Response, para. 176.

68 Response, paras. 179-192.

> "**Article 41**
>
> […]
>
> (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute".[69] [bold in the original].

76. The conditions for bifurcating a preliminary objection are set out in ICSID Arbitration Rule 44, which provides as follows:

> "**Rule 44**
>
> **Preliminary Objections with a Request for Bifurcation**
>
> […]
>
> (2) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:
>
> (a) bifurcation would materially reduce the time and cost of the proceeding;
>
> (b) determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and
>
> (c) the preliminary objection and the merits are so intertwined as to make bifurcation impractical".[70] [bold in the original].

77. In practice, Tribunals retain a "broad discretion to decide on whether there should be a bifurcation of preliminary issues".[71] ICSID Arbitration Rule 44 introduces some useful guidance regarding the conditions that should be analyzed when considering whether or not to bifurcate a preliminary objection.

78. Pursuant to ICSID Arbitration Rule 44, the Tribunal must examine whether: (i) bifurcation would materially reduce the time and cost of the proceedings; (ii) the determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and (iii) the preliminary issues to be dealt with are capable of being separated

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69 ICSID Convention, Article 41.

70 2022 ICSID Arbitration Rules, Rule 44.

71 **Exhibit CL-123**, ICSID Rules and Regulations 2022 Article-by-Article Commentary, R. Happ and S. Wilske (eds.), Part 3, Rule 44, dated 2022, p. 467.

from the rest of the dispute. In assessing the first prong of the test, the Tribunal needs to consider whether *prima facie* the objection is serious and substantial.

79. In the lines that follow, the Tribunal will assess whether or not to bifurcate Respondent's Preliminary Objections.

B. THE PRELIMINARY OBJECTIONS

1. The First and Second Objections

80. For the reasons set out below, the Tribunal has decided that the First and Second Objections will not be bifurcated, but will be joined to the merits.

81. First, regarding the First Objection, the Tribunal considers that a determination of when Claimant first became aware of the alleged breaches and resulting losses underlying his claim in the specific circumstances of this case may require a detailed analysis of the merits which would make bifurcation impractical.

82. Several investment tribunals[72] have reached similar conclusions in the case of time-bar objections. For instance, the *Westmoreland v. Canada* tribunal ruled as follows:

> "We next turn to the Respondent's fourth jurisdictional objection, that the Claimant's actual or constructive knowledge of the alleged breach and loss occurred more than three years before it commenced this arbitration, in breach of the time limitation period under NAFTA Articles 1116(2) and 1117(2). The Respondent says the cut-off date for the purposes of the limitation period is 12 August 2016. The Claimant explained in the oral hearing that the measure it complains of was the entry into the OCAs in November 2016 by the Government of Alberta and the payments made thereunder that started in July 2017, not the publishing of the Climate Plan. Further, the Claimant says that the Respondent's fourth objection cannot be examined without the risk of prejudging or entering the merits. Determining the date on which the Claimant acquired actual or constructive knowledge of the alleged breach and loss is not a simple issue. Whilst it had awareness of the content of the Climate Plan as announced and of the fact the OCAs were being concluded and even that Transition Payments were being made, it was not aware at the time that Transition Payments were first made that it would be excluded from such payments. Therefore, determining the date on which it acquired constructive knowledge will require investigation inter alia into: (i) the Government of Alberta's decision-making process in deciding to which companies Transition

[72] **Exhibit CL-140**, *AMERRA Capital Management, LLC and others v. United Mexican States,* ICSID Case No. UNCT/23/1, Procedural Order No. 3 on Bifurcation, dated 3 November 2023, para. 17; **Exhibit CL-63**, *Merrill & Ring Forestry L.P. v. The Government of Canada,* ICSID Case No. UNCT/07/1, Award, dated 31 March 2010, para. 268; **Exhibit CL-136**, *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2, dated 28 June 2018, para. 55; **Exhibit CL-142**, *Energía y Renovación Holding, S.A. v. Republic of Guatemala,* ICSID Case No. ARB/21/56, Procedural Order No. 2 on Bifurcation, para. 99.

> Payments should be made; (ii) how and when those decisions were reached; and, (iii) consideration of the wider factual matrix. Such analysis will clearly require traversing issues relating to the merits of the dispute".[73] [emphasis added].

