INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

FERNANDO PAIZ ANDRADE AND ANABELLA SCHLOESSER DE LEÓN DE PAIZ

Claimants

v.

REPUBLIC OF HONDURAS

Respondent

ICSID Case No. ARB/23/43

OBSERVATIONS ON REQUEST FOR BIFURCATION

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20 November 2024

WHITE & CASE
Counsel for Claimants

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Fernando Paiz Andrade and Anabella Schloesser de León de Paiz v. Republic of Honduras

CLAIMANTS' OBSERVATIONS ON REQUEST FOR BIFURCATION

1. Mr. Fernando Paiz Andrade ("**Mr. Paiz**") and Ms. Anabella Schloesser de León de Paiz ("**Ms. Schloesser de Paiz**") (together, the "**Paizes**," the "**Investors**," or "**Claimants**"), nationals of Guatemala, acting on their own behalf and on behalf of Pacific Solar Energy, S.A. de C.V. ("**Pacific Solar**" or the "**Enterprise**"), a Honduran company that the Investors own and control in accordance with Article 10.16.1(b) of the Central America - Dominican Republic - United States Free Trade Agreement ("**CAFTA-DR**" or the "**Treaty**"),[1] hereby submit their Observations on the Request for Bifurcation filed by the Republic of Honduras ("**Honduras**," "**Respondent**," or the "**State**") in accordance with Annex B of Procedural Order No. 1 dated 22 July 2024.

I. INTRODUCTION

2. Respondent's Request for Bifurcation ("**Request for Bifurcation**" or "**Request**")[2] constitutes its latest attempt to delay facing the consequences of its Treaty breaches. In its Request, Respondent advocates for bifurcation and the resulting delay in reaching the merits hearing. In parallel, Honduras continues to flagrantly violate the Agreements that incentivized the Paizes' investment,[3] withholding millions of dollars in payments to Pacific Solar and implementing

[1] Central America – Dominican Republic – United States Free Trade Agreement (signed on 5 Aug. 2004) (Preamble and Chapters One, Two, Three, Ten, Seventeen and Annex I) ("**CAFTA-DR**" or the "**Treaty**") dated 1 Apr. 2006 (**CL-1**).

[2] Respondent's Summary of Jurisdictional Objections and Request for Bifurcation dated 21 Oct. 2024 ("**Request for Bifurcation**").

[3] Contract No. 002-2014, Power purchase agreement Empresa Nacional de Energía Eléctrica (the National Company of Electric Energy) ("**ENEE**") and Pacific Solar Energy, S.A. de C.V. dated 16 Jan. 2014 (the "**PPA**") (**Exh. C-1**); the 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 dated 19 Nov. 2014 and published in the Official Gazette on 28 Nov. 2014) dated 1 Oct. 2014 (the "**State Guarantee**") (**Exh. C-2**); and the Operations Contract between Pacific Solar and the Ministry of Natural Resources and Environment of Honduras (Decree No. 109-2015 dated 26 Oct. 2015 and published in the official Gazette on 27 Nov. 2015) (the "**Operations Agreement**", together with the PPA and the State Guarantee, the "**Agreements**") dated 23 Feb. 2014.

measures that have forced Pacific Solar into a precarious financial situation—conduct that is in breach of the Treaty.

3. Honduras's ongoing conduct illustrates its intention to continue weaponizing the New Energy Law to harm Pacific Solar and other generators. Indeed, twelve days prior to submitting its Request, Honduras issued an interpretation of the 2022 New Energy Law,[4] stating that the 60-day "renegotiations" period, the precursor to direct expropriation under the law, "cannot be limiting or restricting to the fulfillment of the objectives of the Law,"[5] which, in effect, extended the New Energy Law's mandate into perpetuity. At the same time, Honduras continues to receive electricity from Pacific Solar while making sporadic and grossly incomplete payments,[6] keeping Pacific Solar in a precarious financial position. As such, Honduras must be held accountable for its conduct as soon as possible—a process that would be undermined if the Tribunal bifurcates the proceeding to address Respondent's baseless objections. If bifurcation is granted, the proceeding will last **at least a year longer** than if bifurcation is rejected.[7]

4. Honduras bears the burden of proving that bifurcation is warranted and therefore, its preliminary objections must meet certain criteria to warrant bifurcation.[8] Under the ICSID

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[4] Special Law to Guarantee the Service of Electric Energy as a Public Good of National Security and an Economic and Social Human Right (Decree 46-2022 dated 16 May 2022), published in the Official Gazette dated 16 May 2022 (the "**2022 New Energy Law**") (**Exh. C-10**). Starting in May 2022, mere months after the inauguration of new President Xiomara Castro, Honduras implemented a law which mandated that ENEE "renegotiate" the PPA and authorized the Government's power to acquire the Plant, unleashing State conduct that substantially harmed the Paizes and Pacific Solar, including weaponizing the State's outstanding debt to Pacific Solar, forcing Pacific Solar to be in a precarious financial situation and seek to restructure its project finance loans in an attempt to salvage the project.

[5] Congreso Nacional HN, "*Approving a New Interpretation of the New Energy Law*" FACEBOOK dated 9 Oct. 2024 (**Exh. C-240**) ("In the sense that the period of 60 calendar days, counting from the publication of the Law, refers to the beginning of the process to renegotiate the contracts, it **does not represent a strict limit** that prevents the continuation of the renegotiation of other contracts beyond that period, since **this time period cannot be limiting or restricting to the fulfillment of the objectives of the Law.**").

[6] Request for Bifurcation ¶ 36 ("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[.]" Although Respondent deems that Claimants unnecessarily characterize ENEE's payments as "sporadic" and "insufficient", the reality proves that ENEE's payments were indeed sporadic and insufficient.). *See* below ¶¶ 55-56; *see also* Claimants' Memorial on the Merits dated 20 Sept. 2024 ("**Memorial**") §§ II.F.1(b), II.F.2(a).

[7] *See* Procedural Order No. 1 dated 22 July 2023, Annex B (scheduling a hearing on jurisdiction on 17–19 Sept. 2025 and assuming that the tribunal issues a decision on jurisdiction within 2 months after holding the hearing on jurisdiction (*i.e.*, 20 Nov. 2025), and that the remaining of the proceedings follow the timing set forth in Procedural Calendar No. 3, the hearing on the merits will take place no earlier than Dec. 2026, provided that the tribunal and counsel for the parties have availability in said dates).

[8] *See MetLife, Inc., MetLife Servicios S.A. and MetLife Seguros de Retiro S.A. v. Argentine Republic*, ICSID Case No. ARB/17/17, Procedural Order No. 2 (Decision on Bifurcation) dated 21 Dec. 2018 (**CL-156**) ¶ 23 (rejecting bifurcation because "the Respondent has failed to establish that bifurcation would serve the interest of an efficient arbitration").

Convention, "[t]here is **no presumption in favor of bifurcation**."[9] Bifurcation is not warranted unless Respondent proves that it will lead to procedural fairness and efficiency in a material manner. Pursuant to ICSID Rule 44(2), the Tribunal should only bifurcate the proceedings if the applicant proves that (i) "bifurcation would materially reduce the time and cost" of the proceeding; (ii) the "determination of the preliminary objection would dispose of all or a substantial portion of the dispute;" and (iii) "the preliminary objection and the merits are [not] so intertwined [that it] make[s] bifurcation impractical."[10] In addition to these factors, investment treaty tribunals have also considered whether the objections raised are "*prima facie* serious and substantial"[11] because permitting the bifurcation of objections that are not serious or substantial would result in an inefficient and protracted proceeding.[12] In other words, if an objection is not serious and substantial, the Tribunal should not bifurcate the proceeding.

5. As further explained below, Honduras's preliminary objections fail to meet the criteria required for bifurcation. Honduras's preliminary objections are meritless, and as such, not substantial. They would not materially reduce the time and costs of the proceeding or dispose of the claims, and are inextricably intertwined with the merits. The first two objections constitute opportunistic and baseless jurisdictional objections. The other three objections are, by definition, intertwined with the merits. Bifurcating on such objections would thereby require the Tribunal to pass judgment directly and indirectly on all claims submitted to arbitration:

- **Respondent's declaration in Legislative Decree 41-88 does not constitute a condition to its consent in this case**. Respondent has litigated cases before ICSID for two and a half decades. It was only in 2023, under President Castro's administration and the wave of investment arbitrations that stemmed from the administration's policies, that Honduras unearthed Legislative Decree No. 41-88, a

[9] ICSID, Bifurcation – ICSID Convention Arbitration (2022 Rules), available at https://icsid.worldbank.org/procedures/arbitration/convention/bifurcation/2022 (last accessed on 18 Nov. 2024) (**Exh. C-241**) (emphasis added).

[10] ICSID Arbitration Rules, Rule 44(2) ("Preliminary Objections with a Request for Bifurcation").

[11] *Glamis Gold, Ltd., v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised) dated 31 May 2005 (**RL-7**) ¶ 12(c); *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 8 Regarding Decision on Bifurcation dated 14 Apr. 2014 (**RL-25**) ¶ 109. *See also* Request for Bifurcation ¶ 77.

[12] Marinn Carlson and Patrick Childress, *Bifurcation in Investment Treaty Arbitration in Barton Legum*, THE INVESTMENT TREATY ARBITRATION REVIEW (Sixth edition, Law Business Research Ltd, 2021) (**CL-150**), at 51 (noting that refusing bifurcation of objections that are not serious or substantial plays a critical role in conducting efficient proceedings); L. Greenwood, "*Revisiting Bifurcation and Efficiency in International Arbitration Proceedings*," Wolters Kluwer 36(4) J. Int'l Arb. (2019) (**RL-41**) ¶ 425 ("If, however, the jurisdiction challenge is unsuccessful, then the data shows that the proceeding will take significantly longer to conclude . . . in light of the additional research on duration of 'unsuccessful' bifurcated proceedings.").

local decree that the State now constitutes a "legal reservation the State registered in . . . 1988,"[13] to require exhaustion of local remedies prior to initiating ICSID arbitration. Honduras announced as much in a press conference shortly after the first ICSID case in 2023 was registered, where it attacked investors who submitted ICSID claims, naming them "enemies" of the State.[14] Months later, in response to the avalanche of arbitration claims filed against it, Honduras formally denounced the ICSID Convention[15]—all in a blatant attempt to avoid international liability for the conduct that is at the root of the present Arbitration.

At least two tribunals have already considered Honduras's objection as a preliminary issue and rejected the argument as a threshold matter. Contrary to Respondent's erroneous assertions,[16] it is a long-standing principle that the only applicable conditions of Respondent's consent to ICSID arbitration are those listed in the instrument of consent—in this case, CAFTA-DR, which contains provisions that govern local proceedings but do not require exhaustion. As such, bifurcating on this objection would only create inefficiencies because the objection is baseless. But even assuming *arguendo* that Respondent's objection is not meritless, to determine whether the Paizes met this supposed exhaustion requirement, the Tribunal would have to analyze issues that implicate the facts that underlie the Paizes' CAFTA-DR claims, including whether Honduran administrative and judicial authorities are adequate institutions to rule on the payments owed to Pacific Solar under the Agreements or the unlawfulness of the New Energy Law (*see* Section III.A).

- **Ms. Schloesser de Paiz complied with CAFTA-DR's notice provision**. Respondent does not contest that Ms. Schloesser de Paiz complied with the Treaty's 90-day notice period. Instead, Respondent advocates for the radical position that the Treaty's notice period imposes an obligation "to meet."[17] Contrary to Respondent's erroneous suggestions,[18] the Treaty's text makes clear that a claimant can submit a claim to arbitration if: (i) at least **90 days before submission**, that **claimant delivers a notice of intent** to respondent and (ii) **a disputing party**

[13] Honduras Press Secretary, "*We Denounce the Legality of ICSID Proceeding*" X (FORMERLY TWITTER) dated 31 May 2023 (**Exh. C-242**); "*Honduras Accuses ICSID of Illegality in Proceedings in Zede Prospera Case*," DINEROHN dated 31 May 2023 (**Exh. C-94**).

[14] "*Honduras Accuses ICSID of Illegality in Proceedings in Zede Prospera Case*," DINEROHN dated 31 May 2023 (**Exh. C-94**) (noting that Honduras's Secretary of Finance describes investor that has brought forth an ICSID as "enemies [that] are going to lose at the national and international level").

[15] ICSID News Release, "*Honduras Denounces the ICSID Convention*" dated 29 Feb. 2024 (**Exh. C-166**).

[16] Request for Bifurcation ¶ 14 ("[T]he Republic of Honduras conditioned its consent to ICSID arbitration at the time of approving and ratifying the ICSID Convention."). Similarly, Respondent's emphatic suggestion that the Paizes should have disclosed Legislative Decree No. 41-88 when filing their Memorial on the Merits is also misguided as Legislative Decree No. 41-88 is irrelevant to establish the jurisdiction of this Tribunal. *See* Request for Bifurcation ¶ 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 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.") (emphasis in original).

[17] Request for Bifurcation ¶¶ 23, 27, 30.

[18] Request for Bifurcation ¶¶ 25, 26, 28, 30.

considers that the dispute cannot be settled by consultation and negotiation.[19] The Treaty's text does not require that the disputing parties actually engage in negotiations to "perfect" Honduras's consent to arbitration; otherwise, a State could evade jurisdiction but unilaterally refusing to meet during the consultations period. Contrary to Respondent's outright inaccurate statements,[20] Claimants, including Ms. Schloesser de Paiz, invited Honduras multiple times to engage in good faith consultations and negotiations to resolve this dispute in compliance with the Treaty's provision.[21] Respondent's deliberate choice to go silent thereafter and ignore Claimants' request to negotiate cannot be rewarded. As such, Respondent's objection is meritless.

But even if Respondent's objection had any merit (which it does not), to determine whether Ms. Schloesser de Paiz complied with this Treaty provision would require the Tribunal to engage in an extensive factual assessment of her attempts to settle this dispute prior to claim submission. This will require undertaking an assessment of Honduras's conduct after it received notice of the dispute—conduct that overlaps with the minimum standard of treatment ("**MST**") and expropriation claims, and witness testimony describing Honduras's conduct after it enacted the New Energy Law. For instance, when Respondent concedes in its Request that there was at least one meeting in which the Government "tangentially" discussed the notice of intent,[22] it failed to mention that in that very same meeting, the Government discussed the valuation of the Plant under the New Energy Law's framework.[23]

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[19] *See, e.g., Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections dated 13 Mar. 2020 (**CL-151**) ¶¶ 189-198 (implying that Article 10.16 "seems to establish requirements for *initiating* an arbitration," which includes the "identification of all then-intended claims through a notice of intent" and a "waiting period process," making no mention of the negotiation and consultation provision in Article 10.15)*; see also Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award dated 14 Mar. 2021 (**CL-152**) ¶¶ 12-13 (noting that "[p]ursuant to Articles 10.16.3 and 10.16.4 of CAFTA, [claimants have] the right, six months after serving their Notice of Intent, to file a Notice of Arbitration . . . under the ICSID Convention").

[20] Request for Bifurcation ¶ 27 ("On 24 March 2023, Claimants filed a new Notice of Intent only to add Ms. Schloesser. However, unlike the Notice of Intent from Oct. 2022, the **new Notice did not include a request for consultations and negotiations**.") (emphasis added).

[21] Notices and Communications from the Paizes to Honduras under CAFTA-DR dated 10 Oct. 2022 – 13 Feb. 2023 (**Exh. C-12**), at 1 (noting that "in accordance with CAFTA-DR, the Investors invite Honduras to engage in good faith consultations and negotiations with the Hondura[n] State to resolve the existing dispute," where Investors is defined as Ms. Schloesser de Paiz, together with Mr. Paiz); Follow up Letter under the Treaty from the Paizes to Honduras dated 26 Apr. 2023 (**Exh. C-243**) ("In these communications, the Investors invited Honduras to initiate consultations and negotiations under CAFTA-DR in respect to the dispute described therein. Honduras, however, has yet to respond to any of these communications in writing."); Letter from Claimants to the Honduran Government dated 23 Aug. 2023 (**Exh. C-244**) ("The Investors have repeatedly invited the Government to consult and negotiate under CAFTA-DR in respect to the dispute. Honduras, however, has not responded, beyond acknowledging receipt. In this context, the Investors have no choice but to obtain relief through international arbitration. However, we also continue to remain open to engaging in good-faith consultations and negotiations with the Government to resolve the existing dispute amicably.").

