

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

HONDURAS PRÓSPERA INC.
ST. JOHN'S BAY DEVELOPMENT COMPANY LLC
PRÓSPERA ARBITRATION CENTER LLC

Claimants

v.

THE REPUBLIC OF HONDURAS

Respondent

ICSID CASE No. ARB/23/2

**CLAIMANTS' OBSERVATIONS ON RESPONDENT'S REQUEST FOR
BIFURCATION**

18 February 2026

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. HONDURAS BEARS THE BURDEN OF ESTABLISHING THAT BIFURCATION IS WARRANTED UNDER THE ICSID ARBITRATION RULES	4
III. RESPONDENT HAS FAILED TO DEMONSTRATE THAT ANY OF ITS OBJECTIONS WARRANT BIFURCATION	12
A. Objection 1: Respondent’s essential security objection is not susceptible to bifurcation as a preliminary objection and, in any event, bifurcation is not warranted because it would be inefficient and procedurally unfair	13
1. Respondent’s objection does not qualify as a preliminary objection susceptible to bifurcation under ICSID Arbitration Rules 42(2) and 44.....	14
2. In any event, bifurcation of Objection 1 is not warranted because it would be inefficient and procedurally unfair.....	18
B. Objection 2: Respondent’s illegality objection is not susceptible to bifurcation as a preliminary objection, and, in any event, bifurcation is not warranted because it would be inefficient and procedurally unfair	22
C. Objection 3: Respondent’s objection to the application of MFN treatment is not susceptible to bifurcation as a preliminary objection, and, in any event, bifurcation is not warranted because it would be inefficient and procedurally unfair	29
D. Objection 4: Bifurcation of Respondent’s objection that the Tribunal lacks jurisdiction to decide claims for breach of the LSA is not warranted because it would be inefficient and procedurally unfair.....	35
E. Objection 5: Bifurcation of Respondent’s objection that the Tribunal lacks jurisdiction to decide claims for breach of the Próspera ZEDE Authorization and the Charter is not warranted because it would be inefficient and procedurally unfair.....	41
F. Objection 6: Respondent’s objection that the Tribunal may not award restitution as a remedy is not susceptible to bifurcation as a preliminary objection and, in any event, bifurcation is not warranted because it would be inefficient and procedurally unfair.....	47
IV. RESPONDENT HAS FAILED TO DEMONSTRATE THAT BIFURCATION OF ITS OBJECTIONS IS WARRANTED IN THE AGGREGATE.....	52
V. REQUEST FOR RELIEF	56

1. Honduras Próspera Inc., St. John's Bay Development Company LLC, and Próspera Arbitration Center LLC (jointly, "**Claimants**") hereby submit their Observations on Request for Bifurcation ("**Request for Bifurcation**") of the Republic of Honduras ("**Honduras**" or "**Respondent**").

I. INTRODUCTION

2. The Request for Bifurcation is Respondent's latest baseless effort to delay the arbitration. While bifurcation can play a useful role in certain circumstances – by enabling tribunals to make arbitrations more efficient and reduce costs – it can also be counterproductive and must not be granted lightly:

[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. These delays 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 In other cases, 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).¹

3. In this case, bifurcation would most certainly not be efficient or fair, and it would merely result in needlessly lengthening and raising the costs of the arbitration. Indeed, that is Respondent's evident objective.
4. As it has in its submissions throughout the arbitration, Respondent begins its Request for Bifurcation by dedicating the initial pages of its submission to addressing the merits of Claimants' claims, which it erroneously insists are unfounded and do not constitute a

¹ See Gary B. Born, *Chapter 15 - Procedures in International Arbitration*, in INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer Law Intl. (3d ed. 2021) (CLA-250) p. 2410.

legitimate investment dispute.² Claimants need not respond to Respondent's mischaracterizations at this time, and a correct account of the facts and claims is set out in Claimants' Memorial. Respondent's grandstanding at the outset of its application is notable, however, because it underscores how Respondent relies on superficial and empty rhetoric but remains unwilling actually to engage on the merits of the dispute.

5. This arbitration has now been ongoing for over three years. Since the outset, Respondent's approach has been to hamper the proceedings, first by refusing to participate in the constitution of the Tribunal, and then through a series of unusual and unfounded requests (*i.e.*, Respondent's application to disqualify one of the arbitrators; its request to exclude one of Claimants' counsel; and its Preliminary Objection pursuant to Article 10.20.5 of CAFTA-DR that already forced the Parties to go through a preliminary phase). Despite losing in each instance, Respondent nonetheless has succeeded in accomplishing the underlying objective of delay. The administration of Ms. Xiomara Castro, which sought to upend the ZEDE Legal Framework that Honduras had put in place and renege on Honduras's legal stability guarantees, has now exited the stage without facing accountability.
6. The Request for Bifurcation – filed by the former Procurador of Honduras as one of his final acts in office – is simply the latest iteration of this strategy of delay. Employing the venerable legal strategy of throwing arguments at the wall and hoping that something will stick, the Request for Bifurcation puts forth a potpourri of six supposed “preliminary objections” that it erroneously alleges will enable the Tribunal to conclude that it lacks jurisdiction. This is wrong, as Claimants will demonstrate.
7. Even a cursory examination of Respondent's objections makes clear that a majority (Objections 1, 2, 3, and 6) do not even concern questions of jurisdiction, and rather relate to issues that are more properly addressed as part of the merits, *e.g.*, the scope of Respondent's obligations under the Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA-DR”), whether its conduct constitutes a breach thereof, and what are the appropriate remedies. As a result, these objections do not qualify as

² See Request for Bifurcation ¶¶ 2-7.

“preliminary objections” as to which Respondent’s request for bifurcation under ICSID Arbitration Rules 42(2) and 44 can properly be granted.

8. In any event, bifurcation is not warranted for any of Respondent’s objections because it would not serve the goal of efficiency and would be procedurally unfair. Indeed, Respondent has failed to show that any of the three factors in favor of bifurcation in ICSID Arbitration Rule 44(2) is met with respect to any of its objections.

- **Bifurcation would not materially reduce the time and cost of the arbitration.** The addition of a separate phase would add rounds of pleading over years unnecessarily. Not one of Respondent’s objections is *prima facie* serious and substantial. Rather, the objections are premised on a selective and incomplete presentation of the facts and a misrepresentation of the law including, among other things, Respondent’s absurd and bad faith conflation of its own ZEDE Legal Framework with an essential security threat (Objection 1); the supposed non-compliance of its own officials with the ZEDE Legal Framework (Objection 2); disregard for established law as to the application MFN provisions (Objection 3); disregard for the ZEDE Legal Framework, the facts as to the Agreement for Legal Stability and Investor Protection between Honduras Próspera and Honduras (“LSA”) and the Charter and Bylaws of Próspera ZEDE (“**Charter**”), and the provisions of CAFTA-DR relevant to the existence of an investment agreement or authorization (Objections 4 and 5); the nature of Claimants’ property rights and the Tribunal’s power to grant restitution thereof in accordance with CAFTA-DR (Objection 6). In addition, deciding these objections will require the Tribunal to consider a plethora of factual evidence, including hundreds of documents and extensive witness testimony, as well as extensive expert testimony and legal authorities in relation to Honduran and international law (all or a significant part of which would also need to be considered during the merits phase).
- **Bifurcation would not dispose of all or even a substantial part of the claims to be decided in this proceeding.** Respondent concedes that four of its objections (Objections 3-6) would not dispose of Claimants’ claims. In fact, not a single of Respondent’s objections could, even if successful, achieve the total dismissal of the arbitration. After the jurisdictional phase, even assuming *arguendo* that Respondent prevailed in eliminating some causes of action, the Tribunal would still have to deal with Claimants’ remaining claims, and the scope of the factual and legal issues to be determined thereunder would not have been meaningfully reduced since the Tribunal will still have to consider essentially the same factual background, regardless of which claims remain, *e.g.*, the ZEDE Legal Framework, Claimants’ investments thereunder, Honduras’s conduct in connection therewith, and the harm caused to Claimants.

- **Each of Respondent’s objections is inextricably intertwined with the merits of the case making bifurcation impractical.** Contrary to Respondent’s assertions in the Request for Bifurcation, it will be impossible for the Tribunal to decide any of the objections without performing a deep dive into the very facts and legal issues to be addressed in the merits phase. For example, the Tribunal will need to analyze the same documents and hear some of the same witnesses and experts to consider the nature and functioning of the ZEDE Legal Framework, whether it does so in connection with analyzing the existence of a supposed essential security threat, Honduras’s legal stability undertakings, or the existence of Claimants’ legitimate expectations, among other things. The significant overlap not only makes multiplication of time and costs inevitable, it also creates a serious risk of the Tribunal having to prejudge important factual and legal issues.

9. The remainder of these Observations are organized as follows. *Section II* sets out the correct legal standard for bifurcation of preliminary objections; *Section III* details the reasons that bifurcation cannot properly be granted and/or is not warranted as to each of Respondent’s objections; *Section IV* further explains that bifurcation is not warranted for Respondent’s objections in the aggregate. These Observations are accompanied by legal authorities CLA-250 to CLA-296.
10. Merely by virtue of having filed the Request for Bifurcation, Respondent has already succeeded in giving itself at least four additional months before its Counter-Memorial. As a result, Claimants will not have a Hearing on their claims until September 2027, at the earliest. While this is now inevitable, the Tribunal must reject the Request for Bifurcation so as to avoid further compounding the inefficiencies, costs, and unfairness.

II. HONDURAS BEARS THE BURDEN OF ESTABLISHING THAT BIFURCATION IS WARRANTED UNDER THE ICSID ARBITRATION RULES

11. Respondent mistakenly asserts that “[c]ommon sense dictates that in this case the Tribunal must first determine whether it has jurisdiction before investing resources in examining the merits.”³ Bifurcation is not mandatory, presumed, or even the standard practice in ICSID arbitrations. On the contrary, it is well established that bifurcation is only appropriate in certain circumstances, which are not met in this case.

³ Request for Bifurcation ¶ 33 (emphasis added).

12. Pursuant to Article 41(2) of the ICSID Convention and ICSID Arbitration Rule 43(4), the Tribunal has discretion to decide whether to address preliminary objections as a preliminary question or together with the merits.⁴ There is no presumption in favor of bifurcation of preliminary objections in ICSID arbitration.⁵ To the contrary, Respondent bears the burden of establishing that bifurcation is warranted.⁶
13. Let there be no doubt: States are not entitled to have their jurisdictional objections bifurcated automatically, and, notwithstanding Respondent's suggestion, no fundamental legal principle obliges the Tribunal to bifurcate such objections.⁷ Bifurcation also is not inherently procedurally fair and efficient and is not "good practice" in all cases.⁸ In fact, contrary to what Respondent asserts, bifurcation is not ordered "routinely."⁹ Respondent cherry-picks the data to identify six decisions on bifurcation issued since the enactment of the 2022 ICSID Arbitration Rules, of which four granted bifurcation.¹⁰ Respondent's cherry-picked cases do not constitute a trend, and Respondent notably fails to cite two

⁴ 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 (2022) Rule 43(4) ("The Tribunal may address a preliminary objection in a separate phase of the proceeding or join the objection to the merits.").

⁵ See ICSID, Bifurcation – ICSID Convention Arbitration (2022 Rules), available at <https://icsid.worldbank.org/procedures/arbitration/convention/bifurcation/2022> (CLA-290) ("The Tribunal has discretion to bifurcate the proceeding into different phases There is no presumption in favor of bifurcation.") (emphasis added). There has not been a presumption in favor of bifurcation in the ICSID system since 2006, when ICSID amended a rule that previously provided for the automatic suspension of the proceedings on the merits following the submission of a jurisdictional objection. Compare ICSID Arbitration Rules (2003), 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 (2006), 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.").

⁶ See, e.g., *Klesch Grp. Holdings Ltd. and Raffinerie Heide GmbH v. Federal Republic of Germany*, ICSID Case No. ARB/23/49, Decision on Bifurcation (8 Apr. 2025) (CLA-251) ¶¶ 42-43 ("[I]n the majority's view, ultimately, in a bifurcation application, the applicant must convince the tribunal that it would be worthwhile to take the chance that some of the claims in dispute can be dealt with earlier, while acknowledging that if the applicant turns out to be wrong about its objections, the entire dispute will be disposed of later."); *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) (21 Dec. 2018) (CLA-252) ¶ 23 (rejecting a bifurcation request because "the Respondent ha[d] failed to establish that bifurcation would serve the interest of an efficient arbitration.").

⁷ See, e.g., Request for Bifurcation ¶¶ 152, 157.

⁸ See, e.g., Request for Bifurcation ¶¶ 158, 159.

⁹ Request for Bifurcation ¶ 147.

¹⁰ Request for Bifurcation n. 142.

publicly available decisions rejecting requests for bifurcation under the 2022 ICSID Arbitration Rules in 2025 (this is in addition to other, non-reported decisions, involving Honduras as the respondent of which is it well aware).¹¹ In addition, more comprehensive data are available and readily disprove Respondent’s suggestion: for example, an empirical study of 110 arbitrations found that investment treaty tribunals granted bifurcation requests in 26% of the cases where it was requested between June 2017 and May 2020 (the most recent data set available).¹² Nor should it be understood that the 2022 ICSID Arbitration Rules enacted a change in favor of granting bifurcation; on the contrary, ICSID has confirmed that there is no presumption in favor of bifurcation in the 2022 ICSID Arbitration Rules¹³ and that the factors in Rule 44 of the 2022 ICSID Arbitration Rules simply reflect what “ha[s] been typically considered in ICSID cases.”¹⁴

14. Whether or not a proceeding should be bifurcated is a case-by-case determination. Considerations of efficiency, procedural economy, and fairness are paramount. Indeed, it is well established that in deciding whether bifurcation is warranted, tribunals “should be driven by the overarching considerations of procedural fairness and efficiency.”¹⁵ Respondent itself admits that bifurcating preliminary objections is warranted only if it is “likely to result in greater efficiency in both time and cost.”¹⁶ Assessing the likelihood of whether taking the step to bifurcate the proceedings would lead to greater efficiency than having a single-phased process is of primary importance because an improvident

¹¹ See *Bacanora Lithium Limited, Sonora Lithium Ltd., and Ganfeng International Trading (Shanghai) Co. Ltd. v. United Mexican States*, ICSID Case No. ARB/24/21, Procedural Order No. 3 (Decision on Bifurcation) (25 Aug. 2025) (CLA-253) ¶ 92; *Suomi Power Networks TopCo B.V., Supernova II Bidco BV and AMF Tjänstepension AB v. Republic of Finland*, ICSID Case No. ARB/24/37, Procedural Order No. 3 (Decision on the Respondent’s Request for Bifurcation) (8 Aug. 2025) (CLA-254) ¶ 106.

¹² Matthew Hodgson, Yarik Kryvoi, Daniel Hrecka, *Empirical Study: Costs, Damages and Duration in Investor-State Arbitration* (Jun. 2021) (“**Hodgson**”) (CLA-291) pp. 14-15.

¹³ See ICSID, Bifurcation – ICSID Convention Arbitration (2022 Rules), available at <https://icsid.worldbank.org/procedures/arbitration/convention/bifurcation/2022> (CLA-290) (“The Tribunal has discretion to bifurcate the proceeding into different phases There is no presumption in favor of bifurcation.”).

¹⁴ Swee Yen Koh and Alvin Yeo, *Part 3: ICSID Arbitration Rules, Chapter VI: Special Procedures [Rules 41-49]*, in ICSID RULES AND REGULATIONS 2022: ARTICLE-BY-ARTICLE COMMENTARY (2022) (“**Koh**”) (CLA-255) p. 19.

¹⁵ *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4, Procedural Order No. 2 (Decision on Bifurcation) (25 Feb. 2022) (CLA-256) ¶ 44.

¹⁶ Request for Bifurcation ¶ 159.

bifurcation materially delays the proceedings and makes them significantly more costly, leading to the very opposite of the intended result. A 2018 study by ICSID found that bifurcated arbitrations that led to an award on the merits lasted “over 550 days longer” than the average non-bifurcated case,¹⁷ while a 2021 study found that the mean length for bifurcated proceedings to conclude is 386 days longer than for non-bifurcated proceedings and that “mean party costs in bifurcated proceedings (including those which resulted in dismissal of the claims after the first part of the process) are higher than those in non-bifurcated proceedings” by 85% for investors and 79% for respondent States.¹⁸ Procedural fairness is likewise paramount: as held in *Mainstream v. Germany*, the Tribunal should consider “general principles of fairness to both sides.”¹⁹

15. The Tribunal’s task is to conduct this analysis on the basis of factors set forth in the applicable rules and developed by prior arbitral tribunals seeking to assess whether bifurcation is likely to result in time and cost savings and is procedurally fair. In particular, the Parties agree that in evaluating Respondent’s request for bifurcation, the Tribunal must consider the factors set forth in Rule 44(2) of the ICSID Arbitration Rules,²⁰ which provides that “the Tribunal shall consider all relevant circumstances, including whether:”²¹

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

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

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

¹⁷ ICSID Secretariat, Proposals for Amendment of ICSID Rules – Working Paper, Vol. 3 dated 2 Aug. 2018 (CLA-21), Schedule 9: Addressing Time and Cost in ICSID Arbitration ¶¶ 9-11.

