INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Almaden Minerals Ltd. and Almadex Minerals Ltd.

v.

United Mexican States

(ICSID Case No. ARB/24/23)

PROCEDURAL ORDER NO. 3 on Respondent's Request for Bifurcation

Members of the Tribunal

Mr. Oscar M. Garibaldi, Arbitrator

Prof. Jorge E. Viñuales, Arbitrator

Prof. Luca G. Radicati di Brozolo, President of the Tribunal

Secretary of the Tribunal

Ms. Anneliese Fleckenstein

Assistant to the Tribunal

Ms. Lucia Pontremoli

July 25, 2025

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1. This decision addresses Respondent's request of May 5, 2025 ("**Request**") that the Tribunal (*i*) bifurcate the proceedings to address the four jurisdictional objections described below ("**Objections**") as preliminary issues separately from the merits, and consequently, (*ii*) establish the procedural calendar of the jurisdictional phase.

2. The Tribunal emphasizes that its task at this stage of the proceedings is only to decide whether to bifurcate one or more of the Objections. Accordingly, although the Tribunal considered the arguments advanced by the Parties in their entirety, the summary of the Parties' respective submissions contained in Section II below does not purport to cover exhaustively all those arguments, but only those that the Tribunal deemed relevant to this decision.

3. The Tribunal further highlights that nothing in this decision can or should be understood as a pre-judgment of the merits of the Objections or of Claimants' claims. As mentioned, the exclusive purpose of this decision is to establish the appropriateness of addressing and deciding the Objections in a preliminary stage of the proceedings, based on the factual and legal allegations as currently formulated by the Parties. Consequently, this decision cannot be taken to reflect the Tribunal's views on the merits of the Objections, or on the merits of the underlying dispute.

I. Procedural history

4. On March 20, 2025, Almaden Minerals Ltd. and Almadex Minerals Ltd. ("**Claimants**") filed their Memorial ("**Memorial**"), requesting that the Tribunal declare that the United Mexican States ("**Respondent**" or "**Mexico**") breached its obligations under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (the "**CPTPP**" or the "**Treaty**") by unlawfully expropriating Claimants' protected investments and failing to accord fair and equitable, as well as national treatment and most-favored nation treatment, to those investments. On these grounds, Claimants request that Respondent be ordered to pay compensation for the losses incurred by them as a result of Mexico's Treaty breaches.

5. In accordance with the procedural calendar set out in Annex B to PO1, on April 21, 2025, Respondent informed the Tribunal that it intended to file the Request, which it did on May 5, 2025.

6. On May 28, 2025, Respondent requested leave to include a new legal authority into the record, *i.e.*, Procedural Order No. 3 (*Decisión de Bifurcación*) issued on March 24, 2025, in ICSID case *Mario Noriega Willars c. los Estados Unidos Mexicanos* (Caso CIADI No. ARB/23/29), that

Respondent argued was material and relevant to the Tribunal's decision on bifurcation. On June 9, 2025, Claimants indicated they did not oppose Respondent's request, which the Tribunal granted on June 11, 2025, following which the additional authority was included into the record as RL-25.

7. On June 19, 2025, Claimants filed their Response to the Request for Bifurcation ("**Response**") opposing the Request and requesting that the Tribunal join the Objections to the merits, establish the procedural calendar for the remainder of the arbitration on a non-bifurcated basis, and order Respondent to bear the costs incurred in connection with the Request.

II. The Parties' positions

II.A Respondent's position

8. As mentioned, Respondent seeks bifurcation of the proceedings and requests that, in a preliminary phase, the Tribunal consider and decide separately from the merits the following four Objections:

(i) the first objection ("**First Objection**"), according to which the Tribunal lacks jurisdiction *ratione personae* because Claimants – Canadian corporations incorporated under the laws of British Columbia – would not qualify as "*investor*[s] *of a Party*" under the CPTPP, due to the declarations ("**Declarations**") included in the bylaws of their Mexican subsidiaries (*i.e.*, Minera Gorrión S.A. de CV, "**Minera Gorrión**" and Minera Gavilán S.A. de C.V. "**Minera Gavilán**"),[1] whereby Claimants accepted to be considered as Mexican nationals with respect to their investments, with the consequence that they would be now estopped[2] from invoking their Canadian nationality to enjoy protection under the CPTPP;[3]

