

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Orazul International España Holdings S.L.**

**v.**

**Argentine Republic**  
**(ICSID Case No. ARB/19/25)**

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**DECISION ON THE RESPONDENT'S REQUEST FOR BIFURCATION**

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***Members of the Tribunal***

Dr. Inka Hanefeld, President of the Tribunal  
Mr. David R. Haigh QC, Arbitrator  
Prof. Alain Pellet, Arbitrator

***Secretary of the Tribunal***

Ms. Anna Toubiana

***Assistant to the Tribunal***

Mr. Aaron de Jong

7 January 2021

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## **A. Procedural Background**

1. On 24 August 2020, following the First Session held on 7 August 2020 and further communications with the Parties thereafter, the Tribunal issued its Procedural Order No. 1 (PO1) and the Procedural Timetable as Annex A thereto.
2. In line with the Parties' joint proposal, the Procedural Timetable contemplates that the Respondent may first submit a Memorial on Preliminary Objections together with a Request for Bifurcation in lieu of a Counter-Memorial on the Merits. In such case, the Parties and the Tribunal are to adhere to a pre-agreed schedule identified as Scenario 2 in the Procedural Timetable to first resolve the issue of the Request for Bifurcation.
3. On 16 November 2020, the Respondent submitted a Memorial on Preliminary Objections together with a Request for Bifurcation, both in Spanish language.
4. On 21 November 2020, in light of the short time frame to render a decision on the Respondent's Request for Bifurcation under Scenario 2, the Tribunal invited the Respondent to submit the English translation of its Memorial on Preliminary Objections and Request for Bifurcation as early as possible. The Tribunal at the same time invited the Claimant to submit its Observations on the Request for Bifurcation and an English translation thereof together on 14 December 2020.
5. On 30 November 2020, the Respondent submitted an English translation of its Memorial on Preliminary Objections and Request for Bifurcation.
6. On 14 December 2020, the Claimant submitted its Observations on the Respondent's Request for Bifurcation in English language.
7. After careful consideration of the Parties' respective positions (Parts B. and C.), the Tribunal herewith issues its Decision on Bifurcation (Part D.) and its corresponding orders (Part E.).

## **B. The Respondent's Position on Bifurcation**

8. The Respondent requests that the Tribunal orders the arbitration to be bifurcated into two phases: one phase to determine the Respondent's preliminary objections, and the other phase to resolve any issues of the merits of the Claimant's claims.<sup>1</sup>
9. Underlining its Request for Bifurcation, the Respondent asserts in its Memorial on Preliminary Objections that the Tribunal should dismiss the Claimant's claims in the

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<sup>1</sup> Memorial on Preliminary Objections and Request for Bifurcation, paras. 298 *et seq.*

arbitration for the following reasons, which the Tribunal summarises briefly as follows (Preliminary Objections):

10. First, the Respondent asserts that the Claimant's claim is inadmissible as it is unreasonably belated and contrary to general principles of law. According to the Respondent, such principles preclude the admissibility of claims not made within a reasonable time after the allegedly wrongful act occurred. In this case, while the Claimant grounds its claim in regulatory measures adopted between 2003 and 2013, the Respondent asserts that the Claimant unreasonably and unduly delayed its initiation of these proceedings when it filed its Request for Arbitration only in August 2019.<sup>2</sup>
11. Second, the Respondent asserts that the Tribunal lacks jurisdiction in these proceedings as the Claimant failed to fulfil the conditions in Article 10 of the BIT and first submit the dispute to Argentine national courts. According to the Respondent, such prior submission forms part of the essential terms under which the Respondent offered its consent to submit disputes to arbitration under the BIT. It says that the Claimant cannot now resort to a broadened interpretation of the MFN Clause in order to evade that obligation by importing norms from other investment treaties. Rather, the Respondent says that Spain and Argentina's conduct subsequent to their entry into the BIT evidences that the dispute resolution mechanisms therein were not meant to be modified by application of the MFN Clause.<sup>3</sup>
12. Third, the Respondent asserts that the Tribunal has no jurisdiction over the present dispute, as the Claimant has not established itself as a protected investor under the BIT, nor one that made any investment in Argentina. Rather, the Respondent says that it was US-based Duke Energy – not the Claimant – that owned the allegedly impaired participations in Argentina when the Respondent first enacted the challenged measures in 2003. It says further that the measures were then all adopted by the time Duke Energy sold its Argentinian interests to the investment fund I Squared Capital in December 2016 without itself ever having commenced proceedings under the BIT. The Respondent otherwise argues that the claimant entity, Orazul International España Holdings S.L., has at all times operated as nothing more than a Spanish-incorporated shell company with no actual activity in Spain; one used by Duke Energy as an intermediary to seek access to the protections under the Argentina-Spain BIT. According to the Respondent, the Claimant has in this regard effected a “clear abuse of process”<sup>4</sup> and that, in view of principles of good faith, the Tribunal should consider its claims inadmissible.<sup>5</sup>