¹⁸ Hodgson (CLA-291) pp. 14, 34.

¹⁹ *Mainstream Renewable Power Ltd and others v. Federal Republic of Germany*, ICSID Case No. ARB/21/26, Procedural Order No. 3 (Decision on Bifurcation) (7 Jun. 2022) (CLA-257) ¶ 44.

²⁰ Request for Bifurcation ¶ 149.

²¹ ICSID Arbitration Rules (2022) Rule 44(2).

16. Based on the factors set out in the ICSID Arbitration Rules, as informed by decisions of prior investment tribunals, Respondent’s burden can be summarized as follows:

- a) *Respondent must establish for each preliminary objection that it would materially reduce the time and cost of the proceeding:* Respondent must establish that bifurcation is “justified in terms of the reduction in costs at the subsequent phase of [a] proceeding,”²² and would not “result in an additional burden by adding another separate phase.”²³ A key consideration in this regard is whether the preliminary objection is *prima facie* serious and substantial,²⁴ because a separate phase is almost certain to cause unnecessary delay and costs if an objection is unlikely to succeed.²⁵ For that reason, although not explicitly stated in the ICSID Arbitration Rules, many tribunals analyze the *prima facie* strength of the preliminary objection in determining whether bifurcation is likely to materially reduce the time and cost of the proceeding (under both the prior and 2022 versions

²² *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised) (31 May 2005) (“*Glamis Gold*”) (CLA-295) ¶ 21.

²³ *Amerra Capital Management LLC and others v. Mexico*, ICSID Case No. UNCT/23/1, Procedural Order No. 3 (3 Nov. 2023) (CLA-258) ¶ 13.

²⁴ *Almaden Minerals Ltd and Almadex Minerals Ltd v. United Mexican States*, ICSID Case No. ARB/24/23, Procedural Order No. 3 on Respondent Request for Bifurcation (25 Jul. 2025) (CLA-259) ¶ 23 (referring to ICSID Arbitration Rule 44 and stating that the prevailing case law dictates that regarding the first prong, the tribunal should consider whether “bifurcation would lead to an effective reduction of time and cost of the proceeding, also taking into consideration a *prima facie* assessment of whether the objection is serious and substantial.”); *Mario Noriega Willars v. United Mexican States*, ICSID Case No. ARB/23/29, Procedural Order No. 3 on Bifurcation (24 Mar. 2025) (CLA-294) ¶ 78 (referring to the three prongs of ICSID Arbitration Rule 44 and “[i]n assessing the first prong of the test, the Tribunal needs to consider whether *prima facie* the objection is serious and substantial.”); *Naftiran Intertrade Co. (NICO) Limited v. Kingdom of Bahrain*, ICSID Case No. ARB/22/34, Procedural Order No. 4 (12 Aug. 2024) (RLA-113) ¶ 43 (noting that “[t]he Parties agree that, in considering whether bifurcation would materially reduce the time and cost of the proceeding, the Tribunal shall consider whether each preliminary Objection is ‘serious and substantial’ on a *prima facie* basis.”).

²⁵ *Glamis Gold* (CLA-295) ¶ 12 (noting that the tribunal should consider “whether the objection is substantial inasmuch as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding.”).

of the Rules),²⁶ as Respondent acknowledges.²⁷ In this respect, the *Eco Oro v. Colombia* tribunal stated that “a higher threshold must be applied than merely requiring that the objection is not frivolous or vexatious.”²⁸

- b) *Respondent must establish for each preliminary objection that, if granted, it would dispose of all or substantial portion of the dispute:* To warrant bifurcation, each preliminary objection must be able to dispose of “an essential part of the claims raised.”²⁹ As explained by the tribunal in *Energía y Renovación v. Guatemala*, if a preliminary objection is “not capable of terminating the proceeding” or “significantly reducing” the complexity of the dispute, bifurcation would “only lead to the waste of resources that it is purportedly intending to avoid.”³⁰ In this regard, Respondent’s assertion that bifurcating an unsuccessful preliminary objection can result in a “material reduction” of the subsequent phase of the proceedings because the preliminary objection has already been decided in the preliminary phase is nonsensical.³¹ If a bifurcated objection fails, there is no efficiency savings, as the Parties will have needlessly been subjected to an additional procedural phase and the overall proceedings would have become much longer.³² Thus, when referring

²⁶ See, e.g., *Stratius Investments Ltd. v. Hungary*, ICSID Case No. ARB/24/6, Procedural Order No. 3 (Reasons for prior bifurcation decision) (12 Feb. 2025) (CLA-260) ¶ 33 (holding that in addition to the factors set forth in Article 44(2) of the ICSID Rules, “another relevant circumstance to consider [is] whether a preliminary objection [is] *prima facie* sufficiently serious and substantial to warrant bifurcation.”); *Mirian G. Dekanoidze and T.G. Trade LLC v. Georgia*, ICSID Case No. ARB/23/45, Procedural Order No. 5 (On Respondent’s Request for Bifurcation) (1 Aug. 2025) (CLA-261) ¶ 578 (holding, in the context of a request for bifurcation under the 2022 ICSID Arbitration Rules, that “[b]oth Parties agree, and the Tribunal accepts, that in the context of deciding whether or not to bifurcate, an important consideration is whether or not the objections that form the subject of a request for bifurcation are ‘serious and substantial’ on a *prima facie* basis.”).

²⁷ Request for Bifurcation n. 160.

²⁸ *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2 Decision on Bifurcation (28 Jun. 2018) (CLA-262) ¶ 51. Similarly applying a threshold higher than “not frivolous,” the *AMC v. Hungary* tribunal decided to bifurcate upon finding that the jurisdictional objections raised there were “significant.” See *Accession Mezzanine Capital L.P. et al., v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent’s Notice of Jurisdictional Objections and Request for Bifurcation (8 Aug. 2013) (CLA-263) ¶ 39(2).

²⁹ *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 8 regarding Decision on Bifurcation (14 Apr. 2014) (RLA-81) ¶ 109.

³⁰ *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) (2 Dec. 2022) (“*Energía y Renovación*”) (CLA-264) ¶ 82(c).

³¹ Request for Bifurcation ¶ 156.

³² See *supra* § I.

to the effects of “determination of the questions to be bifurcated,” ICSID Arbitration Rule 44(2)(b) is contemplating the possibility that “a successful jurisdictional objection would dispose of all the dispute and end the arbitration proceedings,”³³ and does not recognize any benefit in bifurcating unsuccessful objections.

- c) *Respondent must establish for each preliminary objection that it is not so intertwined with the merits as to make bifurcation impractical:* The Parties agree that Respondent must establish for each objection that the facts involved in deciding on the objection are “distinct from those likely to be involved in determining the merits of the claims,” as explained in *Mesa Power v. Canada*.³⁴ Contrary to Respondent’s suggestion, however, it is not the case that objections focused on “legal issues” are by definition not intertwined with the merits.³⁵ Respondent’s reliance on *Mesa Power* for this proposition is misplaced; the tribunal in that case simply held that the facts involved in deciding a specific legal issue (the application of Article 1120(1) of the NAFTA) were “likely” to be distinct from the facts involved in deciding the particular merits of that case; it did not hold that the facts involved in deciding legal issues are necessarily distinct.³⁶ Indeed, this must be so, as otherwise jurisdictional objections that focus on questions that are presented as purely legal (*e.g.*, treaty interpretation) would always meet this factor, which is not the case. Raising objections focused on “legal issues”³⁷ does not relieve Respondent of its burden to establish for each objection that it is not intertwined with the merits because it can be decided without analyzing the same factual matrix that will be relevant to decide the merits. Respondent’s attempt to impose a lower standard for bifurcation by suggesting that preliminary objections should be

³³ Koh (CLA-255) p. 20.

³⁴ Request for Bifurcation ¶ 163; *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Procedural Order No. 2 (Bifurcation) (24 Mar. 2016) (“*Mesa Power*”) (RLA-77) ¶ 20.

³⁵ Request for Bifurcation ¶ 163.

³⁶ *Mesa Power* (RLA-77) ¶ 20.

³⁷ See Request for Bifurcation ¶ 166.

bifurcated unless there is “substantial overlap”³⁸ with the merits and that the “essential factor” is whether “resolving the preliminary objections would amount to deciding the merits of the case”³⁹ is misguided. This factor focuses on overlap between the objections and the merits as regards evidence and substantive issues in dispute, even if such overlap would not result in the Tribunal having to “decid[e] the merits of the case” to decide the preliminary objection.⁴⁰ As the *Orlandini-Ágreda v. Bolivia* tribunal explains, this factor is relevant to avoid (i) having the tribunal “review the same or substantially the same evidence” that it will have to review after bifurcation to address liability, and (ii) “prejudg[ing] some of the issues of fact” that are relevant to liability “without having heard (at the jurisdictional stage) all the relevant evidence,” both of which risks exist when an objection is “at least in some respects, intertwined with the merits.”⁴¹

17. Investment treaty tribunals have held that the factors listed 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.”⁴²
18. Lastly, in addition to the foregoing considerations applicable to the analysis of bifurcation in general, Claimants note that Respondent is seeking bifurcation of six “preliminary objections” pursuant to ICSID Arbitration Rules 42(2) and 44,⁴³ and correspondingly Respondent has framed its arguments as being under Rule 44 throughout the Request for

³⁸ Request for Bifurcation ¶ 164.

³⁹ Request for Bifurcation ¶ 167.

⁴⁰ Request for Bifurcation ¶ 167.

⁴¹ *The Estate of Julio Miguel Orlandini-Ágreda and Compañía Minera Orlandini Ltda. v. Plurinational State of Bolivia*, PCA Case No. 2018-39, Decision on the Respondent’s Application for Termination, Trifurcation and Security for Costs (9 Jul. 2019) (“*Orlandini-Ágreda*”) (CLA-265) ¶¶ 133-134.

⁴² *See, e.g., Energía y Renovación* (CLA-264) ¶ 83 (referring to the three requirements of showing that the objections must be serious and substantial, not intertwined with the merits, and able to dispose of all or a substantial portion of the claims) (emphasis added); *Carlos Sastre and others v. United Mexican States*, ICSID Case No. UNCT/20/2, Procedural Order No. 2 (Decision on Bifurcation) (RLA-101) ¶ 43 (“All three elements of the test [(i.e., substantial and not frivolous, ability to dispose of all or an essential part of the claims raised, and possibility to examine the objection without entering into the merits of the case)] must be cumulatively satisfied to decide a preliminary objection to jurisdiction in a separate phase.”).

⁴³ Request for Bifurcation ¶¶ 145-146 (“The Republic of Honduras submits this Request for Bifurcation pursuant to Article 41(2) of the ICSID Convention, Rules 42 and 44 of the ICSID Arbitration Rules of 2022.”).

Bifurcation.⁴⁴ Unlike other types of bifurcation, Rules 42(2) and 44 specifically refer to the bifurcation of “preliminary objections,”⁴⁵ and consequently, in order for an objection to be susceptible to bifurcation under Rules 42(2) and 44, Respondent must first demonstrate that it qualifies as a “preliminary objection,” which is defined by ICSID Arbitration Rule 43(1) as an objection “that the dispute or any ancillary claim is not within the jurisdiction of the Centre or for other reasons is not within the competence of the Tribunal.”

III. RESPONDENT HAS FAILED TO DEMONSTRATE THAT ANY OF ITS OBJECTIONS WARRANT BIFURCATION

19. Respondent puts forward six objections that it contends are preliminary objections that should be bifurcated and heard separately in advance of the merits. Claimants will engage at the appropriate time in detail with the myriad factual and legal deficiencies underlying Respondent’s objections. At this juncture, Claimants will focus on the question presently before the Tribunal and show that Respondent has not satisfied its burden of establishing that bifurcation is appropriate and unwarranted for any its objections under the criteria set forth above. Rather than engage at this juncture in detail with the myriad factual and legal deficiencies underlying Respondent’s objections, Claimants will explain why bifurcation is inappropriate under the criteria set forth above.

- As a threshold matter, Objections 1, 2, 3, and 6 do not qualify as “preliminary objections” as they are not jurisdictional in nature and, therefore, are not susceptible to bifurcation under ICSID Arbitration Rules 42(2) and 44.

⁴⁴ See, e.g., Request for Bifurcation ¶¶ 34 (“As will be demonstrated, the objections that the Republic of Honduras proposes to raise satisfy all the requirements for bifurcation of the proceedings. In accordance with Rule 44 of the applicable ICSID Arbitration Rules, it is clear that bifurcation would significantly reduce the time and cost of the proceedings, since the objections raised here, if successful, would resolve the case in its entirety or, at a minimum, in a significant part. Furthermore, these are preliminary objections whose analysis and resolution are independent of the merits of the claim. There is also no doubt that the objections announced by the Republic of Honduras are serious and substantial, although this is not an independent requirement under Rule 44.”), 146 (“In line with the above provision, Rules 42(1) and (2) of the 2022 ICSID Arbitration Rules provide that a party may request that a preliminary objection be dealt with in a separate phase of the proceedings, in which case Rule 44 shall apply.”), 169 (“In conclusion, Honduras’ preliminary objections comply with Rule 44.2(c) of the ICSID Arbitration Rules . . .”).

⁴⁵ ICSID Arbitration Rules, Rule 42(2) (“If a request for bifurcation relates to a preliminary objection, Rule 44 shall apply.”), Rule 44 (setting out the procedure and factors to be considered with respect to the bifurcation of preliminary objections).

- In any event, bifurcation is not warranted as to any of the objections because (i) it would not materially reduce – but, rather, materially increase – the time and cost of the proceedings, as the objections are not *prima facie* serious and substantial and they require consideration of extensive factual and legal issues and related evidence; (ii) even if successful, the objections would not dispose of all or a substantial part of the dispute; and (iii) the objections are intertwined with the merits making bifurcation impractical.
20. For these reasons, as detailed below, the Request for Bifurcation should be rejected and Respondent’s objections should be addressed together with the merits.
- A. OBJECTION 1: RESPONDENT’S ESSENTIAL SECURITY OBJECTION IS NOT SUSCEPTIBLE TO BIFURCATION AS A PRELIMINARY OBJECTION AND, IN ANY EVENT, BIFURCATION IS NOT WARRANTED BECAUSE IT WOULD BE INEFFICIENT AND PROCEDURALLY UNFAIR**
21. As its first objection, Respondent invokes the “essential security” exception in Article 21.2(b) of CAFTA-DR, which it contends deprives the Tribunal of jurisdiction. Respondent argues that bifurcation is warranted because the objection “excludes the Tribunal’s jurisdiction over the entirety of the Claimants’ claim;”⁴⁶ does not require analyzing the merits insofar as the exception is “self-judging” or, alternatively, does not “requir[e] a substantive analysis of the merits;”⁴⁷ and is *prima facie* serious and substantial because Respondent’s measures were allegedly taken to protect its purported essential security interests.⁴⁸
22. Bifurcation is neither appropriate nor warranted, however, because (A) Respondent has failed to plead a preliminary objection susceptible to bifurcation under ICSID Arbitration Rules 42(2) and 44, as the defense of essential security is not a question of jurisdiction; and, in any event, (B) none of the three factors for bifurcation are met with respect to this objection.

⁴⁶ Request for Bifurcation ¶ 155.

⁴⁷ Request for Bifurcation ¶ 165.

⁴⁸ Request for Bifurcation ¶ 171.

1. Respondent's objection does not qualify as a preliminary objection susceptible to bifurcation under ICSID Arbitration Rules 42(2) and 44

23. As a preliminary matter, Respondent's request for bifurcation under ICSID Arbitration Rules 42(2) and 44 cannot properly be granted with respect to Objection 1 because the objection does not qualify as a "preliminary objection" within the definition in Rule 43(1), *i.e.*, it is not an objection "that the dispute or any ancillary claim is not within the jurisdiction of the Centre or for other reasons is not within the competence of the Tribunal."⁴⁹ Contrary to what Respondent asserts, the applicability of the essential security exception in Article 21.2(b) of CAFTA-DR is a question not of jurisdiction but rather of the merits, as it goes to whether Respondent is liable for its conduct, not whether the Tribunal has competence. Respondent has failed to show otherwise.
24. Respondent's motive for characterizing Objection 1 as jurisdictional is clear: Respondent wishes to transform Article 21.2(b) of CAFTA-DR into a species of get-out-of-jail-free card that deprives a properly constituted tribunal of competence. The Tribunal should be highly skeptical of such efforts: as explained by the tribunal in *Seda v. Colombia* (on which Respondent relies), absent an unambiguous statement in the treaty, exempting the State from any review by a tribunal upon mere invocation of an essential security provisions would be to improperly transform it into an "escape clause," and "place the otherwise binding international law obligations of the Contracting States in a Schrödinger's box of uncertainty."⁵⁰ In any event, there is no legal basis for Respondent's position.

⁴⁹ ICSID Arbitration Rules, Rule 43(1).

