INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Access Business Group LLC

v.

United Mexican States

ICSID Case No. ARB/23/15

CLAIMANT'S OPPOSITION TO RESPONDENT'S MOTION TO BIFURCATE

[ENGLISH]

Contents

I. INTRODUCTION

Claimant, Access Business Group LLC ("ABG"), respectfully submits its Response to Respondent's Request for Bifurcation ("RFB") pursuant to the May 21, 2024 Procedural Calendar as revised and updated. As more fully set forth below, grant of Respondent's RFB would frustrate rather than further the over-arching principle of efficiency.

II. Preliminary Statement

1. Three (First Objection, Third Objection, and Fourth Objection) of Respondent's RFB preliminary objections demonstrably are not serious and substantial. The First Objection premised on lack of consent (*Ratione Voluntatis*) purportedly arising from Claimant's pleading in the alternative is manifestly insufficient for three reasons. First, Respondent's First Objection is premised on an Annex 14-D USMCA analysis. In this connection, Respondent argues that pleading in the alternative somehow gives rise to simultaneous proceedings under two different treaties, one of which is extinguished.

2. This reasoning fails because Claimant *only* has filed one arbitration pursuant to Annex 14-C USMCA. Claimant inarguably elected to pursue a singular proceeding in keeping with the clear strictures of Annexes 14-C, 14-D, and 14-E USMCA. Neither by operation of law nor pleading has Claimant filed multiple proceedings under different treaties.

3. Second, there is no legal basis for the proposition that pleading in the alternative somehow activates Annex 14-D in addition to Annex 14-C.

4. Third and finally as to the First Objection, Claimant does not pursue a claim pursuant to Annex 14-C USMCA with respect to which Claimant also attempts to prosecute claims under the extinguished NAFTA (1994). To the contrary, Claimant is filing an USMCA-based proceeding pursuant to Annex 14-C USMCA that applies the

substantive law of NAFTA (1994) Chapter 11 Section A as agreed to by the Treaty Parties in Annex 14-C.

5. Respondent's Third Objection (*Ratione Voluntatis*) alleging insufficient waiver is manifestly not serious and substantial. The waiver at issue literally tracks (verbatim) NAFTA (1994) Art. 1121.1(b) but for the first subordinate clause of that provision. Therefore, Claimant's waiver in *every respect* conforms with (i) the ordinary meaning, (ii) the object and purpose, and (iii) the context of Art. 1121.1(b). Furthermore, Respondent, in part, premises its objection on Art. 14.D.5 USMCA, which is not relevant to this Annex 14-C USMCA proceeding. Understandably, Respondent does not and cannot point to a single award where language comparable to Claimant's alleged insufficient waiver in this case has been found to give rise to a jurisdictionally-based dismissal.

6. Respondent's Fourth Objection (*Ratione Voluntatis*) based upon failure to exhaust local remedies pursuant to Art. 14.D.5, Subparagraphs 1(a) and 1(b) USMCA fails on three grounds: (i) Art. 14.D.5 USMCA does not apply to this Annex 14-C proceeding, (ii) Respondent omits to reference Request for Arbitration ("RFA") ¶ 8(c) identifying no less than twelve (12) cases constituting a longstanding effort to address the underlying validity of the August 23, 1939 Presidential Resolution on which Respondent now most recently has taken the property here at issue, and (iii) the Expert Report filed in this proceeding by Former Mexican Supreme Court Justice, Dr. José Ramón Cossío Díaz and Lic. Raúl M. Mejía Garza establishes that, notwithstanding the referenced failed attempts that span twenty (20) years, recourse to Mexican courts and administrative tribunals would be futile.

7. The three referenced preliminary objections never should have been raised in the first place.

8. Respondent's Second Objection (*Ratione Voluntatis* and *Ratione Temporis*) is colorable albeit not meritorious. The Tribunal asked the Parties to brief the question of applicable treaty. Claimant did so and provided the Tribunal with an initial non-exhaustive analysis set forth in Claimant's Memorial Section XII, Subsection B pages 194-219 (¶¶ 384-425). Respondent opted for filing its RFB, and further decided not to address Claimant's analysis, but rather merely to assert the seriousness and substantiality of this objection.

9. Under the procedural circumstances of this case where this issue already has been partially briefed, and the totality of Claimant's case-in-chief lies before this Tribunal and Respondent, the over-arching principle of efficiency would be frustrated rather than furthered by bifurcating this cause.

III. RESPONDENT'S MOTION FOR BIFURCATION INCORRECTLY RESTATES AND, THEREFORE, MISCHARACTERIZES THE RECORD BEFORE THIS ARBITRAL TRIBUNAL

10. Respondent's *Request for Bifurcation* engages in an admittedly "brief description of the claim and of the facts deemed relevant for purposes of objections to the claim and of the Request for Bifurcation."[1] What follows is a very skeletal and unintentionally misleading three-paragraph recitation supplemented by five bullet points. This admittedly "brief"[2] description of the (i) "claim"[3] and (ii) "facts"[4] presumably relevant for purposes of Respondent's preliminary jurisdictional objections and RFB, even within

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[1] RFB ¶ 8 at 3 sets forth the following heading:

> **II. BREVE DESCRIPCIÓN DE LA RECLAMACIÓN Y DE LOS HECHOS RELEVANTES PARA LAS OBJECIONES DE LA DEMANDADA Y LA SOLICITUD DE BIFURCACIÓN[.]**

[2] *See id.*

[3] *Id.*

[4] *Id.*

the very narrow parameters presented, contains incomplete characterizations of factual premises of record that, if not addressed, may be conducive to equally insufficient inferences.

11. Respondent asserts that "Claimant explains in its *Request for Arbitration* (RFA) and its Memorial that, between 1991 and 1994, Nutrilite S. de R.L. de C.V. (Nutrilite México) acquired two parcels of real property in the State of Jalisco that previously formed part of the Hacienda del Petacal (*El Petacal*):

- A parcel comprising 160 hectares known as *Puerta del Petacal 3 y 4* acquired in April of 1992 (Parcel 1), and
- A parcel comprising 120 hectares known as *Puerta del Petacal 1 y 2* were acquired in May of 1994 (Parcel 2)." [Citation omitted.][5]

12. The record before this Tribunal demonstrates that while certainly Nutrilite México (Nutrilite S.R.L.) acquired the 160 hectares known as *Puertas del Petacal Tres* and *Cuatro* in April 1992, and the parcel comprising 120 hectares (*Puertas del Petacal Uno* and *Dos*), in May of 1994, at that time Nutrilite Products, Inc. ("NPI") owned Nutrilite S.R.L.[6] The facts before this Tribunal reflect that Claimant, Access Business Group LLC did not acquire its shares in Nutrilite S.R.L. and therefore its investment in *El*

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[5] RFB ¶ 9. The Spanish language original reads:

9. La Demandante explica en su Solicitud de Arbitraje y en su Memorial que, entre 1991 y 1994, Nutrilite S. de R.L. de C.V. (Nutrilite México) adquirió dos predios en el estado de Jalisco que anteriormente formaban parte de la Hacienda del Petacal (El Petacal):

- un predio de 160 hectáreas conocido como Puerta del Petacal 3 y 4 adquirido en abril de 1992 (Predio 1), y
- un predio de 120 hectáreas conocido como Puerta del Petacal 1 y 2 que fue adquirido en mayo de 1994 (Predio 2). [Cita omitida.]

[6] Claimant's Memorial ¶¶ 8-11.

Petacal, until June 29, 2001.[7] Neither NPI nor Nutrilite S.R.L. is a claimant in this proceeding.[8]

13. This point of clarification matters for at least two foundational reasons. First, the date of ABG's investment is critical to the classification of the actual land comprising 160 hectares (*Puertas del Petacal Tres* and *Cuatro*) because ABG did not purchase this property in April of 1992, a date that pre-dates NAFTA's entry into force on January 1, 1994. Additionally in this regard, underscoring the existing record as to ABG's investment is equally relevant to the time period provided in paragraph 6(a) of Annex 14-C USMCA, which reads:

> *6. For the purposes of this Annex:*
>
> *(a) 'legacy investment' means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement[.]*

14. Second, the referenced omission also helps contextualize the first sentence of paragraph 10 of Respondent's RFB, which provides in the Spanish language original that "[l]a Demandante afirma que, desde su adquisición, ambas propiedades han sido desarrolladas para producir suplementos nutricionales orgánicos bajo la marca 'Nutrilite'." The term, "desde su adquisición," as used in this sentence and in the context of the subject omission is ambiguous in an important respect.

15. The term "*desde su adquisición*," can mean, if accurately paraphrasing the record, since Nutrilite S.R.L.'s actual acquisition of the properties in 1992 and 1994, respectively, when Nutrilite S.R.L. was owned by Nutrilite Products, Inc. ("NPI")

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[7] Claimant's Memorial ¶¶ 1, 12, & 372.

[8] Claimant's Memorial ¶ 1.

through and beyond ABG's acquisition of Nutrilite S.R.L. on June 29, 2001, and beyond (mostly completed by 2008).[9]

16. The less than precise definition would be where the subject of the sentence, "*[l]a Demandante,*" meaning ABG, and "*desde su adquisición,*" i.e, since ABG's acquisition of the two properties, which would be incorrect because this reading excludes the 1992-1994 through June 29, 2001 phases of the staged investment, which pre-dated ABG's acquisition of Nutrilite S.R.L., and moreover continued through 2019.[10]

17. Again, presumably paraphrasing Claimant's Memorial at ¶¶ 25 and 115, according to Respondent's RFB ¶ 10, n. 4, Respondent states that, *"[l]as tierras agrícolas y la infraestructura de producción y procesamiento de Nutrilite México se localizan en el Predio 1 [160 hectares], mientras que el Predio 2 [120 hectares] se utiliza como zona de amortiguamiento para evitar contaminantes externos que pudieran poner en peligro la certificación de sus productos como 'orgánicos'."*[11] This paraphrased summary of Claimant's Memorial ¶¶ 25 and 115 is unintentionally incorrect. Very significantly, ¶ 115 reads:

> *On May 12, 1994 Nutrilite S.R.L. purchased* ***Puerta el Petacal Uno*** *and* ***Dos,*** *which consisted of approximately 120 hectares.* [Citation omitted.] *These 120 hectares are used primarily as a buffer zone to keep insects and any other type of contaminant from the 160 hectares sustaining the harvesting, processing, and packaging operation.* [Citation omitted.] ***They are also used for crop rotation.***
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> [*Citing to* Eppers Witness Statement **(CWS-002)** at ¶¶ 92-96.] (Bold emphasis supplied.)

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[9] Claimant's Memorial ¶¶ 9-12, ¶¶ 115-211, & ¶ 372.

[10] Claimant's Memorial ¶ 145 & n. 156 referencing **Composite C-0059**, facilitating reference to copies of documents kept in the ordinary course of business reflecting employment history that has been synthesized in the form of a chart that is the subject matter of that footnote (n. 156).

[11] *Citing to* Claimant's Memorial ¶¶ 25 & 115.

18. The significance of the use of this property (the 120 hectares *Puertas Uno* and *Dos*) for crop rotation, as well as a buffer zone, is important to understanding the interplay between the two parcels, which simply cannot be abbreviated to the status of (i) the 160 hectares constituting an agricultural harvesting and production site, and (ii) the 120 hectares relegated to the task of a buffer zone. As more fully described in Mr. Eppers' Witness Statement,[12] and in **Subsection VIII D**, titled: **The 120 Hectares Parcel and Crop Rotation**, the crop rotation operational function that the 120 hectares serves is an integral and necessary component of the harvesting and processing undertaken on the 160 hectares parcel.[13] The contiguous and overlapping nature of

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[12] Eppers Witness Statement **(CWS-002)** at ¶ 92.

[13] In this regard, Claimant's Memorial in relevant part reads:

> ***D. The 120 Hectares Parcel and Crop Rotation***
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> *203. As the Tribunal has been informed from the Witness Statement of Mr. Robert P. Hunter, and the **Request for Arbitration** filed in this case, **El Petacal** is comprised of four parcels of land. **Puertas Uno** and **Dos** (120 hectares), and **Puertas Tres** and **Cuatro** (160 hectares). The 120 hectares parcel that the communal landowners of San Isidro physically control pursuant to the expropriation action on the part of Mexico in July of 2022, represents an integral part of the farming and harvesting operation sustained on the 160 hectares because the 120 hectares are contiguous with the 160 parcel hectares, and in some places the parcels circumscribe each other. As Mr. Eppers testifies, **'[a] key feature of organic farming is crop rotation.'***
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> *204. Organic farming needs an adequate land base that will be effective for rotating crops. Certain crops require specific levels of nutrients in the soil. The appropriate level of such nutrients is sustainable only if crops are rotated and land is allowed (i) to lay fallow, and/or (ii) to grow different varieties of plants. The rotation process helps rid soil of insects, negative organic matter like weeds, and soil diseases as pathogens can no longer survive in the soil as soon as diseased plant debris decomposes.*
>
> *205. When crops are rotated, the quantity of the pest population is reduced. What actually is occurring with crop rotation is that crops or plants are rotated to bring in non-host plants or crops that will prevent the accumulation or build-up of significant pathogen populations.*

the 120 hectares parcel, along with its pivotal crop rotation operational function *may* inform the Arbitral Tribunal on jurisdictional and damages issues. Hence, clarification on this point is pivotal.

