

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Eco Oro Minerals Corp.**

Claimant

**v.**

**Republic of Colombia**

Respondent

**(ICSID Case No. ARB/16/41)**

---

**PROCEDURAL ORDER No. 2  
DECISION ON BIFURCATION**

---

***Members of the Tribunal***

Mrs. Juliet Blanch, President of the Tribunal  
Professor Horacio A. Grigera Naón, Arbitrator  
Professor Philippe Sands, Arbitrator

***Secretary of the Tribunal***

Mrs. Ana Constanza Conover Blancas

***Assistant to the President of the Tribunal***

Mr. João Vilhena Valério

28 June 2018

## Contents

<b>I.</b>	<b>PROCEDURAL BACKGROUND.....</b>	<b>1</b>
<b>II.</b>	<b>THE PARTIES' POSITIONS .....</b>	<b>2</b>
	A. THE RESPONDENT'S POSITION.....	2
	B. THE CLAIMANT'S POSITION.....	7
<b>III.</b>	<b>ANALYSIS .....</b>	<b>11</b>
	A. LEGAL FRAMEWORK.....	11
	B. DISCUSSION .....	12
	1. FTA pre-arbitration notice formalities .....	14
	2. Claims outside the jurisdiction <i>ratione temporis</i> .....	15
	3. Definition of Investor .....	15
	4. Denial of benefits .....	15
	5. The measures at issue are outside the jurisdiction <i>ratione materiae</i> pursuant to Article 2201(3) of the FTA.....	16
	6. Quantum .....	16
	7. Conclusion.....	16
<b>IV.</b>	<b>DECISION .....</b>	<b>17</b>

**Procedural Order No. 2**

**I. PROCEDURAL BACKGROUND**

1. In accordance with the procedural calendar set out in Annex A to Procedural Order No. 1 dated 30 November 2017 (“**Procedural Order No. 1**”):
  - (a) On 18 April 2018, the Respondent filed a request to address the objections to jurisdiction as a preliminary question (the “**Request for Bifurcation**”); and
  - (b) On 18 May 2018, the Claimant filed its observations on the Respondent’s Request for Bifurcation (“**Claimant’s Observations**”).
2. On 4 June 2018, the Parties were advised that the Tribunal was inclined to join the jurisdictional objections to the merits, and that the majority of the Tribunal had been discussing whether the most efficient conduct of the proceeding could lead it to bifurcate the quantum phase and accordingly sought the Parties’ views by 15 June 2018.
3. On 15 June 2018, both Parties provided their views as requested.
4. On 20 June 2018, the Respondent sent an email containing its further views on the Claimant’s letter of 15 June 2018.
5. On 20 June 2018, the Parties were advised that the Tribunal did not wish to receive unsolicited communications in the future but, to ensure equality of arms, the Claimant was invited to respond briefly to the Respondent’s further communication by 22 June 2018.
6. On 22 June 2018, the Claimant provided its response to the Respondent’s unsolicited email.

**Procedural Order No. 2**

**II. THE PARTIES' POSITIONS**

**A. THE RESPONDENT'S POSITION**

7. The Respondent in its Request for Bifurcation argues that the Tribunal has the discretionary authority to decide jurisdictional issues as a preliminary question pursuant to Article 41(2) of the ICSID Convention and Rule 41(1), (3) and (4) of the ICSID Arbitration Rules as well as pursuant to Article 829 of the Canada-Colombia Free Trade Agreement (“FTA”). The Claimant did not dispute this.
8. The Respondent argues that pursuant to the terms of Article 829(2) of the FTA there is a presumption in favour of bifurcation. The Respondent further states that it is a basic tenet of public international law that “*a State is not obliged to give an account of itself on issues of merits before an international tribunal which lacks jurisdiction or whose jurisdiction has not yet been established*”<sup>1</sup> and accordingly bifurcation not only ensures procedural economy and efficiency, but it also is an effective tool to uphold these fundamental rules of the settlement of international disputes.
9. The Respondent argues that the applicable test to be applied is that in *Philip Morris v. Australia*.<sup>2</sup> This test requires the Tribunal to determine whether the jurisdictional objections at issue: (i) were *prima facie* serious and substantial; (ii) could be examined without prejudging or entering into merits; and (iii) if successful, disposed of all or an essential part of the claims. The only difference between the Parties’ positions with respect to the applicable test is that whilst the Respondent asserts that the first limb of the test merely requires showing that the objections are not frivolous nor vexatious,<sup>3</sup>

---

<sup>1</sup> Request for Bifurcation, para. 9 (citing T. D. Gill (ed), Rosenne’s *The World Court, What it is and how it works* (2003) (RL-26), p.81 (internal quotations omitted)).

