IN THE MATTER OF AN ARBITRATION UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT
and
THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF FRANCE AND THE GOVERNMENT OF THE UNITED MEXICAN STATES ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS
and
THE AGREEMENT BETWEEN THE PORTUGUESE REPUBLIC AND THE UNITED MEXICAN STATES ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS
and
EL ACUERDO ENTRE EL GOBIERNO DE LOS ESTADOS UNIDOS MEXICANOS Y EL GOBIERNO DE LA REPUBLICA ARGENTINA PARA LA PROMOCIÓN Y PROTECCIÓN RECÍPROCA DE LAS INVERSIONES

- and -

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

- between -

CARLOS SASTRE AND OTHERS
(the "Claimants")

and

THE UNITED MEXICAN STATES
(the "Respondent")

ICSID Case No. UNCT/20/2

PROCEDURAL ORDER NO. 2

DECISION ON BIFURCATION

Tribunal
Prof. Eduardo Zuleta (Presiding Arbitrator)
Dr. Charles Poncet
Mr. Christer Söderlund

Secretary of the Tribunal
Ms. Geraldine R. Fischer

August 13, 2020

I. PROCEDURAL HISTORY

1. On May 26, 2020, the Tribunal held a First Session with the Parties. During the First Session the Parties debated issues arising from Claimants' submission in one single writ of claims by six claimants with different investments under four different treaties ("**Treaties**"). The Parties also debated Respondent's other jurisdictional objections.

2. Further to the Parties' exchanges during the First Session, the Tribunal directed the Parties to make two rounds of written submissions on the following issues: (1) bifurcation, and (2) whether the present proceeding is a multiparty arbitration or a consolidation of claims and any procedural or substantive implications.

3. On May 28, 2020, the Tribunal issued Procedural Order No. 1 and deferred its decision on the applicable arbitration rules and the procedural timetable.

4. Per the briefing schedule set by the Tribunal on May 26, 2020, the Parties made the following written submissions:

    a. On June 10, 2020, Respondent filed its written submission on bifurcation together with Exhibits R-001 through R-009 and Legal Authorities RL-001 through RL-029 ("**Bifurcation Application**").

    b. On June 24, 2020, Claimants submitted the Claimants' Written Submission in Opposition to Bifurcation and Brief in Support of a Multiparty Proceeding together with Legal Authorities CLA-001 through CLA-050 ("**Claimants' Opposition**").

    c. On July 1, 2020, Respondent presented its Reply to the Claimants' Bifurcation Application together with Exhibit R-010 and Legal Authorities RL-030 through RL-040 ("**Respondent's Bifurcation Reply**").

    d. On July 8, 2020, Claimants filed their Rejoinder in Opposition to Bifurcation and in support of a Multiparty Proceeding together with Exhibit C-036 and Legal Authorities CLA-051 to CLA-057 ("**Claimants' Opposition Rejoinder**").

5. This Procedural Order sets out the Tribunal's decision on Respondent's Bifurcation Application.

II. THE PARTIES' ARGUMENTS

A. RESPONDENT'S POSITION

6. Respondent submits that the Tribunal should decide on the objections to jurisdiction as a preliminary matter. Respondent argues that the 1976 UNCITRAL Rules have a presumption in favor of bifurcation, which is commonly used for procedural efficiency.[1]

7. Respondent mentions three criteria for a tribunal to consider when deciding on bifurcation:

   (i) If the objection, *prima facie*, is serious, substantial, and not frivolous;

   (ii) Whether, if the tribunal grants bifurcation, there would be a material reduction in the next phase of the proceeding; and

   (iii) Whether the objection is closely related to the merits.[2]

8. Respondent argues that the Tribunal has no jurisdiction over this dispute and raises objections *ratione voluntatis*, *ratione temporis*, *ratione personae* and *ratione materiae*. First, Respondent argues that the Tribunal lacks jurisdiction *ratione voluntatis* because it did not consent to the "auto-consolidation" of this arbitration, involving four treaties with differing offers to arbitrate, five States, six investors and alleged government actions occurring at different times and places.[3] Additionally, Respondent submits that the Treaties prohibit self-consolidation, which conflicts with the concepts of *pacta sunt servanda* and *pacta tertiis*, and such self-consolidation is *de jure* inadmissible and involves fundamental questions of international law and treaty interpretation.[4]

9. Respondent asserts that ultimately it is the State that decides whether to consolidate arbitrations in accordance with the relevant treaty provisions.[5] In the present case, three of the Treaties (the Argentina-Mexico BIT, the Mexico-Portugal BIT and the NAFTA) explicitly establish the scope of Respondent's consent to join separate arbitrations, which