83. Claimant's case is not merely that Mexico breached NAFTA by expropriating the Concession through the Rescate Declaration in 2016. In Claimant's own words, "Mexico's breach is the continuous failure to compensate CFCM and Mr. Willars as a consequence of the expropriation".[74] Similarly to the abovementioned case, assessing when Mr. Willars became aware of the fact that Respondent would not pay compensation for the termination of the Concession via the Rescate Declaration is significantly intertwined with the merits of Claimant's case.

84. Second, deciding the Second Objection may also require a thorough analysis of the merits, considering Claimant's argument that Respondent's "continuous breach" commenced before the termination of NAFTA and extended thereafter.[75] The Tribunal would be unable to rule on the Second Objection without also examining the alleged continuous nature of the breach, an issue for the merits.

85. The Tribunal notes that Respondent has referred to a handful of cases in which NAFTA tribunals have decided to bifurcate this particular objection. However, none of these cases are relevant.[76] Namely, because none of them analyzed the continuous nature of a breach that allegedly commenced before NAFTA's termination. As mentioned above, the alleged continuous nature of the breach is an issue to be determined at the merits stage.

86. Third, the Tribunal notes that Claimant's current position is that a ruling on the scope of Annex 14-C of the USMCA in the context of an alleged "continuous breach" that may

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73 **Exhibit CL-141**, *Westmoreland Mining Holdings LLC v. Government of Canada,* ICSID Case No. UNCT/20/3, Procedural Order No. 3 Decision on Bifurcation, dated 20 October 2020, para. 54.

74 Response, para. 55.

75 Response, para. 70; *See also*, **Exhibit CL-147**, *Société Générale v. Dominican Republic,* UNCITRAL, LCIA Case No. UN 7927 Award on Preliminary Objections to Jurisdiction, 19 September 2008, dated 19 September 2008, para. 90.

76 **Exhibit RL-4**, *Doups Holdings LLC c. Estados Unidos Mexicanos,* Caso CIADI No. ARB/22/24, Resolución Procesal No. 3. Decisión sobre Bifurcación, 16 de octubre de 2024, paras. 6-24; **Exhibit RL-5**, *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America,* ICSID Case No. ARB/21/63, Procedural Order No. 2, dated 13 April 2023, para. 4a; **Exhibit RL-23**, *Alberta Petroleum Marketing Commission v. United States of America,* ICSID Case No. UNCT/23/4, Procedural Order No. 4 on Application for Bifurcation, dated 7 August 2024, paras. 13-14; **Exhibit RL-24**, *Access Business Group LLC v. United Mexican States,* ICSID Case No. ARB/23/15, Procedural Order No. 3. Bifurcation, dated 29 August 2024, para. 17; **Exhibit CL-149**, *Access Business Group LLC v. United Mexican States,* ICSID Case No. ARB/23/15, Mexico's Request for Bifurcation, dated 12 July 2024, para. 11.

have begun before NAFTA's termination would indeed benefit from the *travaux préparatoires* of the USMCA.[77] Without prejudging any later decision on document production, at this early stage of the proceedings, the Tribunal is not in a position to determine that said argument is frivolous.

87. To date, Mexico has refused to provide such documents to Mr. Willars arguing that they should not be disclosed to the general public.[78] Thus, it is not excluded that Claimant is correct that a document production phase may be required before deciding the Second Objection. In prior cases regarding the same treaty and the same documents, the parties undertook lengthy discussions before producing the *travaux préparatoires* of the USMCA.[79] Without expressing any view on a future decision on document production, or the Parties' future positions thereto, on the balance of probabilities, the Tribunal considers that bifurcating the Second Objection may very well turn out to be inefficient.

88. Finally, the Tribunal notes that Respondent recognizes that "[t]he circumstances resulting from the combination of these two limitations [the First and Second Objections] are extremely complex".[80] Taking this assertion at face value, the Tribunal is of the view that it will be more efficient to determine these complex issues with the benefit of a full evidentiary record.

89. On the basis of the above, the Tribunal decides that the First and Second Objections will not be bifurcated but joined to the merits.

2. The Third Objection

90. The relevant part of Annex 14-C of the USMCA reads as follows:

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[77] Response, paras. 38-43; **Exhibit CL-133**, *Ruby River Capital LLC v. Canada*, ICSID Case No. ARB/23/5, Procedural Order No. 3, Decision on Respondent's Request for Suspension of the Proceedings and Other Requests, dated 9 April 2024, para. 38; **Exhibit CL-134**, *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Dissenting Opinion of Henry C. Alvarez, dated 12 July 2024, paras. 13-14.

[78] **Exhibit C-225**, Mexico's Response to Claimant's Freedom of Information Request No. 330025924001094, dated 10 September 2024, p. 5.

