IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/24/23

BETWEEN:

ALMADEN MINERALS LTD.

and

ALMADEX MINERALS LTD. **Claimants**

-and-

UNITED MEXICAN STATES **Respondent**

RESPONSE TO MEXICO'S REQUEST FOR BIFURCATION

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19 JUNE 2025

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1. INTRODUCTION

1. Almaden Minerals Ltd. ("**Almaden**") and Almadex Minerals Ltd. ("**Almadex**," and together with Almaden, the "**Claimants**"), on their own behalf and on behalf of their respective Mexican subsidiaries, Minera Gorrión S.A. de C.V ("**Minera Gorrión**") and Minera Gavilán S.A. de C.V ("**Minera Gavilán**"), hereby submit this Response to the Request for Bifurcation submitted by the United Mexican States ("**Mexico**" or the "**Respondent**") dated 5 May 2025 ("**Request**"),[1] in accordance with the procedural calendar established by the Tribunal.[2]

2. In its Request, Mexico seeks to bifurcate four jurisdictional objections as preliminary questions to be considered separate from the merits of this dispute. As set forth below, those objections are unserious and facially wrong as a matter of law and fact. Accordingly, bifurcation would not, as Mexico says, "avoid the onerous and costly process of litigating" this dispute. [3] Rather, bifurcation would substantially delay and disrupt the orderly resolution of this dispute and render the proceedings more costly – precisely what the ICSID Arbitration Rules seek to avoid.

3. Specifically, in its first and second objections, Mexico attempts to override the nationality provisions in the CPTPP and to manufacture estoppel grounds and a "waiver" of treaty rights based on standard form declarations mandated by Mexican law for ***all*** Mexican enterprises with foreign investment. If Mexico's argument were correct – which it plainly is not – it would render every single one of Mexico's investment treaties devoid of any investor protection.

4. The mandatory declarations upon which Mexico seeks to rely at most constitute a waiver under Mexican law of the right to seek diplomatic protection – a right that neither the Claimants nor their Mexican enterprises, have asserted. Instead, the Claimants have sought redress for their significant harm directly from Mexico, as they are entitled to do under Chapter 9 of the CPTPP.

5. Mexico's third and fourth objections are likewise devoid of merit. There, Mexico grossly mischaracterizes the factual bases of the Claimants' claims to manufacture artificial timing issues under the CPTPP. But as an objective, good faith reading of the Claimants' Memorial demonstrates, all of the Claimants' claims are covered by the CPTPP and fall within the limitation period. These objections are not only flatly wrong, but they are so intertwined with

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[1] Mexico's Request for Bifurcation dated 5 May 2025 ("**Request for Bifurcation**"). As Mexico did not provide an English courtesy translation of its Request for Bifurcation, the Claimants have used a machine translation of the original Spanish-language document for the purpose of preparing this Response.

[2] Procedural Order No. 1 dated 27 November 2024.

[3] Request for Bifurcation, para. 3.

the merits that bifurcation would not yield any procedural or practical benefit. The short shrift Mexico gives to these objections suggests that Mexico is aware of this inherent weakness.

6. The fundamentally flawed and disingenuous nature of Mexico's four jurisdictional objections raises serious questions as to whether they have been advanced in good faith. Indeed, it appears that having announced its intention to raise jurisdictional and admissibility objections at the First Session, Mexico has simply gone about inventing objections where none exists. The reasons for that are obvious: to defer Mexico's Counter-Memorial and its responses to the Claimants' claims, and to delay the resolution of these proceedings.

7. As elaborated below, for reasons of procedural efficiency and economy,[4] as well as due process and fundamental fairness, the Tribunal should not entertain Mexico's ill-founded Request but should join its baseless jurisdictional objections to the merits.

2. LEGAL STANDARD FOR BIFURCATION

8. There is no dispute between the Parties that the Tribunal has the power and the authority to bifurcate a party's jurisdictional or admissibility objections and to decide them as preliminary questions, separate from the merits. As Article 41(2) of the ICSID Convention provides:

> Any objection by a party to the dispute that the 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*.[5]

9. It is well established, however, that "there is no presumption in favor of bifurcation,"[6] and that "the overarching factor to consider is one of procedural efficiency"[7] – in other words, whether

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4 *See, e.g.*, *GAR-LCIA: Time for a Reset? Roundtable*, 24 January 2024 (noting the need for greater procedural efficiency and economy in international arbitration proceedings), **C-0592**.

5 ICSID Convention, Art. 41(2) (emphasis added).

6 ICSID Working Paper #1, Vol. 3, at para. 393, 2 August 2018 ("ICSID case law has uniformly held that there is no presumption in favor of bifurcation."), **CL-0186**; *see also* ICSID, Procedures: Bifurcation – ICSID Convention Arbitration 2022 Rules, *available at* https://icsid.worldbank.org/procedures/arbitration/convention/bifurcation/2022, **C-0593**.

7 *Orazul International España Holdings S.L. v. Argentine Republic*, ICSID Case No. ARB/19/25 ("***Orazul v. Argentina***"), Decision on the Respondent Request for Bifurcation, 7 January 2021, at para. 30, **CL-0171**; *see also Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2 ("***Emmis v. Hungary***"), Decision on Respondent's Application for Bifurcation, 13 June 2013, at para. 37(2), **CL-0152** ("The overarching question is one of procedural efficiency"); *Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of*

bifurcation "is more likely to increase or decrease the time and costs associated with the arbitration or could significantly contribute to clarifying and simplifying the dispute before the Tribunal."[8] Where, as here, a respondent has failed to establish that bifurcation would serve procedural efficiency, ICSID tribunals should, and routinely do, reject bifurcation.[9]

10. ICSID Arbitration Rule 44(2) provides that, "[i]n 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.[10]

11. Rule 44(2) was added to the ICSID Arbitration Rules with the Amendments to the ICSID Rules and Regulations that went into effect on 1 July 2022.[11] As commentators have noted, Rule 44(2) "seeks to reflect the[] factors typically considered in ICSID cases," namely "(i) whether the objection is closely intertwined with the merits of the claim; (ii) whether the objection is capable of disposing of the entire case; (iii) whether the objection has merit and is not frivolous; and (iv) whether procedural economy would be served by dealing with the objection prior to the merits."[12] The tribunal in *EMS Shipping & Trading v. Albania* similarly remarked that "the

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Indonesia, ICSID Case No. ARB/12/14 and 12/40 ("***Churchill Mining and Planet Mining v. Indonesia***"), Procedural Order No. 15, 12 January 2015, at para. 26, **CL-0154** ("An accepted standard for exercising such power [to bifurcate] in ICSID and other international arbitrations is the furtherance of the efficiency of dispute resolution").

8 *Orazul v. Argentina*, Decision on the Respondent Request for Bifurcation, 7 January 2021, at para. 30, **CL-0171**.

9 *See, e.g.*, *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41 (***Eco Oro v. Colombia***), Procedural Order No. 2 (Decision on Bifurcation), 28 June 2018, at paras. 55, 57, **CL-0161**; *Energía y Renovación Holding, S.A., v. Republic of Guatemala*, ICSID Case No. ARB/21/56 ("***Energía y Renovación v. Guatemala***"), Procedural Order No. 2 (Decision on the Request for Bifurcation), 2 December 2022, at para. 89, 96, **CL-0175**.

10 2022 ICSID Arbitration Rules, Rule 44(2).

11 2022 ICSID Arbitration Rules, Rule 44(2).

12 Swee Yen Koh and Alvin Yeo, 'Part 3: ICSID Arbitration Rules, Chapter VI: Special Procedures [Rules 41-49]', in Richard Happ and Stephan Wilske (eds), ICSID Rules and Regulations 2022: Article-by-Article Commentary, at p. 19, **CL-0173**; *see also* ICSID Working Paper #3, Proposals for Amendment of the ICSID Rules, Vol. 1, at para. 110, August 2019, **CL-0164** ("Several States also suggested including additional criteria that Tribunals should consider when deciding whether to bifurcate, based on case law.").

2022 version of the ICSID Arbitration Rules . . . codifies earlier practice."[13] As such, earlier decisions on bifurcation remain instructive in applying Rule 44(2).

12. For bifurcation to be granted, all three criteria in Rule 44(2) must be met. As the tribunal in *Klesch v. European Union* recently observed, "[i]t is clear to the Tribunal . . . that the Respondents must, amongst other things, establish *each of the three requirements* in . . . Rule 44(2) of the ICSID Arbitration Rules 2022 for bifurcation to be granted."[14]As commentators similarly have remarked, "[b]y placing the word 'and' between the two paragraphs of Rule 44 (2)(b) and (c), it is clear that the Tribunal ought to accede to a request for bifurcation only if *all three* criteria are met."[15] Thus, if one of the factors under Rule 44(2) is not met, the tribunal should not grant bifurcation: it would be "unwise, for example, to bifurcate an objection that is frivolous and detrimental to procedural economy even if it satisfies the other two criteria."[16]

13. Conversely, even if an objection were to satisfy all three criteria in Rule 44(2), this would not mean automatically that bifurcation is warranted. Rather, the tribunal must still consider "whether bifurcation would be procedurally fair and efficient."[17] The tribunal's decision in *Glencore Finance v. Bolivia* is instructive.[18] In that case, the tribunal found that one of Bolivia's objections could justify bifurcation, but nevertheless declined to bifurcate, concluding that, in the interest of "fairness and efficiency of the process as a whole," bifurcation of that one objection would be inappropriate.[19]

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[13] *EMS Shipping & Trading GmbH v. Republic of Albania*, ICSID Case No. ARB/23/9 ("***EMS Shipping & Trading v. Albania***"), Procedural Order No. 3, 23 February 2024, at para. 40, **CL-0178**.

[14] *Klesch Group Holdings Limited & Others v. European Union*, ICSID Case No. ARB(AF)/23/1; *Klesch Group Holdings Limited, Klesch Refining Denmark A/S and Kalundborg Refinery A/S v. Kingdom of Denmark*, ICSID Case No. ARB/23/48; *Klesch Group Holdings Limited and Raffinerie Heide GmbH v. Federal Republic* of Germany, ICSID Case No. ARB/23/49 ("***Klesch v. European Union***"), Decision on Bifurcation, 8 April 2025, at para. 7 (emphasis added), **CL-0182**.

[15] Swee Yen Koh and Alvin Yeo, 'Part 3: ICSID Arbitration Rules, Chapter VI: Special Procedures [Rules 41-49]', in Richard Happ and Stephan Wilske (eds), ICSID Rules and Regulations 2022: Article-by-Article Commentary, at p. 21 (emphasis added), **CL-0173**.

[16] Swee Yen Koh and Alvin Yeo, 'Part 3: ICSID Arbitration Rules, Chapter VI: Special Procedures [Rules 41-49]', in Richard Happ and Stephan Wilske (eds), ICSID Rules and Regulations 2022: Article-by-Article Commentary, at p. 21, **CL-0173**.

[17] *Klesch v. European Union*, Decision on Bifurcation, 8 April 2025, at para. 8, **CL-0182**.

[18] *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia*, PCA Case No. 2016-39 ("***Glencore Finance v. Bolivia***"), Procedural Order No. 2: Decision on Bifurcation, 31 January 2018, **CL-0160**.

[19] *Glencore Finance v. Bolivia*, Procedural Order No. 2: Decision on Bifurcation, 31 January 2018, at para. 56, **CL-0160**.

14. For the reasons explained further below, the overarching principle of "fairness and efficiency of the process as a whole" likewise does not support bifurcation in this case.

2.1 Whether Bifurcation Would Materially Reduce the Time and Cost of the Proceeding

15. The first factor under Rule 44(2) is whether "bifurcation would materially reduce the time and cost of the proceeding"[20] – in other words, whether bifurcation of the proceedings would result in procedural efficiency and economy.

