ARBITRATION BEFORE THE
INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/23/43

FERNANDO PAIZ ANDRADE AND ANABELLA SCHLOESSER DE LEÓN DE PAIZ
(Claimants)

v.

REPUBLIC OF HONDURAS
(Respondent)

Summary of Jurisdictional Objections and Request for Bifurcation

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21 October 2024

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PROCURADURÍA GENERAL
REPÚBLICA DE HONDURAS

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TABLE OF CONTENTS

I. INTRODUCTION

1. In accordance with Procedural Order No. 1 dated 22 July 2024, the Republic of Honduras (the "**Republic**," the "**State**," "**Honduras**," or the "**Respondent**") hereby submits its Request for Bifurcation and summary of the preliminary objections on the date scheduled in the Procedural Calendar set forth in Annex B of Procedural Order No. 1, following the submission of the Memorial on the Merits ("**Memorial**") by Fernando Paiz Andrade and Anabella Schloesser de León de Paiz ("**the Paizes**," the "**Claimants**" and, together with the Republic, the "**Parties**").

2. In this arbitration, the Paizes' claims the alleged infringement of the contractual rights of Pacific Solar Energy, S.A. de C.V. ("**Pacific Solar**" or the "**Enterprise**"), a company they allegedly own.[1]

3. The Paizes have chosen to initiate this arbitration against the Republic of Honduras, despite the fact that their claims lack both factual and legal merit.[2] As indicated in its Memorial on the Merits, Claimants essentially seeks payment allegedly owed by the National Electric Energy Company ("**ENEE**") to Pacific Solar Energy in connection with a contract for the purchase of photovoltaic energy,[3] and attempt—albeit unsuccessfully—to persuade the Tribunal that it has a viable claim under the Dominican Republic-Central America-United States Free Trade Agreement ("**CAFTA-DR**" or the "**Treaty**").

4. The Paizes present five claims that purportedly constitute a violation of the Treaty, specifically:

(i) Claimants allege that Honduras violated Article 10.7 of the CAFTA-DR by supposedly being under a threat of expropriation due to a proposed tariff renegotiation.[4]

[1] Ownership Structure Chart for Pacific Solar Energy, S.A. de C.V. (13 July 2023) (**C-027**). *See also* Pacific Solar Energy Share Register (22 August 2024) (**C-073**). Claimant's only proof of ownership in this arbitration is a chart purporting to show their ownership of Pacific Solar Energy, S.A. de C.V.

[2] For greater certainty, Respondent rejects Claimant's factual and legal allegations in its Memorial on the Merits of 20 September 2024 and denies that it has breached any obligation under the CAFTA-DR.

[3] Contract No. 002-2014, Power Purchase Agreement between Empresa Nacional de Energía Eléctrica and Pacific Solar Energy, S.A. de C.V. ("**Contract No. 002-2014**") (16 January 2014) (**C-001**).

[4] Claimants' Memorial on the Merits ("**Memorial on the Merits**") (20 September 2024), ¶ 188.

(ii) Claimants allege that Honduras violated Article 10.5 of the CAFTA-DR by supposedly behaving unfairly and inequitably towards Claimants' investments.[5]

(iii) Claimants invoke Article 10.4 of the CAFTA-DR ("MFN Clause") to import the umbrella clause from the Bilateral Investment Treaties ("**BITs**") between Honduras and Germany, and Honduras and Switzerland. According to the Claimant, this provision allows it to claim unpaid invoices related to the Power Purchase Agreement between Pacific Solar and ENEE.[6]

(iv) Claimants allege that their rights are protected as "Investment Agreements" under Articles 10.28 and 10.16(1)(b)(i)(C) of the Treaty.[7]

(v) Claimants allege that Honduras's conduct is inconsistent with its international commitments on environmental protection under the CAFTA-DR.[8]

5. The Paizes' claims, however, fall outside of Honduras's consent to international investment arbitration and the Tribunal's jurisdiction for several reasons.

6. *First*, the Paizes have not complied with the requirement to exhaust local remedies, which is a precondition for Honduras's consent to ICSID arbitration. *Second*, Ms. Schloesser failed to comply with the mandatory consultation and negotiation requirement before initiating this arbitration. *Third*, the expropriation claim is premature as it is based solely on an alleged, unmaterialized threat of expropriation. *Fourth*, Claimants cannot invoke the Most-Favored-Nation ("**MFN**") treatment to import an umbrella clause from other treaties because the FTA itself excludes MFN obligations concerning procurement made by the State or a state-owned enterprise. *Fifth*, contrary to Claimants' assertion this dispute does not relate to an Investment Agreement.

7. The preliminary objections raised meet all the criteria applied by ICSID tribunals for bifurcating preliminary objections. In light of the above, the Republic requests the Tribunal to bifurcate this proceeding.

[5] Memorial on the Merits, ¶ 189.

6 Memorial on the Merits, ¶ 190.

7 Memorial on the Merits, ¶ 191.

8 Memorial on the Merits, ¶ 192.

8. The arguments that the Republic submits for the Tribunal's consideration are developed in this Request as follows:

- **Section II** presents an overview of the preliminary objections to the Tribunal's jurisdiction.
- **Section III** explains why each of the preliminary objections should be addressed as a preliminary matter.
- **Section IV** presents the Republic's request for relief and reservation of rights.

9. The Republic submits with this Request Documentary Annexes **R-001** to **R-007** and Legal Authorities **RL-001** to **RL-053**.

II. SUMMARY OF HONDURAS'S PRELIMINARY OBJECTIONS

A. Preliminary Objection 1: ICSID has no Jurisdiction because the Republic of Honduras conditioned its Consent to Arbitration on the Prior Exhaustion of Local Remedies by Investors.

10. The Arbitral Tribunal lacks jurisdiction to hear this case because the Republic of Honduras conditioned its consent to ICSID arbitration on the prior exhaustion of local remedies, a condition which Claimants have failed to fulfill.

11. Claimants chose to submit their claim to ICSID under Article 10.16.3 of the CAFTA-DR.[9] This decision by Claimants implies that Honduras would have consented to the submission of the present dispute under the ICSID Convention. The following background information, however, clearly shows that Honduras did not consent to the submission of this dispute to ICSID.

12. According to Article 26 of the Convention, Contracting States may require investors to exhaust domestic remedies as a precondition for initiating arbitration against them. According to this provision:

9 Notice of Arbitration (24 August 2023), ¶ 1.

> A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.[10]

13. This is an uncontested power of any State party to the Convention to preserve the traditional rule of exhaustion of local remedies under customary international law and to avoid being dragged before an international tribunal before its own courts have had an opportunity to rule on the alleged claims.[11]

14. It was precisely in exercise of this prerogative that the Republic of Honduras conditioned its consent to ICSID arbitration at the time of approving and ratifying the ICSID Convention, through Legislative Decree No. 41-88 dated 4 August 1988 (the "**Legislative Decree 41-88**"). The aforementioned approving decree clearly establishes, as a *sine qua non* condition of the consent of the Republic of Honduras, that:

> DECLARATION OF THE REPUBLIC OF HONDURAS. The State of Honduras shall submit to the arbitration and conciliation procedures provided for in the Convention, only when it has previously expressed its consent in writing. **The investor shall exhaust the administrative and judicial channels of the Republic of Honduras, as a prior condition to the implementation of the dispute settlement mechanisms provided for in this Agreement.** In any case submitted to the Tribunal to which the State of Honduras is a Party, the applicable laws shall be those of the Republic of Honduras, and only the natural and legal parties of the States Parties to the Agreement may make use of the procedures provided for in the Agreement.[12]

15. By means of this Legislative Decree, which the Claimants *did not* disclose to this Tribunal and which they omitted in their Request for Arbitration, the Republic of Honduras

[10] International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulation, Rules*, WBG Doc. ICSID/15/3 (June 2022) (**RL-048**), Convention, Art. 26.

[11] C. F. Amerasinghe, "Basis of the Rule" in *Local Remedies in International Law* (2004) (**RL-006**), p. 58 ("the rule results mainly from recognition of the respondent state's sovereignty in what is basically an international dispute"); M.C. Porterfield, "Exhaustion of Local Remedies in Investor-State Dispute Settlement: an idea whose time has come?" 41 *The Yale Journal of International Law Online* (Fall 2015) (**RL-028**), p. 5 ("The central function of the local remedies rule is to protect the sphere of sovereignty that States are entitled to under international law").

[12] Decree on the ICSID Convention, 1988 (Decree 41-88 of 1988) (**R-003**), art. 75 (translation by the Republic) (emphasis added).

expressly opted to preserve the traditional rule under customary international law and to condition its consent to ICSID arbitration to the prior exhaustion of local remedies.[13] Thus, it excluded direct access —without prior exhaustion of local remedies— to such dispute resolution mechanism. As other tribunals have pointed out, "it is a general principle of international law that international courts and tribunals can exercise jurisdiction over a State only with its consent. [...] A presumed consent is not regarded as sufficient, because any restriction upon the independence of a State (not agreed to) cannot be presumed by courts."[14]

16. As is well known, this requirement is a reflection of respect for the sovereignty of States to allow them, precisely, to address through their own courts any alleged illegality of their organs' actions.[15] It would therefore be completely unacceptable for the Republic of Honduras, having explicitly limited and subordinated its consent to this jurisdictional condition, as authorized by Article 26 of the ICSID Convention, to be dragged into this arbitration when that condition has not been fulfilled. In this regard, the Tribunal cannot rely on the ICSID Convention to assume jurisdiction and at the same time ignore the condition established by the Republic of Honduras for access to its dispute resolution mechanism.

