

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Fotowatio Renewable Ventures S.L.U., FRV Solar Holdings III, S.L.U. and
FRV Solar Holdings VI, S.L.U.**

v.

United Mexican States

(ICSID Case No. ARB/24/5)

PROCEDURAL ORDER NO. 3

DECISION ON BIFURCATION

Members of the Tribunal

Sir Christopher Greenwood, GBE, CMG, KC, President of the Tribunal
Mr. Henri C. Alvarez, KC, Arbitrator
Prof. Mónica Pinto, Arbitrator

Secretary of the Tribunal

Ms. Gabriela González Giráldez

14 April 2025

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I. INTRODUCTION AND PARTIES

1. This Procedural Order addresses the request for bifurcation submitted by the United Mexican States (“**Mexico**” or the “**Respondent**”) on 24 February 2025, in which it asks the Tribunal to bifurcate the proceeding to address the objections to jurisdiction as a preliminary question pursuant to ICSID Arbitration Rules 42 and 44. Fotowatio Renewable Ventures S.L.U. (“**FRV**”), FRV Solar Holdings III, S.L.U. (“**FRV III**”) and FRV Solar Holdings VI, S.L.U. (“**FRV VI**”) (together the “**Claimants**”) object to the request. The Claimants and the Respondent are collectively referred to as the “**Parties**.”

II. PROCEDURAL BACKGROUND

2. On 20 February 2024, ICSID received a request for arbitration from FRV, FRV III and FRV VI against Mexico pursuant to the Agreement on the Promotion and Reciprocal Protection of Investments between the United Mexican States and the Kingdom of Spain (the “**Treaty**”), together with exhibits C-0001 to C-0046. The Claimants supplemented their request by letters of 7 and 8 March 2024, and exhibits C-0047 to C-0050 (the “**Request for Arbitration**”).
3. On 13 March 2024, the Secretary-General registered the Request for Arbitration in accordance with Article 36(3) of the Convention.
4. On 23 July 2024, the Tribunal was constituted in accordance with Article 37(2)(a) of the Convention.
5. On 5 September 2024, the Tribunal held the first session by videoconference.
6. Following the first session, on 11 September 2024, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed procedural issues. Procedural Order No. 1 confirmed, *inter alia*, that the applicable ICSID Arbitration Rules are those in force as of 1 July 2022 (the “**Arbitration Rules**”). Procedural Order No. 1 also set out a procedural timetable. On the same date, the Tribunal issued Procedural Order No. 2 on transparency and confidentiality, which was entirely agreed by the Parties.

Procedural Order No. 3

7. On 18 December 2024, the Parties informed the Tribunal of a short extension agreed between the Parties for the filing of the Claimants' Memorial.
8. On 20 December 2024, further to the Tribunal's instructions, the ICSID Secretariat circulated a procedural calendar amended per the Parties' agreement of 18 December 2024.
9. On 10 January 2025, the Claimants filed their memorial on the merits, together with the witness statement of [REDACTED]; the expert report of [REDACTED] and [REDACTED], of Berkeley Research Group LLC; the expert report of [REDACTED] and [REDACTED], of John Wood Group PLC; exhibits C-0051 to C-0179; and legal authorities CL-0001 to CL-0084 (the "**Memorial on the Merits**").
10. On 24 February 2025, the Respondent filed a request for bifurcation with exhibits R-0001 to R-0002 and legal authorities RL-0001 to RL-0019 (the "**Request for Bifurcation**").
11. By letter of 28 February 2025, the Tribunal acknowledged receipt of the Request for Bifurcation. In accordance with Arbitration Rule 44(1)(c), the proceeding on the merits was suspended pending the Tribunal's decision on whether to bifurcate the proceeding. The Tribunal invited the Claimants to submit their observations on the Request for Bifurcation by 14 March 2025.
12. On 14 March 2025, the Claimants filed Observations on the Request for Bifurcation, together with legal authorities CL-0085 to CL-0114 (the "**Observations**").
13. Having considered the Parties' submissions, the Tribunal's decision on bifurcation is issued herein as Procedural Order No. 3. After summarising the Parties' positions in **Section III**, the Tribunal analyses the Request in **Section IV**. The Tribunal's decision is set out in **Section V**. A new procedural timetable is annexed to this decision.

III. SUMMARY OF THE PARTIES' POSITIONS

14. The Tribunal is grateful for the comprehensive submissions of the Parties which it has carefully considered. The summaries included in this decision are not intended to be exhaustive descriptions of the Parties' submissions. The objective is to provide the relevant context for the Tribunal's analysis and findings.

A. THE RESPONDENT’S POSITION

15. Mexico argues that the Claimants have the burden of establishing that the Tribunal has jurisdiction under the Treaty, but that the Memorial on the Merits “*does not even come close to satisfying this burden of proof.*”¹ Therefore, Mexico requests the Tribunal to decide, as a preliminary matter, four jurisdictional objections to avoid the onerous and costly process of litigating a dispute, or a substantial part thereof, over which it maintains that the Tribunal lacks jurisdiction. Mexico’s objections are based on the facts and claims as described by the Claimants in their Memorial on the Merits but should not be construed as an acceptance of the Claimants’ factual narrative or of the Respondent’s international responsibility.²

(1) Criteria for bifurcation

16. The Respondent argues, by reference to *SPP v. Egypt*, that “*there is no presumption of jurisdiction – particularly where a sovereign State is involved.*”³ It is accepted practice in international arbitration to bifurcate proceedings with respect to the tribunal’s jurisdiction where it ensures efficiency in the proceeding through the early resolution of preliminary questions that resolve all or substantial parts of a case and narrow down the disputed issues.⁴
17. Mexico raises preliminary objections and requests their bifurcation pursuant to Arbitration Rules 42 and 44. It argues that the Tribunal has discretion to consider “*all relevant circumstances*”,⁵ including three main – but non-exhaustive – criteria for determining whether to bifurcate: *first*, whether bifurcation would significantly reduce the time and cost of the proceeding; *second*, whether the decision would dismiss all or a substantial part of the dispute, and *third*, whether the preliminary objection and the merits are so closely linked that bifurcation would be impractical.⁶ Mexico further adds that the *Doups v. Mexico* tribunal recently noted that “*the evaluation of the efficiency of a bifurcation involves not only an analysis of the possible duration of a bifurcated arbitration –both in the hypothesis of a total rejection of the preliminary objections and in which*

¹ Request for Bifurcation, para. 4.