16. As the tribunal in *NICO v. Bahrain* observed, "[w]hen deciding whether bifurcation would 'materially reduce the time and cost of a proceeding', tribunals have considered whether the objection is serious and substantial."[21] Indeed, as the tribunal in *Glamis Gold v. United States* remarked, "consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding."[22]

17. To determine whether an objection is "serious and substantial," tribunals conduct a *prima facie* analysis of whether, "on the basis of the record as it stands, an objection raises a serious issue requiring consideration in a separate procedural phase on the force of the fact allegations and legal arguments as currently formulated."[23] It is the respondent that "bears the burden of demonstrating that its objections are *prima facie* serious and substantial, a burden that is carried . . . by showing that the facts are unlikely to support the Tribunal's jurisdiction."[24]

18. In *Huawei v. Sweden*, for example, Sweden requested bifurcation of its jurisdictional objection that the treaty did not protect the claimant's indirectly held investments.[25] Although that objection would have been dispositive if successful, and could have been resolved

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20 2022 ICSID Arbitration Rules, Rule 44(2)(a).

21 *Naftiran Intertrade Co. (NICO) Limited v. Kingdom of Bahrain*, ICSID Case No. ARB/22/34 ("***NICO v. Bahrain***"), Procedural Order No. 4 on Respondent's Request for Bifurcation, 12 August 2024, at para. 17(a), **CL-0179**; *see also Klesch v. European Union*, Decision on Bifurcation, 8 April 2025, at para. 8 (noting that the tribunal "must consider: (a) as a preliminary matter, whether the Respondents' preliminary objections are *prima facie* serious and substantial"), **CL-0182**.

22 *Glamis Gold, Ltd. v. United States of America*, Ad hoc Arbitration ("***Glamis Gold v. United States***"), Procedural Order No. 2 (Revised), 31 May 2005, at para. 12(c), **CL-0147**.

23 *Huawei Technologies Co. Ltd. v. Kingdom of Sweden*, ICSID Case No. ARB/22/2 ("***Huawei v. Sweden***"), Procedural Order No. 3, 28 April 2023, at para. 33, **CL-0176**.

24 *Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.á r.l. v. Kingdom of Spain*, ICSID Case No. ARB/19/4 ("***Canepa v. Spain***"), Procedural Order No. 3 (Decision on Bifurcation), 28 August 2020, at para. 70, **CL-0169**.

25 *Huawei v. Sweden*, Procedural Order No. 3, 28 April 2023, at para. 37, **CL-0176**.

independently of the merits, the tribunal nevertheless rejected bifurcation because – on its face – the treaty did not impose any requirement that an investment be held directly.[26] Thus, the tribunal held, the objection was not *prima facie* serious and substantial.[27]

19. The tribunal's decision in *Canepa v. Spain* is to similar effect. In that case, Spain sought bifurcation of its objection that the claimants did not have protected investments under the Energy Charter Treaty or the ICSID Convention, because they were not the beneficial owners.[28] The tribunal found that the facts "cast doubt on" Spain's argument that its objection was *prima facie* serious and substantial,[29] as the facts indicated that the claimants "owned directly or indirectly assets in Spain" and did "not suggest an unusual or doubtful transaction."[30] The tribunal refused bifurcation accordingly.

20. A number of tribunals have observed that for the respondent to demonstrate that its objection is *prima facie* serious and substantial, it is insufficient merely to show that it is non-frivolous.[31] As the tribunal in *Aris Mining v. Colombia* noted, "it is self-evident that a frivolous objection would not warrant bifurcation."[32] Accordingly, the mere fact that an objection "surpasses th[e] low threshold" of non-frivolousness is insufficient to create any presumption in favor of bifurcation, much less justify bifurcation.[33] Rather, as the tribunal in *NICO* explained, whether

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26 *Huawei v. Sweden*, Procedural Order No. 3, 28 April 2023, at paras. 40-42, **CL-0176**.

27 *Huawei v. Sweden*, Procedural Order No. 3, 28 April 2023, at paras. 40-42, **CL-0176**.

28 *Canepa v. Spain*, Procedural Order No. 3 (Decision on Bifurcation), 28 August 2020, at para. 75, **CL-0169**.

29 *Canepa v. Spain*, Procedural Order No. 3 (Decision on Bifurcation), 28 August 2020, at para. 76, **CL-0169**.

30 *Canepa v. Spain*, Procedural Order No. 3 (Decision on Bifurcation), 28 August 2020, at para. 74, **CL-0169.**

31 *See, e.g.*, *Westwater Resources, Inc. v. Republic of Türkiye*, ICSID Case No. ARB/18/46 ("***Westwater Resources v. Turkey***"), Procedural Order No. 2, 28 April 2020, at para. 32, **CL-0166** (finding that the respondent's argument in favor of bifurcation was "neither 'frivolous' not 'substantive' but . . . more accurately characterized as 'arguable'").

32 *Aris Mining Corporation (f/k/a GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia* ICSID Case No. ARB/18/23 ("***Aris Mining v. Colombia***"), Procedural Order No. 3, 17 January 2020, at para. 27, **CL-0165**; *see also Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case 2020/074 ("***Komaksavia v. Moldova***"), Procedural Order No. 5 on the Respondent's Requests for Summary Procedure and/or Bifurcation, 26 March 2021, at para. 69 ("The Tribunal also agrees with *Gran Colombia* that a useful 'starting point' is that jurisdictional objections 'must not be frivolous on their face: it is self-evident that a frivolous objection would not warrant bifurcation and the attendant delay in proceeding to determination of the merits.' But, as that tribunal also noted, 'this does not mean that every jurisdictional objection that surpasses that low threshold presumptively warrants bifurcation.' Rather, a tribunal must still 'assess . . . the procedural framework that best serves the overall interests of the case,' giving 'appropriate attention to concerns about fairness and efficiency, including whether granting bifurcation on balance is likely to conserve time and resources or to impose burdens that otherwise could be minimized or avoided.' That assessment must be made holistically and not mechanically."), **CL-0172**.

33 *Aris Mining v. Colombia*, Procedural Order No. 3, 17 January 2020, at para. 27, **CL-0165**.

an objection is "serious and substantial" turns on whether it enjoys "some factual and legal support" and has a "*prima facie* prospect of success."[34]

21. Finally, as the tribunal in *Komaksavia v. Moldova* remarked, in deciding whether to bifurcate, tribunals must consider whether granting bifurcation "on balance is likely to conserve time and resources or to impose burdens that otherwise could be minimized or avoided."[35] In this context, tribunals have underscored the need to exercise "caution" to avoid the "undesirable" scenario where "a bifurcated proceeding . . . ultimately exceed[s] the time and cost that would otherwise have been spent in a single stage proceeding."[36]

22. Where the resolution of an objection on a bifurcated basis would require the tribunal to decide disputed factual issues, tribunals have also routinely rejected bifurcation due to the lack of efficiency gains.[37] For example, in *Global Telecom Holding v. Canada*, the tribunal held that Canada's objections, although potentially "narrower than the facts relevant to the merits of the case," might still require the tribunal to resolve disputed factual issues.[38] The tribunal held that "the costs associated with further briefing, tendering of evidence, and undertaking an evidentiary hearing on these issues on a preliminary basis would not be insignificant" and accordingly rejected Canada's request for bifurcation.[39]

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[34] *NICO v. Bahrain*, Procedural Order No. 4 on Respondent's Request for Bifurcation, 12 August 2024, at para. 17(a), **CL-0179**.

[35] *Komaksavia v. Moldova*, Procedural Order No. 5 on the Respondent's Requests for Summary Procedure and/or Bifurcation, 26 March 2021, at para. 69, **CL-0172**.

[36] *NICO v. Bahrain*, Procedural Order No. 4 on Respondent's Request for Bifurcation, 12 August 2024, at para. 45, **CL-0179**.

[37] *See, e.g.*, *The Burmilla Trust, The Josias Van Zyl Family Trust and Josias Van Zyl v. The Kingdom of Lesotho*, PCA Case No. 2016-21 ("***Burmilla Trust and others v. Lesotho***"), Procedural Order No. 1 (Suspension, Bifurcation, and Procedural Timetable), 3 November 2016, at paras. 49-51 ("[I]t does not appear that these Objections can be dealt with as crisp issues of law, without the benefit of factual evidence, or at least an assessment of the factual background to this matter, on which the Parties have differing views. It is not apparent to the Tribunal that the bifurcation of any of the Preliminary Objections would make these proceedings more efficient or fair. On the contrary, it seems that each of them would be best addressed against the background of all of the relevant evidence in this case."), **CL-0158**.

[38] *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16 ("***Global Telecom Holding v. Canada***"), Procedural Order No. 2 (Decision on Respondent's Request for Bifurcation), 14 December 2017, at para. 109, **CL-0159**.

[39] *Global Telecom Holding v. Canada*, Procedural Order No. 2 (Decision on Respondent's Request for Bifurcation), 14 December 2017, **CL-0159**.

2.2 Whether the Determination of the Preliminary Objection Would Be Dispositive

23. The second factor under Rule 44(2) is whether the "determination of the preliminary objection would dispose of all or a substantial portion of the dispute."[40]

24. Applying this factor, tribunals have rejected bifurcation requests where the respondent's objections would be dispositive of only some of the claims presented.[41] In *Canepa v. Spain*, for example, Spain argued that, due to a carveout in the Energy Charter Treaty for certain tax measures, it had not consented to the tribunal's jurisdiction to hear the claimant's tax-related claim.[42] The tribunal held that, even though Spain's objection was serious and substantial, it would, if successful, dispose of "just a portion of the Claimants' overall claims."[43] Accordingly, the tribunal declined to bifurcate the proceedings.

25. In *Red Eagle v. Colombia*, Colombia requested bifurcation to resolve several jurisdictional objections on a preliminary basis, among them a *ratione temporis* objection.[44] Colombia argued that the State's ban on mining activity that had given rise to the claimant's claims took effect before the treaty entered into force in August 2011.[45] But, as the tribunal found, Colombia's argument "seem[ed] to be premised on the assumption that since the first measures banning mining activities . . . took place prior to August 2011, all subsequent measures are irrelevant."[46] That assumption was false, given that the claimant's claims were based on a series of acts taken by the State after the treaty entered into force.[47] The tribunal thus held that even if Colombia's objection were successful, they "would not dispose of the claims arising out of Colombia's measures, actions or omissions subsequent to" the date on which the treaty entered into force.[48] The tribunal thus refused bifurcation.

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40 2022 ICSID Arbitration Rules, Rule 44(2).

41 *See, e.g.*, *Global Telecom Holding v. Canada*, Procedural Order No. 2 (Decision on Respondent's Request for Bifurcation), 14 December 2017, at paras. 107-110, **CL-0159**; *Red Eagle Exploration Limited v. Republic of Colombia,* ICSID Case No. ARB/18/12 ("***Red Eagle Exploration v. Colombia***"), Decision on Bifurcation, 3 August 2020, at paras. 55-60, **CL-0168**; *see also Energía y Renovación v. Guatemala*, Procedural Order No. 2 (Decision on the Request for Bifurcation), 2 December 2022, at para. 96, **CL-0175**.

42 *Canepa Green v. Spain*, Procedural Order No. 3 (Decision on Bifurcation), 28 August 2020, at paras. 25, 98, **CL-0169**.

43 *Canepa Green v. Spain*, Procedural Order No. 3 (Decision on Bifurcation), 28 August 2020, at para. 99, **CL-0169**.

44 *Red Eagle Exploration v. Colombia,* Decision on Bifurcation, 3 August 2020, at para. 11, **CL-0168**.

45 *Red Eagle Exploration v. Colombia*, Decision on Bifurcation, 3 August 2020, at para. 14, **CL-0168**.

46 *Red Eagle Exploration v. Colombia,* Decision on Bifurcation, 3 August 2020, at para. 56, **CL-0168**.

47 *Red Eagle Exploration v. Colombia*, Decision on Bifurcation, 3 August 2020, at paras. 57-58, **CL-0168**.

