

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Gran Colombia Gold Corp.

v.

Republic of Colombia

(ICSID Case No. ARB/18/23)

PROCEDURAL ORDER No. 3
(Decision on the Respondent's Request for Bifurcation)

Members of the Tribunal

Ms. Jean Kalicki, President of the Tribunal
Professor Bernard Hanotiau, Arbitrator
Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal

Mrs. Ana Constanza Conover Blancas

17 January 2020

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I. PROCEDURAL BACKGROUND

1. On 24 June 2019, the Tribunal issued Procedural Order No. 1, to which a provisional timetable for the arbitration was attached as Annex A (the “**Procedural Calendar**”).
2. On 11 July 2019, the Tribunal issued Procedural Order No. 2, whereby it set out a revised Procedural Calendar with the final dates of three possible scenarios for procedural timetables: (a) Scenario 1, applicable in the event that any objections to jurisdiction were made with the Respondent’s Counter-Memorial on the Merits, and there was no request for bifurcation; (b) Scenario 2, applicable in the event that objections to jurisdiction were made in response to the Claimant’s Memorial on the Merits and there was a request for bifurcation, which was granted; and (c) Scenario 3, applicable in the event that objections to jurisdiction were made in response to the Memorial on the Merits and there was a request for bifurcation, which was denied.
3. On 7 October 2019, the Claimant filed a Memorial on Merits and Damages dated 6 October 2019, together with supporting documentation.
4. On 15 November 2019, the Respondent filed a Request for Bifurcation, together with supporting documentation (“**Request for Bifurcation**”).
5. On 23 December 2019, the Claimant filed Observations on the Respondent’s Request for Bifurcation (“**Observations on Bifurcation**”).
6. This Procedural Order sets out the Tribunal’s decision on the Request for Bifurcation.

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II. THE PARTIES' POSITIONS

A. Respondent's Position

7. The Respondent requests the Tribunal to hear its jurisdictional objections in a preliminary phase, and also to bifurcate any merits proceedings into separate phases for liability and quantum.¹
8. *First*, according to the Respondent, Article 41(2) of the ICSID Convention, ICSID Arbitration Rules 41(1), (3) and (4), and Article 829 of the Free Trade Agreement between Canada and the Republic of Colombia (the “FTA”) grant the Tribunal the discretionary authority to decide jurisdictional issues as a preliminary question, separate from the merits, and to further bifurcate the merits into liability and quantum phases.² The Respondent also argues that it is standard practice for ICSID tribunals to decide jurisdictional and admissibility objections separately from the merits of the dispute.³
9. *Second*, the Respondent raises two sets of objections to jurisdiction that can be briefly summarized as follows.
10. **Objection A:**⁴ The Respondent argues that the Tribunal lacks jurisdiction because the Claimant failed to comply with several of the conditions precedent set out in Article 821 of the FTA, which are necessary to submit the dispute to arbitration.⁵ In particular,⁶ the Respondent argues that the Claimant's Request for Arbitration includes complaints about certain measures for which (i) the Claimant did not previously deliver a notice of intent stating the legal and factual basis for such claims (Article 821(2)(c)(iii)), although it did

¹ Request for Bifurcation, ¶ 60.

² Request for Bifurcation, ¶¶ 3-5, 7, 12.

³ Request for Bifurcation, ¶ 6.

⁴ Request for Bifurcation, § III.A.

⁵ Request for Bifurcation, ¶¶ 19-20.

⁶ In paragraph 20 of the Request for Bifurcation, the Respondent suggests that it may also have intended to raise a “condition precedent” objection that the Claimant failed to comply with the FTA's waiver requirements, but the Respondent did not return to this issue again elsewhere in its Request, and the Claimant accordingly did not brief the issue either.