[22] Request for Bifurcation ¶ 27 ("On 1 February 2023, representatives of Pacific Solar held a meeting with ENEE, in which, among other things, the notice of intent to submit a claim to international arbitration was tangentially discussed.").

[23] [redacted] Minutes of the Meeting between Pacific Solar, Ministry of Energy and ENEE dated 1 Feb. 2023 (**Exh. C-216**).

Bifurcation on this ground would inevitably result in the assessment of duplicative evidence and would not reduce time and costs. Moreover, the objection would not materially dispose of all the claims, as Respondent concedes that Mr. Paiz, who raises the same claims as Ms. Schloesser de Paiz, complied with the notice requirement—claims that would proceed to the merits even if Respondent's notice objection is sustained. Accordingly, bifurcation is unwarranted on this ground (*see* Section III.B).

- **Honduras has expropriated Claimants' investments**. Respondent's assertion that "Honduras has not taken any measure with the purpose of directly taking possession of the Paizes[']s alleged investment," or "any indirect action against their alleged investment which has 'substantially deprived an investor of the use and enjoyment of its investment'" is incorrect.[24] Nonetheless, an analysis of the expropriation claim inherently relates to the merits, and would require an analysis of the 2022 New Energy Law and Honduras's subsequent conduct in light of the measures it enacted and the payments owed to Pacific Solar. Because this would require that the Tribunal to prejudge Claimants' other claims, this objection is too intertwined with the merits to warrant bifurcation (*see* Section III.C).

- **Honduras has failed to observe its obligations under the Agreements, which constitutes a Treaty breach by virtue of the MFN clause**. Respondent requests that the Tribunal bifurcate the proceeding to decide as a preliminary matter that it "lacks jurisdiction *ratione voluntatis* regarding the MFN claim because (i) Claimant cannot import rights that are not provided for in the Treaty and (ii) . . . CAFTA–DR excludes the application of the MFN obligation as it related to procurement made by the State."[25] Beyond its lack of merit, Honduras's objection is intertwined with the merits of the case and would not result in the disposal of any significant part of the claims. Assessing whether the PPA is related to governmental procurement, as required under the CAFTA–DR's MFN carve-out, entails a review of Honduras's breaches of the Agreements and the State's obligations thereunder, all of which is also intertwined with Claimants' other claims. As such, bifurcating on this ground would result in duplicative evidence, indicating that bifurcation is unwarranted (*see* Section III.D).

- **Respondent has violated the Agreements, which constitute Investment Agreements pursuant to CAFTA-DR**. Respondent asserts that the Tribunal lacks jurisdiction over the Paizes' Investment Agreement claim based on Respondent's self-serving reading of the otherwise clear language of CAFTA-DR. Contrary to Respondent's assertions, the Agreements constitute Investment Agreements because they are written agreements between Honduran national authorities (ENEE, the Secretary of Finance, the Attorney General's Office, and the Secretary of Energy, Renewable Resources, Environment and Mines) and the Paizes' investment (Pacific Solar), granting rights over assets controlled by the Honduran State, such as the access to the national grid, and were relied upon by the Paizes

[24] Request for Bifurcation ¶ 36.

[25] Request for Bifurcation ¶ 44.

and Pacific Solar to undertake their investments, as required by CAFTA–DR,[26] and Honduras has breached them. Bifurcating this objection is unwarranted, as the objection is neither serious nor substantial; would require a fact-intensive analysis intertwined with the merits; and would not dispose of a significant part of Claimants' claims, undermining procedural efficiency (*see* Section III.E).

6. Because Honduras has failed to meet its burden—for that reason alone—the Tribunal should reject Respondent's Request for Bifurcation. Honduras has not substantiated its claims that bifurcation in this case will reduce time and costs (let alone that it would do so "materially"), beyond asserting mere conclusory statements. In fact, if Respondent's Request is granted, it would result in the bifurcation of all parts of the claims, except for damages.

7. This Request is only the latest example of Honduras's delay tactics in view of the wave of ICSID arbitrations it is facing. Honduras has submitted preliminary objections in all five ICSID cases pending against it that have reached the relevant procedural juncture,[27] including a nearly identical objection on exhaustion of local remedies.[28] Unsurprisingly, the tribunals that have reached a decision in these cases have dismissed Honduras's threshold objections and moved forward to the merits phase, after spending an average of over ten months considering and declining to uphold the objections as a threshold matter.[29]

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[26] CAFTA–DR (CL-1), Art. 10.28, nn. 12-13.

[27] ICSID Website, Results of Case Search in Which Honduras is Respondent (last accessed Nov. 2024), available at https://icsid.worldbank.org/cases/case-database (**Exh. C-245**). These five cases are; (i) *JLL Capital S.A.P.I. de C.V. v. Republic of Honduras*, ICSID Case No. ARB/23/3; (ii) *Autopistas del Atlántico, S.A. de C.V. and others. v. Honduras*, ICSID Case No. ARB/23/10; (iii) *Inversiones Continental (Panamá), S.A. v. Republic of Honduras*, ICSID Case No. ARB/18/40; (iv) *Honduras Próspera Inc., St. John's Bay Development Company LLC, and Próspera Arbitration Center LLC v. Republic of Honduras*, ICSID Case No. ARB/23/2; and (v) *Inversiones y Desarrollos Energéticos S.A. v. Republic of Honduras*, ICSID Case No. ARB/23/40.

[28] These four cases are (i) *JLL Capital S.A.P.I. de C.V. v. Republic of Honduras*, ICSID Case No. ARB/23/3 (filing preliminary objections pursuant to ICSID Arbitration Rule 41 on 18 Aug. 2023); (ii) *Autopistas del Atlántico, S.A. de C.V. and others. v. Honduras*, ICSID Case No. ARB/23/10 (filing preliminary objections pursuant to ICSID Arbitration Rule 41(5) on 15 July 2023); and (iii) *Honduras Próspera Inc., St. John's Bay Development Company LLC, and Próspera Arbitration Center LLC v. Republic of Honduras*, ICSID Case No. ARB/23/2 (filing preliminary objections pursuant to Article 10.20.5 of CAFTA-DR on 7 Aug. 2024); and (iv) *Inversiones and Desarrollos Energéticos, S.A. v. Republic of Honduras*, ICSID Case No. ARB/23/40 (filing preliminary objections pursuant to ICSID Arbitration Rule 41 on 18 Sept. 2024).

[29] *See* ICSID Case Details for *JLL Capital S.A.P.I. de C.V. v. Republic of Honduras*, ICSID Case No. ARB/23/3 (last accessed on 4 Nov. 2024) (**Exh. C-246**) (showing that Respondent filed preliminary objections pursuant to ICSID Arbitration Rule 41 on 18 Aug. 2023 and the tribunal dismissed the objection on 21 Dec. 2023, causing a two-month delay in the proceedings); ICSID Case Details for *Autopistas Atlántico, S.A. de C.V. and others. v. Honduras*, ICSID Case No. ARB/23/10 (last accessed on 4 Nov. 2024) (**Exh. C-247**) (showing that Respondent filed preliminary objections pursuant to ICSID Arbitration Rule 41(5) on 15 July 2023 and the tribunal dismissed the objection on 3 Apr. 2024, causing an eight-month delay in the proceedings); ICSID Case Details for *Inversiones Continental (Panamá), S.A. v. Republic of* Honduras, ICSID Case No. ARB/18/40 (last accessed on 4 Nov. 2024) (**Exh. C-248**) (showing that Respondent filed a memorial on bifurcated issues on 6 July 2022 and the tribunal issued its decision on

8. If Respondent were sincere about efficiency, it would not have passed on opportunities that would have achieved that result. Against procedural economy—and the support among respondent States to mitigate against their criticism that investment arbitration is lengthy and costly[30] —Respondent rejected Claimants' proposal to apply ICSID's expedited rules, which would have led to a more efficient and less costly proceeding, noting that it was in the "best interests of the State" to deny Claimants' proposal.[31] From the outset of this Arbitration, Respondent has dragged its feet, failing to appoint its party-appointed arbitrator within the Treaty's timeline,[32] and only doing so after Claimants insisted.[33] Moreover, at Respondent's request, this proceeding includes a document production phase, which will further prolong and increase the cost of the proceedings.

9. In sum, Respondent has not met its burden to bifurcate its five jurisdictional objections. As such, the Tribunal should reject Respondent's Request and should allow the Paizes to have their case heard expeditiously, adhering to Procedural Calendar No. 3 already agreed to among the Parties and the Tribunal.

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6 May 2024, causing a 22-month delay in the proceedings); ICSID Case Details for *Honduras Próspera Inc., St. John's Bay Development Company LLC, and Próspera Arbitration Center LLC v. Republic of Honduras*, ICSID Case No. ARB/23/2 (last accessed 20 Nov. 2024) (**Exh. C-250**).

[30] *See, e.g.*, ICSID – The World Bank Group, "Rule Amendment Project – Member State & Public Comments on Working Paper #1" dated 3 Aug. 2018 (**CL-175**), at 391-392, 401. Singapore additionally commented: "We support this new chapter regarding expedited arbitration … it is in line with various States' interest to have such an option and the flexibility of opting into these procedures." Likewise, Portugal commented: "The expedited procedure would in many cases be of great use to SMEs, while at the same time it could bring significant efficiency to ISDS, thus benefiting the respondent State as well. Having said that, every effort should be made to improve the use of this more expeditious and simplified alternative dispute resolution procedure, namely by eliminating the reasons which have been preventing its wider acceptance by the disputing parties."

[31] *See* Claimants' Notice of Arbitration § VII.A. (requesting that this proceeding be conducted under ICSID's Expedited Arbitration Rules); Letter from Respondent to ICSID dated 26 Sept. 2023 ("Respondent hereby rejects Claimant's [sic] request to have an abbreviated proceeding, **as it is in the State's best interest**," in Spanish: "*Por este conducto se rechaza la oferta que efectúa el demandante* [sic] *de tener un proceso abreviado, **por así convenir a los intereses del Estado**.*") (emphasis added).

[32] CAFTA-DR (**CL-1**), Art. 10.19.3 ("If a Tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.").

[33] Email from ICSID to Respondent dated 26 Jan. 2024. Respondent responded merely two hours after ICSID's request. *See* Letter from Respondent to ICSID dated 26 Jan. 2024.

II. THE TRIBUNAL HAS FULL DISCRETION TO NOT BIFURCATE

10. There is no presumption in favor of bifurcation under the ICSID Convention. ICSID unequivocally asserts this principle on its own website.[34] In fact, there has been no presumption in favor of bifurcation in the ICSID system since 2006, when ICSID amended Arbitration Rule 41 to eliminate the automatic suspension of the proceedings on the merits following the submission of a jurisdictional objection.[35] Moreover, the Tribunal has full discretion to reject a bifurcation request relating to a preliminary objection, as provided by Article 41(2) of the ICSID Convention and Rule 43(4) of the ICSID Arbitration Rules.[36]

11. Honduras bears the burden of proving that bifurcation is warranted.[37] Rule 44(2) of the ICSID Arbitration Rules outlines factors that the party requesting bifurcation must establish. ICSID Rule 44(2) provides in its entirety:

> In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:
>
> (a) bifurcation would **materially** reduce the time and cost of the proceeding;

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[34] *See* ICSID, Bifurcation – ICSID Convention Arbitration (2022 Rules), available at https://icsid.worldbank.org/procedures/arbitration/convention/bifurcation/2022 (last accessed on 8 Oct. 2024) (**Exh. C-241**) ("The Tribunal has discretion to bifurcate the proceeding into different phases . . . There is no presumption in favor of bifurcation.").

[35] *Compare* ICSID Arbitration Rules (as of 2003) (**CL-153**), Rule 41(3) ("Upon the formal raising of an objection relating to the dispute, the proceeding on the merits shall be suspended . . .") *with* ICSID Arbitration Rules (as of 2006) (**CL-154**), Rule 41(3) ("Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits . . ."). *See also* ICSID Arbitration Rules (as of 2022), Rule 45 (contemplating a scenario where a party raises preliminary objections without requesting bifurcation, resulting in the joining of the preliminary objection to the merits); ICSID, Working Paper #1, Proposals for Amendment of the ICSID Rules dated Aug. 2018 (**CL-4**) ¶ 392 ("Several Member States commented that bifurcation should be allowed more often, or automatically, when jurisdictional objections are raised. The WP does not propose automatic bifurcation because the facts of each case are relevant to determining whether bifurcation is appropriate.").

[36] ICSID Convention, Art. 41(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"); ICSID Arbitration Rules, Rule 43(4) ("The Tribunal may address a preliminary objection in a separate phase of the proceeding or join the objection to the merits."). *See also* ICSID Arbitration Rules, Rule 42(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."); *Hela Schwarz GmbH v. People's Republic of China*, ICSID Case No. ARB/17/19, Procedural Order No. 3 Decision on the Respondent's Request for Bifurcation dated 17 Dec. 2018 (**CL-155**) ¶ 73 ("[T]here is no presumption in favour of bifurcation in ICSID proceedings.").

[37] *See MetLife, Inc., MetLife Servicios S.A. and MetLife Seguros de Retiro S.A. v. Argentine Republic*, ICSID Case No. ARB/17/17, Procedural Order No. 2 (Decision on Bifurcation) dated 21 Dec. 2018 (**CL-156**) ¶ 23 (rejecting bifurcation because "the Respondent has failed to establish that bifurcation would serve the interest of an efficient arbitration").

(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.[38]

12. In practice, investment treaty tribunals have applied similar factors when deciding whether to bifurcate a proceeding,[39] including in *Ballantines v. Dominican Republic*, a case pursuant to CAFTA–DR.[40] In considering whether to bifurcate, it is undisputed between the Parties[41] that tribunals must determine whether the objection raised:

- **Materially Reduces Time and Cost**. In evaluating this factor, tribunals look to whether "the cost and time of [a bifurcated] proceeding would . . . be justified in terms of the reduction in costs at the subsequent phase of [a] proceeding[]."[42] The complexity of the submissions, documents, and witness and expert testimony, in addition to the issues to be evaluated, are taken into account, and if bifurcation eliminates the need for further proceedings on the merits, or materially narrows the scope of issues of merits and quantum, then bifurcation is warranted under this factor.[43]

- **Disposes of All or Part of the Claims**. This factor is satisfied where an objection would dispose of "an essential part of the claims raised,"[44] or result "in a material reduction of the proceedings at the next phase."[45] Here, the key issue for the arbitral tribunal is whether the possible benefits of bifurcation will in fact make the proceeding more efficient. Put differently, "if the objection, if granted, is not capable of terminating the proceeding, or if the complexity of the resulting

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38 ICSID Arbitration Rules, Rule 44(2) ("Preliminary Objections with a Request for Bifurcation") (emphasis added).

39 *See, e.g., Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2 Decision on Bifurcation dated 28 June 2018 (**CL-157**) ¶ 49; *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 8 Regarding Bifurcation of the Procedure dated 14 Apr. 2014 (**RL-25**) ¶ 109.

40 *See, e.g., Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Procedural Order No. 2 (Decision on Bifurcation) dated 21 Apr. 2017 (**CL-158**) ¶ 18.

41 Request for Bifurcation ¶ 78.

42 *Glamis Gold, Ltd., v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised) dated 31 May 2005 (**RL-7**) ¶ 21.

43 *Suffolk (Mauritius) Limited, Mansfield (Mauritius) Limited and Silver Point Mauritius v. Portuguese Republic*, ICSID Case No. ARB/22/28, Procedural Order No. 3 (Respondent's Request for Bifurcation) dated 1 Mar. 2024 (**RL-53**) ¶¶ 91-93.

44 *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 8 regarding Bifurcation of the Procedure dated 14 Apr. 2014 (**RL-25**) ¶ 109.