[1] Minera Gavilán Bylaws dated September 17, 1996 (Exhibit C-162), Third Clause, p. 16 and Minera Gavillón Bylaws dated January 4, 2011 (Exhibit C-178) Eight Clause, p. 12. In addition to the Declarations, Respondent also refers to Minera Gavilán's applications for the concession, that, in its view, confirm that Claimants agreed to be considered as Mexican nationals with respect to their investments (Response, ¶ 49, where Respondent refers to Exhibit C-2, *Solicitud de concesión sobre Cerro Grande* of October 28, 2002, p. 4, Exhibit C-3, *Título de Concesión sobre Cerro Grande* of March 5, 2003, Exhibit C-7, *Solicitud de concesión minera sobre Cerro Grande 2* of July 14, 2008, p. 7 and Exhibit C-8, *Título de Concesión sobre Cerro Grande 2* of February 24, 2009).

[22] Specifically, Respondent invokes Mexican law and international law principles such as good faith, *pacta sunt servanda*, and estoppel (Request, ¶¶ 48, 52).

[3] Request, ¶¶ 42-52.

(ii) the second objection ("**Second Objection**"), according to which the Tribunal lacks jurisdiction *ratione voluntatis*, since, by the Declarations, Claimants waived their right to invoke the protection of their government, which includes their right to arbitration under the CPTPP;[4]

(iii) the third objection ("**Third Objection**"), according to which the Tribunal lacks jurisdiction *ratione temporis* and *ratione voluntatis* over Claimants' claims, since the acts or facts on which those claims are based occurred before the CPTPP entered into force for Mexico on December 30, 2018;[5] and

(iv) the fourth objection ("**Fourth Objection**"), according to which the Tribunal lacks jurisdiction *ratione temporis* over Claimants' claims, since the latter would be time-barred under Article 9.21.1 of the CPTPP, according to which no claim may be submitted to arbitration if more than three years and six months have elapsed since the date on which the claimant first acquired, or should have acquired, knowledge of the alleged breach and resulting losses.[6]

9. Respondent claims that the Tribunal has the power to bifurcate the proceedings pursuant to Article 41(2) of the ICSID Convention and Rules 42 and 44 of the ICSID Rules and that the latter provision dictates the criteria to decide on a request for bifurcation.[7]

10. In Respondent's view, all those criteria are met in the present case. Specifically, with respect to the First and Second Objections, Respondent contends that bifurcation would significantly reduce the time and costs of the proceedings since, if those Objections are granted, the arbitration would

[4] Request, ¶¶ 53-56.

[5] Request, ¶¶ 62-68. Respondent relies on Article 9.2.3 of the Treaty, as well as on customary international law, and specifically the principle of intertemporal law, as codified in the International Law Commissions' *Articles on States Responsibility for Internationally Wrongful Acts*, (RL-11, Articles 12 and 13), which establishes that a State can only breach an international obligation if that obligation was in force at the time of the alleged wrongful act.

[6] Request, ¶¶ 70-78. Respondent argues that, since the Request for Arbitration was filed on June 14, 2024, claims are admissible only if Claimants first became aware of the alleged breach, and of the resulting loss, after December 14, 2020. Respondent further maintains that the occurrence of a breach and the claimant's knowledge thereof are tied to specific dates, so that subsequent or continuing breaches do not renew or reset the limitation period, which cannot be avoided by focusing on the most recent acts in a series if the claimant was already aware of earlier breaches and losses.

[7] Request, ¶¶ 20-30.

be terminated.[8] In addition, Respondent underscores that deciding the First and Second Objections requires the analysis of a limited number of documents and no inquiry as to the merits.[9]

11. As to the Third and Fourth Objections, Respondent argues that bifurcation would promote procedural efficiency by potentially disposing of all (or, at least, the majority of) Claimants' claims at the jurisdictional stage, thereby obviating a liability and quantum phase and thus resulting in a significant reduction of the resources invested by the Parties and the Tribunal in the arbitration.[10] Respondent further contends that for the Tribunal to bifurcate the proceedings a complete separation between jurisdictional objections and the merits is not required. Rather, bifurcation is appropriate so long as there is no *substantial* overlap between the evidence required for the jurisdictional issues and that relevant to the merits.[11] In the present case, there is no such overlap, as there is no need for the Tribunal to consider witnesses or experts testimony, or to analyze the merits of any of the disputed facts or the legal issues related to the merits of the claims.[12] Finally, Respondent asserts that objections to jurisdiction *ratione temporis* are usually bifurcated, including objections similar to that raised in the present case.[13]

II.B Claimants' position

12. Claimants agree with Respondent that the Tribunal has the power to bifurcate jurisdictional or admissibility objections and to decide them as preliminary questions separate from the merits pursuant to Article 41 of the ICSID Convention and that the criteria to decide on a request for

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[8] Request, ¶ 60.

