INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Fernando Paiz Andrade and Anabella Schloesser de León de Paiz

v.

Republic of Honduras

(ICSID Case No. ARB/23/43)

PROCEDURAL ORDER NO. 3

DECISION ON BIFURCATION

Members of the Tribunal
Prof. Nicolas Angelet, President of the Tribunal
Mr. Stephen L. Drymer, Arbitrator
Prof. Brigitte Stern, Arbitrator

Secretary of the Tribunal
Ms. Gabriela González Giráldez

---

20 December 2024

Table of Contents

I. INTRODUCTION

1. This Procedural Order addresses the Request for Bifurcation submitted by the Republic of Honduras (also "**Honduras**" or the "**Respondent**") on 21 October 2024, in which it requests the Tribunal to bifurcate the proceeding to address the objections to jurisdiction as a preliminary question pursuant to ICSID Arbitration Rule 44. Mr. Fernando Paiz Andrade and Ms. Anabella Schloesser de León de Paiz (respectively "**Mr. Paiz**" and "**Ms. Schloesser**", and together the "**Claimants**") object to the request.

II. PROCEDURAL BACKGROUND

2. On 24 August 2023, the Claimants filed a Request for Arbitration with the ICSID Secretariat pursuant to the Dominican Republic-Central America-United States of America Free Trade Agreement signed on 5 August 2004 (the "**CAFTA-DR**" or the "**Treaty**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**" or the "**Convention**"). The Acting Secretary-General of ICSID registered the Request for Arbitration on 13 September 2023.

3. On 13 May 2024, the Tribunal was constituted in accordance with Article 37(2)(a) of the Convention.

4. On 2 July 2024, the Tribunal held the first session.

5. On 22 July 2024, the Tribunal issued Procedural Order No. 1 ("**PO1**"), as well as Procedural Order No. 2 on Transparency and Confidentiality. Annex B to PO1 contains three procedural calendars reflecting the eventuality of a request for bifurcation.

6. On 20 September 2024, the Claimants filed their Memorial on the Merits, together with factual exhibits C-0043 to C-0239, legal authorities CL-0001 (resubmitted), and CL-0007 to CL-0149, the witness statements by Fernando Paiz and [redacted], and the expert report by Miguel A. Nakhle of Compass Lexecon.

7. On 21 October 2024, the Respondent filed a Summary of Jurisdictional Objections and Request for Bifurcation, accompanied by factual exhibits R-001 to R-007 and legal authorities RL-001 to RL-053 (the "**Request for Bifurcation**" or "**Request**") in accordance with the applicable procedural calendar.

8. On 20 November 2024, the Claimants filed Observations on the Request for Bifurcation, together with factual exhibits C-0240 to C-0255 and legal authorities CL-0150 to CL-0200 (the "**Observations**") in accordance with the applicable procedural calendar.

9. Having considered the Parties' submissions, the Tribunal's Decision on Bifurcation is issued as Procedural Order No. 3 in accordance with Annex B to PO1.

10. After summarising the Parties' positions in **Section III**, the Tribunal analyses the Request in **Section IV**. The Tribunal's decision is set out in **Section V**.

III. SUMMARY OF THE PARTIES' POSITIONS

A. THE RESPONDENT'S POSITION

11. In its Request for Bifurcation, the Respondent summarily raises five preliminary objections (the "**Preliminary Objections**").

12. According to *Preliminary Objection 1*, ICSID has no jurisdiction because the Respondent conditioned its consent to arbitration on the prior exhaustion of local remedies by investors. The Respondent argues that it formulated this condition when approving and ratifying the ICSID Convention through Legislative Decree No. 41-88 of 4 August 1988. Thus, if Claimants believed that Honduras violated their rights by promulgating a new energy law or because the national electric energy company, ENEE, was seeking a renegotiation with Pacific Solar Energy, S.A. de C.V. ("**Pacific Solar**"), the company allegedly owned by the Claimants, the Claimants should have had recourse, and may still have recourse, to the judicial courts of Honduras, and they could and should have appealed or filed an administrative claim before the respective public institutions and following the procedures established in the Honduran Administrative Procedure Law.[1]