17. The Republic of Honduras included this jurisdictional condition —as mentioned above— in its legislation approving the ICSID Convention. The exhaustion of local remedies is

[13] B. Sabahi *et al*. "Exhaustion of Local Remedies," in Investor-State Arbitration (2019) (**RL-040**), pp. 432-433 ("The requirement of exhaustion of local remedies (or local remedies rule) is a longstanding rule of customary international law that was developed in the context of diplomatic protection. Under this rule, where a state commits an act that injures a foreign person, the victim traditionally must exhaust all the effective domestic legal remedies before its home government can espouse its claim in the exercise of diplomatic protection. Exhaustion of local remedies in this sense is a precondition of the admissibility of international claims. The exhaustion of certain local remedies may also be required as a substantive element of some international wrongs, such as denial of justice.") (emphasis in the original).

[14] *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (08 December 2008) (**RL-011**), ¶ 160(3) (emphasis in the original). In the same vein: *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Award (22 December 2017) (**RL-035**), ¶ 148 ("[…] consent cannot be presumed; it must be established by an express manifestation of intent or implicitly by conduct that demonstrates consent. Further, the burden of proving the existence of consent is on the Claimants, as they are the ones asserting jurisdiction.").

[15] C. F. Amerasinghe, "Basis of the Rule" in *Local Remedies in International Law* (2004) (**RL-006**), p. 58 ("the rule results mainly from recognition of the respondent state's sovereignty in what is basically an international dispute."); M.C. Porterfield, "Exhaustion of Local Remedies in Investor-State Dispute Settlement: an idea whose time has come?" 41 *The Yale Journal of International Law Online* (Fall 2015) (**RL-028**), p. 5 ("The central function of the local remedies rule is to protect the sphere of sovereignty that States are entitled to under international law.").

therefore applicable to all arbitration agreements referring to ICSID and involving the Republic of Honduras, whatever the instrument of consent, including, of course, the CAFTA-DR.

18. The failure to comply with this kind of precondition as a matter affecting the consent of the host State and, therefore, the jurisdiction of the Arbitral Tribunal, has been highlighted by numerous tribunals.[16]

19. In this case, the failure to exhaust local remedies is evident and undeniable. Claimants have failed to pursue any local administrative and judicial remedies prior to submitting their dispute to international arbitration. It is not that they have done so unsuccessfully, but rather that they have not even tried.

20. Thus, if Claimants believed that the Republic of Honduras violated their rights by simply promulgating 2022 New Energy Law or because ENEE is seeking a good faith renegotiation, they should have had recourse -- and may still have recourse -- to the judicial courts of Honduras. Claimants could —and should— have appealed or filed an administrative claim

[16] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (02 July 2013) (**RL-022**), ¶ 34 ("The history of the BIT's negotiation and ratification shows that Uruguay deemed domestic litigation requirement to be a critical element of the BIT and an important limitation on the consent to international arbitration."); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (08 December 2008) (**RL-011**), ¶ 145 ("The circumstance that 'waiting periods' are held in some decisions to be 'procedural' rather than imposing a jurisdictional requirement has no bearing in the present case on the characterization of the eighteen-month requirement before the local Courts as a jurisdictional requirement."); P.M. Dupuy, "Preconditions to Arbitration and Consent of States to ICSID Jurisdiction," in *Building International Investment Law: The 50 years of ICSID* (2016) (**RL-030**), p. 227 ("The *Wintershall v. Argentina* Award appears as a warning addressed to the community of investor-State arbitrators to remind them of the limits of their powers in the face of consent to arbitration by sovereign States.") (emphasis in the original); *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case ARB/08/4, Award on Jurisdiction (15 December 2010) (**RL-015**), ¶ 149 ("This Tribunal finds the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period does not constitute, as Claimant and some arbitral tribunals have stated, 'a procedural rule' or a 'directory and procedural' rule which can or cannot be satisfied by the concerned party. To the contrary, it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules."); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (02 June 2010) (**RL-014**), ¶ 315 ("[B]y imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the Treaty effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an *opportunity* to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant has deprived the host State of that opportunity. That suffices to defeat jurisdiction.") (emphasis in the original).

before the respective public institutions and following the procedures established in the Administrative Procedure Law.[17]

21. Only after exhausting the local procedures, and in the event that Claimants had not obtained the protection they expected of their alleged rights, could they have turned to ICSID to initiate the present international arbitration. However, Claimants did nothing of the sort.

22. By virtue of the foregoing, Claimants' claim must be rejected *in limine* as it is evident they have not complied with the requirement of exhaustion of local remedies as a condition to enable ICSID jurisdiction.

B. Preliminary Objection 2: Ms. Schloesser Failed to Comply with the Mandatory Consultation and Negotiation Requirement Before Initiating this Arbitration

23. Honduras has not consented to arbitration with Ms. Schloesser because she failed to comply with the mandatory "Consultation and Negotiation" requirement established in Article 10.15 of the CAFTA-DR before submitting her claims to arbitration.

24. Articles 10.15 and 10.16 of the CAFTA-DR provide as follows:

> In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation. […]
>
> In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation […] the claimant, on its own behalf, may submit [a claim] to arbitration […].[18]

25. The requirement to attempt to resolve a dispute through consultation or negotiation is a mandatory precondition for the submission of a claim to arbitration. Investment tribunals have

[17] Administrative Procedure Act, 1987 (Decree No. 152-87) (**R-002**), arts. 129-145.

[18] Dominican Republic – Central America – United States Free Trade Agreement ("**CAFTA-DR**") (05 August 2004) (**CL-001**), Arts. 10.15, 10.16.

routinely held that similar wording in other treaties entails a mandatory precondition to arbitration.[19]

26. The context of Article 10.15 also confirms that negotiation is a precondition for consent to the submission of a claim to arbitration.[20] The next provision of the CAFTA-DR, Article 10.16., states that a claimant may submit a claim to arbitration "[i]n the event that [it] considers that [the] investment dispute cannot be settled by consultation and negotiation."[21] A claimant cannot determine that "an investment dispute cannot be settled" unless she tries to settle the dispute first. Therefore, Ms. Schloesser was required to attempt to settle this dispute before submitting the Request for Arbitration.

27. In this case, Ms. Schloesser failed to comply with the mandatory consultation and negotiation requirement before initiating this arbitration, as explained below:

- On 22 October 2022, Mr. Paiz, on his own behalf and on behalf of Pacific Solar, submitted a notice of intent under CAFTA-DR.[22] In that notice of intent, his wife, Ms. Schloesser de Paiz, was not mentioned at any point.

[19] *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case ARB/08/4, Award on Jurisdiction (15 December 2010) (**RL-015**), ¶ 149 ("This Tribunal finds the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period does not constitute, as Claimant and some arbitral tribunals have stated, 'a procedural rule' or a 'directory and procedural' rule which can or cannot be satisfied by the concerned party. To the contrary, it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules."). *See also Noble Noble Energy, Inc. and Machalapower Cia. Ltda. v. Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction (05 March 2008) (**RL-010**), ¶ 212 (interpreting the same provision interpreted in *Murphy v. Ecuador*, which mirrors exactly Article 10.15 of the CAFTA-DR , and ruling that "[u]nder the BIT, investment disputes must first be sought to be resolved through consultation and negotiation. Failing such a resolution within six months from the date on which the dispute arose, the investor can invoke the ICSID arbitration clause.").

[20] Vienna Convention on the Law of Treaties ("**VCLT**") (23 May 1969) (**CL-133**), Art. 31(1).

[21] CAFTA-DR (**CL-001**), Art. 10.16.

[22] Notices and Communications from the Paizes to Honduras under DR-CAFTA (10 October 2022–13 February 2023) (**C-012**).

- On 1 February 2023, representatives of Pacific Solar held a meeting with the ENEE, in which, among other things, the notice of intent to submit a claim to international arbitration was tangentially discussed.[23]

- On 24 March 2023, Claimants filed a new Notice of Intent only to add Ms. Schloesser.[24] However, unlike the Notice of Intent from October 2022, the new Notice did not include a request for consultations and negotiations.

- On 24 August 2023, the Claimants submitted their Request for Arbitration.[25] However, no consultations or negotiations were held between State representatives and Ms. Schloesser to attempt to resolve the claim after she submitted her Notice of Intent, as required by the Treaty.[26]

28. Ms. Schloesser's conduct is not simply an omission or an extension of the notice to her person because her husband submitted it.[27] Mr. Paiz's negotiations do not extend to Ms. Schloesser merely because they are allegedly co-owners of Pacific Solar. The only fact is that Ms. Schloesser did not fulfill a requirement that is part of Honduras's consent to arbitration.

