INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Fernando Paiz Andrade and Anabella Schloesser de León de Paiz

v.

Republic of Honduras

(ICSID Case No. ARB/23/43)

PROCEDURAL ORDER NO. 4

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

Secretary of the Tribunal
Ms. Gabriela González Giráldez

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4 April 2025

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I. INTRODUCTION

1. This Procedural Order No. 4 addresses an issue of bifurcation additional to that decided in Procedural Order No. 3 dated 20 December 2024 ("**PO3**"). The question is whether the jurisdictional objections which the Republic of Honduras (also "**Honduras**" or the "**Respondent**") did not raise in its Summary of Jurisdictional Objections and Request for Bifurcation of 21 October 2024, but raised in its Memorial on Jurisdictional Objections of 25 February 2025 in accordance with PO3, should be addressed in full in the bifurcated proceeding, as the Respondent argues, or should only be addressed in the bifurcated proceeding if they intrinsically warrant bifurcation, as it is argued by Mr. Fernando Paiz Andrade and Ms. Anabella Schloesser de León de Paiz (the "**Claimants**").

II. PROCEDURAL BACKGROUND

2. On 20 December 2024, the Tribunal issued its Decision on Bifurcation as PO3, in which the Tribunal decided to bifurcate some, but not all, of the Respondent's preliminary objections enunciated in its Summary of Jurisdictional Objections and Request for Bifurcation of 21 October 2024 (the "**Initial Objections**", ranging from "**Initial Objection 1**" to "**Initial Objection 5**") and requested the Respondent to raise any additional jurisdictional objections it may have in its Memorial in the bifurcated proceeding.

3. On 25 February 2025, the Respondent filed its Memorial on Jurisdictional Objections, in which it set out three jurisdictional objections additional to those raised in the Respondent's Summary of Jurisdictional Objections and Request for Bifurcation of 21 October 2024 (the "**Additional Objections**").

4. By letter of 10 March 2025, the Claimants objected to the Additional Objections, arguing, in substance, that the Respondent bore the burden of proving that the Additional Objections should be bifurcated, and that neither the Additional Objection on the Treaty's limitation period ("**Additional Objection 1**") nor the Additional Objection on the Claimants' ownership and control over the investment ("**Additional Objection 2**") warranted bifurcation.

5. By letter of 14 March 2025, the Respondent argued, in substance, that pursuant to PO3 and the Arbitration Rules, the Additional Objections should be addressed in full in the bifurcated proceeding, and that both aforementioned Additional Objections were precisely the type of threshold jurisdictional questions that should be resolved before proceeding to the merits.

6. By letter of 17 March 2025, the Claimants expanded on their earlier arguments and asserted that the third Additional Objection according to which the Claimants' claims would be purely contractual

claims over which the Tribunal has no jurisdiction ("**Additional Objection 3**") also did not warrant bifurcation.

7. Each of the Parties further expanded on its arguments by letter of 20 March 2025 for the Respondent, and by letter of 21 March 2025 for the Claimants.

8. On 20 March 2025, the United States of America filed a non-disputing party submission pursuant to Article 10.20.2 of the Dominican Republic-Central America-United States of America Free Trade Agreement signed on 5 August 2004 (the "**Treaty**") with respect to the interpretation of Article 10.4 (Most-Favoured-Nation Treatment) and Article 10.18.1 (Limitations Period) of the Treaty.

9. By letter of 24 March 2025, the Tribunal informed the Parties of its decision that the Parties shall address the Additional Objections and whether they should, in whole or in part, be bifurcated or joined to the merits, in their respective submissions pursuant to the calendar in Annex B to PO1, as amended per the Tribunal's decision of 20 January 2025, and that the Tribunal will then decide within 30 days of the Rejoinder on Jurisdictional Objections, ahead of the hearing on jurisdiction, whether the Additional Objections should, in whole or in part, be bifurcated. The Tribunal also gave the Parties further indications on how they should proceed in the interest of procedural efficiency, without prejudice to their right to submit further arguments. The Tribunal indicated that a reasoned decision on this issue would be rendered shortly.

10. After summarizing the Parties' positions in **Section III**, the Tribunal analyses the issues before it in **Section IV**. The Tribunal's decision is set out in **Section V**. This decision does not prejudge any decision regarding the Additional Objections and all considerations herein are made on the basis of a preliminary analysis.

III. SUMMARY OF THE PARTIES' POSITIONS

A. THE RESPONDENT'S POSITION

11. According to the Respondent, its Additional Objections must be considered in full and decided upon in the bifurcated proceeding. The Respondent argues, in substance, as follows.