[1] Bifurcation Application, ¶¶ 18, 21 (citing, *e.g.* RL-003, *Mesa Power Group LLC v. Canada*, PCA Case No. 2012-17, Procedural Order No. 2, January 18, 2013).
[2] Bifurcation Application, ¶¶ 22-23 (citing RL-005, *Glencore Finance (Bermuda) Limited v. Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2, January 31, 2018; RL-002, *Glamis Gold Ltd v. USA*, UNCITRAL, Procedural Order No. 2 (revised), May 31, 2005).
[3] Bifurcation Application, ¶¶ 30, 33, 36, 46.
[4] Bifurcation Application, ¶ 34 (also citing the Vienna Convention Law of Treaties, Arts. 31, 32, 33, 26, 34, 35 and 36).
[5] Bifurcation Application, ¶ 38.

distinguishes this case from others, like *Alemanni v. Argentina*, where no such consolidation provision existed.[6] If the Tribunal considers that the Treaties allow for "self-consolidation", Respondent argues, that, in order to be valid, all the treaty requirements to submit a claim to arbitration must be met, which Respondent underscores is not the present case.[7]

10. In addition, Respondent asserts that the Tribunal lacks jurisdiction *ratione temporis* as the Treaties have an express limitation period to submit a claim to arbitration. Similarly, Respondent submits that the Tribunal lacks jurisdiction *ratione personae* and *ratione materiae* as Claimants have not demonstrated that they have an "investment" under the Treaties. Respondent emphasizes that Claimants bear the burden of proof with respect to jurisdiction.[8] Respondent makes the following specific jurisdictional objections:[9]

    a. With respect to the Mexico-Argentina BIT applicable to Mr. Sastre, CETSA-Tierras del Sol and HLSA and Hamaca Loca, Respondent submits that the treaty requirements of "domicile", "investor of Argentina", "statute of limitations"; legality of the investment and notice of intent were not met.[10]

    b. Under the NAFTA, Respondent asserts that the Claimants, Ms. Mónica Galán Ríos and Mr. Graham Alexander, were not "investors" during all the relevant times and there is no consent as the notice of intent was defective.[11]

    c. Respondent submits that Mr. Renaud Jacquet was not a qualified "investor" under the Mexico-France BIT during all the relevant times.[12]

    d. Respondent argues that Mr. Eduardo Nuno Vaz Osorio dos Santos Silva and Ms. Margarida Oliveira Azevedo de Abreu did not qualify as "investors" under the Mexico-Portugal BIT during all the relevant times nor did the alleged investment comply with the BIT's legality requirements.[13]

[6] Bifurcation Application, ¶¶ 40-43 (citing RL-018, *Giovanni Alemanni and others v. Argentina*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, Concurring Opinion of Mr. J. Christopher Thomas, QC, November 17, 2014).
[7] Bifurcation Application, ¶¶ 44, *et seq.*
[8] Bifurcation Application, ¶¶ 48-51.
[9] Bifurcation Application, ¶¶ 52-139.
[10] Bifurcation Application, ¶¶ 52-108.
[11] Bifurcation Application, ¶¶ 109-122.
[12] Bifurcation Application, ¶¶ 123-127.
[13] Bifurcation Application, ¶¶ 128-139.

11. In the Reply to the Request for Bifurcation, Respondent explains that the Tribunal can only exercise jurisdiction if each investor demonstrates on the balance of probabilities that it is a qualified "investor" of a qualified "investment" on the dates of the alleged treaty violations. Claimants' contradictory, ambiguous and unspecific evidence fails to prove these elements.[14] Additionally, Respondent argues that its objections based on legality, domicile and statute of limitations are not intertwined with the merits. Finally, Respondent submits that if its jurisdictional objections were granted there would be a substantial reduction in the merits phase.[15]

12. Contrary to Claimants' assertions, Respondent emphasizes that its jurisdictional objections are not "frivolous" or "vexatious."[16] In fact, Respondent explains that this is the first self-consolidated arbitration initiated without its consent, so its *ratione voluntatis* objection has a significant impact for future arbitrations.[17] Furthermore, Respondent notes that Claimants do not contest that each Claimant has to comply with the relevant treaty requirements for this Tribunal to have jurisdiction over this arbitration.[18] According to Respondent, it is evident that the multiple treaty requirements have not been met, and, therefore, it is essential that the Tribunal bifurcates the proceedings to deal with the jurisdictional objections as a preliminary manner.[19]

13. Respondent also disputes Claimants' argument that joining two or more arbitrations is a procedural question governed by the 1976 UNCITRAL Rules and policy considerations. Respondent underscores that this is a question of consent as the arbitration agreement is only formed when the State's and Claimants' consent match. Moreover, in three of the four Treaties, there are specific consolidation provisions, which show that other forms of joinder are prohibited. Therefore, Respondent concludes there is no arbitration agreement in the present case.[20]

14. With respect to the burden and standard of proof, Respondent argues that the "Higgins Test" does not apply to its jurisdictional objections. Claimants have the burden to establish jurisdictional facts, and the standard is the balance of probabilities, not the lower standards of "*prima facie*", "plausible" or "capable of constituting a BIT violation" that apply to the

