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By email

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Re: Honduras Próspera Inc., St. John's Bay Development Company LLC, and Próspera Arbitration Center LLC v. Republic of Honduras
(ICSID Case No. ARB/23/2)

Dear Mesdames and Sirs,

I refer to the Proposal for the Disqualification of Mr. David W. Rivkin, filed on February 19, 2024, by the Republic of Honduras.

The Proposal was submitted pursuant to Articles 14 and 57 of the ICSID Convention and ICSID Arbitration Rule 22.

Pursuant to Article 57, a party may propose the disqualification of an arbitrator: (a) on account of any fact indicating a manifest lack of the qualities required by Article 14(1); and (b) on the ground that the arbitrator was ineligible for appointment to the Tribunal under Section 2 of Chapter IV of the ICSID Convention.

Pursuant to Article 58 of the Convention and Arbitration Rule 23(2)(a), the Chair of the ICSID Administrative Council shall decide the present Disqualification Proposal.

On June 20, 2024, the Centre informed the parties of my decision to seek a recommendation on the Proposal from Professor Pierre-Marie Dupuy, a public international law professor from France. In its communication, the Centre confirmed that the final decision on the Proposal would be taken by the Chair of the ICSID Administrative Council in accordance with Article 58 of the ICSID Convention.

The parties have been given a full opportunity to present their positions on this matter. The Centre provided Professor Dupuy with copies of all parties' submissions on the Proposal and the explanations furnished by Mr. Rivkin.

The Centre received the recommendation from Professor Dupuy on July 29, 2024. A copy of the recommendation is attached.

I have carefully considered the Proposal, having regard to the parties' written arguments, the explanations furnished by Mr. Rivkin, and the recommendation from Professor Dupuy.

Based on these materials, I have concluded that the Proposal does not meet the standard for disqualification set forth in Article 57 of the ICSID Convention.

Accordingly, the Proposal is hereby rejected.

Sincerely yours,

Ajay Banga
Chairman of the ICSID Administrative Council

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I. INTRODUCTION

1. This recommendation addresses the Proposal to Disqualify Mr. David W. Rivkin (the "**Proposal**") filed by the Republic of Honduras ("**Honduras**" or "**Respondent**") on 19 February 2024, in Spanish, together with 21 exhibits.

2. In order to issue my recommendation, in addition to the Proposal, I have reviewed the following documents:

   - Response to the Proposal filed by Honduras Próspera Inc. St John's Bay Development Company LLC and Próspera Arbitration Center LLC (collectively, "**Próspera Group**" or "**Claimants**") on 12 March 2024, in English, together with Exhibits C-91 to C-99 and Legal Authorities CL-8 to CL-28 ("**Response**");

   - Mr. Rivkin's statement of 13 March 2024 in English ("**Statement**");

   - Respondent's reply of 20 March 2024 submitted in Spanish ("**Honduras' Reply**"); and

   - Claimants' reply of 20 March 2024 submitted in English together with Legal Authorities CL-27 and CL-28 (resubmitted) and CL-29 to CL-45 ("**Próspera's Reply**").

3. Moreover, I take note of the fact that the Parties refer to the following instruments in their written submissions: (i) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**Convention**"); (ii) the Dominican Republic-Central America-United States ("**U.S.**") Free Trade Agreement ("**CAFTA-DR**" or "**Treaty**"); and (iii) the ICSID Arbitration Rules of July 2022 ("**Arbitration Rules**").

4. Below, I will summarize the positions of the Parties in **Section II**. Subsequently, I will analyze the Proposal under the applicable rules in **Section III**. Finally, I will issue my recommendation in **Section IV**.

II. PARTIES' POSITIONS

1. RESPONDENT'S POSITION

5. Honduras proposes the disqualification of Mr. David Rivkin (a U.S. national) as arbitrator appointed by the Claimants (three U.S. companies) based on three grounds.

6. First, Honduras argues that both the ICSID Convention and the Arbitration Rules prohibit the appointment of arbitrators who are nationals of a party without the agreement of the other party[1]— agreement which did not exist in this case:[2]

- Article 39 of the ICSID Convention imposes a limitation on the constitution of the arbitral tribunal with respect to the nationality of the arbitrators, namely:[3]

  "The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties." (Emphasis added)

- Similarly, Rule 13(3) prohibits the appointment of arbitrators who are nationals of one of the parties to the dispute absent an agreement between them, by providing that:[4]

  "A party may not appoint an arbitrator who is a national of the State party to the dispute or the State whose national is a party to the dispute without agreement of the other party." (Emphasis added)

[1] Proposal, para. 21.
[2] Proposal, para. 45.
[3] Proposal, para. 19; ICSID Convention, Article 39.
[4] Proposal, para. 20; Arbitration Rules, Rule 13(3).