13. According to *Preliminary Objection 2*, Ms. Schloesser failed to comply with the mandatory consultation and negotiation requirement before initiating her claim in the arbitration, as required by CAFTA-DR Article 10.15. On 22 October 2022, Mr. Paiz, on his own behalf and on behalf of Pacific Solar, submitted a notice of intent under the CAFTA-DR, but this notice did not mention Ms. Schloesser. The Claimants filed a new Notice of Intent on 24 March 2023 only to add Ms. Schloesser. However, this new notice did not include a request for consultations and negotiations. No consultations or negotiations were held between the Respondent and Ms. Schloesser before she submitted her claim to arbitration, as a result of which Honduras's offer to arbitrate such claim has not been perfected.[2]

14. According to *Preliminary Objection 3*, the Tribunal lacks jurisdiction *ratione materiae* to hear the Claimants' claim on expropriation because it is premature. The Claimants affirm merely that they are under threat of expropriation, which confirms that no taking or confiscation has taken place.

[1] Request for Bifurcation, paras. 10-22.
[2] Request for Bifurcation, paras. 23-30.

The Claimants have not been subjected to any measure which could be analysed as a direct or indirect expropriation. The ENEE has merely initiated a process of renegotiation of the contract with Pacific Solar but has continued executing the contract. Unlike what the Claimants' assert, the 2022 New Energy Law does not order the termination of the contract if renegotiation fails. It gives instruction to the ENEE to request the renegotiation of the energy contracts, which requires the consent of both parties, and only authorizes the ENEE to propose the termination if the renegotiation fails. Also, the Claimants' arguments are contradictory because direct and indirect expropriation cannot coexist. Accordingly, there is no dispute over which the Tribunal could make a ruling. It has been confirmed by several arbitral tribunals that they will not assume jurisdiction in cases where the expropriation claim is premature.[3]

15. According to *Preliminary Objection 4*, the Tribunal lacks jurisdiction *ratione voluntatis* to hear the Claimants' claim on the alleged violation of the Most-Favoured Nation ("**MFN**") clause. There are two reasons for this:

- *First*, MFN clauses can be used, at most, to import more favourable protection with respect to rights or standards that are already provided in the treaty containing the MFN clause. MFN clauses cannot be used to import totally new rights. The CAFTA-DR contains no umbrella clause at all. Accordingly, its MFN clause cannot be used to import the umbrella clauses from the Honduras-Switzerland and Honduras-Germany BITs.[4]

- *Second*, and in any case, the Claimants are barred from bringing an MFN claim since the dispute relates to procurement made by Honduras. CAFTA-DR Article 10.13(5) specifically excludes procurement from the application of the MFN clause. CAFTA-DR Article 2.1 defines procurement as "the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale or with a view to use in the production or supply of goods or services for commercial sale or resale". There are three simple requirements to determine that there has been procurement: (i) the acquisition must be made by the government, which is the case since ENEE is Honduras's national electricity company; (ii) the government must acquire goods or services, which is the case since ENEE acquires electricity; and (iii) said goods or services must be obtained for governmental purposes, which is the case since the acquired electricity is distributed to the citizens of Honduras.[5]

[3] Request for Bifurcation, paras. 31-43.
[4] Request for Bifurcation, paras. 45-51.
[5] Request for Bifurcation, paras. 52-62.

16. According to *Preliminary Objection 5*, the Tribunal lacks jurisdiction *ratione materiae* because the dispute does not relate to an investment agreement within the meaning of CAFTA-DR Article 10.28. There are three reasons for this:

    - *First*, the Claimants themselves are not parties to the alleged investment agreement, whereas investment agreements must be entered into by the host State and the foreign investor, not by a State-owned entity or a local company established by the investor.
    - *Second*, the Claimants only became involved after Pacific Solar had already entered into the contract with ENEE.
    - *Third*, the agreements are part of a commercial contract for the purchase and sale of electricity, not a contract "with respect to natural resources or other assets that a national authority controls" within the meaning of CAFTA-DR Article 10.28, *i.e.*, a concession agreement or an agreement granting rights over natural resources or State assets.[6]

17. The Respondent requests the Tribunal to rule on its objections as a preliminary matter. It says that to determine whether bifurcation is warranted, the Tribunal must assess: (i) whether bifurcation will likely result in time and resource savings; (ii) whether the objections, if upheld, will resolve all or a significant portion of the dispute, thereby reducing or eliminating the need for a merits phase; and (iii) whether the jurisdictional objection requires an examination of the merits. In a case involving a sovereign State, bifurcation further guarantees that the Tribunal adjudicates only those disputes where consent for arbitration has been given by the State.[7]

