INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

FERNANDO PAIZ ANDRADE AND ANABELLA SCHLOESSER DE LEÓN DE PAIZ

Claimants

v.

REPUBLIC OF HONDURAS

Respondent

ICSID Case No. ARB/23/43

COUNTER-MEMORIAL ON JURISDICTIONAL OBJECTIONS

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5 May 2025

WHITE & CASE
Counsel for Claimants

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CLAIMANTS' COUNTER-MEMORIAL ON JURISDICTIONAL OBJECTIONS

1. Mr. Fernando Paiz Andrade ("**Mr. Paiz**") and Ms. Anabella Schloesser de León de Paiz ("**Ms. Schloesser de Paiz**") (together, the "**Paizes**," the "**Investors**," or "**Claimants**"), nationals of Guatemala, acting on their own behalf and on behalf of Pacific Solar Energy, S.A. de C.V. ("**Pacific Solar**"), a Honduran company that the Investors own and control in accordance with Article 10.16.1(b) of the Central America - Dominican Republic - United States Free Trade Agreement ("**CAFTA-DR**" or the "**Treaty**"),[1] hereby submit their Counter-Memorial on Jurisdictional Objections in response to the Memorial on Jurisdictional Objections ("**Memorial on Jurisdiction**") filed by the Republic of Honduras ("**Honduras**," "**Respondent**," or the "**State**") in accordance with the Tribunal's decision to bifurcate the proceedings in Procedural Order No. 3 dated 20 December 2024, Annex B of Procedural Order No. 1 amended as per the Tribunal's decision of 20 January 2025, and the Tribunal's decision on additional jurisdictional objections in Procedural Order No. 4 dated 4 April 2025.

I. INTRODUCTION

2. As set forth in Claimants' Memorial on the Merits, Honduras has flagrantly violated the critical, specific commitments that it made to the Paizes and Pacific Solar through the agreements and legal framework that incentivized the Paizes' investment, following Honduras's enactment of legislation in 2007 and 2013 to attract investment in renewable energy (the "**Renewables Laws**").[2] Honduras has benefitted from the Paizes' investments in the Nacaome I

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

[2] Law Promoting the Generation of Electricity with Renewable Resources (Decree No. 70-2007 dated 29 June 2007), published in the Official Gazette dated 2 Oct. 2007 (the "**2007 Renewables Law**") (**Exh. C-4**); Law Promoting the Generation of Electricity with Renewable Resources (Decree No. 138-2013 dated 31 July 2013) (the "**2013 Renewables Law**"), published in the Official Gazette dated 1 Aug. 2013 (**Exh. C-5**), at A.1, First Recital ("Whereas: it is the Government's responsibility to promote technological diversification and transform the power generation matrix to include a predominant share of renewable energy, thereby significantly reducing fossil fuel imports, which are subject to unpredictable price volatility that contributes to a gradual deterioration of the country's finances."), A.3, Sixth Recital ("[I]t is essential to develop renewable energy generation projects of all sizes and using all types of renewable resources; to achieve this, it is necessary to simplify and regulate certain provisions of the Law on the

Plant—a photovoltaic plant located in the Nacaome Valley, Honduras (the "**Plant**")—which has been generating clean energy for the Honduran people for nearly a decade. Claimants have done so through a framework of interrelated agreements that the State granted: a power purchase agreement (the "**PPA**") between Pacific Solar and the Empresa Nacional de Energía Eléctrica ("**ENEE**"), an institution of the State,[3] and the sole purchaser of electricity in the country; a State Guarantee with the Attorney General's Office and the Secretariat of Finance (the "**State Guarantee**"), guaranteeing the State is jointly and severally liable for ENEE's obligations under the PPA; and an Operations Agreement with the Secretary of Energy, Renewable Resources, Environment and Mines ("**SERNA**") (the "**Operations Agreement**," collectively, the "**Agreements**").[4] Under the Agreements, the State granted Pacific Solar key investment rights, on which Claimants relied in acquiring their investment in Honduras.

3. Honduras has breached the Treaty through a series of sovereign measures, beginning with the enactment of a law (the "**2022 New Energy Law**"), that destroyed Claimants' rights under the Agreements and have rendered the Paizes' investments nearly worthless. The 2022 New Energy Law imposed Honduras's mandate to "renegotiate" the PPA under the threat of "termination" of the contractual relationship and "State acquisition" of Pacific Solar's assets if it did not agree to the renegotiated terms imposed by the State, which included Pacific Solar's waiver of its rights under the Renewables Laws and the Agreements.[5] Honduras has withheld [redacted] payments to Pacific Solar and has made clear its intention not to satisfy the significant outstanding debt. Honduras is utilizing the existing debt owed to Pacific Solar to exert pressure

Promotion of Electricity Generation from Renewable Energy Resources, enacted via Decree No. 70-2007, dated May 31, 2007, published in the Official Gazette on 2 October 2007.").

[3] *See* Law Creating Empresa Nacional de Energía Eléctrica (Decree 48-1957 dated 20 Feb. 1957), published in the Official Gazette dated 27 Feb 1957 (**Exh. C-6**), Arts. 1, 7; *see also* General Law of the Public Administration (Decree No. 146-86 dated 27 Oct. 1986), published in the Official Gazette dated 29 Nov. 1986 (**Exh. C-61**), Arts. 2, 3, 11, 47, 51, 53.

[4] Contract No. 002-2014, Power Purchase Agreement between *Empresa Nacional de Energía Eléctrica* (the National Company of Electric Energy) ("**ENEE**") and Pacific Solar Energy, S.A. de C.V. dated 16 Jan. 2014 (the "**PPA**") (**Exh. C-1**); the Support Agreement and Joint and Several Guarantee of the State of Honduras for the Performance of the Supply Agreement entered into by *Empresa Nacional De Energía Eléctrica* and Pacific Solar Energy, S.A. De C.V., Agreement 002-2014 provided by the Attorney General's Office and the Secretariat of Finance ("**SEFIN**") (Decree No. 113-2014 dated 19 Nov. 2014 and published in the Official Gazette on 28 Nov. 2014) dated 1 Oct. 2014 (the "**State Guarantee**") (**Exh. C-2**); and the Operations Contract between Pacific Solar and the Ministry of Natural Resources and Environment of Honduras ("**SERNA**") (Decree No. 109-2015 dated 26 Oct. 2015 and published in the official Gazette on 27 Nov. 2015) (the "**Operations Agreement**", together with the PPA and the State Guarantee, the "**Agreements**") dated 23 Feb. 2014.

[5] New Energy Law (**Exh. C-3**), Art. 5. *See* Memorial on the Merits §§ II.F.1, IV.

and to lower the Plant's remuneration to the bare minimum, in an effort to drain Pacific Solar and force it to accept the renegotiation terms unilaterally imposed by the State, measures that have forced Pacific Solar into a precarious financial situation—conduct that is in breach of the Treaty. The Government has also used its control over the electricity system through the System Operator (now in ENEE's hands) to limit the energy Pacific Solar injects into the electrical system,[6] and has prevented generators from selling energy to third parties.[7]

4. Through a second witness statement ("**Paiz WS II**"), Claimant Mr. Fernando Paiz, investor and Director of Pacific Solar, addresses certain factual aspects raised by the objections. Mr. Paiz explains that he "understood the passage of the New Energy Law to mean that [his] investment would be expropriated, at a price, if any, that would be dictated by the Government on a whim, unless we agreed to the PPA terms that the Government wanted to impose on Pacific Solar."[8] Mr. Paiz describes the significant financial harm that has resulted from the Government's order to renegotiate the PPA, and that he has given up hope that the Government will "ever come current with its outstanding debt to Pacific."[9] He explains that his investment "has a dark cloud over it, with complete uncertainty about its present and future rights, because we do not know what the Government will do with the existing Agreements as they stand."[10] Mr. Paiz further describes the harm he has personally suffered as a result of Honduras's treatment to his investment: "[d]uring a stage in my life when I expected to be enjoying the benefits of my hard work and investments made throughout my lifetime, I am instead involved in a public dispute, tied to my name and my wife's name, against a country on which I bet and trusted a decade earlier."[11]

5. In an attempt to avoid liability for its Treaty breaches, Respondent has raised seven jurisdictional objections in total, including four objections that the Tribunal has bifurcated, one that Respondent has abandoned based on Ms. Paiz's notice under the Treaty, and two belated

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6 Memorial on the Merits § II.F.2(a).

7 *See id.* ¶ 156.

8 Paiz WS II ¶ 13; Witness Statement of Fernando Paiz dated 20 Sept. 2018 ("**Paiz WS I**") ¶ 24. *See also Government Warns that It Will Take Over and Acquire Power Plants*, PROCESO DIGITAL dated 13 June 2023 (**Exh. C-28)**.

9 Paiz WS II ¶ 13. *See also id.* ¶ 14 ("Honduras's policies and actions harming my investment are taking place outside of the PPA, through laws, speeches, attacks, intimidations, and other means that started in 2022, which in turn are affecting Pacific Solar's rights under the Agreements and have had a devastating financial impact on the value of my investment.").

10 *Id.* ¶ 13.

11 *Id.* ¶ 16.

objections—Honduras's objections that Claimants' claims fall outside of the Treaty's limitations period and are merely contractual—that are not serious or substantial, would not dispose of the claims, and are far too intertwined with the merits to warrant bifurcation. As set forth below, each of these objections is meritless.

- **Respondent's recycled exhaustion objection is meritless as Legislative Decree No. 41-88 ("Decree 41-88") does not condition Honduras's consent to arbitration in the CAFTA-DR**.[12] Claimants were not required to exhaust local remedies before initiating an arbitration under the CAFTA-DR. Article 26 of the Convention on the Settlement of Investment Disputes Between States and Nationals of other States (the "**ICSID Convention**") reverses the traditional international law rule of exhaustion of local remedies, unless a State expressly conditions its consent to arbitration on an exhaustion requirement in the instrument of consent. The CAFTA-DR, which is the instrument providing Honduras's consent to arbitrate in this case, does not contain any requirement to exhaust local remedies.

  The *Honduras Próspera Inc. and others v. Republic of Honduras* ("***Próspera***"), a tribunal established pursuant to the CAFTA-DR, has already examined and rejected Honduras's recycled objection.[13] The *Próspera* tribunal held that the CAFTA-DR's waiver provision—requiring a claimant to waive its right to initiate or continue any local administrative or judicial proceedings before submitting a claim to arbitration—is inconsistent with an exhaustion requirement; as the later-in-time instrument, the provisions of the CAFTA-DR prevail over Honduras's Decree.[14] Honduras should be estopped from relying on its Decree to condition its consent to arbitrate, given its prior representations and conduct. In particular, Honduras "buried"[15] the exhaustion of remedies language in a Decree within the text of the ICSID Convention, failed to publish the Decree anywhere online, and did not alert ICSID to this alleged "condition" to its consent. Honduras also did not raise this objection in earlier arbitrations. It was only after the latest change in administration that Honduras unearthed the Decree and began invoking it in an attempt to evade liability. In light of this conduct and having expressly conditioned its consent to arbitration in the Treaty on having investors waive their rights to continue administrative and judicial proceedings challenging the measures and adherence to a three-year prescription period, Honduras cannot now insist that investors exhaust local remedies before pursuing arbitration (*see* Section II.A.1).

  Finally, even if Honduras had conditioned its consent to arbitrate on exhausting local remedies—which it has not done—any such requirement cannot bar jurisdiction here, because complying with the requirement would be a futile exercise, as there is no

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[12] Memorial on Jurisdiction § III.A.

[13] *Honduras Próspera Inc., St. John's Bay Development Company LLC, and Próspera Arbitration Center LLC v. Republic of Honduras*, ICSID Case No. ARB/23/2, Decision on Preliminary Objections Under Article 10.20.5 of CAFTA-DR dated 26 Feb. 2025 ("***Próspera***") (**CL-201**) ¶¶ 110-120.

[14] *Id.*

[15] *Id.* ¶ 52. *See* Decree No. 41-88 dated 25 Mar. 1988, published in the Official Gazette dated 4 Aug. 1988 (**Exh. R-3**), Art. 75.

adequate system of judicial protection for Claimants to pursue in Honduras. The Honduran judicial system is plagued by serious problems, including a lack of independence and serious delays.[16] The highest judicial authority—the Supreme Court—is controlled by the same political party that promulgated the New Energy Law and is actively pursuing an anti-investor agenda. In such circumstances, there would be no opportunity for an impartial and fair review. Finally, in light of the well-documented delays in the Honduran judicial system, it is unfathomable that Claimants could commence administrative or judicial proceedings and exhaust their remedies all the way to the highest judicial authority in Honduras in the span of three years, required by the Treaty's prescription period (*see* Section II.A.2).

- **The Tribunal has jurisdiction over the Paizes' claim that Honduras has failed to observe its obligations under the Agreements, which constitutes a Treaty breach by virtue of the most-favored-nation ("MFN") clause**. Honduras has failed to observe its obligations under the Agreements, which constitutes a Treaty breach by virtue of the MFN clause. Honduras breached its obligation under Article 10.4 of the Treaty to accord Pacific Solar treatment no less favorable than it accords to the investors of any other country, and to their investments, *i.e.*, MFN treatment.[17] Pursuant to the MFN clause, Claimants are entitled to any substantive protections available to investors from other countries, and to their investments, that are more favorable than those contained in the CAFTA-DR. Accordingly, through Article 10.4 of the Treaty, Claimants invoke the umbrella clauses in the Switzerland-Honduras Bilateral Investment Treaty ("**BIT**") and the Germany-Honduras BIT.[18] Contrary to Respondent's allegation,[19] the carve-out to MFN treatment contained in Article 10.13(5)(a) of the CAFTA-DR related to "procurement"[20] (the "**Procurement Carve-Out**") does not apply to the present case.[21] This is because the dispute revolves around measures that violate Honduras's commitments under the Agreements, and not measures relating to the "process" by which the Government "obtained" the Agreements, as the CAFTA-DR's "procurement" definition requires before the Procurement Carve-Out may apply (*see* Section II.B).

- **Respondent has violated the Agreements, which constitute an "Investment Agreement" pursuant to CAFTA-DR**. Claimants have shown that the Agreements constitute a written agreement under Article 10.28 of the CAFTA-DR that Honduras

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[16] *See, e.g.*, Luciana Torchiaro, *CPI 2023 for the Americas: Lack of Independent Judiciary Hinders the Fight Against Corruption*, TRANSPARENCY INT'L dated 30 Jan. 2024 (**Exh. C-254**), at 3 (identifying Honduras as an example of "[s]ignificant setback [of] [c]o-optation of power" and lack of judicial independence, noting that it has experienced "a significant weaking of checks and balances."), 14 (remarking that "the removal of judges and prosecutors without merit by other branches of the state . . . fosters injustice and a system where the law is applied according to the interests of the ruling government and elite.").

[17] *See* Memorial on the Merits ¶¶ 25, 190, 322-346.

[18] *Id.* ¶¶ 322-324. Claimants also referred to other treaties entered into by Honduras that contain umbrella clauses. *See* Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Honduras and the Kingdom of the Netherlands (**CL-122**), Art. 3(4).

[19] Memorial on Jurisdiction § III.D.

[20] CAFTA-DR (**CL-1**), Art. 10.13(5)(a) ("Articles 10.3, 10.4 [containing the MFN provision], and 10.10 do not apply to . . . procurement").

[21] *See infra* § II.B.4; *see also*, Observations on Request for Bifurcation ¶¶ 60-62.

has breached.[22] The Agreements implemented a single economic transaction and should be considered as a single investment agreement. The investment agreement was entered into by national authorities of Honduras, including with ENEE, which the Treaty confirms forms part of the "central level of government" in Honduras. The investment agreement was also executed by a covered investment (*i.e.*, Pacific Solar), an enterprise owned and controlled by Guatemalan investors. The investment agreement also confers rights with respect to natural resources or other assets that Honduras controls (*i.e.*, the exclusive right to use and enjoy the solar resource for producing power at the Plant, the right to sell power generated from the Plant at the wholesale market, and the right to connect to the grid for its distribution). Finally, the covered investment and the investors, each of which would have sufficed, relied on the investment agreement in establishing or acquiring a covered investment other than the agreement itself (*i.e.*, among others, the Plant, including the land where it is situated, equipment and other movable assets, contracts, and licenses required for the operation of the Plant).[23] Contrary to Respondent's assertions, the Treaty does not require that Pacific Solar be owned or controlled by Guatemalan investors at the time of executing the Agreements. Respondent's objection thus lacks merit (*see* Section II.C).[24]

- **Respondent has failed to prove its ownership objection because Claimants own and control their investment**.[25] Claimants indirectly own and control a 100% interest in Pacific Solar.[26] Claimants have owned and controlled their investment continuously since they acquired it in 2015. Contrary to Respondent's allegation, Claimants did not transfer such ownership and control to [redacted] through Pacific Solar's project finance arrangement. Through this loan framework, Pacific Solar's shares and assets were provided as collateral for its repayment obligations under the loan agreements.[27] The purpose of the trust is limited to [redacted]

[22] Memorial on the Merits § IV.D.

[23] CAFTA-DR (**CL-1**), Art. 10.28 (defining an "investment agreement" as "a written agreement that takes effect on or after the date of entry into force of this Agreement between a national authority of a Party and a covered investment or an investor of another Party that grants the covered investment or investor rights: (a) with respect to natural resources or other assets that a national authority controls; and (b) upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself.").

[24] Memorial on Jurisdiction § III.E.

[25] *Id.* § III.C.

[26] *See infra* ¶ 159. *See also* Memorial on the Merits ¶¶ 166-68; Ownership Structure Chart for Pacific Solar Energy, S.A. de C.V. dated 13 July 2023 (**Exh. C-27**).

[27] *See* Share Trust Agreement between [redacted], DEG and FMO dated 12 January 2018 ("**Share Trust Agreement**") (**Exh. C-266**), [redacted]; Assets Trust Agreement between Pacific Solar, [redacted], DEG and FMO dated 12 January 2018 ("**Assets Trust Agreement**") (**Exh. C-267**), [redacted]. *See also* Common Terms Agreement between Pacific Solar, DEG and FMO dated 14 Dec. 2017 ("**Loan Agreement**") (**Exh. C-268**) [redacted]).

[redacted][28] [redacted]"[29] *i.e.*, guaranteeing payments from Pacific Solar to the lenders. Despite this arrangement, Claimants still control Pacific Solar and make all relevant decisions on its operations, including indirectly through voting in shareholders meetings and managing it.[30] Thus, Claimants retained beneficial ownership and control over the Pacific Solar's shares and assets, including the PPA. Accordingly, the Tribunal should dismiss Respondent's baseless objection in its entirety (*see* Section II.D).

6. The above-summarized objections must be dismissed. In addition, Respondent has raised additional jurisdictional objections in its Memorial on Jurisdiction that were not included in its Summary of Jurisdictional Objections and Request for Bifurcation of 21 October 2024, thereby expanding the scope of the bifurcated phase.[31] Since then, while Respondent briefed additional objections that the Tribunal had not previously authorized to bifurcate, it also abandoned the objection based on Ms. Schloesser de Paiz's compliance with CAFTA-DR's notice provision.[32] Aware of the flaws in its argument, Honduras appears to have dropped this objection in its Memorial on Jurisdiction, likely realizing that it stood no chance of success.[33] The Tribunal should

[28] Share Trust Agreement (**Exh. C-266**), [redacted]) (emphasis added).

[29] Assets Trust Agreement (**Exh. C-267**), [redacted]) (emphasis added).

[30] Share Trust Agreement (**Exh. C-266**), [redacted]; Assets Trust Agreement (**Exh. C-267**), [redacted]

[31] *See* Procedural Order No. 4 §§ I, II.

[32] Request for Bifurcation ¶¶ 23-30; Procedural Order No. 3 ¶ 64.

[33] Respondent includes only one statement tucked away in a footnote on Ms. Paiz's notice as "background" to the ownership objection. *See* Memorial on Jurisdiction n. 188 ("[A]n additional background to the lack of rigor with which the Claimants have approached compliance with the jurisdictional requirements of this arbitration relates to the failure of Mrs. Schloesser de Paiz to comply with the mandatory requirements of Articles 10.15 and 10.16 of the Treaty with respect to prior mandatory negotiations. This circumstance also confirms the non-existent relationship between the Paiz [*sic*] and Pacific Solar."). As Claimants established (*see* Observations on Request for Bifurcation § III.B), Respondent's notice objection was meritless. Respondent did not contest that Ms. Schloesser de Paiz complied with the Treaty's 90-day notice period. Rather, Honduras advocated for the radical position that the Treaty's notice period imposes obligations for the Claimants "to meet." *See* Request for Bifurcation ¶¶ 23, 27, 30. Contrary to Respondent's erroneous suggestions (*see* Request for Bifurcation ¶¶ 25, 26, 28, 30), the Treaty's text does not contain any such requirement (*see* CAFTA-DR (**CL-1**), Chapter 10, § B, Arts. 10.16.1, 10.16.2; Observations on Request for Bifurcation ¶¶ 39-42). Claimants, including Ms. Schloesser de Paiz, invited Honduras multiple times to engage in good faith consultations and negotiations to resolve this dispute in compliance with the Treaty's provision, which Respondent failed to respond to (*see* Observations on Request for Bifurcation ¶ 43; Notices and Communications from the Paizes to Honduras under CAFTA-DR dated 10 Oct. 2022 – 13 Feb. 2023 (**Exh. C-12**), at 1; Follow up Letter under the Treaty from the Paizes to Honduras dated 26 Apr. 2023 (**Exh. C-243**); Letter from Claimants to the Honduran Government dated 23 Aug. 2023 (**Exh. C-244**).

find that Honduras has withdrawn this objection, and it should be precluded from subsequently raising it.

7. As regards to two of Respondent's belated objections, the Tribunal directed the Parties to address whether they should be bifurcated or joined to the merits, in their respective submissions in the bifurcated phase.[34] As addressed *infra* in section III, Honduras's objections that Claimants' claims fall outside of the Treaty's limitations period and are merely contractual, do not meet any of the criteria for bifurcation: they are both meritless, would not materially reduce the time for and cost of the proceeding, and are far too intertwined with the merits to warrant bifurcation. For the sake of efficiency, in any event, the Tribunal should dismiss Respondent's additional objections at this juncture as they are both clearly unmeritorious.

- **Claimants' claims are not time-barred**. It is undisputed that Claimants submitted their Request for Arbitration on 24 August 2023, well within three years of Honduras's enactment of the New Energy Law in May 2022, and its adoption of subsequent measures that breached the Treaty. This is fatal to Respondent's temporal limitation objection, as it was only then that Respondent's breach under the CAFTA-DR became apparent, triggering Claimants' Treaty claims. In an attempt to undermine the significance of its breaches, Respondent seeks to shift the Tribunal's focus to Honduras's prior payment delays and curtailment of energy, alleging that more than three years have lapsed since Claimants first acquired, or should have first acquired, knowledge of these acts and therefore Respondent's Treaty breaches.[35] Respondent fundamentally misconstrues both the facts and nature of Claimants' claims. Honduras ignores the critical distinction between the mere delayed payment of invoices, accompanied by Honduras's acknowledgment of the debt and promises to pay, and the State's later message that full payment of the existing debt would not occur with the passage of the New Energy Law and the Government's ensuing conduct. Honduras's prior payment delays and curtailment of energy that predated the New Energy Law did not trigger the Treaty breaches of which Claimants complain of here, and Respondent has not and cannot show that they are capable of serving as a separate and distinct basis for Claimants' claims and a violation of the CAFTA-DR.

  Respondent concedes that the forced renegotiation of the PPA, falls within the Tribunal's temporal jurisdiction, which is the correct position as it was introduced through the New Energy Law, promulgated within the Treaty's three year limitation period.[36] All measures implemented through the New Energy Law and Honduras's subsequent conduct, including weaponizing the State's significant and outstanding debt to Pacific Solar and engaging in a public smear campaign against generators, clearly

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[34] *See* Procedural Order No. 4 ¶ 55.

[35] *See* Memorial on Jurisdiction § III.B.

[36] *Id.* ¶ 129 ("[T]he only claim by the Claimants that could fall within the Tribunal's temporal jurisdiction concerns the alleged forced renegotiation of the PPA under Decree 46-2022.").

fall within the Treaty's limitation period, as these measures were adopted after the New Energy Law entered into force. Respondent's temporal limitation objection is meritless and must be dismissed (*see* Section III.A).

- **Claimants' case is based on Honduras's breach of the Treaty and is not a contract claim**. Repeating the same erroneous characterizations that form the basis of its limitations period objection, Honduras's objection rests on a mischaracterization of Claimants' case, which is not based merely on a breach of the PPA. The measures in this case include, *inter alia*, the State's enactment of the New Energy Law and its subsequent conduct pursuant thereto, which are purely public acts that only the State can engage in. These measures violate Honduras's obligations under the Treaty and have caused substantial damage to Claimants and their investment. Respondent also ignores that State measures that amount to a breach of a contract can also result in a breach of international law.[37] Respondent's attempt to evade liability by denying the true nature of Claimants' claims should not be accepted (*see* Section III.B). [38]

8. Honduras contends—based on no grounds whatsoever—that "the present arbitration constitutes an abuse of the investor-State dispute settlement system."[39] Unable to present a cogent case on the issues before this Tribunal, Honduras seeks to cast doubt on the legitimacy of Claimants' investment and their claims, through a factual narrative that is replete with falsehoods and mischaracterizations.[40] Honduras also seizes the opportunity to discuss merits facts that are irrelevant to any of its jurisdictional objections, including for example, the four pages it spends on ENEE's financial situation.[41] It is well-established under international law that a State cannot evade liability by relying on the factors which itself created.[42] Claimants fully reject Respondent's presentation of such issues, which will be addressed at the appropriate juncture.[43]

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[37] *See, e.g.*, *Interocean Oil Development Co. and Interocean Oil Expl. Co. v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Decision on Preliminary Objections dated 29 Oct. 2014 (**CL-203**) ¶¶ 111-112 ("[T]he Tribunal notes that the existence of contractual claims under the JVA does not preclude the Claimants from filing a separate set of claims pursuant to international law, which would be subject to the Tribunal's jurisdiction."); *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction dated 14 Nov. 2005 (**CL-204**) ¶ 148 ("As a preliminary matter, the Tribunal notes that Pakistan accepts that 'treaty claims are juridically distinct from claims for breach of contract, even where they arise out of the same facts' . . . The Tribunal considers that this principle is now well established.").

[38] Memorial on Jurisdiction § III.F.

[39] *Id.* ¶ 2.

[40] *See id.* § II "Factual Background."

[41] *See id.* § II.A.3.

[42] International Law Commission, *Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts* dated 2001 (A/56/10) (**CL-79**) ("**ILC Articles on State Responsibility**"), Art. 25(2)(b) ("[N]ecessity may not be invoked by a State as a ground for precluding wrongfulness if: . . . the State has contributed to the situation of necessity.").

[43] Claimants do not accept the "facts" described in Respondent's Memorial on Jurisdiction, and reserve the right to address the falsehoods contained therein at the appropriate juncture.

9. As Honduras clearly cannot find anything to cast doubts on the legitimacy of Mr. Paiz—a well-respected philanthropist and entrepreneur in Latin America with an exceptional reputation—Honduras resorts to criticizing Pacific Solar's prior owners, suggesting Pacific Solar "was an inexperienced paper company," that was granted the PPA through irregularities; Honduras alleges that the Government's decision to grant the PPA was "one of the biggest political scandals Honduras has ever seen" and part of an alleged "Parliamentary Robbery of the Century," benefiting "politicians, drug traffickers and well-known businessmen in Honduras."[44] Honduras's contentions amount to nothing more than gross mischaracterizations and hyperbole, and are frankly irrelevant given that—as Honduras itself acknowledges—they have nothing to do with Claimants, as they invested in Honduras after Pacific Solar had already entered into the Agreements.[45] Honduras's factual narrative is a transparent attempt to distract from the core issues through wild allegations that are irrelevant to the objections, and seek to tarnish Claimants' reputation with smoke and mirrors. Honduras has gone so far as to recently conduct an on-site inspection of the Plant—Claimants' investment in this treaty dispute[46]—through the pretext of an alleged criminal investigation on the basis of a seven-year-old criminal complaint filed by a Honduran NGO with respect to 20 PPAs entered into in 2014.[47] As Mr. Paiz explains, "our name is now associated with this situation, tainting my reputation and legacy."[48]

10. Respondent now seeks to distance itself from the legal framework that it introduced to attract Claimants' investment. Indeed, it was President Castro's husband, Mr. Manuel Zelaya, who signed the original legislation in 2007 to incentivize investors and promote the development of renewable energy projects, which forms the basis for the PPA.[49] Respondent's effort to criticize the approval of the PPAs and link them to the former President Juan Orlando Hernández while

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[44] Memorial on Jurisdiction ¶¶ 21-25.

[45] *Id.* ¶ 22; Memorial on the Merits ¶ 50.

[46] President's Procedural Order dated 30 April 2025 ¶ 10 ("Parties to arbitral proceedings must *prima facie* abstain from aggravating the dispute and from affecting the integrity of the proceedings. Both obligations are *prima facie* of relevance where a party, in particular **the host State of an alleged investment which is a respondent in arbitral proceedings, conducts onsite inspections at the plant of the alleged investment**.") (emphasis added).

[47] Letter from ENEE to Pacific Solar regarding the State's impromptu inspection of the Plant dated 25 Apr. 2025 (**Exh. C-264**) at 2; Letter from the Special Prosecutor to Pacific Solar regarding the State's impromptu inspection of the Plant on 30 April 2025 dated 28 Apr. 2025 (**Exh. C-265**).

[48] Paiz WS II ¶ 16.

[49] *See* 2007 Renewables Law (**Exh. C-4**), at A.15.

emphasizing his conviction,[50] is insincere given the scandals that plague this administration,[51] and when it is abusing its sovereign authority to intimidate investors and seek to fabricate evidence more than a decade after it awarded the Agreements to support its arbitration defense. Honduras's conduct must not be countenanced.

11. In short, all of Respondent's objections are baseless and constitute a clear attempt to evade liability for Honduras's Treaty breaches.

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[50] Memorial on Jurisdiction ¶¶ 17-19.

[51] The LIBRE party and President Castro's family members are currently facing corruption scandals, implicating for example, President Castro's nephew and former Minister of Defense, Mr. José Manuel Zelaya, President Castro's brother-in-law and former Congressman Carlos Zelaya, and Ms. Obando Presiding Justice of the Supreme Court and the aunt of President Castro's son-in-law. In August 2024, Mr. José Manuel Zelaya reportedly met with an accused drug-trafficker in Venezuela. President Castro promptly ordered the termination of Honduras's extradition treaty with the United States, and Mr. Zelaya has since resigned as Minister of Defense. *See* Noticieros Hoy Mismo, X @HOYMISMOTSI (28 Aug. 2024) (**Exh. C-269**); *Uproar in Honduras over the annulment of the extradition treaty with the U.S.: who benefits?*, FRANCE 24 dated 30 Aug. 2024 (**Exh. C-271**); Elvin Sandoval, *The Government of Honduras denounces its extradition treaty with the United States and accuses Washington of "interference"*, CNN ESPAÑOL dated 28 Aug. 2024 (**Exh. C-272**); *Honduras: President's brother-in-law admits to meeting with drug-trafficker*, DEUTSCHE WELLE dated 1 Sept. 2024 (**Exh. C-273**); M. Torres, *Two weeks after narco video! National Congress accepted the resignation of Carlos Zelaya*, HCH TELEVISIÓN DIGITAL dated 18 Sept. 2024 (**Exh. C-274**). In September 2024, a video was released of President Castro's brother-in-law, Congressman Carlos Zelaya, meeting with known drug-traffickers who offered over half a million dollars to help Honduras' ruling party during the now-President Xiomara Castro's prior unsuccessful presidential bid. Mr. Carlos Zelaya (who is Mr. José Zelaya's father) has resigned. *See* Jeff Ernst *et al.*, *Narco Video Shows Traffickers Discussing Bribes With Honduras President's Brother-in-Law*, INSIGHT CRIME dated 3 Sept. 2024 (**Exh. C-275**), at 3 ("It confirms long-held suspicions that the current ruling party of Honduras was no more immune to the influence of drug money."); *Honduras: President's brother-in-law admits to meeting with drug-trafficker*, DEUTSCHE WELLE dated 1 Sept. 2024 (**Exh. C-273**).