² Request for Bifurcation, para. 10.

³ Request for Bifurcation, para. 22, citing *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 14 April 1988, para. 63, **RL-0001**.

⁴ Request for Bifurcation, para. 23.

⁵ Request for Bifurcation, para. 27.

⁶ Request for Bifurcation, para. 24.

one or more of them are accepted— compared to the possible duration of a non-bifurcated arbitration, but also an evaluation of the possible reduction in costs that could result from the limitation or simplification of the matters to be decided in a merits phase in the event that one or more of the preliminary objections are accepted.”⁷

18. As to the third main criterion, the Respondent quotes the *TC Energy* tribunal, which stated that

[t]he requirement that the jurisdictional objection not be intertwined with the merits aims at avoiding the risk of a duplication of factual arguments and evidence in the jurisdiction and merits phase in case of a decision in favor of jurisdiction. To militate against bifurcation, it is therefore not only necessary that the jurisdictional objection needs to assess questions of fact – which may, as the case may be, require the hearing of witnesses – but also that these questions of fact be duplicative of questions and evidence that would need to be addressed in a possible merits phase.⁸

19. Mexico thus contends that, in the exercise of its discretion, the Tribunal may determine that bifurcation is justified because one or more of the multiple objections, considered together, satisfy Rule 44(2)⁹ – an approach adopted by the tribunal in *Doups v. Mexico* to bifurcate in light of similar objections.¹⁰
20. According to the Respondent, its four objections would be sufficient to meet the threshold to bifurcate the jurisdictional and merits phases.¹¹

(2) First Objection

21. The Respondent’s first objection is that the Tribunal lacks jurisdiction *ratione materiae* because the Claimants did not have ownership or control over the investments at the time of the alleged breaches.
22. *First*, Mexico argues that the Claimants have not proved with evidence that the investments were “owned or controlled by” them at the time of the Second Curtailment (4 January 2022) and the

⁷ Request for Bifurcation, para. 25, citing *Doups Holdings LLC v. United Mexican States*, ICSID Case No. ARB/22/24, Procedural Order No. 3, Decision on Bifurcation, 16 October 2024, para. 53, **RL-0004**.

⁸ Request for Bifurcation, para. 26, citing *TC Energy Corporation and TransCanada Pipelines Ltd. v. United States of America*, ICSID Case No. ARB/21/63, Procedural Order No. 2, 13 April 2023, para. 28, **RL-0006**.

⁹ Request for Bifurcation, para. 27.

¹⁰ Request for Bifurcation, para. 28.

¹¹ Request for Bifurcation, para. 31.

denial of COD Declaration (24 January 2022).¹² Given that the Treaty does not define “ownership” or “control”, Mexico relies on the ordinary meaning of the terms according to which “ownership” is the “right or power to possess something and to dispose of it within legal limits” and “control” is the exclusive power over the investments to the exclusion of any other person or entity.¹³

23. Mexico maintains that, at the relevant times, the Claimants had neither. [REDACTED]
[REDACTED]
[REDACTED]¹⁴ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁵ [REDACTED]
[REDACTED] FRV Potosí’s [REDACTED].

24. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁶ [REDACTED] FRV Potosí [REDACTED]
[REDACTED]¹⁷

25. [REDACTED]
[REDACTED]
[REDACTED] FRV Potosí [REDACTED]¹⁸

¹² Request for Bifurcation, paras. 32, 34. The Declaration was a declaration of entry into commercial operation.

¹³ Request for Bifurcation, para. 33.

¹⁴ Request for Bifurcation, para. 35.

¹⁵ Request for Bifurcation, para. 36, citing Memorial on the Merits, para. 113 and footnote 265 (emphasis by the Respondent).

¹⁶ Memorial on the Merits, para. 113, footnote 265.

¹⁷ Request for Bifurcation, para. 37. [REDACTED]
[REDACTED] FRV Potosí [REDACTED].

¹⁸ Request for Bifurcation, para. 38.

26. [REDACTED]
[REDACTED] FRV Potosí. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] FRV Potosí [REDACTED]
[REDACTED]¹⁹
27. [REDACTED]
[REDACTED]
[REDACTED] FRV Potosí [REDACTED]
[REDACTED] FRV Potosí, [REDACTED]
[REDACTED] FRV Potosí [REDACTED]
[REDACTED] FRV Potosí [REDACTED]
[REDACTED]²⁰
28. *Thirdly*, the Respondent adds that, [REDACTED]
[REDACTED], Mexico would face multiple actions over exactly the same
circumstances, exposing it to the risk of conflicting decisions or double recovery.²¹
29. *Finally*, Mexico maintains that this objection meets the bifurcation standard as it does not require
an examination of the merits of the dispute, but only an analysis of certain facts to determine
whether the investments “[were] owned or controlled by” the Claimants on the dates of the alleged
breaches. The test for bifurcation is whether an objection is intrinsically intertwined with the merits,
not that it does not involve any factual analysis at all. On this issue, the tribunal in *Doups* bifurcated
the procedure in order to analyse the concepts of “ownership” and “control” in the context of
NAFTA, noting that, although a factual analysis had to be undertaken, “*such an examination should
not be duplicative of the evidence to be analyzed in the merits phase*”.²² Moreover, deciding the
first objection would significantly reduce the time and cost of the arbitration, since “*the claims*

¹⁹ Request for Bifurcation, paras. 39-40.