[9] Request, ¶ 61, relying on *Doups Holdings LLC v. los Estados Unidos Mexicanos*, Caso CIADI No. ARB/22/24, Resolución Procesal No. 3, 16 de octubre de 2024, RL-5, ¶ 67.

[10] Request, ¶¶ 79-80.

[11] Request, ¶ 81, relying on *President Allende Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile (II)*, PCA Case No. 2017-30, Decision on Respondent's Request for Bifurcation, January 27,2018 (RL-19), ¶ 106; *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Procedural Order No. 3 – Decision on Bifurcation and Related Requests, July 8, 2016 (RL-20), ¶ 26.

[12] Request, ¶ 82.

[13] Request, ¶¶ 83-85, relying on *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Procedural Order No. 4, Decision on Bifurcation, of November 18, 2016, RL-21, ¶¶ 4.6-4.7; *Carlos Sastre and others c. Estados Unidos Mexicanos*, Caso CIADI No. UNCT/20/2, Resolución Procesal No. 2, Decisión sobre Bifurcación, of August 13, 2020, RL-22, ¶¶ 64-68; *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 9, Renewed Request for Bifurcation of March 10, 2021, RL-24, ¶¶ 36-37, 44.

bifurcation are those established by Rule 44(2) of the ICSID Rules, that, in Claimants' view, reflect the factors typically considered in ICSID cases.[14]

13. With respect to the first requirement of Rule 44(2), Claimants emphasize that, in deciding whether bifurcation would "*materially reduce the time and cost of a proceeding*" tribunals have considered whether the objection is serious and substantial by conducting a *prima facie* analysis based on the available fact allegations and legal arguments.[15]

14. Claimants further maintain that the "*overarching factor*" to consider, in addition to those listed in Rule 44(2) of the ICSID Rules, is procedural efficiency, from which two consequences follow: first, if respondent fails to establish that bifurcation would serve procedural efficiency, bifurcation should be denied; second, even if an objection were to meet all three requirements of Rule 44(2) of the ICSID Rules, this would not automatically mean that bifurcation is warranted, since it is essential to establish whether bifurcation would be procedurally fair and efficient.[16]

15. In Claimants' view, none of the Objections warrants bifurcation. Rather, this would disrupt the resolution of the dispute and render these proceedings more costly. Specifically, with respect to the First and Second Objections, Claimants argue that there would be no material reduction of the time and cost of the proceedings, since neither of those Objections is *prima facie* serious and substantial. In this respect, Claimants allege that the Declarations must be considered in light of their historical background and context, from which it is clear that they are "Calvo clauses", *i.e.*, standard form clauses introduced into Mexican law based on the so called "Calvo Doctrine", elaborated in the 19th century. Claimants argue that that doctrine – which was a response by Latin American countries to the interference in their internal affairs by European powers seeking to protect their citizens and their property – was designed to limit foreign investors' right to seek diplomatic protection when pursuing their claims against the host State. Claimants therefore

[14] Response, ¶¶ 8-11.

[15] Response, ¶¶ 15-20. To support their position, Claimants rely on *Naftiran Intertrade Co (NICO) Limited v. Kingdom of Bahrain*, ICSID Case No. ARB/22/34, Procedural Order No. 4 on Respondent's Request for Bifurcation of August 12, 2024, CL-179; *Klesch Group Holdings Limited & others v. European Union,* ICSID Case No. ARB(AF)/23/1, Decision on Bifurcation of April 8, 2025, CL-182; *Glamis Gold Ltd v. United States of America*, Ad Hoc Arbitration, Procedural Order No. 2 of May 31, 2005, CL-147; *Huawei Technologies Co Ltd. v. Kingdom of Sweden*, ICSID Case No. ARB/22/2, Procedural Order No. 3 of April 28, 2023, CL-176; *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, Procedural Order No. 3 (Decision on Bifurcation) of August 28, 2020, CL-169.