29. By failing to attempt to settle the dispute before initiating this arbitration, Ms. Schloesser denied Honduras its right under the CAFTA-DR to have an opportunity to resolve the dispute amicably. In the words of the *Burlington* tribunal, this deprivation of the State's right "suffices to defeat jurisdiction."[28]

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[23] Minutes of the Meeting between Pacific Solar, Ministry of Energy and ENEE (01 February 2023) (**C-216**). Respondent does not concede that such a meeting is sufficient to comply with the consultations and negotiations requirement.

[24] Notices and Communications from the Paizes to Honduras under DR-CAFTA (10 October 2022–13 February 2023) (**C-012**).

[25] Notice of Arbitration (24 August 2023).

[26] Notices and Communications from the Paizes to Honduras under DR-CAFTA (10 October 2022–13 February 2023) (**C-012**). Notably, unlike the Notice of Intent from 22 October 2022, Ms. Schloesser's defective notice does not include a request for consultations and negotiations.

[27] Notices and Communications from the Paizes to Honduras under DR-CAFTA (10 October 2022–13 February 2023) (**C-012**).

[28] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (02 June 2010) (**RL-014**), ¶ 315.

30. Because Ms. Schloesser did not attempt to resolve the dispute by negotiation or conciliation before submitting her claim to arbitration, Honduras's offer to arbitrate the dispute has not been perfected.

C. Preliminary Objection 3: The Tribunal lacks jurisdiction *ratione materiae* to hear Claimants' claim on expropriation because it is premature.

31. The Tribunal lacks jurisdiction because Claimants claim an illegal expropriation which has not occurred. Claimants constantly affirm that they are **under threat** of expropriation,[29] which confirms that no taking or confiscation has taken place. Simultaneously, Claimant alleges that they have suffered an indirect expropriation. However, the Claimants have not been subjected to any measure which could replicate the effects of a direct expropriation. Thus, there is no dispute over which the Tribunal could make a ruling. The Tribunal lacks jurisdiction *ratione materiae* over the claim of expropriation.

32. Article 10.7(1) of the Treaty provides the following:

> Article 10.7: Expropriation and Compensation
>
> 1. **No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization** ("expropriation"), except:

[29] Memorial on the Merits, ¶ 5 ("Two years after the New Energy Law was enacted, at present, the Government is […] maintaining Pacific Solar in a state of uncertainty with respect to its key rights under the Agreements, **under threat of expropriation**, without having provided nor offered any compensation for the **threatened acquisition of the Plant**."), ¶ 15 ("Unfortunately, Honduras upended the stability when it enacted the 2022 New Energy Law in May 2022, mandating the renegotiation of the PPAs **under threat of expropriation**."), ¶ 16 ("In addition to the **threat of expropriation** […]."), ¶ 28 ("[…] mandating the 'renegotiations' of the PPA under the **threat of expropriation**."), ¶ 93 ("Honduras, on the other hand, implemented the New Energy Law in May 2022, mandating the renegotiation of the PPAs **under threat of expropriation**."), ¶ 98 ("[…] conditions being imposed upon Pacific Solar **under the threat of forced acquisition by the State**."), ¶ 115 ("[…] the renewable energy sector expressed concern at the **threat of 'nationalization, confiscation of assets, and expropriation**.'"), ¶ 182 ("[…] Honduras repudiated its obligations under the Agreements, while **threatening to expropriate Pacific Solar's assets** […]."), ¶ 189 ("Honduras has also unilaterally-imposed a 'renegotiation' of the PPA **under threats of expropriation or State acquisition of the Plant**."), ¶ 207 ("[…] Claimant's investments in Pacific Solar, all **under the threat of Honduras's direct taking of the Plant**."), ¶ 212 ("[…] Respondent's refusal to pay the debts owed to Pacific Solar and **threats of expropriation**."), ¶ 218 ("[…] Claimants' investments in Pacific Solar remain **under the threat of direct expropriation**."), ¶ 221 ("[…] carried out in parallel to a forced 'renegotiation' of the PPA and **under the threat of direct expropriation of the Plant**."), ¶ 232 ("[…] predictable revenue streams under the PPA and **under the threat of expropriation of the Plant** […]."), ¶ 256 ("[…] unilaterally imposing the 'renegotiation' of the PPA **under threats of expropriation or State acquisition**."), ¶ 312 ("[…] unilaterally imposing on Pacific Solar the 'renegotiation' of the PPA **under the threat of expropriation** […]."), ¶ 351 ("[…] and its thinly disguised **threat of expropriation** […].").

(a) for a public purpose;

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and

(d) in accordance with due process of law and Article 10.5.[30]

33. Additionally, the previous article must be interpreted along with Annex 10-C of the Treaty, which states that:

> 3. Article 10.7.1 addresses two situations. The first is **direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.**
>
> 4. The second situation addressed by Article 10.7.1 is **indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation** without formal transfer of title or outright seizure.[31]

34. Considering the provisions of the Treaty, in order to commit an expropriation, the State must have taken a measure, or at the least a series of actions. As established in *Achmea v. Slovakia (II)*, it has been confirmed by several arbitral tribunals that they **will not assume jurisdiction in cases where the expropriation claim is premature**. The claim of expropriation is only ripe and actionable once the expropriatory measure has occurred.[32]

35. In the context of article 1110 of NAFTA, which is similar to article 10.7 of CAFTA-DR, the tribunal in the *Glamis Gold* case determined that the Contracting Parties conceived a ripeness requirement in that a claimant needs to have incurred loss or damage in order to bring a

[30] CAFTA-DR (**CL-001**), Article 10.7(1)

[31] CAFTA-DR (**CL-001**), Annex 10-C.

[32] *Achmea B.V. v. The Slovak Republic (II)*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility (20 May 2014) (**RL-026**), ¶ 233 ("A series of arbitral decisions confirm that tribunals have not been willing to uphold jurisdiction in cases where the expropriation claim was premature. In *Mariposa Development Company v. Panama*, the tribunal held, as a matter of 'practical common sense,' that an expropriation claim only becomes ripe and actionable once the expropriation had been enforced.") (emphasis in the original).

claim for compensation and that mere threats of expropriation are not sufficient to make a claim ripe.[33]

36. The standard laid out by the *Glamis Gold* tribunal can be perfectly applied in this case. Honduras has not taken any measure with the purpose of directly taking possession of the Paizes alleged investment. Likewise, Honduras has not taken any indirect action against their alleged investment which has "substantially deprive[d] an investor of the use and enjoyment of its investment."[34] The ENEE has merely initiated a process of renegotiating the Contract No. 002-2014 with Pacific Solar, as they have with other energy generators.[35] Notwithstanding, the ENEE has continued executing the contract with Pacific Solar, and the latter has continued providing electric energy for which it has been receiving a weekly installment, to which the Claimants admit, although with the unnecessary characterization of "sporadic" and "insufficient."[36]

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[33] *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award (08 June 2009) (**CL-125**), ¶ 328 ("**In the determination of whether the Tribunal has subject matter jurisdiction to decide the Article 1110 claims before it**, the Tribunal begins from the premise that a finding of expropriation requires that a governmental act has breached an obligation under Chapter 11 and such breach has resulted in loss or damage. NAFTA Article 1117(1) establishes standing for an investor of a State Party to bring a claim for harm done to its subsidiary in the territory of another State Party under the investment provisions of Chapter 11. Through the language of Article 1117(1), the State Parties conceived of a ripeness requirement in that a **claimant needs to *have* incurred loss or damage in order to bring a claim for compensation** under Article 1120. Claims only arise under NAFTA Article 1110 when actual confiscation follows, and thus **mere threats of expropriation or nationalization are not sufficient to make such a claim ripe**; for an Article 1110 claim to be ripe, **the governmental act must have directly or indirectly taken a property interest resulting in actual present harm to an investor**.").

[34] *Kornikom EOOD v. Republic of Serbia*, ICSID Case No. ARB/19/12, Award (20 September 2023) (**RL-051**), ¶ 390.

[35] Tweet of Min. Erick Tejada Carbajal (@carbajal_tejada) *disponible en* https://x.com/carbajal_tejada/status/1786182497480364478 (03 May 2024) (**R-004**) ("[…] we will be delivering to the Clerk Office of the Congress, the first package of 18 amendments resulting from the process of contract renegotiation.") (translation by the Republic); Tweet of Empresa Nacional de Energía Eléctrica (@EneeHnOficial) *disponible en* https://x.com/EneeHnOficial/status/1787568113086509334 (06 May 2024) (**R-005**) ("[…] This past two years in which we have been negotiating, the companies presented their proposals and by mutual agreement, we arrived at the provisions that will be delivered to Congress.") (translation by the Republic); Tweet of Empresa Nacional de Energía Eléctrica (@EneeHnOficial), *disponible en* https://x.com/EneeHnOficial/status/1787904546238325136 (07 May 2024) (**R-006**) ("The approval of these 18 amendments at the National Congress will represent a saving of L30 billion, which can be redirected to new projects of public investment in the electric subsector.") (translation by the Republic).