12. *First*, pursuant to PO3 and the Arbitration Rules, the Additional Objections must be decided in the bifurcated proceeding. In substance, the Respondent argues as follows:

- PO3 explicitly directed Honduras to "raise any additional jurisdictional objections it may have in its memorial in the bifurcated proceeding". The Tribunal "did not impose any additional requirement that Honduras must separately justify each objection's suitability for bifurcation.

Imposing such a requirement post hoc would contradict the Tribunal's own directive".[1] PO3 bifurcated the proceeding to address jurisdictional questions as a category.[2]

- According to the Respondent, the Claimants attempt to "create an artificial distinction between 'raising' a jurisdictional objection and 'briefing' it fully. The Respondent adds that "[t]his interpretation finds no support in the applicable ICSID Arbitration Rules or, in general, the international arbitration practice [and that] [u]nder the ICSID framework, there is no rigid procedural distinction between simply raising a jurisdictional objection and fully briefing it. In practice, to raise an objection is to present it with supporting argumentation".[3]

- The Respondent argues that "Article 41(2) of the ICSID Convention provides that 'any objection' […] on whether a dispute is beyond the Centre's jurisdiction or the tribunal's competence 'shall be considered' by the tribunal, which then decides whether to deal with it as a preliminary question or to join it to the merits." It further adds that, "[o]nce the tribunal has exercised this power and decided to hear certain objections in a preliminary (bifurcated) phase, the tribunal's authority under Article 41(2) is engaged to dispose of those objections in that phase. The 2022 ICSID Arbitration Rule 44(2) mirrors the Convention by setting criteria for bifurcation at the time a request is made". The Respondent further argues that "[t]ribunals have treated those criteria as relevant only to the initial decision of whether to bifurcate" and "[o]nce bifurcation is granted, there is no provision stating that the respondent must re-prove that each jurisdictional objection meets the Rule 44(2) standard". The Respondent states that "[t]he Tribunal already exercised its discretion under Article 41(2) by deciding to bifurcate". Since "the jurisdictional phase is currently underway, the Tribunal's responsibility should be to decide the objections on jurisdiction, not to re-evaluate whether it should be deciding them".[4]

- According to the Respondent, "ICSID case law shows tribunals have been willing to consider additional jurisdictional objections introduced after the initial bifurcation decision as long as they fall within the scope of the jurisdictional phase". In *Strabag v. Poland*, the respondent raised an additional objection while the jurisdiction phase was underway, and the tribunal decided to address it in the jurisdictional phase, even though the claimants protested that Poland "could have raised this further jurisdictional objection earlier".[5]

- ICSID tribunals have repeatedly affirmed that considering facts at the jurisdictional stage is appropriate for deciding jurisdictional questions, while refraining from any premature merits'

[1] Respondent's letter of 14 March 2025, p. 1.
[2] Respondent's letter of 20 March 2025, p. 4.
[3] Respondent's letter of 20 March 2025, p. 1.
[4] Respondent's letter of 20 March 2025, p. 2-3.
[5] Respondent's letter of 20 March 2025, p. 3.

determinations. As stated in *Phoenix Action v. Czech Republic*, the facts related to jurisdiction must be proven at the jurisdictional phase.[6] Also, as stated in *Tidewater v. Venezuela,* "it is axiomatic that no findings of fact made by an international tribunal in the context of a jurisdictional challenge can bind it in its subsequent determination of the merits […]".[7]

13. *Second*, in any event, Additional Objections 1 and 2 are precisely the type of threshold jurisdictional questions that should be resolved before proceeding to the merits:

- Additional Objection 1, if successful, would "completely bar several of Claimants' claims under Article 10.18.1 of the Treaty. It is thus *prima facie* serious and substantial." Moreover, the Respondent argues that "[f]ar from requiring 'an examination of the merits' as Claimants suggest, this objection requires only a determination of when Claimants first acquired knowledge of the alleged breaches". This temporal limitation is not so intertwined with the merits of the case as to make bifurcation impractical.[8]

- Additional Objection 2 goes to the very heart of whether the Claimants qualify as protected investors under the Treaty. It is thus also *prima facie* serious and substantial. Contrary to the Claimants' contention, examining the corporate ownership chain is not "a fact and evidence-intensive determination" that would be burdensome in the jurisdictional phase.[9]

- The Claimants' argument that these objections are intertwined with the merits ignores the fundamental distinction between the factual context necessary to understand the dispute and the substantive evaluation of the claims. As stated by the tribunal in *Tidewater v. Venezuela*, findings of fact made in the context of a jurisdictional challenge cannot bind tribunals in their subsequent determination of the merits of the dispute.[10]

- As concerns Additional Objection 3, the Respondent acknowledges that this objection is intertwined with the merits and that it is possible that the Tribunal will join it to the merits, but that it has raised it in its Memorial on Jurisdictional Objections to comply with PO3.[11]