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<sup>2</sup> *Id.*, Section II.A.

<sup>3</sup> *Id.*, Section II.B.

<sup>4</sup> *Id.*, para. 146.

<sup>5</sup> *Id.*, Section II.C.

13. Finally, the Respondent says that the Claimant has already consented to and accepted the measures it now seeks to challenge. In particular, the Respondent asserts that the Claimant's entry into various agreements with the State starting in 2004,<sup>6</sup> together with its adherence to the regime provided for in Resolution SE No. 95/2013, has had the consequence that the Parties have accepted all challenged measures and waived all rights to bring claims based on those measures. Further, the Respondent specifically accepted that the remuneration regime under ES Resolution No. 95/2013 prohibits it from bringing any claims based on a different remuneration mechanism. The Parties also agreed to the payment of certain receivables corresponding to the specific measures, as well as further complementary regulations, meaning that the Parties have also waived their rights to lodge claims in that regard too. According to the Respondent, the Claimant has thus waived any claims over the challenged measures, and thus rendered its claims in these proceedings inadmissible.<sup>7</sup>
14. As to bifurcation itself, the Respondent submits that whether a matter should be bifurcated is a question of procedural efficiency, and in particular, whether the determination of preliminary objections will render addressing the merits of the dispute unnecessary.<sup>8</sup> To this end, citing *Emmis v. Hungary*,<sup>9</sup> the Respondent asserts that tribunals may consider the following factors when addressing a request to bifurcate proceedings: whether the request is substantial or frivolous, whether there would be a substantial reduction in subsequent stages were the request to be granted and an objection upheld, and whether the issues to be considered in the jurisdictional phase are too interrelated with the merits.<sup>10</sup>
15. In the present case, according to the Respondent, bifurcation will facilitate the efficient conduct of the arbitration proceedings.<sup>11</sup> It says further that more than justified reasons exist for the Tribunal to accept its Preliminary Objections above,<sup>12</sup> and that resolution

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<sup>6</sup> According to the Respondent, these include *inter alia* the Final Agreement for the Management and Operation of the Projects to Readjust the Wholesale Electric Market executed in 2005 (known as the "Final Agreement"), the Agreement for the Management and Operation of Projects, Increase of Availability of Thermal Power Generation and Adjustment of the Remuneration for the Generation 2008-2011 executed in 2010, and the 2019 Agreement for the Regularization and Payment of Receivables with the Wholesale Electric Market: Memorial on Preliminary Objections and Request for Bifurcation, para. 13.

<sup>7</sup> *Id.*, Section II.D.

<sup>8</sup> *Id.*, para. 299.

<sup>9</sup> *Emmis International Holding, B.V., Emmis Radio Operating, B.V. and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Application for Bifurcation, 13 June 2013, para. 37(2) (**AL RA 114**). [hereinafter *Emmis v. Hungary*]

<sup>10</sup> Memorial on Preliminary Objections and Request for Bifurcation, para. 305.

<sup>11</sup> *Id.*, para. 309.