⁵⁰ *See Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award (27 Jun. 2024) ("*Seda*") (RLA-112) ¶¶ 722-723 ("[A]n essential security exception may turn into what the OECD Investment Committee described as an 'escape clause.' . . . In the absence of clear and unequivocal language to that effect, the Tribunal is unable to place the otherwise binding international law obligations of the Contracting States in a Schrödinger's box of uncertainty.") (emphasis added).

25. Respondent's attempt to characterize Objection 1 as jurisdictional misinterprets Article 21.2(b)⁵¹ in a manner inconsistent with the principles of interpretation under the Vienna Convention on the law of Treaties ("VCLT").⁵² CAFTA-DR Article 21.2(b) provides:

Nothing in this Agreement shall be construed: . . . (b) to preclude a Party from applying measures that it considers necessary for . . . the protection of its own essential security interests.⁵³

26. On a plain text reading, it is evident that this provision refers to the scope of the Contracting States' obligations under CAFTA-DR, in particular that the Contracting States are not precluded from applying certain measures that might otherwise be prohibited. The provision makes no mention of the competence of a tribunal constituted pursuant to Chapter 10 of CAFTA-DR, let alone provides for any limitation of such competence.
27. Both the context of Article 21.2(b) and CAFTA-DR's object and purpose confirm that the essential security exception is clarifying the scope of Contracting States' obligations, not tacitly creating a jurisdictional bar. For example, Article 21.2(a), which immediately precedes Article 21.2(b), likewise provides that "[n]othing in this Agreement shall be construed: (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests," *i.e.*, it specifies a limit to a requirement that might otherwise apply. Indeed, the entirety of Chapter 21 of CAFTA-DR ("Exceptions") provides exceptions on the scope of the Treaty's substantive obligations.⁵⁴ This reading is consistent with the Preamble of CAFTA-DR, which provides that its purpose is, *inter alia*, to increase economic integration between the Contracting

⁵¹ Request for Bifurcation ¶¶ 40-41.

⁵² Vienna Convention for the Law of Treaties, 1155 U.N. Treaty Series p. 332, concluded at Vienna on 23 May 1969, entered into force on 27 Jan. 1980 ("VCLT") (CLA-1) Art. 31 (treaties shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

⁵³ Dominican Republic-Central America-United States Free Trade Agreement dated 5 Aug. 2004 ("CAFTA-DR") (CLA-2) Art. 21.2(a) (emphasis added).

⁵⁴ *See, e.g.*, CAFTA-DR (CLA-2) Art. 21.3 (providing that, "[e]xcept as set out in this Article, nothing in this Agreement shall apply to taxation measures" – thus limiting the scope of the Contracting States' obligations with respect to issues on taxation).

States through clear rules and a predictable commercial framework.⁵⁵ This is done by providing clear guidelines on the States' obligations, not by creating an all-purpose escape hatch that would allow a respondent State to deprive a properly constituted tribunal of competence merely by invoking Article 21.2(b). Respondent's argument that Article 10.2.1 of CAFTA-DR "confirm[s]" that the essential security exception is not subject to review because it provides that in the event of inconsistency between the Investment Chapter and another Chapter of the Treaty, "the other Chapter shall prevail,"⁵⁶ is baseless, as Respondent is unable to identify any inconsistency whatsoever. Rather, as other tribunals have confirmed, there is no inconsistency that would result in a lack of jurisdiction.⁵⁷

28. Respondent's argument that the Tribunal has no jurisdiction because Article 21.2(b) is "self-judging" or permits the Tribunal only a very narrow scope of review conflates the question of jurisdiction with the question of the scope of the Tribunal's review at the merits stage. Indeed, Respondent is notably unable to marshal a single case to support its argument that the essential security exception constitutes a jurisdictional bar. This is hardly surprising as numerous tribunals over nearly four decades have declined to treat essential security provisions as jurisdictional, including in cases on which Respondent itself relies. As the ICJ explained in its seminal 1986 *Nicaragua v. United States* judgment, an essential security provision "cannot be interpreted as removing the present dispute as to the scope of the Treaty from the Court's jurisdiction," because, while the provision "provides for exceptions to the generality of its other provisions . . . it by no means removes the interpretation and application of that article from the jurisdiction of the Court."⁵⁸ The ICJ's reasoning continues to inform tribunals, including in recent years in the context of

⁵⁵ CAFTA-DR (CLA-2) Preamble (providing that the purpose of CAFTA-DR is to, *inter alia*, "STRENGTHEN the special bonds of friendship and cooperation among their nations and promote regional economic integration;" "ESTABLISH clear and mutually advantageous rules governing their trade;" and "ENSURE a predictable commercial framework for business planning and investment.").

⁵⁶ Request for Bifurcation ¶ 47.

⁵⁷ *See, e.g., Seda* (RLA-112) ¶¶ 271, 432, 671-672, 727 (rejecting Respondent's argument in reliance on a provision similar to CAFTA-DR Art. 10.2.1 that "when the [essential security] exception is raised, the dispute resolution mechanism is disabled.").

⁵⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice, Judgment – Merits (27 Jun. 1986) (CLA-269) ¶ 222.

CAFTA-DR and similar treaties.⁵⁹ For example, just last year, the tribunal in *Azerbaijan v. Armenia* declined to bifurcate a similar essential security objection under the Energy Charter Treaty because “the objection is in essence a merits defense.”⁶⁰

29. Respondent’s own arguments on Article 21.2(b) being “self-judging” belie that the provision constitutes an automatic jurisdictional bar. Indeed, not only does Respondent spend nearly five pages of its Request for Bifurcation seeking to explain the standard and scope of the Tribunal’s review over essential security claims,⁶¹ the very cases on which it relies only ever use the term “self-judging” to describe aspects of the appropriate standard of review, and each expressly reject the argument that the provision is an escape hatch that allows States to deny tribunals jurisdiction.⁶² In particular, Respondent relies on the *Seda v. Colombia* award, which held that the essential security provision was not a “non-justiciable provision,” and did not “operate[] to exclude a tribunal’s jurisdiction.”⁶³ Respondent also relies on the award in *Riverside Coffee v. Nicaragua*, which found that the tribunal had the “power” to review the respondent’s invocation of CAFTA-DR Article 21.2(b).⁶⁴

30. Thus, there is no basis for Respondent to argue that this is an issue of jurisdiction.

⁵⁹ See, e.g., *Oil Platforms (Islamic Republic of Iran v. United States of America)*, International Court of Justice, Judgment – Preliminary Objection (12 Dec. 1996) (CLA-270) ¶ 20; *Energy Charter Treaty Arbitration (The Republic of Azerbaijan v. The Republic of Armenia)*, PCA Case No. 2023-65, Decision on Bifurcation (13 Feb. 2025) (“*Azerbaijan v. Armenia*”) (CLA-271) ¶ 90; *Seda* (RLA-112) ¶ 728; *Riverside Coffee, LLC v. Republic of Nicaragua*, ICSID Case No. ARB/21/16, Award (17 Oct. 2025) (“*Riverside Coffee*”) (CLA-292) ¶ 253.

⁶⁰ *Azerbaijan v. Armenia* (CLA-271) ¶ 90 (emphasis added).

⁶¹ Request for Bifurcation § II.A.2.

⁶² See *Riverside Coffee* (CLA-292) ¶ 258 (“The Tribunal stresses that its determination that Article 21.2(b) of DR-CAFTA is self-judging is limited to the question of whether it is for Nicaragua or the Tribunal to decide whether the measures deemed ‘necessary’ by Nicaragua are indeed to be considered ‘necessary’ for the purposes of this arbitration; it does not deal with the question of whether the measures in question were taken ‘for the protection of [Nicaragua’s own] essential security interests.”) (emphasis added); *Seda* (RLA-112) ¶¶ 722-723 (“[A]n essential security exception may turn into what the OECD Investment Committee described as an ‘escape clause.’ . . . In the absence of clear and unequivocal language to that effect, the Tribunal is unable to place the otherwise binding international law obligations of the Contracting States in a Schrödinger’s box of uncertainty.”) (emphasis added).

⁶³ *Seda* (RLA-112) ¶ 727.

⁶⁴ *Riverside Coffee* (CLA-292) ¶ 253 (interpreting Article 21.2(b) of CAFTA-DR and noting that “the Tribunal has the power to review whether the Respondent has invoked the national security exception in Article 21.2(b) [of CAFTA-DR] in good faith.”).

2. In any event, bifurcation of Objection 1 is not warranted because it would be inefficient and procedurally unfair

31. Even if Objection 1 were susceptible to bifurcation, bifurcation is not warranted under Rule 44.
32. *First*, bifurcation will not result in a material reduction of the time and cost of the proceeding. This is because Objection 1 is not *prima facie* serious and substantial, and also because Respondent's essential security defense implicates the full factual matrix from the moment Honduras put the ZEDE Legal Framework in place through to its present bad faith effort to insulate its subsequent *volte face* in disregard of its prior promises from review by this Tribunal.
33. Objection 1 is not *prima facie* serious and substantial. Contrary to Respondent's assertions, the essential security exception in Article 21.2(b) simply does not apply to shield Respondent's measures in contravention of CAFTA-DR in this case. The Tribunal will first have to analyze whether a threat to an essential security interest even exists. To characterize Honduras's self-established ZEDE Legal Framework as an essential security threat to Honduras is so patently absurd that invoking Article 21.2(b) is inconsistent with Articles 26 and 31(1) of the VCLT which require Honduras to perform and interpret CAFTA-DR in good faith.⁶⁵
34. Respondent characterizes its measures to remove the ZEDE Legal Framework as protecting against a threat to its territory, which it says is an essential security interest.⁶⁶ The essential security exception does not work to permit such self-serving *post hoc* rationalizations. The

⁶⁵ VCLT (CLA-1) Arts. 26, 31(1). *See also Riverside Coffee* (CLA-292) ¶ 263 (“[T]he rule reflected in Article 26 of the Vienna Convention, which bears a close connection to the interpretation of a treaty by a State party, cannot be, and has not been, excluded by Article 21.2(b) of the DR-CAFTA.”); *Seda* (RLA-112) ¶¶ 649-650 (citing the *WTO Panel Russia – Measures concerning traffic in transit* case holding that “the discretion of a Member to designate particular concerns as ‘essential security interests’ is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith,” and finding that a State’s determination of the scope of its essential security interests likewise “may be restrained by the good faith obligations.”), 755-756 (“[T]he Tribunal does not agree with the proposition that it is solely for the State parties to the TPA to ensure that the provision is invoked in good faith and, ultimately, that the other State Party is the judge of the proper invocation of the ESI Provision the Tribunal will conduct a limited review as to whether Respondent invoked the ESI Provision in good faith.”).

⁶⁶ *See Request for Bifurcation* ¶¶ 9-13; 57-65.

ZEDE Legal Framework consists of provisions of Honduras's own Constitution and the ZEDE Law that Honduras put in place, promoted, and implemented to attract much needed investments; its constitutionality was upheld by the Supreme Court of Honduras in 2014 and it was promoted at the highest levels of the Honduran government for years; and it succeeded in inducing Claimants and others to invest hundreds of millions of dollars in the country in reliance on the framework and Honduras's guarantees of legal stability.⁶⁷ Honduras reversed its pro-ZEDE policy in 2022, when the whims of a new government without respect for Honduras's prior guarantees of legal stability led directly to this investment dispute. As Claimants will demonstrate, Honduras's reversal of its legislative framework was motivated by the shift in political positions following the election of President Xiomara Castro in 2022.⁶⁸ Changing political tides cannot transform an investment environment established by a State, or a State's legal stability undertakings, into threats to essential security interests for the purposes of Article 21.2(b). In any event, Honduras not only did not consider the ZEDEs to be a security issue prior the Castro administration, even during the Castro administration the State's position was inconsistent. For example, in 2023, the legislature notably declined to repeal the ZEDE Constitutional Provisions, forcing the Castro administration to rely instead on a stacked Supreme Court and its highly flawed 2024 judgment holding the ZEDE Legal Framework unconstitutional.⁶⁹

35. The situation here is strikingly different from the cases cited by Respondent, which dealt with severe threats caused by third-party actors to real security interests of the State. For example, in *Seda*, Colombia's measures were directly related to the State's decades-long efforts to combat organized crime, money laundering, and drug trafficking.⁷⁰ Similarly, in *Riverside Coffee*, Nicaragua's measures were in response to a nationwide civil strife led by heavily-armed *Contras* utilizing violence and threats of violence, which ultimately led to

⁶⁷ See, e.g., Memorial § II.B.

⁶⁸ Memorial § II.D.

⁶⁹ See Memorial § II.D.6.

⁷⁰ *Seda* (RLA-112) ¶¶ 765-766.

significant deaths, injuries, and detentions.⁷¹ It is ludicrous to compare such situations with the instant case of a left-wing government undoing the policies of a prior right-wing government; rather, as Claimants will elaborate in due time, Respondent should be estopped from relying on a position so entirely inconsistent with that based on which Claimants were induced to invest.

36. Respondent knows that it cannot make a non-frivolous case for the existence of an essential security threat. That is evidently why Respondent's primary position is that its invocation of Article 21.2(b) for the first time in its Request for Bifurcation is not subject to any review whatsoever by the Tribunal. This is wrong because, as noted above, it is well established that invoking an essential security exception does not deprive the Tribunal of its review capacity.⁷² In view of this inescapable conclusion, Respondent has posed an alternative position that acknowledges the Tribunal has a role, but which Respondent states is limited to good faith review of "whether the measures in question are reasonably or plausibly related to the alleged essential security interests."⁷³ Without prejudice to addressing Respondent's formulation of the applicable standard in due course, Claimants note that Respondent's approach not only highlights the baselessness of Respondent's attempt to deprive the Tribunal of a review role, but also that Objection 1 will fail under Respondent's own formulation of the standard because Respondent cannot possibly make a good faith case that its measures were taken to protect an essential security interest where, as here, no threat to an essential security interest existed.
37. Finally, not only is Objection 1 not *prima facie* serious and substantial, but bifurcation would not materially reduce the time or cost of the proceeding for another reason as well. As is by now apparent, in order to assess whether an essential security threat exists (and, to the extent necessary, to consider the measures in question, as even Respondent admits is within the Tribunal's competence), the Tribunal must, perforce, consider the ZEDE Legal Framework's history, scope and legality, as well as Respondent's subsequent attacks.

⁷¹ *Riverside Coffee* (CLA-292) ¶¶ 92-96, 277-278.

⁷² *See supra* § III.A.1.

⁷³ Request for Bifurcation ¶ 51.

This will require much of the same “extensive briefs, . . . extensive . . . documents, and substantial witness and expert testimony” as Respondent avers will be at issue with respect to the merits of the claims.⁷⁴ For example, the Tribunal will be called on to analyze the many documents relevant to the enactment of the ZEDE Legal Framework and Respondent’s measures, hear witnesses like Mr. Brimen and others testify as to Honduras’s representations and assurances to induce Claimants’ investments, as well as hear expert testimony of Mr. Cosenza on the Honduran law issues relevant to the ZEDE Legal Framework. Indeed, because, as explained below, Objection 1 will not dispose of the entire case even if it is granted, the Tribunal will have to consider many if not all of the same issues based on much of the same evidence again during the merits phase in any event.

38. *Second*, bifurcation of Objection 1 cannot result in a material reduction of the proceedings at the next phase. Contrary to what Respondent avers, the essential security provision in CAFTA-DR would not dispose of Claimants’ claims. At most, Article 21.2(b) would apply to Claimants’ Treaty claims. Even if successful, however, it would not reach HPI’s claims under the LSA. Notably, Respondent makes no reference at all to Claimants’ LSA claims in addressing this objection.⁷⁵
39. The fact that Objection 1 would not dispose of the LSA claims is no small thing. The claim under the LSA is that Respondent failed to accord legal stability to HPI and its affiliates. This necessarily involves the same factual matrix as Claimants’ claims under CAFTA-DR, including, for example, the facts relating to the origins of the ZEDE Legal Framework, Claimants’ investments, and Respondent’s various measures in contravention of its legal stability guarantees.⁷⁶ Because these facts constitute violations of both the CAFTA-DR and the LSA,⁷⁷ even disposing of the treaty claims would not materially reduce the scope of the merits phase.

⁷⁴ See Request for Bifurcation ¶ 160 (arguing that “litigat[ing] the merits of the dispute . . . would require extensive briefs, the production of extensive . . . documents, and substantial witness and expert testimony.”).

⁷⁵ See Request for Bifurcation § II.A, ¶ 155.

⁷⁶ See Memorial § II.D.

⁷⁷ See Memorial § IV.B.