18. As concerns the second criterion, the Respondent observes that Preliminary Objection 1 would, if upheld, lead to the dismissal of all the claims.[8] Preliminary Objection 2 would lead to the dismissal of the entirety of Ms. Schloesser's claims. Preliminary Objections 3, 4 and 5 would lead to a "material reduction" in the merits phase of the proceeding.[9]

19. As concerns the third criterion, the Respondent observes that Preliminary Objections 1 and 2 are not tied to any factual aspect of the dispute. Preliminary Objection 3, 4 and 5 require only "a legal analysis based on a *prima facie* reading of the…claims, as asserted by Claimants themselves,

[6] Request for Bifurcation, paras. 63-73.
[7] Request for Bifurcation, paras. 74-81.
[8] The Respondent's Request for Bifurcation at para. 83, first dot, states that the first preliminary objection would result in the dismissal of all claims brought by "the Claimant" (singular). It is clear, however, that the first preliminary objection would result in the dismissal of all claims brought by both Claimants, as opposed to the second objection which would lead to the dismissal of Ms. Schloesser's claims ("that Claimant", as stated in para. 83, second dot).
[9] Request for Bifurcation, paras. 82-88.

without delving into the merits of the facts".[10] Preliminary Objections 4 and 5 require only "a legal analysis based on a *prima facie* reading of the…claims, as asserted by Claimants themselves".[11]

20. As concerns the first criterion, the Respondent argues that since litigating the merits would involve the production of vast financial and technical documents, and substantial witness and expert evidence, bifurcation will enable procedural efficiency and significantly reduce the time and costs of the proceeding.[12]

21. The Respondent requests the Tribunal to bifurcate the proceedings in accordance with the procedural calendar established in Scenario 2 of Annex B to PO1.[13] The Respondent also reserves its right to raise additional jurisdictional objections in the future.[14]

B. THE CLAIMANTS' POSITION

22. In their Observations, the Claimants argue that, in deciding on the Request for Bifurcation, the Tribunal should consider the following principles and factors:

- There is no presumption in favour of bifurcation and the Respondent bears the burden of proving that bifurcation is warranted.[15]
- In addition to the criteria listed in ICSID Arbitration Rule 44(2), namely 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,[16] the Tribunal should consider whether the objections raised are *prima facie* serious and substantial, which does not require a showing that the objection is likely to prevail, but requires more than merely asserting a non-frivolous objection.[17]
- The Tribunal should be guided by fairness and procedural efficiency.[18] Bifurcation is inefficient when it would result in the assessment of duplicative evidence.[19] Where the answer to the jurisdictional questions depends on testimony and other evidence that can only be obtained through a full hearing of the case, or where there is a significant

[10] Request for Bifurcation, para. 91.
[11] *Ibid.*
[12] Request for Bifurcation, paras. 96-100.
[13] Request for Bifurcation, para. 101.
[14] Request for Bifurcation, para. 102.
[15] Observations, paras. 10ff.
[16] Observations, paras. 11-12.
[17] Observations, para. 13.
[18] Observations, para. 15.
[19] Observations, para. 16.

overlap between evidence relevant to both jurisdiction and merits, bifurcation should also be rejected.[20]

- The abovementioned criteria are cumulative.[21]
- The Respondent's burden of proof is enhanced given its reservation to raise additional jurisdictional objections in the future, which risks frustrating the alleged procedural efficiency pursued by bifurcation.[22]

23. The Claimants submit that none of the Preliminary Objections meets the abovementioned cumulative factors. Not a single objection materially reduces time and cost, disposes of all or parts of the claims, and is not intertwined with the merits.[23]

24. With respect to *Preliminary Objection 1 on exhaustion of local remedies*,[24] the Claimants argue in substance as follows:

- The Respondent is estopped from asserting this "reservation" because Honduras has never notified investors of its existence, and it does not appear on the list of legislative and other measures that Member States have communicated to ICSID.[25]
- Multiple tribunals have already rejected this objection as a threshold limitation.[26]
- The objection is not serious or substantial. The requirement of exhaustion of local remedies must be expressed in the instrument providing consent to arbitration. Yet, the Respondent did not express that requirement in the CAFTA-DR. The Treaty does not contemplate the exhaustion of local remedies as a prerequisite for consent. In contrast, it expressly forbids investors or their enterprises from bringing breach of investment agreement claims that have previously been submitted before domestic instances. In addition, the CAFTA-DR requires that claimants, and the enterprise on behalf of which claims are submitted, waive their right to initiate or continue administrative or judicial proceeding seeking redress with respect to measures alleged to be a breach of the Treaty.[27]

[20] Observations, para. 17.
[21] Observations, para. 18.
[22] Observations, para. 20.
[23] Observations, para. 21.
[24] Observations, paras. 22ff.
[25] Observations, para. 25.
[26] Observations, para. 26.
[27] Observations, paras. 27-32.

- Bifurcating Preliminary Objection 1 would create inefficiencies and result in a protracted proceeding. Even assuming the objection is not meritless, it will require the Tribunal to determine whether exhaustion of local remedies would be a "futile" exercise. This raises issues that are intertwined with the merits, notably because administrative recourses should be initiated before the authorities that allegedly breached the Respondent's obligations towards the Claimants' investment.[28]

25. With respect to *Preliminary Objection 2 on Ms. Schloesser's alleged failure to engage in prior consultation and negotiation*,[29] the Claimants argue that bifurcation would not reduce time and cost because the objection lacks support in the Treaty and is intertwined with the merits. More specifically, the Claimants argue that:

- It is undisputed that Ms. Schloesser complied with the 90-day cooling-off period under the Treaty and gave proper notice of the dispute almost a year before the Request for Arbitration. The Respondent's objection is that Ms. Schloesser did not comply with the Treaty's notice requirement because no meetings took place between Government officials and her. However, the CAFTA-DR provides that the parties to a dispute "should initially seek to resolve" disputes through consultation and negotiation (Article 10.15) and that an arbitral proceeding may be brought "[i]n the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation" (Article 10.16). The text does not indicate that a particular party or that both parties must consider that settlement is unfeasible prior to the submission of an arbitration claim.[30]

- The Respondent's argument that the disputing Parties need to engage in negotiations to "perfect" Honduras's consent to arbitration finds no support in the treaty text and is contradicted by the term "should" in CAFTA-DR Article 10.15.[31]

- Ms. Schloesser invited the Respondent on several occasions to enter into consultation or negotiation.[32]

[28] Observations, paras. 33-34.
[29] Observations, paras. 36-51.
[30] Observations, paras. 38-40.
[31] Observations, para. 41.
[32] Observations, paras. 42-46.

- In any event, negotiations would have been futile. The Respondent did not react to the invitations at the time and still has not entered into negotiations.[33]

- This objection is intertwined with the merits. In order to decide on this objection, the Tribunal will have to assess the Respondent's conduct after it received notice of the dispute, which is the very same conduct that underlies the merits of the case.[34]

- Bifurcating on this ground would not dispose of any claims because Mr. Paiz's claims are the same as Ms. Schloesser's, and the Respondent has not contested Mr. Paiz's compliance with the notice provision.[35]

26. With respect to *Preliminary Objection 3 on the expropriation claim*,[36] the Claimants argue that it is by definition intertwined with the merits and that it would not dispose of the claims. More specifically, the Claimants argue that:

- This objection lacks merit because the Respondent has already indirectly expropriated the Claimants' investment and threatens it with direct expropriation. Payments received by the Claimants are grossly insufficient.[37] Moreover, the Respondent has declared that "it has prioritized payment of the historical debt owed to the generators who have 'agreed' to lower their compensation rights", thereby actively enlarging the debt it already owes to the Claimants' investment.[38]

- This objection is intertwined with the merits of the expropriation claim, and the Tribunal would have to prejudge issues related to the Minimum Standard of Treatment claim, in regard of which the Respondent does not object to the Tribunal's jurisdiction.[39]

- To analyse this objection, the Tribunal would have to consider the same, or similar, evidence on two occasions.[40]

27. With respect to *Preliminary Objection 4 regarding the MFN clause and the breach of undertakings*,[41] the Claimants argue that this objection is meritless, intertwined with the merits and would not dispose of a substantial part of the claims. More specifically, the Claimants argue that:

[33] Observations, paras. 47-48.
[34] Observations, paras. 49-50.
[35] Observations, para. 51.
[36] Observations, paras. 52-57.
[37] Observations, paras. 53-55.
[38] Observations, para. 55.
[39] Observations, para. 56.
[40] Observations, para. 57.
[41] Observations, paras. 58-64.