[16] Response, ¶¶ 9, 12-13.

allege that the Declarations – like any "Calvo clause" – target diplomatic protection, not the investors' right to arbitrate under investment treaties (which are two concepts "*fundamentally distinct*"[17]). Consequently, they neither affect Claimants' actual nationality, nor amount to a waiver of their right to arbitrate under the CPTPP. According to Claimants, this interpretation is confirmed by the wording of the relevant provisions of Mexican law and the case law of Mexican courts interpreting these, as well as by the fact that when the "Calvo Doctrine" was introduced, investor-State arbitration did not exist.[18]

16. Claimants further underscore that, since the Declarations reflect domestic law, they cannot and do not operate to abrogate or extinguish international law rights conveyed by a treaty, consistent with the principles of international law that municipal law provisions cannot prevail over those of the treaty.[19]

17. Claimants also contend that Respondent cannot rely on estoppel, since it failed to demonstrate that (*i*) Claimants made a clear and unequivocal representation that they were waiving their right to arbitration under the CPTPP, (*ii*) Respondent relied in good faith on that representation and (*iii*) Respondent suffered material detriment as a result of such reliance.[20] Similarly, Claimants allege that the Declarations cannot amount to a waiver of their right to arbitration under the CPTPP, since a waiver of treaty rights must be clear, specific and informed.[21]

18. Finally, Claimants allege that, even if the Tribunal were to conclude that the First and Second Objections were serious and substantial, in any case it should not bifurcate the proceedings, since addressing those Objections separately from the merits would not serve procedural efficiency and economy. This is so because until 2023, neither Mexico nor other respondent States had raised objections similar to the First and Second Objections, with the consequence that no guiding precedent exists that would make the Objections appropriate for bifurcation.[22]

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[17] Response, ¶ 73.

[18] Response, ¶¶ 43-57.

[19] Response, ¶ 59.

[20] Response, ¶¶ 61-66.

[21] Response, ¶¶ 67-71.

[22] Response, ¶¶ 81-85, where Claimants also allege that the precedents relied upon by Respondent to support the Request have limited persuasive value, since they are materially different from the present case.

19. As to the Third and Fourth Objections, Claimants contend that they are not *prima facie* serious and substantial, since all the acts and omissions on which their claims are based occurred or crystallized *after* the CPTPP entered into force and after the cut-off date relevant for the purposes of the applicable limitation period of Article 9.21.1 of the CPTPP. Claimants further underscore that those Objections are so closely intertwined with the merits that bifurcation would not yield any procedural or practical benefits. Finally, Claimants contend that, even if Respondent's temporal objections were upheld, the case would continue to the merits phase in any case.[23]

III. The Tribunal's analysis

III.A The legal standard to decide on a request for bifurcation

20. The Parties do not diverge significantly on the standard to be applied by the Tribunal in deciding on the Request. It is common ground that, pursuant to Article 41(2) of the ICSID Convention and Rule 42 of the ICSID Rules, the Tribunal has the power to bifurcate jurisdictional or admissibility objections and to decide them as preliminary issues, separate from the merits.[24]

21. The Parties also agree[25] that the legal criteria relevant to deciding on the Request are those established by Rule 44(2) of the ICSID Rules, that reflects and codifies the practice of earlier ICSID tribunals. Pursuant to that provision

> In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:
>
> (a) bifurcation would materially reduce the time and cost of the proceeding;
>
> (b) the determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and
>
> (c) the preliminary objection and the merits are so intertwined as to make a bifurcation impractical.

22. With respect to the requirement under (a), Claimants add that, in deciding whether bifurcation would "*materially reduce the time and cost of a proceeding*" tribunals have considered whether

[23] Response, ¶¶ 88-105.

[24] Request, ¶ 20; Response, ¶ 8.

[25] Request, ¶¶ 24-29; Response, ¶¶ 10-12.

the objection is serious and substantial, by conducting a *prima facie* analysis based on the available fact allegations and legal arguments.[26]

23. The Tribunal agrees with the prevailing case law – including that relied upon by the Parties – that there is no presumption or general practice in favor of or against bifurcating proceedings to decide jurisdiction before the merits and therefore, each request for bifurcation must be analyzed on its own merits, in light of the specific circumstances of the case.[27] Likewise in line with the case law, the Tribunal is also of the view that considerations relevant to the analysis and decision on bifurcation include whether

(i) bifurcation would lead to an effective reduction of time and cost of the proceeding,[28] also taking into consideration a *prima facie* assessment of whether the objection is serious and substantial[29];

(ii) the decision on the objection would dispose of an essential part of the claims raised or result in a material reduction of the proceedings at the next phase;[30] and

(iii) the objection and the merits are sufficiently distinct so as to be analysed and decided independently of each other and without prejudgment of the issues reserved for the subsequent phases of the proceedings.[31]

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[26] See ¶ 13 above.