14. *Third,* the Respondent argues that addressing these Additional Objections in the bifurcated proceeding would promote procedural efficiency.[12] Also, contrary to what the Claimants assert, including these Additional Objections in the bifurcated proceeding will not "unfairly broaden the

[6] Respondent's letter of 20 March 2025, p. 2.
[7] Respondent's letter of 20 March 2025. p. 2.
[8] Respondent's letter of 14 March 2025, p. 1-2.
[9] Respondent's letter of 14 March 2025, p. 2.
[10] Respondent's letter of 20 March 2025, p. 3-4.
[11] Memorial on Jurisdictional Objections, paras. 249-251 and Respondent's letter of 20 March 2025, p. 3.
[12] Respondent's letter of 14 March 2025, p. 1.

scope of the jurisdictional hearing scheduled for September 2025", as it will not require additional hearing days or create any procedural delay.[13]

15. On these bases, the Respondent requests the Tribunal to decide that the Additional Objections shall be considered and decided upon in the bifurcated phase.

B. THE CLAIMANTS' POSITION

16. The Claimants submit, in substance, that PO3 does not imply that any additional objections must be briefed and decided upon in the bifurcated proceeding, and that the Additional Objections under review should be joined to the merits:

- PO3 requires that the Respondent raise any jurisdictional objections in its Memorial on Jurisdictional Objections, but does not give it *carte blanche* to brief any objection and to require the Tribunal to decide upon them in the bifurcated proceeding. Raising a jurisdictional objection is not the same as briefing it. The Respondent should have raised its Additional Objections by providing a summary thereof and justification for bifurcation. PO3 required the Respondent to raise any additional objection in the Memorial on Jurisdictional Objections so as not to frustrate the object and purpose of bifurcation.[14] PO3 makes clear that it is the Tribunal that decides which objections to examine in a bifurcated phase. It thus provides that, "[p]ursuant to Article 41(2) of the Convention, it is for the Tribunal to determine whether to examine any objection that a dispute is not within the jurisdiction of the Centre, or for other reasons [that it] is not within the competence of the Tribunal, as a preliminary question or to join it to the merits of the dispute".[15] Moreover, "[u]nder the ICSID Convention and Arbitration Rules, a bifurcation request and a tribunal's decision on such request [are] specific to the jurisdictional or preliminary objection(s) contained in the request for bifurcation". ICSID Arbitration Rule 42(1) thus provides that "[a] party may request that *a question* be addressed in a separate phase of the proceeding ("request for bifurcation")."[16] The Claimants argue that "Honduras bears the burden of showing that its preliminary objections meet certain criteria to warrant bifurcation".[17] The Respondent's reference to *Strabag v. Poland* is inapposite because the respondent State had first notified the additional objection, which was purely legal in nature, whereafter the parties agreed not to address its substance at the hearing and to address it in post-hearing briefs.[18]

[13] Respondent's letter of 14 March 2025, p. 3.
[14] Claimants' letter of 10 March 2025, p. 1-2; Claimants' letter of 17 March 2025, p. 2.
[15] Claimants' letter of 17 March 2025, p. 2.
[16] Claimants' letter of 21 March 2025, p. 1 and footnote 3 (emphasis added by the Claimants).
[17] Claimants' letter of 10 March 2025, p. 2.
[18] Claimants' letter of 21 March 2025, footnote 6.

- Contrary to what the Respondent asserts, the tribunal in *Phoenix Action v. Czech Republic* reasoned that jurisdictional facts should be proven at the jurisdictional stage "unless the question could not be ascertained at that stage, in which case it should be joined to the merits", and it added that, "[i]f the alleged facts are facts that, if proven, would constitute a violation of the relevant BIT, they have indeed to be accepted as such at the jurisdictional stage, until their existence is ascertained or not at the merits level".[19]

- According to the Claimants, "[f]orcing [them] to spend time and resources on responding to preliminary objections in a bifurcated phase—only for the Tribunal to determine that such objections are inappropriate for decision at this stage—would be highly inefficient and unnecessarily costly". The Respondent's admission that Additional Objection 3 may be joined to the merits, directly supports the Claimants' position that fully briefing the Respondent's new jurisdictional objections – when the Tribunal may ultimately defer a decision on them to the next phase – would be inefficient.[20]

- Additional Objection 1 is too intertwined with the merits to merit bifurcation. "To be able to determine if the claims fall outside the Treaty's limitations period, the Tribunal would have to undertake an analysis of the 2022 New Energy Law and the Government's ensuing conduct, as well as the detrimental impact it has had on Claimants and their investment", and determine whether these constitute an arbitrary and non-transparent abuse of the Respondent's sovereign authority.[21]