- The weight of authority supports the view that an MFN clause grants a claimant the right to benefit from substantive guarantees contained in third treaties.[42]

- In any event, the CAFTA-DR provides investors with the right to "enforce the provisions of...investment agreement[s]", which is a standard of protection akin to the ones contemplated in the umbrella clauses invoked by the Claimants.[43]

- The CAFTA-DR's "MFN carve-out" is limited to procurement, defined as "the process by which a government obtains the use of goods or services". The Claimants' claims are unrelated to such a process.[44]

- This objection is intertwined with the merits and would not dispose of a substantial part of the claims. If the objection were rejected, the Tribunal would have to assess the same evidence again at the merits phase. In addition, the objection would, if upheld, not substantially reduce the Claimants' MFN claim, which also applies to the State Guarantee and the Operations Agreement.[45]

28. With respect to *Preliminary Objection 5 regarding investment agreements*,[46] the Claimants argue that this objection is meritless and intertwined with the merits. More specifically, the Claimants argue that:

    - The PPA, State Guarantee and Operations Agreement (referred by the Claimants as the Agreements) constitute investment agreements pursuant to CAFTA-DR Article 10.28 even though the Claimants are not party to them. According to Article 10.28, an "investment agreement" is a written agreement between a national authority of a Party "and a covered investment or an investor of another Party". Likewise, Article 10.16.1(b)(i)(C) allows "the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, [to] submit to arbitration…a claim that the respondent has breached…an investment agreement".[47]

    - It is irrelevant that the Claimants only became involved after the Agreements were entered into. CAFTA-DR Article 10.28 specifically provides that an investment agreement is one on which "the investor relies in establishing or acquiring a covered

[42] Observations, para. 59.
[43] *Ibid.*
[44] Observations, para. 60.
[45] Observations, paras. 62-64.
[46] Observations, paras. 65-72.
[47] Observations, paras. 66-68.

investment". The Claimants did rely on the Agreements when deciding to make their investment.[48]

- The Agreements are not mere commercial contracts outside the scope of investment agreements within the meaning of the CAFTA-DR.[49]
- The objection is intertwined with the merits and does not dispose of any substantial part of the case, as the Tribunal would have to hear the same arguments and evidence again in deciding the Claimants' expropriation, umbrella clause, and Minimum Standard of Treatment claims.[50]

29. The Claimants request the Tribunal to (a) reject Respondent's Request for Bifurcation; (b) order the Respondent to pay all costs incurred by the Claimants associated with the Request for Bifurcation; and (c) adopt Procedural Calendar No. 3 in Annex B of PO1.[51]

IV. THE TRIBUNAL'S ANALYSIS

A. GENERAL

30. Pursuant to Article 41(2) of the Convention, it is for the Tribunal to determine whether to examine any objection that a dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, as a preliminary question or to join it to the merits of the dispute.

31. Pursuant to ICSID Arbitration Rule 44(2), which applies to requests of bifurcation relating to a preliminary objection, the Tribunal shall, in determining whether to bifurcate, "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."

32. ICSID Arbitration Rule 44(2) does not establish a presumption in favour or against bifurcation. The list of relevant circumstances to be considered is non-exhaustive.

33. The Tribunal observes that procedural efficiency and savings of time and cost must be appreciated from different perspectives and with respect to the proceeding in its entirety. A contemplated

[48] Observations, para. 69.
[49] Observations, paras. 70-71.
[50] Observations, para. 72.
[51] Observations, para. 73.

organisation of the proceeding that is more work-intensive and costly for the Parties at a given phase, may facilitate and speed up later phases of the proceeding.

34. In addition, the orderly conduct of the proceeding may militate in favour of addressing two or more Preliminary Objections together at the same stage of the proceeding, because they raise related legal issues or concern the same set of facts. Decisions on bifurcation should also have regard to the impact on the substantive quality of the proceeding, which may impact on substantive justice but also, again, on efficiency.