Ms. Rebeca Ráquel Obando is the aunt of President Castro's son-in-law and a member of the LIBRE ruling party, and was appointed to the Supreme Court in 2023 and immediately named its Presiding Justice. In August 2024, Ms. Obando became embroiled in a corruption scandal when her husband, Mr. José Luis Melara Murillo, reportedly was implicated in a bribe-taking scheme by an anti-corruption judge who, upon being arrested, was recorded saying: "[t]ell the president of the [Supreme] Court that if I go down, I will talk." Ms. Obando has refused to resign from the Court and is being investigated. At least one opposition congressman called for a political trial of Ms. Obando, citing instances of lost case files pertaining to money laundering by her relatives. *See Rebeca Ráquel Obando elected as new president of the SC*, EL MUNDO dated 17 Feb. 2023 (**Exh. C-280**); *José Luis Melara Murillo, husband of the president of the SC, at the center of corruption scandal*, CHOLUSAT SUR (**Exh. C-281**); Yarely Madrid, *Arrest of Judge Marco Vallecillo rattles Supreme Court leadership in Honduras*, EXPEDIENTE PÚBLICO dated 21 Aug. 2024 (**Exh. C-282**); ICN.Digital, INSTAGRAM @ICN.DIGITAL dated 19 Aug. 2024 (**Exh. C-283**); *Rebeca Obando refuses to resign from the SC: "They want to remove the people who work well"*, EL HERALDO dated 19 Aug. 2024 (**Exh. C-284**); *Jorge Cálix calls for impeachment of SC president, Rebeca Ráquel*, HCH TELEVISIÓN DIGITAL - YOUTUBE dated 20 Aug. 2024 (**Exh. C-285**).

II. RESPONDENT'S JURISDICTIONAL OBJECTIONS SHOULD BE REJECTED

A. RESPONDENT'S RECYCLED EXHAUSTION OBJECTION IS MERITLESS

1. Respondent's Consent to Arbitrate the Present Dispute is Not Conditioned on the Exhaustion of Local Remedies

12. Respondent's contention that "Honduras conditioned its consent to international arbitration under the ICSID Convention on the prior exhaustion of domestic remedies" with which "Claimants failed to comply"[52] must be rejected. In support of its argument, Respondent relies on a recently unearthed Declaration in Legislative Decree No. 41-88[53] to argue that it opted to "expressly preserve the traditional rule of customary international law and to condition its consent to ICSID arbitration on the prior exhaustion of local remedies."[54] Respondent's objection fails on multiple grounds.

13. **First**, Article 26 of the ICSID Convention reverses the traditional requirement of exhaustion of remedies, allowing an exception only where a State expressly conditions its consent to arbitration to require exhaustion. Any such requirement accordingly must be contained in the State's instrument of consent (*i.e.*, the treaty, a foreign investment law, or a contract containing an agreement or offer to arbitrate). The CAFTA-DR, which is the instrument providing Honduras's consent to arbitrate in this case, does not contain any requirement to exhaust local remedies. Including language in a domestic law decree that the State *will* condition its consent to ICSID arbitration and require exhaustion of remedies, without more, is insufficient.

14. **Second**, any requirement to exhaust local remedies is inconsistent with the express conditions to arbitration contained in the CAFTA-DR. Specifically, before submitting a claim to arbitration, a claimant must waive its right to initiate or continue any local administrative or judicial proceedings regarding any measure alleged to constitute a breach of the Treaty. As the *Próspera* tribunal recently held, such a condition under CAFTA-DR is inconsistent with requiring exhaustion of local remedies.[55] This further confirms Claimants' interpretation of Article 26, as

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52 Memorial on Jurisdiction ¶ 8.

53 Decree No. 41-88 dated 25 Mar. 1988, published in the Official Gazette dated 4 Aug. 1988 (**Exh. R-3**).

54 Memorial on Jurisdiction ¶ 79.

55 *Próspera* (**CL-201**) ¶¶ 110-120.

requiring any conditional consent to be contained in the instrument of consent and, in any event, as the later-in-time instrument, the provisions of the CAFTA-DR prevail over Honduras's Decree.

15. **Third**, Honduras should be estopped from relying on its Decree to condition its consent to arbitrate, given its prior representations and conduct. In particular, Honduras "buried"[56] the exhaustion of remedies language in a Decree within the text of the ICSID Convention, failed to publish the Decree anywhere online, and did not alert ICSID to this alleged "condition" to its consent. Neither did Honduras raise this objection in earlier arbitrations. It was only after the latest change in administration that Honduras unearthed the Decree and began invoking it in an attempt to evade liability. In light of this conduct and having expressly conditioned its consent to arbitration in the Treaty on having investors waive their rights to continue administrative and judicial proceedings challenging the measures and adherence to a three-year prescription period, Honduras cannot now insist that investors exhaust local remedies before pursuing arbitration.

16. **Finally**, even if Honduras had conditioned its consent to arbitrate on exhausting local remedies—which it has not done—any such requirement cannot bar jurisdiction here, because complying with the requirement would be futile. This is because there is overwhelming evidence that Claimants would not receive an impartial and fair adjudication of their claims, as Honduran judiciary lacks independence. In addition, the delays in court proceedings are overwhelming and it would be futile to commence administrative or judicial proceedings in Honduras because such proceedings could not realistically be exhausted in three years, whereas the CAFTA-DR contains a three-year prescription period for submitting claims to arbitration.

(a) Honduras Has Not Validly Conditioned Its Consent to ICSID Arbitration on the Exhaustion of Local Remedies

17. Honduras's objection is premised on a flawed understanding of the ICSID Convention and the nature of consent to arbitration thereunder. The ICSID Convention reverses the customary international law rule regarding exhaustion of local remedies: its default presumption is that the exhaustion of local remedies is *not* a prerequisite to a State's consent to arbitration.[57] The sole, limiting exception is contained in Article 26 of the Convention, which provides:

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[56] *Próspera* (**CL-201**) ¶ 52.

[57] CHRISTOPH H. SCHREUER *et al.*, *Chapter II: Jurisdiction of the Centre*, *in* THE ICSID CONVENTION – A COMMENTARY (3d ed. 2022) (**CL-183**), at 617 ("Article 26 reverses the situation under traditional international law:

> Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.[58]

18. In order for a Contracting State to condition its consent, that condition must be contained in the instrument providing for the State's consent to arbitration.[59] It is undisputed that the Treaty—which constitutes the instrument containing Respondent's consent to arbitrate—contains no such requirement. Respondent's reliance on a purported requirement for exhaustion of local remedies in its domestic legislation accordingly fails to comport with Article 26 and, thus, fails to limit Respondent's consent to arbitration provided in the CAFTA-DR.

19. Respondent errs in asserting that Article 26 "does not provide for any formality for States" to condition their consent on the exhaustion of local remedies,[60] and that "all that is required is that the reserving State to express its intent to require the exhaustion of local remedies in writing."[61] The first sentence of Article 26 contains the default rule: by consenting to ICSID arbitration, a State excludes any requirement to exhaust local remedies. The second sentence contains the narrow exception to this presumption, where the State has conditioned its consent to

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the Contracting States waive the requirement of exhaustion of local remedies unless otherwise stated."); *see also, id.*, at 544 ("The exclusive remedy rule of the first sentence implies that there is no need to exhaust local remedies before initiating ICSID arbitration 'unless otherwise stated.'"); *Próspera* (**CL-201**) ¶ 29 ("[T]he ICSID Convention reverses the traditional customary international law requirement of exhaustion of local remedies by enacting Article 26."); *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 Sept. 2003 (**CL-179**) ¶¶ 13.4-13.5 ("The first sentence of Article 26 secures the exclusivity of a reference to ICSID arbitration vis-à-vis any other remedy. A logical consequence of this exclusivity is the waiver by Contracting States to the ICSID Convention of the local remedies rule. . . ."); *AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction dated 26 Apr. 2005 (**CL-182**) ¶ 69 ("Under Article 26 of the Convention, for entering into play, exhaustion of local remedies shall be **expressly required** as a condition of the consent of one party to arbitration under the Convention. Absent this requirement, exhaustion of local remedies cannot be a precondition for an ICSID Tribunal to have jurisdiction.") (emphasis added).

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

[59] CHRISTOPH H. SCHREUER *et al., Chapter II: Jurisdiction of the Centre, in* THE ICSID CONVENTION – A COMMENTARY (3d ed. 2022) (**CL-183**), at 619 ("A State may make the exhaustion of local remedies a condition of its consent to arbitration. The condition may be expressed in a bilateral investment treaty offering consent to ICSID arbitration . . . in national legislation providing for ICSID arbitration . . . or in a contract with the investor containing an ICSID arbitration clause. . . . The condition that local remedies must be exhausted before ICSID arbitration can be instituted may be expressed by a State party to the Convention only up to the time consent to arbitration is perfected but not later . . . A State may also give advance notice that it will require the exhaustion of local remedies as a condition for its consent to ICSID arbitration by way of a general notification to the Centre. But a general notification of this kind is a statement for information purposes only.").

[60] Memorial on Jurisdiction ¶ 95.

[61] Memorial on Jurisdiction ¶ 97.

arbitration on the exhaustion of local remedies. The phrase "may require" before "the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention" underscores that such a condition may be imposed after a State ratifies the ICSID Convention, when it subsequently consents to ICSID arbitration. The ordinary language of Article 26 thus makes clear that a Contracting State may not unilaterally require the exhaustion of local remedies independently of its consent to arbitration that forms part of the arbitration agreement with an investor.[62]

20. To the extent that any ambiguity arises from this interpretation (which, Claimants contend, does not), resort may be made to the ICSID Convention's *travaux préparatoires*, in accordance with Article 32 of the Vienna Convention on the Law of Treaties ("**VCLT**"), in order to confirm the ordinary meaning derived from the text of Article 26.[63] The Report by the ICSID Executive Directors that accompanied the adoption of the ICSID Convention provides, in relevant part:

> It may be presumed that **when a State and an investor agree to have recourse to arbitration**, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. **This rule of interpretation is embodied in the first sentence of Article 26**.
>
> In order to make clear that it was not intended thereby to modify the rules of international law regarding the exhaustion of local remedies, the second sentence explicitly recognizes the right of a State to require the prior exhaustion of local remedies.[64]

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[62] CHRISTOPH H. SCHREUER *et al.*, *Chapter II: Jurisdiction of the Centre*, *in* THE ICSID CONVENTION – A COMMENTARY (3d ed. 2022) (**CL-183**), at 544 ("The exclusive remedies rule applies regardless of whether consent is based on a direct agreement between the host State and the investor or an offer of consent contained in a treaty or legislation. However, Art. 26 operates only once the offer of consent in the treaty or legislation has been perfected through acceptance by the investor.").

[63] Vienna Convention on the Law of Treaties ("**VCLT**") (**CL-133**), Art. 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31.").

[64] International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* dated 18 Mar. 1965 (**CL-205**) ¶ 32 (emphasis added).

21. This explanation specifically refers to consent "**when a State and an investor agree to have recourse to arbitration**," meaning in the instrument of consent.[65]

22. Respondent wrongly asserts that the *travaux* show that the Convention's drafters intended to allow Contracting States to require exhaustion simply by "express[ing] their willingness to give primacy to the exhaustion of local remedies."[66] In doing so, Respondent ignores the very same passage of the *travaux*, which states that it is only "[w]hen parties consent . . . to arbitration" that "they would be free to stipulate . . . that local remedies must first be exhausted."[67]

23. This interpretation has been confirmed by the tribunal in *Generation Ukraine v. Ukraine* ("***Generation Ukraine***"), which held that any exhaustion requirement "must be contained in the instrument in which such consent is expressed, *i.e.*, the [treaty] itself."[68] Respondent's attempt to distinguish *Generation Ukraine*, by arguing that Ukraine sought to impose an exhaustion requirement solely on the basis of the provisions of Article 26,[69] is both a misunderstanding of Ukraine's argument[70] and also irrelevant, because Article 26 excludes the possibility that a requirement to exhaust local remedies can be validly made anywhere other than in the State's instrument of consent to arbitration.[71]

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[65] International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* dated 18 Mar. 1965 (**CL-205**) ¶ 32; *see also* History of the ICSID Convention, Vol. II-2 (1968) (**RL-56**), at 973-974 ("Mr. Rajan said that while Article 26(1) as it stood was acceptable to his Government, he would like Mr. Broches to clarify whether a State's right to require exhaustion of local remedies was one which must have been embodied in an agreement between the State and the investor. Mr. Broches said that when a State had entered into an agreement with an investor containing an arbitration clause unqualified by any reservation regarding prior exhaustion of local remedies, the State could not thereafter demand that the dispute be first submitted to the local courts.").

[66] Memorial on Jurisdiction ¶ 82.

[67] History of the ICSID Convention, Vol. II-1 (1968) (**RL-55**), at 241: ("When parties consented to arbitration, they would be free to stipulate either that local remedies might be pursued in lieu of arbitration, or that local remedies must first be exhausted before the dispute could be submitted for arbitration under the Convention.").

[68] *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 Sept. 2003 (**CL-179**) ("***Generation Ukraine***") ¶ 13.5.

[69] Memorial on Jurisdiction ¶¶ 98-99.

[70] *See Generation Ukraine* (**CL-179**) ¶¶ 6.8(d), 13.1 ("[Ukraine] appears to maintain that it had the right to insist on the exhaustion of local remedies upon the first reference to ICSID arbitration following its accession to the ICSID Convention," and that "Article 26 of the ICSID Convention prevails over Article VI(4) of the BIT, which contains no reference to the local remedies rule, by reason of the *lex specialis* character of the ICSID Convention.").

[71] *See Generation Ukraine* (**CL-179**) ¶¶ 13.4-13.5 (explaining that the second sentence of Article 26 "allows Contracting States to reserve its [*sic*] right to insist upon the prior exhaustion of local remedies as a condition of its [*sic*] consent. **Any such reservation to the Ukraine's consent to ICSID arbitration must be contained in the instrument in which such consent is expressed**, *i.e*. the BIT itself," and that once the investor has accepted the

24. Further, contrary to what Respondent implies, nothing in *Generation Ukraine* supports an understanding of *Lanco International v. Argentine Republic* ("***Lanco***") as standing for the proposition that an exhaustion requirement can be contained in domestic legislation other than an instrument of consent.[72] In fact, the tribunal in *Generation Ukraine* addressed *Lanco* and clearly understood that the reference to domestic legislation in that case meant legislation containing a State's consent to arbitration (such as a foreign investment law, which could serve as the basis for arbitration, like the CAFTA-DR does here).[73] Indeed, the *Lanco* tribunal cites the Report of the ICSID Executive Directors, which explains that "a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing."[74]

25. Respondent's reliance on an editorial by former ICSID Secretary-General Ibrahim F. I. Shihata addressing Article 26 and the Calvo Doctrine is similarly misplaced.[75] Mr. Shihata supports Claimants' position that States may include exhaustion requirements directly into agreements with investors and refers to the model arbitration clause prepared by ICSID that conditions the State's consent to arbitration on the exhaustion of other remedies.[76] He further recognizes that States may make exhaustion of local remedies a condition of their consent to arbitration in investment treaties.[77] Far from endorsing Respondent's position that a State may validly condition its consent to ICSID arbitration through an instrument that does not contain the

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State's offer to arbitrate (whether in a BIT, national legislation, or direct agreement), "no further limitations or restrictions on the reference to arbitration can be imposed unilaterally.") (emphasis added).

[72] *See* Memorial on Jurisdiction ¶ 99 (*citing Generation Ukraine* (**CL-179**) ¶ 13.5).

[73] *Generation Ukraine* (**CL-179**) ¶ 13.5 (quoting *Lanco* approvingly for the proposition that exhaustion of local remedies may be required as a condition of consent in a BIT, domestic legislation, or a direct investment agreement in support of its conclusion that exclusion of the exhaustion requirement must be contained in the instrument in which such consent is expressed); *see also Lanco Int'l Inc. v. Argentina*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction of the Arbitral Tribunal dated 8 Dec. 1998 (**RL-58**) ("***Lanco***") § 39 (an exhaustion requirement must be in the instrument that contains the consent to arbitration, namely "(i) in a bilateral investment treaty that offers submission to ICSID arbitration, (ii) in domestic legislation, or (iii) in a direct investment agreement that contains an ICSID clause.").

[74] *Lanco* (**RL-58**) § 43; *see also, Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Award dated 16 Nov. 2012 (**CL-206**) ¶ 229 (referring to open offers by States to use ICSID arbitration in future disputes, which may be expressed through "the voluntary consent by the State that hosts the investment to ICSID jurisdiction, including that protection in its national legislation for a certain class of investors.").

[75] Memorial on Jurisdiction ¶ 34.

[76] Ibrahim Shihata, *ICSID and Latin America*, NEWS FROM ICSID, VOLUME I-2 (1984) (**RL-62**), at 2.

[77] Ibrahim Shihata, *ICSID and Latin America*, NEWS FROM ICSID, VOLUME I-2 (1984) (**RL-62**), at 2.

State's consent to arbitrate, Mr. Shihata merely states that "[a]nother way to accomplish the same objective might result from a declaration made by a Contracting State at the time of signature or ratification of the Convention that it **intends to avail itself of the provisions of Article 26 and will require, as a condition of its consent to ICSID arbitration**, the exhaustion of local remedies."[78] Mr. Shihata's use of the term "intends" and "will require" indicates his understanding that future action would be required by the State in order to condition its consent to arbitration in any instrument containing an offer to arbitrate.

26. Any purported exhaustion requirement that does not comply with Article 26 is ineffective, and the default presumption that arbitration is the exclusive remedy will prevail. The CAFTA-DR does not condition Respondent's consent to arbitration on the exhaustion of local remedies and, therefore, the ICSID Convention requires that the Tribunal deem Respondent's consent to arbitration to be to the exclusion of local remedies.

27. Respondent erroneously contends that "Honduras conditioned its consent to . . . arbitration at the time of approving and ratifying the . . . Convention"[79] and that the Declaration contained in Decree 41-88 constitutes an exercise of its prerogative under Article 26 of the ICSID Convention and creates a "jurisdictional condition."[80] That Declaration states:

> DECLARATION OF THE REPUBLIC OF HONDURAS. The State of Honduras shall submit to the arbitration and conciliation procedures provided for in the Convention, only when it has previously expressed its consent in writing. The investor shall exhaust the administrative and judicial channels of the Republic of Honduras, as a prior condition to the implementation of the dispute settlement mechanisms provided for in this Convention. In any case submitted to the Tribunal to which the State of Honduras is a Party, the applicable laws shall be those of the Republic of Honduras, and only the natural and legal parties of the States Parties to the Convention may make use of the procedures provided for in the Convention.[81]

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[78] Ibrahim Shihata, *ICSID and Latin America*, NEWS FROM ICSID, VOLUME I-2 (1984) (**RL-62**), at 2 (emphasis added).

[79] Memorial on Jurisdiction ¶ 78. Respondent's emphatic suggestion that Claimants should have "disclose[d]" Decree 41-88 when filing their Request for Arbitration is also misguided. *See id.* ¶ 79.

[80] Memorial on Jurisdiction ¶¶ 78-80, 85.

[81] Decree No. 41-88 dated 25 Mar. 1988, published in the Official Gazette dated 4 Aug. 1988 (**Exh. R-3**), Art. 75.

28. As explained, however, the Declaration in Decree 41-88 does not condition Honduras's consent to ICSID arbitration on the exhaustion of local remedies, because Decree 41-88 does not constitute (and does not purport to constitute) Respondent's consent to arbitration under the ICSID Convention. Rather, Decree 41-88 is a legislative act pursuant to which the National Congress of Honduras approved Agreement No. 8-DTTL, dated 25 July 1986, whereby the President of Honduras had approved the ICSID Convention.[82] Decree 41-88 then reproduces Agreement No. 8-DTTL and the ICSID Convention in its entirety, with the Declaration tucked between Article 75 of the ICSID Convention and the list of the ICSID Signatory States (almost giving the false impression that the Declaration was part of the treaty being ratified), on the penultimate page.[83]

29. In advancing its unmeritorious defense, Respondent conflates two distinct acts: ratification of the ICSID Convention and consent to arbitration under the ICSID Convention. It is only after a State has become an ICSID Member State that it can consent to arbitrate disputes before ICSID. Article 25(1) of the ICSID Convention thus requires that the parties "consent in writing to submit [a dispute] to the Centre" as a prerequisite to jurisdiction.[84] Ratification of the ICSID Convention alone is insufficient to establish consent to arbitrate any dispute.[85] The only applicable conditions of Respondent's consent to ICSID arbitration are those listed in the instrument in which such consent is expressed—in this case, the CAFTA-DR.

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[82] Decree No. 41-88 dated 25 Mar. 1988, published in the Official Gazette dated 4 Aug. 1988 (**Exh. R-3**), Art. 1.

[83] Decree No. 41-88 dated 25 Mar. 1988, published in the Official Gazette dated 4 Aug. 1988 (**Exh. R-3**), at 1-8.

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

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

30. Indeed, the Declaration itself shows that Respondent understood that Decree 41-88 did not constitute its consent to arbitration under the ICSID Convention. The first sentence of the Declaration states "[t]he State of Honduras shall submit to the arbitration and conciliation procedures provided for in the Convention, only when it has previously expressed its consent in writing."[86] The entirety of the Declaration, in fact, is forward-looking and anticipates future steps (*e.g.*, "shall submit" and "only when it has previously expressed its consent in writing," in the first sentence) for Respondent to consent to the arbitration of any dispute.

31. Respondent erroneously analogizes its Declaration to conditions in dispute resolution provisions of investment treaties, claiming that tribunals have ruled compliance with such conditions to be a mandatory requirement for jurisdiction.[87] These cases are inapposite, however, as they deal with conditions in treaty-based dispute resolution provisions, not in legislation ratifying the ICSID Convention (and not providing for consent to arbitration).[88] Notably, Respondent fails to cite any authority where a tribunal has treated a Declaration in ICSID-ratifying legislation as a jurisdictional condition.

32. Furthermore, Respondent itself has acted in a manner inconsistent with its current position that the Declaration conditions its consent to ICSID arbitration on the exhaustion of local remedies. Some of the investment treaties in which Honduras provides its advance offer to ICSID arbitration, for instance, contain fork-in-the-road clauses: requiring an investor to choose between advancing its claim in ICSID arbitration or before local courts is diametrically opposed to requiring the exhaustion of local remedies as a condition to ICSID arbitration.[89] In at least one other treaty,

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[86] Decree No. 41-88 dated 25 Mar. 1988, published in the Official Gazette dated 4 Aug. 1988 (**Exh. R-3**), at 7.

[87] Memorial on Jurisdiction ¶ 86.

[88] *See* Memorial on Jurisdiction, n. 124-125, citing *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction dated 2 July 2013 (**RL-22**) ¶¶ 34-35 (referencing the history of the BIT's negotiation and ratification to find limitations on Uruguay's consent to international arbitration); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award dated 8 Dec. 2008 (**RL-11**) ¶ 145 (concerning an eighteen-month litigation waiting period in the treaty); *Murphy Exploration and Prod. Co. Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction dated 15 Dec. 2010 (**RL-15**) ¶ 149 (regarding a six-month period of consultation and negotiation in the treaty); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction dated 2 June 2010 (**RL-14**) ¶ 315 (concerning a treaty requirement to notify the host State of the dispute at least six-month before it is submitted to arbitration); *ICS Inspection and Control Services Limits v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction dated 10 Feb. 2012 (**RL-83**) ¶ 262 (concerning a requirement to submit the dispute to the Argentine courts for at least 18 months before a recourse to international arbitration).

[89] *See*, *e.g.*, Agreement between the Republic of Chile and the Republic of Honduras for the Reciprocal Promotion and Protection of Investments entered into on 11 Nov. 1996 ("**Chile-Honduras BIT**") (**CL-208**), Art. VIII (providing that Chilean investors must choose between submitting investment disputes against Honduras to local

Respondent conditioned its consent to ICSID arbitration on its ability to demand that the claimant exhaust *administrative* remedies, but only for a six-month period.[90] This, too, is inconsistent with Respondent's current interpretation of the Decree.

33. For all these reasons, Respondent's exhaustion objection is without merit: Honduras consented to arbitrate the dispute with Claimants pursuant to the CAFTA-DR, without conditioning its consent on the prior exhaustion of local remedies.

(b) An Exhaustion Requirement is Fundamentally Incompatible with Honduras's Consent to Arbitrate in the CAFTA-DR

34. The instrument in which Honduras expressed its consent is the CAFTA-DR.[91] Pursuant to the CAFTA-DR, Respondent consented to ICSID arbitration subject to the fulfillment of the criteria set forth in Articles 25 and 26 of the ICSID Convention and those under the CAFTA-DR itself. Not only is there *no* textual support in the CAFTA-DR to support Respondent's proposition that it conditioned its consent to arbitration on an exhaustion requirement, but any such requirement is at odds with the Treaty's provisions.

35. Article 10.18.2 of the CAFTA-DR requires that claimants, and the enterprise on behalf of which claims are submitted, waive their rights to initiate or continue local remedies seeking redress with respect to measures alleged to be a breach of the CAFTA-DR upon submitting claims to arbitration, as a condition and limitation of consent.[92] The Paizes and Pacific Solar complied with CAFTA-DR's waiver provision,[93] a fact that Respondent does not (and cannot)

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courts or ICSID arbitration, and that once the investor submits the dispute to local courts or to arbitration, that election shall be definitive); *see also* Free Trade Agreement between Central America and the Dominican Republic entered into on 16 Apr. 1998 (**CL-209**), Art. 9.20 (containing similar provisions).

[90] Central America-Panama Free Trade Agreement entered into on 6 Mar. 2002 ("**Central America-Panama FTA**") (**CL-210**), Part IV, Art. 10.22 (1)-(2) (providing that arbitration is to the exclusion of other mechanisms, and that a contracting party may require the exhaustion of local administrative remedies, provided that if such a remedy does not conclude within six months the investor may submit claims directly to arbitration).

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

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

[93] Mr. Fernando Paiz's Waiver Pursuant to CAFTA-DR Article 10.18 dated 22 Aug. 2023 (**Exh. C-37**); Ms. Anabella Schloesser de Paiz's Waiver Pursuant to CAFTA-DR Article 10.18 dated 22 Aug. 2023 (**Exh. C-38**);

contest.[94] In addition, Article 10.18.4 of the CAFTA-DR prohibits investors or their enterprises from claiming for breach of an investment agreement where such a claim has been previously submitted before domestic courts or administrative tribunals.[95] Again, there is no dispute that Claimants did not bring any claims for breach of an investment agreement before the Honduran courts or administrative tribunals.

36. Neither the waiver provision nor the investment agreement provision described above can be reconciled with Honduras's purported exhaustion requirement. Article 10.18.2 necessarily *presumes* that local remedies have not been exhausted; otherwise, the requirement of waiving any right to "initiate or continue" local proceedings would make no sense.[96] Article 10.18.4 likewise prohibits arbitration of certain claims if resort has been made to a local court or administrative tribunal. As the *Próspera* tribunal confirmed:

> The recognition in Article 10.18.2 of CAFTA-DR of these two avenues for investors is incompatible with the Republic's case: *CAFTA-DR's* provision forcing an investor to renounce all domestic proceedings in the host State (whether already initiated or yet to be initiated) before it is authorized to proceed to international arbitration is incompatible with the *Exhaustion Requirement* in *Decreto* 41-88. Indeed, Honduras cannot require an

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

[94] Respondent's assertion that "if the Claimants believed that the Republic of Honduras violated their rights by the mere enactment of Decree 46-2022 or because ENEE is seeking a renegotiation, they should have resorted – **and still can resort** – to the Honduran courts" (*see* Memorial on Jurisdiction ¶ 91, emphasis added) is patently wrong, in light of the Treaty's waiver requirement.

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

[96] Christoph H. Schreuer, *Calvo's grandchildren: the return of local remedies in investment arbitration*, *in* 1 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 4, 1 (2005) (**CL-211**), at 16 (explaining that fork-in-the-road clauses and the local remedies rule are incompatible because, under a fork-in-the-road provision "the claimant has an irreversible choice between domestic courts and international arbitration," and thus "any step by the claimant to take the dispute to the national courts would rule out subsequent access to the international forum."); *see Bank Melli Iran and Bank Saderat Iran v. The Kingdom of Bahrain*, PCA Case No. 2017-25, Award dated 9 Nov. 2021 (**CL-126**) ¶¶ 526-528 (finding "no basis in the BIT or in international law to impose a general requirement to pursue local remedies for an investor to bring a treaty claim" where the treaty contained a fork-in-the-road clause, because "[T]he Contracting Parties have chosen to bar recourse to arbitration when the investor has 'primarily referred' the dispute to the courts of the host State and local proceedings are pending or a final judgment has been rendered. Thus, had the Claimants sought redress of the violations impugned here before Bahraini courts, the Tribunal would have been barred from ruling on such claims.").

> investor to exhaust local remedies before initiating arbitration, while simultaneously forcing such investor to renounce its right to initiate local proceedings or to continue proceedings already underway before proceeding to arbitration.[97]

37. Honduras cannot require an investor to exhaust local remedies before initiating arbitration, while simultaneously forcing the investor to renounce its right to initiate or continue local proceedings already underway before proceeding to arbitration.[98]

38. Interpreting the similarly worded waiver provision in the North America Free Trade Agreement ("**NAFTA**"), the tribunal in *Metalclad v. Mexico* similarly reasoned that the waiver requirement, by itself, meant that the claimants were not required to exhaust local remedies as a precondition to arbitration.[99]

39. As Professor Schreuer explains in his seminal commentary on the ICSID Convention, a State's general declarations asserting that it will require exhaustion of local remedies resemble notifications under Article 25(4) (the provision allowing Contracting States to

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[97] *Próspera* (**CL-201**) ¶ 119 (emphasis in original).

[98] *Próspera* (**CL-201**) ¶¶ 112, 119; Gabrielle Kaufmann-Kohler and Michele Potestà, *The Interplay Between Investor-State Arbitration and Domestic Courts in the Existing IIA Framework*, *in* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW (2020) (**CL-212**) ¶ 100 ("[R]equir[ing] a prior waiver of all domestic proceedings as a condition to access investor-State arbitration . . . ha[s] the effect opposite to the exhaustion of local remedies rule. The choice-of-forum requirements can only be enforced if read as an implied waiver of the local remedies rule."). *See also* William S. Dodge, *Local Remedies under NAFTA*, *in* FIFTEEN YEARS OF NAFTA CHAPTER 11 ARBITRATION (2011) (**CL-213**), n. 43 (providing that NAFTA's waiver provision is "inconsistent with a requirement that the investor exhaust local remedies because the act of exhausting such remedies would preclude resort to arbitration under the terms of the treaty."); IISD Best Practices Series, *Exhaustion of Local Remedies in International Investment Law* (2017) (**CL-214**), § 3.1.5 ("[A]lthough not directly waiving the ELR rule itself, Chapter 11 of the NAFTA tacitly waives it, as the text requires investors or investments to 'waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach . . . except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.'"); Andrea K. Bjorklund, *Chapter 17 – Waiver of Local Remedies and Limitation Periods*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID (2015) (**CL-215**), at 238 (stating that "encouraging local recourse while simultaneously permitting investment arbitration would force States to face multiple cases and if not managed properly could allow an investor duplicative recovery. One way States signing investment treaties have dealt with this problem is the so-called 'no-U-turn' approach, which permits an investor to seek relief in local courts first, but if and when the investor shifts to international relief under the treaty the investor must waive its right to initiate or continue litigation in local courts. . . . This is the approach taken [in NAFTA's waiver provision].").