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provide a notice of intent addressing claims about other measures;⁷ and (ii) the Claimant did not comply with the mandatory six-month cooling-off period with respect to the same measures (Article 821(2)(b) and (c)).⁸ The Respondent also contends that (iii) the Claimant did not comply with the FTA’s mandatory time limitations, by submitting claims for which more than 39 months had elapsed since it “first acquired, or should have acquired, knowledge of the alleged breach and knowledge that [it] has incurred loss or damage thereby” (Article 821(2)(e)(i)).⁹

11. **Objection B:**¹⁰ The Respondent contends that pursuant to Article 814(2) of the FTA, it was entitled to deny the benefits of the FTA to the Claimant and did, in fact, properly deny such benefits on 31 May 2018.¹¹ This denial of benefits was made on the basis that the Claimant purportedly was owned and controlled by investors of a non-Party to the FTA (*i.e.*, not by Canadian nationals), and does not have substantial business activities in Canada.¹²
12. *Third*, the Respondent argues that each of these objections to jurisdiction warrants bifurcation.¹³ For this, Respondent relies on a “*three-part test*” set forth in the *Philip Morris* case, involving an assessment of whether the jurisdictional objections at issue (i) were *prima facie* serious and substantial, (ii) could be examined without prejudging or entering into the merits, and (iii) if successful, disposed of all or an essential part of the claims.¹⁴

⁷ Request for Bifurcation, ¶¶ 21-27 (arguing that the dispute submitted by the Claimant in its Request for Arbitration concerns additional measures beyond those included in the Notice of Intent, specifically (a) Judgment SU-133 of the Colombian Constitutional Court, dated 28 February 2017, and (b) the alleged imposition of fines and the failure to timely issue environmental permits in connection to the Segovia project).

⁸ Request for Bifurcation, ¶¶ 28-31.

⁹ Request for Bifurcation, ¶¶ 32-38.

¹⁰ Request for Bifurcation, § III.B.

¹¹ Request for Bifurcation, ¶¶ 45-47; Exhibit R-1.

¹² Request for Bifurcation, ¶¶ 47-52 (arguing that the Claimant in fact was controlled by two Venezuelan nationals, and the limited activities that the Claimant carries out in Canada do not meet the FTA’s requirement of “substantial business activities”).

¹³ Request for Bifurcation, §§ III.A.2 and III.B.2.

¹⁴ Request for Bifurcation, ¶ 13 (citing *Philip Morris Asia Limited v. Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Procedural Order No. 8, Bifurcation of the Procedure, 14 April 2014 (RL-14), ¶ 109 (“*Philip Morris*”). The Claimant contends that other tribunals have applied similar criteria for bifurcation analyses. See Request for Bifurcation, ¶ 15 (citing, *inter alia*, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005 (RL-3), ¶ 12(c) (“*Glamis Gold*”)); and *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on the Respondent’s Request for Bifurcation under Article 41(2) of the ICSID Convention, 2 November 2012 (RL-8), ¶ 30 (“*Tulip*”).

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According to the Respondent, these three criteria are all met in this case. In addition, the Respondent argues that bifurcation here would be consonant with the principles of procedural economy and efficiency, as it “avoids the expense ... of having to prepare extensive submissions, gather evidence and develop complex legal arguments to address the merits of a dispute over which a tribunal lacks jurisdiction.”¹⁵ It further argues that if only one jurisdictional objection warrants bifurcation, the Tribunal can also decide to consider all the remaining jurisdictional objections in the bifurcated jurisdictional stage.¹⁶ The Respondent considers that, in light of these factors, its two sets of objections to jurisdiction must be heard as a preliminary question, separate from the merits of the dispute.

13. In particular, with respect to its “**Objection A**” regarding conditions precedent,¹⁷ the Respondent states that this is *prima facie* serious and substantial since these conditions are necessary to establish the parties’ consent to arbitration under the FTA.¹⁸ Moreover, in deciding on the objection, the Tribunal would be required to review only a discrete, self-contained set of facts, without prejudging the merits of the case.¹⁹ Finally, in the Respondent’s view, the objection is capable of disposing of the entire case, because it means that the Parties have not perfected their consent to submit this dispute to arbitration under the FTA.²⁰

14. Similarly, with respect to its “**Objection B**” regarding denial of benefits,²¹ the Respondent submits *first* that there is credible evidence that supports the objection, making it serious and substantial.²² *Second*, in deciding on the objection, the Tribunal would only have to decide on a distinct and discrete factual scenario, without prejudging the merits of the dispute.²³ *Third*, if the Tribunal decides that the Respondent has properly denied the Claimant the

¹⁵ Request for Bifurcation, ¶ 10.

¹⁶ Request for Bifurcation, ¶ 16.

¹⁷ Request for Bifurcation, § III.A.2.

¹⁸ Request for Bifurcation, ¶ 40.