<sup>12</sup> *Id.*, para. 299.

of the same will render unnecessary the need for the Tribunal to address some issues on the merits.<sup>13</sup>

### **C. The Claimant's Position on Bifurcation**

16. The Claimant opposes the Respondent's Request for Bifurcation.
17. According to the Claimant, when deciding whether to bifurcate proceedings, tribunals should consider whether the preliminary objection will not likely succeed, whether bifurcation would materially reduce time and costs, and whether jurisdiction and the merits are so intertwined as to make bifurcation impractical.<sup>14</sup> The Claimant says further that the Respondent bears the burden to prove that bifurcation is warranted, in that it will contribute to the efficiency of the proceedings and is not impractical, but that in the present case it has failed to meet that burden.<sup>15</sup>
18. As regards the Respondent's assertion that the Claimant's claim is belated, the Claimant submits that the Respondent's position is factually incorrect and therefore meritless. To this end, it says that the challenged measures in fact continued after 2013 and endure even today.<sup>16</sup> In any case, the BIT does not contain a limitation period for claims,<sup>17</sup> while any delay in commencing proceedings only occurred as a result of the Respondent's assurances to the Claimant that it would restore the electricity framework.<sup>18</sup> The Claimant says further that bifurcating the Respondent's objections is otherwise impractical as they are inextricably intertwined with the merits. According to the Claimant, if the Tribunal is to decide any delay argument, it will also need to decide on the merits of the Claimant's claims regarding the Respondent's assurances and violations thereof, in particular as regards the temporary nature of the measures and Claimant's entry into the FONINVEMEM programs.<sup>19</sup>
19. The Claimant says that the Respondent's assertion that it failed to first fulfil the conditions in Article 10 of the BIT is also groundless and cannot justify bifurcation. According to the Claimant, it is entitled to invoke the MFN Clause to import a more favourable dispute resolution clause from another BIT, resulting in it no longer needing to comply with the 18-month waiting period. In any case, such waiting periods are not

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<sup>13</sup> *Id.*, para. 304.

<sup>14</sup> Claimant's Observations on Respondent's Request for Bifurcation, paras. 121, 128.

<sup>15</sup> *Id.*, paras. 9-10.

<sup>16</sup> *Id.*, para. 44.

<sup>17</sup> *Id.*, paras. 20, 51.

<sup>18</sup> *Id.*, para. 45.

<sup>19</sup> *Id.*, paras. 17, 46.

“essential” policies of either Argentina or Spain, while the Claimant’s compliance with Article 10 would in any case be futile and unduly expensive.<sup>20</sup> Further, Claimant says the objection cannot easily be disentangled from the merits of the case. To this end, it argues that local litigation conditions exist to offer States an opportunity to address matters before turning to arbitration.<sup>21</sup> Therefore, to ascertain whether the Respondent had a prior opportunity to resolve the Claimant’s grievances, the Tribunal would have to determine the nature of the measures, the scope of the local submissions, and whether the Claimant’s administrative petitions against the measures gave the Respondent an opportunity to revert them and compensate the Claimant.<sup>22</sup>

20. The Claimant further argues that the Respondent’s objections challenging its status as a protected investor under the BIT are devoid of any merit. It says first that Duke Energy and the Claimant are the same entity; the Claimant simply changed from its Duke Energy designation (Duke Energy International España Holdings S.L.U.) to its current name (Orazul International España Holdings S.L.) in 2017.<sup>23</sup> Thus, Claimant has remained the same Spanish-seated entity that has indirectly owned an interest in Cerros Colorados at all relevant times, and is therefore a protected investor under the BIT.<sup>24</sup> The Claimant was thus also not incorporated simply to obtain protection under the BIT.<sup>25</sup> Finally, the Claimant says the Respondent fails to allege any facts supporting its allegation that the Claimant’s investments are not protected investments under the broad definition in the BIT.<sup>26</sup> Relatedly, the Claimant argues that any question over whether its investments qualify for protection under the BIT is otherwise intertwined with the merits.<sup>27</sup>
21. Finally, the Claimant submits that the Respondent’s assertion that the Claimant has waived its rights to bring claims is without merit.<sup>28</sup> First, the Claimant says Cerros Colorados is party to the relevant agreements and waivers, and otherwise subject to the government resolutions – not the Claimant. Even then, the Respondent forced Cerros Colorados to enter into the agreements or abide by the resolutions, while the agreements are in any case unlawful under Argentine law and otherwise constitute breaches of the BIT in and of themselves. The Claimant says further that the waivers in any case do not

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<sup>20</sup> *Id.*, paras. 67-72.