[99] *Metalclad Corp. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award dated 30 Aug. 2000 (**CL-7**), n. 4 ("Mexico does not insist that local remedies must be exhausted. Mexico's position is correct in light of NAFTA Article 1121(2)(b) which provides that a disputing investor may submit a claim under NAFTA Article 1117 if both the investor and the enterprise waive their rights to initiate or continue before any administrative tribunal or court under the law of any Party any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in NAFTA Article 1117.").

specify which types of disputes they are willing to submit to ICSID arbitration) and, accordingly, "[i]f a State subsequently consents to ICSID arbitration in terms inconsistent with the prior general notification, the consent will prevail over the notification."[100] The tribunal in *PSEG v. Republic of Turkey* ("***PSEG***") accordingly rejected the respondent's contention that it had qualified its consent to arbitration pursuant to Article 25(4) of the ICSID Convention, holding that such unilateral declarations "always have to be embodied in the consent that the Contracting Party will later give in its agreements or treaties. . . . Otherwise the consent given in the Treaty stands unqualified by the notification."[101]

40. Likewise, the *Próspera* tribunal reasoned that, because any exhaustion requirement and CAFTA-DR Article 10.18.2 cannot coexist, the latter must prevail as "being subsequent in time, it implies a waiver of the previously established requirement;" since the terms of a subsequent arbitration agreement can supersede or waive any previous conditions.[102] In reaching this result, the *Próspera* tribunal also relied on the Honduran Constitution, which mandates that treaties override conflicting domestic laws.[103]

41. Indeed, grafting an exhaustion requirement into the Treaty through the Declaration would deprive CAFTA-DR's Articles 10.18.2 and 10.18.4 of their *effet utile*, contrary to accepted principles of treaty interpretation.[104]

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[100] Christoph H. Schreuer *et al.*, *Chapter II: Jurisdiction of the Centre, in* THE ICSID CONVENTION – A COMMENTARY (3d ed. 2022) (**CL-183**), at 619.

[101] *PSEG Global, Inc., The North American Coal Corp., and Konya Ingin Electrik Üretim ve Ticaret Ltd. Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction dated 4 June 2004 (**CL-216**) ¶ 145.

[102] *Próspera* (**CL-201**) ¶ 120. *See also* International Law Commission Draft Articles on Diplomatic Protection with commentaries (2006) ("**ILC Draft Articles on Diplomatic Protection**") (**CL-217**), Art. 15(e) ("Exceptions to the local remedies rule[.] Local remedies do not need to be exhausted where: . . . **the State alleged to be responsible has waived the requirement that local remedies be exhausted**.") (emphasis added); *Hochtief v. Argentina*, ICSID Case No. ARB/07/31, Decision on Jurisdiction dated 24 Oct. 2011 (**CL-218**) ¶ 95 (confirming that a State may waive the international law exhaustion of local remedies requirement or cure a foreign national's non-compliance through acquiescence.).

[103] *Próspera* (**CL-201**) ¶ 120 ("Since the exhaustion requirement and Article 10.18.2 of CAFTA-DR cannot coexist, the latter must prevail because . . . being subsequent in time, it implies a waiver of the previously established requirement; and . . . in accordance with international law, the Honduran Constitution provides that 'In case of conflict between the treaty or convention [in this case, CAFTA-DR] and the law [Decreto 41-88], the former shall prevail.'"). *See* Constitution of Honduras of 1982 with Amendments through 2013 ("**Constitution of Honduras**") (**Exh. R-15**) Art. 18 ("In case of a conflict between the treaty or convention and the law, the former shall prevail.").

[104] VCLT (**CL-133**), Art. 31 ("A treaty 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"); *Próspera* (**CL-201**) ¶¶ 115-117.

42. The CAFTA-DR is fundamentally incompatible with any exhaustion requirement, underscoring that the Decree did not condition Honduras's consent to arbitration on exhaustion of local remedies. Even if it did (which it did not), the latter in time CAFTA-DR would have superseded and repealed any purported requirement, in light of the incompatibility.

(c) Honduras Should be Estopped from Relying on the Declaration

43. Because Honduras did not raise the Decree as having purportedly conditioned its consent to arbitration for years after its adoption—despite being party to several ICSID arbitrations—and has raised it only belatedly and inconsistently thereafter, it should be estopped from relying on the Decree in this arbitration.

44. Estoppel prohibits a party from benefiting from its own inconsistent conduct (*allegans contraria non audiendus est*) when another party has relied on the party's prior conduct to its detriment.[105] As recognized by the International Court of Justice in the *Nuclear Test Case*, "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith."[106] As Bin Cheng explains, it is a principle of good faith that a State "shall not be allowed to blow hot and cold—to affirm at one time and deny at another."[107] In the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*,

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[105] *Documents of the fifteenth session including the report of the Commission to the General Assembly*, *in* II YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1963 (1964) (**CL-219**), at 40 ("The principle of *préclusion* (estoppel) is a general principle of law[.] . . . Under this principle a party is not permitted to take up a legal position that is in contradiction with its own previous representations or conduct, when another party has been led to assume obligations towards, or attribute rights to, the former party in reliance upon such representations or conduct . . . the foundation of the principle is essentially good faith and fair dealing, which demand that a party shall not be able to gain advantage from its own inconsistencies *(allegans contraria non audiendus est)*."); IC MACGIBBON, *Estoppel in International Law* (1958) 7 ICLQ 468 (**CL-220**), at 468 ("Underlying most formulations of the doctrine of estoppel in international law is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation."); Andreas Kulick, *About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals*, *in* 27 THE EUROPEAN JOURNAL OF INT'L LAW 1 (2016) (**RL-92**), at 109-111; *Nova Scotia Power v. Venezuela* (I), UNCITRAL, Award on Jurisdiction dated 22 Apr. 2010 (**RL-77**) ¶ 141 ("The existence of a doctrine of estoppel . . . is well established in public international law[.] . . . Its applicability has long been recognized in investment arbitration. . . . [T]here is general agreement that the doctrine can be applied to the behaviour of States in judicial or arbitral proceedings. In these situations, **if there is an inconsistency between a State's present claims or allegations and its previous conduct, such divergence violates the principle of good faith**, to which all the State's action must submit.") (emphasis added); *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction dated 25 Sept. 1983 (**CL-221**) ¶ 47 ("This concept [of estoppel] . . . is based on the fundamental requirement of good faith, which is found in all systems of law, national as well as international . . . which can and should be applied in international disputes such as the present one.").

[106] *Nuclear Tests* (Australia v. France), ICJ REPORTS 1974, Judgment dated 20 Dec. 1974 (**CL-222**), at 268.

[107] *See* Bin Cheng, *Chapter 5 – Other Applications of the Principle*, in GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1987) (**CL-223**), at 141-142 (*quoting Cave v. Mills* (1862) 7 Hurlstone & Norman 913, 927).

Vice-President Alfaro likewise explained that "inconsistency of conduct or opinion on the part of the State to prejudice another is incompatible with good faith," and "the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right *(venire contra factum proprium non ilalet).*"[108]

45. As the *Próspera* tribunal observed, Honduras "buried"[109] the exhaustion of remedies language in a Decree that reproduced the entire text of the ICSID Convention; the language appeared in between the last Article of the Convention and the list of signatories, making it appear as if it were part of the Convention itself. Honduras failed to publish the Decree anywhere online, and did not alert ICSID to this alleged "condition" to its consent. ICSID thus published the Decree along with other States' instruments of ratification,[110] rather than with the notifications that were sent by a few other States that indicated their intention to require exhaustion of local remedies.[111]

46. And although Honduras was party to at least four ICSID cases that were registered between 1999 and 2018, Honduras failed to raise any objection regarding exhaustion of local remedies on account of the Decree that was enacted in 1988 in any of those cases.[112]

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[108] *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), ICJ REPORTS 1962, Judgment on the Merits, Separate Opinion of Vice-President Alfaro dated 15 June 1962 (**CL-224**), at 42; *see also id.* at 39-40; *Argentina-Chile Frontier Case* (Argentina v. Chile), UNRIAA Vol XVI, Award dated 9 Dec. 1966 (**CL-225**), at 164 (endorsing Judge Alfaro's opinion).

[109] *Próspera* (**CL-201**) ¶ 52.

[110] *See* ICSID/8, Contracting States and Measures taken by Them for the Purpose of the Convention (28 Oct. 2022) (**CL-226**) ICSID/8-F, Legislative or Other Measures Relating to the Convention (Art. 69 of the Convention), at 24 ("Contracting States have communicated to the Centre the following legislative or other measures taken by them, pursuant to Article 69 of the Convention, to make its provisions effective in their territories."; ICSID Convention, Art. 69 ("Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.").

[111] *See* ICSID/8, Contracting States and Measures taken by Them for the Purpose of the Convention (28 Oct. 2022) (**CL-226**) ICSID/8-D, at 12-13 (reporting notifications by Israel, Costa Rica, and Guatemala regarding the exhaustion of local remedies, but not Honduras).

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

47. It was only in 2023, under President Castro's administration, that Honduras unearthed Decree 41-88 and invoked it in ICSID arbitrations.[113] Shortly after the registration of the first of a new wave of ICSID cases against Honduras in 2023, Honduras held a press conference in which it "publicly and legally denounced ICSID," claiming that ICSID had "violated laws and procedures" by allegedly "disregard[ing] the legal reservation the State registered in . . . 1988."[114] It further attacked investors that were seeking recourse via ICSID, branding them "enemies" of the State.[115] Months later, Honduras denounced the ICSID Convention.[116]

48. Notably, Respondent no longer asserts that the Declaration constitutes a reservation—a correct position, as such a reservation would be invalid as a matter of international law.[117] Respondent's shifting stance reveals that Respondent is adopting arguments out of convenience, as opposed to advancing a long-held sincere position.

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[113] To date, it appears as if Honduras has invoked the Decree as a basis for a jurisdiction objection in the following four cases (in addition to the present one): (i) *JLL Capital S.A.P.I. de C.V. v. Republic of Honduras*, ICSID Case No. ARB/23/3 (filing preliminary objections pursuant to ICSID Arbitration Rule 41 on 18 Aug. 2023); (ii) *Autopistas Atlántico, S.A. de C.V. and others v. Republic of Honduras*, ICSID Case No. ARB/23/10 (filing preliminary objections pursuant to ICSID Arbitration Rule 41(5) on 15 July 2023); (iii) *Honduras Próspera Inc., St. John's Bay Development Co. LLC, and Próspera Arbitration Center LLC v. Republic of Honduras*, ICSID Case No. ARB/23/2 (filing preliminary objections pursuant to Article 10.20.5 of CAFTA-DR on 7 Aug. 2024); and (iv) *Inversiones and Desarrollos Energéticos, S.A. v. Republic of Honduras*, ICSID Case No. ARB/23/40. The *Próspera* tribunal dismissed the objection *Próspera* (**CL-201**) ¶¶ 126, 139-140; the *JLL* and *Autopistas* tribunals denied Honduras's objection under ICSID Article 41(5), holding that the issues were too complex to be decided in an expedited matter. *See* Lisa Bohmer, *ICSID Tribunal Dismisses Rule 41 Objection in Financial Services Dispute with Honduras*, INT'L. ARB. REP. (29 Dec. 2023) (**Exh. C-286**) (referring to the *JLL Capital* tribunal's dismissal of Honduras's Rule 41 objection based on exhaustion of local remedies); Lisa Bohmer, *ICSID Tribunal Rejects Honduras' Argument that Claims Manifestly Lack Legal Merit Due to Investor's Failure to Exhaust Local Remedies*, INT'L. ARB. REP. (5 Apr. 2024) (**Exh. C-287**) (referring to the *Autopistas del Atlántico* tribunal's decision in the same line). Notably, Honduras does not appear to have raised this objection in *Inversiones Continental (Panamá), S.A. v. Republic of Honduras*, ICSID Case No. ARB/18/40, which was registered on 30 October 2018—only a few years prior to the first of the four cases where it did raise the objection—and where Honduras is represented by counsel different from that in the other four cases, even though it raised other preliminary objections. *See* ICSID Case Details for *Inversiones Continental (Panamá), S.A. v. Republic of Honduras*, ICSID Case No. ARB/18/40 (**Exh. C-248**).

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

[115] *Honduras Accuses ICSID of Illegality in Proceedings in Zede Prospera Case*, DINEROHN dated 31 May 2023 (**Exh. C-94**).

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

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

49. Indeed, Honduras has never notified investors of the purported requirement to exhaust local remedies. Honduras's Decree does not appear on the list of legislative or other measures that Member States have communicated to ICSID.[118] If Honduras genuinely intended to require exhaustion of local remedies, it would have made the requirement clear. Relying on the State's representations as set forth in its instrument of consent, Claimants complied with the conditions to that consent, as set forth in the Treaty, including the requirement to waive recourse to other dispute settlement procedures.

50. The *Próspera* tribunal recognized that Honduras's prior conduct contradicts the position it now professes with respect to the Declaration:

> Honduras unconventionally inserted the Exhaustion Requirement in Decreto 41-88, back in 1988; ICSID never registered or listed Honduras' Exhaustion Requirement in its official documents for such a purpose; Honduras never mentioned the Exhaustion Requirement in its international treaties providing for ICSID arbitration (including CAFTA-DR), even though in at least one occasion it entered into a treaty that required exhaustion of local remedies; and Honduras never brought the Exhaustion Requirement as a defense in any ICSID arbitration prior to this case.[119]

51. Respondent's subsequent conduct and representations are likewise at odds with its current position. Honduras consented to ICSID arbitration in a variety of agreements, including the CAFTA-DR, without conditioning its consent on the prior exhaustion of local remedies in some instances, and conditioned its consent with compliance with fork-in-the-road provisions and other terms incompatible with exhausting local remedies in other instances. Honduras also failed to raise any exhaustion of local remedies objection in various, prior ICSID cases brought against it.[120] Respondent's statement that "filing of jurisdictional objections is not an imperative or an obligation, but rather a procedural power whose exercise is at the full disposal of the State"[121] misses the point. The significance of Respondent's failure to raise this objection in previous ICSID

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exhaustion of local remedies as a condition of its consent. Any such reservation to the Ukraine's consent to ICSID arbitration must be contained in the instrument in which such consent is expressed, *i.e*. the BIT itself.").

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

[119] *Próspera* (**CL-201**) ¶ 109.

[120] *See Próspera* (**CL-201**) ¶¶ 109, 119-120; *supra* ¶ 49.

[121] Memorial on Jurisdiction ¶ 87.

cases is that it reveals that Respondent did not previously consider that it had conditioned its consent to arbitration on the exhaustion of local remedies. Indeed, it is not credible that Respondent would not have objected on that basis in prior ICSID cases if it genuinely believed that its consent to arbitration had been so conditioned.

52. Claimants relied on Respondent's representations and the terms of Respondent's consent to arbitration in the CAFTA-DR. Claimants duly submitted their waivers pursuant to Article 10.18.2, did not submit any claims to national or administrative tribunals for breach of their investment agreements, and had no reason to believe that they were required to exhaust local remedies in Honduras before submitting their claims to ICSID arbitration.[122] In light of Honduras's conduct detailed above, on which Claimants relied (to their detriment if Honduras's interpretation were to be accepted), Honduras should be estopped from changing its position and relying on the Declaration to evade the Tribunal's jurisdiction.

2. In Any Event, Exhausting Local Remedies is Not Required Because it Would Be Futile

53. Even assuming *arguendo* that Respondent required the exhaustion of local remedies as a condition of its consent to arbitration in this case—which it has not—Claimants would not have to exhaust local remedies before submitting their claim to arbitration, because the exhaustion of local remedies would be a futile exercise.

54. The traditional rule of exhaustion under customary international law that Respondent purports to preserve is not absolute: local remedies need not be exhausted when doing so would be futile.[123] As explained by the International Law Commission ("**ILC**"), the exhaustion

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[122] Mr. Fernando Paiz's Waiver Pursuant to CAFTA-DR Article 10.18 dated 22 Aug. 2023 (**Exh. C-37**); Ms. Anabella Schloesser de Paiz's Waiver Pursuant to CAFTA-DR Article 10.18 dated 22 Aug. 2023 (**Exh. C-38**); Pacific Solar's Waiver Pursuant to CAFTA-DR Article 10.18 dated 22 Aug. 2023 (**Exh. C-39**).

[123] *See* ILC Draft Articles on Diplomatic Protection (**CL-217**), Art. 15 ("Exceptions to the local remedies rule[.] Local remedies do not need to be exhausted where: (a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress; (b) there is undue delay in the remedial process which is attributable to the State alleged to be responsible; . . ."); *Report of the Commission to the General Assembly on the work of its twenty-ninth session*, in YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1977, VOLUME II-2 (1978) (**CL-229**), at 47 ("Needless to say, the requirement of the exhaustion of local remedies by the individuals concerned presupposes that there are remedies open to those individuals under the internal legal system of the State in question. If the measure initially taken by a State organ, whether it be a legislative, administrative, judicial or other measure, does not admit of any remedy, the possibility of using other means to redress the situation created by that measure is ruled out."); *Próspera* (**CL-201**) ¶¶ 37-46 (holding that tribunals have recognized futility as an exception to the exhaustion of local remedies requirement); *Ambiente Ufficio S.p.A. et al. v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility dated 8 Feb. 2013 (**CL-**

rule only applies if a local remedy is available, offers a real prospect of relief, and would result in a binding decision.[124] The crucial question, explains the ILC, is "whether [the local remedy] gives the possibility of an effective and sufficient means of redress."[125] Local remedies do not need to be exhausted if "there are no reasonably available local remedies to provide effective redress or the local remedies provide no reasonable possibility of such redress."[126]

55. Judge Lauterpacht defined the effectiveness criteria as there being a "reasonable possibility" that a remedy would be afforded.[127] In the *Finnish Shipowners* case, the tribunal found that the remedy must be "effective and adequate" for the exhaustion rule to apply.[128] In its Commentary to the ILC Draft Articles on Diplomatic Protection, the ILC recalls that local remedies need not be exhausted when "the local courts are notoriously lacking in independence . . . or the respondent State does not have an adequate system of judicial protection."[129] The ILC also clarifies that local remedies need not be exhausted where "the course of justice is unduly slow."[130]

56. In the present case, there is no adequate system of judicial protection for Claimants to pursue in Honduras. The Honduran judicial system is plagued by serious problems, with

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187) ¶¶ 620, 603 ("Given the jurisprudence of the Supreme Court in Argentina and in the light of the circumstances prevailing in the present case the Tribunal concludes that having recourse to the Argentine domestic courts and eventually to the Supreme Court would not have offered Claimants a reasonable possibility to obtain effective redress from the local courts and would have accordingly been futile."); *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award dated 20 Sept. 2021 (**CL-228**) ¶ 562 ("[T]he exhaustion rule is subject to two categories of exceptions: an aggrieved alien is only required to pursue remedies - which are reasonably available (i), and - which have an expectation that they will be effective, *i.e.* the measure or appeal has a reasonable prospect of correcting the judicial wrong committed by the lower courts (ii).").

[124] *Report of the Commission to the General Assembly on the work of its twenty-ninth session*, *in* YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1977, VOLUME II-2 (1978) (**CL-229**), at 45, 47-48.

[125] ILC Draft Articles on Diplomatic Protection (2006) (**CL-217**), at 45.

[126] ILC Draft Articles on Diplomatic Protection (2006) (**CL-217**), Art. 15.

[127] B. Sabahi *et al.*, *Exhaustion of Local Remedies*, *in* INVESTOR STATE ARBITRATION (2019) (**RL-40**), at 436.

[128] *Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Finland v. Great Britain)*, 3 UNRIIA 1481, Award dated 9 May 1934 (**CL-227**), at 1494; *see also Ambiente Ufficio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility dated 8 Feb. 2013 (**CL-187**) ¶¶ 620, 603; *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award dated 20 Sept. 2021 (**CL-228**) ¶ 562.

[129] ILC Draft Articles on Diplomatic Protection (2006) (**CL-217**), at 47.

[130] *Report of the Commission to the General Assembly on the work of its twenty-ninth session*, *in* YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1977, VOLUME II-2 (1978) (**CL-229**), at 48, n. 204.

international observers and Respondent's own officials recognizing its lack of independence and serious delays.[131]

- In 2024, Respondent's own judiciary launched a "National Plan to Eradicate Judicial Delay."[132] A 2019 report cited in support of the Plan found that Honduras had 100,507 case files in its Judicial Default Control System [*sistema de control de mora judicial*], of which 71,037 were found to be in a state of judicial default [*mora judicial*]. Strikingly, the report found that over 20,000 cases were over ten years old, with four dating back to 1975-1980.[133]
- In August 2024, the President of Honduras's Supreme Court commented on the U.S. Department of State's Investment Climate report, acknowledging that since day one her main challenge has been dismantling the corruption networks and connections with organized crime and drug dealers that exist in the judiciary.[134]
- In March 2025, the Center for the Study of Democracy issued a report on the perception of legal professionals regarding corruption in the Honduran judiciary, where it concluded that "corruption in the judicial system is structural, systemic, and multifaceted" and that "[t]he Judiciary remains co-opted by political, economic, and irregular interests, resulting in a lack of judicial independence and the perception that processes of interest to those in power are politicized."[135] The report added that "the interference of the Executive and Legislative branches in the appointment of judges and magistrates has enabled the formation of networks of influence peddling in favor of particular interests, fostering impunity, weakening the rule of law, and generating a climate of widespread distrust," and in particular, that the "impact of judicial corruption translates into **concrete barriers to access to justice**."[136]

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

[132] *National Plan to Eradicate Judicial Delay*, PODER JUDICIAL dated 11 Mar. 2024 (**Exh. C-289**).

[133] *National Plan to Eradicate Judicial Delay*, PODER JUDICIAL dated 11 Mar. 2024 (**Exh. C-289**), at 4.

[134] Fernando Maldonado, *Corruption, favoritism and bribes tarnish Honduras's judicial system*, EL HERALDO dated 18 July 2024 (**Exh. C-290**), at 2.

[135] Center for the Study of Democracy, *Perception of Legal Professionals on Corruption in the Judicial System of Honduras*, dated Mar. 2025 (**Exh. C-291**), at 45-46.

[136] Center for the Study of Democracy, *Perception of Legal Professionals on Corruption in the Judicial System of Honduras*, dated Mar. 2025 (**Exh. C-291**), at 46 (emphasis added).

57. The serious delays and pervasive corruption plaguing Honduras's legal system would mean that it would take years for Claimants to exhaust local remedies, and any such proceedings would be riddled with irregularities.[137]

58. Moreover, the current administration has taken steps to ensure its control over the judiciary, including, without limitation, through the appointment of 15 justices to the Supreme Court in 2023, reportedly through a process in which political quotas replaced merit-based appointments.[138]

- Under the Constitution of Honduras, Supreme Court justices are supposed to be elected by the National Congress from a list prepared by an official Nominating Board made up of representatives from the Supreme Court, the Honduran Bar Association, the National Commissioner of Human Rights, the Honduran Council of Private Enterprise, faculty from the National Autonomous University of Honduras, civil society organizations, and Labor Confederations.[139] In 2022, however, Respondent enacted Decree 74-2022, modifying the nomination process, which was widely interpreted as an attempt by President Castro to stack the Court in her favor.[140]
- In 2023, the Nominating Board submitted a list of 45 candidates that were ranked according to their qualifications. The President of the National Congress, Mr. Luis Redondo, a member of President Castro's coalition, stated that the Nominating Board's ranking was irrelevant, and that Congress would choose the 15 justices.[141] Ultimately, the ruling LIBRE party reached an agreement with the Liberal and National parties to divide the 15 seats on the Court amongst themselves, with the LIBRE party being allotted six justices, while the National and Liberal parties were allotted five and four justices, respectively.[142] The Center for the Study of Democracy emphasized that

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[137] *See* Paiz WS II ¶ 15 ("[F]iling a lawsuit in Honduras would have taken us nowhere. It is widely known that all the branches of Government, including the judiciary, are heavily influenced by the Presidency's instructions and would not provide an adequate forum to hear our claims.").

[138] *See Final Report of Oversight on the Process of Election and Selection of Justices of the Supreme Court: Lessons Learned and Recommendations for Future Processes of Electing High Public Officials*, CENTRE FOR THE STUDY OF DEMOCRACY, LAWYERS WITHOUT BORDERS CANADA AND THE DUE PROCESS OF LAW FOUNDATION dated Apr. 2023) (**Exh. C-292**), at 17.

[139] Constitution of Honduras (**Exh. R-15**), Art. 311.

[140] Among other things, the reform changed who could be nominated (*e.g.*, eliminating requirements that precluded members of political parties, former members of the Nominating Board, relatives of members of the Nominating Board or members of Congress, and individuals with rulings against them for serious crimes, domestic violence, and failure to pay child support) and changed the scoring criteria to be taken into account (*e.g.*, reducing the points to be awarded for personal and professional integrity and professional ethics). *See* Decree No. 74-2022 dated 20 July 2022, published in the Official Gazette dated 20 July 2022 (**Exh. C-293**).

[141] *The Castro-Zelayas seek to control the Supreme Court of Honduras*, EXPEDIENTE PÚBLICO dated 25 Jan. 2023 (**Exh. C-294**).

[142] Yarely Madrid, *Corruption and nepotism. Learn of the history of the justices of the new Supreme Court of Honduras*, EXPEDIENTE PÚBLICO dated 17 Feb. 2023 (**Exh. C-295**).

during the 2023 appointment process, "political manipulation was evident, where the new judges were chosen based on party agreements rather than merit, putting the autonomy of the judicial system at risk."[143]

- On 17 February 2023, Ms. Rebeca Lizette Ráquel Obando of the LIBRE party—the aunt of President Castro's son-in-law—was appointed Presiding Justice of the Supreme Court.[144] That same day, the Court Justices modified the Court's regulations to create six "substitute justices," to be designated by the Court and appointed to plenary sessions by the Presiding Justice.[145] The Justices agreed that each of the three parties represented in the plenary would select two substitute justices.[146] The Constitution of Honduras makes no provision for substitute justices.[147] In 2024, the Inter-American Commission on Human Rights expressed concerns regarding the concentration of power by Ms. Ráquel Obando and the political influences that affect the independence of the judiciary.[148] The Center for the Study of Democracy likewise noted that "[t]he concentration of power in the presidency of the Supreme Court has limited judicial autonomy, creating an environment conducive to corruption and abuse of power."[149]
- The politicization of the Court appointment process was apparent on its face. Immediately after the selection of the Justices, Mr. Manuel "Mel" Zelaya, former President of Honduras and husband and advisor to President Castro, stated that he had been a protagonist in shaping the Court.[150]

59. Filing a claim with Honduras's judiciary would be futile considering that the highest judicial authority—the Supreme Court—is controlled by the same political party that promulgated the New Energy Law. In such circumstances, there would be no opportunity for an impartial and fair review. Additionally, there are no internal recourse options for challenging decisions made by the Supreme Court. This lack of alternative avenues for redress, combined with political control over the judiciary, renders the filing of local judicial proceedings futile.

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[143] Breidy Hernández, *Judicial Independence in Honduras: A System Under Political Control*, CRITERIO.HN dated 15 Nov. 2024 (**Exh. C-296**).

[144] *Rebeca Lizette Ráquel Obando, President of the New SCJ*, RADIOAMERICA.HN dated 17 Feb. 2023 (**Exh. C-297**).

[145] Agreement of the Supreme Court of Honduras published in Gazette No. 36,158, Section B amending the Supreme Court's Internal Regulations dated 17 Feb. 2023 (**Exh. C-298**).

[146] *SC modified its internal regulations to create deputy judges*, HONDUDIARIO dated 18 Feb. 2023 (**Exh. C-299**).

[147] *SC modified its internal regulations to create deputy judges*, HONDUDIARIO dated 18 Feb. 2023 (**Exh. C-299**).

[148] Breidy Hernández, *Judicial Independence in Honduras: A System Under Political Control*, CRITERIO.HN dated 15 Nov. 2024 (**Exh. C-296**).

[149] Breidy Hernández, *Judicial Independence in Honduras: A System Under Political Control*, CRITERIO.HN dated 15 Nov. 2024 (**Exh. C-296**).

[150] *Mel Zelaya hopes that the new Court will overturn the re-election*, LA PRENSA dated 20 Feb. 2023 (**Exh C-300**).

60. Not only is there overwhelming evidence of the partiality and dependence of Honduras's judiciary, but there is evidence that Claimants, in particular, would be unable to obtain an impartial and fair adjudication of their claims before judges or administrative tribunals not beholden to the State. Claimants cannot be required to present the claims submitted before this Tribunal and exhaust local administrative proceedings before the very same administrative bodies[151] that continue to breach Honduras's commitments to Pacific Solar, and have ignored Claimants' attempts to settle the dispute for years.[152] For claims relating to the forced renegotiation of the PPA, Respondent identifies local Honduran courts or the "Arbitral Tribunals specifically designed as competent to hear disputes arising from the regulatory framework of the energy sector,"[153] whereas for claims relating to the nonpayment of the debt owed to Pacific Solar and Claimants' "other" claims, Respondent states that Claimants could have presented "an administrative claim before the respective public institutions, following the procedures established in the Administrative Procedure Law."[154] Honduras cannot credibly contend that the Honduran courts and administrative bodies, which have enforced measures against Pacific Solar in violation of Honduras's commitments, will impartially adjudicate any proceedings brought before them or offer meaningful redress for these very same measures.[155]

61. Respondent's orchestrated smear campaign against solar generators like Pacific Solar further confirms bias of the State and the futility of commencing local proceedings in the present case.[156] Honduras continues to use Government channels to demonize solar generators

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

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

[153] Memorial on Jurisdiction ¶ 91.

[154] Memorial on Jurisdiction ¶ 91.

[155] *See Próspera* (**CL-201**) (finding that it would have been futile for the claimants in that case to have challenged the measures in Honduran courts).

[156] *See* Memorial on the Merits §§ IV.B.2(c), II.F.1(b).

who have sought recourse through international arbitration,[157] including by attacking investors that have filed ICSID claims and labeling them "enemies" of Honduras.[158] Honduras also has demonized generators who have not "agreed" to the terms outlined in the Government's "offers," relegating them to "**enemies of the nation**."[159] In a radio interview, the former Minister of Economic Development remarked that "there are companies that are not accepting [our] 'renegotiation' and do not want to give the State a 'fair' and 'correct' price for their energy contracts."[160] He further stated "it is urgent that these [generators] accept [our] "renegotiation," that they lower the[ir] prices, to the right prices, the fair prices,"[161] so that the State could lower the debt it owed, which includes that of the generators.[162]

62. Honduras is also using the administrative tools at the State's disposal to punish the Paizes for commencing this arbitration, including by threatening unwarranted, improper and intrusive inspection of Pacific Solar's operations.[163] In such circumstances, it would be unrealistic

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[157] Minister Tejada, *Renegotiations Allow the State to Extinguish ICSID Proceedings*, X (FORMERLY TWITTER) dated 22 May 2024 (**Exh. C-93**) ("4 ICSID arbitrations were initiated in the energy sector some time ago, for two of them, their companies entered into the process of renegotiating their contracts and, the addenda [to their PPAs] represent a significant reduction in the price of energy, in addition, there was a suspension of the [ICSID] process, with a promise to discontinue [the process] if the addenda were approved by @Congress_HN . . . **the other** . . . **ICSID arbitrations that have been initiated are from** . . . **the photovoltaic company Pacific Solar** . . . **this means that, the process of renegotiating contracts to lower energy prices also allows the State of Honduras to extinguish two ICSID arbitrations**."); Noticieros Hoy Mismo, *Interview with the Vice Foreign Minister of the Government Regarding ICSID Denunciation* dated 1 Mar. 2024 (**Exh. C-164**), at 2:10-2:37 ("This means a period of 90 days to ratify that decision and, after that, it does not mean that the proceedings that have already started at ICSID, or those that start at ICSID during that period, will not have to be addressed by Honduras. Of course, it will have to respond to them. What we are saying is that once the period stipulated by this denunciation made by the country is completed, Honduras will be out of the system, and any trade agreement that the country wants to sign, or that any other country wants to sign with Honduras, will have to be done without incorporating those clauses.").