40. *Third*, determining whether Respondent has validly invoked the essential security exception requires the Tribunal to resolve material factual issues that are so intertwined with the merits as to make bifurcation impractical. The Tribunal must examine, for example, the essential security interest invoked by Respondent and the true motivations for Respondent’s measures. The facts involved in conducting this review are not “distinct from those likely to be involved in determining the merits of the claims,”⁷⁸ as Respondent alleges; they actually involve the very same factual matrix. For example, the question of whether the ZEDE Legal Framework constitutes a threat to Honduras’s essential security cannot be evaluated without assessing the creation and implementation of that framework by Honduras over years before and even during the Castro administration. Likewise, the specific measures to be assessed are not simply efforts by Honduras to assert “sovereignty,” but rather include the disregard by Honduras for its legal stability guarantees. The question is not whether the ZEDE Legal Framework should have existed, but whether Honduras should respect its guarantees and commitments to investors. Finally, the question of good faith cannot meaningfully be analyzed without considering the entire factual context of the case, which is inextricable from Claimants’ claims on the merits. Indeed, in Respondent’s Request for Bifurcation, it relies on the very same conduct as “justification” for invoking the essential security exception as Claimants rely on in their Memorial as evidence of Respondent’s breaches.⁷⁹

B. OBJECTION 2: RESPONDENT’S ILLEGALITY OBJECTION IS NOT SUSCEPTIBLE TO BIFURCATION AS A PRELIMINARY OBJECTION, AND, IN ANY EVENT, BIFURCATION IS NOT WARRANTED BECAUSE IT WOULD BE INEFFICIENT AND PROCEDURALLY UNFAIR

41. As its second objection, Respondent contends that Próspera ZEDE was not established in accordance with the ZEDE Legal Framework, and consequently, that Claimants do not have an investment in accordance with Honduran law, absent which they would not be

⁷⁸ *Supra* ¶ 16 (quoting *Mesa Power* (RLA-77) ¶ 20).

⁷⁹ Compare Request for Bifurcation ¶¶ 11, 58 (justifying its conduct relying on Decree No. 32-2022 (C-57) and Decree No. 33-2022 (C-60) and the 2024 Supreme Court Decision (C-559)) with Memorial ¶¶ 257-275 (explaining the wrongful conduct surrounding the passing of Decree No. 32-2022 (C-57) and Decree No. 33-2022 (C-60)), ¶¶ 294-312 (explaining the wrongful conduct surrounding the 2024 Supreme Court Decision (C-559)).

entitled to submit claims to arbitration.⁸⁰ Respondent argues that this objection warrants bifurcation because it supposedly “excludes the entirety of the Claimants’ claim,”⁸¹ “would involve a specific legal analysis” only looking to whether Próspera ZEDE was established in accordance with the ZEDE Legal Framework,⁸² and is *prima facie* serious and substantial because it “refers to compliance with the most basic requirements for establishing an investment in Honduras.”⁸³ Respondent is wrong.

42. As a threshold matter, Respondent’s request for bifurcation of Objection 2 under ICSID Arbitration Rules 42(2) and 44 – which deal with bifurcation of preliminary objections – cannot properly be granted because the objection does not qualify as a preliminary objection as that term is defined in Rule 43(1) (“a preliminary objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or for other reasons is not within the competence of the Tribunal”). While so-called “illegality” objections do potentially raise issues of jurisdiction in certain circumstances, as further addressed below, Respondent’s allegations do not in fact go to the legality of Claimants’ investments and, therefore, would have no bearing on the Tribunal’s competence even assuming they were proven.
43. Respondent’s objection rests on a faulty premise: that Congress never approved Próspera ZEDE. In reality, as Claimants have explained, the National Congress exercised its power under Article 329 of the Honduran Constitution to approve ZEDEs by pre-approving in Article 39 of the ZEDE Organic Law the establishment of ZEDEs in low-density areas “in the municipalities located in departments adjoining the Gulf of Fonseca and the Caribbean Sea,” such as Próspera ZEDE.⁸⁴ No additional Congressional approval was required, and Próspera ZEDE was properly created further to authorizations by Honduras’s authority for the purposes of the ZEDE Legal Framework, the Committee for the Adoption of Best

⁸⁰ Request for Bifurcation ¶ 71.

⁸¹ Request for Bifurcation ¶ 155.

⁸² Request for Bifurcation ¶ 165.

⁸³ Request for Bifurcation ¶ 171.

⁸⁴ See Memorial ¶¶ 67-70; Decree No. 120-2013, approving the Organic Law of the ZEDEs dated 6 Sep. 2013 (“ZEDE Law”) (C-6) Art. 39.

Practices (“**CAMP**”).⁸⁵ As Claimants have demonstrated and will demonstrate further at the appropriate time, Respondent induced Claimants’ investments on this basis⁸⁶ and should not now be permitted to change its position *post facto*.

44. However, even assuming *arguendo* that Respondent is correct regarding the requirements to create a ZEDE under the ZEDE Legal Framework, this has no bearing on whether Claimants made legal investments for the purposes of the Treaty. Respondent itself acknowledges that Claimants were not responsible for legally establishing Próspera ZEDE.⁸⁷ As Claimants explained in their Memorial, ZEDes are political subdivision of Honduras, in some ways akin to departments and autonomous municipalities,⁸⁸ and any deficiency in the establishment of Próspera ZEDE is attributable to Respondent itself, not to Claimants.
45. Critically, while Claimants invested in Próspera ZEDE, the ZEDE is not itself Claimants’ investment. Rather, Claimants’ investments include, *inter alia*, direct and indirect ownership of shares in enterprises, capital contributions, contracts with affiliates and third parties, intellectual property rights, licenses, authorizations, permits, and other rights conferred by Honduras to Claimants, real property assets, loans and other forms of debt instruments, and other intangible property rights.⁸⁹ While the value of such investments to Claimants may depend on Próspera ZEDE and the ZEDE Legal Framework, their legality most certainly does not. Notably, Respondent does not even address whether Claimants’

⁸⁵ See Memorial ¶¶ 67, 136-139. Respondent also incorrectly asserts that Claimants “sought to bypass” this purported requirement given the supposed anti-ZEDE sentiment at the time of Claimants’ investments. Request for Bifurcation ¶ 71. As Claimants have explained, it was their understanding at the time of their investments that such requirement did not exist. Memorial ¶¶ 67, 136-139. Further, all but one of the publications Respondent cites as “support” for the argument that there supposedly existed “enormous social and political opposition” with respect to the ZEDE regime were published in 2021 – years after Claimants established their investments in 2017. See Request for Bifurcation ¶ 71, n. 49.

⁸⁶ See Memorial ¶¶ 315, 404-406.

⁸⁷ See Request for Bifurcation ¶¶ 69-70.

⁸⁸ See Memorial ¶ 83.

⁸⁹ Memorial ¶ 347. See also CAFTA-DR (CLA-2) Art. 10.28 (defining an investment as “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.” This includes, *inter alia*, capital contributions; ownership in an enterprise; debt instruments; contracts, intellectual property rights; licenses, authorizations, and other rights conferred; or other intangible rights).

investments complied with Honduran law, which would be the only question potentially relevant to jurisdiction. Rather, Respondent's objection focuses entirely on whether Próspera ZEDE was properly established and what rights Claimants therefore have – and could legitimately expect to have – under the ZEDE Legal Framework,⁹⁰ which is a question on the merits. Accordingly, Objection 1 simply does not qualify as a preliminary objection that can properly be bifurcated under ICSID Arbitration Rules 42(2) and 44.

46. In any event, even if Objection 2 were susceptible to bifurcation, bifurcation is not warranted because it would not lead to any efficiencies and would be procedurally unfair.
47. *First*, bifurcation will not materially reduce the time and cost of the proceeding. One reason is that Objection 2 does not come close to reaching the legal threshold required to dismiss claims on the basis of illegality and is, thus, not *prima facie* serious and substantial. As Claimants will demonstrate at the appropriate time, it is well established that Respondent must meet a high standard to prevail in an illegality objection. Respondent acknowledges that there is no legality requirement in CAFTA-DR;⁹¹ accordingly, any legality objection must be brought under international law, which requires Respondent to demonstrate a very high threshold of illegality. For example, as the tribunal in *Kim v. Uzbekistan* explained, dismissal of claims for lack of jurisdiction requires that the alleged illegality must be “serious;” that the investor violated the law “flagrantly” or “egregiously,” and not in “only a trivial or accidental way;” and that the violation compromises a significant interest of the host State, such that the harshness of denying jurisdiction is a proportionate consequence.⁹² Prior tribunals have rejected jurisdictional objections where the conduct does not meet this standard of egregiousness, reasoning that, where there is no

⁹⁰ Request for Bifurcation ¶ 70.

⁹¹ Request for Bifurcation ¶ 18.

⁹² *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction (8 Mar. 2017) (CLA-272) ¶ 398. *See also Mr. Cornelis Willem van Noordenne, Mr. Bartus van Noordenne, Stichting Administratiekantoer Anbadi, Estudios Tributarios AP S.A. and Álvarez y Marín Corporación S.A. v. Republic of Panama*, ICSID Case No. ARB/15/14, Award (12 Oct. 2018) (CLA-273) ¶ 154 (“The intent of the offender is another element that every judge must take into account when modulating the severity of the penalty; the willful will to transgress the rule; the ignorance sought or negligent about the applicable legal framework; the conscience or unconsciousness of acting unlawfully; the origin or inadequacy of other exemptions or mitigating factors are all factors to be evaluated.”).

violation that “is offensive to public policy or tainted with criminality,”⁹³ “it would be disproportionate to punish such an omission by denying the investor essential protection such as access to [] arbitral tribunals.”⁹⁴ Likewise, “a host State cannot avoid jurisdiction . . . by invoking its own failure to comply with domestic law,”⁹⁵ or where the illegality was “cloaked with the mantel of Government authority.”⁹⁶

48. Here, it is patently obvious that Respondent fails to meet these standards. To the extent that Respondent now deems that there was illegal conduct, it is only because its own position with respect to the requirements of the ZEDE Legal Framework have changed. Respondent has not identified any illegal conduct attributable to Claimants, much less any serious, flagrant or egregious conduct by Claimants to obtain their investments.
49. Further, the reading of the ZEDE Legal Framework that Respondent advances now not only is wrong, but also is entirely inconsistent with the way that Respondent represented the law to be for years, as Claimants elaborated throughout their Memorial.⁹⁷ Indeed, those very representations induced Claimants’ investments and “cloaked” Próspera ZEDE “with the mantel of government authority.”⁹⁸ As Claimants will demonstrate, Respondent cannot now retroactively assert illegality after establishing Próspera ZEDE and treating its as legally established for years, and should be estopped from doing so.
50. Finally, bifurcation of Objection 2 would not result in a material reduction of time or cost because in deciding this objection the Tribunal will be required to consider a significant

⁹³ *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award on Jurisdiction (13 Jun. 2014) (CLA-274) ¶¶ 92-94 (finding violation of the Exchange Control Act to be “an inadvertent and technical breach of local law that does not deprive this Tribunal of jurisdiction” because “[t]he non-compliance at issue in this case does not involve the breach of fundamental legal principles of Barbados.”).

⁹⁴ *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Decision on Jurisdiction (27 Apr. 2006) (CLA-275) ¶ 84. *See also Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 Apr. 2004) (CLA-276) ¶ 86 (concluding that “to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty.”).

⁹⁵ *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award (22 Aug. 2017) (CLA-277) ¶ 624.

⁹⁶ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992) (“*SPP*”) (CLA-278) ¶ 92.

⁹⁷ *See* Memorial ¶¶ 67-70, 116-122, 130-136, 144, 162-165, 210-212, 266. *See also* Brimen ¶¶ 33-35.

⁹⁸ *SPP* (CLA-278) ¶ 92.

volume of evidentiary material. For example, to determine whether Próspera ZEDE was properly established, the Tribunal must look at all of the evidence underlying Respondent's representations inducing Claimants' investments, as well as Respondent's treatment of Próspera ZEDE after 2017. Further, Messrs. Brimen and Delgado will have to testify with respect to these representations and conduct (and, then again, when these issues are considered in the context of deciding the merits).

51. *Second*, even assuming *arguendo* that Respondent is correct that Claimants' investments may not qualify for protection under CAFTA-DR, bifurcation is still not warranted because prevailing on this objection would not result in a complete or even substantial reduction of the proceedings at the next phase. This is because dismissal of Claimants' claims under CAFTA-DR would not dispose of the separate and independent claims under the LSA, to which Respondent's objection does not refer. As Claimants have explained above, the LSA claims involve the same factual matrix as those to be decided under CAFTA-DR, such that disposing of one set of claims would not result in a material reduction of the facts to be analyzed⁹⁹ (to the contrary, the same facts would need to be analyzed twice, as elaborated next).
52. *Third*, Objection 2 is so intertwined with the merits as to make bifurcation impractical. Notably, tribunals frequently reject requests to bifurcate illegality objections because these typically deal with issues relevant also to the merits, and bifurcation would risk resulting in a prejudging of the dispute. For example, the tribunal in *Benabderrahmane v. Qatar* denied bifurcation because "the illegality issue . . . may also turn on factual issues including the basis, character, and nature of the Claimant's activities in Qatar and the posture of the authorities vis-à-vis those activities at the time when the investment[] or investments were made," which "overlap with the question of whether there was an investment or investments, what these investments consisted of, and ultimately lead to the facts and circumstances surrounding the alleged expropriation of those investments."¹⁰⁰ Similarly, the tribunal in *Gavrilovic v. Croatia* rejected the request to bifurcate because it

⁹⁹ *Supra* § III.A.2.

¹⁰⁰ *Tayeb Benabderrahmane v. State of Qatar*, ICSID Case No. ARB/22/23, Procedural Order No. 6 (Request for Bifurcation) (1 Jul. 2024) (CLA-279) ¶ 32 (emphasis added).

“may well involve careful consideration of the propriety of the actions of various administrative and judicial authorities in registering (or refusing to register) title,”¹⁰¹ and, “[t]o determine that question at the first stage, without the benefit of a comprehensive evidential basis, would be to risk prematurely dismissing the Claimants’ claims.”¹⁰²

53. Likewise, bifurcation should be denied in this case. As in *Benabderrahmane*, there will be significant overlap between the issue of what Claimants’ investments consisted of (particularly the scope of their rights under the ZEDE Legal Framework) and the impacts suffered as a result of Respondent’s conduct. For example, the Tribunal will necessarily have to analyze such questions as what is required for the establishment of a ZEDE under the ZEDE Legal Framework, whether Próspera ZEDE was properly established, what is the nature and scope of Claimants’ rights, and how much credence to give Respondent’s current litigation arguments as opposed to its erstwhile long-held position. Each of these issues are intertwined with the determinations to be made on the merits, for example, as to whether Respondent induced Claimants’ investments, what were Claimants’ legitimate expectations and rights under the ZEDE Legal Framework, and whether Respondent violated these rights. As in *Gavrilovic*, this analysis will likely require the Tribunal to rule on the very same conduct of administrative and judicial actors as will be at issue in determining the merits of the case, risking both inefficiencies and prejudgment of important issues such as the scope of Claimants’ rights and legitimate expectations and Respondent’s changing positions in that regard.¹⁰³

¹⁰¹ *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation (21 Jan. 2015) (“*Gavrilovic*”) (CLA-280) ¶ 74.

¹⁰² *Gavrilovic* (CLA-280) ¶ 74 (emphasis added).

¹⁰³ *See Gavrilovic* (CLA-280) ¶ 77 (“The Tribunal considers that the possibility of it being asked to consider such allegations, and make findings as to credibility, at the jurisdictional or admissibility stage is such that the Tribunal may be asked to undertake this task where it has not yet had the benefit of the full factual matrix. Only a hearing of the entirety of the dispute will provide the Tribunal with all of the relevant evidence to properly consider such serious allegations.”).

C. OBJECTION 3: RESPONDENT’S OBJECTION TO THE APPLICATION OF MFN TREATMENT IS NOT SUSCEPTIBLE TO BIFURCATION AS A PRELIMINARY OBJECTION, AND, IN ANY EVENT, BIFURCATION IS NOT WARRANTED BECAUSE IT WOULD BE INEFFICIENT AND PROCEDURALLY UNFAIR

54. For its third objection, Respondent contends that the Tribunal lacks jurisdiction to decide on Claimants’ claim for breach of the most-favored-nation (“MFN”) protection contained in Article 10.4 of CAFTA-DR because said protection supposedly “cannot [be used to] import rights that are not provided for in [CAFTA-DR].”¹⁰⁴ Specifically, Respondent objects to the use of MFN to import “a legal stability clause from the Honduras-Kuwait BIT and umbrella clauses contained, for example, in the Switzerland-Honduras BIT and the Germany-Honduras BIT.”¹⁰⁵ Further, while this is unclear, Respondent also appears to mix in an objection that the MFN provision in Article 32 of the ZEDE cannot be read to provide Claimants with the same legal stability protection as Honduras guaranteed to Kuwaiti investors in the Honduras-Kuwait BIT.¹⁰⁶ Respondent avers that Objection 3 is *prima facie* serious and substantial because it “directly affects the viability of one of the Claimants’ main claims;”¹⁰⁷ would dispose of a substantial portion of the dispute by resulting in “the rejection of the entire claim referring to the MFN standard;”¹⁰⁸ and is not intertwined with the merits because it is “limited to a legal analysis” of CAFTA-DR and Claimants’ arguments.¹⁰⁹ Once again, Respondent is misguided.
55. As a preliminary matter, Respondent’s request that Objection 3 be bifurcated under ICSID Arbitration Rules 42(2) and 44 (providing for bifurcation of preliminary objections) cannot properly be granted because the objection does not qualify as a preliminary objection as that term is defined in Rule 43(1). Contrary to what Respondent suggests, the question of whether or not Respondent breached its obligations under Article 10.4 of CAFTA-DR to accord covered investors and investments treatment no less favorable than that accorded to

¹⁰⁴ Request for Bifurcation ¶ 75.