[14] Respondent's Bifurcation Reply, ¶¶ 18-20.
[15] Respondent's Bifurcation Reply, ¶¶ 23-25.
[16] Respondent's Bifurcation Reply, ¶ 1.
[17] Respondent's Bifurcation Reply, ¶¶ 2, 5.
[18] In Respondent's Bifurcation Reply, the Respondent notes that it uses the term "multi-party arbitration" to simplify the discussion on its objection, but the Respondent uses this term to describe the joining of two or more arbitration into one, which Mexico described as "self-consolidation" since its first communication. Respondent's Bifurcation Reply, ¶ 3.
[19] Respondent's Bifurcation Reply, ¶ 8.
[20] Respondent's Bifurcation Reply, ¶¶ 9-12.

merits. Furthermore, the need to consider facts, even complicated facts, to decide jurisdictional questions, is not a reason to deny bifurcation. In the present case, a rigorous jurisdictional phase is justified given the nature of the jurisdictional objection.[21]

B. CLAIMANTS' POSITION

15. Claimants oppose Respondent's Bifurcation Application. Contrary to Respondent's assertion, Claimants argue that the Tribunal has *ratione voluntatis* jurisdiction over this multiparty arbitration.[22]

16. First, the Treaties governing this arbitration permit Claimants to arbitrate their claims under the 1976 UNCITRAL Rules.[23] Moreover, in contrast to Respondent's earlier submissions, Claimants note that the "*Respondent's submission refers only to Article 21(4) of the 1976 UNCITRAL Rules*", without referring to the 2010 UNCITRAL Rules. Claimants therefore request that the Tribunal issue an order establishing that the 1976 UNCITRAL Rules govern these proceedings.[24]

17. Claimants submit that Article 15.1 of the 1976 UNCITRAL Rules gives the Tribunal authority to manage the proceeding as it considers best.[25] It is Claimants' position that the multiparty arbitration should be allowed in this case as it has been allowed in prior investor-State arbitrations, even in cases involving multiple treaties and investors.[26] Moreover, policy considerations, such as access to justice, favor hearing the claims together, as the claims share many of the same issues of fact an law (*i.e.* similar investments in Tulum acquired in the same *Ejido*, involving treaty-breaching conducts undertaken between October 31, 2011 to June 17, 2016).[27] Given the similarities, Claimants also underscore that consistency in awards and avoiding parallel proceedings is desirable.[28]

18. Claimants further submit that the Tribunal has jurisdiction *ratione voluntatis* as Respondent made a standing offer to consent to arbitration in the Treaties, which each

[21] Respondent's Bifurcation Reply, ¶¶ 13-17 (citing RL-032 (*B-Mex, LLC and others v. Mexico*) and RL-034 (*Theodoros Adamakopoulos and others v. Cyprus*) to demonstrate that prior cases have included rigorous jurisdictional phases with document production, witness statements and procedural applications).
[22] Claimants' Opposition, Section II.
[23] Claimants' Opposition, ¶ 18.
[24] Claimants' Opposition, ¶ 13.
[25] Claimants' Opposition, ¶¶ 4, 19.
[26] Claimants' Opposition, ¶¶ 22-28 (citing *e.g.* CLA-041, *Suez and others v. Argentina*, ICSID Case No. ARB/03/19, Award, April 9, 2015).
[27] Claimants' Opposition, ¶ 32.
[28] Claimants' Opposition, ¶ 34.

Claimant perfected.[29] According to Claimants, "[o]*nce a qualifying Claimant with a qualifying investment crosses the consent threshold by accepting a standing offer to arbitrate pursuant to the Treaty, consent is complete*"[30], "*Respondent's 'subsequent' consent is neither relevant nor required in advance of proceedings to which Respondent already consented in the Treaties*."[31] Claimants argue that this is not a case of "auto-consolidation" as there are not "two or more pending claims", and when the Amended Notice of Arbitration ("**NOA#2**") was filed, amending Mr. Sastre's claims and adding those of the remaining Claimants, no arbitrator had been appointed. In fact, this Tribunal is the only one that has ever been appointed to hear these claims.[32]

19. With respect to the standard of proof, Claimants argue that the Tribunal should follow the "Higgins Test" used by prior tribunals, and, contrary to Respondent's assertions, Claimants need not "prove" every jurisdictional allegation at this early stage.[33]

20. Claimants submit that neither the Treaties nor the UNCITRAL Rules favor bifurcation.[34] In Claimants' view, "[a]*t worst*", the 1976 UNCITRAL Rules "*creates a 'soft' presumption toward bifurcation* subject to *a case-specific analysis by the Tribunal using the* Glamis Gold *test* […] *to determine the most procedurally efficient course*."[35] Claimants assert that the first of the three-prong *Glamis Gold* test is not met as the Respondent's objections are frivolous or vexatious. To demonstrate this, Claimants counter each of Respondent's purported jurisdictional objections *ratione personae* and *ratione materiae* and further argue that Respondent's notice of intent objections are not serious or substantial.[36] Claimants moreover submit that the remaining jurisdictional objections are inextricably intertwined with the merits, failing the second criterion.[37] Claimants also argue that the merits phase will not be substantially reduced.[38]