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

[159] ENEE, *Not all generators are enemies of the nation*, X (FORMERLY TWITTER) dated 27 June 2022 (**Exh. C-219)** ("**Not all generators are enemies of the nation, this week we will be announcing some of the generators that are willing to lower the costs of their contracts**.") (emphasis added).

[160] Radio Interview with the former Minister of Economic Development, RADIO PROGRESO dated 16 Sept. 2022 **(Exh. C-233)**, at 1:23-1:34 ("The problem that we are having is that there are companies that are not accepting the renegotiation and do not want to give the State a fair and correct price for their energy contracts.").

[161] Radio Interview with the former Minister of Economic Development, RADIO PROGRESO dated 16 Sept. 2022 **(Exh. C-233)**, at 2:29-2:47 ("It is urgent that these companies accept the renegotiation, that they lower the prices, to the right prices, to the fair prices. . . .").

[162] *See* Radio Interview with the former Minister of Economic Development, RADIO PROGRESO dated 16 Sept. 2022 **(Exh. C-233)**, at 1:46-2:07.

[163] *See* Letter from UFERCO to the Secretary of State of Energy dated 11 Apr. 2025 (**Exh. C-276**), in which the Honduran anti-corruption agency requested support from the Department of Energy to assist with inspections of photovoltaic plants, with such inspections to be held at the end of April.

to expect that the State's judicial bodies would exercise impartial and independent judgment towards Claimants during local administrative or judicial proceedings.

63. Finally, in light of the well-documented delays in the Honduran judicial system,[164] it is unfathomable that Claimants could commence administrative or judicial proceedings and exhaust their remedies all the way to the highest judicial authority in Honduras in the span of three years. This is yet one more way in which Respondent's exhaustion objection is incompatible with the CAFTA-DR, which contains a three-year prescription period. While it would be impossible to exhaust local remedies within three years after the date of the breach (and knowledge of damages), Claimants would be precluded from submitting their claim to arbitration if more than three years had elapsed from the date of the breach and when they first incurred damages. This further evidences the futility of requiring exhaustion of local remedies in this case.

B. THE TRIBUNAL HAS JURISDICTION OVER CLAIMANTS' UMBRELLA CLAUSE CLAIM, IMPORTED THROUGH THE MFN CLAUSE

64. In their Memorial, Claimants explained that Honduras breached its obligation under Article 10.4 of the Treaty to accord Pacific Solar treatment no less favorable than it accords to investors of any other country, and to their investments, *i.e.*, MFN treatment.[165] Pursuant to the MFN clause, Claimants are entitled to any substantive protections available to investors from other countries, and to their investments, that are more favorable than those contained in the CAFTA-DR. Accordingly, through Article 10.4 of the Treaty, Claimants invoke the umbrella clauses in the Switzerland-Honduras BIT and the Germany-Honduras BIT.[166]

65. In accordance with Article 31(1) of the VCLT, Article 10.4 of the CAFTA-DR shall be interpreted in good faith in accordance with the ordinary meaning of the terms of the Treaty, in their context and in light of the Treaty's object and purpose.[167] Claimants' interpretation of the

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[164] *See supra* ¶ 56.

[165] *See* Memorial on the Merits ¶¶ 25, 190, 322-346.

[166] Memorial on the Merits ¶¶ 322-324. Claimants also referred to other treaties entered into by Honduras that contain umbrella clauses. *See* Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Honduras and the Kingdom of the Netherlands (**CL-122**), Art. 3(4).

[167] VCLT (**CL-133**), Art. 31(1) ("A treaty 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.").

MFN clause in the CAFTA-DR comports with these rules of treaty interpretation, while Respondent fails to discuss and apply the VCLT standard of interpretation altogether.[168]

66. The CAFTA-DR Parties agreed to an expansive MFN clause in Article 10.4, which permits the importation of substantive treaty standards:

> 1. Each Party shall **accord to investors** of another Party **treatment no less favorable** than that it accords, in like circumstances, to **investors** of any other Party or **of any non-Party** with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 2. Each Party shall **accord to covered investments treatment no less favorable** than that it accords, in like circumstances, to **investments** in its territory of investors of any other Party or **of any non-Party** with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[169]

67. As explained in Claimants' Memorial[170] and Observations to Honduras's Request for Bifurcation,[171] 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**."[172] Many other scholars,[173] and investment tribunals,[174] have endorsed this position.

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[168] Memorial on Jurisdiction ¶¶ 154-203.

[169] CAFTA-DR (**CL-1**), Art. 10.4 (emphasis added).

[170] Memorial on the Merits § IV.C.1.

[171] Observations on Request for Bifurcation ¶ 59.

[172] *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed. 2012) (**CL-82**), at 211 (emphasis added).

[173] J. ROMESH WEERAMANTRY, *Interpretation Jurisprudence Particular to Investment Arbitration*, *in* TREATY INTERPRETATION IN INVESTMENT ARBITRATION (2012) (**CL-143**), at 177; Scott Vesel, *Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32 YALE J. INT'L L. 125 (2007) (**CL-144**), at 163; Stephan W. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath*, 111 AM. J. INT'L L. 914 (2017) (**CL-230**), at 918; Simon Batifort & J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111 AM. J. INT'L L. 873 (2017) (**RL-99**), at 886; Martins Paparinskis, *MFN Clauses and Substantive Treatment: A Law of Treaties Perspective of the 'Conventional Wisdom'*, *in* 112 AM. J. INT'L L. UNBOUND 49 (2018) (**CL-231**), at 50; Ieva Kalnina, *White Industries v. The Republic of India: A Tale of Treaty Shopping and Second Chances*, 9 TRANSNAT'L DISP. MGMT. 1 (2012) (**CL-142**), at 6.

[174] *See, e.g.*, *Mr. Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award dated 8 Apr. 2013 (**CL-97**) ¶ 396; *EDF Int'l S.A., et al., v. Argentina*, ICSID Case No. ARB/03/23, Award dated 11 June 2012 (**CL-8**) ¶¶ 929-934; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 (**CL-70**) ¶¶ 103-104; *Consutel Group S.p.A. in liquidazione v. People's Democratic Republic of Algeria*,

68. Honduras alleges that Claimants seek to introduce new obligations into the Treaty through an "expansive interpretation" of the MFN clause, which Honduras asserts cannot be used to import substantive protections from other treaties.[175] Honduras also argues that the Tribunal lacks jurisdiction because the CAFTA-DR's MFN carve-out related to "procurement" applies.[176] Honduras's assertions are wrong.

1. The Ordinary Meaning of "Treatment" in the MFN Clause Includes Substantive Protections in Other Treaties

69. The relevant clause of CAFTA-DR Article 10.4 provides that "Each Party shall accord to investors of another Party **treatment** no less favorable . . ." In this clause, "treatment" includes the substantive protections a State accords to investors through investment treaty protections.

70. The dictionary definition of the word "treatment" supports Claimants' position that "treatment" includes "conduct or behavior towards another," which treatment can be provided via rights under any agreement, including a treaty.[177] The term "treatment" in the context of the CAFTA-DR has a clear meaning, as it is used to refer to the protections Contracting States offer to investors under the Treaty, *i.e.*, "National **Treatment**," "Minimum Standard of **Treatment**," "**Treatment** in Case of Strife" and "Most-Favored-Nation **Treatment**."[178] In public international law and international investment law, "treatment" thus commonly refers to the rights, protections, and benefits a host State affords to foreign investors through investment treaties.[179]

PCA Case No. 2017-33, Final Award dated 3 Feb. 2020 (**CL-232**) ¶ 357; *White Industries Australia Limited. v. The Republic of India*, UNCITRAL, Final Award dated 30 Nov. 2011 (**CL-145**) ¶¶ 11.2.3-11.2.4; *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Award dated 27 Aug. 2009 (**CL-69**) ¶ 164; *Kontinental Conseil Ingenierie v. Republic of Gabon*, PCA Case No. 2015-25, Final Award dated 23 Dec. 2016 (**RL-93**) ¶¶ 169-170.

[175] Memorial on Jurisdiction ¶ 154.

[176] Memorial on Jurisdiction ¶ 157.

[177] *See* Merriam-Webster, *Online Dictionary of the English Language*, available at https://www.merriam-webster.com/dictionary/treatment (**Exh. C-288**) (last accessed 25 Apr. 2025) (defining "treatment" as "the act or manner . . . of treating someone or something: such as conduct or behavior towards another.").

[178] CAFTA-DR (**CL-1**), Arts. 10.3-10.6.

[179] *See* ILC, *Draft Articles on Most-Favoured-Nation Clauses with Commentaries*, 2(2) Y.B. INT'L L. COMM'N (1978) (**CL-233**), Art. 17 (*Irrelevance of the fact that treatment is extended to a third State under a bilateral or a multilateral agreement*).

71. Tribunals interpreting similarly worded MFN clauses overwhelmingly have concluded that the term "treatment," in its ordinary language, includes better substantive protections in third-party treaties.

72. In *EDF v. Argentina*, for example, the tribunal held that the claimant could rely on the umbrella clause of a third-party BIT, reasoning that to "ignore the MFN clause in [that] case would permit more favorable treatment to investors under third countries, which is exactly what the MFN clause is intended to prevent," and that to rule otherwise "would effectively read the MFN language out of the treaty."[180] The tribunal in *Arif v. Moldova* likewise ruled that the claimant could rely on the umbrella clause in a third-party BIT,[181] noting that MFN clauses apply to substantive treaty obligations, and it was therefore permissible to "extend[] the more favorable standard of protection granted by the 'umbrella' clause in either [the UK-Moldova BIT or the U.S.-Moldova BIT] into the BIT at hand."[647] The *MTD v. Chile* tribunal similarly accepted importing "the obligation to . . . fulfillment of contractual obligations" from another treaty.[182] Indeed, in allowing the claimant to invoke an umbrella clause in a third-party treaty, the *Consutel v. Algeria* tribunal explained that the MFN clause "**necessarily** implies that the Claimant can invoke **more**

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[180] *EDF Int'l S.A., et al., v. Argentina*, ICSID Case No. ARB/03/23, Award dated 11 June 2012 (**CL-8**) ¶¶ 932-933; *see also id.* ¶¶ 935-936 (noting that any "divergence of opinion . . . with respect to application of MFN clauses" arises only with respect to whether an MFN clause reaches jurisdictional and procedural provisions of third-country treaties); Agreement Between the Government of the Argentine Republic and the Government of the French Republic for the Promotion and Reciprocal Protection of Investments entered into on 3 July 1991 ("**Argentina-France BIT**") (**CL-234**), Art. 4 (authentic Spanish text: "*Cada Parte Contratante aplicará, en su territorio y en su zona marítima, a los inversores de la otra Parte, en aquello que concierne a sus inversiones y actividades ligadas a estas inversiones, un tratamiento no menos favorable que el acordado a sus propios inversores, o el tratamiento acordado a los inversores de la Nación más favorecida si este último fuese más ventajoso*. . . .") (English translation: "Each Contracting Party shall accord in its territory and maritime zone to investors of the other Party, in respect of their investments and activities in connection with such investments, treatment that is no less favourable than that accorded to its own investors or the treatment accorded to investors of the most-favoured nation, if the latter is more advantageous. . . ."); *see also* Simon Batifort & J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111 AM. J. INT'L L 873 (2017) (**RL-99**), at 889 (describing the *EDF* case as reflective of the "**widely shared view** that the essential function of MFN clauses in investment treaties is to import treaty standards.") (emphasis added).

[181] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated 8 Apr. 2013 (**CL-97**) ¶ 396; *see also id.* ¶ 394 (quoting Article 4 of the BIT).

[182] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 (**CL-70**) ¶¶ 103, 187; *see also MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment dated 21 Mar. 2007 (**CL-235**) ¶ 64 (holding that "[t]he most-favoured-nation clause in Article 3(1) is not limited to attracting more favourable levels of treatment accorded to investments from third States only where they can be considered to fall within the scope of the fair and equitable treatment standard. Article 3(1) attracts any more favourable treatment extended to third State investments and does so unconditionally.").

favorable clauses included in bilateral treaties concluded between Algeria and third countries."[183]

73. And, notably, the *Telenor v Hungary* award on which Respondent relies states that "[i]n the absence of language or context to suggest the contrary, the ordinary meaning of 'investments shall be accorded **treatment no less favourable** than that accorded to investments made by investors of any third State' is that investor's ***substantive* rights in respect of the investment are to be treated no less favourably under a BIT between the host State and a third State**. . . ."[184] Another authority cited by Honduras likewise acknowledges that, "[a]s a matter of general international law, **a treaty obligation assumed towards a third State may constitute treatment for the purpose of the MFN clause**."[185] As such, the ordinary meaning of "treatment" in the MFN clause clearly includes the substantive protections granted to other investors through different treaties.[186]

74. In this regard, Claimants disagree with the position taken by the United States in its non-disputing Party submission, that provisions of other international agreements do not constitute "treatment" within the meaning of the MFN clause.[187] This position is contradicted by the plain language of the Treaty's provision, and, overwhelmingly by arbitral jurisprudence and scholarship, as shown above. The United States' erroneous position need not be "taken into account" by the Tribunal, since it is not part of any subsequent agreement among the Treaty Parties within the meaning of Article 31(3) of the VCLT.[188] Moreover, a view of one of the State Parties—that also

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[183] *Consutel Group S.P.A. in liquidazione v. People's Democratic Republic of Algeria*, PCA Case No. 2017-33, Final Award dated 3 Feb. 2020 (**CL-232**) ¶¶ 356, 359 (translation by counsel; emphasis added).

[184] *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award dated 13 Sept. 2006 (**RL-72**) ¶ 92.

[185] Campbell McLachlan et al., *Treatment of Investors*, *in* INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2017) (**RL-95**) ¶ 7.308 (emphasis added).

[186] CAFTA-DR (**CL-1**), Art. 10.4; *see also* Stephan W. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath*, in 111 AM. J. INT'L L. 914 (2017) (**CL-230**), at 918, 921 ("[T]he view that MFN clauses covered better substantive standards of treatment in the host state's third-country IIAs has been firmly entrenched since the beginning of investment arbitration. . . . The *jurisprudence constante* is principally due to the limited relevance of variations in the wording of MFN clauses that came up in actual disputes. . . . MFN clauses—in particular those that refer simply to 'better' treatment or 'all' treatment, but possibly also those applying to 'treatment related to the management, maintenance, use, or disposal of investment' with or without a qualifier clarifying that investors must be 'in similar situations'—can faithfully be interpreted as allowing covered investors to rely on better substantive standards of treatment granted in one of the host state's third-country IIAs.").

[187] Non-Disputing Party Submission of the United States of America ¶ 5.

[188] *See* VCLT (**CL-133**), Art. 31(3)(a) ("There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."); *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No.

has been a respondent in other claims under the same or similar treaties—is entitled to little, if any, weight, as it is in the interest of a respondent State to advocate for interpretations that restrict rights granted to investors and, consequently, tribunals should be skeptical of such interpretations.[189]

75. Honduras's remaining arguments run afoul of the MFN clauses' ordinary meaning, in context, because they ignore the fundamental difference between (i) the broad-based MFN clause at issue here and the more narrowly-framed MFN clauses in other cases on which it relies; and (ii) dispute settlement provisions, which are procedural in nature, and substantive treaty standards, which specify the treatment afforded to investors.[190]

76. Honduras thus errs when it relies on cases where the MFN clause, by its terms, applies more narrowly. Respondent, for instance, ignores that the *Teinver v. Argentina* tribunal arrived at its finding based on the specific language of the MFN clause in the applicable treaty (the Spain-Argentina BIT), which differs from the language in the CAFTA-DR in that it limits the protection to "all matters **governed by this Agreement**."[191] The *Teinver* tribunal reasoned that "the plain and ordinary meaning of this language is to refer to the various rights or forms of protection contained in the individual provisions of the Treaty" and accepted Argentina's objection "[o]n the basis of **the specific language used by the Parties in the Treaty**."[192] The *VEB v.*

ARB/18/43, Decision on the Respondent's Preliminary Objections dated 13 Mar. 2020 (**CL-151**) ¶ 156 (explaining non-disputing party submissions may be deemed as a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its application" but that requires "a demonstration that *all* the State Parties to a particular treaty had expressed a common understanding," which not happened in the case, as there was no "unanimous expression of views about the scope and implications" of a particular CAFTA-DR provision) (emphasis in the original).

189 Anthea Roberts, *Subsequent Agreements and Practice: The Battle over Interpretive Power*, *in* TREATIES AND SUBSEQUENT PRACTICE (George Nolte ed., 2013) (**CL-236**), at 6 ("[W]hen a treaty creates rights or benefits for non-state actors, the treaty's creators and beneficiaries are not one and the same. Accordingly, transnational courts and tribunals cannot assume a no-harm-no-foul approach to accepting interpretations because not all of the relevant rights' holders will have consented to the interpretation."); Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1188 (Peter Muchlinski et al. eds., 2008) (**CL-237**), at 1201 (explaining that, in the context of creating official State interpretations, "States will strive to issue official interpretations to influence the proceedings to which they are parties. . . . [T]he home states of disputing investors are less interested in interpretations favourable to their nationals in pending disputes than in interpretations that favour state respondents generally."); *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award dated 3 June 2021 (**CL-238**) ¶ 339 (holding that a non-disputing party submission made by Canada "reflect[s] legal arguments put forward in the context of this dispute to advance [its] respective interests.").

190 Memorial on Jurisdiction ¶¶ 180, n. 240, 186-188.

191 *See Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award dated 21 July 2017 (**CL-102**) ¶ 884 (citing Article IV(2) of the Spain-Argentina BIT) (emphasis added).

192 *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award dated 21 July 2017 (**CL-102**) ¶ 884 (emphasis added).

Ukraine tribunal similarly disallowed the importation of an FET standard via an MFN clause based on the specific wording of the narrowly-drafted MFN clause at issue in the BIT applicable in that case. As that tribunal remarked, it was "**not tasked with determining a general meaning of MFN clauses**."[193]

77. Unlike the BITs at issue in these cases, the CAFTA-DR contains a broad-based MFN clause that applies to all "treatment," without limiting its application to standards already included in the Treaty. As the authorities cited by Honduras confirm, "[a]s a matter of general international law, **a treaty obligation assumed towards a third State may constitute treatment for the purpose of the MFN clause**."[194]

78. Secondly, Honduras errs by relying on cases in support of its objection that concern attempts to circumvent dispute resolution requirements—issues that implicate a tribunal's jurisdiction or the admissibility of claims—an entirely separate matter from the importation of substantive protections.[195] The umbrella clauses that Claimants seek to import are clearly

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[193] *State Dvlp. Corp. VEB.RF v. Ukraine*, SCC Case No. V2019/088, Partial Award on Preliminary Objections dated 31 Jan. 2021 (**RL-104**) ¶ 254 (emphasis added).

[194] Campbell McLachlan *et al.*, *Treatment of Investors*, *in* INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2017) (**RL-95**) ¶ 7.308 (emphasis added); *see also* ILC, *Draft Articles on Most-Favoured-Nation Clauses with Commentaries*, 2(2) Y.B. INT'L L. COMM'N (1978) (**CL-233**), at 23.

[195] *See, e.g.*, *A11Y Ltd. v. Czech Republic*, ICSID Case No. UNCT/15/1, Decision on Jurisdiction dated 9 Feb. 2017 (**RL-96**) ¶¶ 94-95 ("The Claimant invokes this most-favored-nation clause to attract the **more favorable dispute resolution provision** found in the Netherlands-Czech BIT. The Tribunal is of the view that an MFN clause can, *a priori*, apply to dispute settlement.") (emphasis added); *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction dated 8 Feb. 2005 (**RL-67**) ¶¶ 184, 191 (distinguishing between whether an MFN clause applies to dispute settlement procedures or to substantive protections, and holding that "the MFN provision of the Bulgaria-Cyprus BIT cannot be interpreted as providing **consent to submit a dispute** under the Bulgaria-Cyprus BIT to ICSID arbitration.") (emphasis added); *European American Investment Bank AG (Austria) v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction dated 22 Oct. 2012 (**RL-87**) ¶¶ 448-450 (distinguishing between provisions that limit the "substantive scope of the provision for arbitration" and provisions that impose procedural conditions that claimant must meet before submitting to arbitration, and that "[t]he Tribunal therefore considers that the **special character of the provision for investor-State arbitration** . . . militate against attributing to Article 3 of the BIT the effect suggested by the Claimant . . . ."") (emphasis added); *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction dated 24 Oct. 2011 (**RL-16**) ¶ 79 ("In the present case, it might be argued that the MFN clause requires that investors under the Argentina-Germany BIT be given MFN treatment during the conduct of an arbitration but that the MFN clause cannot create a **right to go to arbitration** where none otherwise exists under the BIT.") (emphasis added); *but see Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award dated 22 Aug. 2011 (**RL-81**) ¶ 216 ("As applied to the German-Argentine BIT, then, **the outer limits** set by the *ejusdem generis* rule **are broad enough** to encompass international dispute resolution within the meaning of the Treaty's MFN clauses.") (emphasis added). *See also DS Construction FZCO v. Libya*, Paris Court of Appeal, Judgment dated 23 Mar. 2021 (**RL-105**) ¶¶ 101 (setting aside award and holding that the MFN provision of the underlying treaty could not be used to import the arbitrator appointment mechanism from another BIT concluded by Libya, as the applicable treaty did not mention the UNCITRAL Rules, and the MFN clause could not be used to "extend to the **procedural advantages of dispute settlement** provided for in other investment protection treaties.") (emphasis added); Zachary Douglas, *The MFN*

substantive treaty protections,[196] and Respondent errs in suggesting otherwise.[197] Indeed, the UNCTAD Report on MFN provisions published in 2010 shows that some States have proceeded to limit the use of MFN clauses to import dispute settlements provisions, but not substantive protection in other treaties.[198] Even the author cited by Claimants states that "the debate about the appropriateness of MFN use **only questions** the importation through an MFN clause **of dispute resolution mechanisms**, whereas the **importation of substantive provisions is not at all controversial**."[199] The cases relied on by Honduras, including *Plama v. Bulgaria*, for instance, thus confirm Claimants' position: while the tribunal rejected the possibility of importing dispute resolution provisions, it considered that the MFN provision would cover "substantive protection."[200]

Clause in Investment Arbitration: Treaty Interpretation Off the Rails, 2 J. INT'L DISP. SETTLEMENT 97 (2011) (**RL-79**), at 97; Tony Cole, *The Boundaries of Most Favored Nation Treatment in International Investment Law*, 33 MICH. J. INT'L L. 537 (2012) (**RL-82**), at 539-540, 557, 560-561, 578-581; Memorial on Jurisdiction ¶ 188, n. 250 (referring to *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award dated 13 Nov. 2000 (**CL-239**) but not including it on the record).

[196] *See, e.g., Consutel Group S.p.A. in liquidazione v. People's Democratic Republic of Algeria*, PCA Case No. 2017-33, Final Award dated 3 Feb. 2020 (**CL-232**) ¶ 357 (finding that "the Respondent's argument that the MFN clause cannot cover an umbrella clause due to its procedural nature to be unfounded" because "**the umbrella clause has a substantive nature, not a procedural one**.") (translation by counsel; emphasis added); *Mr. Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award dated 8 Apr. 2013 (**CL-97**) ¶ 395 (holding that umbrella clauses "**are substantive in nature**" and a breach thereof would give rise to "**a substantive breach of the BIT**," therefore rejecting "Respondent's argument that 'umbrella' clauses are procedural in nature and cannot be imported through an MFN clause.") (emphasis added); *EDF Int'l S.A.*, et al., *v. Argentine Republic*, ICSID Case No. ARB/03/23, Award dated 11 June 2012 (**CL-8**) ¶ 936 (holding that umbrella clauses are "**clearly substantive provisions** requiring respect for explicit host state undertakings such as concession agreements.") (emphasis added).

[197] *See* Memorial on Jurisdiction ¶ 195 (arguing that *Lopez-Goyne v. Nicaragua*, relied on by Claimants, is "out of context" because the tribunal addressed "the application of a substantive standard . . . and not its procedural effects (as is the case with the umbrella clause in this dispute).").

[198] UNCTAD, *Most-Favored-Nation Treatment*, UNCTAD SERIES ON ISSUES OF INTERNATIONAL INVESTMENT AGREEMENTS II (2010) (**CL-240**), at 84-86; Central America – South Korea Free Trade Agreement (2018) (**CL-241**), Art. 9.4, n. 1 ("For greater certainty, Article 9.4 **shall not apply to investor-state dispute settlement mechanisms** such as those set out in Section B or that are provided for in an international treaty or trade agreement.") (emphasis added); Honduras-Peru Free Trade Agreement (2015) (**CL-242**), Art. 12.3(3) (containing a similar wording); Canada-Honduras Free Trade Agreement (2013) (**CL-243**), Art. 10.5(3) (same).

[199] Ieva Kalnina, *White Industries v. The Republic of India: A Tale of Treaty Shopping and Second Chances*, 9 TRANSNAT'L DISP. MGMT. 1 (2012), at 6 (**CL-142**) (emphasis added).

[200] *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction dated 8 Feb. 2005 (**RL-67**) ¶ 191 ("the fact that the second paragraph refers to 'privileges' may be viewed as indicating that MFN treatment should be understood as relating to substantive protection"); *see also Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award dated 13 Sept. 2006 (**RL-72**) ¶ 92 ("In the absence of language or context to suggest the contrary, **the ordinary meaning of [the MFN clause] is that the investor's substantive rights** in respect of the investments are to be treated no less favourably than under a BIT between the host State and a third State," which is not the same as "importing **procedural** rights as well.") (emphasis added).

79. As opposed to Respondent's position, Claimants' interpretation of the MFN clause not only comports with the ordinary meaning of its terms, in context, but it also is consistent with its object and purpose. The object and purpose of the MFN clause is to ensure that investors are granted treatment equal to the treatment accorded to investors from third States, which includes treaty protections.[201] The *UP and C.D Holding v. Hungary* tribunal confirmed that "[t]he self-evident **purpose** of an MFN clause is to ensure that **treatment accorded to investors under one BIT will be no less advantageous than treatment accorded to investors under another BIT**."[202] Further, in *Arif v. Moldova*, the tribunal found that "[a]ccording to the ordinary meaning of the text, the specific **purpose** of these clauses is . . . to provide investors with the **right to claim the application of any rule of law more favourable** than the provisions of the BIT."[203] The tribunal noted that MFN clauses apply to substantive treaty obligations, and it was thereby possible to "extend[] the more favorable standard of protection granted by the 'umbrella' clause in either [the UK-Moldova BIT or the U.S.-Moldova BIT] into the BIT at hand."[204] In *White Industries v. India*, the tribunal likewise reasoned that importing a more favorable substantive provision "achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause."[205]

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[201] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d. ed. 2012) (**CL-82**), at 206 ("The simple goal of MFN clauses in treaties is to ensure that the relevant parties treat each other in a manner at least as favourable as they treat third parties. The normal effect of an MFN clause in a BIT is to widen the rights of the investor."); Stephan W. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath*, 111 AM. J. INT'L L. 914 (2017) (**CL-230**), at 922 ("[T]he objective of MFN clauses is to multilateralize, for beneficiary states and their investors, commitments the granting state makes in international agreements with third countries in respect of substantive standards of treatment."); Martins Paparinskis, *MFN Clauses and Substantive Treatment: A Law of Treaties Perspective of the 'Conventional Wisdom'*, in 112 AM. J. INT'L L. UNBOUND 49 (2018) (**CL-231**), at 50 (explaining that during the discussions conducted at the auspices of ILC regarding the scope and application of MFN clauses "most states to address the issue endorsed, whether explicitly or by necessary implication, application of MFN clauses to substantive rules in other treaties"); David D. Caron & Esme Shirlow, *Most-Favored-Nation Treatment: Substantive Protection*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID (Meg Kinnear et al. eds., 2015) (**CL-244**), at 400 ("As a substantive protection obligation, an MFN clause in a 'base treaty' operates by reference to any more favorable standards of protection accorded by the host State to investors of third party nationality – whether that treatment is accorded in practice ('comparator practice'), or is stipulated in a provision of a treaty between the host State and a third State (a 'comparator treaty').").

[202] *UP and C.D Holding Internationale (formerly Le Cheque Dejeuner) v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction dated 3 Mar. 2016 (**CL-245**) ¶ 162 (emphasis added).

[203] *Mr. Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award dated 8 Apr. 2013 (**CL-97**) ¶ 388 (emphasis added).

[204] *Mr. Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award dated 8 Apr. 2013 (**CL-97**) ¶ 396 (emphasis added).

[205] *White Industries Australia Limited. v. The Republic of India*, UNCITRAL, Final Award dated 30 Nov. 2011 (**CL-145**) ¶¶ 11.2.3-11.2.4.

80. This is in line with the general object and purpose of the CAFTA-DR, to create a framework that protects investors and their investments.[206] Notably, the *MTD v. Chile* tribunal found that the MFN obligation allowed for the invocation of substantive obligations in other BITs concluded by Chile, including the obligation to fulfil contractual obligations, because the MFN obligation "has to be interpreted in the manner **most conducive to fulfill the objective of the BIT to protect investments and create conditions favorable to investments**" and this interpretation "is in consonance with this purpose."[207]

81. Claimants accordingly may rely on the MFN clause in the CAFTA-DR to import the umbrella clauses of the BITs that Honduras has entered into with Switzerland and Germany, as they constitute more favorable treatment accorded to Swiss and German investors.

2. Treatment Includes More Favorable Terms in Other Treaties—And Not Just Additional Substantive Protections

82. Respondent argues that, even if the MFN clause in the CAFTA-DR allows importation of other treaty standards, it cannot be used to import new standards of protection not included in the Treaty, but only more favorable enunciations of the standards already included therein.[208] This, too, is incorrect.

83. In *Veolia v. Egypt*, on which Respondent relies, the tribunal's decision was guided by the specific language of the MFN clause in the applicable France-Egypt BIT. In that case, the MFN clause was closely linked to the FET standard and the tribunal accordingly held that it could not be used to import other substantive protections:

> [N]otwithstanding the contradictory conclusions arrived at by various arbitral awards as to whether the FET standard may be considered in international investment law to cover other standards such as FPS and an umbrella clause, this Tribunal is of the view that an MFN clause **which is restricted to the standard of FET, such as the one in the France-Egypt**

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[206] CAFTA-DR (**CL-1**), Art. 1.2 ("Objectives 1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment, and transparency, are to: (a) encourage expansion and diversification of trade between the Parties; . . . (d) substantially increase investment opportunities in the territories of the Parties; . . ."); *see also id.* Preamble ("ENSURE a predictable commercial framework for business planning and investment; . . .").

[207] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 (**CL-70**) ¶¶ 103-104 ("[T]he fair and equitable standard of treatment has to be interpreted in the manner most conducive to fulfill the objective of the BIT to protect investments and create conditions favorable to investments. The Tribunal considers that to include as part of the protections of the BIT those included in Article 3(1) of the Denmark BIT and Article 3(3) and (4) of the Croatia BIT is in consonance with this purpose.").

[208] Memorial on Jurisdiction ¶ 202.

> **BIT**, cannot be used to introduce into the treaty other autonomous standards of international investment law such as the FPS clause or the umbrella clause.[209]

84. By contrast, the MFN provision in the CAFTA-DR is broad and not restricted to specific standards of protection.

85. In two other cases on which Respondent relies, *İçkale v. Turkmenistan* and *Muhammet Çap & Sehil v. Turkmenistan*, the claimants sought to import four different standards of protection from third-party treaties, while the governing treaty allowed them to claim only for unlawful expropriation.[210] This also is not comparable to the CAFTA-DR, which contains a broad MFN clause and many other substantive standards of protection, including the obligation to comply with investment agreements. Additionally, while both tribunals considered that the MFN clause only applied where there was *de facto* discrimination,[211] this position has been widely criticized.[212]

86. And in *Société Générale v. Dominican Republic*, the tribunal addressed the importation of the term "investment" from another treaty to extend its jurisdiction and concluded that the MFN clause could not be used to broaden the definition of investment.[213] This case is also

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[209] *Veolia Propreté v. Arab Republic of Egypt*, ICSID Case No. ARB/12/15, Decision on Jurisdiction dated 13 Apr. 2015 (**RL-89**) ¶ 154 (emphasis added).