[79] **Exhibit CL-135**, *TC Energy Corporation and TransCanada Pipelines Limited. v. United States of America*, ICSID Case No. ARB/21/63, Award, dated 12 July 2024, paras. 31-53. The Tribunal notes that a similar document production in this case lasted from 11 September 2023 to 9 February 2024.

[80] Request for Bifurcation, para. 53.

> "1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:
>
> (a) Section A of Chapter 11 (Investment) of NAFTA 1994; […]
>
> 6. For the purposes of this Annex:
>
> (a) 'legacy investment' means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement;
>
> (b) 'investment', 'investor', and 'Tribunal' have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994;".[81]

91. In turn, the definition of "investment" under NAFTA Article 1139 is transcribed below:

> "**investment** means:
>
> (a) an enterprise;
>
> (b) an equity security of an enterprise; […]
>
> (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
>
> (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);
>
> (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
>
> (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
>
> (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or [...]
>
> but investment does not mean, [...]
>
> (j) any other claims to money,
>
> that do not involve the kinds of interests set out in subparagraphs (a) through (h)".[82] [bold in the original].

[81] **Exhibit CL-3**, United States-Mexico-Canada Agreement, dated 1 July 2020, Annex 14-C.

[82] **Exhibit CL-5**, NAFTA, dated 1 January 1994, Article 1139.

92. In essence, Respondent's position is that the Tribunal lacks jurisdiction over Mr. Willars' claim because, pursuant to Claimant's own case, the Concession was allegedly expropriated through the Rescate Declaration in 2016; therefore, Claimant's investment ceased to exist before 1 July 2020, when the USMCA entered into force.[83]

93. The Tribunal is of the view that deciding this preliminary objection, as formulated by Respondent, would not dispose of all or even a substantial portion of the dispute. Even if the Third Objection were successful, the Tribunal would still need to proceed to the merits phase because Claimant argued that his alleged "investments" extend beyond the Concession itself to include *inter alia*, his "interest in CFCM" and "claims to money" arising from the Concession. The latter's existence on the date when the USMCA entered into force (1 July 2020) has not even been questioned by Respondent.[84]

94. For these reasons, bifurcating the Third Objection would not materially reduce the time and costs of the proceedings.

95. On the basis of the above, the Tribunal declines to bifurcate the Third Objection and instead joins it to the merits.

3. The Fourth Objection

96. Article 1116 of NAFTA reads as follows:

> "**Article 1116: Claim by an Investor of a Party on Its Own Behalf**
>
> 1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,
>
> and that the investor has incurred loss or damage by reason of, or arising out of, that breach".[85] [bold in the original].

[83] Request for Bifurcation, paras. 59-61.

[84] Memorial on the Merits, paras. 215-226; Response, paras. 96-103.

[85] **Exhibit CL-5**, NAFTA, dated 1 January 1994, Article 1116.

97. Respondent's position is that all of Claimant's claims concern CFCM's alleged losses despite the fact that he cannot bring claims for reflective loss under NAFTA Article 1116.[86] On the other hand, Claimant submits that he is advancing: (i) claims for direct losses on behalf of CFCM under NAFTA Article 1117; and alternatively (ii) claims for direct losses of his own investments, including his 51.76% share participation in CFCM on his own behalf under NAFTA Article 1116.[87]

98. The Tribunal is of the view that the Fourth Objection is closely intertwined with the merits of the dispute and in particular with Claimant's case on damages. To properly address this objection, the Tribunal would need to assess the different sources of the losses that Claimant claims on behalf of CFCM and on his own behalf. Only then, the Tribunal would be able to determine if Claimant's claims under Article 1116 are merely a reflective loss of the damages suffered by CFCM, as Respondent suggests.

99. In other words, bifurcating the Fourth Objection would presuppose conducting a full and detailed analysis of the damages claimed by Claimant even before examining issues of liability in the merits phase.

100. On the basis of the above, the Tribunal declines to bifurcate the Fourth Objection and instead joins it to the merits.

4. The Fifth Objection

101. Article 1117 of NAFTA reads as follows:

> "**Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise**
>
> 1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that

[86] Request for Bifurcation, paras. 67-70.

[87] Response, paras. 111-113.

> the enterprise has incurred loss or damage by reason of, or arising out of, that breach".[88] [bold in the original and emphasis added].