[27] ICSID Working Paper # 1. Vol. 3, August 2, 2018, CL-186, ¶ 393 indicating that "*ICSID case law uniformly held that there is no presumption in favor of bifurcation*".

[28] *Doups Holdings LLC c. Estados Unidos Mexicanos*, ICSID Case No. ARB/22/24, Resolución Procesal No. 3, Decisión sobre Bifurcación of October 16, 2024, RL-5, ¶ 14; *Aris Mining Corporation v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, Decision on Respondent's Request for Bifurcation of January 17, 2020, RL-6, ¶ 25; *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, SCC Case 2020/074, Procedural Order No. 5 on the Respondent's Requests for Summary Procedure and/or Bifurcation of March 26, 2021, CL-172, ¶ 69; *Naftiran Intertrade Co (NICO) Limited v. Kingdom of Bahrain*, ICSID Case No. ARB/22/34, Procedural Order No. 4 on Respondent's Request for Bifurcation of August 12, 2024, CL-179, ¶ 45.

[29] *Huawei Technologies Co Ltd. v. Kingdom of Sweden*, ICSID Case No. ARB/22/2, Procedural Order No. 3 of April 28, 2023, CL-17, ¶¶ 32-34; *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Procedural Order No. 2, Decision on the Request for Bifurcation of December 2, 2022, CL-175, ¶¶ 80-82.

[30] *Energía v. of Guatemala*, CL-175, ¶ 82(c).

[31] *TC Energy Corporation and TransCanada Pipeline Limited v. United States of America*, ICSID Case No. ARB/21/63, Procedural Order No. 2 of April 13, 2023, RL-7, ¶ 28; *Westmoreland Mining Holdings LLC v. Government of Canada*,

24. In respect of (*i*) above, the Tribunal clarifies that – as evidenced by authoritative tribunals – the *prima facie* assessment of whether an objection is serious and substantial is to be conducted "*on the record as it stands*", *i.e.*, based on the fact allegations and legal arguments formulated by the Parties in their submissions on the request for bifurcation and preceding the latter and exclusively with a view to determining whether that objection "*raises a serious issue requiring consideration in a separate procedural phase*".[32] Therefore, when assessing the seriousness of an objection for the purposes of deciding on a bifurcation request, tribunals "*merely make*[] *a procedural determination about the most efficient management*"[33] of the proceedings, with the consequence that no decision on the merits of the objection nor on the merits of the case shall be inferred from that preliminary assessment.[34]

25. Having identified the relevant criteria, the Tribunal can now establish whether they are satisfied and thus whether bifurcation is warranted in the present case, which is the concrete issue on which the Parties diverge. In conducting that analysis, the Tribunal will adopt the same approach as the Parties in their submissions and thus will consider jointly the First and the Second Objections (in Section III.B below), and the Third and Fourth Objections (in Section III.C below).

III.B The First and Second Objections

26. As mentioned, by the First and Second Objections, Respondent contends that the Tribunal lacks jurisdiction *ratione personae* and *ratione voluntatis*, because, by the Declarations, Claimants (*i*) accepted to be considered as Mexican nationals with respect to their investments, with the consequence that they would now be estopped from invoking their Canadian nationality to enjoy

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ICSID Case No. UNCT/20/3, Procedural Order No. 3, Decision on Bifurcation of October 20, 2020, CL-170, ¶ 54; *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Procedural Order No. 2, Decision on the Request for Bifurcation of December 2, 2022, CL-175, ¶ 90; *EMS Shipping & Trading GmbH v. Republic of Albania*, ICSID Case No. ARB/23/9, Procedural Order No. 3 of February 23, 2024, CL-178, ¶ 46; *The Burmilla Trust and others v. The Kingdom of Lesotho*, PCA Case No. 2016-21, Procedural Order No. 1 on Suspension, Bifurcation and Procedural Timetable of November 3, 2016, CL-158, ¶¶ 46-51; *Windstream Energy LLC v. The Government of Canada (II)*, PCA Case No. 2021-26, Procedural Order No. 2, Decision on Bifurcation, CL-174, ¶ 55; *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. The Plurinational State of Bolivia*, PCA Case No. 2018-39, Decision on Respondent's Application for Termination, Trifurcation and Security for Costs of July 9, 2019, CL-163, ¶ 133.