48 *Red Eagle Exploration v. Colombia*, Decision on Bifurcation, 3 August 2020, at para. 60, **CL-0168**.

2.3 Whether the Objection Is So Intertwined with the Merits as to Render Bifurcation Unfair and Impracticable

26. The third and final factor under Rule 44(2) is whether "the preliminary objection and the merits are so intertwined as to make bifurcation impractical."[49] This factor goes both to the efficiency of the procedure[50] – as it is not efficient for the tribunal to consider the same or similar evidence twice – and to a concern for due process and fundamental fairness.[51]

27. As the tribunal in *Orlandini v. Bolivia* explained, where "jurisdictional objections are, at least in some respects, intertwined with the merits," the problem is two-fold:

> First, evidence, such as documents and witness testimony, relevant to the determination of jurisdiction would also be relevant to the determination of liability. Thus, assuming the Tribunal finds jurisdiction, the Tribunal will have to review the same or substantially the same evidence in the next phase of the proceedings, dedicated to liability. Such an overlap would not contribute to the efficient conduct of the proceedings. It will hardly be efficient if the same documents would have to be reviewed twice, the same witnesses would have to be heard twice, etc.
>
> Second, and perhaps more significantly, such overlap of evidence may result in due process concerns. At the jurisdictional stage, the Tribunal will need to make certain findings of fact. To the extent that the same facts are also relevant to liability, and if the Tribunal reaches that stage, the Tribunal may have prejudged some of the issues of fact without having heard (at the jurisdictional stage) all the

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49 2022 ICSID Arbitration Rules, Rule 44(2).

50 *See, e.g.*, *Westmoreland Mining Holdings, LLC v. Government of Canada*, ICSID Case No. UNCT/20/3 ("***Westmoreland Mining v. Canada***"), Procedural Order No. 3 (Decision on Bifurcation), 20 October 2020, at para. 54, **CL-0170**; *Energía y Renovación v. Guatemala*, Procedural Order No. 2 (Decision on the Request for Bifurcation), 2 December 2022, at para. 99, **CL-0175**; *EMS Shipping & Trading v. Albania*, Procedural Order No. 3, 23 February 2024, at para. 46, **CL-0178**.

51 *See, e.g.*, *Burmilla Trust and others v. Lesotho,* Procedural Order No. 1 (Suspension, Bifurcation, and Procedural Timetable), 3 November 2016, at paras. 46-51, **CL-0158**; *Windstream Energy LLC v. The Government of Canada (II)*, PCA Case No. 2021-26 ("***Windstream Energy v. Canada (II)***"), Procedural Order No. 2 (Decision on Bifurcation), at para. 55, **CL-0174**.

relevant evidence, which will only become fully available to the Tribunal at the liability stage.[52]

28. With respect to *ratione temporis* objections – like Mexico raises here – tribunals typically find that those objections are too intertwined with the merits to warrant bifurcation.[53]

29. In *Eco Oro v. Colombia*, for example, Colombia raised two *ratione temporis* objections, namely that (i) the claimant had failed to comply with the limitations period in the treaty,[54] and (ii) the relevant measures underlying the claimant's claim predated the entry into force of the treaty in August 2011.[55] The *Eco Oro* tribunal found that to decide either of these two objections, "it would be necessary to undertake an enquiry into the meaning and effect of the measures instituted by the Respondent in 2010 – 2012 and into the Claimant's knowledge" thereof.[56] These issues, the tribunal determined, "are so closely intertwined with the merits that it is unlikely that there would be a procedural efficiency to be gained in bifurcating this issue."[57]

30. Likewise, in *Société Générale v. Dominican Republic*, the Dominican Republic argued, in relevant part, that the acts giving rise to the claimant's claims were "one-time acts" that occurred before the treaty's entry into force and thus that the tribunal did not have jurisdiction *ratione temporis* over them.[58] The tribunal joined this objection to the merits, finding that the "actual determination of which acts" form the basis of the claimant's claims "is a matter for the merits because it is only then that it can be decided which acts amount to breaches and when this took place."[59]

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52 *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. The Plurinational State of Bolivia*, PCA Case No. 2018-39 ("***Orlandini v. Bolivia***"), Decision on Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019, at para. 133, **CL-0163**.

53 *See, e.g.*, *Eco Oro v. Colombia,* Procedural Order No. 2 (Decision on Bifurcation), 28 June 2018, at paras. 51, 57, **CL-0161**; *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927 ("***Société Générale v. Dominican Republic***"), Award on Preliminary Objections to Jurisdiction, 19 September 2008, at paras. 90, 94, **CL-0187**.

54 *Eco Oro v. Colombia*, Procedural Order No. 2 (Decision on Bifurcation), 28 June 2018, at para. 14, **CL-0161**.

55 *Eco Oro v. Colombia*, Procedural Order No. 2 (Decision on Bifurcation), 28 June 2018, at para. 16, **CL-0161**.

56 *Eco Oro v. Colombia*, Procedural Order No. 2 (Decision on Bifurcation), 28 June 2018, at paras. 55, 57, **CL-0161**.

57 *Eco Oro v. Colombia*, Procedural Order No. 2 (Decision on Bifurcation), 28 June 2018, at paras. 55, 57, **CL-0161**.

58 *Société Générale v. Dominican Republic*, Award on Preliminary Objections to Jurisdiction, 19 September 2008, at para. 71, **CL-0187**.

59 *Société Générale v. Dominican Republic*, Award on Preliminary Objections to Jurisdiction, 19 September 2008, at paras. 90, 94, **CL-0187**.

3. MEXICO'S JURISDICTIONAL OBJECTIONS

31. In its Request, Mexico seeks to bifurcate four jurisdictional objections, specifically:

(a) **Objection 1 – *Ratione personae***: Mexico contends that the Claimants – Canadian corporations duly incorporated under the laws of British Columbia – do not qualify as "investor[s] of a Party" or as "enterprise[s] of a Party" under the CPTPP. This is because, according to Mexico, the Claimants are "estopped" from relying on their Canadian nationality by virtue of the bylaws of their Mexican subsidiaries – which, as required by Mexican law, contain mandatory standard form declarations stemming from the 1917 Mexican Constitution providing that the Claimants are to be treated as "Mexican" for purposes of diplomatic protection.[60]

(b) **Objection 2 – *Ratione voluntatis***: Mexico contends that these same mandatory standard form declarations amount to a "waiver" of the Claimants' rights to arbitration under the CPTPP,[61] even though those mandatory declarations relate only to "*the right to invoke the protection of their government*" – and not to any international treaty right or other right existing under international law.[62]

(c) **Objection 3 – *Ratione temporis***: Mexico contends that the Claimants' claims fall outside the Tribunal's jurisdiction *ratione temporis* because certain facts relevant to those claims occurred before the CPTPP entered into force on 30 December 2018[63] – even though the specific acts and omissions that form the basis of the Claimants' claims took place *after* the CPTPP entered into force, including (without limitation): (i) SEMARNAT's arbitrary and baseless rejection of the *Manifestación de Impacto Ambiental* ("**MIA**") for the Project on 17 December 2020, and (ii) Economía's arbitrary and retroactive cancellation of the Claimants' 20 and 14 year-old mining concessions on the legally undefined basis of "infeasibility" on 9 February 2023.

(d) **Objection 4 – *Limitation Period***: Mexico contends that the Claimants' claims are time-barred under CPTPP Article 9.21.1 on the purported basis that the Claimants had knowledge of Mexico's breaches and the resulting loss more than three and a half

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60 Request for Bifurcation, at paras. 41-46.

61 Request for Bifurcation, at paras. 53-56.

62 Minera Gavilán Bylaws, 17 September 1996, Third Clause, at p. 16 (emphasis added), **C-0162**; Minera Albatros (now Minera Gorrión) Articles of Incorporation, 4 January 2011, Eighth Clause, at p. 12 (emphasis added), **C-0178**.

63 Request for Bifurcation, at paras. 62-69.

years before initiating this arbitration[64] – even though Mexico adopted the earliest of the measures that the Claimants challenge in this arbitration on 17 December 2020 (when SEMARNAT arbitrarily denied the MIA) and the Claimants filed their Request for Arbitration on 14 June 2024, *i.e.*, less than three and a half years after that measure.

32. As elaborated below, none of these Objections is *prima facie* serious and substantial. Nor have they been advanced in good faith. Objections 1 and 2 are based on a deliberate mischaracterization of Mexico's own mandatory requirements for foreign investors dating back to 1917 and rooted in the Calvo Doctrine; as Mexico's own courts have held, these mandatory requirements relate to *diplomatic protection*. These objections do not enjoy "some factual and legal support," nor do they have a "*prima facie* prospect of success."[65]

33. Likewise, Objections 3 and 4 and are based on a deliberate mischaracterization of the factual predicates of the Claimants' claims, as articulated in their Memorial. These objections likewise do not enjoy "some factual and legal support," nor do they have a "*prima facie* prospect of success."[66] They are also "so closely intertwined with the merits that it is unlikely that there would be a procedural efficiency to be gained in bifurcating [them]."[67]

34. Accordingly, a bifurcated proceeding in this case would "ultimately exceed the time and cost that would otherwise have been spent in a single stage proceeding."[68] In the interest of fairness and efficiency of the process, the Tribunal should join these baseless objections to the merits.

4. MEXICO'S *RATIONE PERSONAE* AND *VOLUNTATIS* OBJECTIONS DO NOT WARRANT BIFURCATION

35. Mexico's Objections 1 and 2 rely upon different parts of the same mandatory standard form declarations set out in the bylaws of the Claimants' Mexican subsidiaries, specifically: Clause

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64 Request for Bifurcation, at paras. 70-78.

65 *NICO v. Bahrain*, Procedural Order No. 4 on Respondent's Request for Bifurcation, 12 August 2024, at para. 17(a), **CL-0179**.

66 *NICO v. Bahrain*, Procedural Order No. 4 on Respondent's Request for Bifurcation, 12 August 2024, at para. 17(a), **CL-0179**.

67 *Eco Oro v. Colombia,* Procedural Order No. 2 (Decision on Bifurcation), 28 June 2018, at paras. 55, 57, **CL-0161**.

68 *NICO v. Bahrain*, Procedural Order No. 4 on Respondent's Request for Bifurcation, 12 August 2024, at para. 45, **CL-0179**.

3 of Minera Gavilán's bylaws dated 17 September 1996, and Clause 8 of Minera Gorrión's bylaws dated 4 January 2011.[69]

36. In accordance with Article 27 of the Mexican Constitution and Article 15 of the Foreign Investment Law,[70] Clause 3 of Minera Gavilán's bylaws provides:

> [Minera Gavilán] is incorporated under the laws of the Mexican Republic. Any foreigner who, at the time of incorporation or at any time thereafter, acquires an interest or share in the company shall be considered, by that mere fact, as Mexican with respect to one and the other and shall be deemed to agree not to invoke the protection of their government, under penalty, in the event of breach of this agreement, of losing such interest or share for the benefit of the Nation.[71]

37. Similarly, Clause 8 of Minera Gorrión's bylaws provides:

> [Minera Gorrión] is Mexican, expressly establishing that:
>
> The current or future foreign partners of this Company formally undertake before the Ministry of Foreign Affairs to consider themselves as nationals with respect to:
>
> I. The shares or rights they acquire from this Company.
>
> II. The assets, rights, concessions, participations, or interests owned by the Company, and
>
> III. The rights and obligations arising from contracts to which the Company is a party.

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69 Request for Bifurcation, at paras. 43-48.

70 Political Constitution of the United Mexican States, at Art. 27, **R-0001**; Foreign Investment Law published in the DOF on June 7, 1995, at Art. 15, **R-0003**; Foreign Investment Law published in the DOF on August 20, 2008, at Art. 15, **R-0007**.