<sup>2</sup> *Id.*, paras. 13 *et seq.* (citing *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Procedural Order No. 8, Bifurcation of the Procedure, dated 14 April 2014 (“*Philip Morris v. Australia*”) (RL-15), para. 109).

<sup>3</sup> *Id.*, para. 14 (citing *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Procedural Order No. 4, Decision on Bifurcation dated 18 November 2016 (RL-22), para. 4.4).

**Procedural Order No. 2**

the Claimant asserts that the hurdle is higher, in that the objection must be “*sufficiently serious and substantial as to justify bifurcation*”.<sup>4</sup>

10. The Respondent makes the following jurisdictional objections. Firstly, the Respondent submits that the Claimant has not complied with the mandatory conditions precedent set out in Article 821 of the FTA. The Respondent lists four such failures by the Claimant and concludes that the Parties have accordingly not perfected their consent to submit the dispute to arbitration with the consequence that the Tribunal lacks jurisdiction.
11. The first failure asserted by the Respondent is that the Claimant has failed to deliver a written notice of intent (“**NoI**”) stating the legal and factual basis for the claim, including the measures at issue. The Respondent notes that the measures forming the basis of the Request for Arbitration and detailed in its Memorial differ from those referred in the NoI. The Respondent further notes that some measures detailed in the Claimant’s first Memorial were only adopted by the Respondent after the submission of the claim to arbitration.
12. The second failure asserted by the Respondent is the Claimant’s failure to comply with the mandatory six-month cooling-off period contained in Articles 821(2)(b) and (c) of the FTA. The Request for Arbitration was received by the Secretary-General of ICSID on 8 December 2016 but only the first measure giving rise to the dispute had come into effect over six months before this date.
13. The third failure asserted by the Respondent is that the Claimant failed to comply with the FTA’s waiver requirements pursuant to Article 821(2)(e)(ii) of the FTA. In its view, the Claimant’s waiver did not refer to any of the measures detailed in the NoI, Request for Arbitration or Memorial, contrary to the Respondent’s obligations under the FTA. Accordingly, the Respondent argues that the waiver did not unequivocally reflect the Claimant’s intention of withdrawing its right to initiate or continue domestic

---

<sup>4</sup> Claimant’s Observations, para. 139 (citing *Glencore Finance (Bermuda) Limited v. Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2, Decision on Bifurcation, dated 31 January 2018 (RL-25), para. 42 (emphasis omitted)).

**Procedural Order No. 2**

- proceedings with respect to the measures at issue in the arbitration. In any event, the Respondent argues that the waiver cannot be effective with respect to measures which came into force after the submission of the dispute to arbitration.
14. Finally, the Respondent asserts that the Claimant did not comply with the mandatory time limitations contained in Article 821(2)(e)(i) as more than 39 months have passed from the date on which the Claimant acquired knowledge both of the measures allegedly in violation of the FTA and of the loss or damage resulting therefrom.
  15. The Respondent asserts that the Claimant's failure to comply with the above four conditions precedent is *prima facie* serious and substantial as such failure nullifies the Parties' consent to arbitration under the FTA. The Respondent further asserts that this objection is not entwined with the merits of the dispute and can be determined without prejudging the merits. Finally, the Respondent argues that the objection is capable of disposing of the entire case because it means that the Parties have not perfected their consent to arbitration.
  16. The Respondent's second objection is that the claims are outside the jurisdiction *ratione temporis* of the Tribunal because, it submits, the dispute arose prior to the entry into force of the FTA. The Respondent first asserts that the ban on mining activities in *páramo* ecosystems was put in place by laws and regulations which predate the FTA's entry into force in August 2011 and further that the Ministry of Environment specifically directed the Claimant not to conduct mining activities in the relevant area nearly 16 months before the substantive protections of the FTA would begin to cover the Claimant's investments.
  17. The Respondent submits that this objection is serious and substantial as the chronological record speaks for itself, and can be examined without prejudging the merits. In the Respondent's view, the Tribunal would only need to assess whether the dispute existed before the FTA entered into force and is capable of disposing of the whole case. If successful, the Tribunal would have no jurisdiction *ratione temporis*