<sup>21</sup> *Id.*, para. 75.

<sup>22</sup> *Id.*, paras. 26-27, 76.

<sup>23</sup> *Id.*, paras. 31, 82.

<sup>24</sup> *Id.*, paras. 32-33, 82.

<sup>25</sup> *Id.*, para. 84.

<sup>26</sup> *Id.*, para. 34.

<sup>27</sup> *Id.*, para. 35.

<sup>28</sup> *Id.*, para. 103.

cover its treaty claims.<sup>29</sup> The Claimant otherwise asserts that the Tribunal would need to inquire into the merits of the case to determine whether the agreements containing the alleged waivers were, as the Claimant argues, forced upon Cerros Colorados, and whether the Respondent observed its commitments under the said agreements, which the Claimant disputes.<sup>30</sup>

22. The Claimant finally says that the Respondent has failed to show how bifurcation would in any case materially reduce the time and cost of the proceedings.<sup>31</sup>

#### **D. The Tribunal's Decision on Bifurcation**

23. The Respondent requests that the Tribunal bifurcate these proceedings so that it resolves the Respondent's Preliminary Objections prior to undertaking an assessment of the merits of the Claimant's claims.
24. In determining the Respondent's request, the Tribunal is mindful that a decision on whether or not to bifurcate these proceedings will direct the Parties down one or the other jointly proposed pathways: on the one hand, if the Tribunal grants the Respondent's request, the Parties' so-called Scenario 2.1 of the Procedural Timetable comes into operation. This scenario foresees the Parties filing further discrete submissions on the Respondent's Preliminary Objections, with a hearing on the same scheduled for September 2021. If necessary, a hearing on the merits would take place thereafter in the third quarter of 2022.
25. On the other hand, if the Tribunal denies the Respondent's request, the proceedings are, pursuant to the Parties' joint proposal, scheduled to pursue Scenario 2.2 of the Procedural Timetable. This scenario anticipates the Parties making submissions on the Respondent's Preliminary Objections and the merits of the Claimant's claims together, with a hearing on those combined issues to take place in January 2022.
26. In view of the above, the Tribunal acknowledges that its decision on the Respondent's request will influence the likely timing of the final resolution of the Parties' dispute going forward. It takes this decision in full appreciation of that consequence.

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<sup>29</sup> *Id.*, paras. 38, 104.

<sup>30</sup> *Id.*, para. 39.

<sup>31</sup> *Id.*, para. 125.

## I. The Applicable Legal Framework

27. With the above in mind, the Tribunal now specifically turns to the Respondent's request to bifurcate the proceedings. In doing so, the Tribunal first considers the legal framework governing the Respondent's Request for Bifurcation. For this purpose, the Tribunal recalls Article 41(2) of the ICSID Convention, which provides as follows:

*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.*

28. Similarly, ICSID Arbitration Rule 41 relevantly provides that:

*(2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence. [...].*

*(4) The Tribunal [...] may deal with the objection [that a 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] as a preliminary question or join it to the merits of the dispute.*