71 Minera Gavilán Bylaws, 17 September 1996, Third Clause, at p. 16 (Spanish original: "***TERCERA.*** *La sociedad se constituye conforme a las leyes de la República Mexicana. Todo extranjero que en el acto de la constitución o cualquier tiempo ulterior, adquiera un interés o participación social en la sociedad, se considerará por ese simple hecho como mexicano respecto de uno y otra y se entenderá que conviene en no invocar la protección de su gobierno, bajo la pena, en caso de faltar a su convenio, de perder dicho interés o participación en beneficio de la Nación*."), **C-0162**.

> And they waive the right to invoke the protection of their governments, under penalty, in the contrary case, of losing to the benefit of the Nation the rights and property they may have acquired.[72]

38. The different language used in these declarations arise from the publication of the Regulations to the Foreign Investment Law in 1998[73] – *i.e.*, after Minera Gavilán was incorporated in 1996. Those Regulations indicate in Article 14 the language that a company's bylaws must incorporate; that language is included in Minera Gorrión's bylaws quoted above.

39. In addition to these mandatory declarations, Mexico relies on Minera Gavilán's affirmation in its original Concession applications that "the conditions and requirements established in Article 11 of the Mining Law are met."[74] Article 11 of the Mining Law stipulates that "any foreign investment participation adjusts to the provisions of the applicable Law."[75] According to Mexico, these "provisions" include Article 27 of the Mexican Constitution and Article 15 of the Foreign Investment Law, which, in turn, require these mandatory declarations.[76]

40. On the basis of the above, Mexico raises two spurious objections. *First*, Mexico argues that the Claimants "are estopped from bringing a claim under the CPTPP because they agreed with the Mexican State to be considered Mexican with respect to their alleged investments."[77] Specifically, according to Mexico, the Tribunal lacks jurisdiction *ratione personae* "because, under Mexican law, only Mexicans can obtain mining concessions, so the Claimants entered into an agreement with the Mexican State to be considered Mexican with respect to their

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72 Minera Albatros (now Minera Gorrión) Articles of Incorporation, 4 January 2011, Eighth Clause, at p. 12 (Spanish original: "***ARTÍCULO OCTAVO****. La sociedad es mexicana, estableciéndose expresamente que: Los socios extranjeros, actuales o futuros, de esta Sociedad se obligan formalmente ante la Secretaría de Relaciones Exteriores a considerarse como nacionales respecto de: I. Las acciones o derechos que adquieran de esta Sociedad. II. Los bienes, derechos, concesiones, participaciones o intereses de que sea titular la Sociedad, y III. Los derechos y obligaciones que deriven de los contratos en que sea parte la Sociedad. Y renuncian a invocar la protección de sus gobiernos, bajo la pena, en caso contrario, de perder en beneficio de la Nación los derechos y bienes que hubiesen adquirido*."), **C-0178**.

73 Regulations of the Foreign Investment Law and the National Foreign Investment Registry, 8 September 1998, **R-0004**.

74 Cerro Grande Concession Application, October 28, 2002, at p. 4. **C-0002**.

75 1992 Mining Law, at Art. 11, **C-0157**; 1992 Mining Law, as amended by the 2005 Mining Law Amendment, at Art. 11, **Exhibit C-0174**.

76 Request for Bifurcation, at para. 35-41, 47.

77 Request for Bifurcation, at para. 42.

investments in the Ixtaca Project. This agreement was included in the bylaws of Minera Gavilán and Minera Gorrión."[78]

41. *Second*, Mexico argues that the Claimants "expressly waived the protection granted by the CPTPP in relation to their alleged investments."[79] Specifically, according to Mexico, the Tribunal lacks jurisdiction *ratione voluntatis* "because the Claimants obligated themselves not to invoke the protection of their government and, thus, not to initiate this arbitration, both under the mining concessions of the Ixtaca Project and under the bylaws of Minera Gavilán and Minera Gorrión."[80]

42. Mexico's objections are without basis and deliberately misconstrue the origin, nature, and purpose of these mandatory declarations under Mexican law.

4.1 Objections 1 and 2 Are Not *Prima Facie* Serious and Substantial

4.1.1 The Claimants Are Not "Estopped" from Asserting Claims Against Mexico under the CPTPP

43. As set forth in the Claimants' Memorial, Almaden and Almadex are "enterprises" of Canada within the meaning of CPTPP Articles 9.1 and 1.3, because they are, and at all times have been, Canadian companies organized and existing under the laws of British Columbia, Canada.[81] The Claimants made multiple investments in Mexico that qualify as investments in the territory of Mexico under CPTPP Article 9.1.[82] The Claimants therefore qualify as "investors of a Party" under the CPTPP, and the Tribunal has jurisdiction *ratione personae* over this dispute.[83]

44. Mexico argues that the Claimants are nevertheless estopped from asserting their rights under the CPTPP, because their Mexican subsidiaries – through which the Claimants were legally obligated to hold their mining concessions – were required by Mexican law to include in their

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78 Request for Bifurcation, at para. 4.

79 Request for Bifurcation, at para. 53.

80 Request for Bifurcation, at para. 5.

81 Memorial, at paras. 461-464. Article 9.1 of the CPTPP defines a "claimant" as "an investor of a Party that is a party to an investment dispute with another Party" and defines an "investor of a Party" to include "an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party. Article 1.3 of the CPTPP provides that "enterprise means any entity constituted or organised under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including any corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organisation." *See* CPTPP, at Art. 9.1, **CL-0007**.

82 Memorial, at paras. 465.

83 Memorial, at paras. 461-465.

bylaws a declaration that their foreign shareholders (*i.e.*, the Claimants) agreed to be treated as "Mexican" and, as such, to refrain from invoking the protection of the Canadian Government in respect of those subsidiaries.[84] Mexico asserts further that Minera Gavilán confirmed this "agreement" when it filed its concession applications.[85] Having obtained those concessions, Mexico argues, the Claimants "cannot now invoke their Canadian nationality to benefit from the protections of the" CPTPP, as this would be contrary to "good faith, *pacta sunt servanda*, and estoppel."[86] This argument fails *prima facie*.

45. *First*, Mexico elides the historical background and context of this "agreement," which is not an agreement at all, but rather a mandatory declaration rooted in the Calvo Doctrine that must be included in ***all*** Mexican company bylaws where one of its shareholders is foreign. Mexico also ignores the plain meaning and purpose of this "agreement," which is to prevent foreign investors from invoking diplomatic protection – not international treaty rights.

46. Specifically, since 1917, Mexican law has mandated the renunciation of diplomatic protection as a precondition for foreign investors to acquire rights – including mining rights – in Mexico.[87] These mandatory renunciations are known as "Calvo clauses," named after the 19th century Argentine jurist, Carlos Calvo.[88] Such clauses derive from the so-called "Calvo Doctrine," first articulated in 1868 as a response to European powers interfering in the internal affairs of Latin American countries to protect their citizens and their property.[89]

47. Calvo clauses are designed to limit a foreign investor's right to seek diplomatic protection from its home State with the aim of preventing foreign intervention and State-to-State disputes.[90]

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84 Bifurcation Request, at para. 43.

85 Bifurcation Request, at paras. 49-51.

86 Bifurcation Request, at para. 52.

87 *See* 1916 Circular from the Ministry of Development ("***Venustiano Carranza Circular***"), 15 August 1916, First Provision, **C-0589**; *see also* Political Constitution of the United Mexican States, at Art. 27, **R-0001**.

88 Francisco González de Cossío, *Arbitraje de Inversión* (Porrúa ed.), 2009, pp. 23-24, **CL-0183**.

89 Manuel R. Garcia-Mora, *The Calvo Clause in Latin American Constitutions and International Law*, 33 Marq. L. Rev. 205 (1950), *available at* https://scholarship.law.marquette.edu/mulr/vol33/iss4/1, pp. 205-206 ("The origins of the Calvo Clause may be traced back to the 19th century when European governments practiced aggression and conquest on the basis of the inability of weak countries to meet their financial obligations. . . Historically, the Calvo Doctrine was directed to the Latin American countries, especially to Mexico where Napoleon III had sent an expedition in 1861 to make effective certain claims of French citizens against the Mexican government."), **CL-0185**.

90 Manuel R. Garcia-Mora, *The Calvo Clause in Latin American Constitutions and International Law*, 33 Marq. L. Rev. 205 (1950), *available at* https://scholarship.law.marquette.edu/mulr/vol33/iss4/1, pp. 206, 208 ("No one can fail to see that the purpose of these constitutional provisions is to compel aliens to use internal courts *before they resort to diplomatic channels*.") (emphasis added), **CL-0185**; Diego Robles Farias, *La inversión extranjera en México* (Tirant Lo Blanch ed. 2016), at p. 113 ("*[L]a Clausula*

International investment treaties – like the CPTPP in this case – share that same aim, providing the foreign investor with a neutral forum to resolve its disputes with the host State directly. As a number of ICSID tribunals have confirmed – and Mexico ignores – Calvo clauses target diplomatic protection, not direct investor rights under investment treaties.[91] Indeed, at the time the Calvo Doctrine was conceived, investor-State arbitration did not exist.

48. Mexico's 1916 *Venustiano Carranza* Circular first gave effect to the Calvo Doctrine in Mexican law.[92] That Circular provides:

> Foreigners who wish to acquire vacant or national land, *mining properties*, waters under federal jurisdiction, or permits for the exploration or exploitation of natural resources, such as forest products, oil, fisheries, etc., in the Mexican Republic must first appear in writing before the Ministry of Foreign Affairs and make a formal, express, and unequivocal declaration that, in their capacity as owners or concessionaires, and for all purposes and relations concerning the property they seek to acquire, *they consider themselves Mexican, renouncing their rights as foreigners and their*

Calvo se concibió como una formula con la cual, en ejercicio de la soberanía, podían evitarse intervenciones de otros países."), **CL-0184**.

91 *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27 ("***Mobil and others v. Venezuela***"), Decision on Jurisdiction, 10 June 2010, at para. 125 ("[I]n 1902, Venezuela had to face a military intervention by Germany, Italy and the United-Kingdom seeking to collect unpaid debts and had to accept the establishment of Mixed Commissions in charge of fixing the indemnities to be paid to its foreign creditors. Those events led to the formulation of the Drago doctrine and the Drago-Porter Convention of 1907 prohibiting the use of force for the recovery of contractual debts. It also favoured the insertion in concession contracts of the Calvo clause under which the investor commits itself not to ask for diplomatic protection by its State of origin."), **CL-0150**; *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17 ("***AES v. Argentina***"), Decision on Jurisdiction, 26 April 2005, at para. 98 ("[T]he 'Calvo Clause' was in essence a clause by which private persons mistakenly pretended to renounce to a right which in law did not belong to them but to their national State: the right for this State to exercise in favor of its nationals its diplomatic protection"), **CL-0146**; *AWG Group Ltd. v. The Argentine Republic*, Ad hoc Arbitration ("***AWG v. Argentina***"), Separate Opinion of Arbitrator Pedro Nikken (Decision on Liability), 30 July 2010, at para. 13 ("The ICSID Convention and the widespread involvement of Latin American countries in BITs can be seen, in a way, as an implicit abandonment of the *Calvo Clause*, which is not entirely accurate, since that Clause was directed against diplomatic protection, which in the Latin American experience always resulted in an expression of domination by powerful countries of weaker countries. Theoretically, the system of ICSID and of the BITs is based on a relationship between equals that would not justify the fears that motivated Calvo, Drago, and their followers in Latin America, since in its conceptual design it is the result of treaties negotiated between equal States that agree in advance to submit investment disputes to arbitration."), **CL-0151**.

92 *Venustiano Carranza* Circular, at First Provision, **C-0589**.