A. The Characterization of the July 1, and July 7, 2022 Notices, and of the July 14, 2022 Meeting

19. Respondent misstates the scope of the July 1, 2022 Notice of Taking as limited only to the 120 hectares parcel. In doing so, Respondent unintentionally omits critical language from its citation of ¶ 377 of Claimant's Memorial, found in ¶ 11, first bullet point at n. 5 of Respondent's RFB.[14] The language omitted from the citation of

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> *206. The rotation process also increases nutrients available for crops and plants while reducing erosion and promoting soil fertility. Mr. Eppers testifies that **'[a] helpful example is found in the farming of parsley and watercress. Both of these plants require nitrogen-rich soil. The necessary ratio of soil/nitrogen saturation only is possible if crops are rotated.**'*
>
> [Citations omitted.] (Emphasis in original.)

Claimant's Memorial ¶¶ 203-206.

[14] Respondent's n. 5 contained in the first bullet point to ¶ 11 of the RFB reads:

> *Memorial de Demanda, ¶ 377: '[…] the Claimant's claims arose following Mexico's issuance of its initial notice of expropriation with respect to the 120-hectares portion of El Petacal through SEDATU on July 1, 2022.'*

The actual language contained in ¶ 377 of Claimant's Memorial contextualizes the language cited by stating:

> *377. As detailed in Sections I to X above, the Claimant's claims arose following Mexico's issuance of its initial notice of expropriation with respect to the 120-**hectares** portion of **El Petacal** through SEDATU on July 1, 2022. Counting three years from that date, the limitation period under Articles 1116(2) and 1117(2) NAFTA would expire on July 1, 2025. The Claimant submitted its Request for Arbitration on April 13, 2023.*

(Emphasis in original.)

Section X, as stated *infra*, makes clear that the July 1, 2022 Notice of Taking has a broader scope than that which Respondent has identified and ascribed to Claimant. Section X

Claimant's Memorial, ¶ 377 references Section X commencing with ¶ 305 of Claimant's Memorial. There, Claimant explains three factual propositions that Respondent's narrative and characterization omit: (i) the communal landowners took physical control of the 120 hectares parcel on July 4, 2022,[15] (ii) the actual scope of the July 1, 2022 Notice of Taking, according to Claimant's Memorial, is not just the 120 hectares, but the entire 280 hectares comprising *El Petacal*,[16] and (iii) based on its

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additionally observes property violations that pre-date even the July 1, 2022 tender of Notice of Taking.

[15] Section X of Claimant's Memorial ¶ 309, in pertinent part states:

> *309. The testimony before this Tribunal is that the communal landowners of San Isidro took control of* ***Puertas Uno*** *and* ***Dos*** *of El Petacal after the passage of twenty-four (24) hours as of 9:00 p.m., July 4, 2022. This fact conflicts, [as is demonstrated in Claimant's Memorial] … with a document here referenced as* ***'Acta de Posesión y Deslinde'*** *that literally and textually states that physical, material, and juridical title to the property was conveyed to the communal landowners of San Isidro on July 14, 2022. As to the 120 hectares (****Puertas Uno*** *and* ***Dos****) such obviously was not the case.* [*Citing to* Eppers Witness Statement **(CWS-002)** at ¶ 178; Hunter Witness Statement (**CWS-001)** at ¶ 215 and **C-0500-SPA**, document titled "***Acta de Posesión y Deslinde.***"

(Emphasis in original.)

[16] Section X in relevant part as to this proposition states:

> *310. Consequently, the July 1, 2022 Notice, despite the absence of literal textual language so stating, concerned the entire 280 hectares comprising* ***El Petacal****, but notes that only physical control at that time would be taken with respect to '****121-00-00 hectáreas de terreno de monte****,' i.e., the 120 hectares comprising* ***Puertas Uno*** *and* ***Dos*** *of* ***El Petacal****.*
>
> *311. The July 1, 2022 Notice in citing to Art. 302 and underscoring the alleged right to immediate possession of land that was* ***not*** *being cultivated, supports that at the time only the 120 hectares would be physically taken, as the remaining 160 hectares were sustaining crops yet to be harvested and picked. Under Art. 302 of the* ***Ley Federal de Reforma Agraria****, arable land where crops are being farmed would be susceptible to physical possession pursuant to complementary execution of an Executive Order only after time is provided for purposes of gathering the harvest. Article 302 of the* ***Ley Federal de***

own written admission, SEDATU government officials unilaterally trespassed and conducted technical work on the Subject Property *before* representatives of Nutrilite S.R.L. and NPI were served with the July 1, 2022 Notice of Taking.[17]

> ***Reforma Agraria*** *provides for '**un plazo máximo de treinta días para que los ejidatarios entren en posesión plena**'.*
>
> (Emphasis in original.)

Claimant's Memorial ¶¶ 310-311 *citing to* n. 334 referencing attached as **C-0081-SPA** the Notice dated July 1, 2022.

[17] As to this proposition, Section X in part reads:

> *305. The legal representative of Nutrilite S.R.L. was served with a Notice dated July 1, 2022 provided by the **Secretaría de Desarrollo Agrario, Territorial y Urbano** (SEDATU) that purports to provide that government instrumentality with the right to execute a taking immediately on the 120 hectares of **El Petacal** known as **Puertas Uno** and **Dos**. This July 1, 2022 Notice ostensibly purports to do so based upon the 1939 Presidential Resolution that President Lázaro Cárdenas Jiménez issued at that time. This Notice of taking, or of execution pursuant to the 1939 Presidential Resolution, purports to be in furtherance of the rights of the San Isidro communal landowners under the very 1939 Presidential Resolution.*
>
> *306. The July 1, 2022 Notice additionally purports that this taking of property also is normatively premised on Art. 302 of the **Ley Federal de Reforma Agraria,** which the Notice asserts to be applicable with respect to the third transitional Article of the **Ley Agraria** of January 6, 1992.* [Citation omitted.]
>
> *307. After citing to Art. 302 of the Ley Federal de Reforma Agraria, the Notice adds:*
>
> > *Derivado de lo anterior y toda vez que los días 30 de junio y 01 de julio de 2022, se realizaron los trabajaos técnicos de **ejecución complementaria,** en los cuales se observaron 121-00-00 hectáreas de terreno de monte, mismas que están delimitadas con lienzos y malla ciclónica, las cuales de acuerdo al artículo anteriormente descrito [Art. 302 Ley Federal de Reforma Agraria,] **deberán de ponerse en posesión inmediata a los beneficiados de la Resolución Presidencial de fecha de publicación 18 de noviembre de 1939, se les concede un plazo de veinticuatro horas las cuales empezarán a surtir sus efectos a partir de las 9:00hrs del día cuatro de julio de 2022, a efecto de que se retiren los lienzos y malla ciclónicas y esta dependencia del ejecutivo federal se encuentre en condiciones para poner en posesión a los beneficiados.***

20. These three factual propositions are critical to a complete and material understanding of the July 1, 2022 Notice of Taking, as well as the actions that SEDATU officials undertook on June 30 and July 1, 2022 *before* the July 1, 2022 Notice was served on representatives of NPI or Nutrilite S.R.L. These facts are material to understanding Claimant's actual position and representations with respect to the July 1, 2022 Notice of taking as it relates to the measures giving rise to Claimant's claims. Respondent's representations in this regard were incomplete.

21. With respect to the July 7, 2022 Notice of Taking, Respondent summarizes Claimant's position in the following single sentence:

- ***7 de julio de 2022:*** *Oficio de la SEDATU mediante el cual se notificó a Nutrilite México que se había programado una reunión en la casa ejidal de San Isidro el 14 de julio de 2022, para informar a todos los interesados sobre la ejecución de la Resolución Presidencial de 1939 que se tenía prevista.* [Citation omitted.][18]

(Emphasis supplied.)

> *308. The July 1, 2022 Notice states that based upon the technical work undertaken on June 30 and July 1, 2022 in furtherance of **'ejecución complementaria,'** it was observed that 121 hectares were not cultivated with crops, and instead appeared covered with canvases and nets. Therefore, so says the Notice, physical possession of these '121 hectares' pursuant to the 1939 Presidential Resolution would ensue within twenty-four (24) hours as of July 4, 2022 so that the canvases and nets on the property could be removed, and physical possession and control of the property taken at that time. It is worth noting that entry into the property, according to the ordinary textual language of the Notice, actually took place before (June 30 and July 1, 2022) the Notice actually was provided to Nutrilite S.R.L.'s legal representative.*

(Emphasis supplied and in original.)

Claimant's Memorial ¶¶ 305-308.

[18] Respondent's RFB ¶ 11, second bullet point.

22. This abbreviated recitation of the Notice of Taking dated July 7, 2022 and of Claimant's citation of that Notice as a measure giving rise to Claimant's claims is based on cherry-picked language from the Memorial that is incomplete, out of context, and for this reason (among other things) misleading.

23. Indeed, critical to Claimant's claims is that these claims arise because the July 1, and July 7, 2022 Notices, as well as the July 14, 2022 meeting, are devoid of the most fundamental vestiges of due process. The factual bases for the manner in which these measures took place is foundational to the allegations concerning how the claims before this Tribunal arose.[19] Formally and substantively, after the July 1 and July 7,

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[19] On this proposition Claimant's Memorial in one of several sections discussing this issue, reads

> *552. The July 1 and July 7, 2022 Notices did not provide for any process, let alone due process. Indeed, the July 7, 2022 Notice limits itself to advising Nutrilite S.R.L.'s legal representative that a meeting will be held at the* ***'House of the communal landowners of San Isidro'*** *on July 14, 2022. That meeting is not described as a venue for a hearing to adjudicate the merits of the taking that already had been effectuated as to the 120 hectares parcel (****Puertas Uno*** *and* ***Dos*** *of* ***El Petacal****) according to the July 1, 2022 Notice. There can be no substitute, however, for the very language contained in the July 7, 2022 Notice in this regard:*
>
> > *En virtud a lo anterior y de conformidad a lo dispuesto por los artículos 307, 308 y demás relativos y aplicables de la Ley Federal de la Reforma Agraria pero aplicable al caso concreto atento a lo que dispone el artículo tercero transitorio de Ley Agraria vigente se les notifica que a las 10:00 diez horas del día 14 catorce de julio del 2022, en el local que ocupa la casa ejidal del poblado de San Isidro, del municipio de San Gabriel, estado de Jalisco, lugar en donde se llevará a cabo el inicio de la diligencia de los trabajos técnicos de la ejecución complementaria de la Resolución Presidencial anteriormente citada, lo que se les comunica a efecto de que se sirvan a concurrir personalmente o por medio de su representante debidamente acreditado al lugar de la diligencia de los trabajos en comento, en la inteligencia de que su ausencia o retraso no será motivo de la suspensión el acto de referencia.* [Citation omitted.]
>
> *553. Nutrilite S.R.L. personally and/or through its credentialed representative is invited to attend the meeting, and advised that it is the place where 'the*

2022 Notices were served on Nutrilite S.R.L.'s legal representative, the July 14, 2022 conveyance of title to *both* the 120 hectares parcel and the 160 hectares parcel comprising *El Petacal* took place.[20]

24. Respondent characterizes Claimant's averments regarding the July 14, 2022 meeting as follows:

- **14 de julio de 2022:** De acuerdo con la Demandante, en la reunión realizada en la casa ejidal de San Isidro: 'the Mexican government advised Nutrilite Mexico that 120 hectares of the Nutrilite Property's land and corresponding improvements would be immediately given into the possession of the Ejido San Isidro, and the remaining 160 hectares constituting the balance of the Nutrilite Property would be expropriated in six months from that date.'[21]

25. Again, cherry-picking a subordinate clause, not even a complete sentence, as representative of the relevant factual averments arising from the July 14, 2022 meeting and corresponding events that took place on that date as an explanation of the factual

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*technical work' to be undertaken shall take place with respect to the complementary execution of the 1939 Presidential Resolution (**'lugar en donde se llevará a cabo el inicio de la diligencia de los trabajos técnicos de la ejecución complementaria de la Resolución Presidencial anteriormente citada, …'**). Thus, ABG and Nutrilite S.R.L. are notified that they shall be advised of the logistics having to do with a determination already made.*

*554. Indeed, the July 7, 2022 Notice in very plain and direct language makes clear that the scheduled events, i.e., the complementary execution of the 280 hectares comprising **El Petacal**, shall take place irrespective of whether the owner and/or its legal representative failed to attend the meeting or attended the meeting late **('en la inteligencia de que su ausencia o retraso no será motivo de la suspensión el acto de referencia.')***

555. This single paragraph represents the due process accorded to Claimant

(Emphasis in original.) (Underline emphasis supplied.)

Claimant's Memorial ¶¶ 552-555.

[20] Claimant's Memorial ¶ 156.