29. From the above provisions, the Tribunal acknowledges its express power under the ICSID Convention and the ICSID Arbitration Rules to both determine the Respondent's Preliminary Objections, but also, as a first step, to resolve its request for bifurcation. At the same time, the Tribunal observes that neither the ICSID Convention nor the ICSID Arbitration Rules identify any particular guiding principles that might assist it to decide whether a particular proceeding should or should not be bifurcated. It is equally apparent that neither provision establishes an express presumption on a request one way or the other.
30. Accordingly, the Tribunal looks to the established case law on bifurcation in ICSID proceedings. At the outset, the Tribunal agrees with the tribunal in *Churchill Mining v. Indonesia*, which held that the “[b]ifurcation of preliminary issues is within the discretionary power of an ICSID tribunal.”<sup>32</sup> It further agrees with the Parties that in resolving the question of whether to grant the Respondent's request, the overarching factor to consider is one of procedural efficiency; in other words, whether bifurcating is more likely to increase or decrease the time and costs associated with the arbitration or

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<sup>32</sup> *Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case Nos. ARB/12/14 and 12/40, Procedural Order No. 15, 12 January 2015, para. 26 (AL RA 116).

could significantly contribute to clarifying and simplifying the dispute before the Tribunal.<sup>33</sup> Further, while there is no formal burden of proof, the Tribunal must nevertheless be persuaded that, on balance, bifurcation will facilitate that objective.

31. In line with this understanding, the case law – including that cited by the Parties – demonstrates that tribunals generally consider the following three cumulative factors when deciding whether to grant a request for bifurcation:<sup>34</sup>
- a. Whether the preliminary objection is *prima facie* serious and substantial (in other words: does the objection have a reasonable chance of success and is not otherwise frivolous, vexatious or clearly without merit);<sup>35</sup>
  - b. Whether the jurisdictional objection is too intertwined with the merits, insofar as the Tribunal would have to already “*delve into the substance of the alleged breaches*”<sup>36</sup> or that a duplication of evidence would result, meaning any savings in time or cost from a bifurcation would be unlikely; and
  - c. Whether the objection, if granted, will ultimately result in a material reduction of the merits phase of the proceedings, or even dispose of all or substantially all of the claims.

## II. The Tribunal’s Analysis

32. After carefully analysing the Parties’ respective submissions of 30 November 2020 and 14 December 2020, in the interests of procedural economy and efficiency, the Tribunal decides not to bifurcate the hearing of the Respondent’s four Preliminary Objections from the merits for the reasons outlined below.

### 1. The Respondent’s claim that the Claimant’s claim is belated and contrary to general principles of law

33. Bearing in mind its intention not to conflate the “merits of the objection” with the prior question of the merits of a bifurcation, the Tribunal does not accept that the Respondent’s objection based on the Claimant’s allegedly unreasonable delay in commencing these proceedings is frivolous or vexatious. The dispute underlying these proceedings has continued for nearly two decades. While, as the Claimant identifies, the

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<sup>33</sup> C. Schreuer, *The ICSID Convention: A Commentary*, 2nd Edition, p. 537.

<sup>34</sup> See, e.g., *Emmis v. Hungary*, para. 37(2) (AL RA 114).

<sup>35</sup> *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Procedural Order No. 4 (Decision on Bifurcation), 18 November 2016, para. 4.4.

<sup>36</sup> See *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2, 28 June 2018, para. 52 (CL-206).

BIT contains no express limitation period, in a case that has persisted as long as this, the Tribunal is not convinced that the Respondent's objection regarding the commencement of these proceedings is entirely unreasonable. To this end, the Respondent has pointed the Tribunal to, in the Tribunal's preliminary view, defensible legal doctrine supporting its position.<sup>37</sup>

34. At the same time, however, the Tribunal is not convinced that bifurcation based on the Respondent's timeliness argument would necessarily facilitate the efficient conduct of these proceedings. To this end, the Tribunal considers that any decision on the Respondent's objection would likely entail the Tribunal prematurely delving into the substance of the merits of the Claimant's claims and having to decide on issues encompassed therein. This includes, in particular, the likelihood that the Tribunal would have to consider the timing of the challenged measures and whether they amounted to a continuous breach of the BIT. It will also likely entail the Tribunal's consideration of the Respondent's alleged promises to the Claimant over the years that the measures would only be "temporary" in nature (including, in particular, the Respondent's commitments allegedly made in relation to the FONINVEMEM programs). As the Claimant argues, such comprise representations it relied on in deciding not to commence proceedings earlier. However, in the Tribunal's view, such also go to the heart of the Claimant's claims in these proceedings for violations by the Respondent of the BIT. To this end, the Tribunal refers to the evidence of the Claimant's witness Mr. McGee, who explains that:<sup>38</sup>