[210] *İçkale İnşaat Limited Şirketi v. Turkmenistan,* ICSID Case No. ARB/10/24, Award dated 8 Mar. 2016 (**RL-91**) ¶¶ 311, 312; *Muhammet Çap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan,* ICSID Case No. ARB/12/6, Award dated 4 May 2021 (**RL-106**) ¶¶ 550, 552.

[211] *İçkale İnşaat Limited Şirketi v. Turkmenistan,* ICSID Case No. ARB/10/24, Award dated 8 Mar. 2016 (**RL-91**) ¶ 328; *Muhammet Çap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan,* ICSID Case No. ARB/12/6, Award dated 4 May 2021 (**RL-106**) ¶ 789.

[212] *See* Stephan W. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath*, in 111 AM. J. INT'L L 914 (2017) (**CL-230**), at 933 (remarking that the *İçkale* award and its interpretation of MFN clauses "**is highly problematic** and **should not be used to query the effect of MFN clauses** in IIAs . . ." and that "**the general international law background, which supports the application of MFN clauses in IIAs to substantive standards of treatment, should be given preference in applying IIAs**, as long as the clauses' wording and other relevant context so permit.") (emphasis added); Mark Mangan, *Substantive Protections: MFN*, in The Guide to Investment Treaty Protection and Enforcement (2d. edition 2023) (**CL-246**), at 5 (commenting that these "[t]wo decisions rendered under the Turkey–Turkmenistan Bilateral Investment Treaty (BIT) MFN clause, however, appear to **swim against this jurisprudential tide**.") (emphasis added).

[213] *Société Générale on behalf of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A. v. Dominican Republic*, LCIA Case No. UN 7927, Preliminary Objections to Jurisdiction dated 19 Sept. 2008 (**RL-74**) ¶¶ 40-41 ("[R]esort to the specific text of the MFN Clause is unnecessary because it applies only to the treatment accorded to such defined investment, but **not to the definition of 'investment' itself**.") (emphasis added); *see also* UNCTAD, *Most-Favored-Nation Treatment*, UNCTAD SERIES ON ISSUES OF INTERNATIONAL INVESTMENT AGREEMENTS II (2010) (**CL-240**), at 62 (explaining that this case "analysed a basic legal notion: in order to resort to the MFN treatment clause, the basic treaty has to be validly invoked. In other words, first comes the application of the

inapposite, where Claimants are invoking the MFN clause to import substantive protections and not to establish jurisdiction.

87. Finally, Honduras places misplaced reliance on *Vercara v. Colombia* for the proposition that, in order to use the MFN clause to import standards from other treaties, it must be shown that the treaty parties intended to "circumvent the more restrictive clause" and "instead import a broader obligation."[214] In that case, the tribunal rejected the claimant's attempt to import an autonomous FET standard from another treaty, when the applicable treaty tied the standard to the minimum standard under customary international law.[215] As an initial matter, the *Vercara* tribunal adopted a minority position: as shown, the vast majority of tribunals—supported by respected commentators—have permitted the importation of additional or heightened standards of protection. For instance, the tribunal in *Bayındır v. Pakistan* allowed the importation of an FET provision from other treaties where the Turkey-Pakistan BIT did not contain a similar provision.[216] The tribunal in *White Industries v. India*, for example, allowed the importation of an "effective means" standard where the underlying treaty contained only protection for a denial of justice, a higher standard to meet.[217]

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treaty itself, through the scope and definition clauses, and only after this first step, the beneficiary of the MFN clause (the investor) may invoke the clause to seek the better substantive content.").

[214] Memorial on Jurisdiction ¶ 182; *Neustar, Inc. and Vercara, LLC v. Republic of Colombia*, ICSID Case No. ARB/20/7, Award dated 20 Sept. 2024 (**RL-111**) ¶ 726.

[215] *Neustar, Inc. and Vercara, LLC v. Republic of Colombia*, ICSID Case No. ARB/20/7, Award dated 20 Sept. 2024 (**RL-111**) ¶ 724.

[216] *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Award dated 27 Aug. 2009 (**CL-69**) ¶ 164 (" At the outset, the Tribunal notes that the basis for importing an FET obligation into the Treaty is provided by its MFN clause. . . ."); *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award dated 18 May 2010 (**CL-247**) ¶ 125, n. 16 ("The Tribunal notes also that, by virtue of Article II(2) of the Treaty (the 'MFN' clause), the Respondent has assumed the obligation to accord to the Claimant's investment fair and equitable treatment (see the UK-Jordan BIT) and treatment no less favourable than that required by international law (see the Spain-Jordan BIT).").

[217] *White Industries Australia Limited. v. The Republic of India*, UNCITRAL, Final Award dated 30 Nov. 2011 (**CL-145**) ¶¶ 11.2.1–11.2.9. Respondent references a few blog posts criticizing the tribunal's decision. Memorial on Jurisdiction ¶ 194. These blog posts, however, do not even criticize the decision itself; rather, they criticize treaties containing broad MFN language that allows investors to import substantive provisions from other treaties and urge India to adopt different language in new treaties and / or renegotiate its existing treaties. *See* Prabhash Ranjan, *The White Industries Arbitration: Implications for India's Investment Treaty Program*, INVESTMENT TREATY NEWS dated 13 Apr. 2012 (**RL-84**), at 4 (stating that "White Industries was permitted to benefit from the **broadly worded MFN provision**. In light of this ruling, it is pertinent that India reviews the MFN provisions in its BITs, which are often **defined in an expansive manner** without adequate exceptions. . . . Further, a tribunal can find a violation of the 'effective means' standard even when the concerned BIT does not contain such a provision **as long as it contains a broad MFN provision**, which some tribunals **will use to import investor guarantees from other BITs**.") (emphasis added); Amrit Singh, *Avoiding the MFN Clause: One Step Forward, Two Steps Back?*, KLUWER ARBITRATION BLOG dated 1

88. In any event, even if Respondent were correct—and it is not—as the *EDF v. Argentina* tribunal reasoned, "[e]ven if Argentina is right in arguing that MFN clauses should be subjected to an *ejusdem generis* limitation . . . the umbrella clause is part of the same genus of provisions on substantive protection of investments as the fair and equitable treatment clause and other similar provisions which feature in the Argentina-France BIT."[218] Even more so here, as the CAFTA-DR provides investors with the right to "enforce the provisions of . . . investment agreement[s.]"[219] The Treaty thus grants investors a standard of protection akin to the one sought to be imported via the MFN clause, namely, the umbrella clause.[220] Indeed, a respected scholar explains that the effect of elimination of the umbrella clause in the 1994 U.S. Model BIT was "limited," precisely because "the investor-state disputes provision **continues to allow investors to submit to arbitration claims arising out of or relating to an investment agreement** or an investment authorization."[221]

3. The Absence of Specific Limitations in the MFN Clause Supports Including Substantive Protections from Third-Party Treaties

89. It is uncontroversial that under VCLT Article 31(1) the surrounding treaty provisions are relevant as context to understand a treaty's terms. As put by the *Kappes v. Guatemala* tribunal, "any VCLT interpretation must rest not on construction of a treaty provision in isolation, but rather on **that provision in the context of surrounding or otherwise relevant treaty provisions**."[222]

90. As further context, the CAFTA-DR expressly excludes certain matters ("non-conforming measures") from the MFN clause's application in a carve-out provision under Article 10.13.[223] This carve-out does not, however, exclude the possibility of using the MFN clause to

Dec. 2018 (**RL-102**) (describing reforms made in India to eliminate the MFN clause from its model BIT as a reaction to the adverse award in *White Industries v. India*).

[218] *EDF Int'l S.A., SAUR Int'l S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment dated 5 Feb. 2016 (**CL-248**) ¶ 237.

[219] Kenneth J. Vandevelde, *The Scope of BIT Protections, in* U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009) (**RL-12**), at 173.

[220] CAFTA-DR (**CL-1**), Art. 10.28 (definition of "investment agreement").

[221] Kenneth J. Vandevelde, *The Scope of BIT Protections, in* U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009) (**RL-12**), at 261 (emphasis added).

[222] *Daniel W. Kappes and Kappes, Cassiday & Assoc. v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections dated 13 Mar. 2020 (**CL-151**) ¶ 131 (emphasis added).

[223] CAFTA-DR (**CL-1**) Art. 10.13.

import substantive treatment provisions from other treaties. According to the interpretative maxim *expressio unius (est) exclusio alterius*—the express mention of one thing implies the exclusion of others—the decision to enumerate specific exclusions indicates that no others were intended to be excluded.[224] The Treaty drafters clearly understood how to limit the MFN clause, but chose not to exclude the possibility for investors to rely on treatment accorded to investors of third-party treaties.

91. Indeed, at the time of the CAFTA-DR's negotiation and conclusion in 2003-2004, its Parties—including Honduras—were aware that an MFN clause could be relied upon by investors to import more favorable substantive protections from other treaties. By that time, Honduras already had gained experience with ICSID arbitration,[225] and tribunals had found that investors could in principle rely on MFN clauses in investment treaties to invoke more favorable substantive and procedural protections in other investment treaties.[226] In the CAFTA-DR's drafting history, the Contracting Parties reportedly affirmed their understanding that the MFN provision applies to "substantive treatment matters," but was not intended to "encompass international dispute resolution mechanisms."[227] And indeed, no such carve-out was included in

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[224] Alexandre Senegacnik, *Expressio Unius (Est) Exclusio Alterius*, MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL PROCEDURAL LAW (2018) (**CL-249**) ¶¶ 1, 9.

[225] *See*, *e.g.*, ICSID Website, Results of Case Search in Which Honduras is Respondent, available at https://icsid.worldbank.org/cases/case-database (**Exh. C-245**) (last accessed 10 Oct. 2024) (including *Astaldi S.p.A. & Columbus Latinoamericana de Construcciones S.A. v. Republic of Honduras*, ICSID Case No. ARB/99/8).

[226] *See*, *e.g.*, *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award dated 27 June 1990 (**CL-250**) ¶ 54; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award dated 13 Nov. 2000 (**CL-239**) ¶ 21; *Pope & Talbot v. Government of Canada*, Award on the Merits of Phase 2, 10 April 2001 (**CL-251**) ¶ 117 (holding that a more favorable interpretation of the FET standard than that proposed by Canada was also part of the objective of the MFN clause); *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award dated 14 March 2003 (**CL-252**) ¶ 500; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 (**CL-70**) ¶¶ 103-104 (holding that importing a clause providing for the "fulfillment of contractual obligations" from another treaty was possible because, while the treaty excluded certain matters, "**other matters that can be construed to be part of the fair and equitable treatment of investors would be covered by the clause**.") (emphasis added).

[227] *See ICS Inspection and Control Services Limited v. The Argentine Republic (I)*, PCA Case No. 2010-09, Award on Jurisdiction dated 10 Feb. 2012 (**CL-253**) ¶ 302 (noting that "[t]he parties to the CAFTA-DR went one step further in a footnote to the negotiating history of that instrument's investment chapter: ['1. The Parties agree that the following footnote is to be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favored-Nation Treatment Article and the *Maffezini* case. This footnote would be deleted in the final text of the Agreement. The Parties note the recent decision of the arbitral tribunal in *Maffezini (Arg.) v. Kingdom of Spain*, which found an unusually broad most-favored-nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. . . . By contrast, the Most-Favored-Nation Treatment Article of this Agreement is expressly limited in its scope to matters 'with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.' **The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms** such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the

the Treaty. The Tribunal should not allow Honduras to retroactively impose a limitation on the MFN clause that is absent from the Treaty's text, as this would contravene the plain meaning of the Treaty's terms, as understood in context.

92. Honduras, in fact, has it backwards when it argues that the MFN clause cannot be relied upon, because the Treaty Parties "decided not to include" umbrella clause protection in the CAFTA-DR.[228] The Treaty Parties **did include** an MFN clause in the Treaty, and specifically chose **not to include** a carve-out for more favorable substantive protections from other treaties. In any event, Respondent's repeated reliance on a purported "intention" of the Parties to the Treaty[229] is not only unsupported by any evidence, but is misguided as a matter of treaty interpretation. As the International Law Commission explained in its commentary to the draft of what later became VCLT Article 31, "the text must be presumed to be the authentic expression of the intentions of the parties; and . . . in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* of the intentions of the parties."[230] Investment tribunals have explicitly endorsed this view.[231]

93. In the same vein, Respondent's reliance on later-in-time treaties as purported evidence that the CAFTA-DR Parties intended that the MFN provision would not apply to import substantive protections from other treaties[232]—is both legally irrelevant and factually incorrect. It is legally irrelevant both because the Parties' purported intentions cannot override the express text of the Treaty and also because terms in later-in-time treaties are not evidence of the Parties' earlier intentions. In any event, the authorities referenced by Respondent all pertain to the use of MFN

Maffezini case. **Other recent investment treaties have similarly included provisions explicitly indicating that this language intends to specifically limit the MFN clause to substantive treatment matters**.'") (emphasis added).

[228] Memorial on Jurisdiction ¶ 197.

[229] Memorial on Jurisdiction ¶¶ 182, 187, 203.

[230] ILC, *Draft Articles on the Law of Treaties with Commentaries*, 2 Y.B. INT'L L. COMM'N (1966) (**CL-254**), at 220 ¶ 11.

[231] *See, e.g.*, *Methanex Corp. v. United States of America*, UNCITRAL, Final Award dated 3 Aug. 2005 (**CL-255**) at Part II, Chap. B, ¶ 22 ("[T]he approach of the Vienna Convention is that the text of the treaty is deemed to be the authentic expression of the intentions of the parties; and its elucidation, rather than wide-ranging searches for the supposed intentions of the parties, is the proper object of interpretation"); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award dated 8 Dec. 2008 (**CL-256**) ¶ 88 ("[T]here is no room for any presumed intention of the Contracting Parties to a bilateral treaty, as an independent basis of interpretation; because this opens up the possibility of an interpreter (often, with the best of intentions) altering the text of the treaty in order to make it conform better with what he (or she) considers to be the treaty's 'true purpose'.").

[232] Memorial on Jurisdiction ¶ 197.

clauses to import **dispute resolution** provisions from another treaty. Those authorities are thus inapposite.

94. By undertaking to accord protections not less favorable to those accorded to other investors (such as Swiss or German investors), Honduras opened the door for investors to seek treatment that Honduras accords to investors of third-party States, which includes the umbrella clauses in the Honduras-Switzerland BIT and the Honduras-Germany BIT invoked by Claimants.[233] The fact that those treaties pre-date the CAFTA-DR is exactly why Claimants can use them to import the umbrella clauses contained therein.[234]

95. Tribunals accordingly have consistently interpreted MFN clauses to permit the importation of substantive standards of treatment when such possibility was not expressly excluded by the text.[235] This has been confirmed, among others, by the tribunal in *Grupo Energía Bogotá v. Guatemala*, which rejected the importation of umbrella clauses through the MFN provision only because the State had made a specific exception for that purpose in an annex to the applicable treaty.[236] Although Honduras criticizes Claimants' reliance on this case, it fails to engage with the tribunal's reasoning or Claimants' argument in any manner whatsoever.[237]

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[233] *See* Tony Cole, "The Boundaries of Most Favored Nation Treatment in International Investment Law," 33 *Michigan Journal of International Law* 537 (2012) (**RL-82**) at 556 ("[E]ach BIT negotiation is conducted with both states **fully aware of the terms of the other BITs** that its potential treaty partner has already signed. Any state negotiating a BIT will, therefore, do so **with full knowledge of what it must do in order to ensure that its investors are treated at least as well as, and ideally better than, those of any third state**.") (emphasis added); Stephan W. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath*, 111 AM. J. INT'L L. 914 (2017) (**CL-230**), at 918 (explaining that "in 1990, ten years prior to *Maffezini*" the tribunal in *AAPL v. Sri Lanka*, "the first known investment treaty arbitration ever, accepted in principle that an investor covered by the MFN clause in the basic treaty . . . could rely on more favorable substantive treatment granted under other Sri Lankan BITs.").

[234] Honduras's assertion that Claimants cannot apply the MFN clause to import the umbrella clauses from the Switzerland-Honduras BIT and Germany-Honduras BIT, which pre-date the CAFTA-DR, as it would undermine the intent of the drafters and result in a *de facto* modification of the Treaty is not only wrong for the reasons stated, but also directly contradicts the argument made by counsel for Honduras while representing Nicaragua in the *Lopez-Goyne v. Nicaragua* case. *See* Memorial on Jurisdiction ¶¶ 182, 196, 198; *The Lopez-Goyne Family Trust and others v. Republic of Nicaragua*, ICSID Case No. ARB/17/44, Award dated 1 Mar. 2023 (**CL-138**) ¶ 430 (arguing that "the MFN clause would operate prospectively, thereby only allowing the investor to 'import' favorable provisions of treaties concluded **after** CAFTA-DR.") (emphasis added).

[235] Memorial on the Merits ¶ 329, n. 654.

[236] *Grupo Energía Bogotá S.A. E.S.P. y Transportadora de Energía de Centroamérica S.A. v. Republic of Guatemala*, ICSID Case No. ARB/20/48, Decision on Preliminary Objections dated 24 Nov. 2023 (**CL-146**) ¶¶ 60, 317.

[237] Memorial on Jurisdiction ¶ 199 (merely making the irrelevant observation that the law firm representing the claimants in that case was the same as Claimants' counsel in the present case).

96. Other investment tribunals also have applied the rule of *expressio unius est exclusio alterius* to find that if an MFN clause does not expressly exclude a matter from its scope, it should be deemed included. The tribunal in *National Grid v. Argentina* thus imported the dispute resolution provisions of a third-party treaty holding:

> The Tribunal observes that the MFN clause does not expressly refer to dispute resolution or for that matter to any other standard of treatment provided for specifically in the Treaty. On the other hand, dispute resolution is not included among the exceptions to the application of the clause. **As a matter of interpretation, specific mention of an item excludes others**: *expressio unius est exclusio alterius*.[238]

97. This was also the approach taken by the *MTD v. Chile* tribunal.[239] Like in the applicable treaties in *MTD v. Chile*, *National Grid v. Argentina* and *Grupo Energía Bogotá v. Guatemala*, the CAFTA-DR Parties expressly excluded certain matters from the MFN clause's application in a carve-out provision under Article 10.13.[240] This means that any matters not specifically excluded are included in the scope of the MFN provision, including the possibility of incorporating an umbrella clause from treaties Honduras has with third States.

4. The CAFTA-DR's Procurement Carve-Out Does Not Apply

98. As Claimants have demonstrated, the Procurement Carve-Out to MFN treatment contained in Article 10.13(5)(a) of the CAFTA-DR does not apply to the present case.[241] This is because the dispute revolves around measures that violate Honduras's commitments under the Agreements, and not measures relating to the "process" by which the Government "obtained" the Agreements.

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[238] *National Grid PLC v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction dated 20 June 2006 (**CL-257**) ¶ 82 (emphasis added).

[239] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004 (**CL-70**) ¶¶ 103-104 (holding that importing a clause providing for the "fulfillment of contractual obligations" from another treaty was possible because, while the treaty excluded certain matters, "**other matters that can be construed to be part of the fair and equitable treatment of investors would be covered by the clause**.") (emphasis added); *see also* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed. 2012) (**CL-82**), at 209 ("Different conclusions have been drawn from provisions that exclude the applicability of MFN clauses from certain areas (customs unions, free trade areas, economic communities). Under the principle *expressio unius est exclusio alterius*, this could mean that the MFN clause is meant to operate in all other areas, including jurisdictional matters.").

[240] CAFTA-DR (**CL-1**), Art. 10.13 ("Non-Conforming Measures").

[241] Observations on Request for Bifurcation ¶¶ 60-62; CAFTA-DR (**CL-1**), Art. 10.13(5)(a) ("Articles 10.3, 10.4 [containing the MFN provision], and 10.10 do not apply to . . . procurement.").

99. Specifically, the Treaty's Procurement Carve-Out does not apply to the present case, as it only covers "procurement" as expressly defined in Article 2.1 of the Treaty.[242] Interpreting Article 2.1 and Article 10.13(5)(a) of the CAFTA-DR in good faith, in accordance with the ordinary meaning given to the terms in their context and in light of the Treaty's object and purpose, confirms that "procurement" is limited to the formal process that regulates an acquisition of goods or services.[243]

100. According to Respondent, Claimants' claims fall within the scope of the Procurement Carve-Out because they are "directly related to a public procurement, namely the sale of electricity to ENEE."[244] In so doing, Honduras disregards the ordinary meaning of the Treaty terms, overlooks the Treaty's context, and ignores the special meaning of procurement Honduras agreed to with its Treaty counterparts.

101. Article 2.1 of the CAFTA-DR (under the chapeau "Definitions **of General Application**") provides that "[f]or purposes of this Agreement, **unless otherwise specified**," "procurement means the **process** by which a government **obtains the use of or acquires goods or services**, or any combination thereof. . . ."[245] Remarkably, Respondent argues that the Tribunal ought to ignore this definition—which, by its very term applies generally throughout the Treaty—saying that the Treaty's definition of "procurement" "appears nowhere in the respective provision."[246] In doing so, Respondent ignores that nowhere in Article 10.13 or Chapter 10 of CAFTA-DR is it "otherwise specified" that procurement shall have a different meaning for the interpretation of the Procurement Carve-Out. That Respondent adopts this remarkable position is telling, revealing that its objection clearly finds no support in the text of the Treaty.

102. The "process" of acquiring goods and services—as set forth in the Treaty's definition—means the **formal procedures** set forth by a State to regulate the acquisition of such goods and services, such as the determination of tender processes, the requirements to qualify as a

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[242] CAFTA-DR (**CL-1**), Art. 2.1 ("[**P**]**rocurement** means the **process by which** a government **obtains the use of or acquires** goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale or with a view to use in the production or supply of goods or services for commercial sale or resale.") (emphasis added).

[243] VCLT (**CL-133**), Art. 31(1) (emphasis added).

[244] Memorial on Jurisdiction ¶ 159.

[245] CAFTA-DR (**CL-1**), Art. 2.1 (emphasis added); VCLT (**CL-133**), Art. 31(4) ("A special meaning shall be given to a term if it is established that the parties so intended.").

[246] Memorial on Jurisdiction ¶ 170.

bidder and to be awarded a contract, the assessment of such qualifications, and other similar aspects. It does **not** relate to the subsequent stages—after a contract is awarded and executed—related to the performance of a contract and its potential breach, and where criteria for selection of a bidder (which could warrant discrimination based on policy considerations[247]) are no longer relevant. Similarly, it does **not** relate to treatment of Claimants and their investments with respect to the management, conduct, and operation of their investments in Honduras more broadly.

103. Respondent erroneously claims that the NAFTA "has the same wording as the Treaty"[248] and relies on jurisprudence thereunder, arguing that procurement means "public procurement" (*compra pública*) and that "if an activity qualifies as 'public procurement' under Article 10.13(5), it is excluded from the [MFN clause]."[249] It further claims that if the Tribunal decides "that the MFN relates to a public procurement, the Tribunal must declare itself without jurisdiction."[250] This is incorrect. The NAFTA and the CAFTA-DR vary in this regard precisely because the NAFTA does not contain a procurement definition, while the CAFTA-DR expressly provides that procurement is limited to "process."[251] Honduras even goes so far as to argue that the CAFTA-DR definition of "procurement" is "not relevant in this case" because it is "widely known" that the "CAFTA-DR closely follows NAFTA rules as its precursor treaty."[252] This is clearly wrong, as the CAFTA-DR plainly departs from the NAFTA wording with respect to the definition of procurement.[253]

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[247] *See Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award dated 24 Mar. 2016 (**RL-31**) ¶ 419 (explaining that the reason for this carve out is that "the NAFTA Contracting Parties, like many other countries, maintain domestic preference policies when procuring goods and services.").

[248] Memorial on Jurisdiction ¶ 166.

[249] Memorial on Jurisdiction ¶ 162. The English translation of Respondent's Memorial on Jurisdiction differs from its original version in Spanish where Respondent used "*compra pública*" to refer to "public purchase," not "public procurement."

[250] Memorial on Jurisdiction ¶ 163.

[251] *Resolute Forest Prods. Inc. v. Government of Canada*, PCA Case No. 2016-13, Final Award dated 25 July 2022 (**RL-109**) ¶ 405 (noting that "while procurement may often be associated with **formal procedures** for the acquisition of goods and services by governments," the NAFTA does not contain such wording) (emphasis added).

[252] Memorial on Jurisdiction ¶ 178.

[253] Contemporaneous with the CAFTA-DR, the U.S. Model BIT (2004) included the same definition for "government procurement." *See* U.S. Model BIT (2004) (**CL-258**), Art. 1. The tribunal in *Finley Resources v. Mexico* similarly drew distinctions between NAFTA cases relied on the meaning of procurement and the specific language of the USMCA, which contains an almost identical definition of procurement as the CAFTA-DR. *See Finley Resources Inc., MWS Mgmt. Inc., and Prize Permanent Hldgs., LLC v. United Mexican States*, ICSID Case No. ARB/21/25, Decision on Jurisdiction and Liability dated 4 Nov. 2024 (**CL-259**) ¶ 820 (distinguishing the NAFTA, which does not define procurement, from the USMCA, explaining that "the USMCA defines specifically 'government procurement' as 'the process by which a government obtains the use or acquires goods or services, or any combination thereof, for

104. All of the NAFTA cases cited by Honduras show that the tribunals undertook the task of defining the ordinary meaning of "procurement" precisely because NAFTA did not contain any definition.[254] The NAFTA cases relied on by Honduras, such as *ADF v. United States* and *Mesa Power v. Canada*, related to discrimination during the selection of a supplier for goods or services to be provided by the State (*i.e.*, in the determination of whom to award a contract to).[255] Thus, the tribunals applied the procurement carve-out. Similarly, in *Mercer v. Canada*, the tribunal applied the procurement carve-out because the discriminatory treatment claimed by the investor pertained to differences in the contractual terms between its contract with a State-owned entity and similar contracts with other producers.[256]

105. These cases clearly differ from the present case. Claimants' claims do not arise from State conduct related to the process of awarding the Agreements or from any alleged discrimination based on differential treatment under these Agreements compared to other generators. In attempting to shoehorn its objection into the Procurement Carve-Out, Honduras tries to downplay the PPA as a mere "mechanism by which the State[] 'procure[s] or acquire[s]'

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governmental purposes and not with a view to commercial sale or resale or use in the production or supply of goods or services for commercial sale or resale.'").

[254] *See Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award dated 24 Mar. 2016 (**RL-31**) ¶ 404 ("Article 1108 [of the NAFTA] excludes the application of non-discrimination standards and performance requirements in the event of 'procurement by a Party or a state enterprise'. It contains, however, **no definition of the term 'procurement**'. Accordingly, it falls on the Tribunal to determine the meaning of this term, as part of the phrase 'procurement by a Party or a state enterprise'.") (emphasis added); *Resolute Forest Prods. Inc. v. Government of Canada*, PCA Case No. 2016-13, Final Award dated 25 July 2022 (**RL-109**) ¶ 405 ("[W]hile procurement may often be associated with **formal procedures** for the acquisition of goods and services by governments . . . that does not mean that such limitation must be implied **where the text does not provide so**, such as in the case of NAFTA Article 1108(7)(a).") (emphasis added); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award dated 9 Jan. 2003 (**CL-10**) ¶ 161 ("'Procurement' is not defined in NAFTA Chapter 11."); *Mercer Int'l Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award dated 6 Mar. 2018 (**RL-38**) ¶¶ 6.34 ("[T]he English word 'procurement', as a matter of ordinary English language, is the general act of buying goods and services. It is a broad term"), 6.37 ("NAFTA's Chapter 11 does not define 'procurement' any further.").

[255] *See ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award dated 9 Jan. 2003 (**CL-10**) ¶ 155 (considering a claim for discrimination brought by a Canadian steel producer that tendered for a highway construction project, due to the application of a U.S. federal law that favored domestic producers participating in government-funded projects); *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award dated 24 Mar. 2016 (**RL-31**) ¶¶ 12-25, 459 (considering that "the Claimant argues that Canada treated the Claimant and its investments (all of which were in the context of the FIT Program) [a program soliciting bids to award renewable energy contracts and setting eligibility criteria] less favorably than other investors in like circumstances" and that "there is a direct nexus between the claims in this arbitration and the FIT Program").

[256] *Mercer Int'l Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award dated 6 Mar. 2018 (**RL-38**), ¶¶ 2.3-2.14, 6.28-6.29, 6.32-6.33, (describing that the claimant operated a pulp mill that produced energy by burning biomass for self-supply and could only sell excess power above a fixed level, whereas competitors had contracts allowing them to sell energy below their self-supply level and purchase cheaper energy).

electricity."[257] Honduras further asserts that "Claimants themselves have repeatedly acknowledged that their claims essentially derive from the non-payment of invoices under the PPA between ENEE and Pacific Solar."[258] Respondent again distorts Claimants' claims: Claimants' claims have nothing to do with any procurement process or the mere "acquisition" or "purchase" of goods or services, but with compliance with commitments contained, among others, under Honduran law and in contracts already awarded and executed.[259]

106. In any case, Honduras cannot separate the PPA from the other Agreements. The PPA, the Operation Agreement and the State Guarantee (which are incorporated into the PPA by reference and, for the State Guarantee, as an Annex),[260] collectively comprise a package of commitments made by Honduras to Claimants under international law, and granted generator rights and obligations to Pacific Solar, including the right to use the land and natural resources to generate power, and the obligation to build, commission and operate a 50 MW PV Plant for a 20-year term.[261] The Agreements are akin to a concession agreement, where the government delegates its authority to a private investor to exploit natural resources, which is far from the mere "purchase" of energy by ENEE.

107. Accepting Respondent's definition of procurement would deprive the definition in Article 2.1 of *effet utile*, and violate the requirement to interpret the Treaty in good faith.[262] As explained by the *Kappes v. Guatemala* tribunal when analyzing the object and purpose of a

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[257] Memorial on Jurisdiction ¶ 171.

[258] Memorial on Jurisdiction ¶ 171.

[259] *See* Memorial on the Merits ¶¶ 337-346.

[260] *See* PPA (**Exh. C-1**) § 1(A), § 2, Cl. 1.1(1), 4.2, 4.5(h), 4.6(d), 4.6, 9.7, Annex X; State Guarantee (**Exh. C-2**), Recitals 2-3, Cl. 4.2; Operations Agreement (**Exh. C-3**) § 9.

[261] *See* PPA (**Exh. C-1**) § 1(G), § 2, Cl. 2.2, 9.1, 9.2, 9.5.1, 9.7, 14.1.