21. Claimants submit that in its Bifurcation Reply Respondent has "*all but abandoned its earlier position that this is an 'auto-consolidation'*" and dispute "*that the Treaties contain an 'inherent consent limitation' against multiparty arbitration*."[39] According to Claimants,

[29] Claimants' Opposition, ¶¶ 5, 40 (specifying the required steps taken by each Claimant under the relevant Treaty).
[30] Claimants' Opposition, ¶ 5.
[31] Claimants' Opposition, ¶ 47.
[32] Claimants' Opposition, ¶ 42.
[33] Claimants' Opposition, ¶¶ 54, *et seq.* (citing *e.g.* CLA-021, *Impregilo S.p.A. v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005; CLA-004, *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005).
[34] Claimants' Opposition, ¶¶ 67, *et seq*.
[35] Claimants' Opposition, ¶ 70 (emphasis in original).
[36] Claimants' Opposition, ¶¶ 66-95.
[37] Claimants' Opposition, ¶¶ 77-82.
[38] Claimants' Opposition, ¶¶ 104-109.
[39] Claimants' Rejoinder, ¶ 2.

Respondent misconstrues how consent is perfected in multiparty treaty arbitration. Citing prior investor-State tribunals, Claimants submit that in multiparty proceedings involving common issues of law and fact and multiple treaties, consent is perfected if each claimant accepts Respondent's offer to arbitrate, but if one claim does not meet the Treaty requirements, only that claim fails, "*not the entire multiparty proceeding*." Moreover, Claimants posit that limiting multiparty arbitration "*would be an improper modification of the consent provisions in each of the Treaties*."[40] Claimants also point out that Respondent fails to disprove that each Claimant perfected its consent nor did it address Claimants' arguments regarding procedural efficiency and access to justice.[41]

22. Claimants emphasize that Respondent has failed to meet its burden to show that bifurcation is warranted in this case.[42] With respect to the standard of proof, Claimants reiterate that the Tribunal should follow the majority of tribunals using the "*Higgins Test's presumption upon Claimants' presentation of a* prima facie *showing of jurisdiction*", but, in any case, Claimants' Amended Notice of Arbitration demonstrates that Claimants met the necessary jurisdictional elements.[43] According to Claimants, the Parties have agreed that the *Glamis Gold* test provides the bifurcation framework and Respondent has not contested that all three legs must be met for a Tribunal to bifurcate a proceeding. In Claimants' view, Respondent has failed to meet its burden for bifurcation.[44]

III. THE TRIBUNAL'S ANALYSIS

23. The Tribunal has considered all the relevant factual and legal arguments presented by the Parties in their written submissions. The fact that any argument, allegation, or specific piece of evidence is not mentioned in the analysis below does not mean that the Tribunal has not considered it.

24. The decision in this Procedural Order only relates to bifurcation. Moreover, the Tribunal's considerations and decisions regarding bifurcation do not prejudice any future decision the Tribunal will make with respect to the substance of Respondent's preliminary objections or the Parties' submissions on the merits.

[40] Claimants' Rejoinder, ¶¶ 10-26 (citing CLA-019, *Guaracachi America, Inc. and Rurelec PLC v. Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, January 31, 2014; RL-034, *Theodoros Adamakopoulos and others v. Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, February 7, 2020.).
[41] Claimants' Rejoinder, ¶¶ 9, 30-39.
[42] Claimants' Rejoinder, Section III.
[43] Claimants' Rejoinder, ¶¶ 40-45.
[44] Claimants' Rejoinder, ¶¶ 61-71.

25. The Tribunal must (A) evaluate whether Respondent's preliminary objections can be analyzed in one single proceeding, (B) establish the applicable standard on bifurcation, and (C) analyze the preliminary objections raised under the Treaties.

A. WHETHER RESPONDENT'S PRELIMINARY OBJECTIONS CAN BE ANALYZED IN ONE SINGLE PROCEEDING

26. On June 14, 2019, Claimants appointed Dr. Charles Poncet through NOA#2 as arbitrator in these proceedings.[45] On October 7, 2019, by communication to the Secretary General of ICSID, Respondent appointed Mr. Christer Söderlund as arbitrator in these proceedings.[46] On February 11, 2020, the Parties agreed to appoint Prof. Eduardo Zuleta as President of the Tribunal.[47]

27. The Parties do not dispute that the arbitrators were properly appointed, and the Tribunal was validly constituted. Neither Party has questioned the jurisdiction of the Tribunal to decide on bifurcation or to hear and decide the preliminary objections submitted by Respondent. The Tribunal therefore has the authority to decide on the preliminary objections regarding the Tribunal's jurisdiction and to decide whether or not to hear such objections as a preliminary matter or together with the merits. The latter is an obvious consequence of the *kompetenz-kompetenz* rule.