45 *Mesa Power v. Canada*, PCA Case No. 2012-17, Procedural Order No. 2 dated 18 Jan. 2013 (**RL-20**) ¶¶ 4, 19.

proceeding is not significantly reduced," bifurcation should be rejected as it would "only lead to the waste of resources that it is purportedly intending to avoid."[46]

- **Is Not Intertwined with the Merits.** For this factor, tribunals look to whether the "facts involved in determining the objection [at] issue are distinct from those likely to be involved in determining the merits of the claims."[47] That is, the objection "must be severable in the sense that it can be dealt with without having to unduly enter into the analysis of the substantive issues."[48] If an objection "carries a risk of prejudging issues before all the arguments and evidence have been analyzed," it "cannot be separated."[49] Under this factor, an exacting review of facts and evidence would also militate against bifurcating. For instance, the tribunal in *Energía y Renovación Holding v. Guatemala* rejected bifurcation of objections that required "extensive fact checks"[50] and inquiries that involved "very arduous task[s]," even though the facts to be examined related to corporate information that were not directly intertwined with the facts relating to the merits of the dispute.[51]

13. In addition to the factors outlined above, investment treaty tribunals, including under this Treaty, have also considered whether the objections raised are "*prima facie* serious and substantial" when assessing whether to bifurcate a proceeding.[52] While this factor does not require a showing that the objection is likely to prevail, the requesting party must meet a higher threshold than merely asserting a non-frivolous jurisdictional objection.[53] Indeed, tribunals have made a

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[46] *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Procedural Order No. 2 Decision on the Request for Bifurcation dated 2 Dec. 2022 (**CL-159**) ¶ 82(c) ("**The objection must have the capacity to put an end to the entirety or a substantial part of the claims.** The basis for this condition lies in the fact that, if the objection, if upheld, is not capable of bringing the proceedings to an end, or if the complexity of the remaining procedure would not be significantly reduced, bifurcation would only result in the expenditure of resources that it ostensibly seeks to avoid.").

[47] *Mesa Power v. Canada*, PCA Case No. 2012-17, Procedural Order No. 2 dated 18 Jan. 2013 (**RL-20**) ¶ 20.

[48] *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Procedural Order No. 2 Decision on the Request for Bifurcation dated 2 Dec. 2022 (**CL-159**) ¶ 82(b) ("**The objection must be capable of being analyzed without pre-judging or being inseparable from the merits.** That is, it must be separable in the sense that it can be addressed without unduly delving into the analysis of the substantive issues . . . an objection that cannot be separated entails a risk of pre-judging issues before all arguments and evidence have been examined.").

[49] *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Procedural Order No. 2 Decision on the Request for Bifurcation dated 2 Dec. 2022 (**CL-159**) ¶ 82(b).

[50] *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Procedural Order No. 2 Decision on the Request for Bifurcation dated 2 Dec. 2022 (**CL-159**) ¶ 87.

[51] *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Procedural Order No. 2 Decision on the Request for Bifurcation dated 2 Dec. 2022 (**CL-159**) ¶ 87.

[52] *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 8 regarding Bifurcation of the Procedure dated 14 Apr. 2014 (**RL-25**) ¶ 109; *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Procedural Order No. 2 (Decision on Bifurcation) dated 21 Apr. 2017 (**CL-158**) ¶ 18.

[53] *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Procedural Order No. 2 Decision on the Request for Bifurcation dated 2 Dec. 2022 (**CL-159**) ¶ 82(a); *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2 Decision on Bifurcation dated 28 June 2018 (**CL-157**) ¶ 51 ("[F]or an objection to be held to be 'serious and substantial' a higher threshold must be applied

distinction between an objection that is merely "not frivolous" and a "serious and substantial" objection.[54] If a preliminary objection is not likely to succeed, a bifurcation request should be rejected because otherwise, it will significantly increase the time and costs of the proceeding.[55]

14. In a study conducted by ICSID to identify areas where time and cost can be saved in the investment arbitration process, it was found that in bifurcated proceedings where jurisdiction was upheld and an award on the merits was issued, "the proceedings were over 550 days longer than the . . . average" length of an investor-state proceeding.[56]

15. In applying the above factors, tribunals have ultimately been guided by the principles of fairness and procedural efficiency.[57] Consequently, the Tribunal should reject a request for bifurcation when the respondent has **not** proven that it would lead to procedural fairness

than merely requiring that the objection is not frivolous or vexatious."); *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 8 regarding Bifurcation of the Procedure dated 14 Apr. 2014 (**RL-25**) ¶ 109.

[54] *See Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3 (Decision on the Respondent's Request for Bifurcation) dated 17 Jan. 2020 (**CL-160**) ¶ 27 ("[T]he Tribunal accepts as a starting point that jurisdictional objections must not be frivolous on their face; it is self-evident that a frivolous objection would not warrant bifurcation and the attendant delay in proceeding to determination of the merits. But this does not mean that every jurisdictional objection that surpasses that low threshold presumptively warrants bifurcation."); *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2 Decision on Bifurcation dated 31 Jan. 2018 (**CL-161**) ¶¶ 42, 50, 51 (recognizing that while an objection was "not frivolous," it was not "sufficiently serious and substantial as to justify bifurcation.").

[55] ICSID Secretariat, Proposals for Amendment of ICSID Rules – Working Paper #4, Vol. 1 dated Feb. 2020 (**CL-163**) ¶ 93; Marinn Carlson and Patrick Childress, *Bifurcation in Investment Treaty Arbitration in Barton Legum*, THE INVESTMENT TREATY ARBITRATION REVIEW (Sixth edition, Law Business Research Ltd, 2021) (**CL-150**), at 51 (noting that refusing bifurcation of objections that are not serious or substantial plays a critical role in conducting efficient proceedings); Lucy Greenwood, "*Revisiting Bifurcation and Efficiency in International Arbitration Proceedings*," (2019) 36(4) J. Int'l Arb. 421 (**RL-41**) ¶ 425 ("If, however, the jurisdiction challenge is unsuccessful, then the data shows that the proceeding will take significantly longer to conclude . . . in light of the additional research on duration of 'unsuccessful' bifurcated proceedings.").

[56] ICSID, Working Paper #1, Proposals for Amendment of the ICSID Rules dated Aug. 2018 (**CL-4**), Schedule 9: Addressing Time and Cost in ICSID Arbitration ¶¶ 9-11.

[57] *See, e.g., Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2 Decision on Bifurcation dated 28 June 2018 (**CL-157**) ¶ 50 ("The Tribunal considers that, in applying the three-part test, it should seek to determine what will best serve the Parties and the sound administration of justice, in particular with respect to procedural efficiency."); *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2 Decision on Bifurcation dated 31 Jan. 2018 (**CL-161**) ¶ 38 ("[T]he overarching principle that shall guide the Tribunal's decision is procedural fairness and efficiency, having regard to the totality of circumstances."); *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3 (Decision on the Respondent's Request for Bifurcation) dated 17 Jan. 2020 (**CL-160**) ¶ 25 ("The Tribunal agrees that these are all highly relevant considerations. In general, the Tribunal accepts that the exercise is one of 'weighing for both sides the benefits of procedural fairness and efficiency against the risks of delay, wasted expense and prejudice.'").

and efficiency.[58] This is consistent with the view that "[t]he choice between a preliminary decision and a joinder to the merits *is a matter of procedural economy*"[59]—concept that has been recognized in the context of the ICSID Rules.[60] Thus, while bifurcation may play a role in case management in certain circumstances, it is recognized that it may also be counterproductive:

> [B]ifurcating a case is not always efficient or fair. Bifurcation inevitably imposes delays, which are often significant, in the resolution of some issues and frequently results in increases in the overall time (and costs) of an arbitration [which] can only be justified on the basis that significant expense would be wasted in litigating particular issues, which might become moot or irrelevant following decisions on other issues. . . .
>
> In many cases, particularly where there are factual and/or legal overlaps between different issues (*e.g.*, jurisdiction and liability; liability and damages) it may be wasteful, as well as slow, to bifurcate the arbitral proceedings: bifurcation may produce few savings (of time or costs) because assertedly preliminary issues will require detailed evidence and argument, including on other aspects of the parties' dispute. In other cases,

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[58] *See Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation dated 21 Jan. 2015 (**CL-165**) ¶ 92 (stating "[i]n this case, the Respondent has not satisfied the Tribunal that it is appropriate, having regard to all the circumstances, that bifurcation should be ordered."); *MetLife, Inc., MetLife Servicios S.A. and MetLife Seguros de Retiro S.A. v. Argentine Republic*, ICSID Case No. ARB/17/17, Procedural Order No. 2 (Decision on Bifurcation) dated 21 Dec. 2018 (**CL-156**) ¶ 23 ("Respondent has failed to establish that bifurcation would serve the interest of an efficient arbitration."); *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Procedural Order No. 5 (Decision on Bifurcation) dated 29 May 2012 (**CL-166**) ¶ 19 (acknowledging that the standard of proof is on the Respondent to prove "procedural economy."); *see also Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, UNCITRAL, PCA Case No. 2016-7, Procedural Order No. 4 Decision on the Respondent's Application for Bifurcation dated 19 Apr. 2017 (**CL-167**) ¶ 78-79 ("[F]airness and procedural efficiency are the determining factors that should guide the Tribunal"). Numerous tribunals have found that bifurcation does not lead to procedural efficiency. *See e.g.*, *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2 Decision on Bifurcation dated 31 Jan. 2018 (**CL-161**) ¶ 38 (stating "the overarching principle that shall guide the Tribunal's decision is procedural fairness and efficiency, having regard to the totality of circumstances.").

[59] Christoph H. Schreuer et al., THE ICSID CONVENTION: A COMMENTARY (Cambridge University Press 2d ed.) (2009) (**CL-106**), at 537 (emphasis added). *See also Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent's Notice of Jurisdictional Objections and Request for Bifurcation dated 8 Aug. 2013 (**RL-23**) ¶ 38 ("With regard to the applicable standard, Claimants are in agreement with Respondent that the Tribunal shall consider as an overarching question whether fairness and procedural efficiency would be preserved or impaired. The Tribunal agrees."); *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and No. 12/40, Procedural Order No. 15 dated 12 Jan. 2015 (**CL-168**) ¶ 26 ("Bifurcation of preliminary issues is within the discretionary power of an ICSID tribunal. An accepted standard for exercising such power in ICSID and other international arbitrations is the furtherance of the efficiency of dispute resolution."); *Emmis International Holding, B.V. et al. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation dated 13 June 2013 (**RL-21**) ¶ 37(2) (noting the parties' agreement that "[t]he overarching question is one of procedural efficiency.").

[60] ICSID, Working Paper #1, Proposals for Amendment of the ICSID Rules dated Aug. 2018 (**CL-4**) ¶ 393; Schedule 9: Addressing Time and Cost in ICSID Arbitration ¶¶ 2, 9-11 (noting that "most users [of ISDS] consider efficiency vital to the success of the system.").

> **the logic of bifurcation depends on unstated assumptions about the likely outcome of the first phase of proceedings (assumptions whose accuracy is often speculative at early stages in the arbitration)**. These uncertainties often make it difficult to justify bifurcating an arbitration and potentially delaying complete resolution of the parties' dispute for many months (or more).[61]

16. For instance, bifurcation is inefficient when it would result in the assessment of duplicative evidence.[62] When bifurcation would result in duplicative evidence, "[t]here is no procedural or other advantage with bifurcating the proceeding, so as to require not only the Tribunal to consider the same, or similar, evidence on two occasions, but so as to require witnesses to appear on two occasions, submissions to be prepared which canvass the same, or similar, matters, and the consequential cost and expense."[63]

17. "[W]here the answer to the jurisdictional questions depends on testimony and other evidence that can only be obtained through a full hearing of the case," bifurcation should too be rejected.[64] A significant overlap between factual and jurisdictional questions risks the Tribunal prematurely deciding certain issues of fact.[65] Put differently, if this proceeding were bifurcated and the Tribunal had to review the evidence relevant to both jurisdiction and merits, the Tribunal would inevitably "need to make certain findings of fact" and consequently, "the Tribunal may [] prejudge[] some of the issues of fact without having heard (at the jurisdictional stage) all the

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[61] *See* Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION, 3d Ed (**CL-169**), at 2410.

[62] *See Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation dated 21 Jan. 2015 (**CL-165**) ¶¶ 92-94 (rejecting bifurcation where "the result of bifurcation may well require a consideration of the same, or similar, facts for the purpose of jurisdiction and admissibility and then, later, for the purpose of the merits."); *EMS Shipping & Trading GmbH v. Republic of Albania*, ICSID Case No. ARB/23/9, Procedural Order No. 3 Bifurcation dated 23 Feb. 2024 (**CL-170**) ¶¶ 45-46 (rejecting bifurcation when "if the objection were to fail, it would be necessary to address the same facts and evidence twice instead of once" because, in that scenario, "bifurcation would be inefficient.").

[63] *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation dated 21 Jan. 2015 (**CL-165**) ¶ 93.

[64] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Procedural Order No. 5 (Decision on Bifurcation) dated 4 Mar. 2016 (**CL-171**) ¶ 3.6. *See also* Christoph H. Schreuer et al., THE ICSID CONVENTION: A COMMENTARY (Cambridge University Press 2d ed.) (2009) (**CL-106**), at 539; Marinn Carlson and Patrick Childress, *Bifurcation in Investment Treaty Arbitration*, THE INVESTMENT TREATY ARBITRATION REVIEW (**CL-150**), at 53 (explaining that "tribunals generally refuse to bifurcate" when "reaching a decision on the jurisdictional objection will require an examination of the merits of the case."); *Abertis Infraestructuras, S.A. v. Argentine Republic*, ICSID Case No. ARB/15/48, Procedural Order No. 2 on the Respondent's Request for Bifurcation dated 27 Mar. 2017 (**CL-172**) ¶ 40.

[65] *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2 Decision on Respondent's Request for Bifurcation dated 14 Dec. 2017 (**CL-173**) ¶ 109.

relevant evidence, which will only become fully available to the Tribunal at the liability stage."[66] As Professor Schreuer observes, "some jurisdictional questions are so intimately linked to the merits of the case that it is impossible to dispose of them in preliminary form."[67]

18. Importantly, the factors described above "are **cumulative** and must be met with respect to each of the objections invoked in order to be able to bifurcate the respective objection."[68] In other words, unless the party requesting bifurcation proves that bifurcation would result in fairness and procedural efficiency, which is shown by meeting each and every factor described above, the proceeding should not be bifurcated.[69] For example, although the tribunal in *Global Telecom v. Canada* found an objection to be serious and substantial, and potentially dispositive, it rejected bifurcation because it was intertwined with the merits and would not lead to procedural economy.[70] The tribunal was concerned with the "considerable potential for overlap," which would potentially risk the Tribunal having to "decide on issues of fact prematurely" and "inevitably" lead to increased costs, due to multiple hearings and the corresponding "briefing [and] tendering of evidence."[71]

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[66] *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. Plurinational State of Bolivia*, UNCITRAL PCA Case No. 2018-39, Decision on the Respondent Application for Termination, Trifurcation and Security for Costs dated 9 July 2019 (**CL-174**) ¶¶ 133-135.

[67] Christoph H. Schreuer et al., THE ICSID CONVENTION: A COMMENTARY (Cambridge University Press 2d ed.) (2009) (**CL-106**), at 539.

[68] *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Procedural Order No. 2 Decision on the Request for Bifurcation dated 2 Dec. 2022 (**CL-159**) ¶ 83 ("The three stated conditions are cumulative and must be met with respect to each of the objections raised in order to bifurcate the respective objection.").

[69] Marinn Carlson and Patrick Childress, *Bifurcation in Investment Treaty Arbitration*, THE INVESTMENT TREATY ARBITRATION REVIEW (**CL-150**), at 53 (stating "Tribunals typically only favour bifurcation when a preliminary objection meets all three criteria."); *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2 Decision on Bifurcation dated 31 Jan. 2018 (**CL-161**) ¶ 56 ("[T]he Tribunal's analysis reveals that the abuse of process objection, but only that objection, could justify the bifurcation of the proceedings. Nevertheless, the Tribunal recalls that the overarching principle is the fairness and efficiency of this process as a whole. With this principle in mind, the Tribunal considers that it would be more efficient to deal with all preliminary objections together with liability in a first phase . . ."); *Glamis Gold, Ltd., v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised) dated 31 May 2005 (**RL-7**) ¶¶ 9-11 (explaining that despite the presumption in favor of bifurcation, the tribunal may decline to bifurcate when it would not result in increased efficiency and that the tribunal should evaluate this using the three factors).

[70] *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2 Decision on Respondent's Request for Bifurcation dated 14 Dec. 2017 (**CL-173**) ¶¶ 102-103, 109.

[71] *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2 Decision on Respondent's Request for Bifurcation dated 14 Dec. 2017 (**CL-173**) ¶ 109; *see also Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case No. ARB/11/18, Procedural Order No. 1 and Decision on Bifurcation dated 18 Apr. 2012 (**CL-176**) ¶ 13.2.