- Bifurcation of Additional Objection 2 would not materially reduce time and cost in the proceeding. Assessing the merits of this objection would require a fact and evidence-intensive determination of the Respondent's challenge, notably because Pacific Solar was allegedly forced by the Respondent's behaviour to seek restructuring its project finance loans in an attempt to salvage the project.[22] To analyze the Claimants' ownership and control over the investment, the Tribunal would have to "simultaneously analyze the project's financial structure and viability, an analysis that would overlap with the same facts that underlie Claimants' expropriation and damages claims. Because Procedural Order No. 3 has already excluded the expropriation claim from the bifurcated phase, bifurcating on a ground that has overlapping facts with this claim would lead to procedural inefficiencies".[23] According to the Claimants, "the day after Respondent filed its Memorial on Jurisdictional Objections, the Electrical Energy Regulatory Commission ("CREE"), under the guise of an 'inspection,' notified Pacific Solar

[19] Claimants' letter of 21 March 2025, p. 3 and footnote 14.
[20] Claimants' letter of 21 March 2025, p. 2-3.
[21] Claimants' letter of 10 March 2025, p. 2; Claimants' letter of 17 March 2025, p. 4.
[22] Claimants' letter of 10 March 2025, p. 2-3 and footnote 12.
[23] Claimants' letter of 17 March 2025, p. 5.

that it would be visiting the plant and requesting documents". During the visit, the CREE singled out [redacted] trust agreement. "[The] Respondent's conduct should not be countenanced by letting it brief this objection without explaining why it is warranted".[24]

- Additional Objection 3 is, by definition, intertwined with the merits, as the Respondent acknowledges.[25]

- These new objections would unfairly broaden the scope of the jurisdictional hearing scheduled for September 2025. [26]

17. Accordingly, the Claimants request that the Additional Objections be excluded from the bifurcated proceeding because they do not warrant bifurcation. In the alternative, the Claimants submit that if the Respondent wishes to address these new objections during the bifurcated phase of the proceeding, it must first establish that they warrant bifurcation.[27]

IV. THE TRIBUNAL'S ANALYSIS

A. THE TRIBUNAL'S POWER WITH RESPECT TO THE ADDITIONAL OBJECTIONS

18. The first question debated between the Parties is whether the Tribunal has the power, pursuant to PO3, the ICSID Convention and the Arbitration Rules, to decide whether or not to join the Additional Objections to the merits.

19. Unlike what the Respondent asserts, PO3 cannot be interpreted as meaning that any additional objections which the Respondent would raise in its Memorial on Jurisdictional Objections would necessarily be decided upon in the bifurcated proceeding.

20. The Respondent's interpretation is contradicted by the reasons set out in PO3 why the Tribunal requested the Respondent to raise any additional jurisdictional objections it might have in its Memorial in the bifurcated proceeding.[28] While the Respondent's Request for Bifurcation reserved its right to raise additional objections "in the future", the Tribunal considered that this should not frustrate the object and purpose of bifurcation, *i.e.*, its intended efficiency,[29] and in addition, that as the preliminary objections raised by the Respondent illustrated, "decisions whether to bifurcate preliminary objections or not may raise issues of substantive justice".[30] As stated in PO3, substantive

[24] Claimants' letter of 10 March 2025, p. 2-3.
[25] Claimants' letter of 17 March 2025, p. 4.
[26] Claimants' letter of 10 March 2025, p. 3; Claimants' letter of 17 March 2025, p. 5.
[27] Claimants' letter of 10 March 2025, p. 3; Claimants' letter of 17 March 2025, p. 6.
[28] PO3, para. 70.
[29] PO3, paras. 67-68.
[30] PO3, para. 69.

issues may render it "necessary or appropriate to address two or more objections together", [31] as the Tribunal indeed did in PO3.[32] Accordingly, Procedural Order No. 3 cannot be interpreted as meaning that the Tribunal had finally decided to fully deal with any additional objections in the bifurcated proceeding, to the possible detriment of efficiency and substantive justice. To the contrary, the Tribunal's request that any additional objection be filed in the Memorial on Jurisdictional Objections aimed at allowing the Tribunal to determine, notably, whether such objections should be addressed together with any of the Initial Objections that the Tribunal had decided to bifurcate, or whether they should be joined to the merits.

21. This finds further confirmation in the Respondent's position that its Additional Objection 3 on the alleged purely contractual nature of the claim and the ensuing lack of jurisdiction, which the Respondent has raised further to the Tribunal's request in PO3, is intertwined with the merits and that it is possible that the Tribunal will join it to the merits.[33]

22. The above is not contradicted by the ICSID Convention nor by the Arbitration Rules, quite the contrary. Article 41(2) of the Convention confers a broad power on arbitral tribunals to address jurisdictional objections as a preliminary matter or to join them to the merits. The Arbitration Rules provide for the possibility to bifurcate – or not – at the initiative of a party or at the tribunal's initiative as provided in Arbitration Rules 43(3) and 43(4).