7. Second, Honduras rejects Claimants' argument that Article 10.19.4(a) of the CAFTA-DR allegedly contains a waiver by the State of Article 39 of the ICSID Convention or Rule 13(3). Honduras submits that it has not expressed its agreement to Mr. Rivkin's appointment, let alone waived in advance its right to object to his appointment as arbitrator on the ground of nationality.[5] According to Honduras, an interpretation of Article 10.19 of the CAFTA-DR in accordance with the rules of Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**") shows that there is no waiver by the State.[6]

8. Article 10.19.4(a) provides that:

> "4. For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:
>
> (a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules." (Emphasis added)

9. According to Honduras, paragraphs 2, 3 and 4 of Article 19 apply *only* in the specific scenario in which the ICSID Secretary-General must serve as appointing authority for an arbitration under Section B of Chapter Ten of the CAFTA-DR.[7] This is because paragraph 2 of Article 10.19 of the CAFTA-DR provides that:[8]

> "2. The Secretary-General shall serve as appointing authority for an arbitration under this Section."

10. Based on a literal interpretation, Article 10.19.4(a) refers exclusively to the appointment of arbitrators by the ICSID Secretary-General; *i.e.*, the respondent State waives its right to object to the appointment of an arbitrator by the Secretary-General on the ground of nationality, provided that there is no majority prohibited

[5] Proposal, paras. 22 and 45.
[6] Proposal, para. 24.
[7] Proposal, para. 27.
[8] Proposal, para. 27.

by Article 39 of the ICSID Convention. However, this does not entail a waiver of the right to object to the appointment of an arbitrator *by the claimant party.*[9]

11. A systematic interpretation of Section B of the Treaty supports the literal interpretation. Indeed, Article 10.19 of the CAFTA-DR follows:[10]

- Article 10.16, which deals with the submission of a claim to arbitration and sets forth claimant's obligation to provide the name of the arbitrator appointed by it;
- Article 10.17, which addresses the consent of each party to arbitration; and
- Article 10.18, which refers to the conditions and limitations on consent of each party.

12. This sequential arrangement confirms that Article 10.19 refers *only* to the procedural scenario in which, in the event that one of the parties fails to appoint an arbitrator or there is no agreement between them, the Secretary-General is to act as the appointing authority for arbitrators not yet appointed.

13. Finally, Honduras notes that failure to comply with the nationality requirement could result in the annulment of the award for improper constitution of the tribunal. It is worth taking into account that this arbitration addresses one of the most substantial disputes in investment arbitration and is also a case that is widely known and awaited by the Honduran population.[11]

14. In sum, Honduras argues that the ICSID Convention, the ICSID Arbitration Rules and the CAFTA-DR unequivocally prohibit one of the parties from appointing an arbitrator having the same nationality as that State, unless there is an agreement

[9] Proposal, para. 34.
[10] Proposal, paras. 38-43.
[11] Proposal, para. 46.

between the parties—which there was not in the present case; therefore, Mr. Rivkin should be disqualified from serving as arbitrator.

2. CLAIMANTS' POSITION

15. Claimants consider that the Respondent has consented to Mr. Rivkin's appointment and that the Proposal should thus be dismissed.

16. First, Claimants allege that the Proposal lacks merit. An arbitrator may only be disqualified for a manifest lack of the qualities required by Article 14 of the ICSID Convention, or for ineligibility under Articles 37 to 40 of the ICSID Convention. Respondent has not alleged that Mr. Rivkin lacks independence, or any other qualities required by Article 14.[12]

17. Second, Respondent misinterprets the scope and meaning of Article 39 of the ICSID Convention and Arbitration Rule 13(3). Nothing in Article 39 of the ICSID Convention prohibits a single arbitrator on a three-member tribunal from having the same nationality as one of the parties; the provision merely requires that a *majority* of the arbitrators (*i.e.*, two out of three) shall be from a third State.[13] Similarly, nothing in Arbitration Rule 13 absolutely prohibits a single arbitrator on a three-member tribunal from having the same nationality as the parties.[14]

18. Furthermore, the nationality limitation ser forth in Article 39 of the ICSID Convention and in Rule 13 does not apply where there is an agreement between the parties to the contrary. Article 10.19.4(a) of the CAFTA-DR contains precisely such an agreement by Honduras.[15] A good faith interpretation of this Article, in accordance with its ordinary meaning, context, object and purpose (pursuant to the VCLT[16]), demonstrates that Honduras provided advance consent to the