19. In that context, Respondent's reliance on Professor Thirlway's assertion that "a jurisdictional issue must be dealt with as a preliminary point" is entirely misplaced.[72] Indeed, Professor Thirlway's quote refers only to proceedings before the International Court of Justice ("**ICJ**"),[73] where the prior version of the procedural rules provided for mandatory bifurcation if the respondent State raised preliminary objections.[74] As in ICSID, the current ICJ rules of procedure no longer provide for mandatory bifurcation given the "generally accepted belief that the [ICJ]'s efficiency declines when it bifurcates proceedings."[75]

20. Here, it bears noting that Honduras's burden for bifurcation is particularly enhanced given Respondent's reservation "to raise additional jurisdictional objections in the future" in its Request.[76] As the tribunal in *BA Desarrollos v. Argentina* recently found, granting bifurcation when the respondent State has reserved its rights to raise further objections is subject to an even "higher standard" because there is the possibility of "**completely frustrating the intended efficiency of bifurcation**" by granting the State's request.[77] In making this reservation, Respondent suggests that it may raise subsequent preliminary objections even if the Tribunal grants Respondent's request. Therefore, if there are any doubts regarding the "binding force" of the objection raised, bifurcation cannot be granted.[78]

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[72] Request for Bifurcation ¶ 85 (citing H. Thirlway, "Preliminary Objections," in *Max Planck Encyclopedia of Public International Law* (Aug. 2006) (**RL-8**)).

[73] H. Thirlway, "Preliminary Objections," in *Max Planck Encyclopedia of Public International Law* (Aug. 2006) (**RL-8**) ¶ 4 (citing Art. 79 of the ICJ Rules).

[74] *Compare* Xinjun Zhang, "Bifurcation in Inter-State Cases" in *University of Pennsylvania Journal of Law* (2019) (**CL-177**), at 938 (noting that "the Rules of Court in 1936, 1946, 1972, 1978, and 2001 gradually but solidly provide that a party is entitled to bifurcation, notwithstanding a general belief that bifurcation reduces the Court's efficiency.") *with* International Court of Justice, *Amendments to the Rules of Court* dated 21 Oct. 2019 (**CL-178**), Art. 79 ("**the Court may decide, if the circumstances so warrant**, that questions concerning its jurisdiction or the admissibility of the application shall be determined separately.") (emphasis added).

[75] Xinjun Zhang, "Bifurcation in Inter-State Cases" in *University of Pennsylvania Journal of Law* (2019) (**CL-177**), at 982 (noting that "it is conventional wisdom that . . . efficiency declines as a result of bifurcation."), 979-980 (narrating that past cases from the PCJ and the ICJ suggest that bifurcation does not enhance procedural efficiency), 987; *see Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.á r.l. v. Kingdom of Spain*, ICSID Case No. ARB/19/4, Procedural Order No. 3 Decision on Bifurcation dated 28 Aug. 2020 (**CL-200**) ¶ 66 (noting that "unlike some other tribunals such as the International Court of Justice, where proceedings on the merits are suspended upon receipt of preliminary objections, no such action is mandated by the ICSID Convention or the ICSID Arbitration Rules."). .

[76] Request for Bifurcation ¶ 102 ("Respondent also reserves its right to raise additional jurisdictional objections in the future.").

[77] *BA Desarrollos LLC v. Argentine Republic*, ICSID Case No. ARB/23/32, Procedural Order No. 7 dated 9 Sept. 2024 (**CL-164**) ¶¶ 17-18.

[78] *BA Desarrollos LLC v. Argentine Republic*, ICSID Case No. ARB/23/32, Procedural Order No. 7 dated 9 Sept. 2024 (**CL-164**) ¶¶ 17-18.

21. As Claimants explain below, none of Respondent's preliminary objections warrant bifurcation because none of them meet these 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. Accordingly, the Tribunal should reject Respondent's request to bifurcate its preliminary objections.[79] To underscore that bifurcation is not warranted, Claimants summarize below the reasons why Respondent's objections are meritless and reserves all rights to address the merits of the objection in due course should it become necessary.

III. RESPONDENT'S OBJECTIONS DO NOT WARRANT BIFURCATION: THEY ARE INTERTWINED WITH THE MERITS, WOULD NOT MATERIALLY REDUCE TIME AND COST, AND WOULD NOT DISPOSE OF ALL OR PART OF THE CLAIMS

A. RESPONDENT'S RECYCLED EXHAUSTION RESERVATION OBJECTION IS FRIVOLOUS AND DOES NOT WARRANT BIFURCATION

22. Respondent requests that the Tribunal bifurcate the proceeding to address its objection that the "Tribunal lacks jurisdiction to hear this case" on the grounds that Claimants failed to exhaust local remedies prior to resorting to arbitration.[80] According to Respondent, it "conditioned its consent to ICSID arbitration on the prior exhaustion of local remedies, a condition which Claimants have failed to fulfill."[81] To support its statement, Respondent unearthed Legislative Decree No. 41-88[82] to argue that it "expressly opted to preserve the traditional rule under customary international law to condition its consent to ICSID arbitration to the prior exhaustion of local remedies."[83] For several reasons, Respondent's objection is not serious and

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[79] *See, e.g.*, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 Sept. 2003 (**CL-179**) ¶¶ 6.2-6.3 (rejecting to bifurcate respondent's objection based on the exhaustion of local remedies because of the "close relationship between the [r]espondent's primary jurisdictional objection . . . and the factual evidence pertaining to the complete history of the [c]laimant's activities in Ukraine"); *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation dated 3 Aug. 2020 (**CL-180**) ¶¶ 56-60 (rejecting to bifurcate respondent's objection based on expropriation because it would require to analyze issues related to the merits); *Murphy Exploration & Production Company – International v. Republic of Ecuador (II)*, PCA Case No. 2012-16, Decision on Respondent's Request for Bifurcation dated 19 Dec. 2012 (**CL-181**) ¶ 69 (rejecting the State's objection based on the lack of jurisdiction to rule hear an umbrella claim because it was "so intertwined with the substantive issues that [it is] not suitable for determination in a preliminary phase.").

[80] Request for Bifurcation ¶ 10.

[81] Request for Bifurcation ¶ 10.

[82] Republic of Honduras, Legislative Decree No. 41-88 (published in the Official Gazette dated 4 Aug. 1988) dated 25 Mar. 1988 (**Exh. R-3**).

[83] Request for Bifurcation ¶ 15.

substantial, increasing the proceeding's time and cost if argued, and therefore does not warrant bifurcation.

1. Respondent opportunistically raises this objection, even after multiple tribunals have rejected it as a threshold limitation

23. The year 2023 is not the first time that an ICSID case was brought against the Republic of Honduras. In fact, the Republic of Honduras was named respondent in four ICSID cases prior to 2023.[84] These cases were first registered between 1999 and 2018, with the first being registered only 11 years after 1988[85]—the year that Legislative Decree No. 41-88 was enacted in Honduras. Yet, until the recent wave of cases brought against Honduras starting in 2023, there is no indication in the public domain that Respondent ever raised Legislative Decree No. 41-88 to demand the exhaustion of local remedies in any of its ICSID cases.

24. It was only in 2023, under President Castro's administration, that Honduras unearthed Legislative Decree No. 41-88. Shortly after the first ICSID case in 2023 was registered, Honduras held a press conference in which it "publicly and legally denounced ICSID," claiming that ICSID had "violated laws and procedures" by allegedly "disregard[ing] the legal reservation the State registered in . . . 1988."[86] Further, it attacked investors who were seeking recourse via ICSID, naming them "enemies" of the State.[87] Months later, in response to the avalanche of arbitration claims filed against it, Honduras formally denounced the ICSID Convention[88]—all in a blatant attempt to avoid international liability for the conduct that is at the root of the present Arbitration.

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[84] ICSID Website, Results of Case Search in Which Honduras is Respondent (last accessed 10 Oct. 2024), available at https://icsid.worldbank.org/cases/case-database (**Exh. C-245**). These four cases are (i) *Astaldi S.p.A. & Columbus Latinoamericana de Construcciones S.A. v. Republic of Honduras*, ICSID Case No. ARB/99/8; (ii) *Astaldi S.p.A. v. Republic of Honduras*, ICSID Case No. ARB/07/32; (iii) *Elsamex, S.A. v. Honduras*, ICSID Case No. ARB/09/4; and (iv) *Inversiones Continental (Panamá), S.A. v. Republic of Honduras*, ICSID Case No. ARB/18/40.

[85] *See* ICSID Case Details for *Astaldi S.p.A. & Columbus Latinoamericana de Construcciones S.A. v. Republic of Honduras*, ICSID Case No. ARB/99/8 (**Exh. C-251**) (noting that the date of registration was on 29 Dec. 1999).

[86] Honduras Press Secretary, "*We Denounce the Legality of ICSID Proceeding*" X (FORMERLY TWITTER) dated 31 May 2023 (**Exh. C-242**); "*Honduras Accuses ICSID of Illegality in Proceedings in Zede Prospera Case*," DINEROHN dated 31 May 2023 (**Exh. C-94**).

[87] "*Honduras Accuses ICSID of Illegality in Proceedings in Zede Prospera Case*," DINEROHN dated 31 May 2023 (**Exh. C-94**) (noting that Honduras's Secretary of Finance describes investor that has brought forth an ICSID as "enemies [that] are going to lose at the national and international level").

[88] ICSID News Release, "*Honduras Denounces the ICSID Convention*" dated 29 Feb. 2024 (**Exh. C-166**).

25. Indeed, Honduras has never notified investors of its purported reservation. At the time Claimants filed the Notice of Arbitration, and even presently, Honduras's reservation does not appear on the list of legislative and other measures that Member States have communicated to ICSID.[89] If Honduras genuinely intended to require exhaustion of local remedies, it would have made the "reservation" clear, as other States have done.[90] Relying on the State's representations, Claimants complied with the conditions on consent set forth in the Treaty, including the requirement to waive other dispute settlement procedures. Because Honduras did not notify investors, it must be estopped from asserting this "reservation" now to evade jurisdiction.

26. Respondent is no doubt aware of the myriad of flaws in its objection as it has raised preliminary objections in in all five ICSID cases pending against it that have reached the relevant procedural juncture.[91] In the two cases where tribunals have reached a decision on this specific exhaustion objection, tribunals have declined to uphold it in the preliminary phase.[92] In another case, the tribunal declined to bifurcate to address Respondent's objections.[93]

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[89] *Contracting States and Measures Taken by Them for the Purpose of the Convention*, ICSID dated 25 Aug. 2024 (**C-255**).

[90] *Contracting States and Measures Taken by Them for the Purpose of the Convention*, ICSID dated 25 Aug. 2024 (**C-255**), n. 6 ("On January 16, 2003, Guatemala notified the Centre that 'the Republic of Guatemala will require the exhaustion of local administrative remedies as a condition of its consent to arbitration under the Convention.").

[91] These five cases are (i) *JLL Capital S.A.P.I. de C.V. v. Republic of Honduras*, ICSID Case No. ARB/23/3 (filing preliminary objections pursuant to ICSID Arbitration Rule 41 on 18 Aug. 2023); (ii) *Autopistas Atlántico, S.A. de C.V. and others. v. Honduras*, ICSID Case No. ARB/23/10 (filing preliminary objections pursuant to ICSID Arbitration Rule 41(5) on 15 July 2023); (iii) *Inversiones Continental (Panamá), S.A. v. Republic of Honduras*, ICSID Case No. ARB/18/40; (iv) *Honduras Próspera Inc., St. John's Bay Development Company LLC, and Próspera Arbitration Center LLC v. Republic of Honduras*, ICSID Case No. ARB/23/2 (filing preliminary objections pursuant to Article 10.20.5 of CAFTA-DR on 7 Aug. 2024); and (v) *Inversiones and Desarrollos Energéticos, S.A. v. Republic of Honduras*, ICSID Case No. ARB/23/40 (filing preliminary objections pursuant to ICSID Arbitration Rule 41 on 18 Sept. 2024).

[92] *See ICSID Tribunal Dismisses Rule 41 Objection in Financial Services Dispute with Honduras*, INVESTMENT ARBITRATION REPORTER dated 29 Dec. 2023 (**Exh. C-252**) (reporting that the tribunal in *JLL Capital S.A.P.I. de C.V. v. Republic of Honduras* dismissed Respondent's objection that the investor's claims manifestly lacked legal merit because it had conditioned its consent to arbitration upon the exhaustion of local remedies by the investor when it ratified the ICSID Convention); *ICSID Tribunal Rejects Honduras' Argument that Claims Manifestly Lack Legal Merit Due to Investor's Failure to Exhaust Local Remedies*, INVESTMENT ARBITRATION REPORTER dated 5 Apr. 2024 (**Exh. C-253**) (reporting that the tribunal in *Autopistas Atlántico, S.A. v. Honduras* dismissed Respondent's objection that the claim manifestly lacked legal merit because the state had conditioned its consent to arbitration upon the exhaustion of local remedies by the investor when it ratified the ICSID Convention).

[93] ICSID Case Details for *Inversiones and Desarrollos Energéticos, S.A. v. Republic of Honduras*, ICSID Case No. ARB/23/40 (last accessed on 11 Nov. 2024) (**Exh. C-249**) (showing that Respondent filed preliminary objections pursuant to ICSID Arbitration Rule 41 on 18 Sept. 2024 and the tribunal dismissed the objection on 5 Nov. 2023).

2. Respondent's objection is not serious or substantial because respondent's declaration in Legislative Decree 41-88 does not constitute a condition to its consent in this case

27. Notably, contrary to the erroneous argument that Respondent posits,[94] the exhaustion requirement outlined in Legislative Decree No. 41-88 is not a condition upon which its consent to ICSID arbitration is contingent on in this Arbitration. While a State can require the exhaustion of local proceedings as a condition of its consent to arbitration, it must do so in the instrument that provides its consent.[95] Here, the instrument of consent is CAFTA-DR.

28. Contrary to Respondent's incorrect assertion that "every State party to the Convention has to preserve the traditional rule of exhaustion,"[96] the presumption under the ICSID Convention is that the exhaustion of local remedies is not a prerequisite to a State's consent to arbitration.[97] The limiting exception being that, **only if and when** a contracting State indicates so, is a contracting State's consent conditioned on the exhaustion of local remedies.[98] This is evident from Article 26 of the ICSID Convention:

> Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.[99]

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[94] Request for Bifurcation ¶ 14 ("[T]he Republic of Honduras conditioned its consent to ICSID arbitration at the time of approving and ratifying the ICSID Convention").

[95] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 Sept. 2003 (**CL-179**) ¶ 13.5 ("Any such reservation to the [State's] consent to ICSID arbitration must be contained in the instrument in which such consent is expressed, *i.e.* the BIT itself.").

[96] Request for Bifurcation ¶ 13.

[97] *See, e.g., Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 Sept. 2003 (**CL-179**) ¶¶ 13.4-13.5 ("The first sentence of Article 26 secures the exclusivity of a reference to ICSID arbitration vis-à-vis any other remedy. A logical consequence of this exclusivity is the waiver by Contracting States to the ICSID Convention of the local remedies rule, so that the investor is not compelled to pursue remedies in the respondent State's domestic courts or tribunals before the institution of ICSID proceedings. This waiver is implicit in the second sentence of Article 26, which nevertheless allows Contracting States to reserve its right to insist upon the prior exhaustion of local remedies as a condition of its consent.").

[98] *See, e.g., AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction dated 26 Apr. 2005 (**CL-182**) ¶ 69 (noting that "[u]nder Article 26 of the Convention, for entering into play, exhaustion of local remedies shall be **expressly required** as a condition of the consent of one party to arbitration under the Convention. Absent this requirement, exhaustion of local remedies cannot be a precondition for an ICSID Tribunal to have jurisdiction.") (emphasis added).

[99] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("**ICSID Convention**"), Art. 26.

29. The first sentence of Article 26 outlines the default presumption for the exhaustion of local remedies as a condition of consent to ICSID arbitration, whereas the second sentence authorizes a limited exception to this presumption. Accordingly, if a contracting State wishes to require the exhaustion of local remedies as a condition of its consent to ICSID arbitration, it must strictly comport with the narrow limits of Article 26, which mandates that such requirement be an integral part of the parties' consent.

30. Respondent erroneously asserts that "Honduras conditioned its consent to . . . arbitration at the time of approving and ratifying the . . . Convention."[100] That is incorrect. A State's ratification of the ICSID Convention does not constitute consent to arbitration.[101] Rather, it is only after a State has become an ICSID Member State that it can consent to arbitrate disputes before ICSID. Article 25(1) of the ICSID Convention requires that the parties "consent in writing to submit [a dispute] to the Centre" as a prerequisite to jurisdiction.[102] Likewise, diverse tribunals in numerous proceedings have recognized that ratification of the ICSID Convention is insufficient to establish consent and that separate written consent is required.[103] Accordingly, the only

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[100] Request for Bifurcation ¶ 14 ("[T]he Republic of Honduras conditioned its consent to ICSID arbitration at the time of approving and ratifying the ICSID Convention.").