23. In conclusion on this point, the Tribunal finds that, in accordance with PO3, the ICSID Convention and the Arbitration Rules, it has the power to decide whether to bifurcate the Additional Objections or join them to the merits.

B. THE APPROPRIATE TREATMENT OF THE ADDITIONAL OBJECTIONS

1. General Approach

24. The question is now how the Tribunal should exercise its power to bifurcate or not to bifurcate the Additional Objections.

25. The Claimants have requested the Tribunal to exclude the Additional Objections from the bifurcated proceeding or, in the alternative, to order the Respondent to first establish that these Additional Objections warrant bifurcation, through a short submission and grant the Claimants the right to a short response.[34] The Respondent did not specifically address this issue given its principled position that the Tribunal lacked the power to bifurcate or not.

[31] PO3, para. 69.
[32] PO3, paras. 53, 58, 59.
[33] Memorial on Jurisdictional Objections, paras. 249-251 and Respondent's letter of 20 March 2025, p. 3.
[34] Claimants' letter of 21 March 2025, p. 3.

26. Further, the Claimants consider that addressing the Additional Objections in full in the bifurcated proceeding would unfairly broaden the scope of the September 2025 hearing, [35] which the Respondent disputes as it will not require additional hearing days or create any procedural delay.[36]

27. This makes it clear that the Tribunal's decision in the present instance must consider its potential impact at three stages:

- *first*, that of a possible incidental proceeding in the present bifurcated proceeding, aimed at determining whether the Additional Objections must be bifurcated;
- *second*, that of the impact of the Tribunal's decision on the Parties' written submissions in the present bifurcated proceeding; and
- *third*, that of the impact of the Tribunal's decision on the hearing in the present bifurcated proceeding.

28. Starting with the last point, the Tribunal does not consider that adding the consideration of the Additional Objections in the present bifurcated proceeding would "unfairly" broaden their scope or require significantly greater time at the hearing. The number of hearing days was decided upon before it was known how many objections the Parties and the Tribunal would have to address. At the same time, there are already several objections to be addressed at that hearing. It would therefore be more efficient to decide on the bifurcation of the Additional Objections ahead of the hearing.

29. This leaves two options open:

- As a first option, the Tribunal could decide on bifurcation of the Additional Objections on short notice before the Claimants' Counter-Memorial on Jurisdictional Objections. The disadvantage of this option is that it inserts an incidental proceeding in the time period allocated to the Claimants for the submission of their Counter-Memorial. While the Claimants themselves have proposed this approach, it would require the Tribunal to reach a decision on sufficiently short notice to not unduly impact on the time period allocated to the Claimants for their Counter-Memorial. Yet, the correspondence between the Parties evidences the complexity of the questions before the Tribunal, which is amplified by the fact that the Tribunal must consider the Additional Objections in light of the Original Objections and PO3. Adapting the calendar of the bifurcated proceeding may, in turn, impact on the Parties' and the Tribunal's organization.
- As a second option, the Tribunal could decide on bifurcation of the Additional Objections after the Rejoinder on Jurisdictional Objections but ahead of the hearing. The disadvantage of this option is that the Parties would have to address additional issues in their written submissions in

[35] Claimants' letter of 10 March 2025, p. 3; Claimants' letter of 17 March 2025, p. 5.
[36] Respondent's letter of 14 March 2025, p. 3.

the present bifurcated proceeding, *i.e.*, whether the Additional Objections should be bifurcated or not, but also, in the alternative, whether the Additional Objections are well-founded or not.

30. The Tribunal considers that the choice between the two just-mentioned options notably depends on the following factors:

- *First*, in line with the reasons set out in PO3,[37] the Tribunal should aim at making the most efficient use of time that has been allocated to the bifurcated proceeding in the procedural calendar.

- *Second*, regard should be had to the extent to which the Additional Objections will require delving into the merits of the case – a question amply discussed by the Parties. As the Respondent observes, it has been considered that tribunals are not bound in their determination of the merits by factual findings made at the phase of jurisdictional objections .[38] It remains that tribunals must strive to avoid making findings at the stage of objections to jurisdiction that they may revise at the merits phase. Also, as the Claimants observe,[39] one should also avoid overly burdensome evidence-intensive determinations in an incidental proceeding with relatively short deadlines and a relatively short hearing.