> *right to seek protection or file complaints with their respective governments*.[93]

49. Consistent with that Circular, Mexico's 1917 Constitution provided at Article 27 that, as a condition of owning land or natural resource exploitation rights in Mexico, foreign investors must declare before the Ministry of Foreign Affairs that they agree:

> [T]o consider themselves as nationals with respect to said property and, *therefore, not to invoke the protection of their governments in reference to said property*, under penalty, in the event of failure to comply with the agreement, of forfeiting to the nation any property acquired by virtue thereof.[94]

Mexico's current Constitution contains the same language.[95]

50. The Foreign Investment Law of 1995 – which applied to Minera Gavilán and Minera Gorrión at the time of their incorporation in 1996 and 2011, respectively[96] – extended this requirement to ***all*** Mexican companies with foreign investment, as a condition for their incorporation.[97] Article 15 of the Foreign Investment Law provides that:

> A permit from the Ministry of Foreign Affairs is required for the incorporation of companies. The exclusion of foreigners clause or *the agreement provided for in Section I of Article 27 of the Mexican*

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93 *Venustiano Carranza* Circular, at First Provision (emphasis added) (Spanish original: "*Primera. Los extranjeros que pretendan adquirir en la República Mexicana terrenos baldíos o nacionales, fundos mineros, aguas de jurisdicción federal o permisos para la exploración o explotación de las riquezas naturales, como productos forestales, petróleo, pesquerías, etc., deberán presentarse previamente, por escrito, ante la Secretaría de Relaciones, haciendo formal, expresa y terminante declaración de que en su condición de propietarios o concesionarios, y para todos los efectos y relaciones de los bienes que tratan de adquirir, se consideran mexicanos renunciando a sus derechos de extranjeros, y al de acudir en demanda de protección o queja a sus respectivos gobiernos*."), **C-0589**.

94 Political Constitution of the United Mexican States (1917 version), at Art. 27, *available at* https://www.loc.gov/exhibits/mexican-revolution-and-the-united-states/constitution-of-1917 (emphasis added) (Spanish original: "*[Q]ue convengan ante la Secretaría de Relaciones en considerarse como nacionales respecto de dichos bienes y en no invocar, por lo mismo, la protección de sus Gobiernos, por lo que se refiere a aquellos; bajo la pena, en caso de faltar el convenio, de perder en beneficio de la nación, los bienes que hubieren adquirido en virtud del mismo*."), **C-0594**.

95 Political Constitution of the United Mexican States, at Art. 27, **C-0439**.

96 Foreign Investment Law published in the DOF on June 7, 1995, at Art. 15, **R-0003**; Foreign Investment Law published in the DOF on August 20, 2008, at Art. 15, **R-0007**.

97 Foreign Investment Law published in the DOF on June 7, 1995, at Art. 15, **R-0003**; Foreign Investment Law published in the DOF on August 20, 2008, at Art. 15, **R-0007**.

Constitution must be included in the bylaws of the companies that are incorporated.[98]

51. As noted above, Article 14 of the 1998 Regulations to the Foreign Investment Law, in turn, set out the terms to be included in the bylaws of the company before it is incorporated.[99]

52. Accordingly, in order for a foreign investor – like the Claimants – to incorporate a subsidiary in Mexico and acquire mineral rights, that subsidiary must include a declaration, consistent with Article 27 of the Constitution, that its foreign shareholder agrees to be treated as Mexican and, as such, will not seek diplomatic protection from its home State.[100] Notably, this rule applies to ***all*** foreign investors with Mexican subsidiaries regardless of industry sector. Yet, to the Claimants' knowledge, Mexico had never invoked this mandatory declaration as a basis for an objection to an investment treaty tribunal's jurisdiction until 2023.[101] That is telling.

53. As the plain language of Article 27 makes clear, this mandatory declaration is for the ***sole*** purpose of renouncing the right to invoke diplomatic protection;[102] it does not alter in any way the actual nationality of the foreign shareholder. The foreign shareholder does not itself become subject to Mexican taxation or reporting rules by virtue of this mandatory declaration. Nor is the foreign shareholder required to refrain from invoking any other right, including its rights under international law or treaty.

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98 Foreign Investment Law published in the DOF on June 7, 1995, at Art. 15, **R-0003**.

99 Regulations of the Foreign Investment Law and the National Foreign Investment Registry, 8 September 1998, at Art. 14, **R-0004**.

100 Political Constitution of the United Mexican States, at Art. 27, **C-0439**.

101 *See Espíritu Santo Holdings, LP and L1bre Holding, LLC v. United Mexican States*, ICSID Case No. ARB/20/13 ("***Espíritu Santo and L1bre v. Mexico***"), Rejoinder on the Merits, 7 March 2023, at paras. 327-337 (raising jurisdictional objections based on the mandatory declarations and identifying those declarations as "Calvo clauses"), **CL-0188**; *see also Doups Holdings LLC v. United Mexican States*, ICSID Case No. ARB/22/24 ("***Doups Holdings v. Mexico***"), Procedural Order No. 3 (Decision on Bifurcation), 16 October 2024, at paras. 20-21, **CL-0180**; *Mario Noriega Willars v. United Mexican States*, ICSID Case No. ARB/23/29 ("***Willars v. Mexico***"), Procedural Order No. 3 (Decision on Bifurcation), 24 March 2025, at paras. 47-49, **RL-0025**. There is no decision yet in any of these cases on Mexico's baseless Calvo clause objections.

102 *See, e.g.*, Francisco González de Cossío, *Arbitraje* (Porrúa ed. 2009), p. 913 (noting with respect to Article 27 of the Mexican Constitution that, "[f]irst, the way it was reflected in our constitutionalism only establishes the obligation of foreigners not to request diplomatic intervention. Why should that prevent Mexico from entering into investment treaties? Second, investment arbitration not only does not violate the clause, but also achieves its ultimate goals: to prevent foreigners from seeking relief from their home country." Spanish original: "*En primer lugar, la forma en que fue reflejada en nuestro constitucionalismo únicamente establece la obligación del extranjero de no pedir la intervención diplomática. ¿Por qué habría ello de evitar que México celebre tratados de inversión? En segundo lugar, el arbitraje de inversión no solo no viola la cláusula, sino que logra sus fines últimos: evitar que el extranjero busque socorro del Estado del que es originario.*"), **CL-0183**.

54. Specifically, as the original Spanish text of Article 27 reflects, foreign investors must agree "*a considerarse nacionales respecto de dichos bienes y en no invocar por lo mismo la protección de sus gobiernos*" – that is, "to consider themselves as nationals with respect to said property and, ***therefore***, not to invoke the protection of their governments."[103] The phrase "*por lo mismo*" (in English, "therefore," "for that very reason," or "as a result") makes clear that the mandatory declaration is for the ***sole*** purpose of renouncing the right to diplomatic protection.

55. Indeed, Mexico's own courts have confirmed the narrow scope of this mandatory declaration:

> The foreigner must necessarily agree with the government of the country, through the Ministry of Foreign Affairs, to be considered a national with respect to those assets, ***that is, not to invoke the protection of their government when presenting any conflict arising from this property***.[104]

56. In accordance with Article 27 of the Constitution, Minera Gavilán's bylaws provide that each foreign shareholder "shall be considered . . . as Mexican with respect to" its interest or share in Minera Gavilán and "agrees not to invoke the *protection of his [sic] government*."[105] Minera Gorrión's bylaws likewise provide that foreign shareholders "undertake . . . to consider

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[103] Political Constitution of the United Mexican States (1917 version), at Art. 27, *available at* https://www.loc.gov/exhibits/mexican-revolution-and-the-united-states/constitution-of-1917, **C-0594**; Political Constitution of the United Mexican States, at Art. 27, **C-0439**.

[104] Primer Tribunal Colegiado del Vigésimo Cuarto Circuito, Amparo Directo No. 560/2011, Sentencia, 17 May 2012, at p. 76 (Spanish original: "*[N]ecesariamente el extranjero debe convenir ante el gobierno de la nación, a través de la Secretaría de Relaciones Exteriores, en considerarse como nacional respecto aquellos bienes, es decir, en no invocar la protección de su gobierno al presentarse cualquier conflicto derivado de esta propiedad*"), **C-0591**; *see also* Primera Sala de la Suprema Corte de Justicia de la Nación, Contradicción de Tesis 132/2002-PS, Sentencia, 29 March 2005, at p. 30 ("The content of the aforementioned section was the result of the debate that took place during the sessions held on January 29, 30, and 31, 1917, in the Chamber of Deputies, from which it can be inferred that the legislator's purpose in imposing on foreigners, as a condition for acquiring real estate in the national territory, the obligation to agree with the Ministry of Foreign Affairs that *in the event of any dispute arising in relation to the real estate in question, they would waive the protection of their government*, was to protect the territory and ensure that foreigners were subject to national legislation for the purposes of contractual disputes." Spanish original: "*El contenido de la fracción referida fue el resultado del debate suscitado en las sesiones de fecha veintinueve, treinta y treinta y uno de enero de mil novecientos diecisiete de la Cámara de Diputados, del que se desprende que la finalidad del legislador de imponer a los extranjeros, como condición para adquirir bienes inmuebles en territorio nacional, la obligación de convenir con la Secretaría de Relaciones Exteriores, que en caso de que se suscite algún conflicto en relación con el bien inmueble de que se trate, renuncia a la protección de su gobierno, era la de proteger el territorio y que los extranjeros se sujetaran a la legislación nacional para efectos de conflictos contractuales*."), **C-0590**.

[105] Minera Gavilán Bylaws, 17 September 1996, Third Clause, at p. 16, **C-0162**.

themselves as nationals" with respect to their shares or rights in Minera Gorrión and to "renounce to invoke the *protection of their governments*."[106]

57. There can be no dispute that the Claimants in this case do not seek "to invoke the protection of their government[]" with respect to their investments in Mexico. To the contrary, the Claimants have invoked their own rights as covered investors under the CPTPP to seek arbitration of their claims that Mexico breached its treaty obligations with respect to the Claimants' protected investments in Mexico. The mandatory declarations in the bylaws of Minera Gavilán and Minera Gorrión plainly have no bearing on those treaty rights.

58. *Second*, to the extent these standard form declarations reflect mandatory domestic law, they cannot and do not operate to abrogate or extinguish international law rights conveyed by treaty. Nor can they override the nationality provisions in the CPTPP, an international treaty.

59. It is well established that the Respondent cannot invoke its domestic law for the purpose of avoiding ICSID jurisdiction under a treaty.[107] This is consistent with generally accepted principles of international law, namely that, "in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."[108] Mexican law accords with these generally accepted principles.

60. Article 133 of the Constitution expressly provides that duly ratified international treaties form part of the supreme law of the land, prevailing over conflicting state and federal provisions.[109] Mexico cannot therefore rely upon mandatory domestic law declarations to negate its consent

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106 Minera Albatros (now Minera Gorrión) Articles of Incorporation, 4 January 2011, Eighth Clause, at p. 12 (emphasis added), **C-0178**.

107 *See, e.g.*, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29 ("***SGS v. Paraguay***"), Decision on Jurisdiction, 12 February 2010, at para. 72 ("Respondent cannot invoke its domestic law to avoid its obligations under international law."), **CL-0149**.

108 Greco-Bulgarian "Communities", Advisory Opinion, 1930, at P.C.I.J., Series B, No. 17, at p. 32, **CL-0141**; *see also Free Zones of Upper Savoy and the District of Gex,* Order of 6 December 1930, at P.C.I.J., Series A, No. 24, at p. 12 (finding that France could not rely on its own legislation to limit the scope of its international obligations), **CL-0140**; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 1932, at P.C.I.J., Series A/B, No. 44, at p. 24 (noting that "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force"), **CL-0142**.

109 Political Constitution of the United Mexican States, at Art. 133 ("This Constitution, the laws derived from and enacted by the Congress of the Union, and all the treaties made and execute by the President of the Republic, with the approval of the Senate, shall be the supreme law of the country. The judges of each state shall observe the Constitution, the laws derived from it and the treaties, despite any contradictory provision that may appear in the constitutions or laws of the states.") **C-0439**.

to arbitrate under the CPTPP – or to deny the Claimants their right to bring arbitration proceedings against Mexico under the CPTPP as duly qualified investors.