35. In this light, the Tribunal will first analyse each Preliminary Objection separately (**B**), and then turn to an overall assessment (**C**). The Tribunal emphasises that this decision on bifurcation is strictly procedural in nature and does not imply, in any way, any prejudgment of any decision that may be made in subsequent phases of the proceeding. Therefore, all considerations are made on the basis of a *prima facie* analysis and exclusively for the purposes of this decision.

B. *PRIMA FACIE* ASSESSMENT OF EACH PRELIMINARY OBJECTION

1. Preliminary Objection 1

36. According to *Preliminary Objection 1*, ICSID has no jurisdiction because the Respondent conditioned its consent to arbitration on the prior exhaustion of local remedies by investors, and the Claimants did not satisfy this requirement.

37. On the one hand, the main thrust of this objection is unrelated to the merits and the objection would, if upheld, entirely terminate the proceeding. This militates in favour of bifurcation.

38. On the other hand, the Claimants correctly observe that, assuming exhaustion of local remedies is required in principle in cases brought against Honduras under the CAFTA-DR, the Tribunal will have to determine whether exhaustion would have been a futile exercise in the present instance, which raises issues that are intertwined with the merits.

39. The Tribunal further observes that, irrespective of whether it is well-founded or not, the question of principle is clear and circumscribed. It does not appear to require a very time- and cost-intensive debate. Taken in isolation, it would not necessarily justify a bifurcation that would result in prolonging the proceeding as provided in the procedural calendar annexed to PO1.

40. It follows that the decision whether to bifurcate Preliminary Objection 1 or not should be taken in light of the Tribunal's overall assessment of the Request.

2. Preliminary Objection 2

41. According to *Preliminary Objection 2*, Ms. Schloesser failed to comply with the mandatory consultation and negotiation requirement before initiating the arbitration.

42. This objection does not require any examination of the merits. Insofar as Ms. Schloesser's claims on the merits are essentially the same as those of Mr. Paiz, bifurcating Preliminary Objection 2 in isolation would, if the objection were subsequently upheld, produce only marginal benefits in terms of procedural efficiency and the saving of time and resources.

43. By contrast, if the Tribunal decides to bifurcate one or more of the other Preliminary Objections, it will be in the interest of procedural efficiency to also bifurcate Preliminary Objection 2.

44. Similar to Preliminary Objection 1, it follows that the decision whether to bifurcate Preliminary Objection 2 or not should be taken in light of the overall assessment.

3. Preliminary Objection 3

45. According to *Preliminary Objection 3*, the Tribunal lacks jurisdiction *ratione materiae* to hear the Claimants' claim on direct and/or indirect expropriation because it is premature. The Respondent notably argues that the Claimants affirm they are under threat of expropriation, which confirms that no taking or confiscation has taken place; that the Claimants have not been subjected to any measure which could replicate the effects of a direct expropriation; and that the 2022 New Energy Law does not order the termination of the contract if renegotiation fails.

46. The Tribunal considers that this objection would require an examination of the merits. It would notably require an analysis of the payments that the Respondent still makes, or does not make, in consideration of the electricity provided by the Claimants' investment, and on which the Parties take opposing views.[52] It would further require an analysis of the financial viability of the Claimants' investment in the circumstances.[53] This objection should accordingly be addressed at the merits phase, if any.

47. This is all the more so since the Respondent has not raised a specific Preliminary Objection with respect to the Claimants' claims of violation of the Minimum Standard of Treatment, with the consequence that such claims will in any event be addressed on the merits if Preliminary Objection 1 fails. The Tribunal considers it may be appropriate, if the case proceeds on the merits, to address the relevant set of facts at the same time from the viewpoints of direct and/or indirect expropriation and the Minimum Standard of Treatment.

48. Accordingly, there are strong reasons against bifurcating Preliminary Objection 3.

[52] *Supra*, para. 26.
[53] *Ibid.*

4. Preliminary Objection 4

49. According to *Preliminary Objection 4*, the Tribunal lacks jurisdiction to hear the Claimants' claim on the MFN clause. *First*, says Honduras, the MFN clause does not allow importing into the CAFTA-DR an umbrella clause which is entirely absent from the Treaty. *Second*, the CAFTA-DR's MFN clause contains a carve-out for procurement, which applies in the present instance. *Third*, the contract between Pacific Solar and ENEE does not qualify as an "investment agreement" within the meaning of the CAFTA-DR. According to the Respondent, this objection requires nothing more than "a legal analysis of…a *prima facie* reading of the Claimant's allegations, as asserted by Claimants themselves."[54]

50. The Claimants dispute each of these points and argue that bifurcating this objection would not contribute to procedural efficiency.