¹⁹ Request for Bifurcation, ¶¶ 41-43.

²⁰ Request for Bifurcation, ¶ 44.

²¹ Request for Bifurcation, § III.B.2.

²² Request for Bifurcation, ¶ 54.

²³ Request for Bifurcation, ¶ 55.

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benefits of the FTA, including the possibility of submitting the dispute to arbitration, then the Tribunal would lack jurisdiction and would be required to dispose of the entire case.²⁴

15. *Finally*, the Respondent also submits that the merits of the dispute should be bifurcated between a liability and a quantum phase, due to the complexity of the case at hand. It submits that the case is based on a complex fact pattern that gives rise to entirely distinct and separate claims. Accordingly, such a complex fact pattern makes it impossible to accurately calculate the amount of damages, an exercise that moreover would be futile if the Tribunal finds no liability. Thus, the principles of efficiency and judicial economy would warrant this further bifurcation.²⁵

B. Claimant’s Position

16. The Claimant argues that the Respondent has not met its burden of proof and, therefore, the Request for Bifurcation should be denied.²⁶
17. *First*, the Claimant argues that the Tribunal should determine whether bifurcation would serve the principle of “procedural economy and fairness” and whether the requesting Party has demonstrated this *prima facie*.²⁷ It agrees with the three-part test set forth in *Philip Morris*,²⁸ but argues that the Respondent misstates the applicable standard.²⁹ The Claimant submits that, under the proper standard: (i) the objection must be sufficiently serious and substantial so as to justify bifurcation; (ii) it must not raise questions of fact or law that bear on Claimant’s claims on the merits; and (iii) the Tribunal must be convinced that,

²⁴ Request for Bifurcation, ¶ 56.

²⁵ Request for Bifurcation, ¶¶ 57-59 (citing *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010 (RL-5), ¶ 244 (“*Suez*”).

²⁶ Observations on Bifurcation, ¶¶ 2, 68.

²⁷ Observations on Bifurcation, ¶ 3 (citing *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2, Decision on Bifurcation, 28 June 2018 (CL-161), ¶ 50 (“*Eco Oro*”).

²⁸ Observations on Bifurcation, ¶¶ 4, 15-16 (citing *Eco Oro*, ¶ 49; *Philip Morris*, ¶ 109).

²⁹ Observations on Bifurcation, ¶ 5 and § I(A).

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if successful, the objection would substantially reduce the scope of issues before the Tribunal at the merits phase.³⁰

18. *Second*, the Claimant argues that, as the moving party, the Respondent has the burden of proof to demonstrate all the required elements of the test.³¹ However, the Respondent has not done so.³²

19. *Third*, the Claimant addresses the objections to jurisdiction raised by the Respondent and argues that the Respondent has failed to meet its burden of proof with respect to every objection.³³ First, with respect to “**Objection A**,”³⁴ the Claimant argues that it has complied with the conditions precedent set out in Article 821 of the FTA, as follows:

- a. **Concerning the legal and factual basis for the claim.**³⁵ The Claimant argues that its Notice of Intent satisfied the requirements under Article 821 of the FTA and states that the Respondent has certified such compliance.³⁶ Further, it argues that such objection does not warrant bifurcation. *First*, the objection is not *prima facie* serious or substantial because the Respondent was sufficiently notified in the Notice of Intent about all of the claims which are the subject-matter of the dispute and, in any case, the measures identified by the Respondent post-dated the Notice of Intent and were simply continuations of earlier measures.³⁷ *Second*, a dispute on the Claimant’s characterization of the alleged breaches would require the Tribunal to rule on facts and questions related to the merits.³⁸ *Third*, exclusion of the alleged

³⁰ Observations on Bifurcation, ¶ 15.

³¹ Observations on Bifurcation, ¶ 16 (citing *Azurix Corp. v. Republic of Argentina*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009 (CL-164), ¶ 215; *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 (CL-70), ¶ 56).

³² Observations on Bifurcation, ¶ 18.

³³ Observations on Bifurcation, ¶ 19.

³⁴ Observations on Bifurcation, § II.

³⁵ Observations on Bifurcation, § II(A).

³⁶ Observations on Bifurcation, ¶ 20 (citing the Correspondence and the Minutes of the April 2017 Meeting between Gran Colombia Gold Corp. and the Republic of Colombia following Gran Colombia Gold Corp.’s Notice of Intent, 25 October 2016 - August 2017 (C-9), pp. 4, 30).