²⁰ Request for Bifurcation, para. 41.

²¹ Request for Bifurcation, para. 42.

²² Request for Bifurcation, para. 44.

would be dismissed in their entirety” and it would not be necessary to conduct a merits or damages phase.²³

(3) Second Objection

30. The second objection is that the Tribunal lacks jurisdiction *ratione personae* because the Claimants have not demonstrated that they have suffered direct losses as a result of the alleged breaches, and lack standing to claim directly, as their own, the losses suffered by FRV Potosí.
31. *First*, Mexico argues that the damages sought by the Claimants are damages allegedly suffered by FRV Potosí directly and only indirectly by the Claimants. The Claimants do not allege that they have suffered any direct impact on their rights as shareholders or as creditors. The losses claimed are thus derivative or reflective losses.²⁴
32. *Secondly*, the Respondent maintains that the Claimants lack standing to bring, on their own, a claim for losses suffered by FRV Potosí. To do so, they would have had to file a claim on its behalf. However, that is not possible because [REDACTED] FRV Potosí [REDACTED] and (ii) FRV Potosí agreed in the MEM Participant Agreement to settle any dispute related to its operation within the electricity market and in the SEN in a different forum.²⁵
33. *Thirdly*, Article X.3 of the Treaty states that:

Purpose X. Purpose, Scope of Application and Time Limits

*An investor of a Contracting Party may, on his own behalf or on behalf of an enterprise owned by him or under his direct or indirect control, submit a claim to arbitration to the effect that the other Contracting Party has failed to comply with an obligation under this Agreement, provided that the investor or his investment has suffered losses or damages by virtue of the alleged violation or as a consequence thereof.*²⁶

²³ Request for Bifurcation, para. 45.

²⁴ Request for Bifurcation, para. 46.

²⁵ Request for Bifurcation, para. 46. These points are further developed in the third and fourth objections, *infra*.

²⁶ Request for Bifurcation, para. 47, citing Treaty, Article X.3, C-0001 (Respondent’s unofficial translation).

34. For the Respondent, Article X.3 allows two types of claims: (i) the claim of an investor on its own behalf (direct losses), and (ii) the claim of an investor on behalf of an enterprise that the investor owns or controls (reflective losses), to avoid compensating a shareholder (or creditor) for losses suffered directly by the enterprise of which he is a shareholder (or creditor).²⁷ Mexico argues that this distinction was made clear in international law in the *Barcelona Traction* case²⁸ and that, since then, various tribunals have confirmed it in the context of Articles 1116 and 1117 of the North American Free Trade Agreement (NAFTA) and the Dominican Republic-Central America Free Trade Agreement (DR-CAFTA), which provide for the same types of claims.²⁹
35. The two types of claims in Article X.3 do not overlap. If an investor files a claim on its own behalf, it cannot claim reflective losses. Conversely, if it files a claim on behalf of a company, it cannot claim direct losses. Thus, Article X.3 should be interpreted so as to avoid compensating an investor directly for a claim that should have been brought on behalf of the company.³⁰ Here, the Claimants submitted the Request for Arbitration on their own behalf and “[a]t no time did they give any indication that they were submitting a claim on behalf of FRV Potosí.”³¹ Nor have they indicated how the alleged breaches affected them or distinguished the losses they allegedly incurred from the losses incurred by FRV Potosí. The Claimants seek to present FRV Potosí’s losses as their own.³²
36. The Claimants thus seek reflective losses, and it is clear from the Memorial that CENACE’s alleged measures were directed exclusively against FRV Potosí, not against the Claimants as shareholders or creditors. Consequently, the damages or losses allegedly suffered by the Claimants were only an indirect consequence of CENACE’s actions and their impact on FRV Potosí.³³
37. *Fourthly*, in any event, Mexico contends that the Claimants are not the ones who would have suffered losses. [REDACTED]
- [REDACTED]

²⁷ Request for Bifurcation, para. 48.

²⁸ Request for Bifurcation, para. 49, citing the Judgment of the International Court of Justice in *Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain)*, ICJ Reports, 1970, para. 47, **RL-0012**.

²⁹ Request for Bifurcation, para. 50.

³⁰ Request for Bifurcation, para. 51.

³¹ Request for Bifurcation, para. 52.

³² Request for Bifurcation, para. 52.

³³ Request for Bifurcation, para. 53.

[REDACTED]”³⁴ [REDACTED]
[REDACTED] FRV Potosí’s [REDACTED]
[REDACTED] FRV Potosí’s [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁵

38. *Finally*, this objection meets the bifurcation criteria. It is not intertwined with the merits of the dispute as the scope of the two types of claims in Article X.3 is a question of treaty interpretation, *i.e.*, a legal question involving limits to the Tribunal’s jurisdiction. Moreover, the nature of the breaches and losses can be determined by reading the Memorial on the Merits. The bifurcation of this objection would materially reduce the time and cost of the proceeding and resolve the dispute entirely either on its own or joined to the third objection.³⁶

(4) Third Objection

39. The third objection is that, even assuming that the Claimants’ claims had been brought on behalf of FRV Potosí, the Claimants lack standing to bring a claim on behalf of FRV Potosí because they had neither ownership nor control of FRV Potosí at the time of the alleged breaches and on the date of the Request for Arbitration.
40. *First*, Mexico argues that in order to bring claims on behalf of a local company under Article X.3 of the Treaty, the investor must demonstrate, with evidence, that the company is “*owned by [it] or under [its] direct or indirect control.*” Thus, the Claimants must show that FRV Potosí is owned or controlled directly or indirectly by them to establish jurisdiction. As explained in the first objection, the Claimants did not own or control FRV Potosí on the relevant dates.³⁷
41. *Secondly*, Article X.3 has yet to be interpreted. However, referring to tribunals that have interpreted the similarly worded NAFTA Article 1117, Mexico argues that ownership or control must be established at least on (i) the date on which the breach occurs and (ii) the date on which the claims

³⁴ Memorial on the Merits, para. 239.