[262] *See Murphy Exploration & Production Company – International v. The Republic of Ecuador (II)*, PCA Case No. 2012-16, Partial Award on Jurisdiction dated 13 Nov. 2013 (**CL-260**) ¶ 171 ("The Tribunal shall also be guided by the principle of *effet utile*, which requires tribunals to interpret treaty provisions 'so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text.'"); J. ROMESH WEERAMANTRY, TREATY INTERPRETATION IN INVESTMENT ARBITRATION (2012) (**CL-143**) ¶ 5.74 ("The interpretative principle of effectiveness . . . is widely accepted and deployed by international courts and tribunals and operates on the presumption that parties intended that all terms in their agreement had a purpose and that they did not intend any part of it to be ineffective."): ILC, *Draft Articles on the Law of Treaties with Commentaries*, 2 Y.B. INT'L L. COMM'N (1966) (**CL-254**), at 219 ("The Commission, however, took the view that, in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in article 27, paragraph 1, which requires that a shall be *in good faith* in accordance with the ordinary meaning to be given to its terms in the context of the and *in the light of its object and purpose*") (emphasis in the original).

different CAFTA-DR provision, the relevant "question [for treaty interpretation] is what the DR-CAFTA Parties, presumably **with full knowledge of all that had gone before under prior treaties, actually decided** to do in DR-CAFTA, by virtue of adopting **the particular Treaty text** that they did."[263] When the Contracting Parties negotiated and signed the CAFTA-DR in 2004, they were fully aware that the NAFTA did not define procurement and that NAFTA tribunals had taken a broad interpretation of the clause as a result. For instance, in 2003, the *ADF v. United States* case cited by Honduras had already been decided, with its tribunal holding that "'[p]rocurement' is not defined in NAFTA Chapter 11" and taking the broad dictionary definition of "to procure" as "to get; to gain; to come into possession of," and considering that "[i]n the world of commerce and industry, 'procurement' may be seen to refer ordinarily to the activity of obtaining by purchase goods, supplies, services and so forth."[264]

108. However, the CAFTA-DR did not follow NAFTA's drafting and specifically chose to define "procurement" as the "process" for the acquisition of goods and services. Honduras asks the Tribunal to ignore this fundamental difference, without explaining why the Treaty Parties would have included an express definition if they considered that the same definition adopted by NAFTA tribunals should apply. Honduras's position contradicts the requirement to interpret the Treaty in good faith, in accordance with its ordinary meaning, in context, and in light of the Treaty's object and purpose.

109. The Procurement Carve-Out does not apply to the stages after the initial procurement. Given that the dispute here—like in *Finley Resources v. Mexico*[265]—revolves around measures that violate Honduras's commitments under the Agreements after those Agreements were already executed and during the performance of the Agreements, and not measures relating to the process by which the Government "obtained" the Agreements, the Procurement Carve-Out does not apply. Thus, the Tribunal should find that Claimants are entitled to import the umbrella clauses of the Switzerland-Honduras BIT and the Germany-Honduras BIT

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[263] *Daniel W. Kappes and Kappes, Cassiday & Assoc. v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections dated 13 Mar. 2020 (**CL-151**) ¶ 152.

[264] *See also ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award dated 9 Jan. 2003 (**CL-10**) ¶ 161.

[265] *Finley Resources Inc., MWS Mgmt. Inc., and Prize Permanent Hldgs., LLC v. United Mexican States*, ICSID Case No. ARB/21/25, Decision on Jurisdiction and Liability dated 4 Nov. 2024 (**CL-259**) ¶¶ 820-821.

through the MFN provision contained in CAFTA-DR, and that the Tribunal has jurisdiction over Respondent's breach of its obligations to Claimants.

C. THE AGREEMENTS QUALIFY AS AN "INVESTMENT AGREEMENT" UNDER THE CAFTA-DR

110. As explained in Claimants' Memorial, the Agreements constitute an "investment agreement" under Article 10.28 of the CAFTA-DR, and Honduras's violations of the Agreements depart from Honduran law and the most basic notions of fairness.[266] Specifically, Claimants have shown that the Agreements constitute a written agreement between national authorities of Honduras (*i.e.*, ENEE, SERNA, the Attorney General's Office, and SEFIN) and a covered investment of Guatemalan investors (*i.e.*, Pacific Solar) that grants the covered investment rights with respect to natural resources or other assets that the national authority controls (*i.e.*, the exclusive right to use and enjoy the solar resource, including the right to sell electricity generated from it at the wholesale market and connect to the grid for its distribution) and upon which the covered investment or the investors relied in establishing or acquiring a covered investment other than the agreement itself (*i.e.*, among others, the Plant).[267]

111. Respondent argues that the Agreements are not an "investment agreement" within the meaning of CAFTA-DR Article 10.28.[268] According to Honduras, the PPA alone should be considered for purposes of the Treaty's definition of "Investment Agreement," without reference to the Operations Agreement or the State Guarantee.[269] Focusing on the PPA alone, Honduras then argues that (i) the PPA is not a "written agreement" as defined by the Treaty because it was neither executed by a "national authority" of Honduras,[270] nor by an investment or investor;[271] (iii) the PPA does not relate to natural resources or other assets controlled by national authorities;[272]

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[266] Memorial on the Merits § IV.D.

[267] CAFTA-DR (**CL-1**), Art. 10.28 (defining an "investment agreement" as "a written agreement that takes effect on or after the date of entry into force of this Agreement between a national authority of a Party and a covered investment or an investor of another Party that grants the covered investment or investor rights: (a) with respect to natural resources or other assets that a national authority controls; and (b) upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself.").

[268] Memorial on Jurisdiction § III.E.

[269] Memorial on Jurisdiction ¶ 214.

[270] Memorial on Jurisdiction ¶¶ 218-223.

[271] Memorial on Jurisdiction ¶¶ 224-233.

[272] Memorial on Jurisdiction ¶¶ 234-244.

and (iv) the PPA cannot be the basis for both the investment and the investment itself.[273] Respondent is incorrect on all counts.

112. As explained below, (i) all three Agreements constitute an "investment agreement" pursuant to Article 10.28 of the Treaty. In any event, even if the PPA is analyzed alone, it qualifies as an "investment agreement;" (ii) Honduran national authorities (including ENEE, SERNA, SEFIN and the Attorney General's Office) executed the investment agreement, and Pacific Solar is a covered investment that the Paizes own and control; (iii) the Agreements grant Pacific Solar rights regarding natural resources or assets controlled by Honduras's national authorities; and (iv) Claimants relied on the Agreements to make further covered investments.

1. All Three Agreements Constitute an Investment Agreement Under CAFTA-DR Article 10.28

113. The Agreements qualify as a written and validly executed investment agreement pursuant to the definition set forth in CAFTA-DR Article 10.28.[274] Ignoring the inter-related nature of the Agreements, Respondent takes the position that "the only written agreement that the Tribunal must analyze to determine whether an investment agreement under CAFTA-DR Article 10.28 is in place, is the PPA between Pacific Solar and ENEE,"[275] but not the State Guarantee or the Operations Agreement. Respondent further contends that the State Guarantee does not create additional rights for Claimants, and the Operations Agreement is only a "technical document" that does not create any obligations for Honduras beyond what is already provided for in the PPA.[276] Respondent thus does not address whether these other Agreements are an investment agreement under the CAFTA-DR, or whether they can be considered together with the PPA to form an investment agreement. Respondent's position is wrong from both a factual and legal standpoint.

114. The Agreements constitute a single economic transaction, without which Claimants would have not invested in Honduras and would have been unable to operate the Plant. In such circumstances, tribunals have confirmed that an investment must be analyzed holistically, regardless of the number of documents that underpin it.

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[273] Memorial on Jurisdiction ¶¶ 245-246.

[274] CAFTA-DR (**CL-1**), Art. 10.28, n. 12 ("'Written agreement' refers to an agreement in writing, executed by both parties, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 10.22.2.").

[275] Memorial on Jurisdiction ¶ 214.

[276] Memorial on Jurisdiction ¶¶ 212-213.

(a) The Three Agreements Are Part of the Same Economic Transaction

115. The three Agreements are interconnected and memorialize the same single, economic transaction; thus, they should be considered together as forming an investment agreement within the meaning of the Treaty. Honduras erroneously characterizes Claimants' "collective naming" of the three Agreements as "an unsuccessful attempt to elevate the status of the PPA to that of a legal stability framework agreement."[277] The Treaty, however, does not require any kind of stabilization provision to qualify as an investment agreement; the only content required is that the agreement confers rights with respect to natural resources or other assets that a national authority controls,[278] and that it creates an exchange of rights and obligations between the parties.[279] The Agreements are three documents that memorialize the same **single transaction** between the State and a covered investment over the exploitation of natural resources, which together provide for an exchange of rights and obligations between Pacific Solar and Honduras. This is evidenced by the inter-related nature of the Agreements, as explained below.

116. The 2007 Renewables Energy Law provides that generators who enter into a PPA "shall be entitled" to a State guarantee.[280] Under the State Guarantee, the Government accepted joint and several liability to Pacific Solar for ENEE's obligations under the PPA.[281] The State Guarantee expressly provides that the Attorney General's Office, which "holds the legal representation of the State of Honduras," and the Secretary of Finance, who has "the express power for the subscription of the guarantee," confirm the State's joint liability for ENEE's obligations under the PPA.[282] This State Guarantee was an integral part of the PPA; Mr. Paiz confirms that the State Guarantee was an integral part of the investment on which he relied when making his

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277 Memorial on Jurisdiction ¶ 211.

278 CAFTA-DR (**CL-1**), Art. 10.28 (definition of "investment agreement").

279 CAFTA-DR (**CL-1**), Art. 10.28, n. 12 (definition of "written agreement").

280 2007 Renewables Law (**Exh. C-4**), Art. 4 ("Renewable energy generation projects that enter into a Power Purchase Agreement with ENEE shall be entitled to enter into a support agreement for the fulfillment of the Power Purchase Agreement with the Office of the Attorney General of the Republic of Honduras.").

281 *See* Memorial on the Merits ¶¶ 59-61.

282 State Guarantee (**Exh. C-2**), Art. 4; PPA (**Exh. C-1**), Annex X ("The present Support Agreement for the fulfillment of the Supply Contract 002-2014 'The Support Agreement' and the Solidarity Guarantee of the State of Honduras, 'The Solidarity Guarantee,' both together 'The Agreement,' is to be signed between the Attorney General of the Republic . . . as an entity that legally represents the State of Honduras, . . . with express power to sign such agreements, as established in article 4 of Legislative Decree 70-2007.").

decision to invest in Honduras.[283] Honduras, itself, has recognized that without the State Guarantee, Claimants would have been unlikely to have invested in the sector.[284]

117. Respondent argues that the State Guarantee is not "of the same rank" as the PPA, because it is only "derivative and supplementary to the PPA" and does not create "new substantive rights."[285] This is wrong factually and, in any event, legally irrelevant. Under the State Guarantee, the Government accepted joint and several liability to Pacific Solar for ENEE's obligations under the PPA, which specific commitments to Pacific Solar incentivized the investment and ensured its long-term stability. The ability for Pacific Solar to claim directly from the State "the payment obligations of ENEE contained and derived from the PPA and/or its non-compliance"[286] created a new right in favor of Pacific Solar and corresponding obligations for the State. In any event, Honduras tellingly cites no authority for the proposition that an agreement needs to be of a certain "rank" or create "new substantive rights" vis-à-vis other agreements in order to qualify as an investment agreement; there is no such requirement.

118. There can be no question that the PPA and State Guarantee are inter-connected and part and parcel of the same inter-related investment agreement, as one would not exist without the other.[287] Energy generators that entered into PPAs were entitled to a State Guarantee, under

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[283] Paiz WS I ¶ 13 ("I found it very valuable that the Government had signed a government guarantee certifying that it would back the obligations of ENEE in case of default under the PPA (the 'State Guarantee'). The State Guarantee made this investment a no-brainer to me. I understood that this investment would be safe because the Government was confirming its commitments with its State Guarantee and that Honduran officials were generally supportive of private business and foreign investment.").

[284] State Guarantee (**Exh. C-2**), Third Recital ("For its part, the Office of the Attorney General of the Republic states that as a condition for the Generator to commit to the PPA, it has required that the State provide security to comply with the obligations of ENEE and/or its successors under the PPA.").

[285] Memorial on Jurisdiction ¶ 212.

[286] PPA (**Exh. C-1**), Annex X, Art. 4.2 ("The Secretary of State in the Finance Office, representing the State of Honduras and in consideration of the PPA signed between the Generator and the ENEE by this means and to provide certainty as to the fulfillment of the obligations under the responsibility of the ENEE and/or its successors, irrevocably and unconditionally, it constitutes a SOLIDARITY GUARANTEE of the ENEE and undertakes to duly and promptly comply with and comply with the payment obligations of the ENEE contained and derived from the PPA and/or its non-compliance."); State Guarantee (**Exh. C-2**), Art. 2.

[287] State Guarantee (**Exh. C-2**), Recital 2 ("The Generator further represents that it has entered into a Capacity and Associated Electric Power Purchase Agreement, hereinafter referred to as 'PPA' ('Power Purchase Agreement'), with ENEE, and that such agreement has been approved by the Board of Directors of ENEE by means of Resolution No. 02-JD- EX01-2014 contained in Section 03, subsection 3.1, paragraph b of Minutes No. JD-EX01-2014 dated September 1, 2014."); *id.* Recital 3 ("For its part, the Office of the Attorney General of the Republic states that as a condition for the Generator to commit to the PPA, it has required that the State provide security to comply with the obligations of ENEE and/or its successors under the PPA."); *id.* cl. 4.2 ("The Secretary of Finance, on behalf of the State of Honduras **and in consideration of the provisions of the PPA** signed between the Generator and ENEE, hereby and in order to provide certainty as to the fulfillment of the obligations undertaken by ENEE and/or its

Honduran law.[288] The State Guarantee **is included as an Annex** to the PPA,[289] which means—as the PPA itself stipulates—that it "form[s] a **single body** that **must be interpreted as a whole**" with the PPA.[290] And the PPA refers to the State Guarantee, obligating ENEE to enable execution of the same, and providing for its termination if Honduras did not execute State Guarantee within one year.[291]

119. As for the Operations Agreement, it obligated Pacific Solar to operate the Plant while Honduras authorized Pacific Solar to carry out the generation of electricity through the Plant.[292] Through the Operations Agreement, SERNA—the Honduran ministry of **natural resources**[293]—expressly granted Pacific Solar the exclusive right to "use and usufruct" solar resources for the Plant to operate.[294] This was done in accordance with the 2013 Renewables Law, which provides that power generators that use natural resources for their production will receive a "**concession for the use** of the natural resource."[295]

Successors, irrevocably and unconditionally becomes a JOINTLY AND SEVERALLY LIABLE GUARANTOR of ENEE and agrees to comply with the due and timely observance and fulfillment of ENEE's payment obligations contained in and derived from the PPA. The payment obligation undertaken by the State hereunder shall be joint and several with respect to the obligations of ENEE and/or its Successors, and shall arise and be demanded with the sole failure of payment by ENEE to the Generator on the due dates on which payment corresponds according to the PPA or as established by a competent court.") (emphasis added).

288 2007 Renewables Law (**Exh. C-4**), Art. 4.

289 *See* PPA (**Exh. C-1**), Annex X at 85-91.

290 PPA (**Exh. C-1**) § 1(A) ("The following documents constitute the Contract between the BUYER and the SELLER and form a **single body** that **must be interpreted as a whole**: the Contractual Agreement, the General Conditions, and their Annexes. . . .") (emphasis added).

291 PPA (**Exh. C-1**), Cl. 4.6, 9.7 (providing for the obligation by ENEE to collaborate with Pacific Solar so that it could execute the State Guarantee with the Attorney General's Office and SEFIN); *see also id.* cl. 1.1(1) (defining "Support Agreement" [State Guarantee] as a "Document executed between [Pacific Solar] and the Office of the Attorney General of the Republic, with the joint guarantee of the Secretariat of Finance, for the fulfillment of this contract covering up to the quantities of power and electrical energy specified therein, in the format included in the Annexes.").

292 Operations Agreement (**Exh. C-3**) § 1.4.4.

293 Regulations on the Organization, Functioning, and Competencies of the Executive Branch, approved by Decree of the Executive Branch No. PCM-008-97 (**Exh. C-277**), Art. 84.1(c) ("It is the responsibility of the Ministry of Natural Resources and Environment: . . . The formulation, coordination, execution, and evaluation of policies related to water resources, energy, and the environment, including: . . . The formulation of policies **related to new and renewable energy sources**, **including** wind, **solar**, hydro, geothermal, biomass, and tidal energy, and, when applicable, the design or execution of projects for their utilization, when not under the jurisdiction of other state entities.") (emphasis added).

294 Operations Agreement (**Exh. C-3**) § 1.4.8 ("[Pacific Solar has the] exclusive right to use and usufruct the solar resource required for the operation of the Plant.").

295 2013 Renewables Law (**Exh. C-5**), Art. 3 (amending Article 22 of the 2007 Renewables Law) (emphasis added).

120. The Operations Agreement further provides that the National Dispatch Center ("**CND**")—Honduras's authority in charge of administering the national grid—must receive and dispatch all electricity generated at the agreed delivery point in the PPA,[296] and it allows Pacific Solar to be connected to the grid in exchange for a fee,[297] without which it could not deliver the power it generates. These rights and obligations—among others[298]—are closely intertwined with the PPA. One could not function without the other. As with the State Guarantee, the Operations Agreement expressly refers to the PPA, and the PPA expressly refers to the Operations Agreement.[299] In fact, by arguing that the State Guarantee and Operations Agreement are "supplementary" to the PPA,[300] Honduras effectively concedes that the three Agreements are intertwined and that each was critical for the making and operation of the investment in the Plant.

(b) A Holistic Analysis Must be Undertaken to Determine the Existence of an Investment Agreement

121. Investment arbitration tribunals confirm that an investment agreement can be documented in more than one instrument.[301] This is consistent with the accepted principle that an investment may include several inter-related contracts and instruments, particularly in the context of projects involving the exploitation of natural resources.[302] Clarifying language adopted in

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[296] Operations Agreement (**Exh. C-3**) § 1.4.4.

[297] Operations Agreement (**Exh. C-3**) § 1.4.5 ("[T]he Generation Company has the right to build its own facilities to connect to the National Interconnected Grid and/or use third-party transmission and/or distribution facilities, as provided by the Laws, that allow it to sell, pursuant to the Laws, any portion of the electric power produced by the Plant to Large Consumers, distribution companies, and/or authorized agents.").

[298] The Operations Agreement also endorsed Pacific Solar's right to the "incentives and benefits" under the 2007 Renewables Law and the 2013 Renewables Law, providing that SERNA would "provide the necessary assistance" to Pacific Solar to "secure the exemptions and support contained in the decrees referred to herein." Operations Agreement (**Exh. C-3**) § 1.4.7. It also confirmed Pacific Solar's rights to sell energy to third parties. *Id.* § 1.4.5.

[299] Operations Agreement (**Exh. C-3**) § 9; PPA (**Exh. C-1**) Cls. 4.2 (referring to the obligation to have the Operations Agreement executed before the Plant can be put in operation), 4.5(h) (providing for the early termination of the PPA by ENEE if the Operations Agreement is terminated for any reason), 4.6(d) (providing for the early termination of the PPA by Pacific Solar if the Operation Agreement is not executed within 12 months after the effective date of the PPA).

[300] Memorial on Jurisdiction ¶ 212.

[301] *See, e.g.*, *Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility dated 27 Feb. 2012 (**CL-261**) ¶ 4.32.

[302] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction dated 24 May 1999 (**CL-262**) ¶ 72; *Enron Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction dated 14 Jan. 2004 (**CL-162**) ¶ 70; *Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v. The Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility dated 8 Feb. 2013 (**CL-187**) ¶ 428; *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Award dated 20 Dec. 2023 (**CL-191**) ¶ 520; Christoph Schreuer & Ursula Kriebaum, *At what time must legitimate expectations exist?*, *in* A LIBER AMICORUM: THOMAS WÄLDE. LAW BEYOND CONVENTIONAL THOUGHT (Jacques Werner & Arif Hyder Ali eds., 2010) 265 (**CL-**

treaties post-dating the CAFTA-DR further confirm that an investment agreement may consist of more than one inter-related instrument.

122. In *Chevron v. Ecuador (II)*, for instance, the tribunal held that a concession agreement executed in 1973 and a settlement agreement executed in 1995 comprised a single "investment agreement."[303] The tribunal reasoned that there was an "**inextricable link**" between the two documents,[304] because the settlement agreement was a "continuation" of the concession agreement, as it provided for environmental remediation of activities performed during the concession.[305] The tribunal remarked that "the latter [*i.e.*, the settlement agreement] **would not have come into existence without the former**."[306] It thus concluded that, when viewed together, both documents formed part of "the overall 'investment agreement.'"[307] As in *Chevron*, here, the State Guarantee and Operations Agreement were contemplated by the PPA and "would not have come into existence" without the PPA, and vice-versa.

123. Other tribunals have likewise analyzed the interaction between multiple agreements when assessing the existence of an investment for jurisdictional purposes. The *CSOB v. Slovakia* tribunal, for example, reasoned that "[a]n investment is frequently a rather complex operation, composed of **various interrelated transactions**, each element of which, standing alone, might not in all cases qualify as an investment."[308] It held that there can be an investment dispute "even when it is based on a transaction which, standing alone, would not qualify as an investment . . . **provided that the particular transaction forms an integral part of an overall operation** that qualifies as an investment."[309] Similarly, the tribunal in *Enron Corp. v. Argentina* remarked that

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263), at 272; STEPHAN SCHILL ET AL. (EDS.), SCHREUER'S COMMENTARY ON THE ICSID CONVENTION: A COMMENTARY ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES (3d. ed. 2022), Commentary on Article 25 (**CL-183**) ¶ 133 *et seq*.

303 *Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility dated 27 Feb. 2012 (**CL-261**) ¶ 4.32.

304 *Id.* ¶ 4.32 (emphasis added).

305 *Id.* ¶¶ 4.32, 3.17.

306 *Id.* ¶ 4.32 (emphasis added).

307 *Id.* ¶ 4.32.

308 *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction dated 24 May 1999 (**CL-262**) ¶ 72 (emphasis added); s*ee also Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Award dated 20 Dec. 2023 (**CL-191**) ¶ 520 (noting that "an investment typically consists of several interrelated economic activities which, step by step, finally lead to the implementation of a project.").

309 *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction dated 24 May 1999 (**CL-262**) ¶ 72 (emphasis added).

an investment is "a complex process," which may include "various arrangements" leading to its materialization,[310] and held that tribunals typically refer to this as "the general unity of an investment operation" or an "indivisible whole."[311] In the same vein, Professors Schreuer and Kriebaum explain that "[i]t follows from this consistent case law that tribunals, when examining the existence of an investment for purposes of their jurisdiction, **have not looked at specific transactions but at the overall operation**"[312] and "have refused to dissect an investment into individual steps taken by the investor," since "[w]hat mattered for the identification and protection of the investment was the **entire operation** directed at the investment's **overall economic goal**."[313]

124. That an investment agreement, like the investment itself, can be comprised of more than one written agreement is also made clear in the 2004 U.S. Model BIT (which post-dates the CAFTA-DR) and certain treaties entered into by the United States after the CAFTA-DR, including, for instance, the U.S.-Uruguay BIT.[314] These treaties include a definition of "written agreement" as "an agreement in writing, executed by both parties, **whether in a single instrument or in multiple instruments**, that creates an exchange of rights and obligations, binding on both parties under the law applicable. . . ."[315] As Professor Vandevelde cited by Respondent explains, although prior treaties entered by the United States (such as CAFTA-DR) did not contain this specific

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[310] *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction dated 14 Jan. 2004 (**CL-162**) ¶ 70.

[311] *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction dated 14 Jan. 2004 (**CL-162**) ¶ 70; *see also Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v. The Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility dated 8 Feb. 2013 (**CL-187**) ¶ 428 ("[W]hen a tribunal is in presence of a complex operation, it is required to look at the **economic substance of the operation** in question **in a holistic manner**.") (emphasis added).

[312] Christoph Schreuer & Ursula Kriebaum, *At what time must legitimate expectations exist?*, *in* A LIBER AMICORUM: THOMAS WÄLDE. LAW BEYOND CONVENTIONAL THOUGHT (Jacques Werner & Arif Hyder Ali eds., 2010) 265 (**CL-263**), at 272 (emphasis added).

[313] Christoph Schreuer & Ursula Kriebaum, *At what time must legitimate expectations exist?*, *in* A LIBER AMICORUM: THOMAS WÄLDE. LAW BEYOND CONVENTIONAL THOUGHT (Jacques Werner & Arif Hyder Ali eds., 2010) 265 (**CL-263**), at 272 (emphasis added).

[314] *See* U.S. Model BIT (2004) adopted in Nov. 2004 (**CL-258**), Art. 1, n. 4 (definition of "written agreement"); Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment entered into on 4 Nov. 2005 ("**U.S.-Uruguay BIT**") (**CL-264**), Art. 1, n. 5 (definition of "written agreement"). *See also* Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area entered into on 19 Jan. 2006 ("**U.S.-Oman FTA**") (**CL-265**), Art. 10.27, n. 9.

[315] U.S. Model BIT (2004) adopted in Nov. 2004 (**CL-258**), Art. 1, n. 4 (definition of "written agreement").

language, "**nothing in the definition would preclude the written agreement from being embodied in multiple instruments**."[316]

125. The Agreements form part of a single economic transaction on which Claimants relied for making their investments. As in the *Chevron v. Ecuador (II)* case, there is an "inextricable link" between the Agreements: any one of them would not have come into existence without the others. The Agreements' inter-related nature requires that they be considered together, as a single investment agreement.

2. The Agreements Were Executed by a Honduran National Authority

126. The Agreements were executed by a "national authority" of a Party, as required by the CAFTA-DR to qualify as an "investment agreement."[317]

127. There is no dispute between the parties that the State Guarantee and Operations Agreement were executed by "national authorit[ies]": the State Guarantee was executed by the Attorney General's Office and the Secretariat of Finance, both "in representation of the State,"[318] and the Operations Agreement was executed by SERNA, the Ministry in charge of natural resources.[319] If, as Claimants have demonstrated, the Agreements together constitute an integrated "investment agreement," then the investment agreement has been executed by a Honduran national

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[316] KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009) (**RL-12**), at 176 ("The Morocco FTA, at Article 10.27, adopts the definitions in the 2004 model, with several changes. . . . In the footnote defining 'written agreement,' the Morocco FTA omits the language specifying that an investment agreement may be in a single instrument or multiple instruments, **although nothing in the definition would preclude the written agreement from being embodied in multiple instruments**. . . . The CAFTA-DR, at Article 10.28, employs the same language as the Morocco FTA, except that in both definitions it refers to 'another Party' rather than the 'other Party.'") (emphasis added). *See id.* at 175 (commenting the same with regards to the U.S.-Chile FTA).

[317] CAFTA-DR (**CL-1**), Art. 10.28 (defining "investment agreement" as a "written agreement . . . between a national authority of a Party and a covered investment or an investor of another Party.").

[318] Decree No. 113-2014 approving the State Guarantee (**Exh. C-2**), at 1 (first paragraph).

[319] CAFTA-DR (**CL-1**), Art. 10.28, n. 13 (defining "national authority" as "an authority at the central level of government."); CAFTA-DR Annex 9.1(b)(i), Schedule of Honduras (**RL-63**), at 1, 6 (showing that the "*Secretaría de Estado en el Despacho de Finanzas* [SEFIN]" and the "*Secretaría de Estado en los Despachos de Recursos Naturales y Ambiente* [SERNA]" are "entities of the central level of government" in Honduras); *see also* General Law of the Public Administration (Decree No. 146-86 dated 27 Oct. 1986), published in the Official Gazette dated 29 Nov. 1986 (**Exh. C-61**), Arts. 9-10 (showing that the "Centralized Public Administration" is comprised by the organs of the Executive Branch, including the "Secretariats of State"); *id.* Arts. 28(4), 28(12) (listing within the "Secretariats of State" the ones in charge of "*Economía y Comercio*" [SEFIN] and "*Recursos Naturales*" [SERNA]).

authority (and, indeed, by multiple Honduran national authorities), and Respondent's argument that ENEE, which executed the PPA, is not an Honduran national authority[320] is irrelevant.

128. In any event, even assuming *arguendo* that each and every part of the inter-related and integrated investment agreement needs to be executed by a national authority—which is *not* the case—Respondent's objection still fails, because the ENEE also is a "national authority" within the meaning of the Treaty. According to Honduras, whether ENEE is an authority of the central government ought to be determined in accordance with the choice of law clause in Article 10.22 of the Treaty which, it asserts, leads to the application of Honduran law.[321] This is incorrect. Article 10.22 of the Treaty provides for the law that governs a dispute under the investment agreement,[322] that is, whether the investment agreement has been breached. Article 10.22, however, says nothing about the law governing the question as to the existence of an "investment agreement" or, specifically, the meaning of the term "authority at the central level of government." As in *Latam Hydro v. Peru*, where the tribunal held that whether a renewable energy supply contract was an investment agreement must be determined based on an analysis of "the wording of the [Treaty],"[323] the Tribunal needs to apply general rules of treaty interpretation to determine the meaning of "authority at the central level of government" in CAFTA-DR Article 10.28, footnote 13.

129. The CAFTA-DR defines "central level of government" for purposes of Honduras as "the national level of government."[324] Honduras argues that this definition excludes entities that are "autonomous" from the Executive Branch.[325] The definition, however, focuses on whether authority extends throughout the country's territory (*i.e.*, nationwide), as opposed to only certain portions of that territory (*i.e.*, regional or local). This meaning is confirmed by Article 10.13 of the Treaty (governing non-conforming measures), which divides each Party's government into

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[320] *See* Memorial on Jurisdiction ¶¶ 218-219.

[321] Memorial on Jurisdiction ¶ 220.

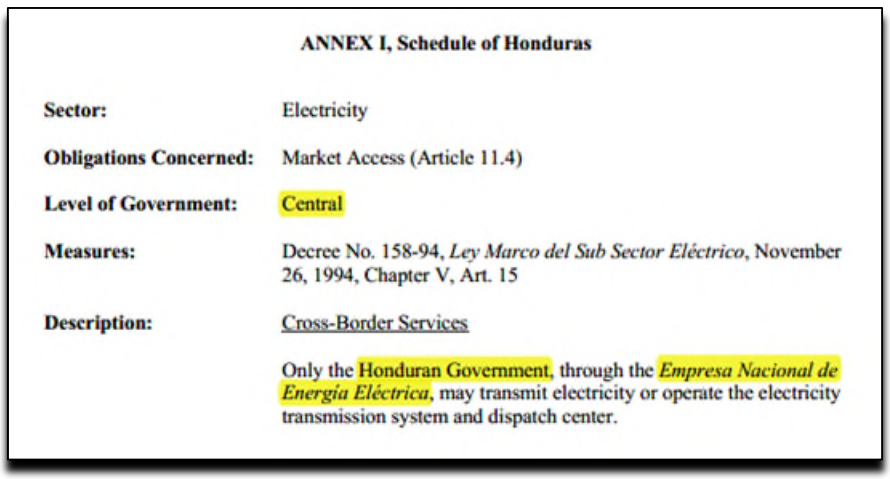
[322] CAFTA-DR (**CL-1**), Art. 10.22(2)(a) ("Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 10.16.1(a)(i)(B) or (C), or Article 10.16.1(b)(i)(B) or (C), the tribunal shall apply: . . . the rules of law specified in the pertinent investment agreement or investment authorization, or as the disputing parties may otherwise agree.").

[323] *Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Award dated 20 Dec. 2023 (**CL-191**) ¶ 503.

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

[325] Memorial on Jurisdiction ¶ 222.

three levels: (i) "central level" of government;[326] (ii) "regional level" of government;[327] and (iii) "local level" of government.[328] Article 10.13 also provides that each State defines the central level of government covered by each non-conforming measure in Annex I to the Treaty.[329] In its Schedule to Annex I, Honduras expressly included a non-conforming measure related to market access (under Chapter 11 of the CAFTA-DR)[330] at the "**Central**" level of government, providing that "[o]nly the **Honduran Government**, **through the *Empresa Nacional de Energía Eléctrica*** [ENEE], may transmit electricity or operate the electricity transmission system and dispatch center."[331]



ANNEX I, Schedule of Honduras

Sector:	Electricity
Obligations Concerned:	Market Access (Article 11.4)
Level of Government:	Central
Measures:	Decree No. 158-94, *Ley Marco del Sub Sector Eléctrico*, November 26, 1994, Chapter V, Art. 15
Description:	Cross-Border Services Only the Honduran Government, through the *Empresa Nacional de Energía Eléctrica*, may transmit electricity or operate the electricity transmission system and dispatch center.

130. Honduras thus acknowledged in the Treaty that ENEE operates at the central level of government and, in fact, exercises the central government's authority in the area of electricity for the State.

131. As demonstrated, the Agreements, taken together (as they should be) or even alone, were entered into by authorities at the central level government of Honduras and thus satisfy this requirement of an "investment agreement" under Article 10.28.