³⁷ Observations on Bifurcation, ¶¶ 21-28.

³⁸ Observations on Bifurcation, ¶ 29.

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un-noticed fact patterns from the merits would not substantially reduce the scope of issues to be determined at the merits stage.³⁹

b. Regarding compliance with the mandatory six-month cooling-off period.⁴⁰

The Claimant rejects this objection and argues that it does not warrant bifurcation.⁴¹ *First*, it asserts that the objection is meritless and constitutes a reformulation of the first objection with respect to continuing measures and events that postdate the Notice of Intent and that deal with the same subject-matter as those measures included in the Notice of Intent.⁴² *Second*, deciding this objection likewise would require the Tribunal to decide on facts and questions related to the merits of the case.⁴³ *Third*, even should the objection be successful, it would not substantially reduce the scope of issues to be determined at the merits phase.⁴⁴

c. Concerning compliance with the FTA's mandatory time limitations.⁴⁵

The Claimant argues that this objection does not satisfy any of the three factors of the applicable test.⁴⁶ *First*, the objection is not serious inasmuch as it is based on misrepresentations by the Respondent of the facts on which the Claimant's claims are made, and in particular about which measures the Claimant actually challenges in this case, which all post-date the "critical date" for purposes of any time bar.⁴⁷ *Second*, to resolve this objection, the Tribunal would have to enter into the merits of the case during the preliminary jurisdictional phase.⁴⁸ *Third*, even if the objection is successful, the objection would not significantly affect the Claimant's claims on liability and damages, and would not dispose of the entire case.⁴⁹

³⁹ Observations on Bifurcation, ¶ 30.

⁴⁰ Observations on Bifurcation, § II(B).

⁴¹ Observations on Bifurcation, ¶ 31.

⁴² Observations on Bifurcation, ¶¶ 32-35.

⁴³ Observations on Bifurcation, ¶ 36.

⁴⁴ Observations on Bifurcation, ¶ 36.

⁴⁵ Observations on Bifurcation, § II(C).

⁴⁶ Observations on Bifurcation, ¶ 38.

⁴⁷ Observations on Bifurcation, ¶¶ 39-49.

⁴⁸ Observations on Bifurcation, ¶¶ 50-51.

⁴⁹ Observations on Bifurcation, ¶ 52.

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20. Similarly, with respect to the Respondent’s “**Objection B**” regarding denial of benefits,⁵⁰ the Claimant argues that this is not properly a jurisdictional objection but an objection on the merits, making it unsuitable for bifurcation.⁵¹ However, even if it could be resolved in a preliminary phase, the Respondent’s purported denial of benefits in this case postdated the Claimant’s filing of its Request for Arbitration with ICSID, and there is no basis for giving it retroactive effect so as to vitiate an acceptance already made of the Respondent’s prior offer to arbitrate.⁵² Moreover, the Respondent bears the burden of establishing the proper grounds for a denial of benefit, which it has not done.⁵³ As a result, this objection does not fulfill the required elements for bifurcation⁵⁴ because it could not be *prima facie* serious and substantial without even an attempt to demonstrate the elements required for a denial of benefits.⁵⁵
21. *Finally*, for reasons of “procedural economy and fairness,” the Claimant asks the Tribunal to deny the Respondent’s request to separate the quantum phase from the liability phase.⁵⁶ It argues that the Respondent has failed to demonstrate its alleged likelihood of success on the merits of the case, and therefore a likelihood that quantum will not need to be determined.⁵⁷ Moreover, the Claimant’s analogy to the *Suez* case is misplaced, because there the decision to bifurcate liability and quantum was adopted after the Tribunal received the Parties’ pleadings on damages, and this case in any event lacks the complexity from a quantum perspective that was involved in the *Suez* case.⁵⁸

III. TRIBUNAL’S ANALYSIS

22. The Tribunal has carefully reviewed and considered all of the arguments presented by the Parties. The fact that this Procedural Order may not expressly reference all arguments does

⁵⁰ Observations on Bifurcation, § II(D).

⁵¹ Observations on Bifurcation, ¶¶ 53-54.

⁵² Observations on Bifurcation, ¶¶ 53, 55-57.