[32] *Huawei v. Sweden*, CL-176, ¶ 33.

[33] *Huawei v. Sweden*, CL-176, ¶ 34.

[34] *Energía v. of Guatemala*, CL-175, ¶ 82(a).

protection under the CPTPP and (*ii*) waived their right to invoke the protection of their government, which includes the right to resort to arbitration under the CPTPP. In Respondent's view, both the First and Second Objections warrant bifurcating the proceedings, since, on the one hand, if they were granted, the arbitration would be terminated, with a significant reduction of time and cost, and, on the other hand, those Objections require a limited analysis of the documentary evidence on the record and no inquiry as to the merits.[35]

27. In Claimants' view, the First and Second Objections do not warrant bifurcation because this would not materially reduce the time and costs of the proceedings, as neither of them is *prima facie* serious and substantial.[36] Claimants add that, in any case, addressing these Objections separately from the merits would not serve procedural efficiency and economy.[37]

28. The Tribunal considers that its reasoning should start with the analysis of the Declarations, which are key for the First and Second Objections.

29. The Declaration in Minera Gavilán's bylaws reads as follows:

> 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.[38]

30. Similarly, the Declaration in Minera de Gorrión's bylaws reads as follows:

> 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

[35] See ¶¶ 8(i)-(ii) and 10 above.

[36] See ¶¶ 15-18 above.

[37] Response, ¶¶ 81-85.

[38] C-162, Third Clause.

> 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.[39]

31. On the basis of the above wording, Respondent submits that Claimants are precluded from invoking their Canadian nationality to benefit from the Treaty's protection and that they waived their right to arbitrate under the Treaty, which, in turn, results in the Tribunal's lack of jurisdiction. In Respondent's view, this would justify bifurcating the proceedings and deciding the First and Second Objections separately from the merits. For their part, Claimants contend that the Declarations are "Calvo clauses" and, as such, have no impact either on Claimants' nationality or on their right to arbitration under the CPTPP, since they are directed at diplomatic protection, not investor-State arbitration.[40] On these grounds, Claimants maintain that the First and Second Objections are not *prima facie* serious and substantial and therefore should be joined to the merits.

32. The Tribunal wishes to emphasize again that the question before it at this stage is not whether the First and Second Objections are meritorious – which is a matter that can only be assessed once those objections have been fully formulated and contested – but whether the arguments and evidence submitted to it at the present stage are sufficient to conclude that those Objections would be most efficiently considered and decided in a bifurcated phase.

33. For the reasons illustrated below, the Tribunal is of the view that, in its Request, Respondent failed to provide sufficient support for its position that the First and Second Objections raise issues requiring consideration in a preliminary phase of the proceedings separate from the merits and that thus bifurcation would foster the efficiency of the arbitration.

34. It is undisputed[41] that the inclusion of the Declarations in the bylaws of Claimants' local subsidiaries was a mandatory precondition for their incorporation under Mexican law. Pursuant to the latter, in order for foreign investors to incorporate a subsidiary in Mexico, the subsidiary's bylaws must include a declaration that its foreign shareholders agree to be treated as Mexican

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[39] C-178, Eight Clause.

[40] Response, ¶¶ 45-57.

[41] Request, ¶¶ 33, 35-42; Response, ¶¶ 49-52.

nationals with respect to their investment and, as such, not to seek the protection of their home government.

35. The Parties equally agree that the Declarations are standard form declarations insofar as their content and even their wording is imposed by, or directly derived from, the law. Specifically, as the Parties observe,[42] the mandatory inclusion of standard form declarations like the Declarations was first established, with regard to investments in the mining sectors, by Article 27 of the Mexican Constitution, that, in the relevant part, reads as follow

> Solo los mexicanos por nacimiento o por naturalización y las sociedades mexicanas tienen derecho para adquirir el dominio de las tierras, aguas y sus accesiones o para obtener concesiones de explotación de minas o aguas. El Estado podrá conceder el mismo derecho a los extranjeros, siempre que 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 los que se refiere a aquellos; bajo la pena, en caso de faltar al convenio, de perder el beneficio de la Nación, los bienes que hubieren adquirido en virtud del mismo.[43]

36. The 1995 Foreign Investment Law[44] subsequently extended the requirement to all Mexican companies with foreign shareholders, irrespective of the sector of their activity, and the 1998 Regulation to the Foreign Investment Law[45] subsequently established the text to be included in a company's bylaws.