[36] Memorial on the Merits, ¶ 22 ("[…] a debt that continues to grow— notwithstanding sporadic and incomplete payments by ENEE […]."), ¶ 94 ("[…] a debt that continues to grow— notwithstanding sporadic and incomplete payments by ENEE. […] insufficiency of ENEE's sporadic payments […]."), ¶ 129 ("[…] ENEE's sporadic payments […]."), ¶ 146 ("[…] notwithstanding sporadic, partial payments by ENEE."), ¶ 150 ("[…] the Government is only making sporadic and incomplete payments to Pacific Solar […]."), ¶ 209 ("While ENEE has made sporadic payments since […]."), ¶ 219 ("[…] insufficiency of ENEE's sporadic payments […].").

37. Claimants' arguments are incoherent and contradictory. In their Memorial, the Paizes claim that they have been indirectly expropriated and are under threat of direct expropriation.[37] Both situations cannot coexist, Claimants cannot characterize alleged government conduct as both direct and indirect expropriation.[38] It is undisputed that "**[a]n act of expropriation**, by its nature, cannot itself be a continuing breach, given that **it only happens at the moment when there is a permanent deprivation of property**,"[39] and in the case of an indirect expropriation, **when an economic deprivation occurs permanently**.[40]

38. The Paizes have already admitted that their alleged investment is **under threat** of nationalization or direct expropriation,[41] which proves that the claim of expropriation is premature. As established in the *Achmea v. Slovakia (II)*, it is a "general principle […] that an expropriation **claim only becomes ripe once the taking has occurred**."[42]

39. On the issue of indirect expropriation, the Claimants point to the 2022 New Energy Law as the root of all their problems.[43] The Paizes claim that the 2022 New Energy Law orders

[37] Memorial on the Merits, ¶ 218 ("Having already suffered an indirect expropriation of their investments, Claimants' investments in Pacific Solar remain under the threat of a direct expropriation.").

[38] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007) (**CL-055**), ¶ 250 ("In fact, **if a given measure qualifies as a form of direct expropriation, it cannot at the same time qualify as an indirect expropriation**, as their nature and extent are different. The converse is also true."). *See also Orazul International España Holdings S.L. v. Argentine Republic*, ICSID Case No. ARB/19/25, Award (14 December 2023) (**RL-052**), ¶ 935 ("[…] a direct expropriation is characterized by the forcible transfer of title in favor of the host State and may also include situations of outright seizure. An indirect expropriation, in contrast, is characterized by an equivalent interference without the forcible transfer of title or an outright seizure. This explains why **there cannot be at the same time a direct and an indirect expropriation with regard to the same investment**.") (emphasis added).

[39] S. D. Murphy, *Temporal Issues Relating to BIT Dispute Resolution*, ICSID Rev. 2022 (**RL-046**), p. 30 ("An act of expropriation, by its nature, cannot itself be a continuing breach, given that it only happens at the moment when there is a permanent deprivation of property—no sooner and no later.") (emphasis added).

[40] *Leopoldo Castillo Bozo v. Republic of Panama*, PCA Case No. 2019-40, Final Award (08 November 2022) (**RL-049**), ¶ 691 ("[…] the expropriation also occurs when a governmental authority, even without a transfer of ownership, destroys an investment, causing **substantial deprivation of the economic use and enjoyment of property rights** (or part thereof) by the investor, **with permanent effects**.") (emphasis added) (translation by the Republic).

[41] Memorial on the Merits, ¶¶ 5, 15, 28, 98, 115, 182, 189, 207, 212, 218, 221, 232, 256, 312, 351.

[42] *Achmea B.V. v. The Slovak Republic (II)*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility (20 May 2014) (**RL-026**), ¶ 234 (emphasis added).

[43] Memorial on the Merits, ¶ 208 ("With the enactment of the 2022 New Energy Law, Honduras has essentially rendered the Agreements ineffective […].").

the State to unilaterally terminate the Contract and acquire Pacific Solar's assets, if a renegotiation is not achieved.[44] This is simply incorrect.

40. Article 5 of the 2022 New Energy Law provides that:

> "ARTICLE 5.- CONTRACTS FOR ELECTRIC ENERGY GENERATED FROM HYDRO, SOLAR AND WIND TECHNOLOGIES. The Empresa Nacional de Energía Eléctrica (ENEE) is hereby authorized to, through the Board of Directors and the Management, **based on the national legislation and the contractual clauses, to raise under its prerogatives and faculties**, and for reasons of public interest, the **renegotiation of contracts and prices**. […] If renegotiation is not possible, **it is authorized to raise the termination of the contractual relationship and the acquisition by the State, prior to the payment of a fair price**."[45]

41. A proper reading of the law shows that the 2022 New Energy Law is simply giving an instruction to the ENEEto request the renegotiation of the energy contracts, which logically, requires the consent of both parties.

42. Even if a renegotiation of energy prices was not achieved, the 2022 New Energy Law **only authorizes the ENNE to raise, *i.e.* propose**,[46] the possible termination of the contract and to acquire or purchase the electric plant. It is not an authorization to expropriate under Honduran law, such procedure is regulated under Decree No. 113-1914,[47] much less a threat of expropriation or an action depriving the alleged investment of its economic value.

43. In conclusion, Claimants' expropriation claim is premature given that Honduras has not taken any concrete action that has resulted in the effective loss of Claimants property or its

[44] Memorial on the Merits, ¶ 15 ("The 2022 New Energy Law mandated the 'termination' of Honduras's contractual relationship with generators, including Pacific Solar, and the 'State acquisition' of the generator's assets […].").

[45] Special Law to Guarantee the Service of Electric Energy as a Public Good of National Security and an Economic and Social Human Right (Decree No. 46-2022) (**C-010**), Art. 5 (emphasis added) (translation by the Republic).

[46] According to the Dictionary of the Spanish Language organized by the Royal Spanish Academy, the word "plantear" in Spanish is a synonym of the following verbs: project, program, expose, present, propose and suggest. *See* Real Academia Española, Diccionario de la lengua española, "Plantear," *available at* https://dle.rae.es/plantear?m=form (last access: 21 October 2024) (**R-007**) (translation by the Republic).

[47] Compulsory Expropriation Act, 1914 (Decree No. 113 of 1914) (**R-001**).

control over it.[48] Also, since the Claimants have not demonstrated or even alleged a permanent economic injury, save for pending invoices which the ENEE has in fact been paying, the Tribunal would be unnecessarily burdened with the task of analyzing arguments on the merits and quantum from both parties, which would unnecessarily increase the costs of this arbitration. Respondent's "measures" amounting to expropriation are, in essence, **i)** an alleged delay in payment; **ii)** a process to renegotiate the Contract which has been requested by their contractual counter-party, the ENEE; and **iii)** an acquisition of their energy plant by the State which has not happened. Those are the three legs in which Claimants' expropriation argument stand on and they all fail. The Tribunal must therefore declare that it lacks jurisdiction to hear this claim.

D. Preliminary Objection 4: The Tribunal lacks jurisdiction *ratione voluntatis* to hear Claimants' claim on the alleged violation of Most-Favored Nation ("MFN") treatment.

44. The Tribunal lacks jurisdiction *ratione voluntatis* regarding the MFN claim because **i)** Claimant cannot import rights that are not provided for in the Treaty and **ii**) the CAFTA-DR excludes the application of the MFN obligation as it relates to procurement made by the State. Claimants are thus barred from bringing a claim for violation of MFN.

1. Claimants cannot benefit from an umbrella clause because it is not a right provided by the CAFTA-DR.

45. Claimants' attempt to import an umbrella clause from the Honduras-Switzerland BIT and the Honduras-Germany BIT must fail because the MFN clause of a treaty cannot be used to import a right or standard that is not explicitly included within its provisions.

46. At most, the MFN clause of a treaty can only be used to import rights or standards of protection that are more favorable, provided that those rights or standards are already established within the treaty containing the MFN clause. As seen in *Teinver v. Argentine Republic*, if the parties had intended to include umbrella clauses in the Treaty, they would have done so.[49]

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[48] *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility (30 January 2018) (**RL-036**), ¶ 161 ("The gist of an expropriation claim is the actual loss of property or (in the case of conduct tantamount to an expropriation) of control over it.").

[49] *Teinver S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award (21 July 2017) (**CL-102**), ¶ 884 ("The Tribunal accepts that the parties to the Treaty were in all likelihood aware of the existence of umbrella clauses and if they had intended to include such a clause in the Treaty, they would have done so.") *See also Orazul International*

47. As McLachlan, Shore, and Weiniger explain:

> It is the subject matter scope of the treaty containing the MFN clause that defines the outer boundaries of the operation of the clause. It is essential to ensure that the provisions relied upon as constituting the more favourable treatment are properly applicable and will not have the effect of fundamentally subverting the carefully negotiated balance of the investment treaty being applied.[50]

48. In the same vein, the tribunal in *Hochtief v. Argentina* emphasized:

> [T]he MFN clause stipulates how investors must be treated when they are exercising the rights given to them under the BIT but does not purport to give them any further rights in addition to those given to them under the BIT.
>
> **The MFN clause is not a *renvoi* to a range of totally distinct sources and systems of rights and duties: it is a principle applicable to the exercise of rights and duties that are actually secured by the BIT in which the MFN clause is found**.[51]

49. The International Law Commission has observed that an MFN clause "can only operate in regard to the subject-matter which the two States had in mind when they inserted the clause in their treaty."[52] Thus MFN clauses "should not be interpreted or applied to create new causes of action beyond those to which consent to arbitrate has been given by the Parties."[53]

España Holdings S.L. v. Argentine Republic, ICSID Case No. ARB/19/25, Award (14 December 2023) (**RL-052**), ¶ 999.