61. *Third*, Mexico's estoppel theory is legally baseless. To rely upon the doctrine of estoppel, Mexico must demonstrate that: (i) the Claimants made a clear and unequivocal representation; (ii) Mexico relied upon that representation in good faith; and (iii) Mexico suffered material detriment as a result of that reliance.[110]

62. Based on even a cursory examination of the mandatory declarations and Mexico's arguments in relation to them, none of these elements is satisfied:

(a) *First*, the Claimants never made a clear or unequivocal representation that they would refrain from asserting rights under the CPTPP, or any other international treaty. The mandatory declarations in the bylaws do not alter the Claimants' Canadian nationality for purposes of the CPTPP, nor do they have any other impact on the Claimants' rights under the CPTPP. As noted, these mandatory standard form declarations stem from historical provisions of Mexican law requiring foreign investors to refrain from invoking diplomatic protection – not investor-State arbitration.

(b) *Second*, Mexico provides no evidence that it relied on any alleged representation by the Claimants in relation to their rights as investors under the CPTPP, let alone that it did so in good faith.

(c) *Third*, Mexico has not identified any detriment that it suffered as a result of such alleged reliance. There is no indication that Mexico changed its position or suffered harm as a result of the Claimants' alleged conduct. On the contrary, as the Claimants

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110 *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24 ("***Mamidoil v. Albania***"), Award, 30 March 2015, at para. 469, **CL-0155** ("The Tribunal shares the opinion that the principle of estoppel is embedded in international law. It is a principle where for reasons of material justice a person is hindered from exercising an existing right. It is apparent that such a consequence must be restricted to exceptional circumstances. Estoppel may be found when a party demonstrates by its conduct that it will not exercise a right and a counter-party legitimately relies on this conduct. Mere inactivity, as opposed to an act, is not enough and is addressed by norms on statute of limitation."); *see also Orazul v. Argentina*, Award, 14 December 2023, at paras. 364, 506-510, **CL-0177**; *Pope & Talbot v. Government of Canada*, Ad hoc Arbitration ("***Pope & Talbot v. Canada***"), Interim Award, 26 June 2000, at para. 111, **CL-0143**; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16 ("***ADC v. Hungary***"), Award, 2 October 2006, at para. 475, **CL-0045**.

explained in their Memorial, Mexico and its citizens significantly benefitted from the Claimants' investment, and the significant social and economic benefits it provided.[111]

63. In support of its estoppel arguments, Mexico relies upon the tribunal's decision in *Sastre and others v. Mexico*.[112] But that decision is inapposite.

64. In *Sastre*, the claimants voluntarily renounced their original nationality and acquired Mexican nationality. As such, the tribunal found that Mexico was "fully justified" in relying on that voluntary renunciation,[113] and that the claimants could not "invoke their nationalities of origin . . . for purposes of their claims in this arbitration."[114] There are no such circumstances here.

65. In the present case, the Claimants never renounced their Canadian nationality, nor did they ever acquire Mexican nationality. At all times, the Claimants remained Canadian-incorporated companies. Instead, the Claimants simply incorporated into the bylaws of their Mexican subsidiaries – as required under Article 27 of the Constitution and Article 15 of the Foreign Investment Law – mandatory standard form language that they would be treated as "Mexican" and, as such, would not seek diplomatic protection from the Canadian Government, a right that they do not assert here. Mexico's reliance on *Sastre* is therefore misplaced.

66. In sum, as in *Huawei* and *Canepa*, the legal and factual premises of Mexico's Objection 1 do not withstand even preliminary scrutiny. As a plain reading of the mandatory declarations in their proper historical context shows, those declarations are directed at diplomatic protection – not investor-State arbitration. They have no impact whatsoever on the Claimants' Canadian nationality or on the Claimants' rights under the CPTPP. Those declarations therefore cannot, either facially or in effect, disqualify or estop the Claimants from asserting rights under the CPTPP. As such, Mexico's Objection 1 does not enjoy a "*prima facie* prospect of success."

4.1.2 The Claimants Have Not "Waived" Any Right to Commence These Proceedings

67. Mexico argues further that the standard form declarations mandated by Mexican law amount to a "waiver" of the Claimants' right to bring arbitration claims against Mexico under the

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111 Memorial, Section 2.8.

112 Request for Bifurcation, at para. 57; *Carlos Sastre and others v. Mexico*, ICSID Case No. UNCT/20/2 ("***Sastre and others v. Mexico***"), Procedural Order No. 2 (Decision on Bifurcation), 13 August 2020, **RL-0022**; *Sastre and others v. Mexico*, Award on Jurisdiction, 21 November 2022, **RL-0009**.

113 *Sastre and others v. Mexico*, Award on Jurisdiction, 21 November 2022, at paras. 252, 264, **RL-0009**

114 *Sastre and others v. Mexico*, Award on Jurisdiction, 21 November 2022, at paras. 252, 264, **RL-0009**

CPTPP and, therefore, that the Tribunal does not have jurisdiction *ratione voluntatis*.[115] Like Mexico's Objection 1, Mexico's Objection 2 does not withstand even preliminary scrutiny.

68. It is well established that a waiver of treaty rights must be clear, specific, and informed. As the tribunal in *Crystallex v. Venezuela* explained, a waiver will not be valid unless it is:

> [F]ormulated in clear and specific terms: a waiver, if and when admissible at all, is never to be lightly admitted as it requires knowledge and intent of forgoing a right, a conduct rather unusual in economic transactions.[116]

69. In *Crystallex*, the tribunal rejected Venezuela's argument that the claimant had waived its treaty rights, emphasizing that the clause at issue "ma[de] no mention of the Claimant's rights under the BIT, and no reference to the BIT in general terms or to the Claimant's right to seek recourse in arbitration for the alleged violation of those rights."[117] It therefore found that the claimant could not have knowingly or voluntarily relinquished its rights under the BIT.[118]

70. Similarly, in *Aguas del Tunari v. Bolivia*, the tribunal refused to infer a waiver of ICSID jurisdiction based upon the terms of a concession contract absent a clear common intention to that effect: "The tribunal finds neither common intention of the Parties to exclude ICSID jurisdiction . . . nor any clear waiver."[119] The tribunal therefore refused to "read an ambiguous clause as an implicit waiver of ICSID jurisdiction[.]"[120] The same conclusions apply here.

71. *First*, on their face, the declarations make no reference to any treaty, let alone the CPTPP; nor do they refer to the Claimants' rights to bring international arbitration claims. They therefore do not constitute a "clear" or "explicit" waiver of treaty rights, as Mexico asserts without basis.

72. *Second*, as elaborated above, the declarations are directed at diplomatic protection – not investor-State arbitration.[121] As the plain language of the bylaws reflect, the Claimants waived

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115 Request for Bifurcation, at paras. 53-56.

116 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2 ("***Crystallex v. Venezuela***"), Award, 4 April 2016, at para. 481, **CL-0156**.

117 *Crystallex v. Venezuela*, Award, 4 April 2016, at paras. 481-482, **CL-0156**.

118 *Crystallex v. Venezuela*, Award, 4 April 2016, at paras. 481-482, **CL-0156**.

119 *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3 ("***Aguas del Tunari v. Bolivia***"), Decision on Respondent's Objections to Jurisdiction, 21 October 2005, at para. 122, **CL-0148**.

120 *Aguas del Tunari v. Bolivia*, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, at para. 122, **CL-0148**.

121 *See supra* at paras. 44-46.

their right to invoke the protection of their "government" with respect to their interest and participation in Minera Gavilán and Minera Gorrión, as required by Mexican law.[122] The Claimants did not waive any other right, including their right to bring arbitration directly against Mexico under Chapter 9 of the CPTPP, an international treaty.[123]

73. While Mexico attempts to conflate diplomatic protection with investor-State arbitration,[124] the two concepts are fundamentally distinct.[125] Diplomatic protection is a discretionary act by a home State to espouse a claim on behalf of its national, whereas investment treaty arbitration is a direct right conferred on the investor by the treaty itself. In other words, when an investor brings a treaty claim, it is not "invoking the protection of [its] government;"[126] it is pursuing its own direct right under the relevant treaty. As the tribunal in *AES v. Argentina* remarked, "the 'Calvo Clause' was in essence a clause by which private persons mistakenly pretended to renounce to a right which in law did not belong to them but to their national State: the right for this State to exercise in favor of its nationals its diplomatic protection."[127]

74. *Third*, at the time of the alleged waivers – in 1996 and 2011 – the Claimants did not even have the treaty rights Mexico alleges they waived.[128] That is because the CPTPP entered into force on 30 December 2018.[129] The bylaws were not – and could not have been – a knowing waiver of treaty rights that did not yet exist.

75. In support of its baseless waiver theory, Mexico again seeks to rely upon *Sastre*. In *Sastre*, as a condition to obtain Mexican nationality, the claimants had to declare that they "renounce[d]

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122 *See supra* at paras. 42, 47-54, 63; Political Constitution of the United Mexican States, at Art. 27, **R-0001**; Foreign Investment Law published in the DOF on 7 June 1995, at Art. 15, **R-0003**; Foreign Investment Law published in the DOF on 20 August 2008, at Art. 15, **R-0007**.

123 *See supra* at paras. 60(a), 64.

124 Request for Bifurcation, at para. 55.

125 *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8 ("***Siemens v. Argentina***"), Decision on Jurisdiction, 3 August 2004, at para. 141, **CL-0145**; *Michael Anthony Lee-Chin v. Dominican Republic*, ICSID Case No. UNCT/18/3 ("***Lee-Chin v. Dominican Republic***"), Partial Award on Jurisdiction, 15 July 2020, at para. 218, **C-0167**; *Azurix Corp. v. The Argentine Republic (I)*, ICSID Case No. ARB/01/12 ("***Azurix v. Argentina (I)***"), Decision on Jurisdiction, 8 December 2003, at para. 72, **CL-0144**.

126 Minera Gavilán Bylaws, 17 September 1996, Third Clause, at p. 16, **C-0162**; Minera Albatros (now Minera Gorrión) Articles of Incorporation, 4 January 2011, Eighth Clause, at p. 12, **C-0178**.

127 *AES v. Argentina*, Decision on Jurisdiction, 26 April 2005, at para. 98, **CL-0146**.

128 Minera Gavilán Bylaws, 17 September 1996, **C-0162**; Minera Albatros (now Minera Gorrión) Articles of Incorporation, 4 January 2011, **C-0178**; CPTPP, **CL-0007**.

129 CPTPP, **CL-0007**.

. . . all rights that international treaties or conventions grant to foreigners."[130] Thus, as the tribunal concluded, there was a "voluntary, clear, and express waiver" of the right to bring treaty claims.[131] No such express waiver exists in the present case. Indeed, unlike the waivers in *Sastre*, the mandatory declarations at issue here contain no reference whatsoever to "rights that international treaties or conventions grant to foreigners." *Sastre* thus undermines Mexico's argument, rather than supports it.

76. Mexico's Objection 2 thus also does not have a "*prima facie* prospect of success."

77. It is worth pausing here to reflect on the logical extension of Mexico's arguments. If, as Mexico says, these mandatory standard form declarations give rise to both estoppel and waiver of treaty rights, *quod non*, every single one of Mexico's investment treaties would be devoid of any purpose or protection. That is because – under Mexico's argument – every foreign investor with a Mexican subsidiary would be estopped from asserting treaty claims against Mexico. As Mexican law requires concessions and other rights to be held through Mexican entities,[132] that would disqualify nearly ***all*** foreign investors from treaty protection.

78. That is plainly absurd and would mean that the 42 multilateral and bilateral investment treaties ratified by the Mexican Government over the past 30 years – including the CPTPP as recently as 2018 – conveyed essentially no rights at all. Simply put, what Mexico would like this Tribunal to find is that it negotiated those treaties with its fingers crossed behind its back – offering rights and protections to foreign investors under treaties, while at the same time denying those protections under its own domestic law. That is not only flatly wrong as a matter of law and fact, but it would undermine the very purpose of international investment treaties – including the CPTPP – which is to encourage, promote, and protect foreign investments.