³⁵ Request for Bifurcation, paras. 54-55.

³⁶ Request for Bifurcation, paras. 56-57.

³⁷ Request for Bifurcation, para. 59.

are submitted to arbitration; and that “ownership” in this context means full ownership of the company (*i.e.*, ownership of all shares) and “control” is the exclusive power to direct a company to the exclusion of any other person or entity.³⁸

42. The Claimants have not shown that they owned or controlled FRV Potosí at the time of the alleged breaches (4 and 25 January 2022) or when the claims were submitted to arbitration (20 February 2024).³⁹ [REDACTED] FRV Potosí [REDACTED]
[REDACTED]
[REDACTED] FRV Potosí [REDACTED].⁴⁰

43. Nor do the Claimants control FRV Potosí. [REDACTED]
[REDACTED]
[REDACTED].⁴¹ At most, the Claimants could claim to have managerial control over FRV Potosí, which is insufficient.⁴²

44. *Finally*, Mexico contends that this objection meets the criteria for bifurcation for the same reasons as the first objection. In addition, this objection would dismiss the claims entirely if considered together with the second objection. Even separately, the bifurcation of this objection would remove any losses allegedly suffered by FRV Potosí from the equation and allow the parties to focus their efforts on addressing the breaches and losses allegedly suffered by the Claimants.⁴³

(5) Fourth Objection

45. The fourth objection is that the Claimants’ claims are beyond the Tribunal’s jurisdiction because FRV Potosí and CENACE agreed to the dispute resolution procedure established in the Market Rules and to abide by Mexican legislation, and that, “[i]f the dispute is not resolved in accordance with [said procedure], it may be submitted to the jurisdiction of the Federal Courts in the Federal District, waiving any jurisdiction that may correspond to them by reason of their present or future

³⁸ Request for Bifurcation, para. 60.

³⁹ Request for Bifurcation, para. 61.

⁴⁰ Request for Bifurcation, para. 62.

⁴¹ Request for Bifurcation, para. 63.

⁴² Request for Bifurcation, para. 64.

⁴³ Request for Bifurcation, paras. 65-66.

domicile".⁴⁴ This procedure applies to disputes between CENACE and market participants regarding instructions of operational control of the SEN and suspension or restriction of activities in the market due to non-compliance of the Market Rules by CENACE. In other words, the measures that the Claimants complain of in this case.⁴⁵

46. Therefore, Mexico argues that the Tribunal should apply the *forum non conveniens* doctrine as the correct forum to consider the Claimants' claims is the dispute resolution procedure established in the MEM Participant Agreement.⁴⁶
47. This objection also meets the bifurcation criteria because it will only require the interpretation and application of the dispute resolution clause in the MEM Participant Agreement, which is a well-defined matter of a strictly legal nature. In addition, this objection would dismiss the entirety of the claims because the two alleged breaches are the subject of the dispute resolution procedure established in the MEM Participant Agreement. Thus, it would be much more efficient and less costly to bifurcate the arbitration.⁴⁷

(6) A Further Jurisdictional Objection

48. Mexico also states that, pursuant to Arbitration Rule 43(2), it has identified a further possible jurisdictional objection related to the nationality of the Claimants, who it maintains are owned and controlled by Abdul Latif Jameel (ALJ), a Saudi company. ALJ acquired 100% of FRV and its portfolio of power projects on 8 April 2015 and, as of the Request for Bifurcation, maintains ownership of FRV. Mexico argues that the Treaty does not grant protection to "*investors*" from a third State that have not assumed the commitments of the Treaty. Although this is not one of the objections which Mexico has advanced in its Request for Bifurcation, Mexico reserves its right to develop this objection "*at the appropriate procedural time*".⁴⁸
49. Therefore, without prejudice to the Respondent's submission of additional jurisdictional and admissibility objections relating to disputed facts or arising from the Tribunal's decision on the

⁴⁴ Request for Bifurcation, para. 67.

⁴⁵ Request for Bifurcation, para. 69.

⁴⁶ Request for Bifurcation, para. 70.

⁴⁷ Request for Bifurcation, paras. 71-72. MEM Participant Agreement stands for "Market Participant Agreement in the Modality of Generator between CENACE and FRV Potosí [REDACTED]".

⁴⁸ Request for Bifurcation, para. 31 and footnote 30.

four objections to jurisdiction hereto, Mexico requests the Tribunal to hear the four jurisdictional objections as a preliminary matter, separately from the merits; stay the proceeding on the merits; and address the jurisdictional objections as a preliminary matter.⁴⁹

B. THE CLAIMANTS' POSITION

50. The Claimants' position is that Mexico's application to bifurcate is unfounded. The purpose of bifurcation is to ensure increased procedural efficiency. Mexico has not demonstrated that this goal would be served *in casu*. None of Mexico's objections are serious and substantial. All objections are intertwined with the merits and require a review of evidence. Moreover, in the absence of any jurisdictional objection in respect of FRV III, the case will have to proceed to the merits in any event. Bifurcation would thus only lead to unnecessary delay in these proceedings, along with a corresponding material increase in costs and should be rejected.⁵⁰

(1) Criteria for Bifurcation

51. According to the Claimants, it is undisputed that Arbitration Rule 44(2) sets out the test to decide whether to bifurcate proceedings. Rule 44(2) sets a high threshold whereby bifurcation is only warranted when it results in material time and cost savings. Accordingly, if bifurcation will not yield material procedural efficiencies, the ICSID Arbitration Rules require the Tribunal to refrain from bifurcation.⁵¹
52. The Claimants do not dispute that "*there is no presumption of jurisdiction*". However, they argue there is no "*accepted practice*" in favour of bifurcation as it rarely improves procedural efficiency.⁵²
53. Pursuant to Arbitration Rule 44(2), bifurcation is appropriate only in limited circumstances. According to the Claimants, in determining whether bifurcation would lead to material improvements in procedural efficiency, tribunals are bound by three cumulative elements: (i) whether bifurcation would materially reduce the time and cost of the proceeding; (ii) whether the determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and (iii) whether the preliminary objection and the merits are so intertwined as to make

⁴⁹ Request for Bifurcation, para. 73.