[21] Respondent's RFB ¶ 11, second bullet point.

matrix pertaining to those events giving rise to Claimant's claims, is inaccurate and misleading.

26. Respondent omits stating that, according to its very own writings recorded in the public records on July 14, 2022 and pursuant to the events that took place on that date concerning the entirety of *El Petacal*, i.e., all 280 hectares, *legal title* to the 160 hectares principally sustaining the harvesting, processing, production, and packaging operations, was transferred to the San Isidro communal landowners. Therefore, by July 14, 2022, based upon an August 23, 1939 Presidential Resolution issued eighty-three (83) years and fifteen (15) Presidential Administrations earlier, *all* 280 hectares comprising *El Petacal* had been conveyed to the communal landowners of San Isidro.[22] Moreover, this 1939 Presidential Resolution had been fulfilled and discharged twenty-eight (28) years earlier in 1994 by the very entities that caused the physical and legal taking of the 120 hectares parcel and the legal taking of the remaining 160 hectares parcel, resulting in the communal landowners ownership of 821 hectares of property as of July 14, 2022 rather than the 541 hectares to which they claimed entitlement pursuant to the August 23, 1939 Presidential Resolution.[23]

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[22] Claimant's Memorial ¶ 529.

[23] *See* Claimant's Memorial ¶¶ 35-96, and ¶ 529.

Paragraphs 35 and 36 of Claimant's Memorial succinctly address this proposition:

> *35. The Federal government of Mexico itself ensured and assured that the 1939 Presidential Resolution would be fully discharged by March 14, 1994. Therefore, NPI and Nutrilite S.R.L., according to the Mexican Federal government's own written representations, would be assured that the purchase of the 120 hectares parcel and the staged investment would not be in any way disrupted by claims to the property pursuant to the 1939 Presidential Resolution.*
>
> *36. An objective review of the documents subscribed to and authored by representatives of Mexico's Federal government and of the State of Jalisco's government constitute compelling evidence beyond cavil. The Mexican*

27. The *physical* and *legal* taking of the 120 hectares parcel (*Puertas Uno* and *Dos*), and the *legal* taking of the 160 hectares parcel (*Puertas Tres* and *Cuatro*) are memorialized in a document titled *Acta de Posesión y Deslinde*.[24] The *Acta de Posesión y Deslinde*, in pertinent part states:

> *En este acto, el Mtro Jonathan Hernández Chávez, comisionado técnico de la oficina de representación en Jalisco del Registro Agrario Nacional, en coordinación con el Ing. Gabriel González Bautista comisionado de la Oficina de Representación en Jalisco de la Secretaría de Desarrollo Agrario Territorial y Urbano [SEDATU], hacen el conocimiento a los ejidatarios presentes que la presente acta de posesión y deslinde,* ***se hace la entrega jurídica de las 280-00-00.00 hectáreas con las previsiones legales en aquellos terrenos que se encuentran sembrados y en que en su momento se describirán ….***
>
> *En ese mismo orden de ideas no habiendo impedimento legal alguno que imposibilite* ***la entrega física, jurídica y material*** *e 120-00-00.00 hectáreas aproximadamente, en este momento* ***se hace la entrega*** *en los términos de mérito, así como* ***su posesión de manera inmediata, identificadas plenamente sin cultivo alguno.***
>
> *En razón de lo anteriormente expuesto y* ***una vez concluido el plazo para levantar las cosechas pendientes en las superficies en explotación, se hará la entrega física y/o material*** *al Comisariado Ejidal de San Isidro de las Tierras que fueron deslindadas en la presente acta; por lo que, 'En nombre del C. Presidente de los Estados Unidos Mexicanos y en cumplimiento a la Resolución Presidencial de fecha 23 veintitrés de agosto de 1939 mil novecientos treinta y nueve, que concedió dotación de tierras al poblado de San Isidro, Municipio de San Gabriel, Estado de Jalisco,* ***por una superficie de 280-00-00 hectáreas, deslindo las tierras que se acaban de recorrer y describir****.'* [Citation omitted.]
>
> (Emphasis supplied.)[25]

> *government's own documents comprise the most compelling evidence in this case.*

[24] *See* Claimant's Memorial ¶¶ 319-320, n. 345 identifying as **(C-0050-SPA)** the *Acta de Posesión y Deslinde de Polígono de las 280-00-00 Hectáreas Pendientes a Entregar de la Ejecución Complementaria de la Resolución Presidencial del 23 de agosto de 1939 Publicada en el Diario Oficial de la Federación el 18 de noviembre del Mismo Año, Por la Cual se Benefició el Ejido San Isidro, Municipio San Gabriel, Estado de Jalisco,* dated July 14, 2022, at 1-8; *see also* Eppers Witness Statement **(CWS-002)** n. 54.

[25] Claimant's Memorial ¶ 320 *citing to* n. 345 **(C-0050-SPA)** the *Acta de Posesión y Deslinde de Polígono de las 280-00-00 Hectáreas Pendientes a Entregar de la Ejecución Complementaria de la Resolución Presidencial del 23 de agosto de 1939 Publicada en el Diario Oficial de la*

28. Respondent in articulating, "*las medidas descritas anteriormente [que] dieron lugar a diversas violaciones del TLCAN y del T-MEC que impactaron su inversión, la cual describen como su participación en El Petacal y en las operaciones comerciales que se llevan a cabo en ese lugar, a través de Nutrilite México*[,]" simply omitted to state that the most fundamental factual premise giving rise to Claimant's claims consists in the (i) ***transfer of legal title and physical control of the 120 hectares parcel (Puertas Uno and Dos) to the San Isidro communal landowners, and (ii) transfer of legal title to the 160 hectares parcel (Puertas Tres and Cuatro) to the San Isidro communal landowners***.

29. In this very same vein, Respondent also omitted to reference that these conveyances (giving rise to Claimant's claims) were memorialized in the *Acta de Posesión y Deslinde*, a document that Respondent drafted, recorded, and presumably executed according to the *Acta de Posesión y Deslinde* itself, on July 14, 2022.[26]

30. These factual propositions, which are beyond quibble, further contextualize Respondent's effort to describe the *status quo* with respect to *El Petacal*, and particularly concerning the 160 hectares parcel (*Puertas Tres* and *Cuatro*). In this connection, Respondent states that, *"[l]a Demandada entiende a partir del Memorial de Demanda, que el Predio 2 ya ha sido entregado a los ejidatarios de San Isidro, sin embargo, el Predio 1 continúa en poder de Nutrilite México,* ***aparentemente, como***

Federación el 18 de noviembre del Mismo Año, Por la Cual se Benefició el Ejido San Isidro, Municipio San Gabriel, Estado de Jalisco, dated July 14, 2022, at 1-8.

[26] *See* **(C-0050-SPA)** - *Acta de Posesión y Deslinde de Polígono de las 280-00-00 Hectáreas Pendientes a Entregar de la Ejecución Complementaria de la Resolución Presidencial del 23 de agosto de 1939 Publicada en el Diario Oficial de la Federación el 18 de noviembre del Mismo Año, Por la Cual se Benefició el Ejido San Isidro, Municipio San Gabriel, Estado de Jalisco,* dated July 14, 2022, *see also* Claimant's Memorial ¶¶ 319-327.

consecuencia de un recurso legal interpuesto por la Demandante y/o su subsidiaria mexicana."[27] (Emphasis supplied.)

31. Here two observations are compelled. First, again, Respondent somehow omits stating that Claimant's position *based upon Respondent's own documents*, and most notably the *Acta de Posesión y Deslinde*,[28] reflects that Respondent *and not* Claimant now holds legal title to both the 120 hectares parcel (*Puertas Uno* and *Dos*) *and* the 160 hectares parcel (*Puertas Tres* and *Cuatro*).

32. Second, Respondent's use of the word "*aparentemente*" (the adverb "apparently"), as well as the subordinate clause "*como consecuencia de un recurso legal interpuesto por* ***la Demandante y/o su subsidiaria mexicana***,"[29] is confusing and disconcerting, in part, because Respondent's SEDATU itself is a defendant in that proceeding. As a party defendant to that action, Respondent is aware that Nutrilite S.R.L. is the plaintiff. Also, Respondent is equally aware, in part because of its agency's status as a defendant in that proceeding, of the court's actual ruling in that action granting *temporary* (non-final) injunctive relief against the physical taking of the 160 hectares parcel (*Puertas Tres* and *Cuatro*).

33. Characterizing with uncertainty ("*aparentemente*") the ruling and effects of that domestic proceeding where only injunctive relief has been sought, as well as raising doubt as to the status of the plaintiff to that action, are rendered all the more intriguing

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27 Respondent's RFB ¶ 12.

28 *Supra* at note 26.

29 Respondent's RFB ¶ 12. [Citation omitted.] (Emphasis supplied.)

because Respondent cites to ¶ 326 of Claimant's Memorial in support of its characterization of Claimant's position with respect to this underlying action.[30]

34. Yet, ¶ 326 of Claimant's Memorial that Respondent references as not providing certainty as to the matters of (i) the identity of the parties and (ii) issuance of an injunctive relief precluding a physical taking on the part of a Mexican Federal judicial tribunal contains footnotes 350 and 351 to Claimant's Memorial. These footnotes explicitly state:

> n. [350] Attached as **Composite C-0062-SPA** to facilitate reference are legal decrees (i) EXPEDIENTE: 292/2023, AMP. INDIRECTO: 68/2023, POBLADO: SAN ISIDRO, MUNICIPIO: SAN GABRIEL, ESTADO: JALISCO dated September 9, 2023, **(C-0062-1-SPA),** and (ii) INCIDENTE DE SUSPENSION 1411/2022-1 (AUDENCIA INCIDENTAL) (AMPARO INDIRECTO 1411/2022), dated August 15, 2022 **(C-0062-2-SPA).**
>
> n. [351] The parties to that proceeding are Nutrilite S.R.L. (Plaintiff) and *Sub-Delegado de Desarrollo Urbano, Ordenación de Territorio y Vivienda de la SEDATU en el Estado de Jalisco, Secretario de Desarrollo Agrario Territorial y Urbano, Dirección General de Ordenamiento de la Propiedad Rural, Dependiente de la Secretaría de Desarrollo Agrario, Territorial y Urbano, Delegación Estatal en Jalisco del Registro Agrario Nacional, Núcleo Agrario Denominado San Isidro, Director de Catastro y Asistencia Técnica del Registro Agrario Nacional,* and the *Sub-Delegación Técnica Jurídica Estatal en Jalisco del Registro Agrario Nacional*.[31]

35. Indeed, Respondent's comments concerning its lack of knowledge (certainty) with respect to the referenced proceeding and the temporary order enjoining SEDATU from *physically* taking the 160 hectares parcel (*Puetras Tres* and *Cuatro*) is rendered all the more enigmatic when considered under the light of the January 11, 2023 correspondence from the *Director General de Consultoría Jurídica de Comercio*

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30 *Id.*

31 *See* Claimant's Memorial n. 350-351.

Internacional, Mr. Roberto Huerta Patoni, presumably Mr. Alan Bonfiglio's predecessor, which reads:

> *Estimado Sr. Martínez-Fraga,*
>
> *Muchas gracias por la información y documentación que nos ha hecho llegar.*
>
> *Respecto a la ejecución de las 160 hectáreas restantes del predio 'Puerta del Petacal', programada para el 14 de enero de 2023, hacemos de su conocimiento que la Secretaría de Desarrollo Agrario, Territorial y Urbano (SEDATU) nos informó que,* ***por el momento****, no se llevará a cabo, derivado de la suspensión definitiva que le fue concedida a Nutrilite S. de R.L. de C.V. en el incidente de suspensión 1411/2022-I del Amparo Indirecto 1411/2022.*
>
> *Por lo anterior, continuaremos con el análisis de la documentación e información del caso con las autoridades correspondientes.*
>
> *Saludos,*
>
> *Sergio Huerta*[32]
>
> (Underlined emphasis in original, bold supplied.)

36. In ¶ 13 of Respondent's RFB, lacking *any* citation to Claimant's Memorial or otherwise, Respondent purports to state Claimant's legal position and recasts it as follows in the Spanish language original:

> *13. De acuerdo con la Demandante, el Anexo 14-C del T-MEC le permite someter una reclamación a arbitraje en contra de México por violaciones a las obligaciones establecidas en la Sección A del Capítulo XI del TLCAN, aun cuando dicho tratado se dio por terminado dos años antes de la fecha de las medidas reclamadas. Sobre esta base, reclama daños por violación de los Artículos 1110 (Expropiación y Compensación), 1102 (Trato Nacional) y 1105 (Nivel Mínimo de Trato) del TLCAN.*[33]

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[32] Attached as **C-0108-SPA** to facilitate reference is email correspondence from Sergio Roberto Huerta Patoni dated January 11, 2023 to Pedro J. Martinez-Fraga; also attached as **C-0109-ENG** to facilitate reference is email correspondence from Pedro J. Martinez-Fraga to Sergio Roberto Huerta Patoni, *Consultoría Jurídica de Comercio Internacional*, dated January 12, 2023, which gave rise to Mr. Huerta Patoni's correspondence.

[33] Respondent's RFB ¶ 13.