¹⁰⁵ Request for Bifurcation ¶¶ 75-76.

¹⁰⁶ *See, e.g.*, Request for Bifurcation ¶¶ 82, 85, 165, 171 (all making arguments about Article 32 of the ZEDE Law).

¹⁰⁷ Request for Bifurcation ¶ 171.

¹⁰⁸ Request for Bifurcation ¶ 155.

¹⁰⁹ Request for Bifurcation ¶ 165.

investors of other States and their investments under other treaties is a question for the merits, not jurisdiction.¹¹⁰ This is evident with respect to the particular applications of Article 10.4 in the instant case. Claimants’ principal claim under Article 10.4 is that Respondent failed to accord Claimants MFN treatment – and therefore breached Article 10.4 – by according them less legal stability than it guaranteed Kuwaiti investors under the Honduras-Kuwait BIT,¹¹¹ *i.e.*, jurisdiction is under CAFTA-DR (more particularly, under Article 10.16.1(a)(i)(A), for breach of an obligation under Section A of Chapter 10) and not the Honduras-Kuwait BIT. In the same vein, Claimants’ umbrella clause claim is that “Honduras is liable for its breaches [of the LSA] under Article 10.4 of CAFTA-DR” on the basis that “Honduras is bound to observe its LSA obligations pursuant to the umbrella clauses in other treaties to which Honduras is a party that oblige Honduras to observe all commitments or obligations into which it has entered with respect to Claimants.”¹¹² In this instance too, the pertinent question is one of liability, but the basis of jurisdiction is firmly Article 10.16.1(a)(i)(A) of CAFTA-DR. Separately, to the extent Respondent seeks to include in this objection its disagreement with Claimants’ position that the MFN provision in Article 32 of the ZEDE Law “automatic[ally] extend[ed]” the 50-year stability guarantee granted in the Honduras-Kuwait BIT and Respondent’s failure to respect this guarantee is in breach of Articles 10.5 (FET) and 10.7 (Expropriation) of CAFTA-DR, this too is a question of liability for which the Tribunal’s jurisdiction is grounded in Article 10.16.1(a)(i)(A) of CAFTA-DR. In sum, even if Respondent’s arguments against the application of MFN were founded (which they are not, as shown below), at most they would mean that Respondent is not liable under CAFTA-DR, not that there is a lack of jurisdiction. Accordingly, Objection 3 does not qualify as a preliminary objection.

56. In any event, bifurcation of Objection 3 is not warranted under ICSID Arbitration Rule 44.

¹¹⁰ See, *e.g.*, *Lao Holdings N.V. v. Lao People’s Democratic Republic (II)*, ICSID Case No. ARB(AF)/16/2, Decision on Jurisdiction, Admissibility and Liability (20 Dec. 2024) (CLA-289) ¶¶ 450-454 (stating that Laos argued that the tribunal “lack[ed] material jurisdiction over most-favoured nation and discriminatory measures claims,” and holding that the tribunal did “not see this objection as properly presenting a jurisdictional issue” and that Laos’ arguments against the claimant’s reliance on an MFN clause were “appropriate for the merits, not at the jurisdictional stage.”).

¹¹¹ Memorial § IV.A.2.a.

¹¹² Memorial ¶¶ 517-518.

57. *First*, bifurcation of Objection 3 is not warranted because it would not lead to a material reduction in the time and cost of the proceeding. Respondent has failed to establish that Objection 3 is *prima facie* serious and substantial. Respondent misguidedly argues that bifurcation is warranted because the objection “directly affects the viability of one of Claimants’ main claims;”¹¹³ however this argument is irrelevant because it does not address whether Objection 3 has any merit such that deciding on it in a separate phase is likely to result in cost and time savings.¹¹⁴
58. Respondent’s contention that the MFN protection in Article 10.4 of CAFTA-DR “cannot be used to import a right or standard that is not explicitly provided for in [CAFTA-DR]”¹¹⁵ is unmeritorious. Respondent relies on a small minority of tribunals and authority that have stated that MFN provisions cannot be used to import substantive protections from other treaties, but disregards the vast majority of cases and other authority confirming the prevalent position that MFN clauses can be used to import substantive protections from other treaties, including where these substantive protections are not provided for in the treaty containing the MFN clause, as Claimants have demonstrated in the Memorial.¹¹⁶ Claimants even identified specific examples where investment treaty tribunals used MFN clauses to add new substantive protections to a treaty, like FET protections¹¹⁷ and umbrella clauses.¹¹⁸ Respondent chose to simply ignore Claimants’ arguments and authorities,

¹¹³ Request for Bifurcation ¶ 171.

¹¹⁴ Likewise, in addition to being unsupported and speculative, Respondent’s assertion that Claimants’ reliance on the 50-year legal stability guarantee in Honduras-Kuwait BIT results in an “exponential[] increase” in Claimants’ damages calculation is also irrelevant because it does not go to whether Objection 3 is *prima facie* meritorious. See Request for Bifurcation ¶ 155.

¹¹⁵ Request for Bifurcation ¶ 76.

¹¹⁶ See Memorial ¶ 459. 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.” See Rudolf Dolzer & Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW*, Oxford University Press (2d ed. 2012) (CLA-140) p. 211.

¹¹⁷ See Memorial ¶ 459; *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, Award (15 Dec. 2014) (CLA-191) ¶¶ 540-555 (importing the fair and equitable treatment provision from the UK-Indonesia BIT through the OIC Agreement’s MFN clause).

¹¹⁸ See Memorial ¶¶ 460-461; *Mr. Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award (8 Apr. 2013) (CLA-192) ¶¶ 385-396 (agreeing to import an umbrella clause from the Moldova-UK or the Moldova-US BIT pursuant to Article 9 of the Moldova-France BIT, which provides that: “Investments having been the subject

which illustrates that Objection 3 is not pled properly by Respondent and *prima facie* not serious and substantial.

59. The flimsiness of this objection is further demonstrated by Respondent’s confusing comments regarding the MFN provision in Article 32 of the ZEDE law.¹¹⁹ Claimants’ claim relating to that provision is not a claim under Article 10.4 of CAFTA-DR (the MFN clause) but rather a claim for breach of Article 10.5 of the Treaty, the FET provision.¹²⁰ Notably, Respondent does not bring an “objection” seeking to have Claimants’ claims under that provision heard in a bifurcated phase. Given that Respondent repeatedly refers to Article 32 of the ZEDE Law in the context of Objection 3, however, it is likely that the Tribunal will also have to engage with those arguments, if only to confirm that they are irrelevant to the objection. This may require the Tribunal to consider the testimony of Mr. Brimen,¹²¹ and the legal opinion of Mr. Cosenza,¹²² all of which are relevant to the legal stability guarantees enshrined in the ZEDE Legal Framework, including Article 32

of a particular [the] specific commitment of one of the Contracting Parties towards the nationals and companies of the other Contracting Party, are regulated, without prejudice to the dispositions of the present Agreement, by the provisions of such commitment as far as it contains more favourable provisions than those provided for in the present Agreement.”); *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award (11 Jun. 2012) (CLA-141) ¶¶ 921-934.

¹¹⁹ See, e.g., Request for Bifurcation ¶ 82 (“The Claimants allege that Honduras violated the MFN standard of Article 10.4 of DR-CAFTA by not granting them the same guarantee of legal stability enshrined in Article 16 of the Kuwait-Honduras BIT. They maintain that this guarantee would have been automatically extended to all investors in the ZEDE through the MFN clause contained in Article 32 of the Organic Law of the ZEDE. The Claimants are mistaken.”).

¹²⁰ See Memorial ¶¶ 9, 70, 96, 258, 404; ZEDE Law (C-6) Art. 32 (providing that “[n]atural and legal persons operating within the [ZEDE] shall be treated on the basis of the Most Favored Nation (MFN) principle, for which they shall obtain the automatic extension of any better treatment that is granted or has been granted to the other parties to an international trade agreement signed by the State of Honduras.”) (emphasis added). See also Chaisse ¶ 37; Cosenza ¶¶ 105-107; Letter from CAMP responding to Erick Brimen’s ZEDE Law interpretation request dated 11 Mar. 2017 (C-459) p. 4; Brimen ¶ 23; Alex Baquis, Roberto Ramos and Jose Carlo Bermúdez, ZEDE: Tax policy implications and their impact on income tax, TAX ADMINISTRATION SERVICE (Apr. 2022) (C-358). Respondent’s assertion that Article 32 does not cover the protections of the Honduras-Kuwait BIT because it is limited to “benefits granted on customs matters” is unmeritorious. Request for Bifurcation ¶ 84. In early 2017, CAMP confirmed in writing that “[a] 50 year [legal stability provision] was included in [the Honduras-Kuwait BIT] [and] [b]y extent, article [32] of the ZEDE’s Organic Law makes that provision enforceable by any investor in a ZEDE.” Letter from CAMP responding to Erick Brimen’s ZEDE Law interpretation request dated 11 Mar. 2017 (C-459) p. 4. Similarly, Mr. Cosenza explained that Article 32 provides for the “automatic extension” of all better treatment granted under international trade agreements, which includes all benefits granted under the Honduras-Kuwait BIT. See Cosenza § 5.3.

¹²¹ See Memorial § II.C.2; Brimen ¶¶ 22-24.

¹²² See, e.g., Cosenza ¶¶ 105-107

of the ZEDE Law. Because their testimony is also relevant to many other areas of the merits, it would be a waste of time and cost to hear their evidence during a bifurcated phase and call them to testify a second time when the Tribunal focuses on the merits.

60. *Second*, bifurcation is not warranted because Respondent has not discharged its burden to establish that Objection 3 can dispose of all or a substantial part of the dispute. Indeed, Respondent concedes that, if granted, Objection 3 would not dispose of the entirety of this case.¹²³ In fact, Objection 3 would not dispose of any substantial part of the dispute because all the substantive protections that Respondent seeks to exclude from the dispute through Objection 3 would remain in play if Objection 3 were granted. In particular, while Objection 3 can in principle dispose of Claimants' claims for breach of Article 10.4 of CAFTA-DR, it cannot dispose of Claimants' core claims that rely on the same factual matrix:

- a) Contrary to Respondent's assertion, Objection 3 cannot dispose of Claimants' claims based on their right to 50-year legal stability guarantee¹²⁴ because the Honduras-Kuwait BIT is not the sole basis for Claimants' right to 50 years of legal stability. Respondent ignores that Article 45 of the ZEDE Law provides that in the event of repeal, the ZEDE Law "shall remain in effect for the term indicated in the legal stability clause or contract signed with the individuals or corporations residing or investing in the [ZEDE]," which transition period "may not be less than ten (10) years, during which time the rights of inhabitants and investors in the [ZEDEs] shall remain in effect."¹²⁵ In the case of HPI, this means that in accordance with the terms of the LSA (which is a "legal stability contract" within the meaning of Article 45) legal stability is guaranteed "until the latter of (a) January 15, 2064 [i.e., for a period of 50 years]; or (b) TEN (10) years after the last of any amendment, reformation, interpretation or repeal of all or any portion of the ZEDE law."¹²⁶ As Claimants already explained, Respondent's failure to observe its legal stability

¹²³ Request for Bifurcation ¶ 31.

¹²⁴ Request for Bifurcation ¶ 155.

¹²⁵ ZEDE Law (C-6) Art. 45 (emphasis added).

¹²⁶ Initial LSA (CLA-6) Preamble, Art. 1.1.

guarantees constitutes a violation of Articles 10.5 (FET)¹²⁷ and 10.7 (expropriation) of CAFTA-DR.¹²⁸ Objection 3 cannot dispose of any of these claims because none of them entail the MFN protection in Article 10.4 of CAFTA-DR.

- b) Objection 3 also cannot dispose of Claimants' claims for breach of the LSA because CAFTA-DR's MFN provision is not the primary (or even secondary) basis for Claimants' contractual claims.¹²⁹ As Claimants explained in their Memorial, the LSA is an instrument of consent to ICSID arbitration,¹³⁰ and Claimants are also entitled to bring claims for breach of the LSA as an "investment agreement" pursuant to Article 10.16(1)(a) of CAFTA DR.¹³¹

61. *Third*, bifurcation is not warranted because it is so intertwined with the merits as to make bifurcation impractical. Respondent mistakenly asserts that Objection 3 is not intertwined with the merits because it is "limited to a legal analysis," relying on the decision in *Paiz v. Honduras*, which Respondent asserts bifurcated "a similar objection."¹³² *Paiz v. Honduras*, however, is not comparable to the instant case. Among other things, Honduras's objection in that case was considerably more limited than that in this case, addressing solely whether the MFN provision in the applicable treaty could be used to import umbrella clauses, but not whether a legal stability guarantee or any similar obligation could be incorporated (let alone whether treaty claims based on an MFN provision in a domestic law should be dismissed). Even more significantly, the relevant finding by the tribunal in that case was that bifurcation was appropriate because "[i]t does not raise the same evidential issues as the umbrella clause case on the merits. Rather, the questions it raises are well-circumscribed and do not appear to require neither witness evidence nor extensive debates on the facts."¹³³ In this case, by contrast, Objection 3 raises significant issues of fact

¹²⁷ Memorial § IV.A.1.b.

¹²⁸ Memorial § IV.A.3.b.

¹²⁹ Claimants referred to the possibility of enforcing the LSA through an imported umbrella clause only as a subsidiary argument. Memorial ¶ 366.

¹³⁰ Memorial ¶ 335. *See* Initial LSA (CLA-6) Art. 2.2.

¹³¹ Memorial ¶¶ 354, 358-365.

¹³² Request for Bifurcation ¶ 165.

¹³³ *Fernando Paiz Andrade and Anabella Schloesser de León de Paiz v. Republic of Honduras*, ICSID Case No. ARB/23/43, Procedural Order No. 3 (Decision on Bifurcation) (20 Dec. 2024) (RLA-117) ¶ 52.

overlapping with the merits of the case, and will require, for example, review of the LSA, the Honduras-Kuwait BIT, and the ZEDE Law (given Respondent’s repeated references to the MFN provision in Article 32), for which the Tribunal must consider the legal opinion of Mr. Cosenza,¹³⁴ as well as Respondent’s erstwhile representations on each of these issues and legal stability protections (which requires consideration of Mr. Brimen’s testimony),¹³⁵ all of which will also “be involved in determining the merits of the claims.”¹³⁶ As previously noted, Claimants’ claims for breach of Articles 10.5 and 10.7 of CAFTA-DR and of the LSA also cover the 50-year legal stability guarantee of the Honduras-Kuwait BIT and its automatic application to Claimants by virtue of Article 32 of the ZEDE Law, and Claimants can enforce their rights under the LSA before this Tribunal regardless of the Tribunal’s decision on Objection 3. For the same reason, if Objection 3 is bifurcated, there is a risk that the Tribunal will prejudge issues of fact that are relevant to decide Claimants’ other claims involving the LSA and legal stability guarantees “without having heard (at the jurisdictional stage) all the relevant evidence.”¹³⁷

D. OBJECTION 4: BIFURCATION OF RESPONDENT’S OBJECTION THAT THE TRIBUNAL LACKS JURISDICTION TO DECIDE CLAIMS FOR BREACH OF THE LSA IS NOT WARRANTED BECAUSE IT WOULD BE INEFFICIENT AND PROCEDURALLY UNFAIR

62. As its fourth objection, Respondent argues that the Tribunal lacks jurisdiction over claims for breach of the LSA because it supposedly does not constitute an “investment agreement” under Article 10.28 CAFTA-DR or, in the alternative, because it does not contain Respondent’s binding consent to ICSID arbitration.¹³⁸ Respondent argues that Objection 4 is *prima facie* serious and substantial because it refers to the absence of Respondent’s consent to ICSID arbitration over disputes related to the LSA;¹³⁹ would “significantly limit[] the scope of the dispute” by disposing of “claims regarding the alleged violation of

¹³⁴ See, e.g., Cosenza ¶¶ 105-107.

¹³⁵ See Memorial § II.C.2.

¹³⁶ See *supra* § II; *Mesa Power* (RLA-77) ¶ 20.

¹³⁷ *Orlandini-Ágreda* (CLA-265) ¶¶ 133-134.

¹³⁸ Request for Bifurcation ¶¶ 86-88.

¹³⁹ Request for Bifurcation ¶ 171.

the LSA;”¹⁴⁰ and “does not require a substantive analysis of the merits.”¹⁴¹ Here, too, Respondent is wrong on all counts.

63. *First*, bifurcation is not warranted because it would not lead to a material reduction in the time and cost of the proceeding. Respondent has not established that Objection 4 is *prima facie* serious and substantial. While Respondent now asserts that a “simple reading” of the LSA shows that it does not qualify as an “investment agreement” under the definition of Article 10.28 of CAFTA-DR,¹⁴² the LSA itself contains Honduras’s acknowledgment that it constitutes an “investment agreement” for the purposes of CAFTA-DR.¹⁴³ Indeed, as Claimants explained in their Memorial, the LSA meets all the requirements to constitute an “investment agreement” in accordance with Article 10.28 of CAFTA-DR.¹⁴⁴ In summary:

a) Respondent mistakenly asserts that the Technical Secretary of Próspera ZEDE who signed the LSA is not an “authority at the central level of government” and does not represent “the host State.”¹⁴⁵ As Claimants have demonstrated in their Memorial, the Technical Secretary signed the LSA on behalf of the Republic of Honduras pursuant to the statutory authority established in the ZEDE Law¹⁴⁶ and acting “as agent and authorized representative for the Republic of Honduras.”¹⁴⁷ Respondent’s present position also contradicts the express contemporaneous representations by Honduran officials that the Technical Secretary could sign legal stability agreements “as public officer and representative of Honduras.”¹⁴⁸

¹⁴⁰ Request for Bifurcation ¶ 155.