[50] C. McLachlan *et al*., "Substantive Rights" in *International Investment Arbitration: Substantive Principles* (2017) (**RL-034**), p. 346, ¶ 7.313 (emphasis added).

[51] *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 October 2011) (**RL-016**), ¶¶ 79, 81.

[52] International Law Commission, "Draft Articles on Most-Favoured-Nation Clauses with Commentaries" in *Yearbook of the International Law Commission* (Vol. II, Part Two) (1978) (**RL-002**), p. 27, Commentary (1) to articles 9 and 10. *See also* Lord McNair, "Most-Favoured-Nation Clauses" in *The Law of Treaties* (1986) (**RL-003**), p. 287 ("The reason, which seems to rest on the common intention of the parties, is that the clause can only operate in regard to the subject-matter which the two States had in mind when they inserted the clause in their treaty.").

[53] *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent's Objection under Arbitration Rule 41(5) (16 January 2013) (**RL-019**), ¶ 73.

50. As seen *supra*, an MFN clause is limited to enhance rights or substantive standards of protection that are already included in the Treaty and thus Claimants' "cannot use th[e] MFN clause to introduce into the Treaty completely new substantive rights."[54]

51. For these reasons, importing the umbrella clause of other treaties would impose on the Treaty Parties obligations that they never contemplated when agreeing to the CAFTA-DR. It would also imply creating jurisdiction where it was never contemplated by the Treaty Parties.

2. Claimants' MFN claim falls within the carve-out provision established by Article 10.13(5) of the Treaty.

52. In any case, Claimants are barred from brining an MFN claim since the dispute relates to procurement made by the State of Honduras, which the Treaty specifically excludes from the application of the MFN obligation.

53. Article 10.4 of the Treaty provides the following:

> Article 10.4: Most-Favored-Nation Treatment
>
> Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[55]

54. Article 10.13(5) of the Treaty establishes the following:

> Article 10.13: Non-Conforming Measures

[54] *Sergei Paushok et al. v. Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 April 2011) (**CL-096**), ¶ 570.

[55] CAFTA-DR (**CL-001**), Art. 10.4.

> […]
>
> Articles 10.3, **10.4**, and 10.10 do not apply to:
>
> **(a) procurement**; or
>
> (b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.[56]

55. The CAFTA-DR defines procurement under Article 2.1:

> Article 2.1: Definitions of General Application
>
> […]
>
> "**procurement means 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.[57]

56. As established by the tribunal in *ADF v. United States of America*, analyzing a similar carve-out provided in Article 1108(7)(a) of NAFTA, Honduras has the right to invoke the exception contained in Article 10.13(5) of the Treaty in order to exclude the application of MFN treatment in this case.[58] In accordance with well-established principles of treaty interpretation, which are codified in the Vienna Convention, a treaty must "be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[59]

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[56] CAFTA-DR (**CL-001**), Art. 10.13(5) (emphasis added).

[57] CAFTA-DR (**CL-001**), Art. 2.1 (emphasis added).

[58] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (09 January 2003) (**CL-010**), ¶ 196 ("Assuming, once more, for purposes of argument merely, that the U.S.- Albania and U.S.-Estonia treaties do provide for better treatment for Albanian and Estonian investors and their investments in the United States, […] in any event, the Respondent is entitled to the defense provided by NAFTA Article 1108(7)(a) which, as noted earlier in some detail, excludes the application of Article 1103 in a case (like the instant one) involving **governmental procurement** by a Party.") (emphasis added).

[59] VCLT (**CL-133**), Art. 31.

57. In the present matter, the Contracting States to the CAFTA-DR have made an express carve-out of the MFN treatment, restricting its scope of application. This carve-out affects the jurisdiction of the tribunal and, after it has verified that the alleged violation of MFN relates to procurement, it should thus declare itself without jurisdiction.[60] In lieu of the provisions of the Treaty, there are three simple requirements to determine that there has been procurement:

(i) The acquisition must be made by the government;

(ii) The government must acquire goods or services; and,

(iii)Said goods or services must be obtained for governmental purposes.

58. *Firstly*, the ENEE is the national electricity company of Honduras. It is constituted as an autonomous organization of public service and is considered an entity of the State.[61] Moreover, the Contract No. 002-2014 is governed by the legislation of Honduras, specifically the Law of Government Procurement and its Regulations.[62] Thus, there is no question that a procurement carried out by the ENEE constitutes procurement on behalf of the government of Honduras.

59. *Secondly*, the Paizes' claim can be characterized as a supposed alleged breach of Contract No. 002-2014 by ENEE. The Contract provides that its object is the supply of electric energy to the ENEE, and conversely, that ENEE shall purchase the energy generated by the Plant,[63] which allegedly belongs to the Claimants. Clearly, \ENEE is thus acquiring a good.

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[60] *Mercer International Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award (06 March 2018) (**RL-038**), ¶ 6.50 ("The Tribunal […] decides that it has no jurisdiction over the Claimant's claims under NAFTA Articles 1102 and 1103 insofar as they concern […] contractual terms in the 2009 EPA […] the Tribunal […] accepts the Respondent's jurisdictional objection under NAFTA Article 1108(7)(a).").

[61] Empresa Nacional de Energía Eléctrica Constitutive Act, 1957 (Decree No. 48 of 1957) (**C-006**), Art. 1 ("An autonomous public service organization is hereby created, with its own personality, legal capacity and patrimony, of indefinite duration, to be called "Empresa Nacional de Energía Eléctrica," and which shall be governed by the present law, its regulations, and in all that is not provided for, by the other applicable laws of the country.") (our translation).

[62] Contract No. 002-2014 (**C-001**) Clause 18.3 ("For that which is not provided for in this Contract, the relationship between the Parties shall be governed by the applicable Honduran legislation. Particularly, it shall be governed by the Law of Government Procurement and its Regulations…") (our translation).

[63] Contract No. 002-2014 (**C-001**), Clause 2.1 ("The purpose of this contract is the supply of energy and power by the SELLER to the BUYER during the Term of the Contract. As stipulated in this Contract, the BUYER shall purchase all the electric energy and power generated by the Plant and which is delivered, measured and billed by the SELLER.") (our translation).

60. *Thirdly*, the electricity acquired by the ENEE is later distributed to the citizens of Honduras. It cannot be disputed that the purchase of electricity by the ENEE includes a governmental purpose.[64]

61. For the foregoing reasons, it is clear that the Contract constitutes public procurement, by which ENEE acquires electricity which is later distributed to the population of Honduras. It therefore falls within the MFN carve-out provided in the Treaty.[65]

62. The Tribunal must therefore declare that it lacks jurisdiction to hear the Claimants' claim on MFN treatment given that the Contracting States to the Treaty have opted to exclude the application of this standard as it relates to procurement by a Contracting State. In the present matter, this claim fits perfectly into this exception, as Pacific Solar is claiming the protection of contractual obligations regarding the sale of electricity via government procurement made by ENEE, and Honduran State-owned entity.

E. Preliminary Objection 5: The Tribunal lacks jurisdiction *ratione materiae* because this dispute does not relate to an Investment Agreement

63. Confronted with insurmountable jurisdictional barriers to their claims under the Treaty, as demonstrated above, Claimants now attempt to craft a claim based on the existence of an alleged "Investment Agreement" purportedly breached by Honduras. However, this tactic cannot succeed. The Claimants' reliance on such an agreement is fundamentally flawed and unsupported by the facts and the applicable law.

64. Article 10.28 of CAFTA-DR defines an Investment Agreement as follows:[66]

> [An] investment agreement means a written agreement that takes effect on or after the date of entry into force of this Agreement

[64] *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award (24 March 2016) (**RL-031**), ¶ 448 ("On the basis of this description, the Tribunal comes to the conclusion that the FIT Program constitutes "procurement." By way of the FIT Program, the Government of Ontario purchases electricity through the OPA for the use of and for the ultimate benefit of the people of Ontario.").

[65] *United Parcel Service of America, Inc. (II) v. Government of Canada*, Award on the Merits (11 June 2007) (**RL-009**), ¶¶ 135-136 ("Having analyzed the PIA […] we are of the view that the PIA is clearly a procurement contract under which Canada Post performs services for Customs for a fee. As such, the PIA falls within the procurement exception of article 1108(7)(a) and the Tribunal so finds.").

[66] CAFTA-DR (**CL-001**), Art. 10.28.