*the Government continued adopting harmful measures affecting Cerros Colorados, while constantly "moving the goal post" to achieve the promised normalization of the market and reinstate the rules in force prior to the 2003 measures.*

35. The Tribunal is thus not convinced that significant issues relevant to both the Respondent's objection and the merits do not overlap, nor that meaningful efficiency savings would result from bifurcation in the event the Tribunal ultimately does not uphold the Respondent's objection.

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<sup>37</sup> See, e.g., the Respondent's references to Professor Bin Cheng: Memorial on Preliminary Objections and Request for Bifurcation, paras. 34–36.

<sup>38</sup> Witness Statement of Richard McGee (CWS-1), para. 30.

## **2. The Respondent's claim that the Claimant failed to first comply with Article 10 of the BIT**

36. With respect to the Respondent's objection regarding the Claimant's failure to first adhere to the 18-month national courts condition in Article 10 of the BIT, the Tribunal also finds that, on balance, it is not in the interest of efficiency to bifurcate the proceedings.
37. The Tribunal considers that the Respondent's objection is not vexatious or without any merit. While the Parties do not dispute that the Claimant did not comply with Article 10 of the BIT before commencing these arbitration proceedings, they disagree on the mandatory nature of such provisions and whether the Claimant may invoke the MFN Clause to effectively remove and replace the obligation in substance. To this end, the Tribunal is cognisant that whether particular aspects of a BIT may be transposed to another treaty through application of a most favoured nation clause remains controversial. It thus considers that the issue warrants further elaboration by the Parties in these proceedings.
38. Notwithstanding this, while the question of whether the Claimant was obligated to comply with Article 10 remains largely a legal one, the Tribunal considers that it will still likely entail a review of matters inextricably intertwined with the merits. In view of the Parties' submissions to date, the Tribunal in particular foresees having to evaluate whether, in light of the surrounding circumstances, the Claimant's compliance with Article 10 would have engendered a reasonable prospect of resolving the Parties' dispute before Argentine national courts within the applicable timeframes. In the Tribunal's view, such will necessarily involve a consideration of matters relevant to the Claimant's substantive claims.

## **3. The Respondent's claim that the Tribunal lacks jurisdiction and the Claimant has engaged in an abuse of process**

39. In its third preliminary objection, the Respondent raises challenges against the Claimant's status as a protected investor under the BIT, and regarding whether its participations constitute protected investments under the same.
40. The Respondent's objections in this regard are representative of the typical issues that arise in investor-state disputes. Outside of the validity of the Respondent's challenges, in the Tribunal's view, the objections the State raises are of a sort that are generally intertwined with the merits of a case, insofar as they render bifurcation an inefficient procedural mechanism. In this case, and similar to the Respondent's objection on timeliness, the Tribunal considers that the perceived complexity and evolving nature of

the ownership and corporate structure of the Claimant, its related entities and their participations in Argentina over the past two decades will in all likelihood warrant a detailed analysis by the Tribunal of facts and evidence relating thereto. Should the Respondent's objection fail, the same issues are then likely to arise again at a merits stage of the proceeding, especially those concerning the ownership of relevant participations over the duration of the Parties' relations and the impact, if any, of the Respondent's alleged conduct on their value. Accordingly, in the Tribunal's view, the Respondent's objection does not warrant bifurcation.