¹⁴¹ Request for Bifurcation ¶ 165.

¹⁴² Request for Bifurcation ¶ 165.

¹⁴³ Initial LSA (CLA-6) Art. 2.2. (stating that the LSA “constitutes an investment authorization and/or investment agreement within the terms [of CAFTA-DR].”).

¹⁴⁴ See Memorial § III.B.4.

¹⁴⁵ Request for Bifurcation ¶¶ 92, 95.

¹⁴⁶ See ZEDE Law (C-6) Arts. 12(2), 45.

¹⁴⁷ Initial LSA (CLA-6) p. 1.

¹⁴⁸ See Notes of Discussion with CAMP dated 8 Nov. 2017 (C-462) (confirming that the Technical Secretary “is entitled by the ZEDE law to sign Legal Stability Agreements . . . acting as public officer and representative of

- b) Likewise, Respondent mistakenly asserts that the rights granted by the LSA do not pertain to natural resources or assets controlled by a national authority, but rather are rights that pertain only to goods and services under ZEDE control.¹⁴⁹ In fact, as Claimants already explained, the LSA includes broad legal stability guarantees by Honduras that encompass rights over natural resources under the control of the Honduran State, *e.g.*, rights with respect to land management, sea and air navigation, and the environment.¹⁵⁰ All these rights were granted pursuant to the ZEDE Legal Framework by the central level of government of Honduras through constitutional amendments and legislation, which confirms that they refer to “natural resources or other assets that a national authority controls.”¹⁵¹
- c) Likewise, Respondent’s argument that the LSA was not the basis for Claimants’ investments because the investment decision predated the LSA by several years¹⁵² is unsupported and also cannot be taken seriously. There is no requirement in CAFTA-DR or elsewhere that an investment agreement must predate the entirety of an investors’ investments. Claimants “acquir[ed] [and] establish[ed]” significant “covered investments” other than the LSA itself relying on the rights granted by the LSA, which is the relevant test under CAFTA-DR.¹⁵³ Moreover, as Claimants have demonstrated, Claimants’ investments increased following the LSA.¹⁵⁴

Honduras.”). *See also* ZEDE Law (C-6) Art. 12 (identifying the Technical Secretary as “the highest executive officer [of the ZEDE] and its legal representative); Memorial § II.C.5; Brimen ¶ 82.

¹⁴⁹ Request for Bifurcation ¶ 97.

¹⁵⁰ *See* Memorial § III.B.4; ZEDE Law (C-6) Art. 6 (“Only the real estate included within [ZEDEs’] spatial area of competence will be subject to a special regime of inclusion therein.”), Art. 27 (providing that ZEDEs administer land within their jurisdiction, including State-owned land, and may enter into lease agreements, subdivide, or otherwise manage property for lawful purposes), Art. 31 (“The free entry of air or sea vessels to the [ZEDEs] is guaranteed. The regulation of sea and air navigation, as well as the control of ports and airports in the jurisdiction of the ZEDE will be under its responsibility, and it may establish the fees that the ZEDE considers appropriate.”), Art. 32 (providing that ZEDEs may regulate their own ports and airports, setting fees as they deem appropriate), Art. 37 (“The [ZEDE] must adopt policies aimed at protecting and preserving the environment.”).

¹⁵¹ CAFTA-DR (CLA-2) Art. 10.28.

¹⁵² Request for Bifurcation ¶¶ 98-100.

¹⁵³ Memorial §§ II.C, III.B.2; CAFTA-DR (CLA-2) Art. 10.28 (defining an “investment agreement” as “a written agreement . . . that grants the covered investment or investor rights . . . upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself.”) (emphasis added).

¹⁵⁴ Memorial § II.C.6.

- d) Respondent's reliance on *Burlington v. Ecuador* and *Duke Energy v. Ecuador* for the proposition that there are strict limitations on what can constitute an investment agreement is misplaced.¹⁵⁵ Neither case supports Respondent's position with respect to the LSA. In *Burlington*, the tribunal concluded that no investment agreement existed because "Burlington itself [was] not a party" to the relevant agreement.¹⁵⁶ Similarly, the *Duke Energy* tribunal concluded that there was no investment agreement because the agreement invoked by the investor had been signed by "a state-owned entity" and "a company incorporated in Ecuador that, at the time of subscription of the Agreements, was not owned by foreign investors."¹⁵⁷ These holdings do not apply to the LSA, which was entered into by a foreign investor (HPI) and an "authorized representative for the Republic of Honduras."¹⁵⁸
64. Likewise, Respondent also has not established *prima facie* that it has a serious and substantial argument that Article 2.2 of the LSA does not constitute valid consent to ICSID arbitration because it was not "signed directly by an authority representing the Republic of Honduras, or by a constituent subdivision or agency expressly authorized by the State to do so and to submit exclusively to the jurisdiction of the Centre on behalf of the Republic."¹⁵⁹ As explained previously, the LSA was signed by an authority representing Honduras, *i.e.*, the Technical Secretary.¹⁶⁰ Accordingly, Respondent's reliance on Article 25 of the ICSID Convention to argue that the LSA is not binding on Honduras because it was not signed with "approval of [the State]," which is required for "a constituent subdivision or agency" to consent to ICSID arbitration, is misplaced.¹⁶¹ There is no question here as to consent by a constituent subdivision or agency because Honduras is itself a party to the LSA. As Professor Schreuer explains, when referring to "constituent

¹⁵⁵ Request for Bifurcation ¶ 92.

¹⁵⁶ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 Jun. 2010) (RLA-13) ¶¶ 218, 235.

¹⁵⁷ *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 Aug. 2008) (RLA-69) ¶¶ 183, 204.

¹⁵⁸ Initial LSA (CLA-6) p. 1.

¹⁵⁹ Request for Bifurcation ¶ 107.

¹⁶⁰ *See supra* ¶ 63.

¹⁶¹ Request for Bifurcation § II.D.2.

subdivision[s] or agenc[ies],” Article 25(1) addresses the possibility that such entities can “become party, as respondent or claimant, to ICSID proceedings instead of, or in addition to, the host State itself.”¹⁶² In other words, consent of the State is required for a “constituent subdivisions or agency” to consent to ICSID arbitration in which they would be the respondent.¹⁶³ The same is not required when, like in the LSA, a “constituent subdivisions or agency” representing its State consents to ICSID arbitration with the State as respondent, as Article 25 does not require that “constituent subdivisions or agenc[ies]” be expressly authorized by their State to consent to ICSID arbitration “on behalf of” the State.¹⁶⁴

65. In any event, bifurcating Objection 4 would not result in a material reduction of time or cost because, as noted above, the Tribunal cannot decide it without analyzing a significant volume of evidence on the background and legal framework relevant to ZEDE governance and the execution of legal stability agreements, including, among other things, the testimony of Mr. Brimen and others.
66. *Second*, bifurcation is not warranted because not only would Objection 4 not dispose of the entirety of the dispute, as Respondent concedes,¹⁶⁵ it also would not “significantly limit[] the scope of the dispute.”¹⁶⁶ Objection 4 targets exclusively Claimants’ ability to enforce the LSA as an “investment agreement” or through the arbitration clause in its Article 2.2.

¹⁶² Stephan W. Schill, Loretta Malintoppi, August Reinisch, Christoph H. Schreuer, Anthony Charles Sinclair, *ICSID Convention, Article 25 [Jurisdiction]*, in SCHREUER’S COMMENTARY ON THE ICSID CONVENTION, Cambridge University Press (3d ed. 2022) (CLA-281) p. 274.

¹⁶³ Indeed, constituent subdivisions or agencies that have authorization from their State to consent to ICSID arbitration are themselves respondents in ICSID cases against them. *See, e.g., Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on Jurisdiction (23 Jan. 2003) (CLA-282) ¶¶ 40-43 (noting that Petroecuador, a State-owned entity, consented to ICSID jurisdiction on its own behalf). Article 25(3) of the ICSID Convention provides that State approval is not required if the “State notifies the Centre that no such approval is required.” In such cases, constituent subdivisions or agencies can consent to ICSID arbitration and be respondents in ICSID arbitration without a specific approval from their States. *See Pluspetrol Perú Corporation and others v. Perupetro S.A.*, ICSID Case No. ARB/12/28, Award (21 May 2005) (CLA-283) ¶¶ 11, 14 (noting that while Peru had specifically designated Perupetro as a “competent party to disputes submitted to the Center,” Peru had specifically clarified that “in accordance with Article 25(3) . . . it is not necessary for the Peruvian State to approve the consent granted by Perupetro to submit disputes to the Center,” and finding that “the jurisdictional requirements provided in Article 25 of the ICSID Convention” had been met).

¹⁶⁴ Request for Bifurcation ¶ 107.

¹⁶⁵ Request for Bifurcation ¶ 31.

¹⁶⁶ Request for Bifurcation ¶ 155.

Accordingly, even if granted, Objection 4 could at most dispose of those causes of action but it cannot dispose of Claimants' claims pursuant to CAFTA-DR Articles 10.16.1(a)(i)(A) (*i.e.*, for breaches of obligations under Section A of Chapter 10 of CAFTA-DR) which encompass the same factual and legal arguments as the contractual claims. Specifically, quite apart from whether the LSA constitutes a jurisdictional basis for claims, the LSA is significant to various other claims insofar as the LSA contains a guarantee of legal stability by Respondent, which is not dependent on the LSA qualifying as an investment agreement under Article 10.28 CAFTA-DR or on the validity of the LSA's arbitration clause. Even assuming *arguendo* that Objection 4 were granted, Respondent's breach of the legal stability guarantee in the LSA would still be relevant to Claimants' claims for breach of Article 10.5 (FET),¹⁶⁷ Article 10.4 (MFN),¹⁶⁸ and Article 10.7 (expropriation),¹⁶⁹ all of which are within the scope the Tribunal's jurisdiction under Article 10.16.1(a)(i)(A) (which allows Claimants to bring claims "that [Honduras] has breached an obligation under Section A" of Chapter 10 of CAFTA-DR). Thus, even if the Tribunal grants Objection 4, it would still have to deal with the same factual and legal arguments as to the origins, scope, and implications of the legal stability guarantee in the LSA, as well as Respondent's measures in contravention thereof.

67. *Third*, Objection 4 should not be bifurcated because it is intertwined with the merits and deciding it requires analyzing facts and evidence that will come into play again in the merits. Indeed, while Respondent presents Objection 4 as focusing on narrow and "purely legal issue[s],"¹⁷⁰ deciding the objection requires delving into numerous factual questions, including, for example, the governance of Próspera ZEDE, the particular circumstances of the execution of the LSA, and the applicable provisions of the ZEDE Legal Framework, all of which the Tribunal would have to analyze again in a merits phase to decide Claimants' other claims. Among other things, to decide on Objection 4, the Tribunal will have to analyze the ZEDE Legal Framework and how it was implemented with respect to

¹⁶⁷ Memorial § IV.A.1.

¹⁶⁸ Memorial § IV.A.2.

¹⁶⁹ Memorial § IV.A.3.

¹⁷⁰ Request for Bifurcation ¶¶ 165-166.

Próspera ZEDE, including, *inter alia*, the provisions with respect to stability agreements, the scope of the Technical Secretary's competencies under the ZEDE Law, and Respondent's contemporaneous representations about it. In addition, the required analysis demands a substantive evaluation and reaching conclusions; a mere "review of some facts"¹⁷¹ will not allow the Tribunal to decide Objection 4. As explained above, this analysis substantially overlaps with the merits of Claimants' other claims under Article 10.16.1(a)(i)(A) (particularly FET, expropriation, and MFN), which also allow Claimants to enforce Respondent's obligations under the LSA. For the same reason, there is a risk of "prejudg[ing] some of the issues of fact" that are relevant to liability "without having heard (at the jurisdictional stage) all the relevant evidence."¹⁷² Thus, Respondent's analogy to the decision on bifurcation in *Paiz v. Honduras* is misguided, as the Tribunal cannot decide Objection 4 without delving into the facts, and the evidentiary issues relevant to decide Objection 4 are not "different from those raised by the merits of the argument."¹⁷³

E. OBJECTION 5: BIFURCATION OF RESPONDENT'S OBJECTION THAT THE TRIBUNAL LACKS JURISDICTION TO DECIDE CLAIMS FOR BREACH OF THE PRÓSPERA ZEDE AUTHORIZATION AND THE CHARTER IS NOT WARRANTED BECAUSE IT WOULD BE INEFFICIENT AND PROCEDURALLY UNFAIR

68. Respondent's fifth objection challenges the Tribunal's jurisdiction to decide on claims for breach of the Próspera ZEDE Authorization and the Charter,¹⁷⁴ because these instruments supposedly do not qualify as an "investment authorization" under Articles 10.16(1)(a) and 10.28 of CAFTA-DR.¹⁷⁵ Respondent argues that Objection 5 should be bifurcated for the following reasons: "it refers to the complete absence of one of the alleged jurisdictional

¹⁷¹ Request for Bifurcation ¶ 166.

¹⁷² *See supra* § II; *Orlandini-Ágreda* (CLA-265) ¶¶ 133-134.

¹⁷³ Request for Bifurcation ¶ 166.

¹⁷⁴ The Próspera ZEDE Authorization is a Certificate of Registration and Incorporation issued by CAMP on 29 December 2017 whereby it incorporated Próspera ZEDE (then called the ZEDE Village of North Bay) into the ZEDE regime and authorized its development by HPI. *See* Memorial ¶ 136; Certificate of Registration and Incorporation of Land as ZEDE Village of North Bay dated 29 Dec. 2017 (C-16). The Charter, for its part, is composed of the Charter and Bylaws of Próspera ZEDE (then called the ZEDE Village of North Bay) and was signed by the Technical Secretary and approved by CAMP on 23 August 2018. *See* Memorial ¶ 144; Charter and Bylaws of ZEDE Village of North Bay dated 23 Aug. 2018 (CLA-4). CAMP approved an amended version of the Charter on 13 September 2019. *See* Memorial ¶¶ 165-166; Charter of Próspera ZEDE dated 12 Sep. 2019 (CLA-5).

¹⁷⁵ Request for Bifurcation § II.E.

bases invoked by Claimants to submit their claims to the Tribunal;”¹⁷⁶ can “significantly reduc[e] the scope of the dispute and the alleged sources that the Tribunal must consider in resolving it;”¹⁷⁷ and does not require “delving into the merits of the dispute” as it can be decided by analyzing the Próspera ZEDE Authorization and the Charter and “determining whether [they] compl[y] with the definitions established under [CAFTA-DR].”¹⁷⁸ Respondent is wrong here as well.

69. *First*, bifurcation of Objection 5 is not warranted because this would not materially reduce the time and cost of the proceeding, among other things, because Objection 5 is not *prima facie* serious and substantial. Respondent cannot establish that the Próspera ZEDE Authorization and the Charter do not qualify as an “investment authorization” under CAFTA-DR. Claimants have already demonstrated in their Memorial that these instruments qualify as an “investment authorization” as defined in Article 10.28 CAFTA-DR because they are “an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of another Party.”¹⁷⁹ Respondent’s only arguments to the contrary consist of inventing myriad requirements that have no basis in CAFTA-DR. This is not the time and place to debate Respondent’s many misguided arguments in detail – the Parties will do so in due course. The only question presently before the Tribunal is whether this debate should take place as part of the overall case or in a separate phase. For purposes of that decision, Claimants summarize below a few points that show that this objection is not *prima facie* serious and substantial and procedural efficiency mandates that it be reviewed together with the merits:

- a) Respondent mistakenly denies the existence of an “investment authorization” on the grounds that “Honduran law does not provide for the granting of ‘investment authorizations’ under the terms of DR-CAFTA,” and specifically notes that unlike its former investment legislation, “the current Decree No. 51-2011 . . . does not

¹⁷⁶ Request for Bifurcation ¶ 171.

¹⁷⁷ Request for Bifurcation ¶ 155.

¹⁷⁸ Request for Bifurcation ¶ 165.

¹⁷⁹ Memorial ¶¶ 355-357.

provide for this concept.”¹⁸⁰ This argument is misguided for a number of reasons. Critically, nothing in CAFTA-DR requires that an “investment authorization” be granted further to a particular investment law. On the contrary, the Treaty defines the term “investment authorization” broadly to encompass any authorization by a foreign investment authority, regardless of the law pursuant to which it is issued. Moreover, Respondent’s reference to Decree No. 51-2011 is particularly inapposite because it entirely disregards that the ZEDE Legal Framework was deliberately established to facilitate investment under conditions separate from other Honduran legislation and was neither governed nor constrained by that Decree.¹⁸¹ Honduras stated as much before the U.N. General Assembly, in various contemporaneous government plans and studies, and as part of a global tour to attract investment to Honduras through the ZEDE Legal Framework.¹⁸²

- b) Likewise, Respondent errs in denying that CAMP is a competent “foreign investment authority” for the purpose of CAFTA-DR on the basis that “not all competent authorities” qualify under the definition, which supposedly refers only to the “investment screening authority” of the host State.¹⁸³ Respondent is unable to find any support in the text of CAFTA-DR to support that narrow interpretation.