37. This characterization is inaccurate. Claimant is not asserting a NAFTA (1994) claim. Instead, Claimant is applying Section A of NAFTA (1994) as the applicable substantive law pursuant to Annex 14-C of the USMCA. In this case, Claimant asserts that the choice of law being applied to this case pursuant to Annex 14-C of the USMCA, as agreed to by the USMCA signatory Parties to the USMCA is the law of the NAFTA (1994). Thus, as set forth in Claimant's Memorial, a claim under a treaty that terminated on June 30, 2020 was not metaphysically extended to provide for a claim under the extinguished treaty on April 23, 2023, two years and nine months after the treaty had terminated; but Claimant's claim under USMCA applies Section A of NAFTA (1994) as the substantive applicable law as the parties to USMCA agreed.[34]

38. Claimant here has filed, solely and exclusively claims under the USMCA pursuant to Annex 14-C. Claimant has not filed claims under the extinguished treaty – NAFTA (1994). Claimant's position is that it has filed only one action under only one treaty (USMCA), pursuant to that treaty's Annex 14-C allowing for the application of NAFTA Chapter 11 Section A's substantive law. This proposition alone, without more, dispenses with Respondent's First Objection (*Ratione Voluntatis* arising from pleading in the alternative *and* bringing parallel proceedings), and Fourth Objection (*Ratione Voluntatis* for failure to meet the USMCA Art. 14.D.5 requirement to meet the exhaustion of remedies before local judicial and administrative tribunals).

39. In light of this single filing under Annex 14-C USMCA, both the First and Fourth Objections cannot be deemed serious and substantial so as to warrant abatement of this proceeding in furtherance of bifurcation.

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[34] *See* Claimant's Memorial ¶¶ 384-466.

40. Contrary to Respondent's characterization of Claimant's claim as resting on a novel principle of public international law pursuant to which claims under terminated treaties can be brought under such treaties, event the title of Section XII, Subsection B of Claimant's Memorial, "T**he Parties' Arbitration Agreement as Contained in Annex 14-C USMCA Plainly Provides for a Binding Choice of Law Provision for the Terms of Section A of NAFTA Chapter 11 to Apply**," clearly specifies that the only issue related to NAFTA (1994) is one of choice of law under the applicable treaty, USMCA.

IV. THREE OF THE FOUR SPECIFIC OBJECTIONS TO JURISDICTION RAISED DO NOT PROVIDE COLORABLE GROUNDS FOR BIFURCATION BECAUSE THEY ARE NOT SERIOUS AND SUBSTANTIAL

41. Three of Respondent's four alleged objections to jurisdiction are not serious and substantial:

(i) First Objection: *Ratione Voluntatis* based on the submission of claims in the alternative as operationally triggering parallel proceedings,

(ii) Third Objection: *Ratione Voluntatis* on the basis that the requisite NAFTA (1994) Art. 1121.1(b) waiver was not submitted as set forth in that provision, and

(iii) Fourth Objection: *Ratione Voluntatis* on the premise that the domestic litigation requirement under Art. 14.D.5, subparagraphs 1(a) and 1(b) of USMCA was not met.

42. The only jurisdictional objection raised presenting a colorable argument is Respondent's second objection, *Ratione Temporis* and *Ratione Voluntatis*, concerning the legal averment that a USMCA Annex 14-C proceeding is proscribed where, as here, the measures at issue are alleged to have occurred during the three-year (June 30, 2020 - June 30, 2023) transition period. In this case, Claimant's RFA was

registered on May 15, 2023. Hence, Respondent asserts that *both* the (i) investment and (ii) measure must fall within the term (January 1, 1994 – June 30, 2020), i.e. the life of the NAFTA (1994). Claimant disagrees. This objection, however, should not give rise to an abatement of the proceedings in furtherance of a jurisdictional hearing because this Tribunal's Procedural Order No. 2 ("P.O. 2") ¶ 10 very explicitly instructed the parties to brief this choice of law issue:

> *10. The Tribunal invites the Parties to brief the issue of the applicable Treaty or Treaties in (i) the Claimant's Memorial on the Merits and (ii) the Counter-Memorial on the Merits and Memorial on Jurisdiction in Scenarios 1 and 2, or the Memorial on Jurisdiction in Scenario 3 (see Procedural Timetable, Annex B to PO1).*

43. Claimant has briefed this issue in Claimant's Memorial on the Merits in Section XII, Subsections B, 1-4. Respondent, however, has characterized Claimant's compliance with P.O. 2, ¶ 10, as Claimant, "*[habiendo][35] tratado de anticipar la Segunda Objeción y ha incluido en su Memorial de Demanda argumentos para rechazarla, incluso antes de que ésta haya sido planteada por la Demandada*."[36] Respondent further adds that "*[e]ste escrito no se ocupará de esos argumentos, los cuales se abordarán, ya sea en la fase de jurisdicción si este Tribunal concede la bifurcación, o durante el procedimiento sobre el fondo si decide negarla,*"[37] and merely proceeds to write three pages in order to establish that the objection is serious and substantial.

44. Respondent states that Claimant's explicit compliance with P.O. 2, ¶ 10 does not constitute the presentation of an unduly anticipated argument. To the contrary, it

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35 The original uses the past tense auxiliary form of the verb "*haber,*" i.e., "*ha.*"

36 Respondent's RFB ¶ 8.

37 *Id.*

merely seeks to meet the Arbitral Tribunal's explicit invitation memorialized in P.O. 2, ¶ 10.

45. A more efficient use of time and allocation of resources, under the circumstances in light of the three insubstantial jurisdictional objections raised, would have been for Respondent to have submitted a Counter-Memorial on the Merits and on Jurisdiction consonant with Scenarios 1 and 2 of P.O. 1, Procedural Timetable, Annex B. This approach is the more efficient methodology that would further and not frustrate efficiency because Claimant already (i) has presented all of its legal and factual arguments in its case-in-chief, (ii) briefed the legal sufficiency of this Second Objection, and (iii) presented all of its evidence as to liability *and* damages.

V. APPLICABLE BIFURCATION PRINCIPLES INFORMING THE EXERCISE OF ARBITRAL DISCRETION

46. The ICSID framework largely contemplates that the determination of whether to bifurcate a proceeding is best left to the arbitral tribunal's exercise of discretion based upon individual case analysis.[38] In fact, prior to the July 1, 2022 Amendments to the ICSID Rules of Procedure for Arbitration Proceedings ("ICSID Arbitration Rules"), the solitary provision on bifurcation granted to arbitral tribunals the absolute discretion in formulating the applicable standard. Article 41(2) of the ICSID Convention broadly states that

> *[a]ny 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,*

[38] Claimant submits a brief analysis of these principles quite respectfully understanding that this Tribunal is amply familiar with them. The analysis is presented only for the sake of completeness.

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.[39]

47. Rules 43 (Preliminary Objections) and 44 (Preliminary Objections with a Request for Bifurcation) now serve as helpful guides to the Tribunal's exercise of the vast discretion that it enjoys in determining bifurcation. Rule 44(2) non-exhaustively codifies the legal principles considered in determining bifurcation:

(2) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:

(a) bifurcation would materially reduce the time and cost of the proceeding;

(b) determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and

(c) the preliminary objection and the merits are so intertwined as to make bifurcation impractical.[40]

(Emphasis supplied.)

48. These non-exclusive principles should primarily assist in assessing efficiency in the context of each individual and particular case.[41] Notwithstanding the virtually unbridled exercise of discretion in selecting a standard accorded to arbitral tribunals, as

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[39] *See* **(CL-0138-ENG)** *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, opened for signature Mar. 18, 1965, entered into force Oct. 14, 1966 ("ICSID Convention") at Art. 41(2).

[40] *See* **(CL-0138-ENG)** ICISD Arbitration Rules (2022).

[41] *See, e.g.*, *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation, January 21, 2015 (Michael C. Pryles, Stanimir Alexandrov, Matthias Scherer) ¶ 66 (observing that "[w]hat is clear is that each case must turn on its own facts. And, this being so, the Tribunal does not consider that it should be placed in the 'straightjacket' of considering this question by reference to the *Glamis Gold* factors, and nothing further. To do so would be to overlook what can be discerned from relevant cases, namely a governing principle that a decision on an application for bifurcation, like other procedural orders, must have regard to the fairness of the procedure to be invoked and the efficiency of the Tribunal's proceedings. To identify and discuss in turn, only certain identified factors may distract from the task at hand."), **CL-141-ENG.**

guidance the commonly cited *Glamis Gold v. United States* tribunal's succinct summary of factors considered remains a helpful non-exclusive benchmark because it does enunciate the element of *substantiality*, which ICSID Rules 43 and 44 do not explicitly mention :

> *Consideration relevant to this analysis include, inter alia, (1) 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; (2) whether the objection to jurisdiction if granted results in a material reduction of the proceedings at the next phase (in other words, the tribunal should consider whether the costs and time required of a preliminary proceedings [sic], even if the objecting party is successful, will be justified in terms of the reduction in costs at the subsequent phase of proceedings); and (3) whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is unlikely that there will be any savings in time or cost.*[42]

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[42] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), May 31, 2005 (Michael K. Young, David D. Caron, Donald L. Morgan) ¶ 12 (c) [Citations omitted, **CL-142-ENG**; *see also*, *Tennent Energy LLC v. Government of Canada*, PCA Case No. 2018-54, Final Award, October 25, 2022 (Cavinder Bull, Doak Bishop, Sir Daniel Bethlehem KC), **CL-143-ENG** / Procedural Order No. 4, February 27, 2020, ¶¶ 87-88, and 91 (observing the three relevant considerations articulated in *Glamis Gold*, but ultimately denying request for bifurcation on the separate ground of ripeness; "[h]aving considered the Parties' submissions on this issue, the Tribunal has decided to dismiss the Respondent's request for bifurcation on the ground that it is premature"), **CL-144-ENG**; *Orazul International España Holdings S.L. v. Argentine Republic*, ICSID Case No. ARB/19/25, Award, December 14, 2023 (Dr. Inka Hanefeld, David Haigh QC, Prof. Alain Pellet), **CL-145-ENG** / Decision on Respondent's Request for Bifurcation, January 2, 2021 ¶¶ 27-31 (declining to grant bifurcation after considering the three factors identified in *Glamis Gold* and also identifying as principal to consider whether bifurcation "could significantly contribute to *clarifying* and *simplifying* the dispute before the Tribunal") (Emphasis supplied.), **CL-146-ENG** *citing at* ¶ 30, n. 33 Christoph Schreuer, THE ICSID CONVENTION: A COMMENTARY, 2nd ed., p. 537, **CL-147-ENG**; *LSG Building Solutions GmbH and others v. Romania*, ICSID Case No. ARB/18/19, Procedural Order No. 3 (Decision on Bifurcation), October 10, 2019 (Juan Fernández-Armesto, Pierre-Marie Dupuy, O. Thomas Johnson, Jr.) ¶¶ 35-59 (declining to bifurcate proceeding after applying the *Glamis Gold* analysis customized to the multi-party factual matrix of the particular case), **CL-148-ENG**; *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, September 9, 2021 (Juliet Blanch, Prof. Horacio A. Grigera Naón, Prof. Phillipe Sands QC) ¶¶ 54-60, **CL-149-ENG** / Procedural Order No. 2 Decision on Bifurcation, June 28, 2018 (declining to grant motion for bifurcation after reviewing the standard set forth in *Glamis Gold*, and in the view of this Tribunal *Phillip Morris v. Australia*, on two grounds: (i) merits

49. The wide discretion accorded to arbitral tribunals in deciding bifurcation is tantamount to ascribing normative value to any principle that reasonably furthers procedural efficiency together with basic fairness. Therefore, tribunals that identify such factors as whether a purported objection is even ripe for disposition,[43] or the extent to which bifurcation would assist in *clarifying* and *simplifying* analysis of the relevant objections,[44] are merely constituting derivative expressions of the principle of efficiency that do not necessarily consider the dismissal of all or parts of a case as exclusive metrics of procedural efficacy.

50. None of the ICSID Arbitration Rules concerning bifurcation, i.e., Rules 42 (Bifurcation),[45] 43 (Preliminary Objections), and 44 (Preliminary Objections with a Request for Bifurcation) contain any textual language concerning *presumptions* in the

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facts intertwined with jurisdictional issues, and (ii) three of the preliminary grounds in support of Respondent's motion for bifurcation were found, without prejudice to the merits, as "not serious or substantial"), **CL-150-ENG**; *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia*, PCA Case No. 2016-39, Award, September 8, 2023 (Prof. Ricardo Ramírez-Hernández, Prof. John Y. Gotanda, Prof. Phillipe Sands QC), **CL-151-ENG** / Procedural Order No. 2: Decision on Bifurcation, January 31, 2018 ¶ 56 (declining to grant motion to bifurcate based on multiple alleged preliminary objections, despite finding that one of the objections premised on the allegation of abuse of process – *ratione temporis* –could have justified bifurcation of the proceedings, but "the over-arching principle is the fairness and efficiency of this process as a whole [ ]," warranted the motion's denial), **CL-152-ENG**; and *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, Final Award, September 3, 2019 (Prof. Ricardo Ramírez-Hernández, Marney L. Cheek, Prof. Raúl Emilio Viñuesa), **CL-153-ENG** / Procedural Order No. 2, April 21, 2017 ¶ 28 (declining to grant motion to bifurcate after canvassing the *Glamis Gold* standard, but focusing on "the particular circumstances of the dispute at hand[.]") **CL-154-ENG.**

[43] *Tennent Energy LLC*, *supra* note 42, Procedural Order No. 4, ¶¶ 91, 93 (finding that request for bifurcation is premature and not ripe), **(CL-144-ENG)**.