28. The Tribunal also notes that the Parties have not objected to the Tribunal dealing with all of the preliminary objections presented by Respondent, including the so-called "self-consolidation", in a concurrent fashion.

29. There is no doubt that under both the UNCITRAL Rules of 1976 and the UNCITRAL Rules of 2010, the Tribunal has the obligation to conduct the proceedings in an efficient manner. Thus, in order to decide on the preliminary objections submitted by Respondent, the Tribunal may hear all such objections in one single proceeding, as opposed to holding multiple separate proceedings related to the preliminary objections under each applicable treaty.

30. Other considerations favor the Tribunal deciding on Respondent's Bifurcation Application and preliminary objections in one single proceeding. First, Respondent's objections appear to include: (A) objections that are particular to a given treaty; (B) objections that share issues of law or fact with more than one treaty; and (C) objections that have common issues of law or fact among the Treaties, particularly the objection regarding the so-called "self-

[45] Bifurcation Application, ¶ 9.
[46] Bifurcation Application, ¶ 13.
[47] Procedural Order No. 1 of May 28, 2020, Section 1.3.

consolidation" of the arbitration. Second, hearing all the objections together will result in significant time and cost savings.

31. For the reasons elaborated above, the Tribunal will decide the dispute on bifurcation regarding all the preliminary objections in one procedural order, and thereafter will hear all the objections filed by Respondent that comply with the requirements for bifurcation set out below in one single proceeding.

B. THE APPLICABLE STANDARD ON BIFURCATION

a) The UNCITRAL Rules

32. Both Parties agree that the applicable procedural rules are the UNCITRAL Arbitration Rules. Yet, during the First Session, the Parties disagreed as to whether the 1976 or 2010 version of those rules applied.

33. Article 21(4) of the 1976 UNCITRAL Rules provides that:

> In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

34. Article 23(3) of the 2010 UNCITRAL Rules provides that:

> The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.

35. Respondent's view is that Article 21(4) of the 1976 UNCITRAL Arbitration Rules provides a presumption that objections to jurisdiction should be resolved as preliminary questions, before consideration of the merits.[48] On the other hand, Claimants assert that Article 21(4) creates a "soft" presumption on bifurcation *subject to* a case-specific analysis by the Tribunal in order to determine the most procedurally efficient course.[49] According to Claimants, none of the procedural guidelines set forth in the Treaties refer to the concept of bifurcation.[50]

[48] Bifurcation Application, ¶ 18.
[49] Claimants' Opposition, ¶ 70.
[50] Claimants' Opposition, ¶ 67.

36. The Parties do not dispute that the Tribunal has the power to bifurcate the proceedings.

37. The Tribunal notes that, under both the 1976 and the 2010 UNCITRAL Rules, it has ample discretion to decide whether to deal with jurisdictional objections first or join them with the merits in view of the specific circumstances of this dispute. What is paramount in exercising this discretion is to conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the Parties' dispute.[51]

b) The Three-Prong Test on Bifurcation

38. The Parties agree that efficiency is a key factor in determining whether the Tribunal should rule on objections that may affect its jurisdiction as a preliminary matter. For that purpose, the Tribunal must look for procedural economy, and the significant savings in time, energy and costs that would be involved in avoiding entering the merits of the controversy.[52]

39. Both Parties also agree that arbitral tribunals often consider the following three criteria in order to examine whether or not bifurcation would be more efficient:[53] a) whether the request is substantial or the objection is *prima facie* serious and substantial; b) whether the request, if granted, would lead to a material reduction in the proceedings at the next stage, or whether the objection, if successful, will result in disposing of all or an essential part of the claims raised; and c) whether bifurcation is impractical in the sense that the issues are too intertwined with the merit that it is very unlikely that there will be any savings in time or cost or can the objection be examined without prejudging or entering the merits of the case.

40. Under the first criterion, the Tribunal must determine whether there is a credible basis for the objection. As noted in *Glamis Gold*, this criterion involves evaluating "*whether the objection is substantial inasmuch as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding.*"[54] At this stage, the Tribunal is required to examine whether the objections are frivolous or vexatious. If a tribunal determines that a preliminary objection is "serious"–

[51] RL-002, *Glamis Gold Ltd v. USA*, UNCITRAL, Procedural Order No. 2 (revised), May 31, 2005, ¶ 11; RL-007, *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. India*, PCA Case No. 2016-7, Procedural Order No. 4, April 19, 2017, ¶ 74.
[52] CLA-0035, *Rand Investments Ltd. and others v. Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 3, June 24, 2019, ¶ 15.
[53] Claimants' Opposition, ¶ 71; Bifurcation Application, ¶ 22; Claimants' Rejoinder, ¶ 46; RL-006, *Philip Morris Asia Limited v. Australia* (UNCITRAL) Procedural Order No. 8, April 14, 2014, ¶ 109; RL-002, *Glamis Gold Ltd v. USA*, UNCITRAL, Procedural Order No. 2 (revised), May 31, 2005, ¶ 12; RL-007, *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. India*, PCA Case No. 2016-7, Procedural Order No. 4, April 19, 2017, ¶ 37.
[54] RL-002, *Glamis Gold Ltd v. USA*, UNCITRAL, Procedural Order No. 2 (revised), May 31, 2005, ¶ 12.

understood as the opposite of superficial–or dispositive of the claims, this does not necessarily mean that the objection will be successful at a later stage of this arbitration.