¹⁸⁰ Request for Bifurcation ¶ 125.

¹⁸¹ ZEDE Law (C-6) Art. 1 (providing that the ZEDE were “created for the purpose of . . . facilitat[ing] conditions that allow the country to become integrated into world markets under highly competitive and stable rules” and that this would be accomplished in “an environment that is transparent and capable of attracting the domestic and foreign investment required for accelerated growth.”).

¹⁸² See, e.g., Memorial § II.B.4; Speech of the President of Honduras to the UN General Assembly 24 Sep. 2024 (C-10); Strategic Government Plan 2014-2018, Presidency of the Republic of Honduras dated Apr. 2014 (C-437) p. 42; Strategic Government Plan 2014-2018: Plan for Everyone for a Better Life, Presidency of the Republic of Honduras (Dec. 2015) (C-438) p. 31; Ministry of Economy of Honduras, *Technical Report of Achievements 2014-2017* dated Dec. 2017 (C-18) p. 1; Peralta, Adriana, *Honduras: Supreme Court rejects constitutional challenge against ZEDEs*, PANAM POST (20 Jun. 2014) (C-9); César Andrés Panting, *Nacaome, Alianza and Amapala dream of being the first model city*, LA PRENSA (28 Sep. 2014) (C-439); *Honduras: Hernández will present ZEDE in March, South Korea and USA*, REVISTA ESTRATEGIA Y NEGOCIOS (21 Jan. 2015) (C-443); *President Hernández after trip to the United States: “It was a very positive tour that projected Honduras in a regional context,”* EL INFORMATIVO (26 Apr. 2015) (C-444); *Honduran President Reaffirms Cooperation with South Korea*, EL HERALDO (20 Jul. 2015) (C-445); *Official Visit to Japan by President Juan Orlando Hernández (Result)*, EMBASSY OF JAPAN IN HONDURAS (6 Feb. 2016) (C-446); Ministry of Foreign Affairs of Japan, *Honduras-Japan Joint Statement*: <https://www.mofa.go.jp/files/000091939.pdf> dated 2016 (C-447); *Country Brand Honduras is exhibited in Louisiana*, PROCESO DIGITAL (12 Aug. 2015) (C-449); *Honduran President on Tour to U.S. to Boost Investment in the Country*, HONDUPRENSA (9 Nov. 2015) (C-450).

¹⁸³ Request for Bifurcation ¶¶ 126-127.

Instead, Respondent relies on two academic commentaries, neither of which contains a proper treaty interpretation exercise or refers to any interpretation materials, such as *travaux préparatoires*.¹⁸⁴ Furthermore, contrary to Respondent's suggestion, CAMP is not just any "competent authority" or "any state authority," but rather the relevant foreign investment authority for investment under the ZEDE Legal Framework, as demonstrated in the Memorial.¹⁸⁵ Indeed, CAMP actively promoted the ZEDE Legal Framework abroad to attract foreign investments.¹⁸⁶ Contrary to what Respondent now contends, CAMP was competent to incorporate land into the ZEDE regime – *i.e.*, to authorize investment into the regime – pursuant to Article 39 of the ZEDE Law as explained in § III.B above.¹⁸⁷ Respondent's assertion that the ZEDE Organic Law did not provide that CAMP could issue authorizations¹⁸⁸ is misguided because it omits that the ZEDE Law (in force at the time of the authorizations) expressly empowered CAMP to determine the procedure for compliance with the provisions of Article 39, pursuant to which land was incorporated into the ZEDE regime,¹⁸⁹ and ZEDE Regulation No. 001-2018 expressly confirms CAMP's role overseeing and authorizing the incorporation of land into the ZEDE regime in accordance with Article 39.¹⁹⁰ Finally, Respondent's assertion that the Charter was not issued by a "foreign investment authority" because it is "an internal document" issued by "Claimants themselves"¹⁹¹ is patently incorrect as the Charter on its face is an approval by CAMP, together with the Technical Secretary of Prospera ZEDE, of all the rights and responsibilities

¹⁸⁴ Request for Bifurcation n. 107.

¹⁸⁵ See Memorial § III.B.4.

¹⁸⁶ See Memorial § II.B.4; Delgado ¶ 18.

¹⁸⁷ Memorial ¶ 77; ZEDE Law (C-6) Arts. 11, 28, 29, 39; Cosenza § 4.3.1. Respondent contends that CAMP lacked authority "to authorize the establishment of a ZEDE." Request for Bifurcation ¶ 128. Respondent's assertion is irrelevant, as Claimants' investments did not consist of "establishing a ZEDE" but simply of incorporating land into the ZEDE regime, which is what CAMP authorized. See *supra* § III.B.

¹⁸⁸ Request for Bifurcation ¶¶ 127-128.

¹⁸⁹ ZEDE Law (C-6) Art. 39.

¹⁹⁰ ZEDE Regulation No. 001-2018 dated 30 Jan. 2018 (C-456) (regulating the incorporation of properties located in low-population-density areas within municipalities situated in departments adjacent to the Gulf of Fonseca and the Caribbean Sea into the ZEDE regime).

¹⁹¹ Request for Bifurcation ¶ 29.

provided therein, and as such constitutes a governing document of Próspera ZEDE.¹⁹²

- c) Finally, contrary to Respondent's contention,¹⁹³ unlike for an "investment agreement," CAFTA-DR does not require that an "investment authorization" grant rights or create obligations. Respondent's only basis for this purported requirement is reference to a footnote in the definition of "investment" in CAFTA-DR that does not apply to the definition of "investment authorization" under Article 10.28.¹⁹⁴ In any event, Respondent's argument is moot because, as Claimants already explained in their Memorial, the Próspera ZEDE Authorization and the Charter did in fact grant rights to Claimants and also acknowledged the existence of an obligation to respect HPI's right to the protections of CAFTA-DR and the Honduras-Kuwait BIT.¹⁹⁵

70. Moreover, as illustrated above, to decide Objection 5, the Tribunal will have to consider extensive evidence on the legal framework for CAMP, the Charter, and ZEDE governance, including numerous contemporaneous statements by the Honduran State, the testimony of Mr. Brimen, Mr. Delgado and others. Rather than materially reducing time and cost, focusing on that evidence in a separate phase would make the arbitration more costly and inefficient.

¹⁹² See Charter and Bylaws of ZEDE Village of North Bay dated 23 Aug. 2018 (CLA-4) § 11.02 (stating that CAMP's approval "shall constitute its consent to all of the rights and responsibilities applicable to it in this Charter"); p. 23 (showing that CAMP and the Technical Secretary approved the Charter).

¹⁹³ Request for Bifurcation ¶¶ 29, 129.

¹⁹⁴ Request for Bifurcation ¶ 129. Respondent's reference to the U.S.'s submission in *Kappes v. Guatemala* is likewise misplaced because it refers to the definition of "investment" and not of "investment authorization." Request for Bifurcation ¶ 129; *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Submission of the United States (19 Feb. 2021) (RLA-103) n. 12.

¹⁹⁵ The Próspera ZEDE Authorization granted HPI the right to develop its ZEDE project in accordance with CAMP's authorization therein. See Memorial ¶ 136; Certificate of Registration and Incorporation of Land as ZEDE Village of North Bay dated 29 Dec. 2017 (C-16). And the Charter confirmed HPI's status as Promoter and Organizer of Próspera ZEDE, established the governance rules for Próspera ZEDE (including the procedures for the promulgation of regulations), and cemented HPI's rights with respect to the constitution of the Council and the delivery of governance services. See Memorial §§ II.C.3.c, II.C.3.f; Brimen ¶¶ 48-49, 74; Charter and Bylaws of ZEDE Village of North Bay, dated 23 Aug. 2018 (CLA-4); Charter of Próspera ZEDE (CLA-5) §§ 1.02, 2.01. The Amended Charter contains a statement "reaffirming" that CAMP and Próspera ZEDE are "subject" to CAFTA-DR and the Honduras-Kuwait BIT, "under which [HPI] as well as other Landowners and Residents are entitled to protection."). Charter of Próspera ZEDE (CLA-5) § 11.02.

71. *Second*, bifurcation is not warranted because, as Respondent concedes, Objection 5 cannot dispose of the entirety of the dispute.¹⁹⁶ Nor can the objection result in a substantial reduction of the proceedings at the next phase. Even assuming *arguendo* that Objection 5 is granted, Claimants have brought other claims that encompass Respondent’s frustration of their rights and disregard for its commitments and representations in the Próspera ZEDE Authorization and the Charter, including, for example, claims for breach of Article 10.5 (FET)¹⁹⁷ and Article 10.7 (expropriation) of CAFTA-DR,¹⁹⁸ both of which are within the scope of the Tribunal’s jurisdiction under Article 10.16.1(a)(i)(A) of the Treaty. Even if the Tribunal grants Objection 5, it will still have to deal with the same factual and legal arguments as to the origin, scope and significance of the Próspera ZEDE Authorization and the Charter, Claimants’ rights thereunder, and Respondent’s measures in contravention thereof. It is more efficient for the Tribunal to hear these arguments (and review the extensive related documentary, witness, and expert evidence¹⁹⁹) together in one and the same phase than to hear them first in a separate phase on Objection 5 and then again in the context of other claims (even if Objection 5 is granted which, as shown above, is in any event unlikely).
72. *Third*, bifurcation of Objection 5 is not warranted because the objection is so intertwined with the merits as to make bifurcation impractical. Respondent mistakenly asserts that the Tribunal can decide Objection 5 “without delving into the merits of the dispute by analyzing the Prospera ZEDE Statutes submitted by the Claimants and determining whether that document complies with the definitions established under DR-CAFTA.”²⁰⁰ On the contrary, deciding Objection 5 will require more than a mere “review of some

¹⁹⁶ Request for Bifurcation ¶ 31.

¹⁹⁷ Memorial § IV.A.1.

¹⁹⁸ Memorial § IV.A.3.

¹⁹⁹ See, e.g., Brimen ¶¶ 28, 33-36; Delgado ¶¶ 29, 30; *Requirements to be part of the ZEDE regime*, ZEDE (14 Nov. 2016) (C-451); ZEDE Application Packet for: Village of North Bay, A Zone for Economic Development and Employment, by Sociedad para el Desarrollo Socio-Económico de Honduras, LLC (C-17); Act No. 17 issued by CAMP dated 29 Dec. 2017 (C-464); Letter from Próspera ZEDE to CAMP dated 23 Sep. 2019 (C-465); Environmental Technical Report of Corporate Offices Seed Project by ACQUA dated Sep. 2019 (C-466); ZEDE Regulation No. 001-2018 dated 30 Jan. 2018 (C-456).

²⁰⁰ Request for Bifurcation ¶ 165.

facts.”²⁰¹ At minimum deciding Objection 5 requires analyzing and deciding on issues of Honduran law with respect to the nature and authority of CAMP under the ZEDE Legal Framework as well as the scope of the authorizations in the Próspera ZEDE Authorization and the Charter themselves. In this context, the Tribunal’s analysis will not be limited to the Próspera ZEDE Authorization and the Charter themselves,²⁰² as it will also have to consider Respondent’s prior representations as to these issues, not solely its present position for purposes of this arbitration. Such analysis involves numerous factual issues and significant documentary and witness evidence,²⁰³ and would overlap with the merits of Claimants’ other claims under Articles 10.5 (FET) and 10.7 (expropriation) of CAFTA-DR, creating both inefficiencies and a risk of prejudging factual issues that will be relevant for the merits of other claims. Accordingly, Respondent’s analogy to the decision on bifurcation in *Paiz v. Honduras* is misguided as regards Objection 5 because deciding it requires analyzing factual issues and those issues are not “different from those raised by the merits of the argument.”²⁰⁴

F. OBJECTION 6: RESPONDENT’S OBJECTION THAT THE TRIBUNAL MAY NOT AWARD RESTITUTION AS A REMEDY IS NOT SUSCEPTIBLE TO BIFURCATION AS A PRELIMINARY OBJECTION AND, IN ANY EVENT, BIFURCATION IS NOT WARRANTED BECAUSE IT WOULD BE INEFFICIENT AND PROCEDURALLY UNFAIR

73. As its final objection, Respondent asserts that the Tribunal lacks jurisdiction to award restitution as a remedy, because it would supposedly involve restoring the ZEDE Legal Framework whereas CAFTA-DR is limited to providing only material restitution of tangible property.²⁰⁵ Respondent asserts that this objection should be bifurcated because

²⁰¹ Request for Bifurcation ¶ 166.

²⁰² Request for Bifurcation ¶ 165.

²⁰³ See, e.g., Brimen ¶¶ 28, 33-36; Delgado ¶¶ 29, 30; *Requirements to be part of the ZEDE regime*, ZEDE (14 Nov. 2016) (C-451); ZEDE Application Packet for: Village of North Bay, A Zone for Economic Development and Employment, by Sociedad para el Desarrollo Socio-Económico de Honduras, LLC (C-17); Act No. 17 issued by CAMP dated 29 Dec. 2017 (C-464); Letter from Próspera ZEDE to CAMP dated 23 Sep. 2019 (C-465); Environmental Technical Report of Corporate Offices Seed Project by ACQUA dated Sep. 2019 (C-466); ZEDE Regulation No. 001-2018 dated 30 Jan. 2018 (C-456).

²⁰⁴ Request for Bifurcation ¶ 166.

²⁰⁵ Request for Bifurcation ¶ 131 *et seq.*

it purportedly (i) would “imply the total dismissal of the Claimants’ main claim;”²⁰⁶ (ii) is “a strictly legal matter;”²⁰⁷ and (iii) “is based on the express exclusion” of restitution in CAFTA-DR and the LSA.²⁰⁸ These assertions are incorrect.

74. As a threshold matter, Respondent’s request that Objection 6 be bifurcated under ICSID Arbitration Rules 42(2) and 44 cannot properly be granted because Objection 6 does not qualify as a preliminary objection as that term is defined in Rule 43(1) (“a preliminary objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or for other reasons is not within the competence of the Tribunal”).²⁰⁹ Contrary to what Respondent asserts, Objection 6 is a question of remedies that has nothing to do with jurisdiction; even if Respondent were to prevail on its arguments (which, as shown below, it should not), this would have no impact on the Tribunal’s competence. Respondent is unable to marshal any support for its position that this is a jurisdictional objection. By contrast, various prior tribunals have confirmed that the availability of restitution is not a jurisdictional issue. For example, in *Perenco v. Ecuador*, the tribunal declined to hear a similar allegation regarding restitution, deciding that the question “does not properly belong to the jurisdictional phase of the proceedings,” because “the issue of available remedies is certainly not ‘a preliminary question’ in the sense of Article 41(1) of the ICSID Convention and Rule 41 of the ICSID Arbitration Rules.”²¹⁰ Likewise, the tribunal in *Micula v. Romania (I)* declined to hear a similar objection at the jurisdictional phase, reasoning that “whether restitution is an appropriate remedy, and whether restitution or compensation should be ordered, are questions properly addressed at the merits phase of the proceedings” and, therefore, “[i]t [wa]s premature to discuss this issue.”²¹¹

²⁰⁶ Request for Bifurcation ¶ 155.

²⁰⁷ Request for Bifurcation ¶ 165.

²⁰⁸ Request for Bifurcation ¶ 171.

²⁰⁹ ICSID Arbitration Rules, Rule 43(1).

²¹⁰ *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Jurisdiction (30 Jun. 2011) (CLA-284) ¶¶ 237, 239.

²¹¹ *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (24 Sept. 2008) (CLA-285) ¶ 168.

Accordingly, there simply is no basis to consider the issue of remedies at the jurisdictional phase.

75. In any event, even if Objection 6 were susceptible to bifurcation as a preliminary objection, bifurcation is not warranted under Rule 44.
76. *First*, bifurcation of Objection 6 would not result in a material reduction in time or cost of the proceedings, including because Respondent’s objection is not *prima facie* serious and substantial.
77. At the outset, it is important to underscore that Claimants’ request for restitution is one among various different remedies that the Tribunal may grant, and that the Tribunal will have to rule on the amount of compensation even if it awards restitution. This makes Objection 6 entirely superfluous and means that bifurcating it would *ipso facto* increase the time and costs of the proceedings unnecessarily. As Claimants explained in their Memorial, under the plain terms of CAFTA-DR, “the respondent may pay monetary damages and any applicable interest in lieu of restitution.”²¹² Respondent’s own sources confirm that tribunals have held that the identical provision in NAFTA allows them to award restitution or compensation, and that States have the choice to provide only compensation.²¹³ Because it will be entirely up to Respondent to decide whether to provide restitution or pay monetary compensation to comply with an eventual award, there is no need to increase the time and costs of the proceedings by debating whether or not restitution is an appropriate remedy during a preliminary phase.
78. In any event, Respondent’s objection is built on a faulty premise: contrary to Respondent’s misrepresentations, Claimants have not requested that this Tribunal order Respondent to

²¹² See Memorial ¶ 535 (quoting CAFTA-DR (CLA-2) Art. 10.26.1(b) (“Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only . . . (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.”) (emphasis added)).