> between a national authority of a Party and a covered investment or an investor of another Party that grants the covered investment or investor rights:
>
> (a) with respect to natural resources or other assets that a national authority controls; and
>
> (b) upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself.

65. Footnote 12 established what written agreement means:[67]

> "Written agreement" refers to an agreement in writing, **executed by both parties**, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 10.22.2. For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity or a decree, order, or judgment; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.

66. Both CAFTA-DR and consistent arbitral jurisprudence, including cases like *Duke Energy v. Ecuador* and *Burlington Resources v. Ecuador*, impose strict limitations on what constitutes an Investment Agreement.[68]In Duke Energy the Tribunal held that "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."[69]

67. In this case, Claimants attempt to argue that the PPA, the State Guarantee and the Operation Agreement constitute an Investment Agreement under CAFTA-DR is both factually and

[67] CAFTA-DR (**CL-001**), note 12 (emphasis added).

[68] *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) (**CL-042**), ¶¶ 182-183; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (02 June 2010) (**RL-014**), ¶ 234.

[69] *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) (**CL-042**), ¶¶ 182-183 ("an investment agreement has to be one that 'is between a State Party and a national or company of the other State Party.' In this case, the PPAs were entered into by INECEL – a state-owned entity – and Electroquil, a company incorporated in Ecuador that, at the time of subscription of the Agreements, was not owned by foreign investors. It appears therefore that, for the purpose of Article VI(1)(a) – as required by Article X(2)(c) – the PPAs cannot be considered as investment agreements."), ¶ 186 ("Duke Energy did not sign the PPAs nor did it acquire any obligations under their terms.").

legally baseless. The so-called Agreements, neither individually nor collectively, can be considered an Investment Agreement:

68. *First*, the Paizes themselves are not parties to the alleged Investment Agreement. The Treaty itself requires the Investment Agreement to be "executed by both parties." As explained, it is well-established in jurisprudence that "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."[70] Here, the Agreements were signed between Pacific Solar and different State entities.[71] This alone disqualifies the PPA, the State Guarantee and the Operation Agreement from being considered an Investment Agreement under Article 10.28. Moreover, it reveals that the Paizes did not assume any obligation under those instruments, as required by the Treaty.

69. *Second*, Claimants concede that they only became involved after Pacific Solar had already entered into the contract with ENEE.[72] Their post-facto involvement did not make them the direct parties to the contract.

70. *Third*, the so-called Agreements are part of a commercial contract for the purchase and sale of electricity, not a concession agreement or an agreement granting rights over natural

[70] R. Dolzer & C. Schreuer, "Investment Contracts" in *Principles of International Investment Law* (2012) (**RL-017**), p. 80.

[71] Contract No. 002-2014 (**C-001**); ("We, the EMPRESA NACIONAL DE ENERGÍA ELÉCTRICA, a decentralized Institution of the State of Honduras, created by Decree Law No. 48 of February 20, 1957 […], who hereinafter will be referred to as the PURCHASER, and Pacific Solar Energy, S.A. de C.V., PS ENERGY, a company constituted under the laws of the Republic, […] hereinafter referred to as the SELLER.") Support Agreement and Guarantee of Solidarity of the State of Honduras for the fulfillment of the Contract of Supply, between Empresa Nacional de Energía Eléctrica and Pacific Solar Energy Contract No. 002-2014 (Decree No. 113-2014) (19 November 2014) (**C-002**) ("ARTICLE 1.- To approve in each and every one of its parts the SUPPORT AND SOLIDARITY the SOLIDARITY SUPPORT AND GUARANTEE AGREEMENT OF THE STATE OF HONDURAS FOR THE FULFILLMENT OF THE CONTRACT OF SUPPLY CONTRACT, BETWEEN THE NATIONAL COMPANY DE ENERGÍA ELÉCTRICA AND Pacific Solar Energy, S.A. de C.V. CONTRACT 002-2014."); Operations Contract between Pacific Solar and the Ministry of Natural Resources and Environment of Honduras (Decree No. 109-2015) (26 October 2015) (**C-003**) ("ARTICLE 1.- To approve in each and every one of its parts the OPERATION CONTRACT FOR THE GENERATION, TRANSMISSION AND COMMERCIALIZATION OF ELECTRIC ENERGY, for the facilities of the NACAOME I Project, GENERATION OF ELECTRIC ENERGY WITH SOLAR SOURCE, located in the Municipality of Nacaome, Department of Valle, sent by the Executive Power through the Secretary of State in the Offices of Energy, Natural Resources, Environment and Mines, between Engineer José Antonio Galdámes Fuentes, Secretary of State in the Offices of Energy, Natural Resources, Environment and Mines and Engineer Karla María Ramos Andino, representative of the Mercantile Society PACIFIC SOLAR ENERGY, S.A. DE C.V.").

[72] Witness Statement of Fernando Paiz (21 September 2024), ¶¶ 11-17.

resources or state assets.[73] CAFTA-DR's definition of an Investment Agreement requires the agreement to involve strategic state assets or resources.[74] The sale of electricity through PPAs does not meet this standard.

71. As emphasized by the relevant doctrine when assessing similar provisions in US Treaties:

> "The intent is to exclude agreements arising from regulatory activities, such as rulings, closing agreements with respect to tax, and agreements that arise out of judicial or administrative proceedings, such as consent decrees."[75]

72. This clear doctrinal interpretation directly undermines the Claimants' attempt to elevate the so-called Agreements to the level of an Investment Agreement. Here, Claimants' argument that the PPA, the State Guarantee and the Operation Agreement qualify as an Investment Agreement is not only legally unsustainable but also contrived in an effort to sidestep the jurisdictional limitations of this Tribunal. The so called "Agreements" do not meet the clear and narrow definition of an Investment Agreement under CAFTA-DR.

73. Therefore, the Tribunal lacks jurisdiction *ratione materiae* over this claim, and it must be dismissed in its entirety.

III. THE TRIBUNAL SHOULD RULE ON HONDURAS'S OBJECTIONS AS A PRELIMINARY MATTER

74. The ICSID Convention allows the Tribunal to address jurisdictional issues as a preliminary question, separate from the merits of the dispute. Article 41(2) of the ICSID

[73] *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) (**CL-042**), ¶182-183 ("an investment agreement has to be one that 'is between a State Party and a national or company of the other State Party.' In this case, the PPAs were entered into by INECEL – a state-owned entity – and Electroquil, a company incorporated in Ecuador that, at the time of subscription of the Agreements, was not owned by foreign investors. It appears therefore that, for the purpose of Article VI(1)(a) – as required by Article X(2)(c) – the PPAs cannot be considered as investment agreements."), ¶ 186 ("Duke Energy did not sign the PPAs nor did it acquire any obligations under their terms.").

[74] CAFTA-DR (**CL-001**), Art. 10.28 ([A] investment agreement means a written agreement … with respect to natural resources or other assets that a national authority controls.").

[75] K. J. Vandevelde, "The Scope of BIT Protections" in *U.S. International Investment Agreements* (2009) (**RL-012**), p. 173.

Convention grants the Tribunal the authority to examine jurisdictional objections as a preliminary matter, distinct from the substantive merits of the dispute. It provides that:[76]

> (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

75. This provision is complemented by Rules 42(6) and 43(4) of the 2022 ICSID Arbitration Rules, granting the Tribunal discretionary authority to bifurcate the proceedings into distinct phases, either at the request of a party or at its own initiative:[77]

> (6) The Tribunal may at any time on its own initiative decide whether a question should be addressed in a separate phase of the proceeding.
>
> (4) The Tribunal may address a preliminary objection in a separate phase of the proceeding or join the objection to the merits. It may do so upon request of a party pursuant to Rule 44 or at any time on its own initiative, in accordance with the procedure in Rule 44(2)-(4).

76. Bifurcation is "standard procedure" in ICSID arbitration.[78] International investment tribunals routinely bifurcate proceedings to address jurisdictional and admissibility objections as preliminary matters.[79]

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[76] International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulation, Rules*, WBG Doc. ICSID/15/3 (June 2022) (**RL-048**), Convention, Art. 41(2).

[77] International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulation, Rules*, WBG Doc. ICSID/15/3 (June 2022) (**RL-048**), Arbitration Rules, Arts. 42(6), 43(4).

[78] C. Scheuer *et al*., "Article 41" in *The ICSID Convention: A Commentary* (2009) (**RL-013**), ¶ 77 ("In the practice of ICSID tribunals, treatment of jurisdictional issues as preliminary questions is standard procedure."); A. Carlevaris, "Preliminary Matters: Objections, Bifurcation, Request for Provisional Measures," in Litigating International Investment Disputes : A Practitioner's Guide (2014) (**RL-024**), p. 186 (noting that "it is still common practice for ICSID tribunals to treat jurisdictional objections as preliminary questions, and to suspend the proceedings on the merits pending a decision on jurisdiction").

[79] *See* N. Blackaby *et al*, *Redfern and Hunter on International Arbitration* (2023) (**RL-050**), ¶ 652.