[12] Response, para. 12.
[13] Response, paras. 17-18; Próspera's Reply, para. 14.
[14] Response, para. 25.
[15] Response, para. 27.
[16] Response, para. 15.

appointment of national arbitrators and waived any objection to an arbitrator on the ground of nationality.[17]

19. Numerous ICSID Member States have interpreted Article 39 as allowing pre-agreements to the appointment of national arbitrators (*i.e.*, without requiring an agreement on the identity of particular arbitrators), including the ICSID Member States parties to CAFTA-DR, the North America Free Trade Agreement ("**NAFTA**") and its successor treaty, the United States-Mexico-Canada Agreement ("**USMCA**"), and other treaties with provisions similar to Article 10.19.4.[18]

20. Third, Article 32 of the VCLT provides that, to confirm the meaning resulting from the application of Article 31 of the VCLT, the Tribunal may rely on "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion."[19] Similarly, the Tribunal may look at the preparatory work of other treaties with identical provisions.[20]

21. The publicly available *travaux préparatoires* of the CAFTA-DR shed little light on the object and purpose of Article 10.19.4 However, the Tribunal can rely on the *travaux préparatoires* of Article 1125(a) of the NAFTA, which Article 10.19.4 of the CAFTA-DR replicates verbatim.[21]

22. The negotiation history of Article 1125 of the NAFTA demonstrates that its object and purpose was to ensure that parties would be allowed to appoint their own nationals in ICSID arbitrations.[22] Likewise, the ICSID Secretary-General has recognized that Article 1125 circumvents nationality limitations in the ICSID Convention.[23]

[17] Response, para. 29.
[18] Próspera's Reply, para. 18.
[19] Response, para. 34.
[20] Response, para. 34, citing CL-13, *LaGrand Case*.
[21] Response, para. 35.
[22] Response, para. 36.
[23] Response, para. 37, citing CL-16.

23. In Claimants' view, if this were not the case, and the parties to an arbitration still needed to agree to the appointment of every specific individual arbitrator on the tribunal, Article 10.19.4 and similar provisions would have no *effet utile*.[24] This would also imply that close to 60 ICSID Member States parties to the NAFTA, the CAFTA-DR and many other treaties containing provisions similar to Article 1125 of the NAFTA and Article 10.19.4 have misinterpreted Article 39.[25]

24. Moreover, a decision to the contrary would be a devastating precedent. Finding that Article 10.19.4 and all similar provisions run afoul of Article 39 would mean that arbitrator appointments in dozens of cases could be called into question.[26]

25. Fourth, Claimants assert that nothing in Article 10.19 refers to two distinct moments of procedure.[27] Article 10.19.4 does not refer to paragraphs 10.19.2 and 10.19.3 and is not subjected to them, or otherwise suggests that the agreement in Article 10.19.4 applies only to arbitrators appointed by the ICSID Secretary-General.[28] Thus, the provisions of Article 10.19.4(a) of the CAFTA-DR also apply to arbitrators appointed by the parties and not just to arbitrators appointed by the Secretary-General, as alleged by Respondent.

26. Fifth, Claimants argue that Respondent could easily have cured any perceived unfairness had it simply appointed an arbitrator having its own nationality, as has occurred in several ICSID cases. Respondent had the opportunity to participate in the constitution of the Tribunal but refused to do so.[29]

27. Sixth, Honduras has submitted no authorities to support its arguments; such arguments are contrary to a significant volume of authoritative source, as well as

[24] Próspera's Reply, para. 20.
[25] Próspera's Reply, paras. 21, 30.
[26] Próspera's Reply, para. 30.
[27] Response, para. 51.
[28] Response, para. 51.
[29] Response, para. 63.

the consistent practice of both investors and respondent States in ICSID arbitrations.[30]

28. Finally, Respondent does not question Mr. Rivkin's competence to serve as arbitrator;[31] on the contrary, it requests his disqualification resorting to arguments such as the potential impact of the arbitration on the Honduran population,[32] which shows that the Respondent's real intention is to politicize, distract and paralyze the proceedings by means of wholly irrelevant matters.[33]

3. RESPONDENT'S REPLY

29. In response to Claimants' arguments, Respondent adds several arguments.

30. First, Respondent states that it has not clearly and unequivocally waived the provisions of ICSID Arbitration Rule 13(3). Even assuming that there was a waiver of the nationality requirement of Article 39 of the ICSID Convention, this would not imply an *ipso facto* waiver of the nationality requirement under the ICSID Arbitration Rules.[34]