**Procedural Order No. 2**

- under the FTA to hear the claim as it concerns facts and acts taking place prior to the entry into force of the FTA.
18. The Respondent's third objection is that the Claimant does not meet the definition of Investor under Article 838 of the FTA as a result of the claim being assigned to a U.S. entity, Trexs Investments LLC ("Trex") prior to submission of the claim to arbitration pursuant to an investment agreement such that Trexs is the real party in interest in this arbitration. Trexs, being a U.S. entity and not a Canadian entity, is not protected under the FTA.
  19. The Respondent submits that this objection is serious and substantial as credible evidence exists demonstrating the assignment. It also considers that the objection can be examined without prejudging the merits because it relates to a limited and discrete set of facts, and that it is capable of disposing of the entire case because the Tribunal has no jurisdiction under the FTA to hear claims of a U.S. national under the FTA.
  20. The Respondent's fourth objection is that it was entitled to and did properly deny the benefits of the FTA to the Claimant pursuant to Article 814(2) of the FTA. The Respondent asserts that it took this action on 15 December 2016 on the basis that the Claimant is owned and controlled by investors of a non-party to the FTA (pursuant to the investment agreement with Trexs) and that it does not have substantial business activities in Canada.
  21. Again, the Respondent asserts that this objection is serious and substantial as there is credible evidence indicating that the Claimant is owned and controlled by U.S. nationals and has no substantial business activities in Canada, can be examined without prejudging the merits because it concerns a distinct and discrete factual scenario which is completely independent from the merits of the dispute, and is capable of disposing of the entire case.
  22. The Respondent's fifth objection is that the measures at issue are outside the jurisdiction *ratione materiae* of the Tribunal as concerning measures "necessary [t]o

**Procedural Order No. 2**

*protect human, animal, or plant life or health*” and “[f]or the conservation of living or non-living exhaustible natural resources”, which are specifically excluded from the scope of the FTA’s investment protections, including recourse to international arbitration pursuant to the provisions of Article 2201(3) of the FTA.<sup>5</sup> The Respondent asserts that the effect of this provision is to exclude the application of the provisions of Chapter Eight of the FTA where these would “*prevent a Party from adopting or enforcing*” the environmental measures at issue.<sup>6</sup> The Respondent asserts that the measures adopted are excluded from the scope of the FTA’s Chapter Eight being (i) necessary; (ii) not constituting arbitrary or unjustifiable discrimination; and (iii) not being a disguised restriction on international trade or investment.

23. The Respondent submits that the objection is serious and substantial as the measures adopted are intended to protect a legitimate public welfare objective such as the protection of the environment, that it can be examined without prejudging the merits as the analysis for the Tribunal to undertake would relate to the Respondent’s general efforts to protect the *páramo* ecosystems and thus would not overlap with the Tribunal’s assessment of the measures’ specific effect on the Angostura Project and would be capable of disposing of the entire case.
24. With respect to the possibility of bifurcating the quantum phase, the Respondent argues that such bifurcation could result in a reduction of costs and duration of proceedings as the expert evidence filed in support of the quantum is voluminous. Moreover, even if the Tribunal concluded that the Respondent’s actions give rise to liability, it is probable that the scope, complexity and duration of the quantum phase will be significantly reduced as a result of findings made by the Tribunal in the merits phase. The Respondent further submits that there is no overlap between the merits and damages phases such that there would be no procedural efficiency to be gained from hearing the merits and quantum phases together.

---

<sup>5</sup> Request for Bifurcation, para. 100 (internal quotations omitted).

<sup>6</sup> *Id.*, para. 102 (internal quotations omitted).