51. The Tribunal observes that this objection requires it to make a finding on the interpretation of the relevant provisions of the CAFTA-DR, as well as on their application to the agreement between Pacific Solar and ENEE. For instance, the objection as formulated by the Respondent requires a finding on whether a contract with ENEE qualifies as a contract with the State or with a State authority within the meaning of the CAFTA-DR, and on whether the acquisition of electricity for distribution to Honduran citizens is an activity "for governmental purposes".

52. By contrast, Preliminary Objection 4 does not require the Tribunal to determine whether, assuming the umbrella clause can be imported and assuming also that it applies to the agreements to which the Claimants allege it applies, these agreements have been breached, in such a manner that the umbrella clause has also been breached. Preliminary Objection 4 does not, therefore, require the Tribunal to delve deeply into the facts of the case, even if it may require an assessment of certain facts relevant to both jurisdiction and the merits. It does not raise the same evidential issues as the umbrella clause case on the merits. Rather, the questions it raises are well-circumscribed and do not appear to require neither witness evidence nor extensive debates on the facts. Accordingly, bifurcation will, if this objection is upheld, materially reduce the time and cost of the proceeding.

53. The Tribunal further observes that the Claimants' alternative argument that, in any event, the CAFTA-DR provides investors with the right to "enforce the provisions of…investment agreement[s]",[55] assumes that one or more of the agreements they rely on indeed qualify as "investment agreements" within the meaning of the CAFTA-DR. Preliminary Objection 4 is, therefore, related to Preliminary Objection 5.

[54] Request for Bifurcation, para. 91.
[55] *Supra*, para. 27.

54. Accordingly, there may be sound reasons to bifurcate Preliminary Objection 4 even if taken in isolation. However, whether it should be bifurcated or not also depends on Preliminary Objection 5.

5. Preliminary Objection 5

55. According to *Preliminary Objection 5*, the Tribunal lacks jurisdiction *ratione materiae* because the dispute does not relate to an investment agreement within the meaning of CAFTA-DR Article 10.28.

56. The Claimants dispute the Respondent's interpretation of the relevant CAFTA-DR provisions and their application to the agreements they rely upon. They argue that the objection is intertwined with the merits.

57. The Tribunal observes that the debate between the Parties is essentially concerned with the interpretation of the relevant CAFTA-DR provisions and their application in the present instance, which raises some well-circumscribed questions. Preliminary Objection 5 does not require the Tribunal to delve deeply into the facts of the case and into whether the relevant agreements have been breached or not. Evidentiary issues raised by this objection are essentially different from those raised by the merits of the argument.

58. The Tribunal further observes that Preliminary Objection 5 will notably require the Tribunal to determine whether the relevant agreements qualify as an agreement "between a national authority of a Party and a covered investment or an investor of another Party" pursuant to CAFTA-DR Article 10.28, or whether, as the Respondent argues, "an agreement must be entered into by the host state and the foreign investor, and not by a state-owned entity or a local company established by the investor".[56] This would notably require the Tribunal to determine whether ENEE qualifies as a "national authority" within the meaning of the said provision. The Tribunal considers that this question may *prima facie* be related to the question to be addressed under Preliminary Objection 4 whether the distribution of electricity to Honduran citizens qualifies as an activity "for governmental purposes".

59. There are two reasons, therefore, for treating Preliminary Objections 4 and 5 together. *First*, as mentioned earlier,[57] Preliminary Objection 4 in part depends on the qualification as "investment agreement" which is the object of Preliminary Objection 5. *Second*, both objections turn in part on the distinction between private and public operations and its application in the present instance.

[56] Request for Bifurcation, para. 68.
[57] *Supra*, para. 53.

60. Accordingly, the Tribunal considers that Preliminary Objection 5 can be bifurcated, and that the decision whether to bifurcate it or not should be taken in light of the overall assessment and of the need to address Preliminary Objections 4 and 5 in the same phase of the proceeding.