31. Respondent notes that Article 10.19.4 refers exclusively to the majority rule of Article 39 of the ICSID Convention. Therefore, it does not extend to ICSID Arbitration Rule 13(3).[35]

32. Moreover, Rule 13(3) does not contain an express reference to Article 39 of the ICSID Convention and, thus, it cannot be inferred that, by making a statement for the purposes of Article 39 of the Convention, a statement for the purposes of Arbitration Rule 13(3) is being made.[36]

[30] Response, paras. 6, 44, 45.
[31] Proposal, para. 48.
[32] Proposal, para. 46.
[33] Response, paras. 70, 77.
[34] Honduras' Reply, para. 14.
[35] Honduras' Reply, paras. 8, 10.
[36] Honduras' Reply, para. 15.

33. Second, Respondent argues that the appointments of nationals by Guatemala under the CAFTA-DR, as mentioned by Claimants, do not constitute subsequent practice in the application of the Treaty.[37] The commentaries to the VCLT state that what should be considered is not the subsequent practice of a single party to the treaty; instead, what should be examined is the subsequent practice in the application of the treaty by all parties or the acceptance of such practice by all parties, which is not the case here.[38]

34. Third, Honduras alleges that the *travaux préparatoires* of the NAFTA cannot serve as preparatory works of the CAFTA-DR for the purposes of Article 32 of the VCLT, since Mexico's and Canada's intent or understanding cannot be transferred to the CAFTA-DR.[39] As the International Tribunal for the Law of the Sea has pointed out, the interpretation of similar provisions in different treaties may not yield the same results. Furthermore, the NAFTA's text of is not identical to the CAFTA-DR's text.[40]

35. Fourth, Respondent argues that, in any event, Article 1125 of the NAFTA does not constitute a waiver of the provisions of Article 39 of the ICSID Convention. According to Prof. Schreuer, although Article 1125 of the NAFTA "attempts to preserve the right to appoint national arbitrators,"[41]

> "[...] [t]his provision simply provides for the appointment of each arbitrator by agreement. It neither constitutes nor makes superfluous a specific agreement on each arbitrator under Art. 39 of the ICSID Convention."

36. In conclusion, Respondent submits that Article 10.19.4(a) cannot be considered a clear and unequivocal waiver of the prohibition from appointing nationals of the other party as arbitrators because a proper interpretation of the terms of the Treaty

[37] Honduras' Reply, paras. 21-26.
[38] Honduras' Reply, para. 23.
[39] Honduras' Reply, para. 27.
[40] Honduras' Reply, paras. 30-31.
[41] Honduras' Reply, paras. 38-39.

leads to the conclusion that its content only extends to the majority rule of Article 39 of the ICSID Convention and never to Rule 13(3).[42]

4. MR. RIVKIN'S STATEMENT

37. On 13 March 2024, Mr. Rivkin provided the following Statement:

> "In response to the Proposal for Disqualification submitted by the Republic of Honduras, I simply confirm that I am a US national. I also confirm that I remain independent and impartial and that, if the Proposal is rejected, I will judge the case fairly based on the facts and law presented."

III. ANALYSIS

38. Article 10.19 of the CAFTA:[43]

> "**Article 10.19: Selection of Arbitrators**
>
> 1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
>
> 2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.
>
> 3. If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.
>
> 4. For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:
>
> (a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;
>
> (b) a claimant referred to in Article 10.16.1(a) may submit a claim to arbitration under this Section, or continue a claim, under the

[42] Honduras' Reply, para. 40.
[43] CL-2, Article 10.19.

> ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and
>
> (c) a claimant referred to in Article 10.16.1(b) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal."

39. Article 39 of the ICSID Convention:

> "The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties."

40. Arbitration Rule 13:

> "**General Provisions Regarding the Establishment of the Tribunal**
>
> (1) The Tribunal shall be constituted without delay after registration of the Request for arbitration.
>
> (2) The majority of the arbitrators on a Tribunal shall be nationals of States other than the State party to the dispute and the State whose national is a party to the dispute, unless the Sole Arbitrator or each individual member of the Tribunal is appointed by agreement of the parties.
>
> (3) A party may not appoint an arbitrator who is a national of the State party to the dispute or the State whose national is a party to the dispute without agreement of the other party.
>
> (4) A person previously involved in the resolution of the dispute as a conciliator, judge, mediator or in a similar capacity may be appointed as an arbitrator only by agreement of the parties."