**Procedural Order No. 2**

**B. THE CLAIMANT’S POSITION**

25. The Claimant first notes that whilst it agrees with the application of the test in *Philip Morris v. Australia*, bifurcation should only be ordered if it offers the possibility of significant efficiency gains and thus the Tribunal should determine the most procedurally efficient and fair way to conduct the proceeding.
26. With respect to the Respondent’s first objection, the Claimant notes as an overriding point that even if the Respondent’s objections were to be accepted by the Tribunal, they would not dispose of the totality of the Claimant’s claims such that a substantial portion of the case would still proceed to the merits in any event. The Claimant then responds to each of the alleged “failures” detailed by the Respondent.
27. With respect to the inadequacies in the NoI, citing the *Crystallex* decision,<sup>7</sup> the Claimant submits that the later measures (“**Related Measures**”) are part and parcel of the same dispute which had previously arisen and over which the Tribunal had jurisdiction and that the investor could not be required to re-notify the State in relation to a subsequent measure enacted after submission of the NoI which related to the same subject matter. The Claimant further notes that pursuant to Article 46 of the ICSID Convention, the Tribunal is empowered to hear “*incidental*” and “*additional*” claims “*arising directly out of the subject-matter of the dispute*”. The Claimant thus submits that as all the measures taken by the Respondent after service of the NoI arise directly out of the same subject matter of the dispute and the measures described in the NoI, there is no failure by it with respect to the content of the NoI.
28. The Claimant adopts the same arguments with respect to the second alleged failure, again noting that the Respondent was aware that a dispute had arisen in respect of the specific subject matter in excess of the six months cooling-off period and had no

---

<sup>7</sup> Claimant’s Observations, para. 18 (citing *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/112, Award dated 4 April 2016 (CL-85), para. 454).

**Procedural Order No. 2**

obligation to renotify the Respondent of any subsequent related measures nor wait any additional cooling-off period.

29. With respect to the third alleged failure, the Claimant notes that it provided a waiver almost verbatim with the form required by Article 821(3) (as contained in Annex 821) of the FTA. Accordingly, the Claimant submits that there can be no legitimate complaint from the Respondent. The Claimant indicates that the waiver is valid also with respect to measures that post-date the waiver. Firstly, the Claimant notes that consent was perfected when the Request for Arbitration was submitted with the waiver attached at which time the Parties' consent to resolve the dispute by ICSID arbitration was perfected. Secondly, the jurisdiction of the Tribunal extends to any additional or incidental claims which concern the same subject matter. For the sake of completeness, the Claimant finally notes that it has complied at all times with the waiver. Accordingly, the Claimant asserts that the objection is frivolous and would not materially reduce the scope of the subsequent phase of the proceedings.
  
30. The Claimant then turns to the fourth alleged failure. The Claimant agrees with the Respondent that the cut-off date to evaluate the timeliness of Eco Oro's claims pursuant to Article 821(2)(e)(i) of the FTA is 8 September 2013. The Claimant asserts that looking at its claims as currently pleaded, on a *prima facie* basis the Respondent's breaches arose from measures commencing in 2014 such that, *prima facie*, the claims have been brought in a timely manner. The Claimant further asserts that the events which took place prior to that date did not deprive it of its rights and thus could not form the basis of a claim against the Respondent. Finally, the Claimant asserts that in any event the objection is too intertwined with the merits to justify bifurcation and would fail the second limb of the *Philip Morris v. Australia* test as it would require a substantial and detailed analysis of the facts of all the State measures, a legal assessment of the nature of each measure and an evaluation of the damages or loss caused by each measure.

**Procedural Order No. 2**

31. The Claimant finally argues that this objection fails on the third limb of the *Philip Morris v. Australia* test in that, even if successful, the Tribunal would still retain jurisdiction over the dispute as described in the NoI and would thus not substantially reduce the scope of the dispute, let alone obviate the need for a merits phase.
32. With respect to the second objection, the Claimant repeats the arguments made in respect of the fourth alleged failure of the first objection, as detailed in paragraph 30 above.
33. The Claimant then turns to the third objection in relation to which it argues that it is a company constituted under the laws of Canada and notes that it has not assigned its claim to Trexs but merely granted it an economic interest in the proceeds of the claim. Accordingly, the Claimant argues that this objection is frivolous.
34. With respect to the fourth objection, the Claimant notes that the Respondent's attempt to deny the Claimant benefits under the FTA was exercised after the claim had been submitted. The Claimant asserts that pursuant to *Plama*<sup>8</sup> a denial of benefits clause can only operate prospectively such that any attempt by the Respondent to deny the Claimant the benefits under the FTA would have no retroactive effect. Accordingly, the Claimant argues that bifurcation would be inappropriate as this objection would have no effect on the admissibility of the Claimant's claim. The Claimant further argues that, as it is not owned or controlled by a national of a non-party and as it has substantial business activities in Canada, the Respondent could not validly invoke the denial of benefits clause in any event.
35. Finally, with respect to the Respondent's fifth objection, the Claimant argues that the Respondent's interpretation of Article 2201(3) of the FTA is flawed in that, by expressly referring to its applicability with respect to the provisions of Chapter Eight, the purpose is to limit the remedies an investor can seek by preventing the right of restitution; it does not operate to prevent an investor being permitted to seek