[101] ICSID Convention, Preamble ("The Contracting States: . . . [d]eclar[e] that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration."). *See also* Christoph H. Schreuer *et al., Chapter II: Jurisdiction of the Centre, in* THE ICSID CONVENTION – A COMMENTARY (3d ed. 2022) (**CL-183**), at 346-347 (explaining that "[c]onsent by both or all parties is an indispensable condition for the jurisdiction of the Centre. The fact that the host State and the investor's State of nationality have ratified the Convention will not suffice.").

[102] ICSID Convention, Art. 25(1) ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."). Similarly, Article 25(3) of the ICSID Convention also conveys that consent to arbitration is separate and subsequent to becoming a member of ICSID ("[c]onsent . . . shall require.").

[103] *See, e.g., PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award dated 5 May 2015 (**CL-184**) ¶ 244 ("It is well-established that this requirement is not satisfied merely by a State's ratification of the ICSID Convention or by a notification under Article 25(4) of the ICSID Convention that the Contracting States may choose to make."); *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction dated 11 May 2005 (**CL-185**) ¶ 139 ("The Tribunal agrees with the Argentine Republic that the consent expressed in ratifying the Convention is not the consent required by the Convention for bringing a claim before ICSID; this indeed requires a separate declaration by means of a treaty or other acts making such consent unequivocally clear."); *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction dated 8 Feb. 2013 (**CL-186**) ¶ 131 ("As earlier stated, a fundamental tenet of the ICSID Convention is that 'no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.'").

applicable conditions of Respondent's consent to ICSID arbitration are the ones listed in the instrument in which such consent is expressed.

31. Here, the instrument in which Honduras expressed its consent is CAFTA-DR.[104] Pursuant to CAFTA-DR, Respondent consented to ICSID arbitration subject to the fulfillment of the criteria set forth in Articles 25 and 26 of the ICSID Convention and those under CAFTA-DR itself. Claimants' claims satisfy such criteria,[105] a fact which, tellingly, Respondent does not contest.[106]

32. CAFTA-DR 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 been previously been submitted before domestic instances.[107] In addition, 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 proceedings seeking redress with respect to measures alleged to be a breach of CAFTA-DR.[108]

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[104] CAFTA-DR (**CL-1**), Chapter 10, § B, Art. 10.17 ("1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement. 2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of . . . Chapter II of the ICSID Convention (Jurisdiction of the Centre) . . . for written consent of the parties to the dispute.").

[105] Notice of Arbitration ¶¶ 48-53, 60-62; Memorial ¶¶ 163, 180-183.

[106] Respondent only contests that Ms. Schloesser de Paiz did not comply with CAFTA-DR's purported "negotiation and consultation requirements," an argument completely devoid of merit as explained below in § III.B.

[107] CAFTA-DR (**CL-1**), Chapter 10, § B, Art. 10.18.4 ("No claim may be submitted to arbitration (a) for breach of an investment authorization under Article 10.16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or (b) for breach of an investment agreement under Article 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C), if the claimant (for claims brought under Article 10.16.1(a)) or the claimant or the enterprise (for claims brought under Article 10.16.1(b)) has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, for adjudication or resolution.").

[108] CAFTA-DR (**CL-1**), Chapter 10, § B, Art. 10.18.2(b) ("No claim may be submitted to arbitration under this Section unless . . . the notice of arbitration is accompanied, (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.").

The Paizes and Pacific Solar complied with CAFTA-DR's waiver provision as of the submission of the claims to arbitration,[109] an additional fact that Respondent does not (and cannot) contest.[110]

3. Bifurcating Respondent's objection would create inefficiencies and result in a protracted proceeding

33. Respondent has failed to establish that its supposed exhaustion reservation warrants bifurcation because this objection is frivolous on its face. As the tribunal in *Generation Ukraine* explained, an exhaustion requirement further to the second sentence of Article 26 "must be contained in the instrument in which such consent is expressed, *i.e.*, the [treaty] itself."[111] Here, it is evident that there is **no** textual support in the applicable instrument of consent, CAFTA-DR, that Respondent conditioned its consent to arbitration on the exhaustion requirement outlined in Legislative Decree No. 41-88. Indeed, in Article 10.17 of CAFTA-DR, Respondent consented to arbitration on the condition that the investor submit its claims pursuant to CAFTA-DR. As this preliminary objection is not likely to succeed, to bifurcate on this ground would only accomplish Respondent's goal to unnecessarily delay the proceedings. In fact, in the two cases where Respondent presented and tribunals dismissed this very same objection, there was an average of a

[109] Mr. Fernando Paiz's Waiver Pursuant to CAFTA-DR Article 10.18 dated 22 Aug. 2023 (**Exh. C-37**); Ms. Anabella Schloesser de Paiz's Waiver Pursuant to CAFTA-DR Article 10.18 dated 22 Aug. 2023 (**Exh. C-38**); Pacific Solar's Waiver Pursuant to CAFTA-DR Article 10.18 dated 22 Aug. 2023 (**Exh. C-39**). Consistent with the terms of CAFTA-DR, the Paizes and Pacific Solar reserve their right to initiate or continue any proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party. *See* CAFTA-DR (**CL-1**) Art. 10.18.3.

[110] In that sense, Respondent's assertion that "Claimants should have had recourse – and may still have recourse – to the judicial courts of Honduras" (*see* Request for Bifurcation ¶ 20) only shows Respondent's lack of deference for the wording of CAFTA-DR. Had the Paizes and Pacific Solar brought claims before domestic courts, they would be barred from bringing claims for breach of Investment Agreements pursuant to CAFTA-DR (*see* CAFTA-DR (**CL-1**) Art. 10.10.4). In any way, and contrary to what Respondent suggests, the Paizes and Pacific Solar cannot resort to domestic litigation since they waived their right to do so.

[111] *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 Sept. 2003 (**CL-179**) ¶ 13.5 ("Any such reservation to the [State's] consent to ICSID arbitration must be contained in the instrument in which such consent is expressed, *i.e.* the BIT itself.").

six-month delay in the proceedings.[112] Accordingly, to bifurcate on this ground would "only lead to the waste of resources that [bifurcation] is purportedly intending to avoid."[113]

34. But even assuming *arguendo* that Respondent's objection is not meritless, it requires the Tribunal to determine, among other things, whether requiring the Paizes to exhaust local remedies before accessing arbitration would be a "futile" exercise.[114] To make this determination, the Tribunal would have to analyze, *inter alia*, whether the Paizes can be required to exhaust local administrative proceedings before the same administrative bodies[115] that continue to breach Honduras's commitments to Pacific Solar[116] and have ignored the Paizes' and Pacific Solar's attempts to settle the dispute for years.[117] Similarly, the Tribunal would also have to assess the conduct and level of independence and efficiency of the Honduran Judiciary, which is questionable,[118] and the smear campaign orchestrated precisely by the Government against renewable energy generators like Pacific Solar, an issue which goes to the heart of the merits of

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[112] *See* ICSID Case Details for *JLL Capital S.A.P.I. de C.V. v. Republic of Honduras*, ICSID Case No. ARB/23/3 (last accessed on 17 Oct. 2024) (**Exh. C-246**) (showing that Respondent filed preliminary objections pursuant to ICSID Arbitration Rule 41 on 18 Aug. 2023 and the tribunal dismissed the objection on 21 Dec. 2023, causing a two-month delay in the proceedings); ICSID Case Details for *Autopistas Atlántico, S.A. de C.V. and others. V. Honduras*, ICSID Case No. ARB/23/10 (last accessed on 17 Oct. 2024) (**Exh. C-247**) (showing that Respondent filed preliminary objections pursuant to ICSID Arbitration Rule 41(5) on 15 July 2023 and the tribunal dismissed the objection on 3 Apr. 2024, causing an eight-month delay in the proceedings).

[113] *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Procedural Order No. 2 Decision on the Request for Bifurcation dated 2 Dec. 2022 (**CL-159**) ¶ 82(c).

[114] *See, e.g.*, *Ambiente Ufficio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility dated 8 Feb. 2013 (**CL-187**) ¶ 620.

[115] The relevant administrative bodies before which Pacific Solar could potentially bring its claims are ENEE, SEFIN, and SERNA. *See* 2022 New Energy Law (**Exh. C-10**), Art. 5; State Guarantee (**Exh. C-2**), Cls. 4.4. (providing that if ENEE fails to honor its obligations under the PPA, Pacific Solar can request the payment before the Honduran State, represented through SEFIN and the Attorney General's Office), 3.2 (providing that the Honduran State is to be addressed through SEFIN and the Attorney General's Office); Operations Agreement (**Exh. C-3**), Cl. 10 (mandating Pacific Solar to raise any issue with SERNA).

[116] As explained in the Memorial (*see* § II.F), ENEE, SEFIN, the Attorney General's Office, and SERNA have breached the Agreements, including by refusing to pay and by curtailing Pacific Solar's energy dispatch, and the Attorney General's Office is also defending the State in the current proceedings.

[117] *See, e.g.*, Notices and Communications from the Paizes to Honduras under CAFTA-DR dated 10 Oct. 2022. 10 Jan 2023 and 24 Mar. 2023 (**Exh. C-12**) (addressing the consultations requests to Minister Tejada, head of the Ministry of Energy – which is the entity succeeding SERNA, and manager of ENEE; and copying, *inter alia*, Minister Moncada, then head of SEFIN, and Procurador Díaz, head of the Attorney General's Office, the two entities that entered into the State Guarantee).

[118] *See, e.g.*, *CPI 2023 for the Americas: Lack of Independent Judiciary Hinders the Fight Against Corruption*, Transparency International dated 30 Jan. 2024 (**Exh. C-254**), at 6 (putting Honduras as an example of "significant setback [of c]o-optation of power" and lack of judicial independence, noting that Respondent has experienced "a significant weaking of check and balances."), 4 (confirming that "the removal of judges and prosecutors without merit by other branches of the state [in Honduras]. . . fosters injustice and a system where the law is applied according to the interests of the ruling government and elite.").

Claimants' claims.[119] As such, treating this issue on a separate phase case would be inefficient, making bifurcation unwarranted.[120]

35. In sum, Respondent's Preliminary Objection is *prima facie* non substantial, as the Honduras consented to arbitrate the dispute with the Paizes pursuant to CAFTA-DR. Further, the objection is intertwined with the merits, since it would require the Tribunal to assess whether resorting to the Honduran authorities and judiciary would be futile (which it would), and thus would not favor the efficiency of the proceedings.

B. BIFURCATING RESPONDENT'S NOTICE OBJECTION WOULD NOT REDUCE TIME AND COST BECAUSE IT LACKS SUPPORT IN THE TREATY AND IS INTERTWINED WITH THE MERITS

36. Respondent requests that the Tribunal bifurcate the proceeding to decide as a preliminary matter that "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 . . . CAFTA-DR before submitting her claims to arbitration." [121] To support its objection, it argues that "Honduras's offer to arbitrate the dispute has not been perfected" because "no consultations or negotiations were held between State representatives and Ms. Schloesser."[122] Beyond its evident lack of merit, Respondent's objection is too intertwined with the merits to warrant bifurcation, as further explained below.

37. To begin with, Respondent does not contest that Ms. Schloesser complied with the 90-day cooling-off period under the Treaty, or that it received proper notice of the dispute almost a year before Claimants submitted their claims to arbitration.[123] Instead, Respondent argues that Ms. Schloesser did not comply with the Treaty's notice requirement because no **meetings** between Government officials and her took place.[124] As explained below, Respondent's objection is not

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119 *See* Memorial §§ IV.B.2.(c), II.F.1.(b).

120 See *Tayeb Benabderrahmane v. State of Qatar*, ICSID Case No. ARB/22/23, Procedural Order No. 6 Request for Bifurcation dated 1 July 2024 (**CL-188**) ¶¶ 32-34.

121 Request for Bifurcation ¶ 23.

122 Request for Bifurcation ¶¶ 23, 27, 30.

123 *See generally* Request for Bifurcation § II.B. *See also* CAFTA-DR (**CL-1**), Chapter 10, § B, Art. 10.16.2. ("At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent")."); Notices and Communications from the Paizes to Honduras under CAFTA-DR dated 10 Oct. 2022 – 13 Feb. 2023 (**Exh. C-12**), at 1; Claimants' Notice of Arbitration, at 1.

124 *See* Request for Bifurcation ¶ 27 ("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.").

supported by the Treaty's text and therefore lacks merit. It also runs contrary to the well-established principle that the purpose of a notice provision is to "enable the respondent State to conduct such dispute settlement negotiations as it considers appropriate," [125] which, in Ms. Schloesser's case, Respondent received 153 days before the submission of claims, or 60+ days longer than the 90-day cooling-off period that the Treaty requires.[126]

38. Article 10.15 of CAFTA-DR outlines the "Consultation and Negotiation" provision of the Investor-State Dispute Settlement section. It provides in its entirety:

> In the event of an investment dispute, the claimant and the respondent should initially **seek to resolve** the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures such as conciliation and mediation.[127]

39. Further, Article 10.16 of CAFTA-DR outlines the procedure for the submission of a claim to arbitration. In particular, it states: "[i]n the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation . . . the claimant . . . may submit to arbitration . . . a claim . . . that the respondent has breached" the Treaty provided that "at least 90 days before submitting any claim to arbitration . . . a claimant . . . deliver[s] to respondent a written notice of its intention to submit the claim to arbitration ("notice of intent")."[128]

40. In other words, the Treaty's text makes clear that a claimant can submit a claim to arbitration if: (i) at least 90 days before submission, that claimant delivers a notice of intent to

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[125] *See Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections dated 13 Mar. 2020 (**CL-151**) ¶ 198 (noting that the purpose of requiring a notice of intent or a waiting period under CAFTA-DR includes, among others, "to enable the respondent State to conduct such dispute settlement negotiations as it considers appropriate")*; David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award dated 18 Sept. 2018 (**CL-6**) ¶¶ 344-345 (noting that the purpose of the notice requirement outlined in CAFTA-DR's Article 10.16 is protect Respondent's right "to have a clear framework of the claims from the outset"). *See also B-Mex, LLC and Others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award dated 19 July 2019 (**CL-189**) ¶¶ 130-133 (noting that the purpose of a notice of intent is to provide a respondent party "with the information it needs to assess amicable settlement opportunities"); *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction dated 7 Feb. 2020 (**CL-190**) ¶¶ 309-318.

[126] Ms. Schloesser de Paiz delivered her letter on 24 Mar. 2023 and Claimants submitted their Notice of Arbitration on 24 Aug. 2023, or 153 days after Ms. Schloesser de Paiz had delivered her letter. *See* Notices and Communications from the Paizes to Honduras under CAFTA-DR dated 10 Oct. 2022 – 13 Feb. 2023 (**Exh. C-12**), at 1; Claimants' Notice of Arbitration, at 1; CAFTA-DR (**CL-1**), Chapter 10, § B, Art. 10.16.2 (providing that "at least 90 days before submitting any claim to arbitration . . . a claimant . . . deliver[s] to respondent a written notice of its intention to submit the claim to arbitration ("notice of intent").").

[127] CAFTA-DR (**CL-1**), Chapter 10, § B, Art. 10.15.

[128] CAFTA-DR (**CL-1**), Chapter 10, § B, Arts. 10.16.1, 10.16.2.

respondent; and (ii) **a disputing party considers that the dispute cannot be settled** by consultation and negotiation.[129] The phrase "a disputing party" indicates that **either** claimant or respondent can consider settlement via consultation and negotiation unfeasible to submit a claim to arbitration. The text does not indicate that a particular party or that both parties must consider that settlement is unfeasible prior to claim submission.

41. Contrary to Respondent's erroneous suggestions,[130] the Treaty's text likewise does not suggest that the disputing parties need to engage in negotiations to "perfect" Honduras's consent to arbitration. If that had been the intent of the Contracting Parties, they would have specified explicitly so in the Treaty.[131] Instead, the Treaty's Parties indicated that "the claimant and the respondent **should** initially seek to resolve the dispute through consultation and negotiation," using the conditional "should" in this provision.[132] The deliberate use of a conditional term confirms that the disputing parties are not required to engage in consultations or negotiations prior to claim submission.[133]

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[129] *See, e.g.*, *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections dated 13 Mar. 2020 (**CL-151**) ¶¶ 189-198 (implying that Article 10.16 "seems to establish requirements for *initiating* an arbitration," which includes the "identification of all intended claims through a notice of intent" and a "waiting period process," making no mention of the negotiation and consultation provision in Article 10.15); *see also Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award dated 14 Mar. 2021 (**CL-152**) ¶¶ 12-13 (noting that "[p]ursuant to Articles 10.16.3 and 10.16.4 of CAFTA, [claimants have] the right, six months after serving their Notice of Intent, to file a Notice of Arbitration . . . under the ICSID Convention").