77. The criteria to determine the bifurcation of proceedings was prominently defined in *Glamis Gold Ltd. v. United States of America*[80] and then reiterated and developed by numerous tribunals,[81] including those in *Phillip Morris v. Australia*,[82] *Sastre and others v. Mexico*,[83] *Lighthouse v. Timor-Leste*,[84] *Lee-Chin v. Dominican Republic*,[85] *Suffolk v. Portugal*,[86] and *A11Y v. Czech Republic*.[87]

78. In line with these decisions, Article 44(2) of the 2022 ICSID Arbitration Rules provides that, when deciding whether to bifurcate the proceeding, the Tribunal shall consider all relevant circumstances, including whether:[88]

> (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.

79. To determine whether bifurcation is warranted, the Tribunal must assess: (i) whether bifurcating the proceedings will likely result in time and resource savings; (ii) whether

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[80] *See Glamis Gold, Ltd., v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised) (31 May 2005) (**RL-007**), ¶ 12(c).

[81] *See* C. M. Esteban, "Bifurcation of ICSID Awards and Reconsideration of Interlocutory Decisions: The Fine Balance of Procedural Economy," 87 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 1 (2021) (**RL-045**), pp. 38-39.

[82] *See Philip Morris Asia Ltd. v. Commonwealth of Australia*, Procedural Order No. 8 regarding Decision on Bifurcation (14 April 2014) (**RL-025**), ¶ 109.

[83] *See Carlos Sastre and others v. United Mexican States*, ICSID Case No. UNCT/20/2, Procedural Order No. 2 (Decision on Bifurcation) (13 August 2020) (**RL-044**), ¶ 39.

[84] See *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Procedural Order No. 3 (Bifurcation) (08 July 2016) (**RL-032**), ¶ 20.

[85] *Michael Anthony Lee-Chin v. Dominican Republic*, ICSID Case No. UNCT/18/3, Procedural Order No. 2 (Decision on Bifurcation) (06 March 2019) (**RL-042**), ¶ 44.

[86] *Suffolk (Mauritius) Limited et al. v. Portuguese Republic*, ICSID Case No. ARB/22/28, Procedural Order No. 3 (Respondent's Request for Bifurcation) (01 March 2024) (**RL-053**), ¶ 42.

[87] *See A11Y LTD. v. Czech Republic*, ICSID Case No. UNCT/15/1, Decision on Bifurcation (05 October 2015) (**RL-029**), ¶ 56.

[88] International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulation, Rules*, WBG Doc. ICSID/15/3 (June 2022) (**RL-048**), Arbitration Rules, Art. 44(2).

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.

80. In a case involving a sovereign State, bifurcation further serves to guarantee that the Tribunal adjudicates only those disputes where consent for arbitration has been given by the State. Indeed, "[it is] a basic rule of international law and a principle of international relations that a State is not obliged to give an account of itself on issues of merits before an international tribunal which lacks jurisdiction or whose jurisdiction has not yet been established."[89] Guided by this "uncontroverted principle of general international law,"[90] the tribunal in *Southern Pacific Properties v. Egypt*, stressed that there is no presumption of jurisdiction, "particularly where a sovereign State is involved," and that the tribunal must examine the objections raised by the respondent State "with meticulous care, bearing in mind that jurisdiction in the present case exists only insofar as consent thereto has been given by the Parties."[91]

81. Respondent's five preliminary objections to the jurisdiction of the Tribunal are substantial and far from frivolous, would dispose of Claimants' claims in their entirety or a substantial portion of the dispute and may be resolved independently from the merits and therefore strongly call for bifurcation.

A. Each one of Respondent's objections disposes of Claimants' claims in their entirety or a substantial portion of the dispute

82. As set out in Section II above, Respondents' Objections are substantial and far from frivolous.[92]

[89] T. D. Gill, *Rosenne's the World Court: What It Is and How It Works* (2003) (**RL-005**), p. 81.

[90] *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction (14 April 1988) (**RL-004**), ¶ 62.

[91] *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction (14 April 1988) (**RL-004**), ¶ 63.

[92] See *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Procedural Order No. 4 (Decision on Bifurcation) (18 November 2016) (**RL-033**), ¶ 4.4 ("The determination of the first part of the test, namely whether an objection is 'prima facie serious and substantial' should not, in the Tribunal's view, entail a preview of the jurisdictional arguments themselves. Rather, at this stage the Tribunal is only required to be satisfied that the objections are not frivolous or vexatious. In respect of the four objections that Canada seeks to have resolved on a preliminary

83. Should any of the exceptions presented by the Republic be accepted by the Tribunal, it would imply a total dismissal of Claimant's claim or, in a conservative scenario, to a substantial reduction of the case, thus leading to a more efficient and fairer process. In particular:

- *Preliminary Objection 1*, concerning the requirement to exhaust local remedies before resorting to arbitration, would result in the dismissal of all claims brought by the Claimant.

- *Preliminary Objection 2*, concerning the failure of Ms. Schloesser to fulfill the consultation and negotiation requirement, would result in the dismissal of all claims brought by that Claimant.

- *Preliminary Objection 3*, concerning the immaturity of the expropriation claim, would result in the dismissal of those claims, thereby significantly reducing the disputes in this arbitration.

- *Preliminary Objection 4*, concerning the claim based on the MFN clause, would result in the dismissal of all contractual claims that underpin the controversy presented by the Claimant.

- *Preliminary Objection 5*, concerning the absence of an Investment Agreement under the terms of CAFTA-DR, would result in the total dismissal of that claim, significantly reducing the disputes in this arbitration.

84. As can be seen, any of the preliminary objections raised could have the effect of terminating the arbitration altogether or at least substantially reducing the claims. In any event, tribunals have also held that bifurcation should be granted when a decision on an Objection would lead to a "**material reduction**" in the next phase of the proceedings.[93] This may occur when an Objection, even "if unsuccessful, would reduce the scope of the subsequent phase," thus

basis, the Tribunal is satisfied that they are each credible and brought in good faith and cannot be excluded on a prima facie basis.").

[93] *Glamis Gold, Ltd., v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised) (31 May 2005) (**RL-007**), ¶ 12(c).

simplifying the matter by only focusing on the merits of the dispute.[94] In the instant case, regardless of the Tribunal's ultimate decision on Honduras' preliminary objections, as developed in detail in the next section, they raise legal and factual issues distinct from the merits that must be carefully considered and decided. Doing so in the context of a simplified timetable with written pleadings and a hearing that would conclude next year, 2025, would be highly efficient.

85. Indeed, requiring a State to present its defense on the merits of a claim to a Tribunal that lacks jurisdiction is inherently unjust and runs counter to fundamental legal principles. As stated by Professor Thirlway,[95] "a jurisdictional issue must be dealt with as a preliminary point since a State is entitled to decline to permit its conduct to be scrutinized by a tribunal unless it has conferred jurisdiction on that tribunal."

86. Respondents' jurisdictional objections undoubtedly have the potential to dispose of the case in its entirety or a substantial portion of the dispute. If the Tribunal concludes that it lacks jurisdiction *ratione materiae* or *ratione voluntatis*, all of Claimants' claims would have to be dismissed.

87. By virtue of the foregoing, "the benefits of procedural fairness and efficiency" weigh strongly in favor of bifurcation. Granting bifurcation would avoid a situation where, as described by the tribunal in *Caratube v. Kazakhstan*. In that decision, the Tribunal stated that "in retrospect," if the proceeding had been bifurcated and the preliminary objections had been heard at a preliminary stage, "most of the costs and expenses of each party and of the dispute, both in duration and in amount, would have been avoided."[96]

88. Therefore, the preliminary objections filed by Honduras comply with the requirement set forth in ICSID Arbitration Rule 44.2(b), as they would lead to the total dismissal of the case, or in the alternative, to the material curtailment of the next phase of the proceedings.

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[94] *Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan, Ltd v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/12/31 (22 September 2015) (**RL-027**), ¶ 34.

[95] *See* H. Thirlway, "Preliminary Objections," in *Max Planck Encyclopedia of Public International Law* (August 2006) (**RL-008**), ¶ 4.

[96] *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Award (05 June 2012) (**RL-018**), ¶ 487 ("With the wisdom of hindsight, the majority of the costs and expenses of each party and of the dispute, both in duration and expense, would have been avoided had Respondent opted for bifurcation and the preliminary determination of its equivalent of Rule 41(1) objections under the Rules.").

Thus, the costs and time of the Parties and the Tribunal would be saved. These savings would be significant. Consideration of such exceptions is therefore merited as a preliminary matter.