---

<sup>8</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision of Jurisdiction dated 8 February 2005 (RL-3), cited in Claimant's Observations, para. 103.

**Procedural Order No. 2**

- compensation for a breach of the FTA in accordance with the provisions of Chapter Eight. The Claimant notes that it is not seeking restitution and accordingly this provision is irrelevant and that, in any event, an analysis of whether the specific measure is covered by Article 2201(3) of the FTA is inextricably linked with an assessment of the merits and would not achieve a reduction of time or costs.
36. In conclusion, the Claimant argues that the Respondent's objections are not serious or likely to succeed, that even if successful they would not dispose of the entire case or a material part of it, or are so intertwined with the merits that bifurcation would not be efficient.
37. With respect to the Tribunal's subsequent question as to bifurcating the quantum phase, the Claimant argues that issues of quantum are closely intertwined with issues of liability and jurisdiction such that there would be duplication of evidence leading to additional cost and a longer proceeding. With respect to liability, the Claimant notes that to determine whether there has been an indirect expropriation pursuant to Article 811 of the FTA, it would be necessary for the Tribunal to determine the economic impact of the measures in question. With respect to jurisdiction, the Tribunal will be required to assess the Claimant's knowledge that it has suffered loss or damage as well as the date on which it acquired or should have acquired that knowledge.
38. Accordingly, the Claimant argues that it would be inappropriate to bifurcate the quantum phase.
39. The Respondent, by an unsolicited email of 20 June 2018, responded to the Claimant's arguments in paragraph 37 above firstly by arguing that the assessment of the economic impact of the measures in question does not rely on expert damages evidence as the Claimant's expert has assumed a 100% loss. Secondly, the Respondent argues that the investor's knowledge that it has suffered loss or damage does not require quantification of actual damage but is limited to generic knowledge of the existence of damage.

**Procedural Order No. 2**

40. In response, the Claimant argues that the Respondent is incorrect in its assertion that it does not rely on expert evidence to assess the economic impact of the measures but that, in any event, this does not have any relevance to the procedural efficiencies of bifurcation. Pursuant to the text of the FTA, the Tribunal will need to assess the difference in value of the investment pre and post the effect of the measures to determine whether there has been a diminution of value such that there has been an indirect expropriation. This, asserts the Claimant, will entail the Tribunal's evaluation of the Parties' respective positions on quantum.
41. The Claimant further argues that the Respondent is incorrect to assert that no damages assessment is necessary to determine its jurisdictional argument with respect to knowledge of loss or damage. It notes that for the Respondent to succeed in its jurisdictional objection, it will need to establish that the Claimant was or should have been aware both of a breach of the FTA and that as a result it had incurred loss or damage by the cut-off date. The Claimant argues that this will entail the Tribunal assessing and comparing the effect of any measures that fall outside the limitation period and the effect of the measures that form the basis of the Claimant's claim which, the Claimant asserts, will require an evaluation of causation and damages.
42. In conclusion, the Claimant submits that even if the Tribunal considers that any of the Respondent's objections were sufficiently serious and substantial to warrant bifurcation and would dispose of or would significantly reduce the need for the merits phase and are not intertwined with the merits, the Tribunal must still weigh up the delay and costs that would be incurred if bifurcation were to be ordered against the time and economy to be gained by bifurcation if the jurisdictional objections are successful.

### **III. ANALYSIS**

#### **A. LEGAL FRAMEWORK**

43. The Tribunal's power to rule on the Respondent's Request for Bifurcation is enshrined in the ICSID Convention and in the ICSID Arbitration Rules.