[130] Request for Bifurcation ¶¶ 25, 26, 28, 30.

[131] In fact, Article 10.18 establishes the conditions and limitations on Honduras's consent to arbitrate claims under the Treaty. This is made clear by the title of Article 10.18: "Conditions and Limitations on Consent of Each Party." The negotiation and consultation provision is found in Article 10.15—separate from the conditions and limitations on Honduras's consent to arbitrate under the Treaty. *See* CAFTA-DR (**CL-1**), Chapter 10, § B, Art. 10.18.

[132] CAFTA-DR (**CL-1**), Chapter 10, § B, Art. 10.15 (emphasis added).

[133] *See, e.g.*, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction dated 27 Apr. 2006 (**CL-116**) ¶ 38 ("Under Article VII (2) of the BIT the parties to an investment dispute 'should initially seek a resolution through consultation and negotiation'. That provision goes on to say that, 'if the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution', *inter alia* to ICSID arbitration. This text could, in truth, raise a question of interpretation: is it mandatory, in order to resort to arbitration, to have consulted and negotiated? The conditional 'should' in the first phrase of Article VII (2), chapeau, suggests that it is not. The second phrase, however, seems to view consultation and negotiation as a condition for submitting a case, a view shared by the Respondent. The question is moot in our case, however, as the Claimant has in effect attempted to consult and negotiate, as is shown by the facts related above."). This argument is even stronger here, where Article 10.15 does not include the phrase, "if the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution," which the *El Paso* tribunal noted would suggest that the consultation and negotiation provision might be a condition for submitting an arbitration claim.

42. As Respondent concedes multiple times in its Request,[134] the Treaty only requires that Ms. Schloesser "**attempt**" to settle this dispute before submitting her claims to arbitration, and nothing more.[135] Even Respondent's own case law affirms that, in the context of a consultation and negotiation provision, "[t]here is no obligation to reach, but rather try to reach, an agreement."[136]

43. Therefore, to assert that "Ms. Schloesser failed to comply with the mandatory 'Consultation and Negotiation' requirement established in Article 10.15 of . . . CAFTA-DR" is disingenuous.[137] In asserting so, Respondent blatantly ignores Ms. Schloesser's attempts to settle this dispute prior to Claimants submitting the Notice of Arbitration. In accordance with the above Treaty provisions, and contrary to Respondent's outright false statements,[138] the Paizes:

- on 24 March 2023, "invite[d] Honduras to **engage in good faith consultations and negotiations** . . . to resolve the existing dispute;"[139]

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[134] Request for Bifurcation ¶¶ 25 ("The requirement to **attempt** to resolve a dispute through consultation or negotiation"); 26 ("Ms. Schloesser was required to **attempt** to settle this dispute before submitting the Request for Arbitration"); 29 ("By failing to **attempt** to settle the dispute before initiating this arbitration"); 30 ("Because Ms. Schloesser did not **attempt** to resolve the dispute by negotiation or conciliation") (emphasis added).

[135] *See Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Award dated 20 Dec. 2023 (**CL-191**) ¶¶ 465-467 (holding that "[o]ne key purpose of the notice requirement is . . . **to provide an opportunity for potential settlement** of a claim by consultation or negotiation" when analyzing a nearly identical provision to the one in CAFTA-DR) (emphasis added). *See also SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction dated 6 Aug. 2003 (**CL-192**) ¶ 184 ("Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction."); Christopher Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, THE JOURNAL OF WORLD INVESTMENT & TRADE, Vol 5, Issue 2 (2004) (**CL-193**), at 239 ("While it is conceivable that a tribunal would find that it lacked jurisdiction because the claim was registered prematurely or because no serious attempt at negotiations had been made during the prescribed time, the initiation of arbitral proceedings normally indicates that other, less costly means of settling the dispute have failed or were seen as likely to fail . . . . However, it would hardly make sense to decline jurisdiction in a situation when the waiting period had passed in the interim. The only consequence of such a finding would be to compel the claimant to start the proceeding anew, which would be a highly uneconomical solution. It follows that waiting periods may be seen as a bar to the tribunal's competence only in extreme circumstances.").

[136] *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction dated 15 Dec. 2020 (**RL-15**) ¶ 135.

[137] Request for Bifurcation ¶ 23.

[138] Request for Bifurcation ¶ 27 ("On 24 March 2023, Claimants filed a new Notice of Intent only to add Ms. Schloesser. However, unlike the Notice of Intent from Oct. 2022, the **new Notice did not include a request for consultations and negotiations**.") (emphasis added).

[139] Notices and Communications from the Paizes to Honduras under CAFTA-DR dated 10 Oct. 2022 – 13 Feb. 2023 (**Exh. C-12**), at 1 (noting that "in accordance with CAFTA-DR, the Investors invite Honduras to engage in good faith consultations and negotiations with the Hondura[n] State to resolve the existing dispute," where Investors is defined as Ms. Schloesser de Paiz, together with Mr. Paiz).

- on 26 April 2023, in a follow-up letter, "**invited Honduras to initiate consultations and negotiations under CAFTA-DR** in respect to the dispute described therein;"[140]
- on 23 August 2023, reiterated that they "continue[d] to **remain open to engaging in good-faith consultations and negotiations** with the Government to resolve the existing dispute amicably;"[141] and
- on 24 August 2023, more than 90 days after the 24 March 2023 letter, submitted the Notice of Arbitration.[142]

44. Accordingly, Ms. Schloesser complied with the Treaty's consultation and negotiation provision. Ms. Schloesser first sought to resolve this dispute through consultation and negotiation when she "**invit[ed] Honduras to engage in good faith consultations and negotiations** . . . to resolve the existing dispute."[143] She reiterated that invitation **twice more** before submitting the Notice of Arbitration[144]—a submission that occurred 153 days after Ms. Schloesser de Paiz delivered her letter,[145] or 60+ days more than the Treaty's required 90-day cooling-off period.[146]

45. As such, Respondent's reliance on *Murphy v. Ecuador* is inapposite here. Unlike Claimants (including Ms. Schloesser de Paiz), the claimant in that case did not allow the applicable cooling-off period to lapse prior to submitting its claims to arbitration.[147] Here, Honduras became

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[140] Follow up Letter under the Treaty from the Paizes to Honduras dated 26 Apr. 2023 (**Exh. C-243**) ("In these communications, the Investors invited Honduras to initiate consultations and negotiations under CAFTA-DR in respect to the dispute described therein. Honduras, however, has yet to respond to any of these communications in writing.").

[141] Letter from Claimants to the Honduran Government dated 23 Aug. 2023 (**Exh. C-244**) ("The Investors have repeatedly invited the Government to consult and negotiate under CAFTA-DR in respect to the dispute. Honduras, however, has not responded, beyond acknowledging receipt. In this context, the Investors have no choice but to obtain relief through international arbitration. However, we also continue to remain open to engaging in good-faith consultations and negotiations with the Government to resolve the existing dispute amicably.").

[142] Claimants' Notice of Arbitration, at 1.

[143] Notices and Communications from the Paizes to Honduras under CAFTA-DR dated 10 Oct. 2022 – 13 Feb. 2023 (**Exh. C-12**), at 1.

[144] Follow up Letter under the Treaty from the Paizes to Honduras dated 26 Apr. 2023 (**Exh. C-243**); Letter from Claimants to the Honduran Government dated 23 Aug. 2023 (**Exh. C-244**).

[145] Ms. Schloesser de Paiz delivered her letter on 24 Mar. 2023 and Claimants submitted their Notice of Arbitration on 24 Aug. 2023, or 153 days after Ms. Schloesser de Paiz had delivered her letter. *See* Notices and Communications from the Paizes to Honduras under CAFTA-DR dated 10 Oct. 2022 – 13 Feb. 2023 (**Exh. C-12**), at 1; Claimants' Notice of Arbitration, at 1.

[146] *See* CAFTA-DR (**CL-1**), Chapter 10, § B, Art. 10.16.2 (providing that "at least 90 days before submitting any claim to arbitration . . . a claimant . . . deliver[s] to respondent a written notice of its intention to submit the claim to arbitration ("notice of intent").").

[147] *See Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction dated 15 Dec. 2020 (**RL-15**) ¶¶ 108-109.

aware of the existence of this dispute when Mr. Paiz delivered his notice, which outlines the same dispute that is the basis for Ms. Schloesser de Paiz's letter and Claimants' Notice of Arbitration, more than ten months before the submission of the claims.[148] During that time period, Ms. Schloesser de Paiz made it clear that she was willing to engage in consultations and negotiations in an effort to resolve this dispute.[149] It was not until determining that the dispute could not be settled by consultation and negotiation that Claimants submitted the Notice of Arbitration.

46. That Respondent did not engage or respond to Claimants' communications bears no weight on Ms. Schloesser de Paiz's compliance with this provision. To support its objection, Respondent states that "no consultations or negotiations were held between State representatives and Ms. Schloesser de Paiz to attempt to resolve the claim after she submitted her Notice of Intent."[150] Yet, Respondent conveniently omits that it chose to never engage with Claimants, going so far as to ignore the "Consultation and Non-Disclosure Agreement" that they sent at Respondent's request "with a view of executing it and engaging in consultations."[151] Unlike the respondent in *Noble Energy v. Ecuador*, a case on which Respondent relies, Honduras never made an effort to host meetings with Claimants[152]—the reason why "no consultations or negotiations were held between State representatives and Ms. Schloesser" prior to claim submission.[153]

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[148] Mr. Paiz delivered his notice on 10 Oct. 2022, which contains the same claims for which Ms. Schloesser de Paiz submitted her letter. Claimants submitted the Notice of Arbitration on 24 Aug. 2023, or more than 10 months after Mr. Paiz had delivered his notice. *See* Notices and Communications from the Paizes to Honduras under CAFTA-DR dated 10 Oct. 2022 – 13 Feb. 2023 (**Exh. C-12**), at 1 n.2 (confirming that "the provisions that Honduras breached, the legal and factual basis for each claim, and the relief and approximate amount of damages claimed are the same as those specified in Mr. Paiz's Notice [of Intent]"), 6; Claimants' Notice of Arbitration, at 1.

[149] *See, e.g.*, Notices and Communications from the Paizes to Honduras under CAFTA-DR dated 10 Oct. 2022 – 13 Feb. 2023 (**Exh. C-12**), at 1; Follow up Letter under the Treaty from the Paizes to Honduras dated 26 Apr. 2023 (**Exh. C-243**); Letter from Claimants to the Honduran Government dated 23 Aug. 2023 (**Exh. C-244**).

[150] Request for Bifurcation ¶ 27.

[151] *See, e.g.*, Follow up Letter under the Treaty from the Paizes to Honduras dated 26 Apr. 2023 (**Exh. C-243**) ("Honduras, however, has yet to respond to any of these communications in writing."); Letter from Claimants to the Honduran Government dated 23 Aug. 2023 (**Exh. C-244**) ("Honduras, however, has not responded, beyond acknowledging receipt.").

[152] *Noble Energy Inc. and Machala Power Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction dated 5 Mar. 2008 (**RL-10**) ¶¶ 212-213 (showing that, unlike Honduras, Ecuador Government officials held various meetings with the investor to reach an amicable resolution to the dispute).

[153] Request for Bifurcation ¶ 27.

47. But even assuming *arguendo* that Respondent's objection had any merit (it does not), Respondent's admissions in its Request make it evident that negotiations with Ms. Schloesser de Paiz would have been futile. Respondent concedes that Mr. Paiz complied with the Treaty's notice provision.[154] Nonetheless, Respondent neither met nor attempted to resolve this dispute with Mr. Paiz,[155] who submitted the same claims that Ms. Schloesser de Paiz submitted to arbitration.[156] In any event, Respondent's present conduct shows that negotiations would be futile as more than a year has lapsed since Claimants submitted their claims to arbitration and Honduras has yet to engage in amicable negotiations.[157]

48. As in *Lauder v. Czech Republic*, had Respondent been willing to engage in negotiations, Respondent would have capitalized on the myriad of opportunities it had to negotiate during the ten months that it knew about the existence of the dispute.[158] Yet, Respondent never proposed to engage in consultations and negotiations with Claimants, despite their numerous invitations to do so.[159] Even assuming that Respondent's interpretation of the consultations and negotiations provision is accurate (it is not), to insist that arbitration cannot be commenced until Ms. Schloesser de Paiz meets with the Honduran Government would "amount to an unnecessary, overly formalistic approach [that] would not serve to protect any legitimate interests of the Parties."[160] Adopting such interpretation would also imply that a respondent State could avoid jurisdiction by simply refusing to meet with a disputing party during a treaty's consultation period.

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[154] *See* Request for Bifurcation ¶¶ 28, 29 ("Mr. Paiz's negotiations do not extend to Ms. Schloesser merely because they are allegedly co-owners of Pacific Solar . . . . By failing to attempt to resolve the dispute before initiating this arbitration, Ms. Schloesser denied Honduras its right under the CAFTA-DR to resolve the dispute amicably.").

[155] Respondent notes that "[o]n 1 February 2023, representatives of Pacific Solar held a meeting with ENEE" to support its contention that it held negotiations with Mr. Paiz. Request for Bifurcation ¶¶ 27-28. However, Mr. Paiz was not present at this meeting. *See* [redacted].

[156] *See* Notices and Communications from the Paizes to Honduras under CAFTA-DR dated 10 Oct. 2022 – 13 Feb. 2023 (**Exh. C-12**), at 1 n.2 (confirming that "the provisions that Honduras breached, the legal and factual basis for each claim, and the relief and approximate amount of damages claimed are the same as those specified in Mr. Paiz's Notice [of Intent]").

[157] *See* Claimants' Notice of Arbitration, at 1 (noting that Claimants submitted their claims on 24 Aug. 2023).

[158] *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award dated 3 Sept. 2001 (**CL-194**) ¶¶ 181-191.

[159] *See e.g.*, Notices and Communications from the Paizes to Honduras under CAFTA-DR dated 10 Oct. 2022 – 13 Feb. 2023 (**Exh. C-12**), at 1, 6, 9, 11, 15, 19; Follow up Letter under the Treaty from the Paizes to Honduras dated 26 Apr. 2023 (**Exh. C-243**); Letter from Claimants to the Honduran Government dated 23 Aug. 2023 (**Exh. C-244**).

[160] *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Award dated 3 Sept. 2001 (**CL-194**) ¶ 190.

49. Ultimately, contrary to Respondent's claims that this objection "is not tied to any factual aspect of the dispute's merits,"[161] to determine whether Ms. Schloesser de Paiz complied with this Treaty provision, the Tribunal would be required to engage in an extensive factual assessment of her attempts to settle this dispute prior to claim submission. For instance, the tribunal in *Bacilio Amorrortu v. Peru*, which analyzed a nearly identical consultation and negotiation provision to the one in CAFTA-DR,[162] noted that an objection based on this ground "raises a mixed question of fact and law."[163] Further, it noted that such objection would require "*inter alia*, a factual assessment of the content and significance of the . . . alleged attempts to settle this dispute with the . . . Government," an analysis that "would be better addressed as part of the larger evidentiary exercise engaged with the merits."[164] The same applies here.

50. If the Tribunal bifurcates on this ground, the Tribunal will have to assess Honduras's conduct after it received notice of the dispute, which is the very same conduct that underlies the merits of this case. For example, the Tribunal would have to assess the content of "renegotiation" meetings that took place pursuant to the 2022 New Energy Law and the tactics Honduras engaged in to corner Pacific Solar into such meetings—conduct that Claimants cite in support of their MST and expropriation claims in their Memorial.[165] Indeed, the February 2023 meeting that Respondent puts forth in its Request as a forum where "the notice of intent to submit a claim to international arbitration was tangentially discussed"[166] is the very same meeting in which the Government discussed the valuation of the Plant pursuant to the 2022 New Energy Law's framework.[167] Because [redacted] and not Claimants, was present at this meeting,

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[161] Request for Bifurcation ¶ 91.