⁵⁰ Observations, para. 23.

⁵¹ Observations, para. 12.

⁵² Observations, paras. 13-14.

bifurcation impractical. According to the Claimants, the fact that tribunals are directed to consider “*all relevant circumstances*” simply means that, while cumulative, these criteria are not exhaustive.⁵³ When, as here, the Respondent raises multiple objections, bifurcation is not justified unless all of them satisfy the three-fold test. Partial bifurcations are not in the interest of efficiency.⁵⁴

54. An objection must be *prima facie* serious and substantial to justify bifurcation. In cases where a state has made reservations to bring additional jurisdictional objections, tribunals apply a heightened standard in assessing the seriousness of an objection.⁵⁵ The Tribunal should also consider whether Mexico’s objections are intertwined with the merits or require a review of evidence best undertaken at the merits stage. The Claimants stress that, while Mexico acknowledges that bifurcation is not warranted when the preliminary objections hinge on questions or evidence that would also need to be addressed at the merits stage, it distorts the test by arguing its objections are “*independent*”, “*can be resolved without making any determinations of the merits of the claim*” or “*would not involve any factual analysis*”.⁵⁶
55. In addition, the Claimants emphasise that, in cases where the objection “*involve[s] facts that are inextricably linked to the merits*”, bifurcating would cause duplication of efforts, because the Tribunal would have to “*review the same or substantially the same evidence in the next phase of the proceedings, dedicated to liability*” and could harm due process, since this would entail prejudging some of the issues of fact without having heard all the relevant evidence.⁵⁷
56. The Claimants contend that none of the four objections raised by Mexico satisfy this test.

(2) First Objection

57. The Claimants maintain that bifurcation of the first objection would not achieve procedural efficiency.

⁵³ Observations, paras. 15-16.

⁵⁴ Observations, para. 17.

⁵⁵ Observations, para. 18.

⁵⁶ Observations, para. 19.

⁵⁷ Observations, para. 20.

58. *First*, they argue that they have demonstrated that they owned or controlled the investments at the time that Mexico breached the Treaty:

– Article I.4 of the Treaty requires the Claimants to have ownership or control of their investments.

– FRV Potosí [REDACTED]
[REDACTED] FRV Potosí [REDACTED]
[REDACTED]
[REDACTED] FRV Potosí [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] FRV Potosí.⁵⁸

– [REDACTED]
[REDACTED] FRV Potosí. [REDACTED]
[REDACTED]
[REDACTED] FRV Potosí [REDACTED]
[REDACTED] FRV Potosí.⁵⁹

– tribunals regard control as “*a flexible concept, which can only be determined case by case in the light of the particular facts*”, and that control can be “*exercised in various manners*.”⁶⁰ In *Thunderbird v. Mexico*, the tribunal held that control can be legal or *de facto* and considered the investor’s involvement at key stages of the development of the investment, such as the planning of the business activities and the initial expenditures and capital to conclude that the investor controlled the investment.⁶¹ Mexico cites the dissenting opinion in *B-Mex LLC v.*

⁵⁸ Observations, paras. 26-27.

⁵⁹ Observations, para. 28.

⁶⁰ Observations, para. 29, citing *United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019, **CL-0102-ENG**, para. 366; and *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL), Award, 26 January 2006, **CL-0091-ENG**, para. 106.

⁶¹ Observations, para. 31.

Mexico, but does not address the majority’s decision that control “*means both legal capacity to control and de facto control*” and its application of the *Thunderbird* standard.⁶²

- Mexico concedes that FRV III controls its investment in FRV Potosí.⁶³ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] FRV Potosí [REDACTED]
[REDACTED].⁶⁴
- [REDACTED] FRV Potosí [REDACTED]
[REDACTED] FRV Potosí [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [FRV
Potosí’s] [REDACTED]⁶⁶ [REDACTED]
[REDACTED]
[REDACTED]⁶⁷
- [REDACTED]
[REDACTED]
[REDACTED] FRV Potosí. [REDACTED]
[REDACTED]
[REDACTED] FRV Potosí.⁶⁸

⁶² Observations, para. 32, citing *B-Mex LLC v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, paras. 213-214 and 221, **CL-0104**.

⁶³ Observations, para. 33.

⁶⁴ Observations, para. 34.

⁶⁵ Observations, para. 35.

⁶⁶ Observations, para. 36, [REDACTED]
[REDACTED].

⁶⁷ Observations, para. 36.

⁶⁸ Observations, para. 37.

- if the Tribunal concludes that FRV III and FRV VI controlled their investments in FRV Potosí then it does not need to address the issue of ownership.⁶⁹
- in any event, the Claimants have established that they owned the investments when Mexico breached the Treaty. [REDACTED] FRV Potosí [REDACTED].⁷⁰ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁷¹
- Mexico asserts that [REDACTED] could also bring a claim similar to that of the Claimants, forcing Mexico to defend multiple actions over the same circumstances, exposing it to the risk of conflicting decisions or double recovery. However, the risk of conflicting decisions can arise in any investment arbitration in which various stakeholders (creditors and shareholders, for example) hold investments in an affected business. In this case, there is no risk of double recovery as all amounts claimed are distinct from losses suffered by [REDACTED]. In any event, this is a matter that goes to quantum or enforcement, rather than to jurisdiction.⁷²

59. *Secondly*, this objection is deeply intertwined with the merits. Mexico admits that the Tribunal would have to explore the facts to determine who had control over the investments at the time of breach of the Treaty, which includes reviewing (i) documents related to the [REDACTED] interconnection process, (ii) communications with Mexican authorities, including those relevant to the Second Curtailment and the denial of the COD Declaration, and (iii) testimony from the [REDACTED] FRV Potosí. Numerous tribunals have refused to bifurcate objections such as this one, holding that such objections involve facts better developed along with the merits.⁷³

⁶⁹ Observations, para. 38.