⁵³ Observations on Bifurcation, ¶¶ 56-57.

⁵⁴ Observations on Bifurcation, ¶ 53.

⁵⁵ Observations on Bifurcation, ¶¶ 58-60.

⁵⁶ Observations on Bifurcation, ¶ 61.

⁵⁷ Observations on Bifurcation, ¶ 62.

⁵⁸ Observations on Bifurcation, ¶¶ 63-67 (citing *Suez*, ¶ 272).

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not mean that such arguments have not been considered; the Tribunal includes only those points which it considers most relevant for its decision. This Procedural Order sets out the reasons for the Tribunal's decision on the Respondent's Request for Bifurcation, which is without prejudice to its eventual decision on the substance of the Respondent's various jurisdictional objections.

A. Considerations Relevant to Bifurcation

23. The Tribunal's power to rule on the Request for Bifurcation is embodied in Article 829 of the FTA as well as in the ICSID Convention and the ICSID Arbitration Rules. Article 829(1) of the FTA states that "[t]he Tribunal shall have the power to rule on preliminary objections to jurisdiction and admissibility," and Article 829(2) states that such objections "shall be made in accordance with the applicable arbitration rules" Article 41(2) of the ICSID Convention states that a tribunal "shall determine" whether to resolve any jurisdictional objection "as a preliminary question or to join it to the merits of the dispute," and Rule 41(4) states that a tribunal "may deal with the objection as a preliminary question or join it to the merits of the dispute."
24. Notably, however, neither the FTA nor the ICSID Convention or ICSID Arbitration Rules set forth an applicable legal standard for determining the appropriateness of bifurcation. Rather, each of these instruments leaves this decision entirely to the discretion of an arbitral tribunal, exercising its good faith judgment regarding the best interests of the case in light of its particular circumstances.
25. The Tribunal of course is aware that in exercising the discretion thus granted, other tribunals have identified certain factors as important to their analysis. This includes, *inter alia*, whether the objection is "substantial" and not "frivolous"; whether the jurisdictional issue is sufficiently discrete from the factual and legal issues that would need to be heard on the merits, so that it may be resolved without the parties being put to the burden and expense of potentially duplicative presentations; and whether the objection is aimed at only a subset of claims, or has the potential either to dispose of the entire case or to result in a material

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reduction of scope in the next phase of proceedings. More generally, in addressing the question of procedural efficiency, tribunals consider whether the “costs and time required of a preliminary proceedings ... will be justified in terms of the reduction in costs at the subsequent phase of proceedings.”⁵⁹ The Tribunal agrees that these are all highly relevant considerations. In general, the Tribunal accepts that the exercise is one of “weighing for both sides the benefits of procedural fairness and efficiency against the risks of delay, wasted expense and prejudice.”⁶⁰

26. Yet, while the jurisprudence identifies certain relevant considerations, it does not suggest that there is a rigid or mandatory formula regarding the process of *weighing* these considerations. There is no consensus on whether they are to be considered holistically or sequentially (much less in what sequence); whether any particular factor is mandatory; or whether certain factors should be weighted more heavily than others for purposes of reaching an eventual result. Given the absence of standards in the governing instruments, the Tribunal considers it appropriate that no “one-size-fits-all” analytical structure be imposed on the reasoning process, leaving each tribunal free to consider all factors that it considers relevant in the particular circumstances of its case.⁶¹
27. Certainly, the Tribunal accepts as a starting point that jurisdictional objections must not be frivolous on their face; it is self-evident that a frivolous objection would not warrant bifurcation and the attendant delay in proceeding to determination of the merits. But this does not mean that every jurisdictional objection that surpasses that low threshold presumptively warrants bifurcation. While the Tribunal appreciates the concern that Parties should not be put to the expense of litigating merits issues if there is a reasonable possibility that a claimant lacks jurisdiction to proceed, the fact remains that the current Arbitration

⁵⁹ *Glamis Gold*, ¶ 12 (RL-3).

⁶⁰ *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order Deciding Bifurcation and Non-Bifurcation, 25 January 2013, ¶ 10 (“*Apotex*”).

⁶¹ See similarly *Apotex*, ¶ 10 (acknowledging that “[t]here is no bright dividing-line” in the application of bifurcation factors, and the tribunal must decide the application “in the particular circumstances of this case. It serves no purpose for this Tribunal to follow blindly what other tribunals have or have not done in other circumstances, particularly with hindsight.”).