102. In his Memorial, Mr. Willars asserted that through the SPA, on 14 December 2015, he acquired 16.38% of the shares of CFCM and 48% of the shares of Viabilis —another CFCM shareholder— which would allegedly give him a 51.76% controlling interest in CFCM.[89]

103. Respondent argues that Mr. Willars can only bring claims on behalf of CFCM under NAFTA Article 1117 if he demonstrates that he "owned" or "controlled" CFCM "directly" or "indirectly", which is not the case.[90] Respondent further contends that Mr. Willars cannot simply combine his own shares in CFCM (16.38%) with 48% of Viabilis' shares in CFCM to claim that he owns 51.76% of CFCM "unless there is a specific corporate structure or agreement (e.g., through voting agreements or controlling shareholder agreements)".[91]

104. On the other hand, Claimant argues that on 14 December 2015, Mr. Willars and Mr. [redacted]. In Claimant's view, those shares, combined with his 16.38% shares in CFCM (see paragraph 13 above), grant him exclusive control over 90% of CFCM's shares, which makes him the "unquestionable owner and controlling shareholder" of CFCM.[92]

105. Without forming a view on the matter, in the Tribunal's current understanding, the issue of Mr. Willars' ownership and/or control of CFCM raised by Respondent seems to be serious and substantial. Moreover, Claimant did not submit [redacted].

106. In addition, the issues that need to be decided when ruling on the Fifth Objection (whether and at which points in time Mr. Willars owned and/or controlled CFCM) can be separated

88 **Exhibit CL-5**, NAFTA, dated 1 January 1994, Article 1117.

89 Memorial on the Merits, para. 19.

90 Request for Bifurcation, paras. 78-80.

91 Request for Bifurcation, paras. 83-84.

92 Response, para. 131.

from the rest of the dispute. Indeed, this type of objection has been typically bifurcated by investment tribunals in the past.[93] Furthermore, determining these issues at an earlier stage of the proceedings may enhance the overall efficiency since, if successful, this objection would dispose of a substantial portion of the dispute.

107. On the basis of the above, the Tribunal bifurcates the Fifth Objection.

5. The Sixth and Seventh Objections

108. At this early stage of the proceedings, based on preliminary submissions and an incomplete record, the Tribunal is not in a position to determine, even on a *prima facie* basis, whether the Sixth and Seventh Objections are not serious and substantial, as Claimant suggests.

109. In circumstances where the Tribunal has already decided to conduct a preliminary phase of the proceedings to address the Fifth Objection, it seems expedient for such phase to also comprise the Sixth and Seventh Objections.

110. The Tribunal considers that the distinct issues that need to be assessed to resolve the Sixth and Seventh Objections are capable of being severed from the rest of the dispute.

111. Regarding the Sixth Objection, the Tribunal will effectively need to assess whether: (i) Mexican Law required Mr. Willars to obtain prior authorization from the National Foreign Investment Commission to acquire more than 49% of CFCM; and (ii) the effect, if any, of Mexico's alleged implied waiver.

112. Additionally, it is undisputed that the issues under the Seventh Objection are not intertwined with the merits of the dispute. To decide this objection the Tribunal is required to analyse whether Mr. Willars waived his rights to bring a claim under NAFTA.

113. Furthermore, determining these issues at an earlier stage may enhance the overall efficiency of the proceedings since, if successful, these objections may dispose of the entire arbitration.

[93] **Exhibit RL-4**, *Doups Holdings LLC c. Estados Unidos Mexicanos*, Caso CIADI No. ARB/22/24, Resolución Procesal No. 3. Decisión sobre Bifurcación, 16 de octubre de 2024, para. 66.

114. On the basis of the above, the Tribunal decides to bifurcate the Sixth and Seventh Objections.

* * *

115. Finally, Claimant requests the Tribunal to order Respondent to pay the costs and expenses incurred in responding to Respondent's Request for Bifurcation.[94] Respondent has remained silent in this regard.

116. The Tribunal's view is that it will be more efficient to defer its decision on costs to a later stage of the proceedings.

VII. DECISIONS

117. For these reasons, the Tribunal decides as follows:

- Respondent's request to bifurcate the Fifth, Sixth and Seventh Objections is granted;
- The proceedings regarding these bifurcated objections shall continue under Scenario 1 of Annex B of Procedural Order No. 1;
- The Tribunal defers its decision on costs to a later stage of the proceedings; and
- All other requests are denied.

On behalf of the Tribunal,

[*signed*]

_____

Bernard Hanotiau
President of the Tribunal
Date: 24 March 2025

[94] Response, para. 195.