[162] *Compare* the Free Trade Agreement Between the United States of America and Peru (**CL-195**), Chapter 10, § B, Art. 10.15 ("In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.") *with* CAFTA-DR (**CL-1**), Chapter 10, § B, Art. 10.15 ("In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures such as conciliation and mediation.").

[163] *Bacilio Amorrortu v. Republic of Peru (II)*, PCA Case No. 2023-22, Procedural Order No. 2 Decision on Bifurcation dated 18 Mar. 2024 (**CL-196**) ¶ 62.

[164] *Bacilio Amorrortu v. Republic of Peru (II)*, PCA Case No. 2023-22, Procedural Order No. 2 Decision on Bifurcation dated 18 Mar. 2024 (**CL-196**) ¶ 62.

[165] *See* Memorial § II.F.1.

[166] Request for Bifurcation ¶ 27 ("On 1 February 2023, representatives of Pacific Solar held a meeting with ENEE, in which, among other things, the notice of intent to submit a claim to international arbitration was tangentially discussed.").

[167] *See* Memorial ¶ 138; [redacted].

the Tribunal would have to review his witness statement in tandem with his contemporaneous notes, which include Claimants' and Respondent's proposals and concessions during the so-called "renegotiations" process.[168] In other words, if the proceeding is bifurcated on this ground, the Tribunal will be required to assess duplicative evidence and prejudge issues of fact before having heard all the relevant evidence.

51. But even assuming that this is not the case, bifurcating on this ground would not dispose of any claims because Mr. Paiz's claims are the same as Ms. Schloesser de Paiz's, and Respondent has not contested Mr. Paiz's compliance with the notice provision.[169] As such, bifurcation on this ground would inevitably result in an inefficient proceeding and is therefore not warranted here.

C. RESPONDENT'S EXPROPRIATION OBJECTION IS, BY DEFINITION, INTERTWINED WITH THE MERITS AND WOULD NOT DISPOSE OF THE CLAIMS

52. According to Respondent, "the Tribunal lacks jurisdiction *ratione materiae* over the claim of expropriation" because "Claimants consistently affirm that they are under threat of expropriation, which confirms that no taking or confiscation has taken place."[170] Respondent argues that the claim is "premature" and "would result in the dismissal of those claims, thereby significantly reducing the disputes in this arbitration,"[171] adding that the expropriation claim "only requires a prima facie reading" to determine that it is not intertwined with the merits.[172] Contrary

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[168] While "the Government rejected the possibility of acquiring the whole Plant," it "offered to pay up to US$ 80 million for a 51% interest in the Plant if [Pacific Solar] continued to be the owner of the remaining 49% of the Plant and remained responsible for the operation and maintenance of the Plant." Similar to its conditions regarding duly owed payments, the Government hinged such payment on Pacific Solar signing an amendment to PPA. *See* [redacted]; Minutes of the Meeting between Pacific Solar, Ministry of Energy and ENEE dated 1 Feb. 2023 (**Exh. C-216**); *see also* Letter from PSE Pacific Solar to Minister Tejada (Ministry of Energy and ENEE) dated 4 July 2022 (**Exh. C-68**); Letter from Pacific Solar to ENEE dated 21 June 2022 (**Exh. C-65**).

[169] *See* Request for Bifurcation ¶¶ 28, 29 ("Mr. Paiz's negotiations do not extend to Ms. Schloesser merely because they are allegedly co-owners of Pacific Solar . . . . By failing to attempt to resolve the dispute before initiating this arbitration, Ms. Schloesser denied Honduras its right under the CAFTA-DR to resolve the dispute amicably.").

[170] Request for Bifurcation ¶ 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, which confirms that no taking or confiscation has taken place. Simultaneously, Claimant [sic] 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.") (emphasis and citations removed).

[171] Request for Bifurcation ¶ 83(3) ("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.").

[172] Request for Bifurcation ¶ 91(3) ("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.").

to Respondent's conclusory and erroneous assertions, Honduras's objection is self-evidently intertwined with the merits of the dispute, and therefore does not warrant bifurcation.

53. *First*, Respondent's objection lacks merit because it has already indirectly expropriated the Paizes' investment. Respondent's assertion that "Honduras has not taken any measure with the purpose of directly taking possession of the Paizes['] alleged investment" or "any indirect action against their alleged investment which has 'substantially deprived an investor of the use and enjoyment of its investment" is objectively incorrect.[173] Here, Honduras has **already indirectly expropriated** the Paizes' investment and continues to **threaten the Paizes with direct expropriation**.

54. As Claimants explain in their Memorial,[174] with the enactment of the 2022 New Energy Law, Honduras has essentially rendered its contractual relationship with Pacific Solar ineffective as it stood under the Agreements.[175] Respondent's own Request cites the New Energy Law's mandate for the State to set "the termination of the [relevant] contractual relationship and **the acquisition by the State**" if generators, like Pacific Solar, do not accede to the State's demands via its "negotiations,"[176] a mandate that it has recently extended into perpetuity.[177] Meanwhile, the Government has weaponized this threat of direct expropriation, in addition to the millions of dollars it owes to Pacific Solar, to impose "renegotiation" terms, putting Pacific Solar in a dire financial situation.[178] Put differently, the Government's aim is to strip Pacific Solar of its revenues during the 14 years remaining under the Agreements, or else it will take over the Plant.

55. Respondent's allegations that the Paizes' expropriation claim is "premature" or consists of mere "threats of expropriation" are preposterous.[179] Honduras has already substantially deprived the Paizes of their investment through the weaponization of its growing debt to Pacific

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173 Request for Bifurcation ¶ 36.

174 *See* Memorial § II.F.

175 *See* Memorial § II.F.

176 Request for Bifurcation ¶ 40.

177 Congreso Nacional HN, "*Approving a New Interpretation of the New Energy Law*" FACEBOOK dated 9 Oct. 2024 (**Exh. C-240**) ("In the sense that the period of 60 calendar days, counting from the publication of the Law, refers to the beginning of the process to renegotiate the contracts, it **does not represent a strict limit** that prevents the continuation of the renegotiation of other contracts beyond that period, since **this time period cannot be limiting or restricting to the fulfillment of the objectives of the Law.**").

178 *See* Memorial § II.F.

179 Request for Bifurcation ¶¶ 34-38, 43.

Solar. Respondent's assertions that Pacific Solar "has been receiving a weekly installment" or Honduras's questioning of its blatant delay in payments are equally unfounded.[180] Pacific Solar **has not received weekly installments** from ENEE. On the contrary, Honduras has made grossly insufficient payments [redacted] over the course of the past two years,[181] including periods of [redacted] weeks without making any partial payment.[182] Moreover, it has openly boasted that it has prioritized payment of the historical debt owed to the generators who have "agreed" to lower their compensation rights under the PPAs through the execution of Memoranda of Understanding ("**MOU**s") with ENEE.[183] Since the New Energy Law was enacted, ENEE has failed to reduce the significant debt it owes Pacific Solar, and is also actively enlarging it by reducing the payments made to the Enterprise,[184] while it continues to receive all the energy that the Plant produces.[185] ENEE's payments to Pacific Solar are evidence of Honduras's sporadic and insufficient payments, and constitute a testament of Honduras's erratic behavior towards the Paizes. By not compensating the Paizes, Honduras has expropriated the Paizes' investments in breach of Article 10.7 of CAFTA-DR.[186]

56. *Second*, this objection is inextricably intertwined with the merits and Respondent has failed to meet its burden to bifurcate it. Naturally, an analysis of this objection would require an analysis of the Claimants' expropriation claim, the crux of the merits of the dispute. It would also require scrutiny of the same facts that relate to the other merit-related claims, including those relating to the 2022 New Energy Law and Respondent's subsequent conduct in light of the measures it enacted and the debt owed to it, which would require the Tribunal to prejudge other

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[180] Request for Bifurcation ¶ 36 ("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"), ¶ 43 ("[S]ince the Claimants have not demonstrated or even alleged a permanent economic injury, save for pending invoices which the ENEE has in fact been paying . . . Respondent's "measures" amounting to expropriation are, in essence, . . . an alleged delay in payment") (emphasis added).

[181] Pacific Solar "Facturas y pagos ENEE histórico 16072024 08.41" (**MN-0032**) (showing that ENEE only made [redacted] payments to Pacific Solar during the [redacted] weeks of year 2023 and [redacted] during the [redacted] first months of 2024).

[182] ENEE withheld payments to Pacific Solar for [redacted] **weeks** between May and June 2024. *See* Pacific Solar "Facturas y pagos ENEE histórico 16072024 08.41" (**MN-0032**) Cells G233-G233. In several other occasions, [redacted] **weeks or more** have lapsed without Pacific Solar receiving any payments from ENEE (Jan. 2023, May – June 2023, Dec. 2023 – Jan. 2024, Feb. 2024). *See id.* at Cells G165-G167, G180-G181, G215-G216, G220-G221.

[183] Memorial ¶ 144.

[184] *See* Compass Lexecon Report, Figure 6 (showing the growth of ENEE's outstanding debt with Pacific Solar since 2022).

[185] Request for Bifurcation ¶ 36.

[186] *See* Memorial § IV.A.

claims, such as the breach of MST in violation of Article 10.5 of CAFTA-DR (a claim to which Respondent has not objected the Tribunal's jurisdiction).[187] That to support this objection, Respondent needs to argue that it "has not taken **any** measures to . . . take[] possession of the Paizes alleged investment,"[188] demonstrates that this objection cannot be addressed without entering into the full array of facts pertinent to the merits,[189] including Honduras's sporadic and insufficient payment to Pacific Solar, Honduras's weaponizing of its [redacted] debt to impose "renegotiation" terms, and the financial impact of Honduras's measures on the Enterprise's financial situation.[190]

57. To analyze this objection, the Tribunal would have to consider "the same, or similar, evidence on two occasions," requiring witness and expert evidence "to appear on two occasions" to testify about the value of the Plant, "submissions to be prepared which canvass the same, or similar, matters," leading to increased cost and expense.[191] As such, investment tribunals, like the one in *Red Eagle v. Colombia*, have proscribed the bifurcation of the expropriation objection because its analysis can only be made in relation to the discussion on the merits.[192] Honduras has not discharged its burden of proving that this objection is not intertwined with the merits and therefore bifurcation is not warranted here.

D. RESPONDENT'S BREACH OF ITS UNDERTAKINGS, A TREATY BREACH BY VIRTUE OF THE MFN CLAUSE, IS, BY DEFINITION, INTERTWINED WITH THE MERITS, AND WOULD NOT DISPUTE OF THE CLAIMS

58. Respondent requests that the Tribunal bifurcate the proceeding to decide as a preliminary matter that it "lacks jurisdiction *ratione voluntatis* regarding the MFN claim because i) Claimant [sic] cannot import rights that are not provided for in the Treaty and ii) . . . CAFTA–

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187 *See* Memorial § IV.B.

188 Request for Bifurcation ¶ 36 ("Honduras has not taken any measure with the purpose of directly taking possession of the Paizes alleged investment.").

189 See Request for Bifurcation ¶ 91(3) (conceding that the assessment of the expropriation claim "requires . . . a[n] . . . analysis of the Claimants' claims" in this respect).

190 *See* Memorial § II.F.

191 *See Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia,* ICSID Case No. ARB/12/39, Decision on Bifurcation dated 21 Jan. 2015 (**CL-165**) ¶ 93.

192 *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation dated 3 Aug. 2020 (**CL-180**) ¶¶ 56-60 (finding that the analysis of the investor's expropriation claim "[its] relationship with the [c]laimant's investment and the measures actions and omissions of Colombia for purposes of determining whether they fall within the . . . limits of the Treaty, can only be made in relation with the merits, [which] raises doubts as to whether Respondent's objection meets the first test of being *prima facie* 'serious and substantial'").

DR excludes the application of the MFN obligation as it relates to procurement made by the State."[193] In support of its objection, Respondent relies on a minority of arbitral tribunals finding that investors cannot import the umbrella clause through the MFN provision,[194] and on Article 10.13(5)(a) of CAFTA-DR, noting that the MFN clause under the Treaty is not applicable to "**procurement**."[195]

59. *First*, Claimants are entitled to import the umbrella clause of the Switzerland-Honduras BIT and Germany-Honduras BIT. As explained in the Memorial,[196] Professors Dolzer and Schreuer, two of the world's leading authorities on international investment law, confirm that "[t]he weight of authority clearly supports the view that an MFN rule grants a claimant the right to benefit from substantive guarantees contained in third treaties."[197] Many other scholars[198] and investment tribunals[199] have also endorsed this position. To challenge this well-established principle, Respondent's theory lies on generic statements,[200] and the conclusions of a minority of tribunals interpreting treaties with different MFN provisions.[201] But even if Claimants could not

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193 Request for Bifurcation ¶ 44.

194 Request for Bifurcation ¶¶ 45-51; RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 125 2D. EDITION, 98 (2012) (**CL-82**), at 211.

195 Request for Bifurcation ¶¶ 52-62; CAFTA-DR (**CL-1**), Chapter 10, § A, Art. 10.13(5)(a) ("Articles 10.3, 10.4 [containing the MFN provision], and 10.10 do not apply to . . . procurement").

196 Memorial § IV.C.1.

197 *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 125 2D. EDITION, 98 (2012) (**CL-82**), at 211.

198 Ieva Kalnina, *White Industries v. The Republic of India*: A Tale of Treaty Shopping and Second Chances, 9 Transnat'l Disp. Mgmt. 1 (2012) (**CL-142**), at 6 (concurring that the importation of substantive provisions through MFN provisions is not controversial); J. Romesh Weeramantry, Treaty Interpretation in Investment Arbitration (OUP 2012) (**CL-143**), at 177; Scott Vesel, Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties, 32 Yale J. Int'l L. 125 (2007) (**CL-144**), at 163.

199 *See, e.g.*, *Mr. Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award dated 8 Apr. 2013 (**CL-97**) ¶ 396; *EDF International S.A.*, et al., *v. Argentina*, ICSID Case No. ARB/03/23, Award dated 11 June 2012 (**CL-8**) ¶¶ 929-934; *White Industries Australia Ltd. v. The Republic of India*, UNCITRAL, Final Award, Nov. 30, 2011 (**CL-145**) ¶¶ 11.2.3-11.2.4.

200 C. McLachlan *et al*., "Substantive Rights" in *International Investment Arbitration: Substantive Principles* (2017) (**RL-34**) ¶ 7.313; 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-2**), at 27; Lord McNair, "Most-Favoured-Nation Clauses" in *The Law of Treaties* (1986) (**RL-3**), at 287.

201 *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) dated 16 Jan. 2013 (**RL-19**) ¶ 73 (interpreting the UK-Hungary BIT, in which the State Parties only consented to arbitrate disputes arising out of expropriation); *Teinver S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award dated 21 July 2017 (**CL-102**) ¶ 884 (interpreting the Spain-Argentina BIT, which limits the application of the MFN clause to issues also governed therein and treatment afforded through "laws, regulations . . . or specific contracts"); *Orazul International España Holdings S.L. v. Argentine Republic*, ICSID Case No. ARB/19/25, Award dated 14 Dec. 2023 (**RL-52**) ¶ 999 (also interpreting the Spain-Argentina BIT); and *Sergei Paushok et al. v. Government of Mongolia*, UNCITRAL,

import standards of treatment from other treaties pursuant to the MFN provision (*quod non*), Respondent's theory is flawed, given that CAFTA-DR provides investors with the right to "enforce the provisions of . . . investment agreement[s.]" [202] In other words, the Treaty already grants investors a standard of protection akin to the ones contemplated under the umbrella clauses invoked by Claimants. It should therefore be undisputed that the Paizes are entitled to import the umbrella clause provisions of the Switzerland-Honduras BIT and Germany-Honduras BIT (which Respondent has breached) pursuant to Article 10.4 of CAFTA-DR.

60. *Second*, according to Respondent, the PPA falls within the scope of the carve-out of the MFN provision (the "**MFN carve-out**"). However, the Treaty's MFN carve-out only covers procurement, *i.e.*, "the **process** by which a government obtains the use of or acquires goods or services[.]" [203] Given that the dispute revolves around measures that violate Honduras's commitments under the Agreements, and not measures relating to the process by which the Government "obtained" the Agreements, the MFN carve-out is not applicable here.