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Rules do not build in any presumption of bifurcation, as the prior 1984 version of the Arbitration Rules did.⁶² The amendment of the Arbitration Rules in 2006 to remove the presumption of bifurcation – which was followed by a similar modification of the UNCITRAL Arbitration Rules⁶³ – reinforces the broad discretion of tribunals to take all considerations into account in assessing the procedural framework that best serves the overall interests of the case. As noted above, those considerations include appropriate attention to concerns about fairness and efficiency, including whether granting bifurcation on balance is likely to conserve time and resources or to impose additional burdens that otherwise could be minimized or avoided. At the same time, a tribunal always must be guided by its ultimate duty to protect the integrity of proceedings, including its ability to hear all appropriate evidence and to provide meaningful relief. In certain cases, such issues may also factor into the bifurcation analysis.

B. The Respondent’s Request for Bifurcation

28. While the Tribunal believes its decision with respect to bifurcation ultimately should be made holistically with an eye towards serving the overall interests of justice in a particular case, it is necessary to make certain brief comments regarding the nature of the particular objections that the Respondent advances here.
29. First, the Tribunal considers that the various issues presented as part of the Respondent’s “**Objection A**” are unlikely, even if successful, to dispose of all (or perhaps even most) of the issues in the case. In particular, there is no dispute that the Claimant did present a Notice of Intent, which identified a series of actions or omissions about which the Claimant complained.⁶⁴ There appears likewise to be no dispute that the Claimant observed the

⁶² ICSID Rules of Procedure for Arbitration Proceedings, 25 September 1984, Rule 41(3) (“Upon the formal raising of an objection relating to the dispute, the proceeding on the merits shall be suspended.”).

⁶³ Compare UNCITRAL Arbitration Rules, 1976, Article 21(4) (“[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question”) with UNCITRAL Arbitration Rules, 2010, Article 23(3) (“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.”).

⁶⁴ Notice of Intent to submit the claim to arbitration with Annexes 1-6 attached thereto, 10 October 2016 (C-8).

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required cooling-off period after the Notice of Intent and before its filing of the Request for Arbitration, so this objection does not arise with respect to the actions or omissions that were addressed in the Notice of Intent. The Respondent’s objections rather relate to two *additional* developments that were not referenced in the Notice of Intent, apparently because they post-dated it. The question therefore is whether a claimant in these circumstances is required under the FTA to present a second notice, and observe a second cooling-off period, before it may properly include complaints about such later developments in an arbitration that otherwise satisfied the requisite conditions precedent. Regardless of how the Tribunal eventually resolves this question, at most it appears to impact the differential scope of the case, not whether substantial portions of the case will proceed in any event.

30. Moreover, resolving these objections may require a greater understanding of the underlying facts, and the interrelationship between various events and measures, than is suitable for accelerated determination in advance of a merits phase. The Claimant has argued that the later developments it seeks to include in this case were (a) simply “continuations of conduct noticed and preexisting the [Notice of Intent],” and (b) in any event would be admissible as “ancillary claims” under Article 46 of the ICSID Convention and Rule 40(1) of the ICSID Arbitration Rules.⁶⁵ The latter standards require a determination of whether incidental or additional claims “aris[e] directly out of the subject-matter of the dispute”⁶⁶ Addressing these issues would require the Parties to brief, and the Tribunal eventually to consider, the factual and legal relationship between the events identified in the Notice of Intent and the events that were not. The Tribunal is not convinced that it would be procedurally efficient to examine these factual issues in a preliminary jurisdictional phase, considering that they may well overlap significantly with the factual issues the Tribunal would need to consider anyway in the merits phase which appears likely to proceed (at minimum) with respect to the originally noticed claims.

⁶⁵ Observations on Bifurcation, ¶ 34.

⁶⁶ Article 46 of the ICSID Convention; Rule 40(1) of the ICSID Arbitration Rules.