41. Under the second criterion, the Tribunal must evaluate whether the objection to jurisdiction, if granted, would result in a substantial reduction of the proceedings at the next phase. In order to determine whether the objection, if successful, would dispose of all or an essential part of the claims raised,[55] the Tribunal must assess whether bifurcation of a preliminary objection would reduce time and costs. The Parties agree that this is the standard the Tribunal should apply when deciding the effectiveness of bifurcating the proceedings. In the present case, the Tribunal must analyze whether there would be a reduction of time and costs in the arbitration if some of Respondent's preliminary objections succeed.

42. Under the third criterion, the Tribunal must consider the practicality of bifurcation, meaning whether the objection can be examined without entering into the merits of the case. On this point, the *Glamis Gold* tribunal concluded that bifurcation is "*impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost.*"[56] Conversely, in cases where jurisdiction appears to be a distinct question to be resolved, the Tribunal could decide such questions in a different award.

43. The Tribunal agrees that these criteria should be taken into consideration when deciding bifurcation. The three factors identified are not "stand-alone" criteria. All three elements of the test must be cumulatively satisfied to decide a preliminary objection to jurisdiction in a separate phase.

44. The Tribunal also considers that such criteria serve as mere guidance and should not be interpreted as restricting the Tribunal's discretion to weigh each of the requirements when arriving at its decision. In order to decide whether the bifurcation of jurisdictional objections will lead to greater efficiency in the proceeding, the Tribunal must examine the legal and factual circumstances of each particular case.

45. The Parties agree that "procedural efficiency", understood as the reduction in time and costs associated with the arbitration, is the principal factor that tribunals should consider when deciding whether to bifurcate.[57] The Tribunal agrees that the goal of bifurcation is procedural efficiency. Yet, efficiency has to also be understood in a broader sense. The

[55] RL-006, *Philip Morris Asia Limited v. Australia* (UNCITRAL) Procedural Order No. 8, April 14, 2014, ¶ 63.
[56] RL-002, *Glamis Gold Ltd v. USA*, UNCITRAL, Procedural Order No. 2 (revised), May 31, 2005, ¶ 12.
[57] Claimants' Opposition, ¶ 52.

analysis of whether bifurcation would bring efficiency to the procedure should not focus exclusively on the possible additional time or costs of the jurisdictional stage.

46. Both the 1976 and the 2010 UNCITRAL Rules seek to promote efficiency in the proceedings. According to these rules, arbitration tribunals must ensure efficiency through the early resolution of preliminary questions that resolve all or substantial parts of a case. The Tribunal thus concludes that the decision to bifurcate the proceedings must balance the benefits of procedural efficiency, against the risks of delay, increased costs, and prejudging. The Tribunal is aware that any decision on bifurcation has to weigh those inherent risks with the potential benefits of reducing costs and time for the Parties. In doing so, the Tribunal will take into account the three-part test described above.

C. THE PRELIMINARY OBJECTIONS RELATED TO EACH APPLICABLE TREATY

47. The Tribunal must analyze each of the preliminary objections presented by Respondent in the light of the three-prong test set out on Section III.B of this decision. For the sake of clarity and efficiency, –and given that some objections are repeated with respect to different treaties– the preliminary objections raised by Respondent will be analyzed in groups.

a) Respondent's Objection regarding the "Self-Consolidation" of the Proceeding

48. The Tribunal faces a situation in which six different Claimants from different nationalities decided to present their claims under four different Treaties in a joint notice of arbitration. Respondent argues that the Treaties do not allow for "self-consolidation" of claims or, as Claimants submit, a multi-party arbitration,[58] and in any event, even if the Tribunal were to consider that the Treaties allow for "self-consolidation", the requirements provided in the Treaties for consolidation are not met in the present case.[59]

49. The Tribunal has already decided that, in the event of bifurcation, it will hear all of Respondent's objections that comply with the requirements for bifurcation in a single proceeding. The Tribunal, however, will not decide in this procedural order the nature of the objection filed by Respondent in connection with what it characterizes as a "self-consolidation", which Claimants describe as a "multiparty arbitration". For the purposes of this bifurcation decision, the Tribunal will focus on the analysis exclusively on whether the said objection complies with the three-prong test on bifurcation.

[58] Bifurcation Application, ¶¶ 40-43.
[59] Bifurcation Application, ¶¶ 44, *et seq.*

50. *Prima facie* the objection is serious and substantial because the consent given by the Parties to determine the procedure is essential to the Tribunal's jurisdiction–if the objection were to be considered a jurisdictional one –, or to conduct the proceedings – if the objection were to be considered a procedural one.