⁷⁰ Observations, para. 40.

⁷¹ Observations, para. 41.

⁷² Observations, para. 42.

⁷³ Observations, paras. 44-46.

60. The Claimants further stress that, when there are overlapping issues of jurisdiction and merits, procedural concerns arise and the Tribunal risks prejudging issues of jurisdiction germane to liability before hearing all the relevant evidence which will become available at the quantum stage. This potential prejudice “*cannot be undone*”. Thus, many tribunals have declined to bifurcate for precisely this reason.⁷⁴

61. *Thirdly*, even if upheld this objection would not dispose of the dispute or reduce time and costs.

[REDACTED]
[REDACTED]
[REDACTED] FRV Potosí.⁷⁵ [REDACTED]
[REDACTED] FRV
Potosí [REDACTED]
[REDACTED].⁷⁶

(3) Second Objection

62. The Claimants contend the second objection is not serious or substantial and that, in any event, it is deeply intertwined with the merits and would require a duplicative review of evidence.

63. *First*, they maintain that this objection does not satisfy the “*serious and substantial*” test because Mexico mischaracterizes the Claimants’ quantum case. The Claimants seek compensation for the harm that they suffered through their equity and debt interests in the investments. This is very different from reflective loss.⁷⁷

64. *Secondly*, they add that the objection is misconceived as a matter of law. If a claimant qualifies as an investor under the relevant treaty and has made a qualifying investment, any State measures in breach of the applicable treaty that affect the value of the investment are actionable. The fact that the Claimants are not the direct target of the measure is irrelevant. [REDACTED]

[REDACTED] FRV Potosí’s [REDACTED]
[REDACTED]
[REDACTED]. Tribunals have consistently confirmed that loss in equity value of a

⁷⁴ Observations, para. 47.

⁷⁵ Observations, paras. 4, 48.

⁷⁶ Observations, para. 48.

⁷⁷ Observations, para. 50.

shareholding in a locally established entity is compensable, provided that the claimant is a qualifying investor and the shareholding is a protected investment.⁷⁸

65. *Thirdly*, the second objection is deeply intertwined with the merits as the apportionment of the Claimants' losses is a quantum issue. Any consideration of the nature of the damages sought by the Claimants would be closely intertwined with issues of liability and quantum, requiring expert testimony, analysing the same factual and expert evidence that would be relied upon by the Claimants when arguing their damages case. Mexico admits that this objection requires understanding the nature of the breaches and the losses of the Claimants.⁷⁹

(4) Third Objection

66. The Claimants contend this objection is neither serious nor substantial as it relies on "*an imaginary scenario*" whereby, had the Claimants brought the dispute on behalf of FRV Potosí, they would lack standing to do so under Article X.3. The Claimants stress that Mexico acknowledges that the Claimants submitted this arbitration on their own behalf. The Tribunal should not bifurcate the proceedings because of a hypothetical jurisdictional situation.⁸⁰

(5) Fourth Objection

67. The Claimants argue that this objection is premised on a misrepresentation of the claims and is wrong as a matter of law.
68. *First*, the Claimants' claim a breach of the Treaty's FET standard not of CENACE's obligations under the Market Participation Agreement. This is a claim brought by the Claimants, who are not party to the Market Participation Agreement, not by FRV Potosí.⁸¹ There is nothing preventing a claim under an investment treaty from addressing facts also relevant to performance under a contract.⁸² The *Vivendi I* annulment committee developed a test to decide whether "*the essential basis of a claim brought before an international tribunal is a breach of contract,*" or "*a treaty*

⁷⁸ Observations, para. 51.

⁷⁹ Observations, paras. 52-54.

⁸⁰ Observations, paras. 55-56.

⁸¹ Observations, para. 57.

⁸² Observations, para. 58.

laying down an independent standard by which the conduct of the parties is to be judged".⁸³
Mexico's reference to the *MOX Plant* case is inapposite.⁸⁴

69. *Secondly*, the Claimants argue this objection is deeply intertwined with the merits as it not only concerns the Market Participation Agreement but goes to the nature of the claims on the merits, requiring the Tribunal to (i) consider each of the Claimants' allegations of treaty breach to determine whether they are in fact contractual in nature, (ii) assess the full range of documents and witness evidence supporting those claims, and (iii) consider the regulatory framework. Many tribunals have refused to bifurcate similar objections.⁸⁵
70. *Finally*, the Claimants contend that bifurcation would not provide greater efficiency or fairness because Mexico has already announced it will bring an additional jurisdictional objection. The Claimants refer to the *BA Desarrollos v. Argentina* case, where the tribunal held that a State's reservation of the right to advance more jurisdictional objections undermines any efficiencies that could be generated by bifurcation. Thus, the Tribunal should decide Mexico's present and future jurisdictional objections together with the merits with a single briefing schedule and hearing.⁸⁶
71. The Claimants, therefore, request the Tribunal to deny Mexico's Request for Bifurcation and order Mexico to pay all the costs and expenses incurred by the Claimants in connection with the Request for Bifurcation.⁸⁷

IV. THE TRIBUNAL'S ANALYSIS

A. THE CRITERIA TO BE APPLIED ON A REQUEST FOR BIFURCATION

72. The Tribunal agrees with the Respondent that there is no presumption in favour of jurisdiction over a State either in international law in general or in the ICSID Convention and Arbitration Rules. Indeed, that proposition is not disputed by the Claimants. Nor is there any presumption against

⁸³ Observations, para. 59, citing *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, **CL-0087-ENG**, paras. 98, 101.

⁸⁴ Observations, paras. 60-61.

⁸⁵ Observations, para. 63.

⁸⁶ Observations, paras. 64-67. See also, Observations, para. 9.