B. Each one of Respondent's objections may be resolved independently from the merits

89. Bifurcation is also appropriate because each of Respondents' jurisdictional objections may be resolved separately from the merits of the dispute. Arbitral tribunals have recognized that this requirement is met when the preliminary objection can be examined without the Tribunal having to enter in the merits of the case.[97] Thus, bifurcation is deemed appropriate when "the facts relevant to the objection are distinct from those likely to be involved in determining the merits of the claims," and when the objection involves "legal questions that are separate from those arising on the merits."[98]

90. Moreover, tribunals have held that even if the analysis of the preliminary objections involves some degree of overlap of issues pertinent to both jurisdictional and merit-related questions, bifurcation is still warranted. Only a substantial overlap would require merging an objection with the merits because such "a jurisdictional question could not be decided efficiently without also ruling on the merits of the case."[99]

91. In this case, as shown above, the Tribunal does not need to enter substantively into the merits to resolve any of the five preliminary objections:

- *Preliminary Objection 1,* concerning the requirement to exhaust local remedies before resorting to arbitration, is not tied to any factual aspect of the dispute's merits. The objection focuses solely on legal issues under the Treaty, the conditions imposed by the Republic for its consent to arbitration before ICSID,

[97] *See Philip Morris Asia Ltd. v. Commonwealth of Australia*, Procedural Order No. 8 regarding Decision on Bifurcation (14 April 2014) (**RL-025**), ¶ 109.

[98] *See Mesa Power Group LLC. v. Government of Canada*, PCA Case No. 2012-17, Procedural Order No. 2 (18 January 2013) (**RL-020**), ¶ 20.

[99] *See President Allende Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile*, PCA Case No. 2017-30, Decision on Respondent's Request for Bifurcation (27 June 2018) (**RL-039**), ¶ 106.

and the undisputed fact that the Claimants have not exhausted the available local remedies.

- *Preliminary Objection 2*, concerning the failure of Ms. Schloesser to fulfill the consultation and negotiation requirement, is not tied to any factual aspect of the dispute's merits. The objection can also be decided without reference to any facts relevant to the claims and without considering new factual allegations of supposed negotiation attempts raised by the Claimant after the filing of the Notice of Arbitration and the Memorial on the Merits (as these alleged facts are irrelevant and immaterial to the objection).

- *Preliminary Objection 3*, concerning the immaturity of the expropriation claim, requires only a legal analysis based on a *prima facie* reading of the Claimant's claims, as asserted by Claimants themselves, without delving into the merits of the facts.

- *Preliminary Objection 4*, concerning the claim based on the MFN clause, would be limited to a legal analysis of the Treaty and a *prima facie* reading of the Claimant's allegations, as asserted by Claimants themselves.

- *Preliminary Objection 5*, concerning the absence of an Investment Agreement under the CAFTA-DR, would be limited to a legal analysis of the definition of an Investment Agreement under the Treaty and a *prima facie* analysis of the Claimant's allegations, as asserted by Claimants themselves.

92. Each of these objections addresses factual issues that lie outside the scope of the merits of Claimants' case. While the Tribunal's analysis of Respondent's objections may, in certain instances, require a review of some facts, this would not involve any assessment or determination of the substantive merits of the case.

93. As emphasized by the Permanent Court of International Justice, "the determination by the Court of its jurisdiction may "involve […] touching upon subjects belonging to the merits

of the case."[100] The essential factor is whether resolving the preliminary objections would be equivalent to making a decision on the subject matter of the case. Here, this would clearly not be the case and, accordingly, any minor overlap of the jurisdictional and merits issues cannot preclude the Tribunal form considering Respondent's objections in a preliminary phase of the proceedings.

94. For example, in *Emmis v. Hungary*, the tribunal decided to resolve the Respondent's Exception *ratione materiae* at a preliminary stage, noting that only after "identify[ing] precisely" the existence and nature of the property rights, would it be possible "to determine the nature and incidents of the rights held by Claimants that may be considered as investments capable of enjoying the protection of international law against expropriation."[101] The tribunal further concluded that "deferring the determination of that question to the merits phase could lead to confusion and lack of clarity on a fundamental issue," thus leading to inefficiencies at the merits phase. [102] That is precisely the case here, where Claimant and Honduras would have to present alternative cases on merits and quantum depending on the extent of admissible claims.

95. In conclusion, Honduras' preliminary objections comply with Rule 44.2(c) of the ICSID Arbitration Rules as they are not linked to the merits of the claim and the Tribunal will not have to make decisions as to the factual merits of the case.

C. Bifurcation enables efficiency and justice

96. The relevant doctrine and jurisprudence recognize that[103] "the Tribunal shall consider as an overarching question whether fairness and procedural efficiency would be preserved or improved."[104] Furthermore, "it is good practice to deal with jurisdictional objections

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[100] *See Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Jurisdiction, Judgment No. 6, P.C.I.J., Series A, No. 6 (25 August 1925) (**RL-001**), p. 15.

[101] *Emmis International Holding, B.V. et al. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation (13 June 2013) (**RL-021**), ¶¶ 43-49.

[102] *Emmis International Holding, B.V. et al. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation (13 June 2013) (**RL-021**), ¶ 50 ("The Tribunal considers that to defer the determination of that question to the merits phase might lead to confusion and lack of clarity on a fundamental question.").

[103] See C. Scheuer *et al*., "Article 41" in *The ICSID Convention: A Commentary* (2009) (**RL-013**), ¶ 77 ("It is standard practice for ICSID tribunals to decide jurisdictional and admissibility objections separately from the merits of the dispute."); L. Greenwood, "Revisiting Bifurcation and Efficiency in International Arbitration Proceedings," in 36 *Journal of International Arbitration* 4 (2019) (**RL-041**), p. 3 [PDF].

[104] *See Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent's Notice of Jurisdictional Objections and Request for Bifurcation (08 August

preliminarily, so as to avoid imposing full-fledged proceedings on a party disputing that it is subject to arbitration, whenever bifurcating such objections would likely result in increased efficiency in terms of both time and costs."[105] In the present case, bifurcating the proceeding will promote efficiency, as litigating issues of merits and quantum will necessarily be expensive, burdensome, and time-consuming.

97. If bifurcation is granted, the Tribunal could dismiss the entire case or at least 80% of the claims. For example, if the Tribunal dismisses the expropriation claims as premature, the MFN claims for not allowing the importation of umbrella clauses, and the alleged investment agreement, the efficiency of the proceedings and associated costs would be significantly reduced, benefiting both parties.

98. The alternative to bifurcation would compel the Parties to fully litigate the merits of the dispute, which would be an exceedingly costly and burdensome undertaking. Given the complexity of the case, this would require extensive submissions, the production of vast financial and technical documents, and substantial witness and expert evidence, resulting in a considerable waste of resources for all parties involved.[106]

99. Therefore bifurcation, if granted, will in this case enable procedural efficiency and significantly reduce the time and costs of the proceedings. In addressing whether objections should be decided as preliminary questions or jointly with the merits, as observed by Professor Schreuer, "the choice between a preliminary decision and a joinder to the merits is a matter of procedural

2013) (**RL-023**), ¶ 35; *Emmis International Holding, B.V. et al. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation (13 June 2013) (**RL-021**), ¶ 41.

[105] *See Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Procedural Order No. 3 (Bifurcation) (08 July 2016) (**RL-032**), ¶ 19. *See also Rand Investments Ltd. et al. v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 3 (Decision on Bifurcation) (24 June 2019) (**RL-043**), ¶ 15; *Mesa Power Group LLC. v. Government of Canada*, PCA Case No. 2012-17, Procedural Order No. 2 (18 January 2013) (**RL-020**), ¶ 6.

[106] *Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Procedural Order No. 2 (Decision on Bifurcation) (21 February 2018) (**RL-037**), ¶ 30 ("It would be a waste of significant time and funds for the Parties to address quantum in the first phase should the Tribunal decide in the Respondent's favor in whole or substantial part on jurisdiction.").

economy. […] It does not make sense to go through lengthy and costly proceedings dealing with the merits of the case unless the tribunal's jurisdiction has been determined authoritatively."[107]

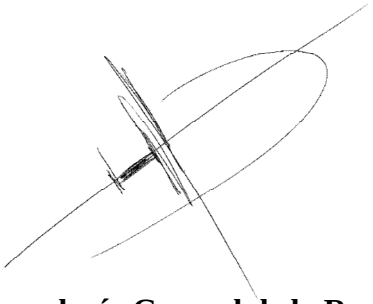
100. In sum, the preliminary objections submitted by Honduras comply with the requirement set forth in Rule 44.2(a) of the ICSID Arbitration Rules. This strongly militates in favor of bifurcation, as doing otherwise would result in inefficiency, waste of public funds in defending unnecessary claims in the merits, and potential violations of the Republic's due process rights to fair and efficient proceeding.

IV. REQUEST FOR RELIEF AND RESERVATION OF RIGHTS

101. For all the reasons set forth above, Respondent respectfully requests the Tribunal to bifurcate the proceedings in accordance with the procedural calendar that the Tribunal established in Scenario 2 of Annex B to Procedural Order No. 1.

102. Respondent reserves the right to supplement, modify or complement these allegations and present all additional arguments that are necessary in accordance with the ICSID Rules, Procedural Orders and orders of the Arbitral Tribunal for purposes of responding to any allegations made by Claimants in relation to this case. Respondent also reserves its right to raise additional jurisdictional objections in the future.

Respectfully submitted,



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[107] *See* C. Scheuer *et al.*, "Article 41" in *The ICSID Convention: A Commentary* (2022) (**RL-047**), ¶¶ 158-159.