31. In relation to the second factor, both the Respondent and the Claimants have referred to the award in *Phoenix Action v. Czech Republic*. The Respondent argued that "ICSID tribunals have repeatedly affirmed that considering facts at the jurisdictional stage is appropriate for deciding jurisdictional questions, while refraining from any premature merits' determinations. For example, in *Phoenix Action v. Czech Republic*, the tribunal engaged in an extensive analysis of the facts to determine whether the claimant's investment was protected under the BIT/ICSID Convention. The tribunal noted that certain facts – those related to jurisdiction – must be proven at the jurisdictional phase".[40] The Claimants responded that, as "stated by the tribunal in *Phoenix Action v. Czech Republic* which Respondent relies on, jurisdictional facts should be proven at the jurisdictional stage 'unless the question could not be ascertained at that stage, in which case it should be joined to the merits'", and further that, "[i]f the alleged facts are facts that, if proven, would constitute a violation of the relevant BIT, they have indeed to be accepted as such at the jurisdictional stage, until their existence is ascertained or not at the merits level".[41] The Tribunal observes that the passage of *Phoenix* referred to by the Parties indeed considered two hypotheses:

> If the alleged facts are facts that, if proven, would constitute a violation of the relevant BIT, they have indeed to be accepted as such at the jurisdictional stage, until their

[37] PO3, para. 64.
[38] Respondent's letter of 20 March 2025, p. 4.
[39] Claimants' letter of 10 March 2025, p. 2.
[40] Respondent's letter of 20 March 2025, p. 3.
[41] Claimants' letter of 21 March 2025, p. 3 and footnote 14.

> existence is ascertained or not at the merits level. On the contrary, if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage. For example, in the present case, all findings of the Tribunal to the effect that there exists a protected investment must be proven, unless the question could not be ascertained at that stage, in which case it should be joined to the merits.[42]

32. Since both Parties have referred to this award, the Tribunal may invite the Parties to consider the distinction made therein between:

- on the one hand, facts on which jurisdiction rests and which must be proven at the jurisdictional stage (unless the question cannot be ascertained at that stage in which case it should be joined to the merits). To clarify what this approach implies, a reference can again be made to *Phoenix*:

> The tribunal must take into account the facts and their interpretation as alleged by the claimant, as well as the facts and their interpretation as alleged by the respondent, and take a decision on their existence and proper interpretation. To take a simple example, if under a BIT entered into by Italy, a tribunal only has jurisdiction if the claimant is an Italian investor and if, at the jurisdictional level, a claimant asserts that he is Italian, and the respondent alleges that he is not, the tribunal cannot simply accept the facts as asserted by the claimant and confirm its jurisdiction, but it has to make a decision in order to verify whether or not it has jurisdiction *ratione personae* over the investor, based on his Italian nationality.[43]

- on the other hand, facts that, if proven would constitute a violation of the treaty and which must be accepted as such at the jurisdictional stage.

33. With these factors in mind, the Tribunal will now consider the specifics characteristics of each Additional Objection.

2. Additional Objection 1

34. According to *Additional Objection 1*, the Claimants' claims are time-barred on the basis of the limitation period contained in the Treaty.

35. The Parties disagree on the extent to which this Additional Objection is intertwined with the merits and will require the Tribunal to delve into the merits of the case. In the Tribunal's preliminary view, this disagreement appears to stem in part from the Parties' respective positions as to what the relevant facts are and how they may qualify. The Respondent appears to focus on the role of the 2022 New Energy Law,[44] and refers in its Memorial on Jurisdictional Objections to case law regarding the application of limitation periods to continuous facts.[45] The Claimants appears to focus on the series, accumulation or combination of events.[46]

[42] *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, **RL-076**, para. 61.
[43] *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, **RL-076**, para. 63.
[44] E.g., Respondent's letter of 14 March 2025, p. 1.
[45] Memorial on Jurisdictional Objections, para. 116.
[46] E.g., Claimants' letter of 10 March 2025, p. 2.

36. The question of how the alleged facts qualify – e.g., as continuous facts or differently – appears to be a question of mixed fact and law. The question of how the limitation period applies to these different types of facts appears to be a question of law.

37. On a preliminary basis, the Tribunal considers that there is a possibility that the questions of law may appropriately be addressed in the present bifurcated proceeding. The Parties and the Tribunal could address the legal question of how the limitation period applies to different types of acts – instantaneous, continuous, composite, etc. The United States of America's non-disputing party submission likewise addresses some of these issues as a matter of treaty interpretation without taking position, in that submission, on how that interpretation applies to the facts of this case.[47]

38. Further, while the qualification of the alleged facts appears to also be a factual issue which may be intertwined with the merits, the Tribunal considers, on a preliminary basis, that there is a possibility that it will prove unnecessary to make an actual factual finding in this respect if (always without prejudice to their right to bring further arguments) the Parties address Additional Objection 1 based on the assumption that the facts alleged by the Claimants as constituting violations of the Treaty are established.[48]

39. The Parties' briefing these issues (together with any additional arguments they wish to present) in the written phase of this bifurcated proceeding will assist the Tribunal in determining whether the Additional Objection should be decided upon in the bifurcated proceeding or joined to the merits.