37. In its assessment of the Request the Tribunal has also considered the following:

- *first*, at the time Minera Gavilán's and Minera Gorrión's bylaws were signed – *i.e.*, in 1996 and 2011, respectively – the CPTPP had not yet entered into force, so that the Declarations could not amount to an informed waiver by Claimants of treaty rights that did not yet exist;[46]

- *second*, adopting Respondent's interpretation of the mandatory declarations imposed under Mexican law (including the Declarations) as a waiver by foreign investors of their rights under international investment treaties, would render meaningless all of Mexico's investment

[42] Request, ¶¶ 35-41; Response, ¶¶ 49-52.

[43] C-1, Article 27.

[44] R-3.

[45] R-4.

[46] Response, ¶ 74.

treaties and the protection they purport to afford foreign investors. If one were to follow Respondent's interpretation, *every* foreign investor with a Mexican subsidiary would in practice be estopped from asserting treaty claims against Mexico. This would be so because, as mentioned, the inclusion in the bylaws of standard form declarations like the Declarations is a mandatory requirement for the incorporation in Mexico of *any* company with foreign shareholders, irrespective of the type of activity it is engaged in, with the consequence that *any* foreign investor with a subsidiary in Mexico would be disqualified from treaty protection due to those declarations;[47]

- *moreover*, the fact that Mexico has concluded and continues to conclude investor protection treaties appears incompatible with the position it holds in this arbitration, unless one accepts that Mexico negotiated and continues to negotiate those treaties "*with its fingers crossed behind its back*",[48] offering rights and protections to foreign investors under those treaties, while at the same time denying those protections under its domestic law.

38. Simply on the basis of these facts, the Tribunal is not at this stage convinced that the First and Second Objections would be most efficiently addressed and decided in a bifurcated phase.

39. The Tribunal wishes to underscore again that the above conclusion is a mere procedural determination concerning the most efficient management of the arbitration and based on a *prima facie* analysis of the First and Second Objections. Therefore, that conclusion in no way prejudges the merits of those Objections nor binds the Tribunal's future decision thereon.

III.C The Third and Fourth Objections

40. By the Third and Fourth Objections, Respondent alleges that the Tribunal lacks jurisdiction *ratione temporis* and *voluntatis* over Claimants' claims, since the latter (*i*) are based on events that pre-date the CPTPP's entry into force[49] and thus are excluded from the tribunal's jurisdiction pursuant to Article 9.2.3 of the CPTPP and due to the general principle of intertemporal law codified in the *Articles on States Responsibility for Internationally Wrongful Acts* and (*ii*) are time-barred under

[47] Response, ¶ 77.

[48] Response, ¶ 78.

[49] Specifically, Respondent alleges that Claimants' claims are based on events that occurred between 2015 and December 14, 2018 (Request, ¶¶ 63-66).

Article 9.21.1 of the CPTPP, since Claimants commenced this arbitration more than three years and six months after the date they became (or should have become) aware of the measures they are challenging in the arbitration and the alleged consequent losses.[50]

41. In Respondent's view, the Third and Fourth Objections warrant bifurcation, since, if they were granted, all (or, at least, the majority of) Claimants' claims would be disposed of, which, in turn, would result in a significant reduction of the time and resources invested by the Parties and the Tribunal in the arbitration. Respondent further alleges that the factual background relevant to decide on the Third and Fourth Objections does not substantially overlap with that relevant to the merits, since the Tribunal only needs to assess, on the one hand, when Claimants acquired knowledge of the measures they challenge in the arbitration and of the losses allegedly deriving therefrom and, on the other hand, whether those measures occurred before the entry into force of the CPTPP. There is no need for the Tribunal to consider witnesses' or experts' testimony, nor to analyze legal issues relating to the merits.[51]

42. Claimants contend that all facts on which their claims are based occurred or crystallized after the CPTPP's entry into force, as well as after the cut-off date relevant for the purposes of the limitation period established by Article 9.21.1 of the CPTPP. They further maintain that the Third and Fourth Objections are so closely intertwined with the merits to render bifurcation impractical.[52]

43. In the Tribunal's view, deciding on the Third and Fourth Objections would necessarily require the Tribunal to preliminarily determine the scope of Claimants' claims and namely, the factual matrix underpinning them, which is a question on which the Parties have strongly differing views, as the Request and the Response show.[53]

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[50] See ¶¶ 8(iii)-(iv) above.