79. The Claimants note further that Mexico made no reservation to exclude its mining sector from the investment protections under Chapter 9 of the CPTPP, despite doing so for other sectors, including energy, gambling, social services, and telecommunications.[133] The absence of any

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130 *Sastre and others v. Mexico*, Award on Jurisdiction, 21 November 2022, at para. 259 (emphasis added), **RL-0009**.

131 *Sastre and others v. Mexico*, Award on Jurisdiction, 21 November 2022, at para. 251, **RL-0009**.

132 Indeed, this would include ***all*** foreign investors in the mining, energy, telecommunications, air transport, financial services, and broadcasting sectors, among others, since only Mexican companies may hold mining concessions, electricity generation permits, telecommunications licenses, operate airlines, or provide banking or media services. *See* Foreign Investment Law published in the DOF on June 7, 1995, at Arts. 5-8, **R-0003**; Foreign Investment Law published in the DOF on August 20, 2008, at Arts. 5-8, **R-0007**.

133 CPTPP Annex II – Mexico [Sectoral Non-Conforming Measures], **CL-0007**.

mining-related carve-out in the CPTPP confirms that Mexico made a deliberate choice to subject the mining sector to Chapter 9. Nor did Mexico ever indicate – either before or following entry into force of the CPTPP – that compliance with required domestic formalities would neutralize investors' rights under Chapter 9. Yet that is precisely the position Mexico now advances. If accepted, Mexico's theory would give any State *carte blanche* to unravel its treaty obligations through local requirements – rendering *pacta sunt servanda* meaningless and investment treaties effectively hollow.

80. In sum, Mexico's Objections 1 and 2 are not *prima facie* serious and substantial, and should be joined to the merits accordingly.

4.2 Bifurcation of Objections 1 and 2 Would Not Serve Procedural Efficiency or Economy

81. Furthermore, addressing Mexico's Objections 1 and 2 now as preliminary questions, separate from the merits, would not serve procedural efficiency or economy.

82. That is because even if the Tribunal were to conclude that Objections 1 and 2 are *prima facie* serious and substantial – which they are not – and do not rest upon a deliberate misreading of mandatory declarations required by Mexican law dating back to 1917 – which they do – these objections raise issues that Mexico has *never* raised in any investment treaty arbitration until 2023.[134] Nor, to the Claimants' knowledge, has any other respondent State. Accordingly, there is no guiding precedent that would make these objections appropriate for bifurcation. As the tribunal in *Klesch v. European Union* observed in rejecting bifurcation in that case, "[w]ithout guidance from precedent, it is all the more important that this issue be dealt with by the Tribunal with full knowledge of the facts and the evidence."[135] The same is true here.

83. Moreover, while Mexico has recently introduced into the record the tribunal's bifurcation decision in *Willars v. Mexico*,[136] that decision carries limited persuasive value. The tribunal's decision in that case to bifurcate a similar *ratione personae* objection based on the same

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134 It appears that, as of 2023, Mexico is now raising these objections as a matter of course in ***all*** of its investment treaty arbitrations. This only reinforces the Claimants' point that these baseless objections – if accepted – would render all of Mexico's investment treaties without any meaning or protection. *See Espíritu Santo and L1bre v. Mexico*, Rejoinder on the Merits, 7 March 2023, at paras. 327-337, **CL-0188**; *Doups Holdings v. Mexico*, Procedural Order No. 3 (Decision on Bifurcation), 16 October 2024, at paras. 20-21, **CL-0180**; *Willars v. Mexico*, Procedural Order No. 3 (Decision on Bifurcation), 24 March 2025, at paras. 47-49, **RL-0025**. As noted above, there is no decision yet in any of these cases on Mexico's baseless Calvo clause objections.

135 *Klesch v. European Union*, Decision on Bifurcation, 8 April 2025, at para. 38, **CL-0182**.

136 Correspondence from Mexico Regarding Introduction of New Evidence, 28 May 2025, at p. 2.

mandatory standard form declarations Mexico raises here was premised explicitly on the fact that the tribunal had already decided to bifurcate a separate objection concerning ownership and control of the investment – an objection not raised by Mexico in this arbitration.[137] *Willars* is therefore materially different and does not support bifurcation in this case.

84. The same is true of *Doups Holdings v. Mexico*, upon which Mexico also relies. While the tribunal in that case granted bifurcation of Mexico's *ratione personae* objection based on similar mandatory standard form declarations, Mexico also raised several objections that it does not assert here – namely, objections that the claimant did not have a legacy NAFTA investment, could not claim indirect damages, had failed to provide a valid waiver, and did not own or control a covered investment, as well as that the claimant's predominant nationality was Mexican.[138] Having already decided to bifurcate various of these objections, the tribunal granted Mexico's request to bifurcate its *ratione personae* objection arising out of the mandatory standard form declarations.[139] There are no such circumstances here.

85. The only other objections that Mexico raises in this case are equally flawed temporal arguments regarding pre-treaty conduct and the limitation period, which are without any factual basis and do not meet the criteria for bifurcation, as set forth below.

5. MEXICO'S *RATIONE TEMPORIS* AND *VOLUNTATIS* OBJECTIONS LIKEWISE DO NOT WARRANT BIFURCATION

86. Objections 3 and 4 challenge the Tribunal's jurisdiction *ratione temporis* and *voluntatis*. Specifically, Mexico argues that the Claimants' claims: (i) are based on events that pre-date the CPTPP's entry into force on 30 December 2018;[140] and (ii) are time-barred under CPTPP Article 9.21.1 because the Claimants obtained knowledge of the alleged breaches and loss more than three and a half years before commencing arbitration, *i.e.*, before 14 December 2020.[141]

87. Again, Mexico's objections fail *prima facie*.

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137 *Willars v. Mexico*, Procedural Order No. 3 (Decision on Bifurcation), 24 March 2025, para. 109 (finding that "[i]n 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"), **RL-0025**.

138 *Doups Holdings LLC v. United Mexican States*, Procedural Order No. 3 (Decision on Bifurcation), 16 October 2024, at paras. 8-19, **CL-0180**.

139 *Doups Holdings v. Mexico*, Procedural Order No. 3 (Decision on Bifurcation), 16 October 2024, at para. 67, **CL-0180**.

140 Request for Bifurcation, at paras. 65-66.

141 Request for Bifurcation, at paras. 70-71.

88. As the Claimants' Memorial demonstrates, all of the acts and omissions that the Claimants challenge occurred or crystallized *after* the CPTPP entered into force and *after* the cut-off date for purposes of CPTPP Article 9.21.1. In any event, these objections are not dispositive of the Claimants' claims. That is, even if Mexico's prior conduct is excluded, the challenged measures – beginning with SEMARNAT's arbitrary and baseless MIA rejection – are all within the Tribunal's jurisdiction. Additionally, these objections are so closely intertwined with the merits that bifurcation would not yield any procedural or practical benefit.

5.1 Objections 3 and 4 Are Not *Prima Facie* Serious and Substantial and Would Not Dispose of the Claimants' Case

89. As set forth in their Memorial, the Claimants' claims arise out of a series of measures attributable to Mexico that occurred or crystallized after the CPTPP entered into force on 30 December 2018 and after the cut-off date for purposes of CPTPP Article 9.21.1 on 14 December 2020. Specifically, the challenged conduct comprises four main measures:

(a) SEMARNAT's MIA Denial Decision of 17 December 2020, in which SEMARNAT rejected arbitrarily and without basis the MIA for the Ixtaca Project.[142] While this Decision was preceded by various procedural irregularities, including the suspension of the MIA evaluation process, the breach crystallized with the Denial Decision itself.

(b) The February 2022 Supreme Court Decision, in which the Court ordered Economía to suspend the Cerro Grande and Cerro Grande 2 Concessions, reassess their "feasibility," and conduct indigenous consultations;[143]

(c) SEMARNAT's bad faith campaign to stop the Project, after it denied the MIA;[144] and

(d) The February 2023 *Oficio*, in which Economía arbitrarily and retroactively determined that reissuing the Concession titles it had approved and granted decades earlier was "not feasible," thereby cancelling the Ixtaca Project and the Claimants' investments therein in full.[145]

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142 SEMARNAT Official Notice No. SGPA/DGIRA/DG/06549, 17 December 2020, **C-0086**; Memorial, at Section 2.14.4.

143 *Amparo* 134/2021, SCJN Decision, 16 February 2022, **C-0092**; Memorial, at Section 2.16.

144 Memorial, at Sections 2.13, 2.17.3.

145 Economía, *Amparo* Filing, Of. Letter No. 110.03.1430.2023, 9 February 2023, **C-0111**; Memorial, at Section 2.17.5.

90. In its Request, Mexico deliberately ignores these four main measures and instead attempts to artificially reframe the case around earlier events. It does so in bad faith. Specifically:

(a) To support Objection 3, Mexico relies on the factual background to the February 2022 Supreme Court Decision and the February 2023 *Oficio*, namely: (i) the Tecoltemi *amparo* and the Claimants' good faith attempt to reduce its concession areas; and (ii) the 1 February 2018 Collegiate Court Decision cancelling Economía's approval of Minera Gorrión's reduction applications.[146] According to Mexico, the Claimants' mere reference to these earlier events shows that "the Claimants' claims are based on acts or facts that took place before the entry into force of the [CPTPP]."[147]

(b) Mexico argues further that the February 2022 Supreme Court Decision and February 2023 *Oficio* merely "confirmed" the earlier District Court's first instance ruling in 2019.[148] With respect to the MIA, Mexico ignores the MIA Denial Decision altogether, instead focusing on the procedural irregularities that preceded it.[149]

91. Mexico's arguments are disingenuous and disregard the plain text of the Claimants' Memorial. As noted above, the Claimants base their claims on four main measures, each of which occurred or crystallized after the CPTPP entered into force and after the cut-off date for purposes of the limitation period.[150] Mexico cannot simply rewrite the Claimants' case and the factual bases of their claims to manufacture jurisdictional objections that do not exist.

92. Moreover, it is well established that prior conduct may inform an assessment of breach, without constituting a breach itself. As the tribunal in *Jak Sukyas v. Romania* observed, "[e]vents or conduct prior to the entry into force of an obligation for the State may be relevant in determining whether the State has subsequently committed a breach of the obligation."[151] The fact that the Claimants detailed in their Memorial certain conduct and events that occurred before Mexico's breaches does not in any way demonstrate that the Claimants' claims are

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146 Request for Bifurcation, at paras. 64-65.

147 Request for Bifurcation, at para. 63.

148 Request for Bifurcation, at para. 76.

149 Request for Bifurcation, at para. 77.

150 *See* Memorial, at Section 2.

151 *Jak Sukyas v. Republic of Romania*, PCA Case No. 2020-53 ("***Jak Sukyas v. Romania***"), Partial Award on Jurisdiction, 6 November 2024, at para. 298, **CL-0181**.

based on those earlier events. These events are contextual – they explain the backdrop to the measures Mexico took to destroy the Claimants' investment.

93. Objection 4 suffers from similar flaws. It is well established that the limitation period starts to run only when a claimant knew or should have known of both: (i) the respondent's breach; and (ii) the resulting loss.[152] When determining whether such knowledge arose before the cut-off date, tribunals assess whether the post-cut-off date conduct constitutes "a new independently actionable breach separable from the conduct that preceded it."[153]

94. That standard is easily met here:

(a) *First*, the 2020 MIA Denial Decision was the culmination of a multi-year permitting process.[154] Until that point, the process remained open and the outcome undecided. As the tribunal in *Gold Reserve v. Venezuela* observed, a breach may arise when a sequence of pre-treaty events progressively crystallizes into a concrete, post-treaty violation.[155] That is precisely what occurred here. While the MIA permitting process began in 2019, it concluded with SEMARNAT's rejection in its Denial Decision after the CPTPP entered into force – crystallizing Mexico's conduct into a concrete breach.