[44] *Orazul International España Holdings S.L.*, *supra* note 42, Decision on Respondent's Request for Bifurcation ¶¶ 30-35 **(CL-146-ENG)**.

[45] ICSID Bifurcation Rule applicable to bifurcations *that do not* relate to a preliminary objection.

context of bifurcation. There is, however, significant authority for the proposition that there is no general presumption in favor of bifurcation,[46] or "formal burden of proof."[47]

VI. EFFICIENCY IS BEST SERVED BY DENYING RESPONDENT'S MOTION TO BIFURCATE

A. Respondent's Purported *Ratione Voluntatis* Objection on the Ground That Claims Are Filed in the Alternative Misstates the Proposition Asserted and Is Otherwise Groundless: Respondent's First Objection

51. As well as Claimant is able to discern, Respondent's first objection seems to be based on three very related propositions. First, Respondent argues that Claimant has

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[46] *See Eco Oro Minerals Corp., supra* note 42, Procedural Order No. 2 Decision on Bifurcation ¶ 47 **(CL-150-ENG)** (holding that "[t]he tribunal does not agree that there is a general presumption in favour of bifurcation, or that such presumption is to be read into [Article of the relevant FTA]"); *see also Hela Schwarz GmbH v. People's Republic of China*, ICSID Case No. ARB/17/19, Procedural Order No. 3 – Decision on the Respondent's Request for Bifurcation, December 17, 2018 (Sir Daniel Bethlehem QC, Prof. Campbell Alan Mclachlan, Roland Ziadé) ¶ 73 (pre-dating the July 1, 2022 amendments to the ICSID Arbitration Rules, the tribunal notes that "[u]nlike, for example, the International Court of Justice, in which proceedings on the merits are suspended upon receipt of preliminary objections, the ICSID Convention and ICSID Arbitration Rules do not mandate such action. On the contrary, *there is no presumption in favour of bifurcation in ICSID proceedings*.") (Emphasis supplied.), **CL-155-ENG**; *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation, August 13, 2020 (Dr. Andrés Rigo Sureda, José A. Martínez de Hoz, Prof. Philippe Sands) ¶ 40 (pre-dating the July 1, 2022 ICSID Arbitration Rules Amendments but still relevant, observing that "ICSID Arbitration Rule 41 does not establish a presumption in favor or against bifurcation"), **CL-156-ENG**; and Mainstream Renewable Power Ltd and others v. Federal Republic of Germany, ICSID Case No. ARB/21/26, Procedural Order No. 3 – Decision on Bifurcation, June 7, 2022 (Wendy J. Miles QC, Dr. Charles Poncet MCL, Antolín Fernández Antuña) ¶ 40 ("[a]s further noted by Schreuer, the proposal in the Working Paper and Preliminary Draft to the ICSID Convention that tribunals were mandated to decide jurisdictional objections as preliminary questions was expressly rejected in the final draft.. . . Therefore, it is not for the Claimants to prove compelling reasons to rebut a presumption of bifurcation.") (The separate opinion in this case does not address burden or presumption and, therefore, is excluded.), **CL-157-ENG.**

[47] *Orazul International España Holdings S.L.*, *supra* note 42, Decision on Respondent's Request for Bifurcation ¶ 30 **(CL146-ENG)**, and on n. 33 Christoph Schreuer, THE ICSID CONVENTION: A COMMENTARY, 2nd ed., p. 537 **CL-158-ENG**.

attempted to bring alternative claims under Annexes 14-C and 14-D of USMCA, which, Respondent asserts, simply is impermissible[48]

52. Second, notwithstanding having articulated that claims in the alternative pursuant to Annexes 14-C and 14-D USMCA are legally inviable, Respondent's second prong of this argument is based on the proposition that Art. 14.2(4) USMCA provides that "an investor may only submit a claim to arbitration under this Chapter as provided under Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts)."[49] In this connection, Respondent notes that the disjunctive "or" and not the conjunctive "and" is used and, therefore, Respondent concludes that a claimant (investor) would need to choose one of the three Annexes as a predicate to prosecuting a claim.[50]

53. Respondent further surmises that neither NAFTA (1994) nor USMCA "provides for both sequential or parallel" claims in the same proceeding and, therefore, as the Treaty parties did not provide for successive or parallel proceedings, Claimant's effort fails for lack of consent (*Ratione Voluntatis*).[51]

54. Respondent's argument is certainly insubstantial for one single reason. Claimant has not filed this proceeding pursuant to *any* Annex other than Annex 14-C USMCA.

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[48] The Spanish language original reads:

> *16. La Demandante ha intentado presentar reclamaciones alternativas bajo los Anexos 14-C y 14-D del T-MEC en el mismo arbitraje, lo cual sencillamente no está permitido.*

Respondent's RFB ¶ 16.

[49] Respondent's RFB ¶ 17.

[50] *Id.*

[51] *Id.* ¶ 18.

Indeed, Claimant has honored the use of the disjunctive that Respondent has underscored. Consequently, Claimant has *not sought* to bring parallel proceedings pursuant to Annexes 14-C *and* 14-D. Claimant also has not sought or triggered the simultaneous workings of Annexes 14-C and 14-D, even if such undertaking were legally possible.

55. Throughout this proceeding, Respondent has been made well aware of the configuration of Claimant's claims pursuant to Annex 14-C USMCA. Claimant opines that Annex 14-C USMCA allows an investor whose investment was made at any time between January 1, 1994 (NAFTA's entry into force) and June 30, 2023 (NAFTA's termination) to bring a claim *under USMCA* with the application of NAFTA substantive law for improper host-State-government measures taken between July 1, 2020 (the date on which USMCA entered into force) and July 1, 2023 (the end of the three-year extension period) because (i) the plain and ordinary language of Annex 14-C, (ii) the object and purpose of Annex 14-C, (iii) the contemporaneous statements on the part of the USMCA signatories, (iv) the Working Papers and collateral negotiation statements, and (v) the rational functional workings of Annex 14-C compel the finding that the parties agreed to the application of NAFTA substantive law (Section A Chapter 11) for such claims where the alleged wrongful measure took place during the three-year (June 30, 2020 – June 30, 2023) transition period.

56. Claimant's position has been constant and never has morphed. The issue does not concern the extension of a terminated treaty, but rather a choice of applicable substantive law pursuant to Annex 14-C USMCA. Claimant has not sought to bring a claim under two treaties having different provisions.

57. Respondent has been made aware of Claimant's position long before the May 23, 2024 submission of Claimant's Memorial. As early as October 11, 2022, Mr. Orlando

Pérez Gárate (*Director General de Consultoría Jurídica de Comercio Internacional*), one of the two predecessors to Mr. Bonfiglio involved with this proceeding, was provided with correspondence constituting the requisite Notice of Intent ("NOI"). That NOI was not a perfunctory writing. The NOI consisted of thirty (30) pages comprising nine appendices reads:

> ***Notice of Intent to Submit a Claim to Arbitration Pursuant to the North American Free Trade Agreement (NAFTA) Article 1119.*** *That Article is titled, "Notice of Intent to Submit a Claim to Arbitration."*

58. Moreover, pages 5 and 6 of the Art. 1119 Claimant's *Notice of Intent to Submit a Claim to Arbitration*, explicitly states that the claim is filed pursuant to Annex 14-C of the USMCA.[52] It simply cannot reasonably be construed, as does Respondent here, as operationally traveling under two treaties.

59. Just one day later, on October 12, 2022, Claimant provided Director General Pérez Gárate with a NAFTA Art. 1118 settlement, consultation, and negotiation attempt correspondence. Again, that writing made clear in its reference and body that any potential claim would be pursued pursuant to *Annex 14-C USMCA*.[53]

60. Mr. Pérez Gárate was replaced by Mr. Sergio Roberto Huerta Patoni. Hence, on November 15, 2022, Director Huerta Patoni also *was* provided with a NAFTA (1994)

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[52] Attached as **C-0110- ENG** to facilitate reference is the *Notice of Intent to Submit a Claim to Arbitration* pursuant Art. 1119 NAFTA (1994).

[53] Attached as **C-0111-ENG** to facilitate reference is correspondence dated October 12, 2022 to Mr. Orlando Pérez Gárate, *Director General de Consultoría Juridíca de Comercio Internacional*. The letter does not contain any material settlement proffers and for this reason is being attached in un-redacted format.

Art. 1119 correspondence stating that the proceeding was brought pursuant to Annex 14-C USMCA.[54]

61. In any event, however, on May 23, 2024 Claimant's Memorial was filed and made available to Respondent. Section XII of the Memorial titled, "The Tribunal has jurisdiction over claimant's claims under Annex 14-C USMCA," makes clear that this claim is being brought under Annex 14-C USMCA and, in keeping with the (i) ordinary meaning of Annex 14-C USMCA,[55] (ii) the context of Annex 14-C USMCA,[56] (iii) the object and purpose of USMCA as confirming Claimant's construction of Annex 14-C,[57] and (iv) the supplementary means of interpretation, as further confirming that the treaty Parties intended for their consent in Annex 14-C to continue the application of Section A of NAFTA Chapter 11.[58]

62. Certainly, upon receiving and reading Claimant's Memorial, Respondent should have been made aware that no simultaneity in the prosecution of claims pursuant to Annex 14-C USMCA was sought or is otherwise being pursued.

63. Claimant did plead in the alternative, for the sake of completeness, in an abundance of caution if for whatsoever reason the Tribunal determined that an Annex 14-C USMCA analysis did not support the application of the NAFTA (1994) substantive law for investments undertaken during the life of the NAFTA (1994) but where the government measure at issue occurred during the three-year transition period. Under

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[54] Attached as **C-0112-ENG** to facilitate reference is correspondence dated November 15, 2022 from Pedro J. Martinez-Fraga to Mr. Sergio Roberto Huerta Patoni, Director General for Regulations and Consulting at Secretariat of Economy.

[55] Claimant's Memorial at 194.

[56] *Id.* at 211-215.

[57] *Id.* at 217.

[58] *Id.* at 219.

any analysis, however, this pleading in the alternative is not ripe for challenge because by definition that effort only would mature upon a very specific jurisdictional ruling. The pleading in the alternative does not in any way trigger the activation of the USMCA pursuant to Annex 14-D.[59]

64. Such pleading in the alternative *may* even remain moot were this Tribunal to find that there was no Annex 14-C jurisdiction arising from the measure at issue having taken place during the three-year transition period. Under such scenario, i.e., upon a finding of no jurisdiction, this Tribunal may decide in such hypothetical that having determined lack of jurisdiction on this basis, it is without competence to entertain a pleading in the alternative absent a reconstitution of the Tribunal pursuant to agreement of the parties.

65. Respondent's first objection does not amount "to a serious and substantial objection" such as to justify bifurcation.[60] Indeed, it straddles the frivolous and vexatious.

66. The Tribunal in *Eco Oro Minerals Corp.,* "determine[d] that, with respect to the first limb of the three-part test [*Phillip Morris v. Australia* or *Glamis Gold*], for an objection to be held to be '*serious and substantial*' a higher threshold must be applied than merely requiring that the objection is not frivolous or vexatious."[61] It would not appear to be prudent or reasonable for Respondent to expect to bifurcate a proceeding, placing in abatement the underlying action, based on its First Objection.

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[59] The only effect that such pleading in the alternative would have would be to promote the efficiency of not having to re-file the identical claim with corresponding *directional* pre-action requirements a second time. If the Tribunal finds the pleading in the alternative in any way disruptive to its processing of a claim pursuant to Annex 14-C, Claimant would be ready to withdraw such a pleading without prejudice to filing an Annex 14-D claim in the event that jurisdiction does not lie for an action pursuant to Annex 14-C as here asserted.

[60] *Eco Oro Minerals Corp., supra* note 42, Procedural Order No. 2 Decision on Bifurcation ¶ 58 **CL-146-ENG.**

[61] *Id.* ¶ 51.

B. Respondent's Second Objection (*Ratione Temporis and Ratione Voluntatis*) Concerning the Bringing of An Annex 14-C Claim Where the Measure Falls Within the Three-Year Transition Period Should Not Warrant Bifurcation

67. Instead of acknowledging that Claimant has briefed the choice of law question in keeping with P.O. 2, ¶ 10, Respondent states that,

> *Lastly, Respondent desires to underscore that Claimant has tried to anticipate the Second Objection and has included in its Claimant's Memorial arguments to refute this issue, even before Respondent actually raised it. Therefore, Respondent continues to assert, this writing shall not concern itself with those arguments, which shall be addressed in the jurisdictional phase if this Tribunal grants bifurcation, or in Respondent's Counter-Memorial on Merits and Jurisdiction should Respondent's Motion for Bifurcation be denied*.[62]

68. Claimant merely followed the Arbitral Tribunal's imperative of briefing this issue pursuant to P.O. 2 ¶ 10. Even though Claimant's Memorial did not provide Respondent with any new facts for purposes of *any* of its preliminary objections, Respondent opted for not briefing this issue and filing its RFB wherein it raises the question, fails to brief it, and altogether ignores Claimant's detailed analysis of this issue.