51. In addition, any decision regarding this objection may reduce time and costs, which would promote procedural efficiency. If upheld, all or part of the claims presented by Claimants could be disposed of, and if this objection is rejected it may substantially reduce the scope of the proceedings in the merits phase. Both scenarios would save the Parties considerable time and costs.

52. Finally, the objection is not a question related to the merits of the dispute. This objection is a matter of interpretation of the applicable procedural rules, and it has no bearing on the merits of the case.

53. The Tribunal therefore finds that Respondent's objection under this Section III.C(a) meets the test for bifurcation.

b) Respondent's Objection that Claimants have not Demonstrated that They are Covered "Investors" of Covered "Investments" under the Treaties at All Relevant Times

54. Respondent objects to the Tribunal's jurisdiction on the ground that Claimants have not proven that they are covered "investors" of covered "investments" under the Treaties, which requires proving their nationality, the investments, and the legality of the investments at all relevant times.[60]

55. The Tribunal considers that this group of objections meets the three-prong test on bifurcation for the reasons set out below.

56. First, the objections are *prima facie* serious as they raise a substantial issue regarding whether each Claimant has proven that he or she complies with the definitions of "investor" and "investment" contained in the applicable treaty during all the relevant dates. These objections could impact the tribunal's jurisdiction *ratione personae* and *ratione materiae*.

57. Second, if all or some of these objections were upheld, the claims raised by all or some of the Claimants would be disposed of, which would make the merits phase unnecessary or lead to a significant reduction of the scope of the dispute.

[60] Respondent's Bifurcation Reply, ¶ 18.

58. Third, these objections can be examined without prejudging or entering the merits of the case for two main reasons. First, the question on what the relevant dates are for analyzing whether Claimants are covered "investors" of covered "investments" under each treaty is a matter of interpretation of the applicable law; the Tribunal need not address whether on those critical dates Respondent breached its obligations under the Treaties. Second, the evidence required for proving or disproving that the Claimants complied with the requirements set out in each treaty to be covered "investors" of covered "investments" at the critical dates is not intertwined with the merits of the case. While the Tribunal may have to engage with some factual evidence, it is not convinced that significant issues regarding Claimants' substantive claims would have to be determined in the jurisdictional phase.

c) Respondent's Objection under the Argentina-Mexico BIT regarding Mr. Sastre's Dual Nationality and Domicile

59. Respondent contends that Article 2(3) of the Argentina-Mexico BIT is applicable in the present case given that there is *prima facie* evidence that Mr. Sastre had his domicile in Mexico as from the date of the investment to the date when the alleged breach of the treaty occurred. According to Respondent, the critical dates to determine whether this provision is applicable are the date of the investment and the day of the alleged breach of the treaty, not the day the dispute settlement mechanism of the BIT was activated. Respondent also contends that there is *prima facie* evidence that Mr. Sastre is also a Mexican national, and therefore Claimants must prove that his Argentinian nationality was the dominant one at all relevant periods of time.[61]

60. The objections related to Mr. Sastre's dominant nationality and domicile at the relevant periods of time comply with the three bifurcation criteria.

61. First, the objections regarding Mr. Sastre's dual nationality and domicile are *prima facie* capable of impacting the jurisdiction of the Tribunal. Both objections raise plausible questions that must be analyzed before addressing the merits of the case.

62. Second, if one or both objections were upheld, Mr. Sastre's claims under the Argentina-Mexico BIT would be disposed of, which would significantly reduce the scope and complexity of the dispute.

63. Third, these objections are not intertwined with the merits of the case. The question of whether Mr. Sastre's dual nationality has any bearing on the Tribunal's jurisdiction is, first, a matter of law that has no relation with the merits of the case. Likewise, to resolve whether

[61] Bifurcation Application, ¶¶ 59-69.

Article 2(3) of the Argentina-Mexico BIT is applicable in the case at hand, the Tribunal must analyze the scope of interpretation of this provision, which is not related to the merits of the case. Although both objections are fact-intensive, their factual basis is restricted to the evidence regarding Mr. Sastre's "dominant" nationality and "domicile" at "all the relevant times", and not to the merits of the case.

d) Respondent's Objection that Mr. Sastre's Claim Does Not Comply with the Time Limit Set Out in Article 1(2) of the Argentina-Mexico BIT

64. Respondent argues that Article 1(2) of the Annex to the Argentina-Mexico BIT provides that any claim must be presented no later than four years after the claimant knew or should have known of the alleged breach and the losses or damages suffered. Yet, Mr. Sastre submitted the NOA#1 on December 29, 2017, and the NOA#2 on June 14, 2019, more than six years after he knew about the measures taken on October 31, 2011 related to the hotels "Hamaca Loca" and "Tierras del Sol", which allegedly breached the treaty. Therefore, Respondent argues that the time limit ("prescription period" as characterized by Respondent) to present a claim regarding said measures expired. Claimants in turn contend that the denial of justice and judicial expropriation arising from the failure of Respondent's judicial system crystallized in 2015, and thus *prima facie* satisfies the four-year period, provided in Article 1(2) of the BIT.