²¹³ See B. Sabahi, *Chapter 4: Restitution*, in COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION: PRINCIPLES AND PRACTICE (2011) (RLA-72) p. 64 (“[NAFTA] obliges the tribunal to provide the state party to the dispute with an option to ‘pay monetary damages and any applicable interest in lieu of restitution.’”); G. Stephens-Chu, *Is it Always All About the Money? The Appropriateness of Non-Pecuniary Remedies*, in 30 INVESTMENT TREATY ARBITRATION, ARBITRATION INTERNATIONAL 4, 662 (2017) (RLA-90) pp. 662-663 (“[NAFTA] allows the respondent state to pay damages in lieu of restitution.”).

change its legal framework, but rather that it order Respondent to restore Claimants' rights for the 50-year period during which Respondent guaranteed Claimants legal stability of these rights.²¹⁴ Contrary to what Respondent suggests,²¹⁵ doing so need not involve the wholesale restoration of the ZEDE Legal Framework or have effects on third parties; while Honduras might well have good reasons for making the ZEDE Legal Framework generally applicable, all restitution would require is that it ensure that Claimants and their investments continue to have the benefits of the ZEDE Legal Framework.

79. As Respondent acknowledges, CAFTA-DR expressly empowers tribunals to award “restitution of property.”²¹⁶ The Treaty specifically contemplates that property may be intangible, for example in the definition of “investment,” which, *inter alia*, refers to “other tangible or intangible, movable or immovable property, and related property rights,”²¹⁷ as well as in Annex 10-C on expropriation, which also expressly provides that an expropriation may arise from the host State’s “interfere[nce] with a tangible or intangible property right or property interest in an investment.”²¹⁸ As explained in the Memorial, this obviously includes Claimants’ rights under the ZEDE Legal Framework and related legal stability rights.²¹⁹
80. Respondent is wrong to assert that CAFTA-DR limits restitution to the material restitution of tangible property.²²⁰ Nothing in the plain text of CAFTA-DR supports this strained interpretation which, rather, directly contradicts the express terms of the Treaty. As Claimants will demonstrate at the appropriate time, restitution of property can comprise return of any type of property, including intangible property. Respondent itself appears to acknowledge this, as it argues that *Cairn v. India* involved “restitution measures linked

²¹⁴ Memorial ¶ 542 (emphasis added).

²¹⁵ See Request for Bifurcation ¶ 137.

²¹⁶ CAFTA-DR (CLA-2) Art. 10.26.1(b).

²¹⁷ CAFTA-DR (CLA-2) Art. 10.28 (emphasis added).

²¹⁸ CAFTA-DR (CLA-2) Annex 10-C (emphasis added).

²¹⁹ Memorial § IV.A.3.

²²⁰ See Request for Bifurcation ¶¶ 134-137.

precisely to the property of investors or companies controlled by them,”²²¹ when such case involved an order for the State to withdraw a tax assessment directed at the claimant.²²² Further, while Respondent focuses on arguing that juridicial restitution cannot be granted under CAFTA-DR,²²³ it does not even address restitution “under another form,” which the ILC Articles confirm “encompass[es] any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act.”²²⁴ Had States intended to exclude such forms of restitution under CAFTA-DR, they would have done so expressly, as was done in the United States – Mexico – Canada Agreement (“USMCA”) 20 years after the conclusion of CAFTA-DR.²²⁵

81. Finally, Respondent’s argument that restitution is not available under the LSA is simply a red herring.²²⁶ Claimants clearly phrased their restitution request under CAFTA-DR and do not request restitution for their LSA claims, as Respondent wrongly suggests.²²⁷
82. *Second*, bifurcation of Objection 6 would not result in a complete or substantial reduction of the proceedings at the next phase because, even if Respondent were to prevail on its argument, it would dispose only of one requested remedy leaving the alternative requested

²²¹ Request for Bifurcation ¶ 138.

²²² See Request for Bifurcation ¶ 138 (citing *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India (I)*, CPA Case No. 2016-7, Final Award (21 Dec. 2020) (“*Cairn Energy*”) (CLA-220) ¶ 1877). Given that Claimants initially relied on *Cairn Energy* in their Memorial (see ¶ 535), Respondent’s acknowledgement of this point also directly contradicts its assertion that Claimants failed to point to relevant caselaw. See Request for Bifurcation ¶ 138.

²²³ See Request for Bifurcation ¶ 138.

²²⁴ ILC Articles (CLA-216) Art. 35 cmt (5). Respondent’s contention that the ILC Articles do not apply (Request for Bifurcation ¶ 139) is plainly false. Tribunals widely acknowledge that the ILC Articles are “the starting point of the Tribunal’s analysis” for determining reparation in investor-State disputes.” See *William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Damages (10 Jan. 2019) (CLA-286) ¶ 108; *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award (21 Nov. 2007) (CLA-287) ¶¶ 278-282 (referencing the ILC Articles as the “applicable international law rules” for determining remedies).

²²⁵ See Agreement between the United States of America, the United Mexican States, and Canada dated 30 Nov. 2018 (CLA-288) n. 27 (prohibiting a tribunal from “order[ing] the respondent to take or not to take other actions, including the amendment, repeal, adoption, or implementation of a law or regulation.”) (emphasis added).

²²⁶ See Request for Bifurcation ¶¶ 141-143.

²²⁷ See Memorial ¶ 540 (“Claimants first and foremost seek restitution in accordance with Article 10.26.1(b) of CAFTA-DR, to the extent this remedy remains practical at the time of the award.”).

remedies intact. As elaborated in the Memorial, restitution is only one of a number of remedial theories in this case, separate from which Claimants are entitled to compensation in the amount of at least US\$ 1.63 billion.²²⁸ Respondent does not (and cannot) contend that this request for compensation is not an appropriate remedy under CAFTA-DR. Thus, Respondent's repeated argument that bifurcating Objection 6 would result in a "significant reduction in the scope of the dispute" is nonsensical, because it would not in any way reduce the analysis required to determine liability or the monetary compensation to which Claimants are entitled in lieu of restitution. Respondent's argument that restitution is Claimants' "main claim"²²⁹ is in any event a red herring because this only concerns the form of remedy to be provided, and CAFTA-DR requires that the award shall provide that Respondent may pay monetary damages and any applicable interest in lieu of restitution.

83. *Third*, Objection 6 is intertwined with the merits making bifurcation impractical. As argued by Respondent, the question of whether restitution is appropriate will require that the Tribunal analyze what restitution would actually involve, including, for example, whether Claimants had a property right capable of restitution and whether that right was taken by Respondent. This will require the Tribunal to conduct an in-depth analysis of the ZEDE Legal Framework, the rights afforded by Respondent to Claimants thereunder, as well as the impact of Respondent's measures on such rights. Only then can the Tribunal determine whether or not restitution is an appropriate remedy. These are the very same issues before the Tribunal on the merits and, much like Respondent's other objections, involve the very same factual matrix.

IV. RESPONDENT HAS FAILED TO DEMONSTRATE THAT BIFURCATION OF ITS OBJECTIONS IS WARRANTED IN THE AGGREGATE

84. As detailed above, none of Respondent's objections individually warrant bifurcation. Seemingly recognizing this, Respondent suggests that the Tribunal should analyze its objections "as a whole, not in isolation,"²³⁰ and that if "at least one of the objections

²²⁸ *Supra* ¶ 77; Memorial § V.C.

²²⁹ Request for Bifurcation ¶¶ 31, 155.

²³⁰ Request for Bifurcation ¶ 150.

justifies bifurcation,” this would justify bifurcation of “the rest of the objections.”²³¹ In effect, Respondent’s position appears to be that the “whole” of its six objections is more than the sum of its parts, and that the Tribunal should be willing to bifurcate the objections in the aggregate even though bifurcation is not warranted individually. This is wrong.

85. As explained above, an objection only warrants bifurcation if each of the three factors set out in ICSID Arbitration Rule 44(2) is met.²³² Bifurcating an objection that does not warrant it contradicts the basic objective of efficiency and results in the Tribunal having to consider issues in a preliminary phase that increase the time and cost of the proceedings, do not dispose of all or a substantial part of the dispute, and/or are intertwined with the merits. Naturally, Respondent’s assertion to the contrary has no legal basis whatsoever.
86. Contrary to Respondent’s assertion,²³³ *Suffolk v. Portugal* did not hold that if at least one of the objections justifies bifurcation, bifurcation of the other objections is necessary. In *Suffolk*, the tribunal properly analyzed whether objections could individually dispose of all or a substantial portion of the dispute, and concluded that “each of the Respondent’s Objections, if accepted, would likely dispose of all or a substantial portion of the dispute.”²³⁴
87. Likewise, contrary to what Respondent suggests,²³⁵ the tribunal in *Doups Holdings v. Mexico* did not hold that potential objections should always be considered in the aggregate. At issue in *Doups Holdings* were four objections that all challenged the claimant’s relationship with its investment in Mexico.²³⁶ This was critical to the tribunal, which found

²³¹ Request for Bifurcation ¶ 151.

²³² See *supra* § II.

²³³ Request for Bifurcation ¶ 151.

²³⁴ *Suffolk (Mauritius) Limited et al. v. Portuguese Republic*, ICSID Case No. ARB/22/28, Procedural Order No. 3 (Request for Severance) (1 Mar. 2024) (CLA-296) ¶¶ 94-104.

²³⁵ Request for Bifurcation ¶ 150.

²³⁶ See *Doups Holdings LLC v. United Mexican States*, ICSID Case No. ARB/22/24, Procedural Order No. 3 (Decision on Bifurcation) (16 Oct. 2024) (“*Doups Holdings*”) (CLA-293) ¶¶ 6 (stating that the first objection challenged that claimant “made an investment” under Article 25 of the ICSID Convention), 8 (stating that the second objection challenged that the claimant does not hold an “existing investment” under the terms of NAFTA), 11 (stating that the third objection challenged claimant’s right to recover “indirect” damages suffered by its local

that it was appropriate to assess the objections together because it was “in the presence of a multiplicity of interrelated objections.”²³⁷

88. In contrast to the situation in *Doups Holdings*, Respondent makes no effort to demonstrate that its six objections are interrelated. They are not. As detailed above, Respondent puts forth a mélange of objections including an objection seeking to use the essential security exception in Article 21.2(b) of CAFTA-DR as a jurisdiction-destroying get-out-of-jail-free card (Objection 1); an objection based on the establishment of Próspera ZEDE by CAMP (Objection 2); an objection to the application of the MFN provision in Article 10.4 of CAFTA-DR (as well as apparently, although this is unclear, the MFN provision in Article 32 of the ZEDE Law) (Objection 3); an objection to jurisdiction with respect to HPI’s LSA claims (Objection 4); an objection to jurisdiction with respect to Claimants’ investment authorization claims (Objection 5); and an objection to Claimant’s request for restitution as a remedy (Objection 6). The principal commonality among these objections is that they are all unmeritorious. None is interrelated with any other in a way that would justify joint evaluation.
89. In addition, even considering Respondent’s six objections “as a whole” would not justify their wholesale bifurcation. Indeed, Respondent conveniently omits that the tribunal in *Doups Holdings* declined to bifurcate Mexico’s first objection upon concluding that it was too intertwined with the merits of the dispute.²³⁸ Here, even assuming *arguendo* that it is appropriate to analyze Respondent’s objections “as a whole,” the Tribunal should likewise decline to bifurcate the six objections because none of them satisfies all the relevant factors to warrant bifurcation (which, as explained above, need to be met cumulatively).²³⁹ Nothing about considering the objections in the aggregate changes the inevitable conclusion that Respondent’s request for bifurcation is meritless and must be dismissed.

subsidiary), 17 (stating that the fifth objection challenged that claimant owned or controlled its investment at the time of the alleged breach and when the dispute was submitted to arbitration).

²³⁷ *Doups Holdings* (CLA-293) ¶ 51.

²³⁸ *Doups Holdings* (CLA-293) ¶¶ 61, 69.

²³⁹ *See supra* § III.

90. If anything, the fact that bifurcation is not merited for all objections means that granting bifurcation as to any objections may be inconsistent with procedural inefficiency. As the tribunal in *Amerra v. Mexico* explained when it declined to grant bifurcation, “partial bifurcation of the jurisdictional objections would not be in the interests of efficiency,” because if the preliminary objections were not granted, “the proceedings on the merits would have been delayed significantly without the jurisdictional issue having been resolved conclusively.”²⁴⁰ Thus, if the Tribunal determines that bifurcation is not appropriate as to all of Respondent’s objections (as it must), this militates against granting bifurcation as to any objections.
91. Lastly, the Tribunal should be circumspect about the fact that Respondent continues to reserve the right to keep raising additional objections at a later stage.²⁴¹ In equivalent situations, tribunals have applied a “reinforced” standard and resolved any doubts against bifurcation.²⁴² For instance, in *BA Desarrollos v. Argentina*, the tribunal held that requests for bifurcation that reserve the right to raise new objections at a later stage should be subject

²⁴⁰ *Amerra Capital Management LLC and others v. United Mexican States*, ICSID Case No. UNCT/23/1, Procedural Order No. 3 (3 Nov. 2023) (CLA-258) ¶ 18 (declining to bifurcate Mexico’s objections because “a partial bifurcation of the jurisdictional objections would not be in the interests of efficiency” and noting that if the Tribunal were to ultimately decide against Mexico on some of the objections “the proceedings on the merits would have been delayed significantly without the jurisdictional issue having been resolved conclusively”). See also *Fotowatio Renewable Ventures S.L.U., FRV Solar Holdings III, S.L.U and FRV Solar Holdings VI, S.L.U. V. United Mexican States*, ICSID Case No. ARB/24/5, Procedural Order No. 3 (Decision on Bifurcation) (14 Apr. 2025) (“**Fotowatio**”) (CLA-267) ¶ 84 (referring to the tribunal’s findings in *Amerra* and noting that “procedural efficiency is not normally served by a partial bifurcation in which some jurisdictional arguments are deferred to a possible future merits stage” and that this “consideration militated against the bifurcation of [one of the objections] when it ha[d] already been rejected in respect of the first three.”).

²⁴¹ Request for Bifurcation ¶ 173.

²⁴² See *Abertis Infraestructuras, S.A. v. Argentine Republic (II)*, ICSID Case No. ARB/23/39, Procedural Order No. 2 (on the Request for Bifurcation) (2 Jul. 2024) (CLA-266) ¶¶ 20-21 (holding that while the respondent has the right to reserve the right to submit additional jurisdictional objections, “the strength of its Request for a Bifurcation is undermined by this: if the Arbitral Tribunal bifurcates the jurisdictional objections currently announced, then confirms its jurisdiction and continues the processing of the merits of the case and, during this process, new jurisdictional objections arise, which the Arbitral Tribunal subsequently accepts, the bifurcation would have been frustrated in its purpose of contributing to procedural efficiency.” The tribunal further concluded that on this basis, it “will apply a reinforced standard to appreciate the concurrence of the premise [requiring that] the magnitude of the jurisdictional objections must be such that, the Applicant, in the allegatory and evidentiary effort carried out so far, has not succeeded in weakening them – if the Arbitral Tribunal has doubts, this will argue for non-bifurcation.”). See also *Fotowatio* (CLA-267) ¶ 84 (considering, in rejecting a request for bifurcation, the fact that Mexico had “reserved the right to make another, wholly distinct, jurisdictional objection regarding the ownership of the Claimants at a later stage.”).

to “a higher standard . . . when trying to persuade the Arbitral Tribunal of the relevance of the jurisdictional objections raised” for bifurcation.²⁴³

V. REQUEST FOR RELIEF

92. For the above reasons, Claimants respectfully request that the Arbitral Tribunal:
- a) Reject Respondent’s Request for Bifurcation; and
 - b) Order Respondent to pay all costs incurred by Claimants associated with the Request for Bifurcation;
93. Claimants reserve the right to supplement these Observations at the appropriate time, in response to Respondent’s eventual jurisdictional objections as well as its allegations on the merits and remedies.

²⁴³ *BA Desarrollos LLC v. Argentine Republic*, ICSID Case No. ARB/23/32, Procedural Order No. 7 (On Request for Bifurcation) (9 Sept. 2024) (CLA-268) ¶ 18.

Respectfully submitted,

White & Case LLP

WHITE & CASE LLP

Ank Santens
Bianca McDonnell
Ricardo Cruzat Reyes
1221 Avenue of the Americas
New York, NY 10020
United States of America

Francisco X. Jijón
Caitlin Walczyk
701 Thirteenth St. NW
Washington, DC 20005
United States of America

BRUCHOU & FUNES DE RIOJA

Ignacio Minorini Lima
Manuel Mazza
Juan Franco Raparo Faure
Ing. Enrique Butty 275
Piso 12, C1001AFA
Buenos Aires
Argentina

Counsel for Claimants

18 February 2026