40. At the same time, this will not unduly burden the written phase of the bifurcated proceeding, and will allow for making the most efficient use of the time allocated to the bifurcated proceeding. Indeed, addressing these issues may, in the abstract, lead to a finding (i) that none of the Claimants' claims are time-barred; or (ii) that all the claims are time-barred, in which case this would terminate the entire proceeding; or (iii) that some of the claims are time-barred, in which case the scope of the merits phase (if any) will be reduced accordingly; or (iv) it may lead to a decision by the Tribunal on the *interpretation* of the limitation period, leaving its application to the merits phase.

41. In order to maximize the efficiency of the bifurcated proceeding, the Tribunal will request the Parties to address the applicability of the limitation period in the presence of continuous facts (a hypothesis envisaged by the Respondent), but also in the presence of composite acts, which might *prima facie* be another possible qualification of the events as they are presented by the Claimants.[49]

[47] United States of America's Submission pursuant to Article 10.20.2 of the Treaty, para. 1 and paras. 6 ff.
[48] See *supra*, para. 31. This suggested approach is preliminary and non-exhaustive and must not be understood as taking as stand on the Respondent's position at para. 118 of its Memorial on Jurisdictional Objections that "in determining jurisdiction, a tribunal cannot rest simply on how a claimant has formulated its case and the respondent formulated its reply" but must "discern the reality of the case".
[49] E.g., Claimants' letter of 10 March 2025, p. 2, referring to "the 2022 New Energy Law and the Government's ensuing conduct".

42. The Tribunal considers that, on these bases, and without prejudice to the Parties' arguments, Additional Objection 1 could be addressed by the Parties in their written submissions in the present bifurcated proceeding, whereafter the Tribunal would decide on bifurcation after the Rejoinder on Jurisdictional Objections but ahead of the hearing.

3. Additional Objection 2

43. Additional Objection 2 is concerned with ownership and control over the alleged investment. In the Tribunal's preliminary understanding, the objection has two limbs. According to the first limb, the Claimants do not evidence that they own and control the investment through the various corporations that are notably mentioned in the Claimants' Memorial and accompanying exhibits.[50] According to the second limb, the Claimants have transferred the rights of what they claim is (part of) their investment, Pacific Solar, to a third party, [redacted] The Claimants' notably respond that these issues raise evidentiary issues that are proper to the merits, including the fact that Pacific Solar has been forced by the Respondent's behaviour to enter into a trust agreement with [redacted]

44. On a preliminary basis, the Tribunal considers that the establishment of the Claimants' uninterrupted ownership and control of the investment through the chain of corporations identified in their written submissions hitherto, appears to be a rather well-circumscribed issue presenting no relation with the merits. Addressing this issue in the written submissions in the present bifurcated proceeding, before the Tribunal decides whether to bifurcate or not, will not unduly broaden the scope of these written proceedings. Also, unless the Tribunal were to find that it lacks jurisdiction on another basis, the Claimants will have to address this issue in any event. Briefing this issue in the present bifurcated proceeding thus contributes to an efficient use of the time allocated to said proceeding.

45. Always on a preliminary basis, the second limb of this Additional Objection raises issues regarding the nature of the agreement between these two entities, which also appear to be well-circumscribed. Leaving aside the Claimants' response, the second limb can also be briefed in the written submission of the present bifurcated proceeding, together with the first limb.

46. Conversely, the Claimants' response whereby the agreement with [redacted] is a consequence of the Respondent's wrongful acts, may raise more complex issues intertwined with the merits. Nevertheless, it appears to the Tribunal that, without prejudice to the Parties' right to present further arguments, the Claimants' response may, possibly, also be addressed in a sufficiently circumscribed manner. That would be the case if, again, one were to proceed on the assumption that the facts alleged by the Claimants to be wrongful are established. The question would then be

[50] Claimants' Memorial, para. 167 and Ownership Structure Chart for Pacific Solar Energy, S.A. de C.V., **C-027**.

whether, on the assumption that Pacific Solar was, as the Claimants allege, forced by the Respondent's behaviour to transfer its rights to [redacted], said transfer should be disregarded to establish the Claimants' ownership and control over the investment as a condition to the Tribunal's jurisdiction.