61. In attempting to shoehorn its objection into the MFN carve-out, Honduras tries to downplay the PPA as a mere agreement for the "supply of electric energy" by ENEE.[204] In doing

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Award on Jurisdiction and Liability dated 28 Apr. 2011 (**CL-96**) ¶ 570 (interpreting the Russia-Mongolia BIT, which only extends the MFN clause to the FET standard). *See also* Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hungarian People's Republic for the Promotion and Reciprocal Protection of Investments (entered into force on 28 Aug. 1987) dated 9 Mar. 1987 (**CL-197**) Arts. 8 ("Each Contracting Party hereby consents to submit to [ICSID] . . . for the settlement by conciliation or arbitration under the [ICSID Convention] any legal dispute arising under Article 6 of this Agreement"), 6 (referring to expropriation only); Agreement for the Promotion and the Reciprocal Protection of Investments between the Kingdom of Spain and the Argentine Republic (entered into force on 28 Sept. 1992) dated 3 Oct. 1991 (**CL-198**) Art. VII ("1. Where a matter is governed by this Agreement and also by another international agreement to which both Parties are a party or by general international law, the Parties and their investors shall be subject to whichever terms are more favourable. 2. Where one Party, on the basis of specific laws, regulations, provisions or contracts, has applied to investors of the other Party terms more advantageous than those provided for in this Agreement, such investors shall be accorded the more favourable treatment.") (emphasis added); Agreement between the Government of the Russian Federation and the Government of Mongolia on Promotion and Mutual Protection of Investments (entered into force on 26 Feb. 2006) dated 29 Nov. 1995 (**CL-199**) Art. 3 ("1. Each Contracting Party shall, in its territory, accord investments of investors of the other Contracting Party and activities associated with the investments fair and equitable treatment, excluding the application of discriminatory measures that would impede the management and disposal of investments. 2. The treatment referred to in paragraph 1 of this Article, shall be no less favorable than that accorded to investments and activities in connection with the investments of its own investors or investors of any third state.") (emphasis added).

[202] K. J. Vandevelde, "The Scope of BIT Protections" in *U.S. International Investment Agreements* (2009) (**RL-12**), at 173.

[203] CAFTA-DR (**CL-1**) Art. 2.1.

[204] Request for Bifurcation ¶ 59. In any view, Respondent's reduction of the PPA to a mere "sale and purchase of electricity" contract is wrong in light of the obligations contained therein, its term (20 years) and its inherent complexity. While the PPA certainly provides for ENEE's obligation to purchase (and pay for) electricity from Pacific

so, Respondent misses the point. The question is whether the dispute arises out of a process by which the Government obtains or acquires goods. Moreover, Respondent's reliance on case law applying NAFTA,[205] a treaty that, unlike CAFTA-DR, does not define "procurement,"[206] is misplaced and should therefore be given little weight in considering Honduras's MFN carve-out objection.

62. Beyond its lack of merit, Honduras's objection is intertwined with the merits of the case and would not result in the disposal of any significant part of the claims. Assessing whether the PPA constitutes "procurement," as required under the Treaty's MFN carve-out, entails a review of the nature of Honduras's breaches of the PPA and the State's obligations thereunder, including pursuant to the State Guarantee. In particular, Claimants' claims and arguments as to (i) the scope of Honduras's obligations under the State Guarantee,[207] (ii) Claimants' expropriation claim,[208] and (iii) the assessment of Honduras's breach of Claimants' MST rights,[209] hinge, at least in part, on Honduras's breach of the Agreements. Honduras purports that its MFN carve-out objection "will be limited to a legal analysis of the Treaty and to a *prima facie* reading of the Claimant's [sic] allegations."[210] Yet, Respondent does not explain why or how its submissions on this matter could be circumscribed to a "reading of Claimant's [sic] allegations," without passing judgment on the underlying facts and merits of the dispute. Indeed, the tribunal in *Murphy v. Ecuador*, when deciding on an objection based on the tribunal's lack of jurisdiction over the umbrella clause claim, found that the objection was "so intertwined with the substantive issues that [it is] not suitable for determination in a preliminary phase."[211]

Solar ENEE's commitments are not limited to this purchasing obligations. The PPA also provides key obligations for Pacific Solar that go well beyond the scope of a mere sale and purchase agreement, including the building and commissioning a 50 MW PV Plant. *See* PPA (**Exh. C-1**) § 1.G, § 2, Cls. 2.2, 9.1, 9.2, 9.5.1, 9.7, 14.1.

205 Request for Bifurcation ¶¶ 56-57, 60-61.

206 *See Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award dated 24 Mar.2016 (**RL-31**) ¶ 404 ("Article 1108 [of the NAFTA] excludes the application of non-discrimination standards and performance requirements in the event of 'procurement by a Party or a state enterprise'. It contains, however, no definition of the term 'procurement'. Accordingly, it falls on the Tribunal to determine the meaning of this term, as part of the phrase 'procurement by a Party or a state enterprise'.").

207 Memorial § II.B.2.

208 Memorial § IV.A.

209 Memorial § IV.B.

210 Request for Bifurcation ¶ 91(4).

211 *Murphy Exploration & Production Company – International v. Republic of Ecuador (II)*, PCA Case No. 2012-16, Decision on Respondent's Request for Bifurcation dated 19 Dec. 2012 (**CL-181**) ¶ 69.

63. If the proceedings are bifurcated and, as expected, Respondent's objection subsequently fails, the Parties (and the Tribunal) would be forced to assess the very same evidence, including documents, witness and expert evidence, twice instead of once. But, even if, for argument's sake, the Tribunal grants Respondent's meritless request to bifurcate this objection and upholds it, the Parties would still have to discuss the same (or very similar) factual issues in the liability phase, rendering bifurcation highly inefficient. The tribunal in *EMS v. Albania*, when deciding on a similar issue, found that doing so "would necessarily cause additional costs and use up more time," thus generating inefficiencies.[212]

64. Further, if bifurcation is granted with respect to Respondent's MFN carve-out objection, and Respondent were to prevail (it cannot), it would not significantly reduce Claimants' umbrella clause claims. The Parties would still have to plead their cases on Honduras's breaches of the Treaty's umbrella clause under the State Guarantee and the Operations Agreement. Thus, Honduras's request to bifurcate the MFN carve-out objection would not dismiss a significant part of Claimants' contractual claims, let alone all of them.

E. RESPONDENT'S INVESTMENT AGREEMENTS OBJECTION IS MERITLESS AND INTERTWINED WITH THE MERITS, AND THUS, DOES NOT WARRANT BIFURCATION

65. In its Request for Bifurcation, Respondent attempts to dispute the Tribunal's jurisdiction over Claimants' claim that Honduras breached its Agreements with Pacific Solar.[213] As explained in Claimants' Memorial, the Agreements constitute investment agreements pursuant to Article 10.28 of CAFTA-DR,[214] and Honduras's violations thereof depart from Honduran law and the most basic notions of fairness.[215] Nevertheless, Respondent avers that the Agreements do not constitute investment agreements under CAFTA-DR because (i) the Paizes are not parties to the Agreements;[216] (ii) the Claimants' involvement in Pacific Solar postdates the Agreements;[217] and (iii) the Agreements are commercial in nature and not a concession agreement or an agreement

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212 *EMS Shipping & Trading GmbH v. Republic of Albania*, ICSID Case No. ARB/23/9, Procedural Order No. 3 Bifurcation dated 23 Feb. 2024 (**CL-170**) ¶ 46.

213 Request for Bifurcation §II.E.

214 Memorial §III.B.3.

215 Memorial §IV.D.

216 Request for Bifurcation ¶ 68.

217 Request for Bifurcation ¶ 69.

granting rights over natural resources or state assets.[218] Respondent's arguments are flawed, as they run contrary to CAFTA-DR's definition of investment agreement and are inapposite to investment treaty case law.

66. *First*, Respondent's argument that the Paizes are not parties to the Agreements is a *non sequitur*.[219] Claimants have not argued otherwise. Pacific Solar is the party that entered into the Agreements with Honduras.[220] Contrary to Respondent's position, the investors need not be parties to the Agreements for the latter to qualify as investment agreements under the Treaty.[221] Article 10.28 of CAFTA-DR makes it abundantly clear that an investment agreement is "a written agreement . . . **between a national authority of a Party and a covered investment** or an investor of another Party . . ."[222] Thus, a written agreement between a covered investment (here, Pacific Solar)[223] and a national authority of a State Party (here, ENEE, the Attorney General's Office, SEFIN and SERNA[224]) qualifies as an investment agreement under CAFTA-DR, provided that it also fulfills the rest of the criteria set forth in Article 10.28 therein (which the Agreements do).[225]

67. This is also consistent with Article 10.16.1(b)(i)(C), which 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**."[226]

68. In an attempt to rewrite the Treaty, Honduras asserts that there is "well-established 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."[227] For that

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218 Request for Bifurcation ¶¶ 70-72.

219 Request for Bifurcation ¶ 68.

220 Memorial ¶ 177 ("Third, all the Agreements were executed by a national authority of a Party and the Paizes's covered investment, Pacific Solar.").

221 Request for Bifurcation ¶ 68 *in fine* (stating that "it reveals that the Paizes did not assume any obligation under those instruments, **as required by the Treaty**.") (emphasis added).

222 Central America – Dominican Republic – United States Free Trade Agreement (signed on 5 Aug. 2004) (Preamble and Chapters One, Two, Three, Ten, Seventeen and Annex I) dated 1 Apr. 2006 ("**CAFTA-DR**") (**CL-1**), Art. 10.28 (emphasis added).

223 Memorial § II.B, ¶¶ 49-53.

224 Memorial ¶ 177, n. 398.

225 Memorial § III.B.3.

226 CAFTA-DR (**CL-1**) Art. 10.16.1(b)(i)(C) (emphasis added).

227 Request for Bifurcation ¶ 68 (citing R. Dolzer & C. Shreuer, "Investment Contracts" in *Principles of International Investment Law* (2012) (**RL-17**), p. 80).

assertion, Respondent relies on two cases under the US-Ecuador BIT, a treaty which, unlike CAFTA-DR, does **not** contain the above-referenced definition of "investment agreement,"[228] explicitly stating that the investor **or the investment** can be a party to the investment agreement.

69. *Second*, Respondent takes the position that Claimants "post-facto involvement did not make them the direct parties to the [PPA]."[229] This is yet another attempt to undo Honduras's commitments under the Treaty. CAFTA-DR specifically provides that an investment agreement is one "the investor **relies in establishing or acquiring a covered investment**."[230] The Treaty does not impose any timing requirement, so long as the investor "relies" on the investment agreement to "acquir[e] a covered investment." Here, the Claimants invested in Pacific Solar and undertook the construction of a 50 MW PV plant in Honduras precisely **because** the State had entered into the Agreements with Pacific Solar.[231]

70. *Third*, Respondent contends that the "Agreements are part of a commercial contract for the purchase and sale of electricity, as opposed to a concession agreement or an agreement granting rights over natural resources or state assets" such that it does not qualify as an investment agreement.[232] To support such claim, it misreads the award in *Duke Energy v. Ecuador*, a case in which the tribunal, constituted under a different treaty, deemed that a PPA was not an investment agreement because the investor was not a party to the PPA, not because of the obligations contained therein.[233] As such, the *Duke Energy* award should be given little weight when assessing this matter.

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[228] *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award dated 18 Aug. 2008 (**CL-42**) ¶ 182.

[229] Request for Bifurcation ¶ 69.

[230] CAFTA-DR (**CL-1**) Art. 10.28.

[231] *See* Memorial ¶ 173, § II.B; Paiz WS ¶¶ 12-13, 17; [redacted]. *See also Enron Co. and Ponderosa Assets L.P. v. Argentina*, ICSID Case No. ARB/01/3, Decision on Jurisdiction dated 14 Jan. 2004 (**CL-162**) ¶ 70 (noting that, by its characteristics, sometimes "an investment is indeed a complex process including various arrangements, such as contracts, licences and other agreements leading to the materialization of such investment, a process in turn governed by the Treaty" and considering "an investment based on several instruments as constituting an indivisible whole").

[232] Request for Bifurcation ¶ 70.

[233] *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award dated 18 Aug. 2008 (**CL-42**) ¶ 183. As explained above, the US-Ecuador BIT applicable to the dispute did not contain a definition of investment agreement as CAFTA-DR does. *See id.*, ¶ 182.

71. More importantly, the Agreements are not mere commercial contracts. As established by Claimants in the Memorial,[234] through the Agreements, Pacific Solar was awarded rights related to the generation of electricity,[235] including the right to be connected to the national grid,[236] as well as all the relevant licenses and permits to produce and sell electricity in Honduras, all of which are activities essentially controlled by national authorities.[237] The Agreements authorize Pacific Solar to generate electricity, in particular by granting it the "exclusive right to use and enjoy the solar resource required for the operation of the Plant within the site of the Plant."[238] Further, during the Congressional Debate to enact the 2022 New Energy Law, Minister Tejada described the "supply of electricity to the country," which is the "purpose of the [PPA],"[239] as "a matter of national security and energy sovereignty."[240] This is also confirmed by Honduras in its Request, when it asserts that "[i]t cannot be disputed that the purchase of electricity by the ENEE includes a governmental purpose."[241]

72. The plain text of CAFTA-DR shows that this objection is meritless and therefore not substantial. As such, it cannot serve as the basis for granting bifurcation. Further, this objection is inextricably intertwined with the merits of the case and does not dispose of any substantial part of Claimants' case. As Respondent admits, for the Tribunal to assess its objection, it would have to analyze Claimants' allegations on the merits.[242] Since Respondent must meet the bifurcation factors under ICSID Rule 44(2) cumulatively, this would suffice for the Tribunal not to grant bifurcation. Similarly, even if the Tribunal bifurcated on this objection, the dispute would

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234 Memorial ¶ 178.

235 *See, e.g.*, PPA (**Exh. C-1**) Annex I, Table 2.1., Annex III, Cl. 2.3, Annex X, First Recital; State Guarantee (**Exh. C-2**) First Recital; Operations Agreement (**Exh. C-3**) Cl. 1.4.8.

236 *See, e.g.*, PPA (**Exh. C-1**) § 2, Cl. 7.1, Annex II; Operations Agreement (**Exh. C-3**) Cl. 1.4.5.

237 Electricity Law of 1994 (**Exh. C-56**), Second Whereas Clause ("[I]t is the State's duty to regulate the electric power generation, transmission and distribution activities taking place within the national territory"), Arts. 15-16, 19; 2014 Electric Power Industry Law (**Exh. C-8**), Art. 5.

238 *See* Operations Agreement (**Exh. C-3**) Cl. 1.4.8. *See also* PPA (**Exh. C-1**) Annex I, Table 2.1., Annex III, Cl. 2.3, Annex X, First Recital; State Guarantee (**Exh. C-2**) First Recital; Operations Agreement (**Exh. C-3**) Cl. 1.4.5.

239 PPA (**Exh. C-1**), § 2, Cl. 2.1 ("As stipulated in this Agreement, the BUYER shall purchase all the capacity and energy that the Plant generates that is delivered, measured and invoiced by the SELLER").

240 Honduran Congress, Debate Regarding 2022 New Energy Law (**Exh. C-76**), 04:36:37-04:38:54.

241 Request for Bifurcation ¶ 60. *See also* Operations Agreement (**Exh. C-3**) Cl. 1.4.8 ("[Pacific Solar has the] exclusive right to use and enjoy the solar resource required for the operation of the Plant within the site of the Plant."); State Guarantee (**Exh. C-2**) Third Whereas Clause ("For its part, the Office of the Attorney General of the Republic states that as a condition for the Generator to commit to the PPA, it has required that the State provide security to comply with the obligations of ENEE and/or its successors under the PPA[.]").

242 Request for Bifurcation ¶ 91(5).

not be "significantly reduced,"[243] as the Tribunal would have to hear the same arguments and evidence again in deciding Claimants' expropriation, umbrella clause, and MST claims. Numerous arbitral tribunals have found that, in similar situations, bifurcation is highly impractical and inefficient, defeating the very purpose of granting a bifurcation request.

IV. REQUEST FOR RELIEF

73. For the foregoing reasons, Claimants respectfully request the following relief:

(a) reject Respondent's Request for Bifurcation;

(b) order the Republic of Honduras to pay all costs incurred by Claimants associated with the Request for Bifurcation;

(c) adopt Procedural Calendar No. 3 in Annex B of Procedural Order No. 1.

74. Claimants reserve all of their rights with respect to this matter, including the right to supplement their Observations in response to Respondent's jurisdictional objections, as well as the claims and reliefs relating to the merits and quantum.

Respectfully submitted,

White & Case LLP

Counsel for Claimants

20 November 2024

[243] Request for Bifurcation ¶ 83(5).