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31. The same point applies with respect to the third prong of the Respondent’s “**Objection A**,” which concerns application of the limitations period in the FTA. The Respondent says that the Claimant knew or should have known of certain events prior to the “critical date” for jurisdiction; the Claimant responds that those prior events are not the ones about which it complains in this case, but rather that its claims of an FTA breach are for State acts or omissions post-dating the critical date. Exploring this objection may well require nuanced assessments about the interrelationship between events occurring before and after the critical date, in order to determine when the Claimant could be said to have first acquired actual or constructive knowledge of various alleged breaches and the incurrence of associated loss or damage. Moreover, even with such a nuanced appreciation of the facts, it is entirely possible that even if the objection succeeds in part (with respect to certain alleged breaches), it would not succeed in full (with respect to other alleged breaches), with the result that significant parts of the case would remain. In these circumstances, the Tribunal does not believe that procedural economy would be served by examining these issues in a preliminary phase.
32. By contrast, the Tribunal considers that “**Objection B**,” the denial of benefits objection, does not suffer from these two infirmities from the perspective of a bifurcation analysis. *First*, unlike the other objections, this has the potential (if successful) to dispose of the entire case, and not merely some subset either of additional claims (raised after the Notice of Intent) or early breaches (predating the critical date). *Second*, unlike the other objections, the denial of benefits objection is not likely to present factual issues overlapping with the merits. Part of the objection is entirely legal in nature, concerning when a denial of benefits must be declared in order to be effective (*i.e.*, was the Respondent’s denial of benefits timely as a matter of law?). While a second part of the objection is factual (*i.e.*, were the FTA’s grounds for denial of benefits met in this case?), the factual issues to be explored are quite limited, revolving around ownership and control of the Claimant and the nature and substantiality of its business activities in Canada. These issues are entirely discrete from – and not intertwined with – the sequence of events underlying the challenged State measures.

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33. In light of this conclusion, the Tribunal considers that the grounds for bifurcation would be met with respect to the denial of benefits objection, provided that briefing and resolution of this objection could be accomplished fairly expeditiously, so as not to unduly delay proceeding with the balance of the case if the objection ultimately does not succeed. The Tribunal is mindful that Procedural Order No. 2 provided a presumptive timetable for a bifurcated proceeding, under which the case would not be ready for a hearing on jurisdiction until the first quarter of 2021, while in a non-bifurcated proceeding, the entire case could be ready for a hearing in the last few months of 2021.⁶⁷ This schedule was predicated, however, on the assumption that there could be multiple bifurcated jurisdictional issues and that some of these could be law- or fact-intensive. For example, Procedural Order No. 2 envisioned 9 weeks for each of the Memorial on Jurisdiction and Counter-Memorial on Jurisdiction, 12 weeks thereafter to complete document requests and production, then a further 7 weeks for each of the Reply on Jurisdiction and Rejoinder on Jurisdiction, and then still a further 3 weeks for the Parties to determine which witnesses they wished to cross-examine at the hearing. These periods seem far longer than necessary to prepare the discrete denial of benefits issue for a hearing. Given the narrowness of the issue involved – as well as the Tribunal’s issuance of its Decision on Bifurcation two weeks earlier than originally anticipated in Procedural Order No. 2 – it should be possible with the cooperation of the Parties to accelerate the briefing schedule, in order to achieve a hearing on this single issue later this year.
34. For example, the Tribunal attaches as Annex A a draft (revised) Procedural Schedule which would enable a 1-3 day jurisdictional hearing (depending if there will be witnesses) to proceed as early as September 2020. The Tribunal also indicates several alternative dates of availability in October, November and early December, if the Parties are unable to accommodate a September 2020 jurisdictional hearing or prefer somewhat more time to develop the denial of benefits issue. The Parties are requested to confer and report jointly in one week as to (1) which of the various alternative hearing dates they wish to reserve, and

⁶⁷ Procedural Order No. 2, Annex A, Scenario 2.

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(b) any requested adjustments to the attached draft (revised) Procedural Schedule leading up to those hearing dates.