⁸⁷ Observations, para. 68.

jurisdiction. Moreover, unlike the UNCITRAL arbitration rules,⁸⁸ neither the ICSID Convention, nor the ICSID Arbitration Rules, contains any express presumption for or against dealing with jurisdictional objections in a preliminary phase as opposed to addressing them at the same time as the merits.⁸⁹ The Claimants point out that in a majority of cases under the 2022 ICSID Arbitration Rules in which there has been a request for bifurcation, the tribunal has rejected that request.⁹⁰ The Tribunal, however, agrees with the observation of the *Westwater* tribunal:

*To the extent that the Respondent suggests that there is some sort of presumption in favour of bifurcation [...], the Tribunal considers the better view to be that each case turns on its own facts and the relevant text of the BIT, in particular the dispute resolution clause. Whether or not “most” applications for bifurcation in unrelated cases have succeeded or failed is irrelevant, except for the persuasive value of the reasoning behind the result.*⁹¹

73. Arbitration Rule 42 directs that “if a request for bifurcation relates to a preliminary objection, rule 44 shall apply”.⁹² Arbitration Rule 44(2) provides that:

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) the 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.*

74. This provision gives express guidance which was lacking in the 2006 Arbitration Rules, which merely stated that a tribunal had a discretion whether or not to hear preliminary objections in a separate phase of the proceeding.⁹³ Nevertheless, the Tribunal considers that the criteria set out in 2022 Arbitration Rule 44 reflect criteria that were already being taken into account by tribunals

⁸⁸ UNCITRAL Arbitration Rules 1976, Art. 21(4).

⁸⁹ See, e.g., *MetLife Inc. and Others v. Argentine Republic*, ICSID Case No. ARB/17/17, Procedural Order No. 2, 21 December 2018, para. 6, **CL-0101**.

⁹⁰ Observations, footnote 20.

⁹¹ *Westwater Resources Inc. v. Republic of Turkey*, ICSID Case No. ARB/18/46, Procedural Order No. 2, 28 April 2020, para. 21, **CL-0107**.

⁹² ICSID Arbitration Rule 42(2).

⁹³ 2006 Arbitration Rule 41(3) and (4).

under the 2006 Rules.⁹⁴ Moreover, the use of the term “*including*” in the opening sentence of Rule 44(2) makes clear that the list set out in the following sub-paragraphs is not comprehensive.

75. The critical question is whether or not bifurcation would assist in the efficient and cost-effective conduct of the proceeding. In determining that question, the tribunal will consider *all* relevant circumstances, including but not confined to the three factors set out in Rule 44(2). In doing so, it will proceed on the basis that there is no presumption either for or against bifurcation.
76. The Parties have dealt with each of the four objections in separate sections of their pleadings. While that is inevitable and the Tribunal will do the same, the question is whether, taken as a whole, the four objections are such that the efficient conduct of the proceedings would be assisted or hindered by addressing them in a preliminary phase.
77. In this context, it is important to sound one note of warning. In their very helpful and comprehensive submissions, the Parties have dealt at some length with whether or not they consider that each of the four objections set out by the Respondent is capable of being upheld. That is not surprising, since addressing a weak jurisdictional objection in a preliminary phase is likely only to prolong proceedings and make them more expensive. However, while the Request for Bifurcation and the Claimants’ Observations have given the Tribunal an indication of the arguments for and against each objection, it has to be remembered that none of these objections has yet been fully argued by either Party. It would therefore be wrong for the Tribunal to express a view in this Order on whether or not an objection is likely to succeed and it does not do so.⁹⁵ Nothing that follows should be taken as such an expression of opinion.

B. THE FIRST OBJECTION

78. [REDACTED]
[REDACTED]
[REDACTED] FRV Potosí. Article I(4) of the Treaty provides that an investment is one of the listed assets “*owned or controlled*” by an investor of one Contracting Party and established in the territory of the other Contracting Party. In the authentic Spanish text, “*propiedad de, o controlados por, inversores de una Parte Contratante y establecidos en el territorio de la otra Parte Contratante*”. [REDACTED]

⁹⁴ See, e.g., *MetLife*, footnote 89 *supra*, at para. 7.

⁹⁵ See, e.g., *TC Energy*, footnote 8 *supra*, at para. 13.

FRV Potosí. [REDACTED]

79. The Treaty does not define either ownership or control. There is, therefore, a question of law about whether the rights [REDACTED] amounted to ownership within the meaning of the Treaty. If that were the only question, it would be one which could be answered without, in the words of the tribunal in *Amerra*, “delv[ing]” into facts relevant to the merits of the case.⁹⁶
80. However, the Treaty requires only that an investor should demonstrate that it possessed either ownership or control. The concept of control is potentially a broad one. Article X(3) of the Treaty speaks of “*direct or indirect control*” (in the authentic text, “*control directo o indirecto*”). Moreover, the tribunal in *Thunderbird* held that a similar provision in NAFTA embraced both legal control and *de facto* control.⁹⁷ In order to rule upon the first objection, it will be necessary to ascertain what degree of control is required as a matter of law and whether that degree of control is shown to have existed at the relevant times. The Tribunal considers that this exercise is likely to involve detailed inquiry into evidence which would also be material to the merits of the case if those are reached. That being the case, the Tribunal concludes that bifurcation in respect of the first objection would not serve the interests of procedural efficiency.

C. THE SECOND OBJECTION

81. The second objection is closely related to the first. Mexico’s position is that, since no claim has been brought on behalf of FRV Potosí and it was FRV Potosí which was affected by the actions of CENACE, the claim is for what Mexico refers to as “*reflective losses*”. Mexico maintains that the Tribunal lacks jurisdiction over such a claim. However, to rule on this objection will also require delving into facts pertinent to the merits of the claim because it will require a detailed examination both of the precise nature of the claim and of the relationship between the Claimants and FRV Potosí. For that reason, and because the Tribunal has already ruled against bifurcation of the closely

⁹⁶ *Amerra Capital Management LLC v. United Mexican States*, ICSID Case No. UNCT/23/1, Procedural Order No. 3, 3 November 2023, para. 15, **CL-0111**.