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326 CAFTA-DR (**CL-1**), Art. 10.13(a)(i).

327 CAFTA-DR (**CL-1**), Art. 10.13(a)(ii).

328 CAFTA-DR (**CL-1**), Art. 10.13(a)(iii).

329 CAFTA-DR (**CL-1**), Art. 10.13(a)(i) ("central level of government, **as set out by that Party in its Schedule to Annex I**") (emphasis added).

330 Chapter 11 of CAFTA-DR, which governs Cross-Border Trade in Services, contains the same distinction between "central," "regional," and "local" levels of government. *See* CAFTA-DR (**CL-1**), Art. 11.6(1).

331 CAFTA-DR (**CL-1**) Annex I, Schedule of Honduras, at 145 [PDF] (emphasis added).

3. The Agreements Were Executed by a Covered Investment of Claimants

132. Respondent also contends that the Agreements cannot constitute an investment agreement under Article 10.28, because the Agreements were executed by an entity (Pacific Solar) that has the same nationality (Honduran) as Respondent.[332] Honduras appears to argue that there can be no "investment agreement" within the terms of Article 10.28 unless the agreement was directly entered into between a national authority of a Contracting State and a national of another Contracting State.[333] In so arguing, Respondent has seemingly abandoned its prior argument that the Paizes should have executed the PPA themselves[334]—which argument added requirements to those contained in the Treaty. Respondent's new argument likewise adds requirements that are not found anywhere in the Treaty and, in fact, contravene the terms of the Treaty.

133. The definition of investment agreement under Article 10.28 provides that "investment agreement means a written agreement . . . between a national authority of a Party **and a covered investment *or* an investor of another Party** that grants the covered investment or investor rights."[335] It is undisputed that "an enterprise"[336] may qualify as a covered investment, and that a "covered investment" must be "an investment . . . in [the host State's] territory."[337] Hence, Pacific Solar, the entity that is party to the Agreements,[338] qualifies as Claimants' "covered investment" under the CAFTA-DR. Consequently, the written agreements between a covered investment (here, Pacific Solar)[339] and a national authority of a State Party (here, ENEE, the Attorney General's Office, SEFIN and SERNA)[340] qualify as an investment agreement under

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[332] Memorial on Jurisdiction ¶¶ 225-226.

[333] Memorial on Jurisdiction ¶ 225.

[334] Request for Bifurcation ¶ 68 (where Respondent alleges that "[t]he Treaty itself requires the Investment Agreement to be 'executed by both parties' [since] 'an agreement must be entered into by the host state and the foreign investor, and not by a state-owned entity or a local company established by the investor'… This alone disqualifies the PPA, the State Guarantee and the Operation Agreement [and] it reveals that the Paizes did not assume any obligation under those instruments, as required by the Treaty") (emphasis in the original).

[335] CAFTA-DR (**CL-1**), Art. 10.28 (definition of "investment agreement") (emphasis added).

[336] CAFTA-DR (**CL-1**), Ar. 10.28 (definition of "investment").

[337] CAFTA-DR (**CL-1**), Art. 2.1 (definition of "covered investment").

[338] Memorial on the Merits ¶ 177 ("Third, all the Agreements were executed by a national authority of a Party and the Paizes' covered investment, Pacific Solar.").

[339] Memorial on the Merits § II.B, ¶¶ 49-53.

[340] Memorial on the Merits ¶ 177, n. 398.

CAFTA-DR, provided that the remaining criteria set forth in Article 10.28 are met (which, as shown elsewhere in this section, is the case).[341]

134. In support of its objection, Honduras relies on inapposite authorities interpreting treaties that do not contain any definition of investment agreement.[342] In those cases, tribunals considered that the counter-party to an investment agreement needed to have a nationality other than the host State.[343] Recognizing that States often require local incorporation or constitution of entities that are party to a concession contract or other form of investment agreement, the CAFTA-DR does not so limit the scope of an investment agreement: rather, it expressly includes within the definition of an investment agreement an instrument entered into by a **covered investment**, which must be located in the host State,[344] much as it allows for arbitration claims to be brought on behalf of an investment that is owned or controlled by a foreign investor—as here—unlike most traditional investment treaties.[345]

135. Undoubtedly aware of its untenable position, Respondent seeks to create yet another additional requirement not found in the definition of "investment agreement," *i.e.*, that the "covered investment" party to an investment agreement must be owned or controlled by an

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[341] Memorial on the Merits § III.B.3.

[342] Memorial on Jurisdiction ¶ 226 (referring to *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction dated 2 June 2010 (**RL-14**) ¶ 235 and *El Paso Energy Int'l Co. v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award dated 31 Oct. 2011 (**CL-19**) ¶ 193).

[343] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction dated 2 June 2010 (**RL-14**) ¶ 235 (finding no investment agreement because the contract was signed by the claimant's Bermuda-incorporated subsidiary, failing to meet the treaty's requirement of being a national or company "of the other Party."); *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award dated 31 Oct. 2011 (**CL-19**) ¶¶ 193-194 (finding no investment agreement because the contract was not signed by a U.S. "national or company").

[344] CAFTA-DR (**CL-1**), Arts. 2.1 (defining "investment" as inclusive of "an enterprise"), 10.28 (defining "covered investment" as "with respect to a Party, **an investment**, as defined in Article 10.28 (Definitions), **in its territory** of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter.") (emphasis added); Memorial on the Merits § III.B.1-3.

[345] CAFTA-DR (**CL-1**), Art. 10.16.1(b); *see also* STEPHAN SCHILL ET AL. (EDS.), SCHREUER'S COMMENTARY ON THE ICSID CONVENTION: A COMMENTARY ON THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES (3d. ed. 2022), Commentary on Article 25 (**CL-183**) ¶ 677 (noting that "[i]n general, derivative and representative claims are . . . outside the jurisdiction of an ICSID tribunal, **unless both disputing parties consent to such claims**. One way to do this is . . . through provisions in host State legislation or in an investment treaty. **An example of the latter can be found in the NAFTA, which allows covered investors not only to bring claims on their own behalf** (Art. 1116 NAFTA), but also 'on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly' (Art. 1117(1) NAFTA).") (emphasis added); *see id.* n. 1112 (citing CAFTA-DR as another example).

investor at the time the agreement is executed.[346] The sole authority relied on by Honduras in support of this new argument is the *Duke Energy v. Ecuador* case, which applied a "very narrow" definition of investment agreement[347] in the face of a treaty (the U.S.-Ecuador BIT), which, unlike the CAFTA-DR, lacks any definition of the term "investment agreement."[348]

136. Respondent's reference to the definition of the term "investment disputes" in the U.S.-Ecuador BIT cannot assist it.[349] The U.S.-Ecuador BIT provides that a dispute may relate to "an investment agreement between that Party [*i.e.*, the host State] and such national or company [of the other Party] [*i.e.*, the investor]."[350] The CAFTA-DR, the governing Treaty in this Arbitration, however, expressly provides that an investment agreement may be entered into by an **investor** (*i.e.*, a national or company of another Party) **or** a covered **investment** (*i.e.*, a local company).[351] Honduras cannot rely on the definition of "investment dispute" in the U.S.-Ecuador BIT to displace the definition of the term "investment agreement" in the CAFTA-DR, just as it could not rely on the fact that the (terminated) U.S.-Ecuador BIT did not provide for claims to be brought by an investor on behalf of an investment, while the CAFTA-DR expressly so provides.

137. Respondent's reference to *Lanco v. Argentina* is equally inapposite.[352] There, the tribunal did not even address the question of whether an investment agreement existed; rather, it considered whether ownership of shares and contractual rights by a minority shareholder of an Argentine company qualified as investments for purposes of establishing the tribunal's jurisdiction.[353]

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346 Memorial on Jurisdiction ¶ 228.

347 RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d. ed. 2012) (**RL-17**), at 80 (explaining that "[i]n *Duke Energy v Ecuador* the Tribunal **very narrowly** held that such an agreement must be entered into by the host state and the foreign investor, and not by a state-owned entity or a local company established by the investor.") (emphasis added).

348 *See* U.S.-Ecuador BIT (**Exh. R-17**); *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award dated 18 Aug. 2008 (**CL-42**) ¶ 182 (noting that the U.S.-Ecuador BIT does not contain a definition of "investment agreement").

349 Memorial on Jurisdiction ¶ 232.

350 Memorial on Jurisdiction ¶ 232; *see also* U.S.-Ecuador BIT (**Exh. R-17**), Art. VI(1).

351 CAFTA-DR (**CL-1**), Art. 10.28 (definition of "investment agreement").

352 Memorial on Jurisdiction ¶ 230.

353 The tribunal answered this question in the affirmative, as the claimant held shares in an Argentine company and was the party to a concession agreement with the Argentine government, which qualified as an "investment" under the applicable treaty. *Lanco Int'l Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal dated 8 Dec. 1998 (**RL-58**) §§ 9-16.

138. Finally, Respondent fails to explain how the fact that the Paizes acquired shares in Pacific Solar after the Agreements had been executed could prevent the Agreements from qualifying as an investment agreement. The CAFTA-DR does not contain any temporal requirement regarding when an investor must acquire a covered investment party to an agreement for such agreement to qualify as an "investment agreement." To the contrary, ICSID tribunals addressing this issue confirm that a "covered investment" does **not** need be owned by the claimants before an investment agreement is executed.

139. In *Freeport-McMoRan v. Peru*, for instance, the tribunal held that a local company qualified as a "covered investment" and, hence, an "investment agreement" existed between it and Peru.[354] Rejecting an argument made by Peru similar to that advanced by Honduras here, that the local company could not be considered a "covered investment" because the treaty had not entered into force at the time the investment was made or the investment agreement was executed, the tribunal held that "[t]he plain wording of the definition of a 'covered investment' . . . shows that an investment could have already been in existence at the date of entry into force of the TPA" and "[t]here is thus **no basis to consider that there is a temporal limitation to investments covered by the TPA unique to Article 10.16.1(b)(i)(C) claims**."[355] The tribunal further held that "the TPA clearly sets out that an investment agreement for the purposes of the TPA is an agreement, on which **either the covered investment *or* the investor relies in establishing or acquiring a covered investment**."[356]

140. For the reasons stated above, the Agreements qualify as an "investment agreement" because they were entered into by a covered investment. Furthermore, CAFTA-DR Article 10.28

[354] *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/08, Award dated 17 May 2024 (**CL-266**) ¶ 638 ("Turning to the third requirement, MINEM's counterparty to the 1998 Stability Agreement was SMCV. Article 1.3 of the TPA defines '*covered investment*' as an investment in the territory of a party of '*an investor of another [p]arty in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter*.' Article 10.28 of the TPA further includes '*enterprise*' in its non-limitative list of investments covered by the TPA. SMCV is thus a covered investment because it is an enterprise that the Claimant owns or controls.") (emphasis in original).

[355] *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/08, Award dated 17 May 2024 (**CL-266**) ¶ 639 (emphasis added).

[356] *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/08, Award dated 17 May 2024 (**CL-266**) ¶ 643 (emphasis added); *see also id.* ¶ 643 ("Reliance for the purposes of Article 10.28 or 10.16.1(b) can thus **either be established through the investor or the investment**.") (emphasis added).

does not require that such a covered investment must be owned by investors from another Party at the time the investment agreement is executed.

4. The Agreements Confer Rights over Natural Resources or Other Assets that Honduras Controls

141. Honduras argues that the PPA does not confer rights with respect to natural resources that Honduras controls and, consequently, it is not an "investment agreement" because: (i) solar energy is not a natural resource that Honduras controls;[357] and (ii) the PPA is just a commercial contract for the purchase and sale of electricity, rather than an investment agreement.[358] Honduras is wrong on all counts.

142. By resorting to a generic dictionary definition[359] and to definitions of control of investments adopted by other tribunals not applicable in this context,[360] Respondent engages in wordplay. It attempts to limit the concept of control to "**physical** control," and argues that it cannot "control whether the sun shines more or less, or whether the solar panels installed in a photovoltaic plant receive more or less solar radiation under its control."[361] Control, in its ordinary meaning and in the context of the Treaty, however, refers to **legal**, and not physical, control.[362]

143. Honduras's legal regime makes clear that Honduras exerts legal control over solar energy resources in its territory. The 2013 Renewables Law, for example, expressly provides that renewable energy projects "that use domestic **natural resources** other than hydraulic power from national waters—such as wind, **solar**, biomass, geothermal, marine or tidal energy and urban

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[357] Memorial on Jurisdiction ¶¶ 239-243; *see also* CAFTA-DR (**CL-1**), Art. 10.28 (definition of "investment agreement").

[358] Memorial on Jurisdiction ¶¶ 236-238.

[359] Memorial on Jurisdiction ¶ 240 (citing Royal Spanish Academy, *Spanish Language Dictionary* (23d. ed. 2014) (**Exh. R-26**), definition of "control" (where control is defined as "to exercise control over someone or something.")).

[360] Memorial on Jurisdiction ¶ 241 (citing *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction dated 8 Feb. 2005 (**RL-67**) ¶ 170).

[361] Memorial on Jurisdiction ¶ 242. This argument is disingenuous, as a natural resource does not need to be physically controlled by the State for the State to control it. For instance, Decree 104-93 specifically labels "water" as a natural resource of the State and yet Honduras cannot claim to control precipitation levels. *See* General Environmental Law, Decree No. 104-93 dated 8 June 1993 (**Exh. R-16**), Title III, Ch. I.

[362] *See* Oxford University Press, Oxford English dictionary (**CL-267**), definition of "control" (defining control as "[t]o exercise power or authority over" and "to regulate or govern."); Black's Law Dictionary (12th ed. 2024) (**CL-268**), definition of "control" (defining "control" as "[t]o exercise power or influence over" and "[t]o regulate or govern.").

waste" shall be exempt from any fees "for the **use and exploitation** of the renewable resource."[363] If Honduras did not control the use and exploitation of solar resources, it could not charge any fees for their use and a law specifically providing for an exemption would not be required.

144. The 2013 Renewables Law also provides that these projects (including solar projects) "shall obtain the **concession for the use of the natural resource** utilized for power generation and the relevant area where the renewable natural resource, the development, and the project's installations are located **through the respective Operation Agreements** . . . ."[364] Again, Honduras could not grant a concession for the use of an asset over which it did not exercise exclusive control. The Honduran Government thus decides who can produce energy through solar radiation, connect to the grid, and sell that energy to ENEE, the sole purchaser of power in Honduras.[365]

145. Consistent with the 2013 Renewables Law, the Operations Agreement executed with SERNA, the Ministry of Natural Resources—which Honduras disregards in this analysis—confirms that Honduras granted Pacific Solar the "**exclusive right to use and usufruct over the solar resource** required for the Plant's operation."[366] Respondent fails to explain how it could grant an "exclusive" right over something it does not control.

146. Honduras's only response is that those "exclusive rights" would be granted "only in relation to the Nacaome Plant [that Pacific Solar] built and owns, and the electricity used by that plant" and that "[t]he fact that a natural resource is used in the production of electricity is insufficient to elevate these 'Agreements' to the status of investment agreements."[367] In so arguing, Honduras fails to engage with the issue, which is that its ability to grant an exclusive right over a particular natural resource confirms that it exercises legal control over that natural resource. Granting exclusive rights to exploit a natural resource in order to produce electricity is precisely what Article 10.28 of the CAFTA-DR requires for an agreement to constitute an "investment agreement."

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[363] 2013 Renewables Law (**Exh. C-5**), Art. 3 (amending Art. 22 of the 2007 Renewables Law) (emphasis added).

[364] 2013 Renewables Law (**Exh. C-5**), Art. 3 (amending Art. 22 of the 2007 Renewables Law) (emphasis added).

[365] Electricity Law (Decree No. 158-94 published in the National Gazette on 26 Nov. 1994) (**Exh. C-56**), Arts. 2, 3, 7, 14; *see also* Operations Agreement (**Exh. C-3**) § 1.4.5; Memorial on the Merits ¶ 36.

[366] Operations Agreement (**Exh. C-3**) § 1.4.8 (emphasis added).

[367] Memorial on Jurisdiction ¶ 238.

147. This is further confirmed by other aspects of Honduras's legal regime. For instance, the Honduran Government establishes and enforces regulations to ensure that the development and use of solar energy are conducted in an orderly, safe, and environmentally responsible manner.[368] It has a Ministry of Natural Resources (SERNA), party to the Agreements, that has the authority to formulate policies related to "new and renewable energy sources **including** . . . **solar**."[369] Under the 2014 Electric Power Industry Law, Honduras exclusively decides which companies produce solar energy for wholesale distribution, sell it and transmit it through the grid, all of which are "rights" conferred in relation to natural resources.[370] Honduras also exercises broad police and monitoring powers over the generators.[371] In addition, Honduras's regulatory powers include the State's ability to require generators to obtain permits and fulfill technical criteria.[372] The State also manages land use planning and can designate certain areas for development of renewable energy projects.[373] The State further oversees the integration of solar energy into the power grid, including setting standards for interconnection, managing grid reliability, and ensuring fair access to the grid for solar producers.[374] In all of these respects, the State exercises control over solar resources.

148. In any case, the Agreements (including the PPA) indisputably grant rights with respect to natural resources **and** other assets controlled by Honduras, such as the national grid. Honduras does not dispute this and only takes issue with the fact that it purportedly does not "control" the solar resource itself.[375] However, the Treaty provides that for an "investment agreement" to exist, the State must grant rights with respect to either natural resources **or** "other

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368 Constitution of Honduras (**Exh. R-15**), Arts. 260, 340, 354.

369 Regulations on the Organization, Functioning, and Competencies of the Executive Branch, approved by Decree of the Executive Branch No. PCM-008-97 (**Exh. C-277**), Art. 84.1(c) (emphasis added).

370 2014 Electric Power Industry Law dated 20 May 2014 (**Exh. C-8**), Recitals, Arts. 4, 5, 7(D), 8, 9, 11, 17, 29.

371 The General Environment Law cited by Respondent also confirms this point. Under Article 78 of Decree No. 104-93, Honduras mandates that any activity that can potentially alter or harm the environment shall be subject to notification to the competent authorities and to making an environmental impact assessment, including the "generation and transmission of electricity." General Environmental Law, Decree No. 104-93 dated 8 June 1993 (**Exh. R-16**), Art. 78. The 2014 Electric Power Industry Law requires that every renewable energy project obtain an environmental license, superseding certain aspects of the General Environmental Law. *See* 2014 Electric Power Industry Law dated 20 May 2014 (**Exh. C-8**), Art. 5.

372 1994 Electricity Law (Decree No. 158-94 published in the National Gazette on 26 Nov. 1994) (**Exh. C-56**), Arts. 7, 19, 20, 23, 25, 28, 30, 66, 67, 69. *See also* Operations Agreement (**Exh. C-3**).

373 General Environmental Law, Decree No. 104-93 dated 8 June 1993 (**Exh. R-16**), Art. 28.

374 1994 Electricity Law (Decree No. 158-94 published in the National Gazette on 26 Nov. 1994) (**Exh. C-56**), Arts. 2, 3, 7, 14. *See also* Operations Agreement (**Exh. C-3**).

375 Memorial on Jurisdiction ¶ 242.

assets" it controls.[376] Hence, even if it were found that Honduras does not control the rights to exploit solar resources—which, as shown, is *not* the case—Honduras also granted Claimants the right to use "other assets" that Honduras controls that are needed for power generation and sale, such as the national grid.[377] Respondent acknowledges that the CND, a Honduran agency that acts as System Operator, has the legal and technical obligation to guarantee the continuity supply and correct coordination of the system and "must **control** the dispatch of energy to avoid transformer overloads and possible collapses."[378] Indeed, this recognizes Honduras's control over the grid and its authority to determine energy dispatch and quantities.

149. Finally, contrary to Honduras's assertions, the PPA is not a mere commercial contract. As established by Claimants in their Memorial[379] and further explained above,[380] the PPA is part of a wider investment relationship under the Agreements, whereby the State granted rights to Pacific Solar related to the generation of electricity,[381] including the right to be connected to the national grid, an asset of the State.[382]

150. Even considering the PPA in isolation (apart from the other Agreements which are all cross-referenced and inter-related), Honduras's argument ignores its own legal framework. Honduras's Renewables Laws make clear that the execution of PPAs was integral to a public policy initiative of the Government to diversify the State's energy matrix by allowing private, renewable energy generators to produce energy through solar resources, in accordance with the State's National Plan.[383] A PPA arising out of a direct statutory mandate can hardly be classified as a "mere commercial" agreement.

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[376] CAFTA-DR (**CL-1**), Art. 10.28(a).

[377] *See*, *e.g.*, PPA (**Exh. C-1**) Cl. 7.1, Annex II; Operations Agreement (**Exh. C-3**) § 1.4.5; 1994 Electricity Law (Decree No. 158-94 published in the National Gazette on 26 Nov. 1994) (**Exh. C-56**), Arts. 2, 3, 7, 14.

[378] Memorial on Jurisdiction ¶ 43 (emphasis added).

[379] Memorial on the Merits ¶ 178.

[380] *See supra* § II.C.1.

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

[382] *See*, *e.g.*, PPA (**Exh. C-1**) Cl. 7.1, Annex II; Operations Agreement (**Exh. C-3**) § 1.4.5; *see also* 1994 Electricity Law (Decree No. 158-94 published in the National Gazette on 26 Nov. 1994) (**Exh. C-56**).

[383] National Plan (**Exh. C-66**), at 26, 105, 101, 110-112.

151. For the aforesaid reasons, the Agreements confer rights with respect to natural resources (the solar resource) and other assets controlled by Honduras and thus qualify as an investment agreement.

5. The Agreements Qualify as Both an Investment Agreement and a Protected Investment under the Treaty

152. An "investment agreement" under Article 10.28 of the CAFTA-DR must be an agreement that confers rights to the covered investor or its investments "upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself."[384] Regarding this requirement, Honduras argues that the Agreements cannot be at the same time an "investment agreement" and the investments covered by that agreement.[385]

153. Respondent's argument conflates issues and mischaracterizes Claimants' claims. As Claimants have explained, the Paizes relied on the Agreements to invest in Pacific Solar (*i.e.*, acquire **shares** of Pacific Solar).[386] The CAFTA-DR broadly defines an "investment" as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment," including, among others, an enterprise, shares, contracts, licenses, authorizations and permits, and other tangible or intangible, movable or immovable property.[387] Squarely within that definition, Claimants' investments include, but extend beyond, their rights under the Agreements to enjoy the income or profits from the Plant. Claimants' investments also include the Paizes' indirect participation in Pacific Solar, the capital committed to developing and operating the Plant, and their indirect ownership of all the assets held by Pacific Solar, such as the Plant itself, the licenses, and the land where the Plant is located, among others. There is nothing unusual about having several investments, including agreements that form part of those protected investments,

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384 CAFTA-DR (**CL-1**), Art. 10.28 (definition of "investment agreement") (b).

385 Memorial on Jurisdiction ¶¶ 245-246.

386 *See* Memorial on the Merits ¶¶ 173, 179, § II.B; Paiz WS I ¶¶ 12-13, 17; [redacted] ¶¶ 8-9, 10-13; *see also Enron Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction dated 14 Jan. 2004 (**CL-162**) ¶ 70 (noting that, by its characteristics, sometimes "an investment is indeed a complex process including various arrangements, such as contracts, licences and other agreements leading to the materialization of such investment, a process in turn governed by the Treaty" and considering "an investment based on several instruments as constituting an 'indivisible whole.'").

387 CAFTA-DR (**CL-1**), Art. 10.28 (definition of "investment") (a), (b), (e), (g), (h).

while at the same time having those agreements qualify for separate claims as an "investment agreement."[388]

154. Therefore, whether (i) a claimant has made a protected investment under the Treaty, and (ii) an agreement qualifies as an investment agreement, are distinct inquiries under the Treaty, and nothing in the Treaty renders them mutually exclusive. Accordingly, the Tribunal should find that Claimants relied on the Agreements to make further investments in Honduras, thus meeting the last requirement challenged by Respondent for the Agreements to qualify as an "investment agreement."

155. For the reasons explained above, Claimants have proven that the Agreements are mutually interdependent and form a single economic transaction that must be considered jointly in assessing if they qualify as an investment agreement under the CAFTA-DR. Claimants have also established that the Agreements were entered into with national authorities of Honduras, including ENEE, which is part of the central government. Further, Claimants have demonstrated that Pacific Solar validly entered into the Agreements as a signatory thereto and that, under the Agreements, Pacific Solar received rights related to natural resources and assets controlled by Honduras. Hence, the Agreements, jointly and individually considered, qualify as investment agreements under Article 10.28 of the CAFTA-DR.

D. RESPONDENT HAS FAILED TO PROVE ITS INVESTMENT OBJECTION BECAUSE CLAIMANTS OWN AND CONTROL THE INVESTMENT

156. The Tribunal allowed Respondent to raise its objection concerning ownership and control over the investment to assess two "well-circumscribed" issues.[389] First, Respondent's allegation that "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

[388] *See, e.g.*, *Chevron Corp. and Texaco Petroleum Co. v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility dated 27 Feb. 2012 (**CL-261**) ¶¶ 4.2, 4.18-4.20 (holding that one agreement could be "both an alleged 'investment' and an alleged 'investment agreement' under the BIT" for different purposes).

[389] Procedural Order No. 4 ¶¶ 43-44 ("Additional Objection 2 is concerned with ownership and control over the alleged investment. In the Tribunal's preliminary understanding, the objection has two limbs. . . . [T]he 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.").

exhibits."[390] Second, Respondent's allegation that "Claimants have transferred the rights of what they claim is (part of) their investment, Pacific Solar, to a third party, [redacted]."[391] As explained below, both allegations are incorrect because Claimants: (i) own and control Pacific Solar indirectly through the ownership structure already disclosed and further specified herein; and (ii) have owned and controlled their investment continuously since acquiring it, and did not transfer such ownership and control to [redacted]. Accordingly, the Tribunal should dismiss Respondent's objection in its entirety.

1. The Paizes Own and Control Pacific Solar

157. As Claimants established, Pacific Solar is an enterprise incorporated in Honduras that the Paizes own and control.[392] Pursuant to the Treaty, an "investment" is "every asset that an investor owns or controls, directly or indirectly." Moreover, the Treaty broadly contemplates that "[f]orms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise;" among others.[393] Claimants' investment falls squarely within the Treaty's definition of investment. The Paizes are nationals of Guatemala,[394] and directly and indirectly own and control a 100% interest in Pacific Solar, an enterprise incorporated in Honduras.[395] As Mr. Paiz has explained, "based on the Government's guarantees, and the Project's rights and potential, my wife and I invested in Pacific Solar in February 2015."[396]

158. Respondent does not question the Treaty's requirements or Claimants' explanation of how they meet them. Nevertheless, Respondent questions the Paizes' ownership because it deems that the certified corporate chart in the record is deficient and thus insufficient to establish ownership. Even more, Respondent ties its criticism of the evidence to personal attacks against Claimants, which are inaccurate and unwarranted.[397]

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[390] Procedural Order No. 4 ¶ 43.

[391] Procedural Order No. 4 ¶ 43.

[392] *See* Memorial ¶¶ 166-68; *see also* Ownership Structure Chart for Pacific Solar Energy, S.A. de C.V. dated 13 July 2023 (**Exh. C-27**).

[393] CAFTA-DR (**CL-1**), Art. 10.28 (definition of "investment") (footnotes not included).

[394] Passport of Ms. Anabella Schloesser de Paiz (**Exh. C-19**); Passport of Mr. Fernando Paiz (**Exh. C-18**).

[395] *See* Memorial on the Merits ¶¶ 166-68; *see also* Ownership Structure Chart for Pacific Solar Energy, S.A. de C.V. dated 13 July 2023 (**Exh. C-27**).

[396] Paiz WS I ¶ 17.

[397] *See, e.g.*, Memorial on Jurisdiction ¶ 145 ("The lack of proof is truly astonishing given the allegedly sophisticated investors in this case.").

159. Respondent's own allegations with respect to the certificate's purported deficiencies reveal the pettiness of its objection. According to Respondent, the certificate is invalid because it is in English, does not state "*por mí y ante mí*" (although it does contain the equivalent English term "by me and before me" on the face of the certificate), and contains other similar clerical deficiencies under the Guatemalan Notarial Code.[398] Claimants reject these criticisms but, for the sake of efficiency, submit additional information relating to their ownership of Pacific Solar. As these documents show, the Paizes own and control Pacific Solar indirectly through [redacted] British Virgin Islands, of which the Paizes are the ultimate [redacted], incorporated in the Bahamas.[399]

160. Claimant Mr. Paiz explains that "[m]y wife and I put in place a structure to hold our investments in Pacific Solar, as I do with my other investments, that ensures our ownership and control."[400] He adds that "I make all the important decisions relating to Pacific Solar," doing so by "coordinating almost daily [redacted]."[401]

161. Accordingly, the Paizes own and control their investment, and the first limb of Respondent's objection must be dismissed.

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[398] Memorial on Jurisdiction ¶ 142.

[399] Pacific Solar's current owners are [redacted], which holds 99.99% of the enterprise's stock, and Mr. Fernando Paiz, who holds the remaining 0.01% of Pacific Solar's equity. [redacted] is wholly owned by [redacted], which, in turn, is wholly owned by [redacted] owns 84.77% of [redacted], while [redacted] owns the remaining 15.23%. Additionally, [redacted] is the sole shareholder of [redacted], which owns 32% of [redacted]'s stock. The remaining 68% of [redacted]'s stock is owned by [redacted]. Finally, [redacted] is owned by [redacted] the Claimants as the ultimate beneficial owners. *See* Pacific Solar's Corporate Documents (**Exh. C-256**); [redacted] (**Exh. C-257**); [redacted] (**Exh. C-258**); [redacted] (**Exh. C-259**); [redacted] (**Exh. C-260**); [redacted] (**Exh. C-261**); [redacted] (**Exh. C-262**); [redacted] (**Exh. C-263**). Respondent asserts that it is "curious and striking" that Claimants have asked the tribunal to redact information of their ownership structure from their Memorial on the Merits, arguing that "Claimants seem determined that as little information as possible about their corporate structure should be disclosed." Memorial on Jurisdiction ¶ 139, n. 184. This is yet another attempt to cast doubt on the legitimacy of Claimants and their investment, based on mischaracterizations and falsehoods, which the Tribunal should not entertain. Claimants' corporate structure contains confidential commercial and personal information, and it is perfectly acceptable that such information be redacted from a public pleading, particularly where, as here, the Claimants are natural persons.

[400] Paiz WS II ¶ 5.

[401] Paiz WS II ¶ 6.

2. Claimants Have Continuously Owned and Controlled their Investment

162. According to Respondent, it "conducted its own investigation," and "all indications are that Mr. and Ms. Paiz are not the owners of the investment they claim."[402] To support its allegation, Respondent relies on a letter from Pacific Solar in which it "informed ENEE that it had entered into a trust agreement with [redacted] as trustee."[403] On that basis, Respondent concludes that, as a matter of Honduran law, "the true owner of the alleged investment, i.e. the Nacaome Plant and the PPA, is the trustee and not Pacific Solar."[404] Respondent's inference, derived from a single letter and cursory references to Honduran law, is fundamentally flawed and ignores that Claimants have owned and controlled their covered investment continuously since they acquired it in 2015.

163. As a preliminary matter, the implications of Respondent's assertion that it has "investigat[ed]"[405] issues relating to the arbitration should not be lost on the Tribunal, given Honduras's vast sovereign powers and track record of disregarding the rights of private parties. As Claimants advised the Tribunal last month,[406] Respondent conveniently scheduled an inspection of the Plant a few days after its pleading, disguised as a regulatory site visit, but requesting vast information relating to the issues in dispute, including about Pacific Solar's ownership structure.[407] Respondent's abuse of its sovereign powers to forcefully conduct a fishing expedition has only escalated since that time. As Claimants advised the Tribunal on 29 April 2025 on an urgent basis, Honduras sought to conduct inspections of the Plant pretextually, relying on a complaint filed in 2018, which constituted yet another abuse of the State's sovereign authority to obtain documents relating to the claims made in this arbitration, some of which likely relate to ownership and control of Pacific, outside the channels set forth in this proceeding to do so.[408]

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[402] Memorial on Jurisdiction ¶ 148.