**Procedural Order No. 2**

44. Article 41(2) of the ICSID Convention establishes that:

Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

45. Furthermore, Rule 41(4) of the ICSID Arbitration Rules provides in its relevant part that:

The Tribunal [...] may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.

46. The Tribunal notes that Article 829 of the FTA provides as follows:

Article 829: Preliminary Objections

1. The Tribunal shall have the power to rule on preliminary objections to jurisdiction and admissibility.
2. Any preliminary objection that the dispute should not be admitted or registered, is not within the jurisdiction of the Tribunal or, for other reasons, is not within the competence of the Tribunal, shall be made in accordance with the applicable arbitration rules as early as possible.

**B. DISCUSSION**

47. The Tribunal does not agree that there is a general presumption in favour of bifurcation, or that such a presumption is to be read into Article 829(2) of the FTA. The Tribunal interprets this provision merely as imposing a requirement that if a jurisdictional objection is made, then it should be made as early as possible.

48. The Parties agree that the matter as to whether the proceedings shall be bifurcated or not is a matter that falls to be decided by the Tribunal, having regard to the principles set out below, and the particular circumstances of each case.<sup>9</sup>

---

<sup>9</sup> Request for Bifurcation, para. 12; Claimant's Observations, para. 4.

**Procedural Order No. 2**

49. The Tribunal recognises that, as a general matter, three factors are to be examined by the Tribunal in deciding whether to bifurcate (the so-called ‘three-part test’ applied in *Philip Morris v. Australia*<sup>10</sup>):
- (a) whether the objections raised are *prima facie* serious and substantial;
  - (b) whether the objection can be examined without prejudging or entering the merits of the case; and
  - (c) if decided in the Respondent’s favour, whether the objection would dispose of all or an essential part of the claims raised.
50. The Tribunal recognises the significance of the concerns raised by the Respondent with respect to determining its jurisdiction before turning to issues of liability and/or quantum. The Tribunal considers that, in applying the three-part test, it should seek to determine what will best serve the Parties and the sound administration of justice, in particular with respect to procedural efficiency. It recognises, too, that any additional costs that may be incurred by the Respondent in the event that there is no bifurcation may be taken into account when the Tribunal makes its final decision on costs. The Tribunal further emphasises that at all times it has been guided by procedural economy and fairness on a *prima facie* basis and has striven to ensure that it has not prejudged the merits of any of the jurisdictional arguments – or any other arguments – made by either Party.
51. The Tribunal therefore turns to consider each of the Respondent’s objections. In undertaking this analysis, the Tribunal confirms that, at this stage of the proceedings, it has formed no view whatsoever on the merits, whether in relation to liability or quantum, or on any objection to jurisdiction. The Tribunal further determines that, with respect to the first limb of the three-part test, for an objection to be held to be “*serious*

---

<sup>10</sup> *Philip Morris v. Australia*, para. 109.

**Procedural Order No. 2**

*and substantial*” a higher threshold must be applied than merely requiring that the objection is not frivolous or vexatious.

1. **FTA pre-arbitration notice formalities**
52. The Tribunal considers that to determine the validity of the first objection it will be required to delve into the substance of the alleged breaches. In its view, the issues are not sufficiently distinct from the merits that this consideration could be undertaken without duplication of the Parties’ and the Tribunal’s efforts. The Tribunal further notes – without forming a view on the matter – the Claimant’s submissions that even if the Respondent were to be successful in making this objection, there is, at minimum, perfected consent for claims arising out of measures detailed on the NoI, even if not for claims arising out of subsequent measures. It considers that to determine this issue without having regard to the merits would raise difficulties. Finally, the Tribunal agrees with the Claimant that jurisdictional issues are to be decided *prima facie* on the basis of the Claimant’s pleadings, which indicate that the Related Measures arise out of the subject matter of the dispute covered by the NoI or alternatively are additional or ancillary claims which are within the jurisdiction of the Tribunal pursuant to the operation of Article 46 of the ICSID Convention and Rule 40(1) of the ICSID Arbitration Rules.
53. The Tribunal comes to the same view as that expressed in paragraph 52 with respect to the Claimant’s alleged failure to wait for the cooling-off period to expire.
54. The Tribunal agrees with the Respondent that the issue of whether the waiver was valid appears to be an issue of legal assessment, which is not intertwined with the merits and will not require an investigation into facts or issues that will be duplicated in a merits hearing. The Tribunal notes, however, that even if determined in favour of the Respondent, it will not resolve the totality of the Claimant’s claims. The Tribunal further notes that without an examination of the merits of the claim, the Tribunal is unable to determine the extent to which bifurcation of this objection would be capable of disposing of a substantial part of the claim.