⁹⁷ *Thunderbird*, footnote 60 *supra*, at para. 106.

related first objection, the Tribunal concludes that it would not be in the interests of procedural efficiency to order that the second objection be heard in a preliminary phase.

D. THE THIRD OBJECTION

82. The third objection is that the Claimants are not entitled to present a claim on behalf of FRV Potosí. However, the Claimants have not in fact brought a claim on behalf of FRV Potosí. While the question whether or not they could have done so, had they so chosen, may be important in determining the second objection, when the Tribunal comes to rule upon that objection, it cannot be regarded as a matter suitable for bifurcation in its own right.

E. THE FOURTH OBJECTION

83. The fourth objection is quite distinct from the other three, relying as it does on the dispute settlement clause in the MEM Participant Agreement, to which FRV Potosí, though not the Claimants, is party. The Tribunal is conscious of the line of authorities, beginning with *Vivendi*,⁹⁸ which have addressed the distinction between contractual and treaty claims and the effect upon the latter of a contractual dispute settlement provision. The Tribunal considers that to determine the fourth objection would necessarily involve a detailed examination of the precise nature of each aspect of the claim and would therefore entail delving into facts relevant to the merits. It therefore concludes that procedural efficiency would not be served by dealing with this objection in a preliminary phase.
84. The Tribunal is also conscious of the warning, sounded by the tribunal in *Amerra*, that procedural efficiency is not normally served by a partial bifurcation in which some jurisdictional arguments are deferred to a possible future merits stage.⁹⁹ That consideration militates against bifurcation in respect of the fourth objection when it has already been rejected in respect of the first three. The Tribunal also notes, in this context, that the Respondent has reserved the right to make another, wholly distinct, jurisdictional objection regarding the ownership of the Claimants at a later stage.¹⁰⁰

⁹⁸ *Vivendi*, footnote 83 *supra*.

⁹⁹ *Amerra*, footnote 96 *supra*, at para. 18.

¹⁰⁰ Request for Bifurcation, footnote 30; see para. 48 *supra*.

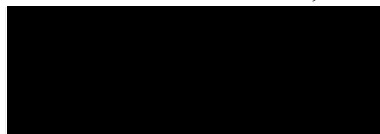
F. CONCLUSION

85. The Tribunal therefore concludes that, whether the objections raised by the Respondent are considered separately or together, the interests of procedural efficiency would not be served by bifurcation. Accordingly, the Respondent's request is rejected.
86. It follows that the suspension of proceedings which came into effect by operation of Arbitration Rule 44(1)(c) on 24 February 2025 is ended. The proceeding on jurisdiction and the merits will resume in accordance with the timetable annexed to this Order unless the Parties otherwise agree. Either Party may apply to the Tribunal for a variation of the timetable.

V. DECISION

87. For the reasons set forth above, the Tribunal decides as follows:
- (1) The Respondent's Request for Bifurcation is rejected.
 - (2) The suspension of the proceeding is ended with immediate effect and, subject to paragraph 86 *supra*, the proceeding will resume in accordance with the timetable set out in Annex A to this Order.
 - (3) The question of costs arising from the Request for Bifurcation will be addressed in the Award.

On behalf of the Tribunal,



Sir Christopher Greenwood, GBE, CMG, KC
President of the Tribunal
Date: 14 April 2025

**ANNEX A -
AMENDED PROCEDURAL TIMETABLE (ANNEX B TO PO1)**

Procedural Step	By	Time Interval from previous step	Updated Deadlines after Decision on Bifurcation
First Session	All		
Memorial	Claimants	127 days from First Session	
<i>Respondent's Request for Bifurcation</i>	<i>Respondent</i>	<i>Filed on 24 February 2025</i>	
<i>Observations on the Request for Bifurcation</i>	<i>Claimants</i>	<i>Filed on 14 March 2025</i>	
<i>Decision on Bifurcation</i>	<i>Tribunal</i>	<i>30 days from last submission on the request</i>	<i>Monday, 14 April 2025</i>
Counter-Memorial and Memorial on Jurisdiction	Respondent	120 days from Memorial	Monday, 30 June 2025 ¹⁰¹
Requests for Production of Documents	Parties	21 days from Counter-Memorial	Monday, 21 July 2025
Responses and/or Objections to Requests for Production of Documents and Voluntary Production of Documents	Parties	14 days from Requests for Production of Documents	Monday, 4 August 2025
Replies to Objections to Requests for Production of Documents	Parties	14 days from Responses	Monday, 18 August 2025
Decision on Objections to Requests for Production of Documents	Tribunal	28 days from Replies to Objections	Monday, 15 September 2025
Production of Documents ordered by Tribunal	Parties	14 days from Decision on Objections	Monday, 29 September 2025
Reply and Counter-Memorial on Jurisdiction	Claimants	90 days from Decision on Production of Documents	Monday, 15 December 2025
Rejoinder and Reply on Jurisdiction	Respondent	90 days from Reply	Monday, 16 March 2026
Rejoinder on Jurisdiction	Claimants	TBD	TBD
Parties to identify witnesses and experts for cross-examination	Parties	TBD	TBD
Pre-hearing Conference	Parties and Tribunal	TBD	TBD
Hearing	Parties and Tribunal	TBD	TBD

¹⁰¹ Takes into account the suspension of the proceeding in accordance with ICSID Arbitration Rule 44(1)(c).

*Fotowatio Renewable Ventures S.L.U., FRV Solar Holdings III, S.L.U., and
FRV Solar Holdings VI, S.L.U. v. United Mexican States*
(ICSID Case No. ARB/24/5)

Procedural Order No. 3

Post-Hearing Submissions	Parties	TBD	TBD
Cost Statements	Parties	TBD	TBD