C. OVERALL ASSESSMENT

61. Based on the above analysis of each objection's intrinsic features, its relationship with other objections, and further factors relevant to the proper administration of the proceeding, the Tribunal makes the following overall assessment.

1. Non-bifurcation of Preliminary Objection 3

62. Preliminary Objection 3 on the expropriation claim must not be bifurcated. Addressing it at the merits phase, if any, will notably allow the Parties and the Tribunal to confront the same or related facts with the standards of direct and indirect expropriation, on the one hand, and Minimum Standard of Treatment, on the other hand. The Tribunal considers that this will contribute to the quality and efficiency of the proceeding on the merits and may, therefore, also save time and costs.

2. Bifurcation of Preliminary Objections 4, 5, 1 and 2

63. Preliminary Objections 4 and 5 should, on balance, be bifurcated. For the reasons stated above,[58] the Tribunal considers it necessary to address both objections together. In light of all the relevant circumstances, this should be done in a bifurcated proceeding. Both objections mainly raise issues of treaty interpretation. The factual issues they raise are well-circumscribed and do not require an analysis of whether the agreements or CAFTA-DR standards have been breached or not. The issues are not the same as those which should be addressed at the merits phase, and the risk of prejudging facts relevant to the merits seems minimal, even if certain facts and evidence may be relevant to both phases. Addressing them together on bifurcation should contribute to the overall efficiency *and* quality of the proceeding. The scope of the debate on the merits will be reduced *and* clarified, even if one or both these objections are rejected.

64. In turn, the bifurcation of Preliminary Objections 4 and 5 has an impact on the bifurcation of Preliminary Objections 1 and 2. Since there will be a bifurcated proceeding on Preliminary Objections 4 and 5 in any event, and since the bifurcated proceeding is subject to a pre-established procedural calendar annexed to PO1, also bifurcating Preliminary Objections 1 and 2 will allow the time dedicated to the bifurcated proceeding to be used in the most efficient manner.

65. In conclusion, therefore, Preliminary Objections 1, 2, 4 and 5 will be bifurcated, while Preliminary Objection 3 will be addressed at the merits phase, if any.

[58] *Supra*, para. 59.

D. IMPLICATIONS AND FURTHER GUIDANCE

66. Having decided to bifurcate part but not all the Preliminary Objections raised by the Respondent, the Tribunal draws the Parties' attention to the following implications of its decision.

1. Additional jurisdictional objections

67. The Respondent has reserved its right to raise additional jurisdictional objections "in the future".[59]

68. The Claimants correctly observe that this must not frustrate the object and purpose of bifurcation, *i.e.*, its intended efficiency.[60]

69. In addition, the Tribunal has observed, and the Preliminary Objections raised by the Respondent illustrate, that decisions whether to bifurcate preliminary objections or not may raise issues of substantive justice. It may be necessary or appropriate to address two or more objections together.[61]

70. The Tribunal therefore requests the Respondent to raise any additional jurisdictional objections it may have in its memorial in the bifurcated proceeding.

2. Calendar for a possible merits phase

71. It follows from the above reasons that, even if the proceeding does not come to an end at the phase of Preliminary Objections – specifically, if Preliminary Objection 1 is not upheld – the anticipated bifurcation will result in a substantial reduction of the scope of issues to be addressed at the merits phase.

72. The Tribunal observes that it will be possible to reflect this in the procedural calendar for the merits phase after bifurcation, which has not been adopted yet.

V. DECISION

73. For these reasons, the Tribunal decides as follows:

(A) The Respondent's Request for Bifurcation is granted with respect to Preliminary Objections 1, 2, 4 and 5.

(B) The Respondent's Request for Bifurcation is denied with respect to Preliminary Objection 3.

(C) The arbitration is to proceed in accordance with the schedule for bifurcated proceeding set out in Procedural Calendar No. 2 at Annex B of PO1, unless subsequently modified by the Tribunal.

[59] Request for Bifurcation, para. 102.
[60] Observations, para. 20.
[61] *Supra*, paras. 53, 58, 59.

(D) The Respondent is requested to address any additional jurisdictional objections in its memorial in the bifurcated proceeding.

(E) The issue of costs is reserved for a later stage of the proceeding.

For the Tribunal,

[signed]
_____
Prof. Nicolas Angelet
President of the Tribunal
Date: 20 December 2024