47. In the Tribunal's preliminary view, this is a well-circumscribed legal question. The answer to this question may potentially (depending on the Tribunal findings regarding the other aspect of this Additional Objection, and depending on the fate of the other objections) put an end to the entire proceeding. That would *prima facie* be the case if the Tribunal were to find, for example, that Pacific Solar did transfer its rights to [redacted] in a manner which affects the Claimants ownership and control over the investment for jurisdictional purposes, *and* that this remains unaltered by the fact that the Claimants were allegedly forced to transfer their rights due to the Respondent's wrongful acts. In the alternative, the briefing of this legal question may limit the scope of the subsequent proceeding on the merits.

48. The Parties' briefing these issues (together with any additional arguments they wish to present) in the written phase of this bifurcated proceeding will greatly assist the Tribunal in determining whether the Additional Objection should be decided upon in the bifurcated proceeding or joined to the merits. At the same time, this will not unduly burden the written phase of the bifurcated proceeding, and it will contribute to an efficient use of the time allocated to that proceeding.

49. The Tribunal considers that, on these bases, and without prejudice to the Parties' additional arguments, this Additional Objection could be addressed by the Parties in their written submissions in the present bifurcated proceeding, whereafter the Tribunal would decide on bifurcation after the Rejoinder on Jurisdictional Objections but ahead of the hearing.

4. Additional Objection 3

50. Additional Objection 3 is to the effect that the Claimants' claims are purely contractual, and that the Tribunal has no jurisdiction over purely contractual claims.

51. The Respondent itself observes that this objection is intertwined with the merits. Indeed, the Tribunal cannot find that the Claimants' claims are purely contractual absent a prior finding that the Respondent did not breach any of the substantive standards of the Treaty. Yet, it follows from PO3 that the Claimants' allegations regarding expropriation and full security and protection will be addressed at the merits phase, if any. Accordingly, the Tribunal cannot find in the present bifurcated proceeding that the Claimants' claims are purely contractual.

52. It remains that Additional Objection 3 raises the legal question whether, and if so, under what conditions, the Tribunal has jurisdiction over purely contractual claims. This legal question is *prima facie* closely related to the Respondent's original objections regarding the MFN clause (Original

Objection 4) and the existence of a dispute relating to an investment agreement within the meaning of Article 10.28 of the Treaty (Original Objection 5), which the Tribunal decided to bifurcate in PO3. From the viewpoint of procedural efficiency and coherence, it is therefore appropriate to address this legal aspect of Additional Objection 3 in the written submissions in the present bifurcated proceeding.

C. OVERALL ASSESSMENT

53. Based on the above, the Tribunal considers, on balance, that the Parties should brief the Additional Objections in their written submissions in the ongoing bifurcated proceeding, whereafter the Tribunal will decide on bifurcation within 30 days after the Rejoinder on Jurisdictional Objections.

54. Without prejudice to their right to present additional arguments, the Parties are requested to brief the Additional Objections in line with the above reasons, and as indicated more succinctly in the decision below.

V. DECISION

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

(A) The Parties are requested to address the Additional Objections and whether they should, in whole or in part, be bifurcated or joined to the merits, in their respective submissions pursuant to the calendar in Annex B to PO1, as amended per the Tribunal's decision of 20 January 2025.

The Tribunal will decide whether the Additional Objections should, in whole or in part, be bifurcated within 30 days after the Rejoinder on Jurisdictional Objections.

(B) Without prejudice to their right to present any additional argument, the Parties are requested to:

1) With respect to Additional Objection No.1 on the Treaty's limitation period:

a. Address the Objection based on the assumption that the facts alleged by the Claimants qualify as violations of the Treaty.

b. Discuss whether and if so, how, the limitation period applies (i) to continuous acts and (ii) to composite acts.

2) With respect to Additional Objection No. 2 on the Claimants' ownership and control over the investment:

a. Discuss whether the Claimants had or have ownership and/or control over the investment through the chain of corporations notably referred to in paragraph 167 of

the Claimants' Memorial by reference to Exhibit C-27, for the purpose of determining the Tribunal's jurisdiction.

b. Discuss the potential impact of the agreement between Pacific Solar and [redacted] on such ownership and/or control and on the Tribunal's jurisdiction.

c. Discuss whether, on the assumption that, as the Claimants allege, Pacific Solar was forced by the Respondent's behaviour to transfer its rights to [redacted], this transfer should be disregarded for purposes of establishing the Claimants' ownership and control over the investment as a condition to the Tribunal's jurisdiction.

3) With respect to Additional Objection No. 3 on the alleged purely contractual nature of the Claimants' claims and the lack of jurisdiction of the Tribunal over such claims:

a. Focus on the *legal* question whether, and if so, under what conditions, the Tribunal has jurisdiction over purely contractual claims.

For the Tribunal,

[signed]

Prof. Nicolas Angelet
President of the Tribunal
Date: 4 April 2025