(b) *Second*, the February 2022 Supreme Court Decision was not merely confirmatory, as Mexico contends; in ruling on the Tecoltemi *amparo*, the Supreme Court introduced an entirely novel "feasibility" assessment and disregarded key legal findings of the District Court.[156] Moreover, the fact that the Claimants described in their Memorial

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152 CPTPP, at Art. 9.21.1, **CL-0007**. Knowledge of both elements is required for the limitation period to be triggered. *See Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3 ("***Corona Materials v. Dominican Republic***"), Award on Respondent's Expedited Preliminary Objections in Accordance with Art. 10.20.5 of the DR-CAFTA, 31 May 2016, at para. 195, **CL-0157**.

153 *Spence International Investments et al v. Costa Rica*, ICSID Case No. UNCT/13/2 ("***Spence v. Costa Rica***"), Interim Award, 30 May 2017, at para. 298, **RL-0018**

154 SEMARNAT Official Notice No. SGPA/DGIRA/DG/06549, 17 December 2020, **C-0086**; Memorial, Section 2.14.4.

155 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1 ("***Gold Reserve v. Venezuela***"), Award, 22 September 2014, at paras. 580-582, **CL-0153**. *See also Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania (I)*, ICSID Case No. ARB/15/28 ("***Hydro, Becchetti and others v. Albania (I)***"), Award, 24 April 2019, at paras. 557-558, **CL-0162**.

156 As the Claimants explained in their Memorial, the District Court ordered that the Concessions be declared "*insubsistentes*" or "ineffective" while DGM reevaluated the original concession applications with "full discretion", taking into account two key factors (i) that the Mining Law does not require prior consultation or free, informed consent for indigenous peoples (meaning that the absence of such consultations could not invalidate the original concession applications as a legal matter), and (ii) that the

certain procedural developments in the *amparo* proceedings before the Supreme Court Decision has no bearing on the analysis. Indeed, under Mexican law, lower court decisions are provisional only and have no legal effect until appeals are exhausted.[157]

(c) *Third*, Economía's February 2023 *Oficio* was not a mere formality – it was a direct, deliberate, and, most importantly, *final* administrative act cancelling the Concessions definitively in law and in fact.[158] It was in no way tethered to pre-treaty or pre-cut-off date conduct – it flowed from the February 2022 Supreme Court Decision, which ordered Economía to reassess the feasibility of reissuing the Concession titles it had approved and granted decades earlier and involved an exercise of discretion not predetermined by earlier acts.[159] It was also influenced by SEMARNAT's bad faith campaign against the Project.[160]

95. Finally, any examination of Objections 3 and 4 would likely require fact witness testimony, expert evidence, and document production, for example, in relation to the nature and timing of the Claimants' loss and their knowledge of the same. This would give rise to a fact and evidence-intensive inquiry that is not suitable for a bifurcated preliminary phase and would not yield procedural efficiency.

96. Moreover, even if certain aspects of the permitting and the procedural history predate the CPTPP's entry into force and the cut-off date under Article 9.21.1,[161] Mexico's objections would still not dispose of the dispute in whole or in part. That is because, as noted above, the Claimants' claims rest on four discrete and independently actionable measures that occurred after the CPTPP entered into force and within the applicable limitation period.

97. International tribunals have repeatedly declined to bifurcate limitation objections where, as here, post-cut-off conduct could sustain the claims. In *Global Telecom*, for example, the

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original concession applications related to lands granted to the Tecoltemi *ejido*. In this regard, *see* Memorial, at para. 358. However, the Supreme Court also made no mention of the two factors that the District Court had ordered DGM to consider.

157 Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos, at Art. 192 (providing that only final and repeated interpretations of the law have binding effect, and, by implication, a lower court's decision does not create binding precedent, and its legal effect is not final if appeals are pending), *available at* https://www.diputados.gob.mx/LeyesBiblio/pdf/LAmp.pdf, **C-0507**.

158 Economía, *Amparo* Filing, Of. Letter No. 110.03.1430.2023, 9 February 2023, **C-0111**; Memorial, Section 2.17.5.

159 *Amparo* 134/2021, SCJN Decision, 16 February 2022, **C-0092**; Economía, *Amparo* Filing, Of. Letter No. 110.03.1430.2023, 9 February 2023, **C-0111**; Memorial, Sections 2.16, 2.17.5.

160 Memorial, Sections 2.13, 2.17.3.

161 Request for Bifurcation, at paras. 65-66,76-77.

tribunal rejected bifurcation of Canada's objections – including its limitation objection.[162] Based on the non-dispositive nature of Canada's objections, the tribunal "[was] not convinced that [bifurcation] would warrant the additional costs and time delays associated with a complete two-phase proceeding."[163] Likewise, as noted above, in *Red Eagle*, the tribunal declined to bifurcate the proceedings where claims based on later conduct would proceed regardless.[164]

98. The same is true here. Even if Mexico's temporal objections were upheld, *quod non*, the case would continue to the merits phase. The MIA Denial Decision, the February 2022 Supreme Court Decision, SEMARNAT's bad faith campaign, and the February 2023 *Oficio* all indisputably occurred after the CPTPP entered into force and after the cut-off date for the limitation period.[165] Moreover, as explained above, each of these measures is a self-standing and independently actionable measure capable of forming a breach in its own right. Thus, the Claimants' claims in relation to these measures would remain even if Mexico's objections were upheld. Bifurcation therefore would not eliminate the need for a full merits phase – it would merely delay and duplicate it unnecessarily.

99. In sum, contrary to Mexico's deliberate mischaracterizations, this is not a case where the Claimants artificially rely upon pre-treaty and pre-cut-off date conduct. Nor are the measures the Claimants rely upon ancillary or derivative of earlier acts. The Claimants' claims are based upon self-standing, concrete, and final actions that post-date the entry into force of the CPTPP and the cut-off date for purposes of Article 9.21.1. Each was independently wrongful and caused the Claimants significant loss. These objections are therefore neither serious nor substantial, would not dispose of the Claimants' case, and do not warrant bifurcation.

5.2 Objections 3 and 4 Are Too Intertwined with the Merits to Justify Bifurcation

100. Finally, bifurcation of Objections 3 and 4 is not warranted because they are too intertwined with the merits to yield any efficiency gains. Bifurcating such objections as preliminary

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162 *Global Telecom Holding v. Canada*, Procedural Order No. 2 (Decision on Respondent's Request for Bifurcation), 14 December 2017, at paras. 107-110, **CL-0159**.

163 *Global Telecom Holding v. Canada*, Procedural Order No. 2 (Decision on Respondent's Request for Bifurcation), 14 December 2017, at para. 110, **CL-0159**.

164 *Red Eagle Exploration v. Colombia*, Decision on Bifurcation, 3 August 2020, at paras. 55, 60, **CL-0168**.

165 SEMARNAT Official Notice No. SGPA/DGIRA/DG/06549, 17 December 2020, **C-0086**; *Amparo* 134/2021, SCJN Decision, 16 February 2022, **C-0092**; Economía, *Amparo* Filing, Of. Letter No. 110.03.1430.2023, 9 February 2023, **C-0111**.

questions would require the Tribunal to conduct a full review of the same factual matrix that underpins the merits, which would not contribute to the efficient conduct of these proceedings.

101. Tribunals have routinely rejected bifurcation requests in similar circumstances. In addition to *Eco Oro* and *Red Eagle* noted above,[166] the tribunal in *Westmoreland v. Canada* rejected Canada's request to bifurcate a similar limitation period objection.[167] As the tribunal remarked, "[d]etermining the date on which the Claimant acquired actual or constructive knowledge of the alleged breach and loss is not a simple issue" and would "clearly require traversing issues relating to the merits of the dispute."[168]

102. Likewise, in *Willars v. Mexico*, the tribunal declined to bifurcate two objections analogous to Mexico's Objections 3 and 4 in this case. Specifically, regarding Mexico's limitation period objection, the tribunal considered that "a determination of when Claimant first became aware of the alleged breaches and resulting losses . . . may require a detailed analysis of the merits which would make bifurcation impractical."[169] As for Mexico's *ratione temporis* objection – which was based on an allegation that certain treatment post-dated the NAFTA's termination – the tribunal found that that objection was similarly entangled with the merits, given the claimant's argument that Mexico's breach was continuous and straddled the NAFTA's termination.[170] The tribunal also noted that bifurcation would likely prove inefficient, particularly in light of the potential need for document production and the overall complexity of the objections.[171]

103. The same conclusion applies here. For the Tribunal to decide Objections 3 and 4, it would need to examine the effect and interrelationship of all of the relevant measures in this case, both before and after the CPTPP entered into force and the limitation period commenced. It would also need to determine what the Claimants knew and when – including their understanding of the legal and practical impact of each challenged measure, and the losses they suffered. To address these questions, the Tribunal would need to understand virtually the entire factual record, as well as the witness and expert testimony proffered by the Claimants. Mexico's

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166 *Red Eagle Exploration v. Colombia*, Decision on Bifurcation, 3 August 2020, at para. 59, **CL-0168**; *Eco Oro v. Colombia*, Procedural Order No. 2 (Decision on Bifurcation), 28 June 2018, at paras. 55-56, **CL-0161**.

167 *Westmoreland Mining v. Canada*, Procedural Order No. 3 (Decision on Bifurcation), 20 October 2020, **CL-0170**.

168 *Westmoreland Mining v. Canada*, Procedural Order No. 3 (Decision on Bifurcation), 20 October 2020, at para. 54, **CL-0170**.

169 *Willars v. Mexico*, Procedural Order No. 3 (Decision on Bifurcation), at para. 81, **RL-0025**.

170 *Willars v. Mexico*, Procedural Order No. 3 (Decision on Bifurcation), at para. 84, **RL-0025**.

171 *Willars v. Mexico*, Procedural Order No. 3 (Decision on Bifurcation), at paras. 87-88, **RL-0025**.

objections are therefore not appropriate for bifurcation, as they are so intertwined with the merits as to make bifurcation impractical.

104. Finally, Mexico invokes the bifurcation decision in *Pey Casado v. Chile (II)*.[172] But the tribunal in that case emphasized that it would not need to address the underlying factual or legal issues to decide the objection.[173] That is not the case here. Rather, the nature of Mexico's objections requires the Tribunal to address the underlying factual and legal issues.

105. Accordingly, bifurcating Objections 3 and 4 would not contribute to the efficient conduct of this arbitration, but would delay and protract it unnecessarily.

6. CONCLUSION

106. In view of the foregoing, bifurcation is not warranted and would not serve procedural efficiency or economy: Mexico's baseless jurisdictional objections are not *prima facie* serious and substantial, are not dispositive of the case, are too intertwined with the merits, and present issues not appropriate for a separate preliminary phase. Accordingly, bifurcation would not decrease the time and costs associated with this arbitration or simplify this dispute; rather, it would unnecessarily delay, protract, and increase the costs of this case. As such, the Tribunal should reject Mexico's Request and join its baseless jurisdictional objections to the merits in accordance with ICSID Convention Article 41(2) and ICSID Arbitration Rule 44(2).

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172 Request for Bifurcation, at para. 81.

173 *Presidente Allende Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile*, PCA Case No. 2017-30 ("***Pey Casado v. Chile (II)***"), Decision on Respondent's Request for Bifurcation, 27 June 2018, at paras. 109-113, **RL-0019**.

7. REQUEST FOR RELIEF

107. For all of the reasons set forth above, the Claimants request respectfully that the Tribunal:

(a) **REJECT** Mexico's Request for Bifurcation under ICSID Convention Article 41(2) and ICSID Arbitration Rule 44(2);

(b) **JOIN** Mexico's baseless jurisdictional objections to the merits;

(c) **ESTABLISH** the procedural calendar for the remainder of the arbitration on a non-bifurcated basis; and

(d) **ORDER** the Respondent to bear the costs incurred in connection with the Request for Bifurcation.

Respectfully submitted,

[redacted]

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