69. Respondent, during the course of three and one-half pages in its RFB, only addresses the choice of law question for the narrow purpose of the RFB. All of the issues that

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[62] The Spanish language original reads:

> 8. Por último, la Demandada desea hacer notar que la Demandante ha tratado de anticipar la Segunda Objeción y ha incluido en su Memorial de Demanda argumentos para rechazarla, incluso antes de que ésta haya sido planteada por la Demandada. Este escrito no se ocupará de esos argumentos, los cuales se abordarán, ya sea en la fase de jurisdicción si este Tribunal concede la bifurcación, o durante el procedimiento sobre el fondo si decide negarla.

Respondent's RFB ¶ 8.

Respondent raises were addressed at length in Section XII, B, pages 194-219 (¶¶ 384-425) of Claimant's Memorial.

70. Under the procedural circumstances of this case, bifurcation would not further efficiencies. The record before this Tribunal already has an initial briefing on this issue together with the entirety of Claimant's case-in-chief. Moreover, bifurcation will not in any way facilitate or simplify the processing of this discrete legal question.

71. Indeed, jurisdictional dismissal on this single issue would not have preclusive effect on Claimant re-filing a direct Annex 14-D proceeding as this second action would not necessitate any determination regarding Annex 14-C.[63]

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[63] Even though the specific issue in the context of an Annex 14-C dismissal on the question of whether the measure rightfully can take place during the three-year transition period has not been discussed in the context of a dismissal on this ground and the filing of a brand new proceeding directly under Annex 14-D, the Tribunal in *Waste Management II*, held as follows:

> *Neither does a claim which fails for want of jurisdiction prejudice underlying rights: if the jurisdictional flaw can be corrected, there is in principle no objection to the claimant re-commencing its action. This applies equally to claims which fail on (remediable) grounds of inadmissibility, such as failure to exhaust local remedies.*

Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004 (Professor James Crawford, Benjamin R. Civiletti, Eduardo Magallón Gómez), **CL-159-ENG** / Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, June 26, 2002 ¶ 36, **CL-160-ENG.**

The Tribunal in *Waste Management II* further observed:

> *Thus there is no doubt that, in general, the dismissal of a claim by an international tribunal on grounds of lack of jurisdiction does not constitute a decision on the merits and does not preclude a later claim before a tribunal which has jurisdiction. The same is true of decisions concerning inadmissibility…. The point is simply that a decision which does not deal with the merits of the claim, even if it deals with issues of substance, does not constitute* ***res judicata*** *as to those merits.*
>
> (Emphasis in original.)

Id. ¶ 43.

72. Depending on Respondent's response to Claimant's position as stated in Section XII, B of Claimant's Memorial, evidence taking on jurisdiction may be warranted. Under this scenario, efficiencies would likely be furthered by consolidating jurisdictional and merits evidence taking.

C. Respondent's Third Objection Premised on Insufficiency of Waiver Is Not Serious and Substantial

73. Respondent asserts that the waiver filed in this proceeding (i) substantively and (ii) procedurally does not meet the NAFTA (1994) Art. 1121 strictures.[64] In this same vein, Respondent states that Claimant's waiver does not comport with the USMCA Art. 14.D.5(2) requirements. Therefore, Respondent concludes that these two alleged deficits give rise to an irreparable lack of consent (*Ratione Voluntatis*) warranting dismissal of Claimant's claims.[65]

74. Specifically, Respondent argues that Claimant's waiver, asserted in ¶ 8(b) of the RFA, defeats any possibility of consent because of the clarifying language contained in that waiver making clear that the filing of this proceeding pursuant to USMCA Annex 14-C would not conflict with the waiver itself. The waiver here at issue *literally* consists of a verbatim recitation of all but the first subordinate clause comprising NAFTA (1994) Art. 1121.1(b). The language tracked in Claimant's waiver and filed together with the RFA has been underscored below to facilitate reference:

> *1. A disputing investor may submit a claim under Article 1116 to arbitration only if:*
>
> *(a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and*
>
> *(b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise**, waive their right to initiate or***

[64] Respondent's RFB ¶ 42.

[65] *Id.*

> ***continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party*.***
>
> (Emphasis supplied.)

75. The waiver that Claimant submitted together with its RFA, asserted in ¶ 8(b) of that pleading reads:

> *b. Access waives its right to initiate or continue before any administrative tribunal or court under the law of any NAFTA Party, or any other dispute settlement procedures (other than arbitration under the Treaties), any proceedings with respect to the measures taken by Mexico that are here alleged to be breaches of the Treaties, except for court or administrative proceedings under Mexican law for injunctive, declaratory or other extraordinary relief, not involving the payment of monetary damages, and for the sole purpose of preserving Access's rights and interests during the pendency of the arbitration*.[66]

76. Respondent invited the Tribunal to find that the clarifying language, "other than arbitration under the Treaties," renders the waiver inoperative because this clarifying language, together with a verbatim recitation of the relevant language comprising the waiver and exception contained in NAFTA (1994) Art. 1121.1(b) somehow constitutes a departure from an interpretation of that provision (i) in good faith, (ii) in accordance with the ordinary meaning to be ascribed to the terms of Art. 1121.1(b), (iii) in keeping with the object and purpose of Art. 1121.1(b), and (iv) in accord with the context of Art. 1121.1(b).

77. Even a surface reading of the waiver establishes the following six propositions.

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[66] Claimant's Request for Arbitration ¶ 8.b.

78. First, proceedings in Mexico before courts or administrative tribunals can be brought only so long as such actions are for (a) injunctive, (b) declaratory, (c) or other extraordinary relief.[67]

79. Second, duplicative recovery is not conceptually or legally possible.

80. Third, inconsistent findings on identical factual or legal issues are not conceptually or legally possible.

81. Fourth, the waiver is in writing.

82. Fifth, it was delivered to the Centre and to the disputing Party by the Centre.

83. Sixth, the waiver was included in the submission of the claim to arbitration.

84. Indeed, the very language from *Waste Management I* [68] on which Respondent relies is here quite helpful:

> *§18 The act of waiver per se is a unilateral act, since its effect in terms of extinguishment is occasioned solely by the intent underlying same. The requirement of a waiver in any context implies a voluntary abdication of rights, inasmuch as this act generally leads to a substantial modification of the pre-existing legal situation, namely, the forfeiting or extinguishment of the right. Waiver thus entails exercise of the power of disposal by the holder thereof in order to bring about this legal effect.*[69]

85. The waiver in ¶ 8(b) of the RFA provided to ICSID on April 13, 2023 meets every single material term contained in this operational definition of a waiver generally and in the context of NAFTA (1994) Art. 1121.1(b). The language in the RFA ¶ 8(b) *is a unilateral*

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[67] *Id.*

[68] *Waste Management, Inc. (I) v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, June 2, 2000 (Bernardo Cremades, Eduardo Siqueiros T., Keith Higher) **CL-161-ENG**.

[69] *Id.* ¶ §18.

See Respondent's RFB ¶ 49.

act. Claimant ABG states that it intentionally and without compulsion, in the present progressive form of the verb "*to waive,*" gives up known and existing rights. This much is semantically established by the first four words of RFA ¶ 8(b).

86. As to these four words the intent is beyond cavil. The waiver here at issue demonstrates a "voluntary" and "genuine" intent to relinquish the specific rights identified in Art. 1121.1(b).

87. What follows the first four words of RFA ¶ 8(b) is a demonstrable material and substantial modification of a "pre-existing" legal situation. ABG has dispossessed itself of a right. The following two subordinate clauses comprising RFA ¶ 8(b) define the right that has been waived as constituting (i) the initiation or continuation, (ii) before any administrative tribunal or court under the law of any NAFTA Party, or any other dispute settlement procedures, (iii) of any proceedings with respect to the measures taken by Mexico that are [alleged in this arbitration] to be breaches of the Treaties [the substantive law of Chapter 11 Section A NAFTA (1994) pursuant to Annex 14-C USMCA].

88. The language identified by (i)-(iii) unequivocally establishes that the rights waived pertained to the initiation or continuation of claims in the entire universe of *fora* or venues that Art. 1121.1(b) contemplates. Up to this point the absolute relinquishment of rights as literally identified and qualified by Art. 1121.1(b) (measures taken by Mexico that are here alleged to be breaches of the substantive obligations of the applicable substantive law), has been articulated.

89. The balance of the language comprising the waiver contained in RFA ¶ 8(b) tracks the carve-out exception ("*except*….") language.

90. The clarifying language that Respondent objects to, "other than arbitration under the Treaties," is of no functional moment for at least four reasons. First, the NAFTA (1994) terminated on June 30, 2020. Therefore, a direct treaty claim based on an expired treaty is not possible and such claim cannot be perfected.

91. Second, the USMCA Annex 14-C three-year transition period expired on June 30, 2023. Accordingly, a second claim pursuant to USMCA Annex 14-C arising from a NAFTA (1994) legacy investment is no longer possible.

92. Third, Claimant already has registered a claim pursuant to Annex 14-C USMCA. Consequently, the parenthetical clause in RFA ¶ 8(b) operationally cannot bestow Claimant any additional right beyond that which Claimant already has exercised with respect to the application of NAFTA (1994) substantive law pursuant to an Annex 14-C USMCA proceeding.

93. Fourth and finally, the parenthetical clause does not and cannot create a right where such right did not already exist. Put simply, the object and purpose of the NAFTA (1994) Art. 1121.1(b) waiver amply has been met. It is not possible for Claimant to recover compensatory damages from any tribunal, domestic or international, arising from Mexico's wrongful physical taking of, and taking of legal title to, the 120 hectares parcel (*Puertas del Petacal Uno* and *Dos*), and taking of legal title to the 160 hectares parcel (*Puertas del Petacal Tres* and *Cuatro*).

94. In an effort to reinforce the waiver asserted in RFA ¶ 8(b) pursuant to NAFTA (1994) Art. 1121.1(b), Claimant, without any legal compulsion or imperative to do so, together with Claimant's Memorial filed the Affidavit of Ms. Rainey Repins, Vice President and Deputy General Counsel – Corporate Services, Global Compliance/Privacy, LatAm, ESAN, Central Asia, and Legal Ops of Alticor, Inc., reinforcing the proposition that neither ABG nor Nutrilite S.R.L. would file an action seeking compensatory damages

for the government of Mexico's wrongful taking of legal title to all 280 hectares comprising *El Petacal*, as well as physical control and taking of the 120 hectares Parcel (*Puertas del Petacal Uno* and *Dos*) of *El Petacal*. Respondent argues that this additional layer of protection from seeking compensatory damages in any tribunal domestic or international, regarding the measures here at issue defeat consent.

95. It does not and conceptually cannot do so because this affidavit, *in addition to* the waiver set forth in RFA 8(b), does little more than reinforce a commitment to honor the NAFTA (1994) Art. 1121.1(b) waiver stricture. It does not add, detract, nor modify the waiver's legal import.

96. As will be demonstrated in what follows, Respondent misapprehends the object and purpose of Art. 1121.1(b). Moreover, and in part in so doing, Respondent cannot point to a single Tribunal that has found a comparably drafted waiver that has dismissed a case on this jurisdictional ground. All instances of dismissal on the premise of an insufficient waiver point to the encroachments on the Art. 1121.1(b) carve-out provision not here at all present, or instances where pre-existing or contemporaneous conduct gives rise to parallel proceedings that (i) are *not* in Mexico, and/or (ii) concern an attempt to recover money damages.

1. Respondent Misapprehends the Object and Purpose of the Article 1121.1(b) Waiver Requirement and Corresponding Exception

97. The Tribunal in *Thunderbird v. Mexico*[70] pithily stressed both the purpose and requirement for a waiver provision to become effective:

> *118. In construing Article 1121 of the NAFTA, one must also take into account the rationale and purpose of that article. The consent and waiver requirements set*

[70] *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, January 26, 2006 (Albert Jan van den Berg, Agustín Portal Ariosa, Thomas Wälde) **CL-162-ENG**.

forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure. In the present proceedings, the Tribunal notes that the EDM entities did not initiate or continue any remedies in Mexico while taking part in the present arbitral proceedings. Therefore, the Tribunal considers that Thunderbird has effectively complied with the requirements of Article 1121 of the NAFTA.[71]

98. Notably, the Tribunal in *Thunderbird* also observed:

> *117. Although Thunderbird failed to submit the relevant waivers with the Notice of Arbitration, Thunderbird did proceed to remedy that failure by filing those waivers with the PSoC. The Tribunal does not wish to disregard the subsequent filing of those waivers, as to reason otherwise would amount, in the Tribunal's view, to an over-formalistic reading of Article 1121 of the NAFTA. The Tribunal considers indeed that the requirement to include the waivers in the submission of the claim is purely formal, and that a failure to meet such requirement cannot suffice to invalidate the submission of a claim if the so-called failure is remedied at a later stage of the proceedings. The Tribunal joins the view of other NAFTA Tribunals that have found that Chapter Eleven provisions should not be construed in an excessively technical manner.*[72]

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[71] *Id.* ¶ 118.