[51] See ¶ 11.

[52] See ¶ 19.

[53] Specifically, with respect to the Third Objection, Respondent asserts that the core acts and facts underlying Claimants' claims occurred before December 30, 2018, as demonstrated by the Memorial, that focuses on events from 2015 to December 14, 2018 (Request, ¶¶ 64-66). Conversely, according to Claimants, their claims arise out of a series of measures attributable to Mexico that occurred or crystallized after the CPTPP entered into force, and namely: (*i*) The "*Manifestación de Impacto Ambiental*" decision issued by the *Secretaría de Medio Ambiente y Recursos Naturales* ("**SEMARNAT**") on December 17, 2020; (*ii*) the Mexican Supreme Court's decision of February 2022; (*iii*) SEMARNAT's bad faith campaign to stop the Claimants' project; and (*iv*) the "*Oficio*" issued by Mexico's *Secretaría de Economía* in February 2023 (Response, ¶¶ 89-91). As to the Fourth Objection, Respondent maintains

44. In particular, deciding on the Third and Fourth Objections would require the Tribunal to:

- identify the measures on which Claimants' claims are based;
- establish when those measures occurred;
- assess the relationship between those measures and their effects;
- assess which measures amount to a breach of international obligations;
- establish when Claimants acquired knowledge of that breach and of the losses deriving therefrom;
- determine whether Respondent's conduct preceding that breach is relevant to decide on its liability.

45. In the Tribunal's view and contrary to Respondent's allegation, the above assessment would require the Tribunal to examine extensive evidence, possibly including fact witnesses testimony and expert evidence. As Claimants highlight,[54] such a "*fact and evidence-intensive inquiry*" is not suitable for a bifurcated preliminary phase and would not contribute to the efficiency of the proceedings.

46. Moreover, the issues listed above, that ultimately consist in the determination of which acts form the basis of Claimants' claims, are also likely to be relevant to liability. As indicated by the investor-State case law mentioned by Claimants, issues like those listed above are "*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*".[55]

47. Two consequences follow from this. *First*, the factual matrix relevant to determine those issues substantially overlaps with that relevant to the merits of the case, so that if the Tribunal finds jurisdiction, it will have to review the same or substantially the same evidence in the merits phase, which again would not foster procedural efficiency. *Second*, by bifurcating the proceedings and

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that the first act forming the basis of Claimants' claims occurred on April 11, 2019, when the Mexican Second District Court ordered the cancellation of Claimants' mining concessions, i.e. well before the cut-off date relevant for the limitation period established under Article 9.21.1 of the CPTPP (Request, ¶¶ 76-77). According to Claimants, all four events ((*i*)-(*iv*) above) on which their claims are based occurred or crystallized after the cut-off date relevant for the purposes of Article 9.21.1 of the CPTPP (Response, ¶¶ 93-94).

[54] Response, ¶ 95.

[55] *Société Generale v. Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction of September 19, 2008, Exhibit CL-187, ¶ 94.

deciding the Third and Fourth Objections separately from the merits the Tribunal run the risk of prejudging those issues without a clear and complete picture of the case.

48. Based on the above, the Tribunal concludes that the Third and Fourth Objections are too closely intertwined with the merits so to render bifurcation impractical.

IV. The Tribunal's decision

49. In light of the above, the Tribunal

(i) **Rejects** Respondent's request that the proceedings be bifurcated and that the Objections be decided as preliminary issues in a phase separate from the merits;

(ii) **Orders** the Parties to communicate to the Tribunal a joint proposed procedural calendar for the subsequent phases of the proceedings by September 1, 2025 or, if the Parties are unable to reach an agreement, that each Party submits its own proposed procedural calendar by the same deadline; and

(iii) **Reserves** its decision on the allocation of the costs incurred by the Parties in connection with Respondent's Request for Bifurcation.

[redacted]

Prof. Luca G. Radicati di Brozolo

President

On behalf of the Tribunal