35. Finally, the Tribunal defers for the time being the question of whether, should this case proceed to the merits, there may be sufficient efficiencies to warrant addressing issues of quantum only after a decision on liability is rendered. The Tribunal accepts that in some cases there may be considerable burdens and costs associated with preparing quantum submissions, including the need to develop damages models to address multiple possible scenarios, and that this burden may be exacerbated in cases where challenges are brought to multiple different government acts, and the quantum analysis may differ depending on which (if any) acts eventually are found to violate which (if any) treaty articles. In such cases, a decision to defer quantum submissions may enable the parties to accelerate the liability briefing schedule, while later focusing any quantum submissions on the relevant liability scenario which applies. In other cases, however, the quantum analysis is relatively straightforward, and therefore the added delay occasioned by deferring quantum until after liability is resolved is not justified. The Tribunal acknowledges the Parties' different views of which type of case this one is, based on the pleadings thus far submitted. However, there is no need to resolve the issue at present, given the Tribunal's decision first to accelerate briefing on a discrete jurisdictional issue. Once that issue is resolved, the Tribunal naturally will consult the Parties further regarding the expeditious scheduling of the remaining stages (if any) of the proceeding, including whether any adjustments may (or may not) be warranted to the basic briefing structure or intervals of time previously provided in Procedural Order No. 2.

IV. ORDER

36. For the above reasons, the Tribunal decides as follows:
- a. The Respondent's Request for Bifurcation with respect to the "**Objection A**" issues is denied, with such objection preserved and joined to the merits for further proceedings;

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- b. The Respondent's Request for Bifurcation with respect to the "**Objection B**" issue (denial of benefits) is granted, but on the basis of an accelerated timetable which will enable resolution of this discrete issue as expeditiously as reasonably possible;
- c. The Parties are invited to confer promptly with respect to the draft (revised) Procedural Schedule for a discrete jurisdictional phase proposed in Annex A, and to report jointly in one week as to (1) which of the various alternative hearing dates they wish to reserve (on the basis of a presumptive 1-3 day hearing on jurisdiction), and (b) any requested adjustments to the draft (revised) Procedural Schedule leading up to the selected hearing dates.

On behalf of the Tribunal,

[Signed]

Ms. Jean Kalicki
President of the Tribunal
Date: 17 January 2020

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SCENARIO 2

**PROPOSED SCHEDULE FOR ACCELERATED
DETERMINATION OF THE BIFURCATED JURISDICTIONAL ISSUE**

Description	Party/Tribunal	Period of Time (from prior step)	Date
First Session (by telephone conference)	All		Thursday, 6 June 2019
Claimant's Memorial	Claimant	17 weeks + 1 day	Friday, 4 October 2019
Respondent's Summary of Jurisdictional Objections and Request for Bifurcation	Respondent	40 days	Wednesday, 13 November 2019
Claimant's Observations on Request for Bifurcation	Claimant	40 days	Monday, 23 December 2019
Tribunal's Decision on Bifurcation	Tribunal	25 days	Friday, 17 January 2020
Respondent's Memorial on Jurisdiction	Respondent	6 weeks from Decision on Bifurcation	Monday, 2 March 2020
Claimant's Counter-Memorial on Jurisdiction	Claimant	6 weeks	Monday, 13 April 2020
Requests for production of documents (with respect to the bifurcated jurisdictional issue)	Claimant and Respondent	1 week	Monday, 20 April 2020
Responses, including any objections, to requests for production, and production of uncontested documents	Claimant and Respondent	1 week	Monday 27 April 2020
Reply to objections to requests for document production and transmittal of Schedules to Tribunal	Claimant and Respondent	1 week	Monday 4 May 2020
Decision by the Tribunal on parties' requests for document production	Tribunal	1 week	Monday 11 May 2020

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Description	Party/Tribunal	Period of Time (from prior step)	Date
Production of Documents as ordered by the Tribunal	Claimant and Respondent	3 weeks	Monday 1 June 2020
Respondent's Reply on Jurisdiction	Respondent	4 weeks	Monday 29 June 2020
Claimant's Rejoinder on Jurisdiction	Claimant	4 weeks	Monday 27 July 2020
Parties to exchange list of witnesses and experts to be cross-examined at the hearing on jurisdiction	Claimant and Respondent	1 week	Monday 3 August 2020
Additional witnesses called by the Tribunal to be cross-examined at the hearing	Tribunal	1 week	Monday 10 August 2020
Pre-hearing organizational meeting (by telephone conference)	All	TBD	TBD based on hearing dates
Hearing on Jurisdiction	All	–	1-3 days TBD, within: (a) 28-30 Sept. 2020, (b) 1-6 Oct. 2020, (c) 9-12 Nov. 2020, or (d) 30 Nov.-4 Dec. 2020
Tribunal's Decision on Jurisdiction	Tribunal	–	TBD