[72] *Id.* ¶ 117, *citing to Mondev International Ltd. v. USA*, ICSID Case No. ARB(AF)/99/2 Award, 11 October 2002 (Sir Ninian Stephen, Prof. James Crawford, Judge Stephen M. Schwebel) ¶ 44 **CL-163-ENG** ("Chapter 11 should not be construed in an excessively technical way, so as to require the commencement of multiple proceedings in order to reach a dispute which is in substance within its scope").

See also, Ethyl Corporation v. The Government of Canada, UNCITRAL, Award on Jurisdiction, June 24, 1998, (Prof. Dr. Karl-Heinz Böckstiegel, Charles Brower, Marc Lalonde) ¶ 91 **CL-164-ENG** (noting that

> [t]he Tribunal has little trouble deciding that Claimant's unexplained delay in complying with Article 1121 is not of significance for jurisdiction in this case. While Article 1121's title characterizes its requirements as 'Conditions Precedent,' it does not say to what they are precedent. Canada's contention that they are a precondition to jurisdiction, as opposed to a prerequisite to admissibility, is not borne out by the text of Article 1121, which must govern…. The Tribunal therefore concludes that jurisdiction here is not absent due to Claimant's having provided the consent and waivers necessary under Article 1121 with its Statement of Claim rather than with its Notice of Arbitration.)

99. The *Thunderbird* Tribunal considered the obvious inefficiencies arising from multiple filings in connection with purported non-compliance with a formality that in and of itself does not cognizably remove the claim from the ambit of consent to which the treaty parties actually agreed. In doing so, the Tribunal again reiterated the need to "take into account the rationale and purpose of [Article 1121]."[73] And further observed:

> *…[t]he consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.*

Leading the Tribunal to decline the waiver-based jurisdictional challenge.[74]

100. Similarly, in *Renco Group v. Perú*,[75] the Tribunal analyzed a legitimate defective waiver jurisdictional challenge in connection with Art. 10.18(2)(b) of the US-Perú TPA, which is modelled after NAFTA (1994) Art. 1121.

101. In that case the Tribunal upheld the jurisdictional objection based upon a defective waiver where the claimant "purported to qualify its written waiver by reserving its right to bring claims in another forum for resolution on the merits if [the] Tribunal were to decline to hear any claims on jurisdictional or admissibility grounds."[76] Specifically, claimant's carve-out reservation of rights sought to circumvent the "no U-turn"

The Tribunal's analysis places emphasis on substantive and material compliance over a formal stricture of no consequence in light of Art. 1121's object and purpose.

[73] *Waste Management I, supra* note 68, ¶ 118 **(CL-161-ENG)**.

[74] In *Thunderbird, supra* note 70, **(CL-162-ENG)** Mexico argued that the waivers at issue had not been timely filed, which fact was undisputed. *Id.* ¶ 112. This deficit was subsequently cured. *Id.* ¶ 117.

[75] *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016 (Dr. Michael Moser, The Hon. L. Yves Fotier, CC, QC, Toby T. Landau QC), **CL-165-ENG**.

[76] *Id.* ¶ 80.

provision in Art. 10.18(2)(b) that "[i]n particular, [ ] prevents an investor from returning to a domestic court after submitting its claims to arbitration."[77] The Tribunal thus held "that [claimant's] reservation of rights is incompatible with this 'no U-turn' structure because it purports to reserve [claimant's] right to initiate subsequent proceedings in a domestic court and perform the very 'U-turn' which Article 10.18(2)(b) is designed to prohibit."[78]

102. In so finding, the Tribunal reiterated that claimant, the respondent host-State (Perú), and the United States "all agree[d] that the object and purpose of Article 10.18(2)(b) is to protect a respondent state from having to litigate multiple proceedings in different *fora* relating to the same measure and to minimize the risk of double recovery and inconsistent determinations of fact and law by different tribunals."[79]

103. The waiver provided in ¶ 8(b) of the RFA in this case *prima facie* meets the object and purpose of Art. 1121.2(b). Pursuant to that waiver, ABG is precluded from commencing or persisting in a proceeding related to the measures and claims underlying this arbitration except as provided for in Art. 1121.1(b). Therefore, the possibility of having (i) single or multiple disputes in other *fora*, (ii) inconsistent findings on identical legal or factual issues, or (iii) double recovery simply is not present.

104. Respondent can cite to no authority addressing the alleged invalidity of a jurisdictional waiver pursuant to Art. 1121 or other comparable provision in another treaty granting dismissal based upon alleged insufficiencies at all comparable to the alleged deficit

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[77] *Id.* ¶ 96.

[78] *Id.*

[79] *Id.* ¶ 84 *citing to*, in part, the second submission of the United States of America in that case at ¶ 5.

that Respondent avers with respect to Claimant's RFA ¶ 8(b) waiver. Such authority does not exist.

2. The Authority upon Which Respondent Relies Does Not Support the Preliminary Objection and In Fact Undermines It

105. Respondent cites to language in *Waste Management I*,[80] also relied on by Claimant in this writing,[81] in support of the proposition that the affidavit filed with Claimant's Memorial does not meet strict requirements of NAFTA (1994) Art. 1121. The reference to *Waste Management I*, however, omitted noting the type and extent of the multiple deficits that riddled the purported waiver in that proceeding, which contextualizes the arbitral tribunal's understandable concern with basic rigor.

106. *Waste Management I* addressed the claimant's four attempts to craft an Art. 1121 viable waiver. All four iterations represented substantive and material departures from Art. 1121 that bear no semblance whatsoever to Claimant's waiver in RFA ¶ 8(b). The Tribunal in *Waste Management I* very correctly found that there was no consent under the nearly inexplicable circumstances of that case. The alleged waivers in that proceeding are illustrative because they eloquently illustrate that *Waste Management I* is inapposite and materially distinguishable.[82]

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[80] *Waste Management I, supra* note 68 **(CL-161-ENG)**.

[81] *Supra* note 69, *citing to* Respondent's RFB ¶ 49.

[82] The four attempts at an Art. 1121 waiver in *Waste Management* I are helpful in identifying defective waivers that in fact are meaningfully beyond the ken of the contracting parties' consent. They are here listed:

(*Waste Management I*, ¶ §4.) (First Attempt)

Additionally, Claimants hereby waive their right to initiate or continue before any administrative tribunal or court under the law of any NAFTA Party, or other dispute settlement procedures, any proceedings with respect to the measures taken by Respondent that are alleged to be a breach of NAFTA Chapter 11 and applicable rules of

international law, except for the proceedings for injunctive, declaratory, or other extraordinary relief, not involving the payment of damages. ***This waiver does not apply, however, to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by other sources of law, including the municipal law of Mexico.***

(Emphasis in original as published in the Award.)

(*Waste Management I*, ¶ §4.) (Second Attempt)

In the Notice of Institution submitted to ICSID on July 22, Claimants effected this waiver, echoing the language in NAFTA Article 1121. Claimants also set forth their understanding of the scope of that required waiver. By setting forth this understanding, however, ***Claimants did not intend to derogate from the waiver required by NAFTA Article 1121.***

(Emphasis in original as published in the Award.)

(*Waste Management I*, ¶ §5.) (Third Attempt)

Additionally, Claimants hereby waive their right to initiate or continue before any administrative tribunal or court under the law of any NAFTA Party, or other dispute settlement procedures, any proceedings with respect to the measures taken by Respondent that are alleged to be in breach of NAFTA Chapter Eleven and applicable rules of international law, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages. ***Without derogating from the waiver required by NAFTA Article 1121, Claimants here set forth their understanding that the above waiver does not apply to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by sources of law other than Chapter Eleven of NAFTA, including the municipal law of Mexico.***

(Emphasis in original as published in the Award.)

(*Waste Management I*, ¶ §5.) (Fourth Attempt)

With respect to the inclusion in the Notice of Institution, of the waiver required by NAFTA Article 1121 and USA Waste's understanding of the scope of that required waiver, USA Waste ***hereby confirms that the waiver contained in the Notice of Institution applies to dispute settlement proceedings in Mexico involving allegations of breaches of any obligations, imposed by other sources of law, that are not different in substance from the obligations of a NAFTA State Party under Chapter Eleven of the NAFTA****, except for proceedings for injunctive, declaratory, or other extraordinary relief, not*

107. In addition to the multiple waiver attempts containing reservation of rights far beyond what could reasonably be construed as the NAFTA Parties' consent regarding Art. 1121, *Waste Management I* also is distinguishable *and* analytically helpful because in that case claimant brought or had pending three lawsuits for money damages, two of which were against instrumentalities of the Mexican government.[83] The third proceeding was an arbitration against the City Council of Acapulco for payments under the Concession Agreement that concerned the NAFTA proceeding at issue.[84]

108. Respondent in this case also cites to *KBR v. Mexico*,[85] in support of the general proposition that ABG's waiver is insufficient under NAFTA Art. 1121. *KBR* is distinguishable in ways that, much like *Waste Management I*, are analytically helpful in establishing the legal propriety of ABG's waiver.

109. In that case KBR, Inc. ("KBR"), a U.S. Delaware registered corporation and subsidiary of Corporación Mexicana de Mantenimiento Integral, S. de R. L. de C.V. ("COMMISA") entered into a contract with Pemex Exploración y Producción ("PEP") for the construction of two offshore natural gas platforms, which contained an ICC arbitration clause. Eventually PEP took control of the platforms and provided COMMISA with

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involving the payment of damages. ***With respect to USA Waste's efforts to resolve its dispute with Mexico outside of the remedies offered by NAFTA, there are no pending legal proceedings related to that dispute in which the Government of the United Mexican States is a named a party****.*

(Emphasis in original as published in the Award.)

83 *Waste Management I, supra* note 68 ¶ § 25, 1-3 **(CL-161-ENG)**.

84 *Id.*

85 *KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Award, April 30, 2025 (Dr. Andrés Rigo Sureda, Prof. Gabrielle Kaufmann-Kohler, Gerardo Lozano Alarcón), **CL-166-SPA**.

notice of its intent to rescind the contract under the theory that COMMISA had failed to meet particular contractual milestones.[86]

110. COMMISA commenced an ICC arbitration against PEP that resulted in a final award in favor of COMMISA.[87]

111. COMMISA sought to enforce the award in the Federal District Court for the Southern District of New York and in Luxemburg.[88] PEP and Petróleos Mexicanos ("PEMEX") subsequently annulled the award in Mexican courts. KBR, (on behalf of itself and COMMISA) brought a NAFTA Chapter 11 case against Mexico asserting that the annulment of the award was contrary to Mexico's obligations under NAFTA. Yet, even after commencing the NAFTA arbitration, COMMISA continued its enforcement proceedings in New York and Luxemburg.

112. Mexico challenged KBR's Art. 1121 waiver because *KBR* carved-out from the waiver's scope the enforcement of proceedings *outside* of Mexico.

113. It is clear that, in KBR, the proceedings in New York and Luxemburg were not "before an administrative tribunal or court under the law of the disputing Party," pursuant to Art. 1121, i.e., Mexico. Thus, if the proceedings in New York and Luxemburg were considered to be proceedings "with respect to the measure[s]" in dispute (which measures were the annulment of the ICC award and Mexico's related enforcement of performance bonds), those proceedings would be in violation of the waiver requirement, without any need for further inquiry. In this regard, the KBR Tribunal noted that "*[l]os procedimientos de Nueva York y Luxemburgo (los 'Procedimientos*

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86 *Id.* ¶¶ 42-44.

87 *Id.* ¶ 51.

88 *Id.* ¶¶ 60-61.

de Ejecución') no son en cualquier caso 'ante [un] tribunal administrativo o judicial, conforme a la legislación de la Parte contendiente', es decir, México. En vista de esta lectura realizada por el Tribunal, no es necesario que el Tribunal considere la afirmación de la Demandante de que los Procedimientos de Ejecución no persiguen el pago de daños."[89]

114. Accordingly, the *KBR* Tribunal focused on the issue of whether New York and Luxemburg proceedings were "with respect to" the challenged measures. The Arbitral Tribunal agreed with the three NAFTA Parties that "with respect to" should be given a broad reading.[90] Considering the New York and Luxemburg proceedings were "with respect to" the challenged measures, the Tribunal found that the goal and practical effect of both the foreign enforcement proceedings and the NAFTA arbitration was, in both cases, to recover the amounts represented by the ICC awards and the related performance bond amounts.[91]

115. In light of this close relationship between the various proceedings,[92] the Tribunal concluded "*que los Procedimientos de Ejecución constituyen '**procedimientos […] respecto a la[s] medida[s] presuntamente violatoria[s] de las disposiciones a las que se refiere el Artículo 1116**' y el 1117*."[93] (Emphasis in original.) Given that

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[89] *Id.* ¶ 120.