**Procedural Order No. 2**

55. The Tribunal finds that to determine whether the claim is in breach of the FTA's mandatory time limits contained in Article 821(2)(e)(i), 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 actual knowledge as well as considering this issue on an objective basis. The Tribunal considers that these issues 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.
56. The Tribunal does not therefore believe there would be any procedural efficiency in bifurcating the first objection.

**2. Claims outside the jurisdiction *ratione temporis***

57. The Tribunal considers that a determination of this objection will require the same exercise to be undertaken as that with respect to the Respondent's objection that the Claimant is in breach of Article 821(2)(e)(i) of the FTA. As determined in paragraph 55 above, the Tribunal considers that the issues are so closely intertwined with the merits that it is unlikely that there would be any procedural efficiency to be gained in bifurcating this objection.

**3. Definition of Investor**

58. The Tribunal accepts that this is a discrete issue which could be determined without consideration of the merits. However, having carefully considered the material that is currently before it, the Tribunal is not minded to order bifurcation of this objection on the basis it does not appear, on a *prima facie* basis and without prejudice to its view once the matter has been fully argued, that it amounts to a serious or substantial objection such as to justify bifurcation.

**4. Denial of benefits**

59. Whilst the Tribunal accepts that this is a discrete issue which could be determined without consideration of the merits, the Tribunal is not minded to order bifurcation of this objection on the basis it does not appear, on a *prima facie* basis and without

**Procedural Order No. 2**

prejudice to its view once the matter has been fully argued, that it is a serious or substantial objection such as to justify bifurcation.

**5. The measures at issue are outside the jurisdiction *ratione materiae* pursuant to Article 2201(3) of the FTA**

60. On the basis of the limited material that is available to the Tribunal at this stage, it is not possible to determine with any confidence whether this is a discrete issue which could be determined without consideration of the merits. However, the Tribunal appreciates that it may be necessary to examine each measure to determine its purpose and impact which would not lead to procedural fairness or efficiency and in any event the Tribunal is not of the view that, on a *prima facie* basis and without prejudice to its view once the matter has been fully argued, that this objection is serious or substantial justifying bifurcation.

**6. Quantum**

61. The Tribunal has carefully considered the arguments of the Parties as to the utility of bifurcating the quantum phase of the proceedings. On the basis of the material that is currently available to it, the Tribunal considers that issues related to quantum are closely intertwined with the merits, such that it is unlikely that any procedural efficiencies would be obtained by such a bifurcation.

**7. Conclusion**

62. Accordingly, having weighed up the Parties' competing arguments, the Tribunal does not believe that the Respondent's concerns are justified and it therefore does not order bifurcation either of jurisdiction or of quantum.

63. In reaching this conclusion, on the basis of the material that is available to it at this time, the Tribunal wishes to make clear that it has formed no view on whether or not it has jurisdiction to hear some or all of the claims that have been put before it, or on any aspect of the merits. It has simply concluded that, at this stage of the proceedings and on the basis of the limited material that is available to it, it would be assisted by having

**Procedural Order No. 2**

the jurisdictional, merits and quantum issues fully argued together. Further, this decision is entirely without prejudice to the allocation of costs in these proceedings, which will be decided at a later stage.

**IV. DECISION**

64. For the foregoing reasons, the Arbitral Tribunal:
- (a) Rejects the Respondent's request to bifurcate the proceedings.
  - (b) Directs the Parties to follow Scenario 3 of the procedural calendar set out in Annex A to Procedural Order No. 1, as amended in accordance with the Tribunal's communication of 12 March 2018 regarding the Respondent's additional period of nine calendar days to file its next substantive memorial.
  - (c) Reserves its decision on the costs of this application for a later stage.

On behalf of the Tribunal,

[Signed]

---

Mrs. Juliet Blanch

President of the Tribunal

Date: 28 June 2018