IV. RECOMMENDATION

41. The issue under discussion is ultimately whether there was agreement between the parties to the arbitration so that there would be no obstacle to the appointment of an arbitrator of the nationality of one or the other, even in the absence of an explicit expression of such agreement (in this case on the part of the Respondent).

42. Indeed, a reading of the relevant provisions of the various legal instruments cited above as interpreted according to the principle codified at Articles 31 and 32 (VCLT) shows that the rule of principle is as follows: the *majority* of the tribunal must be composed of nationals of States other than those of the States directly concerned (*i.e.*, on the one hand, the State directly party to the dispute and, on the other hand, the State whose national is itself the other party to the same dispute).

43. This principle is to be identically found in Article 10.19 of CAFTA, Article 39 ICSID and ICSID Arbitration Rule 13. However, each of these provisions also establishes the possibility of derogating from the said principle by agreement between the parties.

44. Honduras, the host State of the investment, considers that it has not given such an agreement, whereas the claimant takes the opposite position. On the face of it, this might seem to be the end of the matter, as it is usually difficult, unless effectively demonstrated, to claim that a sovereign State has given an approval that it itself says does not exist.

45. However, here, matters are more complex, primarily for two factual reasons which should be stressed at the outset: not only (a) was such disagreement not explicitly expressed by Honduras, but even more (b) Honduras itself refused to take part in the procedure for appointing the Tribunal[44], without later explaining in its Proposal the reason for this abstention.

46. Such an attitude might in itself be justified if it were self-evident that a State's agreement could never be assumed in the absence of its specific consent to the issue in question. However, this is not necessarily the case. In the present one, in a procedure based on the application of CAFTA, ordinarily interpreted in the light of the earlier application of NAFTA (as the latter was its model), Honduras' non-participation could mean that this State did not deem it necessary to express its will

[44] Response, para. 63.

in this regard, thereby giving rise to the presumption that silence is equivalent to consent.

47. Indeed, the mere well-known connection of CAFTA with NAFTA should have raised particular diligence on the part of the host State, given the interpretation that has been given to this treaty including its Article 1125 (which deals with the composition of an arbitral tribunal with regard to the nationality of its members).

48. As a matter of fact, as rightly stated by the Claimant, quite a large number of ICSID Members, including CAFTA Members have interpreted CAFTA Article 10.19.4 as allowing pre-agreement to the appointment of national arbitrators without requiring any specification on the identity of particular arbitrators[45]. This is "relevant practice" in the (large) sense in which this element of interpretation is mentioned at VCLT Article 31.3 as it may be meaningfully "related to the possibility of achieving its object and purpose"[46].

49. As demonstrated by the negotiation history of NAFTA article 1125 of which CAFTA Article 10.19.4 retake the words, the purpose of this provision was to make it possible for one of the Parties to a litigation to appoint one of its nationals in ICSID arbitration[47], an interpretation which is reinforced by that of qualified commentators[48]. The opinion of the present author is that, as rightly stated by the Claimant, Article 10.19.4(a) of the CAFTA-DR does contain an agreement by Honduras to set aside the nationality limitation set forth in Article 39 of the ICSID Convention.[49]

50. As for the argument developed by the Respondent according to which Article 10.19. 4 refers to two distinct moments of the procedure, it seems hard to find in this

[45] Próspera's Reply, para. 18.
[46] See Georg Nolte, *Treaties and their Practice-Symptoms of their Rise or Decline,* The Hague Academy of International Law, pocketbook form, Brill/Nijhoff, 2018, at 20.
[47] Response, para. 36.
[48] Response, para. 37, citing CL-16: Meg Kinnear, Andrea Kay Bjorklund, et al., Article 1125 – Agreement to Appointment of Arbitrator, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, Supplement No. 1 (June 2006) (CL-16) pp. 1125-2-1125-3.
[49] Response, para. 27.

provision any suggestion that such an interpretation of this provision is to be retained. Article 10.19.4 does not refer to paragraphs 10.19.2 and 10.19.3 and is not subjected to them. The position of the present author, including in taking due account of its textual context, is that the agreement in Article 10.19.4 does not apply only to arbitrators appointed by the ICSID Secretary-General.[50] It does also apply to arbitrators appointed by the parties.

51. On the basis of the foregoing considerations, it is the recommendation of this author that the Application of Honduras should not be granted and that, on the contrary, the option chosen by the Claimant should be accepted as being in accordance with the treaty bases on which the composition of the Tribunal was established.

Pierre-Marie Dupuy
29 July 2024

[50] Response, para. 51.