**4. The Respondent's claim that the Claimant consented to the measures and has waived its right to bring its claims**

41. The Parties are in dispute over the application and effect of the successive agreements and governmental regulations issued by the Respondent over the course of the Parties' dealings. These include, *inter alia*, the agreements concerning the contested FONINVEMEM programs and Resolution No. 95/2013.
42. The Parties in particular disagree on whether the Claimant itself was party to the agreements or subject to the regulations, whether such amounted to waivers over the Claimant's claims in these proceedings (or adequate compensation in lieu), and whether the Respondent might have breached its commitments under the agreements and lost its right to rely on the waivers. In the Tribunal's view, these questions are complex and, in view of the Parties' submissions to date, deserve further elaboration and substantiation in the course of these proceedings.
43. At the same time, the Tribunal considers that evaluating the above questions without prematurely delving into the substance of the Claimant's claims and the evidence in support thereof is unrealistic. In particular, the Tribunal expects that resolving the Respondent's waiver objection will entail deciding on questions such as whether the Respondent forced the Claimant or *Cerros Colorados* to enter into the above agreements, their scope and content, and whether the Respondent breached its commitments thereunder, including as regards the FONINVEMEM programs. In the Tribunal's understanding, these are issues that remain central to the Claimant's claims that the Respondent violated the BIT and will require an evaluation of evidence to that end.
44. Should the Respondent fail on its objection, it is likely that the Tribunal would need to consider the same evidence again, resulting in a probable duplication thereof. To this end, the Tribunal points to the evidence of the Respondent's witness, Mr. Cameron, filed with its Memorial on Preliminary Objections, in which he already now discusses matters that appear relevant to the Claimant's claims on the merits, including, in

particular, the contested circumstances around the entry by power generators into the FONINVEMEM program and its various agreements.<sup>39</sup> As the Claimant's witness Mr. McGee also explains:<sup>40</sup>

*While the Government made it look as if participation in FONINVEMEM was optional, in reality doing so was a condition for Cerros Colorados to secure collection of the unpaid receivables from CAMMESA originated between 2004 and 2006 that were not "invested" in FONINVEMEM.*

45. Thus, in the Tribunal's view again, considerations of efficiency do not advocate for bifurcating the proceedings in light of the Respondent's waiver obligation.

### **III. Conclusion**

46. In view of the above, the Tribunal is not convinced that bifurcation would assist to facilitate the efficient conduct of this arbitration. Rather, given the likelihood that the Tribunal would need to consider many of the same issues and supporting evidence necessary to establish the merits of the Claimant's claims, the Tribunal considers that one collective procedure and final hearing is appropriate in this case. The Tribunal nevertheless recalls that the present decision by no means prejudices its final decision on the preliminary objections raised by the Respondent and, should it ultimately uphold the Respondent's Preliminary Objections, it retains authority and discretion to compensate it by way of orders as to costs.
47. In coming to its decision, the Tribunal is mindful that the Respondent, being the party bringing this request to bifurcate the proceedings, has itself not sought to elaborate further on how bifurcation might materially reduce or render entirely unnecessary the remaining stages of the arbitration, were the Tribunal to uphold its objections.<sup>41</sup> As to the third factor tribunals consider when deciding such requests, the Tribunal has in this regard not been convinced that, on balance, bifurcation would in fact reduce time and costs in these proceedings.
48. In view of its decision, and as described above in Part A, the arbitration will henceforth adhere to the jointly established procedure identified as *Scenario 2.2* of the Procedural Timetable. The Tribunal will therefore address the Respondent's Preliminary Objections together with the merits.

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<sup>39</sup> Witness Statement of Daniel Cameron, paras. 15 *et seq.*

<sup>40</sup> Witness Statement of Richard McGee (CWS-1), para. 24.

<sup>41</sup> See, in particular, Memorial on Preliminary Objections and Request for Bifurcation, para. 309.

**E. The Tribunal's Orders**

49. In view of the foregoing, the Tribunal:
- a. dismisses the Respondent's request to bifurcate the proceedings;
  - b. directs the Parties to follow the procedural calendar set out in *Scenario 2.2* of the Procedural Timetable annexed to the PO1.
50. The Tribunal reserves its decision on costs.

For and on behalf of the Tribunal,

[signed]

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Dr. Inka Hanefeld, LL.M. (NYU)

President of the Tribunal

Date: 7 January 2021