65. The Tribunal considers that the jurisdictional objection raised by Respondent complies with the bifurcation test.

66. First, the objection raises a serious and reasonable question about the application of Article 1(2) of the Annex to the Argentina-Mexico BIT, which could impact of the Tribunal's jurisdiction.

67. Second, if the objection were upheld, all or some of Mr. Sastre's claims would be disposed of, leading to a significant reduction of the scope and complexity of the dispute.

68. Third, the objection is not intertwined with the merits of the case. While the Tribunal may have to examine the measures taken by Respondent to determine, *inter alia*, whether they constitute continuous or separate acts, this question is primarily a question of international law. The factual basis necessary to conduct such analysis does not touch upon the issue of whether the alleged measures taken by Respondent breached the Argentina-Mexico BIT or any of the Treaties invoked by Claimants.

e) Respondent's Objection that Mr. Sastre, Mr. Alexander and Ms. Galán Did Not Comply with the Notice of Intent Requirements in the Argentina-Mexico BIT and the NAFTA

69. As regards Mr. Sastre, Respondent argues that he did not comply with the requirements under Article 10(3) and (4) of the Argentina-Mexico BIT, given that the notice of intent presented by Mr. Sastre on June 15, 2017 referred to the Mexico-Switzerland BIT and not to the Argentina-Mexico BIT. Claimants contend that the second notice of intent presented by Mr. Sastre on September 6, 2017, "*expanded upon the original claims, by adding additional claims arising from Respondent's same treaty violations under the Argentina BIT*."[62] Also, the NOA#1 dated December 29, 2017, and the NOA#2 dated June 14, 2019, complied with the requirements of the Argentina-Mexico BIT.

70. As regards Mr. Alexander and Ms. Galán, Respondent contends that the notice of intent presented by both Claimants on January 17, 2019, does not comply with the requirements set forth on NAFTA Article 1119, which are necessary for the materialization of the consent provided in NAFTA Article 1116.

71. The Tribunal considers that the jurisdictional objections raised by Respondent are not frivolous.

72. If these objections were upheld, the scope of the case would be significantly reduced because the objections are susceptible of barring the Tribunal's jurisdiction *ratione voluntatis*, and either Mr. Sastre's, and/or Mr. Alexander and Ms. Galán claims would be disposed of.

73. Also, these objections are matters of law with a narrow scope of factual grounds to be analyzed, which are not related to the merits of the case. Thus, the Tribunal considers that the *ratione voluntatis* objections comply with the criteria for granting bifurcation.

f) Respondent's Objection that Mr. Sastre's Attempt to Present Claims for HLSA/Hamaca Loca is an Abuse of Rights Not Protected under the Argentina-Mexico BIT

74. Respondent claims that Mr. Sastre's alleged "investment" in HLSA was not made for the purpose of carrying out an economic activity in Mexico but merely to initiate a claim in this arbitration. According to Respondent, Mr. Sastre's attempt to present claims for HSLA/Hamaca Loca constitutes an abuse of rights and the alleged investment is therefore not protected by the BIT.

[62] Claimants' Opposition, ¶ 94.

75. The Tribunal considers that the objection raised by Respondent regarding Mr. Sastre's abuse of rights is serious and substantial, and if upheld, could reduce the scope of the dispute given that the claims regarding HLSA/Hamaca Loca could be dismissed before reaching the merits of the case. The Tribunal also notes that the factual basis to be analyzed under this objection is not related to the alleged breach of the Argentina-Mexico BIT, but ultimately to Mr. Sastre's alleged "investment" in Mexico. Therefore, this is an issue that can be analyzed without prejudging or entering the merits of the case. The Tribunal thus considers that the objection regarding Mr. Sastre's "abuse of rights" complies with the three-prong test on bifurcation and therefore will be addressed in the preliminary phase of the proceedings.

76. In sum, the Tribunal finds that the interests of procedural efficiency and fairness are best served by bifurcating the preliminary objections raised by Respondent from the merits of the case.

IV. COSTS

77. Both Parties requested that the Tribunal award costs against the other Party for this phase of the proceeding.[63] The Tribunal will decide the issue of costs together with its decision on the jurisdictional objections of Respondent.

V. DECISION

78. Based on the foregoing, the Tribunal decides to bifurcate the proceedings and address the preliminary objections raised by Respondent in a preliminary phase. The decision on costs will be issued together with the decision on the objections submitted by Respondent.

79. The Tribunal will provide the Parties with the corresponding instructions as to the procedure for the jurisdictional phase.

On behalf of the Arbitral Tribunal,

[Signed]

Prof. Eduardo Zuleta
Date: August 13, 2020

[63] Bifurcation Application, ¶ 142(2); Claimants' Opposition, ¶ 110(e); Respondent's Bifurcation Reply, ¶ 26(ii); Claimants' Rejoinder, ¶ 72(e).