[90] *Id.* ¶¶ 113-116. It observed that *"[e]l Tribunal esta de acuerdo con estas afirmaciones* [referring to the *Thunderbird* Tribunal's pronouncements on the object and purpose of Art. 1121 as, in great measure, preventing parallel proceedings]. *Al igual que otros mecanismos destinados a evitar procedimientos concurrentes, la disposición sobre renuncia del Artículo 1121 pretende evitar los riesgos de una doble reparación, recursos desperdiciados debido a procedimientos duplicativos, y resultados en conflicto.*" *Id.* ¶ 116.

[91] *Id.* ¶¶ 139-141.

[92] *Id.* ¶ 140.

[93] *Id.* ¶ 142.

the proceedings were in non-Mexican courts, they were thus in violation of Art. 1121's waiver requirement.

116. In contrast to the analysis in *KBR*, a number of Art. 1128 (Participation by a Party) submissions noted by the *KBR* Award (both in that case and in prior cases) expressly address the "not involving the payment of damages" portion of the waiver exception, and they plainly support Claimant's position in the case before this Tribunal.[94] For its part, Mexico's prior submissions to investment tribunals repeatedly confirmed that the second part of the Art. 1121 exception excludes only claims for damages as opposed to other relief. For example, Mexico's second Art. 1128 submission in *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*,[95] emphasized that:

> *The waiver contemplated in Article 1121 is for the **claims** for damages only in 'any administrative tribunal or court under the law of any Party, or other dispute settlement procedures'. Article 1121 expressly contemplates that proceedings for 'injunctive, declaratory or other extraordinary relief, not involving the payment of damages' need not be waived*.[96]
>
> (Emphasis in original.)

117. Mexico's first Art. 1128 submission in that case reached the identical conclusion:

> *7. [t]he concluding words of the Article permit a particular set of proceedings to continue as an exception to the non-initiation or discontinuance of proceedings in the broad class of **fora** just noted. A would-be NAFTA claimant could initiate or continue before an administrative tribunal or court of **the disputing Party only**, proceedings for injunctive, declaratory or other extraordinary relief not involving the payment of damages.*

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94 *Id.* ¶¶ 102-107.

95 *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003 (Sir Anthony Mason, Judge Abner J. Mikva, Lord Mustill), **CL-167-ENG**.

96 *Id.*, Mexico's Second 1128 Submission, November 9, 2001, ¶ 13, **CL-168-ENG**.

> *8. [t]he concluding words show that the Article 1121 election requirement is restricted to claims for the payment of damages.*[97]
>
> (Emphasis in original.)

118. Subsequently, Mexico's Art. 1128 submission in the *Detroit International Bridge Company v. Government of Canada,*[98] confirmed that "Article 1121 precludes a claimant from simultaneously commencing or continuing proceedings *for damages* under Chapter 11 and in any other *fora*, including the US domestic courts, based upon the measure that is alleged to be a breach of Chapter 11."[99] (Emphasis supplied.)

119. In this same vein, Canada's Art. 1128 submission in the KBR case explicitly confirmed that:

> *The only exception to the waiver rule in Article 1121 is the right of the claimant to initiate or continue 'proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.' **In other words, proceedings with respect to a measure alleged to breach the NAFTA are permitted before the courts and tribunals of the respondent NAFTA Party as long as such proceedings do not involve the payment of damages.***[100]
>
> (Emphasis supplied.)

120. Thus, both Art. 1121 and the NAFTA Parties' prior statements plainly show that the continued pursuit in the Mexican courts of injunctive, declaratory, and/or other extraordinary relief that does not include any claim for damages falls outside the scope of the waiver requirement. Nothing in the *KBR* award suggests or supports a contrary

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97 *Id.*, Mexico's First 1128 Submission, October 16, 2000, ¶¶ 7-8, **CL-169-ENG**.

98 *Detroit International Bridge Company v. Government of Canada*, UNCITRAL, PCA Case No. 2012-25, Award, April 2, 2015 (Yves Derains, The Hon. C. Michael Chertoff, Vaughan Lowe, QC), **CL-170-ENG**.

99 *Id.* Submission of Mexico Pursuant to Article 1128 of NAFTA (February 14, 2014), ¶ 4, **CL-171-ENG**.

100 *See supra* note 85, Canada Article 1128 Submission, July 30, 2014, ¶ 13, **(CL-166-ENG)**.

conclusion. Equally clear from *KBR*, and *Waste Management I*, is that the content of an Art. 1121 waiver provision is deemed insufficient only where the waiver purports to carve out a reservation of jurisdiction for cases "with respect to the measure" alleged to be a NAFTA breach and that either are not before an administrative tribunal or court of the respondent (here Mexico), and/or concern the payment of damages. The waiver provision here at issue as a *prima facie* matter does not prescribe any such deficits.

3. Respondent's Arguments Regarding Compliance With USMCA Article 14.D.5 In Connection With the Third Objection Are Inapplicable

121. Claimant has filed a single claim pursuant to Annex 14-C USMCA. Therefore, the Art. 14.D.5 strictures, whether the same or different from those incident to Annex 14-C, and the application of the substantive provisions of NAFTA (1994) Chapter 11, Section A, do not constitute any part of this proceeding. For this reason, Claimant will not address the arguments in Respondent's RFB Section C.3, ¶ ¶ 58-60.

122. Respondent's preliminary objection regarding the alleged insufficiency of Claimant's Art. 1121 waiver simply is not serious and substantial.

D. Respondent's Fourth Objection Concerning the Exhaustion or Pending Timeframe before Local Judicial or Administrative Tribunals Is Inapplicable and Were It Relevant to This Proceeding (Which It Is Not) Such Requirement Has Been Satisfied

123. Respondent's fourth argument is not serious and substantial. As previously noted, this proceeding has been filed pursuant to Annex 14-C USMCA. Therefore, an USMCA Article 14.D.5 exhaustion of local remedies before administrative or judicial tribunals, or the thirty- (30) month minimum pending requirement for such proceeding, is not relevant to this case.

124. If it were relevant, *arguendo*, because the case had been filed pursuant to Annex 14-D USMCA (which it has not been) the Fourth Objection would still be far from serious

and substantial for least two reasons. First, local remedies were duly exhausted. As stated in ¶8(c) of Claimant's RFA,

> *[t]he challenged measures taken by Mexico in this case have been premised upon Mexico's assertion that the real property underlying Access's investment is subject to ejido communal ownership under Mexican law. Through its subsidiary, Nutrilite Mexico, and in various capacities including that of defendant, injured third-party (tercero perjudicado), and interested third-party (tercero interesado), Access has been litigating that issue against Mexican governmental entities in the Mexican courts since at least the year 2000, including before*
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> - *the Tribunal Unitario Agrario Distrito 13;*
> - *the Tribunal Unitario Agrario Distrito 16;*
> - *the Juzgado Primero de Distrito en Materia Administrativa del Tercer Circuito;*
> - *the Primer Tribunal Colegiado en Materia Administrativa del Tercer Circuito;*
> - *the Noveno Tribunal Colegiado en Materia Administrativa del Primer Circuito;*
> - *the Juez Primero de Distrito del Centro Auxiliar de la Tercera Región;*
> - *the Segundo Tribunal Colegiado en Materia Administrativa del Tercer Circuito;*
> - *the Juzgado Quinto de Distrito en Materia Administrativa, Civil y del Trabajo del Tercer Circuito;*
> - *the Séptimo Tribunal Colegiado en Materia Administrativa del Tercer Circuito;*
> - *the Sexto Tribunal Colegiado en Materia Administrativa;*
> - *the Juzgado Décimo Noveno de Distrito en Materia Administrativa;*
> - *and the Juzgado Segundo de Distrito en Materia Administrativa*.

125. Respondent omitted to address ¶8(c) of Claimant's RFA.

126. Therefore, "[i]n light of the more than twenty (20) years of litigation of these issues in the Mexican courts that ABG and its predecessor-in-interest have undergone with favorable results that have been challenged, upheld, and most recently, disregarded

repeatedly, recourse to further litigation of the subject in Mexican courts is simply futile."[101]

127. RFA ¶8(e) reads:

> *Recourse to further litigation in Mexican courts also is obviously futile because the Mexican government has proceeded with the measures despite (i) the* ***Presidential Resolution*** *issued by Mexican President Manuel Ávila Camacho and dated December 2, 1942 declaring the 280 hectares in dispute to be exempt from transfer under the prior resolution upon which Mexico relies, (ii) agreements entered into between Mexico's Secretariat of Agrarian, Territorial and Urban Development ('SEDATU') and the* ***Ejido San Isidro*** *pursuant to which other land was conveyed to the* ***Ejido San Isidro*** *in lieu of the Nutrilite real property, and (iii) the holding of the* ***Tribunal Unitario Agrario*** *that the property ('Nutrilite Property') (a) is private in nature, (b) is exempted from the August 23, 1939 land grant that forms the basis for Mexico's assertion of the property's ejido ownership status, and (c) was duly and validly purchased by Nutrilite S.R.L. de C.V. The Mexican government's determination to proceed with the measures despite the existence of a Presidential Resolution and agreements by the government itself that established the illegality of such measures – and, indeed, despite the existence of a court decision establishing their illegality – clearly establishes the futility of further recourse to domestic remedies*.
>
> (Emphasis in original.)

128. Therefore, for this first reason, without more, Respondent's Fourth Objection generously can be characterized as not serious and substantial. It straddles on being frivolous and vexatious.

129. Second, Respondent's Fourth Objection fails on the additional ground that the expert testimony of Former Mexican Supreme Court Justice, Dr. José Ramón Cossío Díaz and Lic. Raúl M. Mejía Garza have submitted an Expert Report that now constitutes

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[101] *See* Claimant's RFA ¶8(c), (d).

evidence in this proceeding, as more fully set forth in Claimant's Memorial in ¶¶ 567-568.[102]

130. The expert testimony on this point, i.e., whether recourse to domestic judicial administrative tribunals would be viable under the facts of this case, not surprisingly suggests that it would not be. Dr. José Ramón Cossío Díaz and Lic. Raúl M. Mejía Garza explain "that there is no precedent under the domestic law of Mexico where the taking of property in the manner communicated to the legal representatives of Nutrilite S.R.L. in the Notices dated July 1, and July 7, 2022 was successfully challenged."[103] Hence, in the hypothetical that Art. 14.D.5 were at this time relevant, which it is not, and never should have been raised, Respondent's Fourth Objection would be inviable on this additional ground.

131. Respondent's Fourth Objection could not, under the record before this Arbitral Tribunal, seriously warrant an abatement of this proceeding in furtherance of a jurisdictional hearing.

VII. CONCLUSION

132. For the foregoing reasons, arguments, and authority, Claimant respectfully invites this Tribunal to decline Respondent's Motion to Bifurcate proceedings. Three of Respondent's core arguments demonstrably are not serious and substantial. Only Respondent's Second Objection is colorable.

133. Under the facts of this case, i.e., its procedural posture, the initial briefing of this Second Objection, Claimant's submission of its entire case-in-chief, and Respondent's

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[102] The Expert Report of Former Mexican Supreme Court Justice, Dr. José Ramón Cossío Díaz and Lic. Raúl M. Mejía Garza is identified as **(CER-003-SPA)**.

[103] *See id.,* opining on the futility of resorting to domestic remedies.

election (i) not to brief this objection, or (ii) otherwise not to respond to Claimant's briefing and instead brief only the substantiality of the issue for purposes of bifurcation, cannot be said to further efficiency by now bifurcating the proceeding.

134. Claimant respectfully requests this Arbitral Tribunal to order Respondent to proceed to file its Memorial on Jurisdiction and Merits and to award Claimant the costs and fees arising from addressing Respondent's RFB.

Dated: August 9, 2024.

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ANNEX 1 – LIST OF ABBREVIATIONS

Acta de Posesión y Deslinde

Acta de Posesión y Deslinde de Polígono de las 280-00-00 Hectáreas Pendientes a Entregar de la Ejecución Complementaria de la Resolución Presidencial del 23 de agosto de 1939 Publicada en el Diario Oficial de la Federación el 18 de noviembre del Mismo Año, Por la Cual se Benefició el Ejido San Isidro, Municipio San Gabriel, Estado de Jalisco dated July 14, 2022 (**C-0050-SPA**).

ICSID Convention

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States

ICSID Arbitration Rules

International Centre for Settlement of Investment Disputes Arbitration Rules

Mexico

United Mexican States

NAFTA

North American Free Trade Agreement

Notice of Intent

Notice of Intent to Submit a Claim to Arbitration dated October 11, 2022

NPI

Nutrilite Products Inc.

Nutrilite S.R.L.

Nutrilite S. de R. L. de C.V.

P.O. No. 2

Procedural Order No. 2 of January 19, 2024

RFA

Request for Arbitration

RFB

Request for Bifurcation

SEDATU

Registro Agrario Nacional Secretaría de Desarrollo Agrario, Territorial y Urbano

USMCA

United States-Mexico-Canada Agreement