[403] Memorial on Jurisdiction ¶ 149.

[404] Memorial on Jurisdiction ¶ 151.

[405] Memorial on Jurisdiction ¶ 148.

[406] Letter from the Claimants to the Tribunal dated 10 Mar. 2025, at 2-3.

[407] *See* Inspection Order No. CREE-006-2025 issued by the Electrical Energy Regulatory Commission dated 21 Feb. 2025 (**Exh. C-278**); Inspection and Verification Report issued by the Electrical Energy Regulatory Commission dated 5 Mar. 2025 (**Exh. C-279**).

[408] Letter from ENEE to Pacific Solar attaching letter from the Special Prosecutor to the Ministry of Energy regarding the State's inspection of the Plant dated 25 Apr. 2025 (**Exh. C-264**), at 1; Letter from Claimants to the Tribunal dated 29 Apr. 2025; *see also* Procedural Order by the President of the Tribunal dated 30 Apr. 2025.

164. As Claimants explained in correspondence, the so-called "[redacted] Trust" relates to Pacific Solar's project finance contractual framework. To build the Plant and enter into commercial operation, Pacific Solar obtained loans [redacted] from German Investment and Development Corporation ("**DEG**"), which is part of the KfW Group,[409] and the Dutch Entrepreneurial Development Bank ("**FMO**" and, together with DEG, the "**Lenders**"),[410] two well-known and respected public development banks.[411] [redacted] The [redacted] Trust Agreements did not alter the fact that the Paizes continue to **own** and/or **control** their investment in Pacific Solar.

409 KfW DEG, *About Us Page* (**Exh. C-48**).

410 FMO, *About FMO* (**Exh. C-54**).

411 Pacific Solar's Audited Financial Statements, at 23 (**MN-0005**).

(a) CAFTA-DR's Requirement that the Claimants Own or Control the Investment Directly or Indirectly is Amply Met

166. Investments in Honduras "**own[ed] or control[led], directly or indirectly**" by Guatemalan nationals constitute covered investments under the Treaty, as is clear from the ordinary meaning of Article 10.28.[415] The Treaty does not define the terms "own[ed] or control[led]." The inclusion of the terms "own[ed] or control[led]" in the Treaty was partially in response to the International Court of Justice's decision in *Barcelona Traction*, where the Court held that a company could only be protected by its state of incorporation and, therefore, barred shareholder standing.[416] Arbitral tribunals interpreting investment treaties that contain the "owned or controlled" language routinely find that claimants have a covered investment where they own or control protected investments, even where other affiliates form part of the investments' ownership structure.[417]

167. In ownership structures in which trusts or similar structures are involved, "[t]he separation of legal title and beneficial ownership rights does not deprive such ownership of the characteristics of an investment within the meaning of the ICSID Convention or the . . . BIT."[418] This is confirmed, among others, by the annulment committee in *Occidental v. Ecuador*, which rejected that a "nominee" may be the owner of an investment under international law, confirming

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[415] CAFTA-DR (**CL-1**), Art. 10.28 (definition of "investment").

[416] *See, e.g., Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction dated 8 Dec. 2003 (**CL-269**) ¶ 64 (concluding that claimant "made an investment by paying a 'canon' to obtain the concession to provide water and wastewater services" which it provided through subsidiaries and a locally-registered company, given that "[t]he objective of the definition of investment in the BIT is precisely to include this type of structure established for the exclusive purpose of the investment in order to protect the real party in interest.").

[417] *See, e.g., Antin Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award dated 15 June 2018 (**CL-61**) ¶ 262 (holding that "[t]here is nothing in the text or context of the [treaty] that supports [respondent's] position," given that it "refers to direct or indirect control or ownership, but nowhere in its text or in the context of the [treaty] is there a requirement that only the real and ultimate owner or beneficiary may submit claims to arbitration."); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction dated 3 Aug. 2004 (**CL-270**) ¶ 137 ("The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments."); *Venezuela Hldgs. B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction dated 10 June 2010 (**CL-271**) ¶ 165 ("The BIT does not require that there be no interposed companies between the ultimate owner of the company or of the joint venture and the investment. Therefore, a literal reading of the BIT does not support the allegation that the definition of investment excludes indirect investments.").

[418] *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award dated 14 July 2010 (**CL-272**) ¶ 134 ("The separation of legal title and beneficial ownership rights does not deprive such ownership of the characteristics of an investment within the meaning of the ICSID Convention or the Netherlands-Turkey BIT.").

that "[t]he position as regards beneficial ownership is a reflection of a more general principle of international investment law" since the "claimants are only permitted to submit their own claims, held **for their own benefit**, not those held (be it as nominees, agents or otherwise) on behalf of third parties not protected by the relevant treaty."[419]

168. In the same case at the award stage, Professor Stern explained that "[a]s far as the position of international law towards beneficial owners, in cases where the legal title and the beneficial ownership are split, is concerned, it is quite uncontroversial . . . that international law grants relief to the owner of the economic interest."[420] Other prominent international law scholars also confirm that when ownership is split between "nominal" owners and "beneficial" owners, a tribunal should find jurisdiction to hear claims brought by the latter.[421]

169. Further, it is well established that for purposes of a tribunal's jurisdiction, the investor must prove either ownership **or** control of the investment, and not necessarily both.[422] As illustrated by authority on which Respondent relies, *Plama v. Bulgaria*, "the word 'or' signifies that ownership and control are alternatives: in other words, only one need be met for the first limb

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[419] *Occidental Petroleum Corp. and Occidental Exploration and Prod. Co. v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award dated 2 Nov. 2015 (**CL-273**) ¶ 262 (emphasis added).

[420] *Occidental Petroleum Corp. and Occidental Exploration and Prod. Co. v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Dissenting Opinion of Professor Brigitte Stern (Award) dated 5 Oct. 2012 (**CL-274**) ¶ 148; *see also id.* ¶ 149 (adding that "[t]he fact that international law favours the beneficial owner has been recognized by the doctrine; the case-law of the Iran-US Claims Tribunal which has always considered the beneficial owner of the legal interest rather than the legal owner when there was a split of title, as well as ICSID tribunals' decisions.").

[421] *See, e.g.*, David J. Bederman, *Beneficial Ownership of International Claims*, in 38 INT'L & COMP. L.Q. 935 (1989) (**CL-275**), at 936 ("International law authorities have agreed that the real and equitable owner of an international claim is the proper party before an international adjudication, and not the nominal or record owner. . . . The notion that the beneficial (and not the nominal) owner of property is the real party-in-interest before an international court may be justly considered a general principle of international law."); SIR ROBERT JENNINGS ET AL. (EDS.), OPPENHEIM'S INTERNATIONAL LAW (9th ed. 2008) (**CL-276**), at 514 ("Where a claim is made in respect of property which is beneficially owned by one person, although the nominal title is vested in another, and they are of different nationalities, it will usually be the nationality of the holder of the beneficial interest which will be the determining factor for purposes of an international claim."); JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (8th ed. 2012) (**CL-277**), at 704-705 ("It is clear that the national character of a claim must be tested by the nationality of the individual holding a beneficial interest therein rather than by the nationality of the nominal or record holder of the claim. Precedents for the foregoing well-settled proposition are so numerous that it is not deemed necessary to document it with a long list of authorities.") (citing a decision of the U.S. Foreign Claims Settlement Commission in American Security and Trust Company).

[422] *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Arbitral Award dated 26 Jan. 2006 (**CL-38**) ¶ 106 (holding that a "showing of effective or '*de facto*' control is, in the Tribunal's view, sufficient" in light of the NAFTA's provision that "[a]n investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit [a claim] to arbitration.").

to be satisfied."[423] The tribunal further explained that "ownership includes indirect and beneficial ownership" and that "control includes **control in fact**, including an **ability to exercise substantial influence** over the legal entity's management, operation and the selection of members of its board of directors or any other managing body."[424] Other tribunals have found that control over an investment, even where there is no formal ownership, is enough for that investment to qualify as a "covered investment" to determine jurisdiction *ratione materiae*.[425]

170. The tribunal in *Castillo Bozo v. Panama* conducted a similar analysis, holding that since the claimant—a settlor and beneficiary of a trust—retained political and economic rights as a shareholder of a company, the "ownership" transferred to the trustee was merely nominal and did not affect the claimant's ownership or control of the investment under the applicable treaty.[426] The tribunal also considered that Mr. Castillo "controlled" the investment because it could instruct the trustee on how to exercise the political rights of the company on his behalf.[427]

171. Here, the Paizes are undoubtedly the beneficial owners and controllers of the investment. As Mr. Paiz explains, "[i]n 2015, I acquired Pacific Solar, and since then, I have been co-owner and Director of Pacific Solar."[428] Mr. Paiz further states that "[m]y wife and I put in place a structure to hold our investments in Pacific Solar, as I do with my other investments, that

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[423] *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction dated 8 Feb. 2005 (**RL-067**) ¶ 170.

[424] *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction dated 8 Feb. 2005 (**RL-067**) ¶ 170 (emphasis added).

[425] *See, e.g.*, *Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan Ltd v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/12/31, Award dated 22 Sept. 2015 (**CL-278**) ¶ 137 (holding that an investor is one that controls the investment through the exercise of management and voting rights and thus rejecting a claim made by a trustee); *Blue Bank Int'l & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Award dated 26 Apr. 2017 (**CL-279**) ¶¶ 196-197 (holding that, according to the language of the trust, the trustee claimant could not be deemed to own or control the investment because it could not take relevant decisions on the administration of the company in trust); *Rand Investments Ltd. and Others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Award dated 29 June 2023 (**CL-280**) ¶ 332 ("As Mr. Rand controls Sembi's contractual interest in the Beneficially Owned Shares, his investment is a covered investment, which is protected by the Treaty."); *see also Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability dated 12 Sept. 2014 (**CL-67**) ¶ 526 ("In the exceptional circumstances of this case, where except for legal title under Bahamian law, French nationals manifested every indicia of control over the shares of PIL . . . the Tribunal is of the view that it cannot take a formalistic approach to the question of control.").

[426] *Leopoldo Castillo Bozo v. Republic of Panama*, PCA Case No. 2019-40, Final Award dated 8 Nov. 2022 (**CL-281**) ¶ 174.

[427] *Leopoldo Castillo Bozo v. Republic of Panama*, PCA Case No. 2019-40, Final Award dated 8 Nov. 2022 (**CL-281**) ¶ 189.

[428] Paiz WS II ¶ 5.

ensures our ownership and control."[429] In sum, the [redacted] Trust Agreements did not transfer the Paizes' ownership rights within the meaning of the Treaty and certainly did not transfer their control rights.

(b) The Paizes Continue to Be Owners of Their Investment Despite the [redacted] Trust Agreements

172. The [redacted] Trust Agreements do not limit or exclude the Claimants' ownership of their investment, held indirectly through their stake in [redacted], the direct shareholder of Pacific Solar.

173. The provisions under Honduran law on which Respondent relies confirm that ownership remains with the Paizes.[430] Under the Honduran Commercial Code, a trustee does not have absolute ownership over the assets transferred in trust, but "with the **mandatory limitation** of performing only those acts required to fulfill the lawful and **specific purpose** for which [the trust is] intended."[431] It further provides that the trustee's "ownership powers . . . shall be exercised in accordance with the purpose to be achieved and not in the interest of the trustee."[432] Indeed, the trustee must maintain the assets allocated in a trust in separate accounts from its own assets and liabilities.[433]

174. The Commercial Code also provides that the assets subject to a trust "are dedicated to the purpose for which they are intended and, consequently, **only the rights and actions related to the mentioned purpose may be exercised over them**."[434] Finally, under the Code, the settlor has, among others: (i) the rights "that **have been reserved to be exercised directly on the affected**

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[429] Paiz WS II ¶ 5.

[430] Memorial on Jurisdiction ¶ 150.

[431] Honduran Commercial Code (Decree No. 73 dated 17 Feb. 1950) published in the Official Gazette dated November 1951 ("**Honduran Commercial Code**") (**Exh. R-14**), Art. 1033 (emphasis added).

[432] Honduran Commercial Code (**Exh. R-14**), Art. 1037(1). Article 1056 further provides that "[i]n all kinds of operations that involve the acquisition or substitution of goods or rights, or investment of money or liquid funds, the credit institution [*i.e.*, trustee] must strictly adhere to the instructions of the trustor [*i.e.*, settlor]." *Id.* Art. 1056.

[433] National Banking and Insurance Commission, *Rules for the Constitution, Administration and Supervision of Trusts* dated 27 Feb. 2017 (**R-33**), Art. 13(a)(2) (providing that trustees must "[e]nsure the complete separation of the trust assets from its own assets, for which it must maintain accounting records that register the transactions derived from the trust assets separately from its own accounts."); *see also* Share Trust Agreement (**Exh. C-266**), [redacted]; Assets Trust Agreement (**Exh. C-267**), [redacted]

[434] Honduran Commercial Code (**Exh. R-14**), Art. 1048 (emphasis added). The same article includes as exceptions "those expressly reserved by the settlor, those that derive for him from the trust itself, or those legally acquired concerning such assets prior to the constitution of the trust, by the beneficiary or by third parties." *Id.*

assets;"[435] (ii) the right to "revoke the trust . . . and request the removal of the trustee" for various reasons;[436] and (iii) the right to "[o]btain the return of the assets upon the conclusion of the trust, unless otherwise agreed."[437]

175. The [redacted] Trust Agreements show that [redacted] continues to be the owner of Pacific Solar's shares, for at least four reasons.

176. **First**, the purpose of the [redacted] Trust Agreements was to guarantee a financial transaction and was never intended to transfer full ownership of Pacific Solar to [redacted] or the Lenders. Indeed, it is well-known that project finance transactions routinely rely on similar trust structures to secure the borrower's repayment obligations, and that does not convert the lenders or trustees to owners of the assets.[438] [redacted]

[435] Honduran Commercial Code (**Exh. R-14**), Art. 1060(1) (emphasis added).

[436] Honduran Commercial Code (**Exh. R-14**), Art. 1060(2).

[437] Honduran Commercial Code (**Exh. R-14**), Art. 1060(4).

[438] *See*, *e.g.*, National Banking and Insurance Commission, *Rules for the Constitution, Administration and Supervision of Trusts* dated 27 Feb. 2017 (**R-33**), Art. 2(j) (defining "Guarantee Trust" as "[a] trust by virtue of which the settlor transfers to the trustee certain assets and/or rights, **in order to secure with these and/or with their proceeds, the fulfilment of an obligation** owed by the settlor or a third party, designating the creditor as beneficiary of the trust. The beneficiary in his capacity as creditor may require the trustee to pay the debt with the proceeds of the sale or liquidation of the assets or rights in trust, in accordance with the procedure established in the trust contract.") (emphasis added). *See also Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award dated 18 Aug. 2008 (**CL-42**) ¶ 40 (explaining that "payment trusts and collateral trusts are often used in project finance transactions, as the trust allows a single lender to control all the security interests, reducing administration and transaction costs, and facilitating the enforcement of the security interests.").

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[445] Paiz WS II ¶ 7.

[redacted]

[redacted]

180. **Finally**, the fact that Pacific Solar continues to be the owner of its assets is further confirmed by Pacific Solar's and ENEE's contemporaneous conduct. As Respondent states, Pacific Solar advised ENEE that the Assets Trust Agreement had been executed on 12 January 2018. It did so because, under the PPA, as the letter notes, it was required to communicate when it entered into transactions in exercise of its "**right to encumber**" under Clause 20.6 of the PPA.[450] If this communication proves anything, it is that Pacific Solar's assets were **encumbered**, but its ownership did not change.[451] Honduras understood this contemporaneously, as it never considered this as a transfer of ownership until this arbitration.

181. Importantly, under the PPA, Pacific Solar and ENEE had specifically regulated Pacific Solar's right to seek financing and transfer rights related to the Project, expressly agreeing that an encumbrance of this type would **not** constitute a transfer of ownership:

> The Parties expressly agree that **in the event of assigning, encumbering, or pledging** this Contract and/or the rights **to the Lender** or **for the purposes of the financing to be provided by the Lenders**, such assignment, pledge, or encumbrance of the Contract and/or rights **shall not be understood as a transfer of ownership** of this Contract. The Lender to whom such assignment, pledge, or encumbrance is made shall not be required to assume the fulfillment of any of the terms or conditions that the SELLER must comply with under this Contract.[452]

182. It is thus not true that "in the eyes of third parties such as ENEE [and] Honduras" the "true owner" of the investment is [redacted], as Respondent alleges.[453] To the contrary, ENEE expressly agreed that a lender would not become a "true owner" under these

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[449] Honduran Civil Code (**Exh. C-114**), Art. 613 ("Ownership of property is the right to exclusively possess a thing and to enjoy **and dispose of it** without any limitations other than those established by law or the will of the owner.") (emphasis added).

[450] PPA (**Exh. C-1**), Cl. 20.6.

[451] *See* Letter from Pacific Solar to J. A. Mejía Arita (ENEE) dated 12 Jan. 2018 (**Exh. R-37**) at 3 ("In accordance with the provisions of Section 20.6 of Clause Twenty of the PPA: RIGHT TO ENCUMBER of the PPA, the Company may encumber, pledge, assign, or transfer as security the PPA and/or the rights granted to it by the PPA, in favor of and/or for the benefit of any financial institution that has provided the resources supporting the PPA, by giving prior written notice to ENEE").

[452] PPA (**Exh. C-1**), Cl. 20.6 (emphasis added).

[453] Memorial on Jurisdiction ¶ 151.

circumstances. Hence, the Paizes continue to be owners of their investment for purposes of this Tribunal's jurisdiction.

(c) The Paizes Also Continue to Control their Investment

183. Even if the Tribunal were to find that formal "ownership" was transferred to the trustee—which is not the case—the [redacted] Trust Agreements confirm that the Paizes retain full control over their investment in Pacific Solar.

[redacted]

185. The Assets Trust Agreement also provides that Pacific Solar still controls the Plant and all related assets. In particular, Pacific Solar retained the right to operate the Plant,[458] including

[454] Share Trust Agreement (**Exh. C-266**), [redacted]

[455] Share Trust Agreement (**Exh. C-266**), [redacted]

[456] Share Trust Agreement (**Exh. C-266**), [redacted]

[457] Share Trust Agreement (**Exh. C-266**), [redacted]

[458] Assets Trust Agreement (**Exh. C-267**), [redacted]

the right to receive the proceeds from the Plant that are necessary to operate it[459] and other rights arising from the Agreements.[460]

186. Following the tribunals' reasoning in *Plama v. Bulgaria* and *Castillo Bozo v. Panama*, Claimants here undoubtedly retained indirect control over Pacific Solar and its assets at all relevant times, as—through Solar Energy Holding—they have broad governing powers over the affairs of Pacific Solar, including by voting in ordinary and extraordinary shareholders' meetings. Such voting powers allow them to "exercise substantial influence over the legal entity's management, operation and the selection of members of its board of directors or any other managing body."[461] Indeed, as shareholder of Pacific Solar, Claimants' company Solar Energy Holding may (i) discuss, approve, or modify Pacific Solar's balance sheet; (ii) appoint and remove its directors and commissioners, and determine their wages; (iii) amend Pacific Solar's articles of incorporation; and (iv) take any other decisions required by law or the articles of incorporation.[462]

187. The fact that Claimants control Pacific Solar and its operation is also confirmed by Mr. Paiz, who states that "I make all the important decisions relating to Pacific Solar."[463] The situation here is even clearer than in *Castillo Bozo* because, here, the Claimants' company, Solar Energy Holding, does not even need to "instruct" the trustee on how to vote on its behalf, but rather it attends shareholders' meetings and votes on its own behalf.

188. For all these reasons, the Tribunal should conclude that Claimants continue to own **and** control their investments in Honduras, and the [redacted] Trust did not change this circumstance.

3. If Anything, the [redacted] Trust Agreements are Relevant to Illustrate Respondent's Breach

189. While the [redacted] Trust Agreements are irrelevant for purposes of ownership and control, they provide a powerful illustration of the implications of Honduras's commitments to Pacific Solar and its subsequent breaches.

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459 Assets Trust Agreement (**Exh. C-267**), [redacted]

460 Assets Trust Agreement (**Exh. C-267**), [redacted]

461 *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction dated 8 Feb. 2005 (**RL-067**) ¶ 170.

462 Honduran Commercial Code (**Exh. R-14**), Arts. 168-169.

463 Paiz WS II ¶ 6.

190. As Claimants established, the project finance model requires that lenders be confident that the renewable installation will be financially viable in the long term, such that borrowers will generate a steady stream of revenue to repay the debt incurred. As such, PV projects required "long-term bankable contracts" backed by a stable regulatory framework and public support.[464]

191. In turn, investors in a solar project will only be interested if they are confident that, over and above servicing project debts, the PV energy installation will generate a return on the capital invested. The Renewable Incentives played a key role in enabling this kind of project finance.[465]

192. In the case of Pacific Solar, FMO and DGE loaned it significant sums, relying on Honduras's commitments, including ENEE's obligation to pay at a specific price under the PPA guaranteed by the State Guarantee, which constitutes Pacific Solar's sole source of income. As a consequence of Honduras's repudiation of its obligations, including its failure to compensate Pacific Solar, the unpredictability and insufficiency of ENEE's sporadic payments, and the uncertainty created, Pacific Solar has been compelled to restructure its project finance loans to salvage the project.[466] Pacific Solar's breach of the loan commitments enables the Lenders to request the trustee to transfer the shares directly to them or sell them in a public auction and pay the Lenders with the proceeds of that sale, which would constitute a total loss of Claimants' investments in Pacific Solar.

III. THE LIMITATIONS PERIOD AND CONTRACT CLAIMS OBJECTIONS ARE INAPPROPRIATE FOR BIFURCATION AND IN ANY CASE SHOULD BE DISMISSED

193. In Procedural Order No. 4, the Tribunal instructed the Parties to address Respondent's limitations period and contract claims objections in their written submissions and

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[464] Inter-American Development Bank, *Rethinking Our Energy Future. A White Paper on Renewable Energy for the 3GFLAC Regional Forum* dated June 2013 (**Exh. C-131**), at 17.

[465] Honduras itself was aware of the financing institutions need for incentives and assurances to invest in the country's green transition. *See* 2013 Renewables Law (**Exh. C-5**), Tenth Recital (acknowledging that renewable energy projects are made possible thanks to financing institutions such as DEG and FMO).

[466] Paiz WS I ¶ 27; Paiz WS II ¶ 8 (stating that "[i]ncidentally, because of the significant financial consequences of the Government's actions after the New Energy Law, I had to personally, together with [redacted] restructure Pacific Solar's project finance loans with DGE and FMO, precisely to avoid triggering these consequences and losing my entire investment as contemplated by that particular structure.").

deferred the decision on bifurcation until after the Rejoinder on Jurisdictional Objections and prior to the hearing.[467] The Tribunal also requested that the Parties address the: (i) applicability of the limitation period in the presence of continuous acts and composite acts; and (ii) the legal question of whether, and if so, under what conditions, the Tribunal has jurisdiction over purely contractual claims.[468]

194. Honduras has failed to discharge its burden of showing that the temporal limitation objection or the contract claims objection warrant bifurcation.[469] To warrant bifurcation, the preliminary objection should (i) materially reduce time and cost; (ii) dispose of all or a substantial part of the dispute; (iii) not be so intertwined with the merits that it would make bifurcation impractical; and (iv) be *prima facie* serious and substantial.[470] Honduras's objections that Claimants' claims fall outside of the Treaty's limitations period and are merely contractual, do not meet any of these criterion: they are both meritless, far too intertwined with the merits to warrant bifurcation, and would not materially reduce time and cost for the proceeding. It would thus be inefficient to address these objections in the bifurcated phase. However, as noted below, considering that the Parties have already briefed these objections, the Tribunal should dismiss them now, after analyzing the facts and claims as alleged by Claimants.

195. **First**, the temporal limitation is inappropriate for bifurcation. In its Order, the Tribunal cited favorably to the *Phoenix Action v. Czech Republic* decision, where that tribunal

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[467] Procedural Order No. 4 dated 4 April 2025 ¶ 42.

[468] Procedural Order No. 4 dated 4 April 2025 ¶ 41 ("[T]he 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."), ¶ 55(B) ("[D]iscuss whether and if so, how, the limitation period applies: (i) to continuous acts and (ii) to composite acts."), ¶ 55(3).

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

[470] Claimants' Observation on Request for Bifurcation ¶ 4; *see generally id.*, § II; Procedural Order No. 3 dated 20 Dec. 2024 ¶ 31 ("Pursuant to ICSID Arbitration Rule 44(2), which applies to requests of bifurcation relating to a preliminary objection, the Tribunal shall, in determining whether to bifurcate, 'consider all relevant circumstances, including whether: (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.'"); Procedural Order No. 4 dated 4 Apr. 2025 ¶ 30 ("[R]egard 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 . . . tribunals must strive to avoid making findings at the stage of objections to jurisdiction that they may revise at the merits phase . . . one should also avoid overly burdensome evidence-intensive determinations in an incidental proceeding with relatively short deadlines and a relatively short hearing.").

found 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 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."[471] The facts relied on by Claimants that are relevant to Respondent's objection are of such a nature that, if proven, would constitute a violation of the Treaty, and thus have to be accepted at the jurisdictional stage. Based on the facts as presented by Claimants, the only possible conclusion is that the claims are not time-barred.

196. Indeed, CAFTA-DR tribunals have generally only bifurcated preliminary objections based on the limitation period in Article 10.18(1) when it was mandated by the Treaty – such as when the respondent invoked Article 10.20.5 of CAFTA-DR or Rule 41 of the ICSID Rules, triggering automatic bifurcation.[472] In such cases, the tribunals had no choice but to bifurcate and to decide on the merits of the objection during the preliminary phase.[473] Notably, those tribunals generally outright dismissed the respondent's time-bar objection during the preliminary phase, on the basis of the claims alleged by claimant, and because they needed to accept the veracity of the facts, as alleged by the claimant.[474]

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[471] *See* Procedural Order No. 4 dated 4 April 2025, ¶ 31 (*citing Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award dated 15 Apr. 2009 (**CL-282**) ¶ 61).

[472] CAFTA-DR (**CL-1**), Art. 10.20.5 ("[T]he tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. **The tribunal shall suspend any proceedings on the merits** and issue a decision or award on the objection(s).") (emphasis added); ICSID Arbitration Rules, Rule 41(3) (establishing the procedure for deciding an objection that a claim is manifestly without legal merit and mandating that the Tribunal shall issue a decision on the objection before continuing with the remainder of the proceeding.).

[473] *See, e.g.*, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (**CL-283**) ¶ 1.17 (deciding a *ratione temporis* objection brought by respondent under Rule 41 of the ICSID Arbitration Rules).

[474] *See, e.g.*, *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections dated 13 Mar. 2020 (**CL-151**) ¶ 220 (finding that under the time-limitation provision in Article 10.18.1 "the relevant inquiry is whether 'more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of *the breach alleged* under Article 10.16.1 and knowledge that the claimant . . . has incurred loss or damage' by reason of that breach. This determination cannot be made without a predicate determination of *what particular breach has been alleged*."(emphasis in original)). *See also id.* (**CL-151**) ¶¶ 222-223 (relying on claimants' allegations that they were not claiming for facts that occurred prior to a certain date and noting that "The Tribunal takes Claimants at their word regarding what breach they in fact are alleging, and what breach they are not alleging."). *See also Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (**CL-283**) ¶ 3.35 ("[T]he Parties strongly disagree as to what is the relevant dispute and the time when it arose."), ¶ 3.36 ("[T]he Tribunal has determined that the relevant dispute as regards the Claimant's claims (as now pleaded and clarified in these proceedings) arose on 13 March 2008, at the earliest."), ¶ 3.37 ("The Tribunal's determination has several consequences for the Ratione Temporis issue . . . the relevant measure alleged by the

197. In *Kappes v. Guatemala*, for example, the tribunal dismissed the Article 10.20.5 time-bar objection for the purposes of the preliminary phase.[475] The tribunal reasoned that the time-bar issue could not be fully resolved at that stage, as "the jurisdictional issue it presents is one that properly requires factual investigation, and cannot be resolved simply as a matter of the very first pleading."[476] The tribunal also noted that "[i]n due course, the evidence likely will be developed regarding" the facts underpinning the claims, and the tribunal may need to decide whether the facts falling within the limitation period "involved new State actions or omissions, or merely continuations of (or effects emanating from) prior State actions or omissions."[477] The tribunal thus considered it premature to opine on the jurisprudence presented by the parties regarding continuous acts and other doctrinal issues in investment law, as **"[d]iscussion of legal principles is best done against the backdrop of a developed evidentiary record"** during the merits phase.[478]

198. The *Renco v. Peru (II)* tribunal reached a similar decision when faced with an expedited preliminary objection under Article 10.20.5 of the U.S. – Peru Trade Promotion Agreement, which is nearly identical to the CAFTA-DR, on the application of the Treaty's timing provisions. The tribunal ruled that it could not accept the respondent's allegations as to the claimant's FET and indirect expropriation claims at that stage, without having examined the merits of the dispute. The tribunal noted that it would need to closely scrutinize the parties' accounts of the claimant's claims when it turns to the merits, and that the respondent's assertions at the preliminary phase were insufficient to deprive the tribunal of jurisdiction over the claims.[479]

Claimant will necessarily focus on unlawful acts or omissions under CAFTA that allegedly took place not earlier than March 2008."), ¶ 3.38 ("Such being the Tribunal's analysis, the debate between the Parties concerning: . . (ii) the three-year time limit under CAFTA as invoked by the Respondent become irrelevant for the purpose of deciding the Ratione Temporis issue.").

[475] *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections dated 13 Mar. 2020 (**CL-151**) ¶ 228.

[476] *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections dated 13 Mar. 2020 (**CL-151**) ¶ 226.

[477] *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections dated 13 Mar. 2020 (**CL-151**) ¶ 226.

[478] *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections dated 13 Mar. 2020 (**CL-151**) ¶ 227; *see also id*. ¶ 228 ("The Tribunal accordingly denies the Respondent's application pursuant to DR-CAFTA Article 10.20.5 to dismiss at the outset Claimants' claim for lack of full protection and security because it is time-barred, and reserves for the merits phase of this arbitration the issues presented by that application.").

[479] *The Renco Group, Inc. v. The Republic of Peru (II)* ("***Renco v. Peru (II)***"), PCA Case No. 2019-46, Decision on Expedited Preliminary Objections dated 30 June 2020 (**CL-284**) ¶ 147 ("The key question is thus whether the

199. As these cases demonstrate, even where tribunals considered timing objections in a bifurcated phase because they were mandated to do so under an automatic bifurcation provision in the applicable treaty, the tribunals considered this objection to be inappropriate for bifurcation, as it is intrinsically tied to the merits of the dispute. Claimants respectfully note that even if the Tribunal and the Parties "address the objection based on the assumption that the facts alleged by the Claimants indeed qualify as violations of the Treaty,"[480] as instructed, the Tribunal must still undergo an analysis of the facts comprising Respondent's Treaty breaches, as pled by Claimants. The Tribunal, in particular, must consider Respondent's acts prior to the New Energy Law, in order to compare that to later conduct in order to appreciate that the New Energy Law imposed a new agenda on Honduras's electricity system that affected Claimants and their investments in concrete and direct ways, and resulted in loss and damage to Claimants and their investments. As was the result in the other cases where the respondent States unsuccessfully attempted to obtain a resolution of their limitations objections in a preliminary phase, the Tribunal should also find that, on the basis of the facts and claims alleged by Claimants, Respondent's time-bar objection is meritless.

200. **Second**, Honduras's objection that Claimants' claims are merely contractual is, by definition, intertwined with the merits. It is also not serious or substantial, and thus would not dispose of any part of the claims. Both Respondent and the Tribunal have acknowledged this.[481] Notably, the Tribunal reasoned that it "cannot find that the Claimants' claims are purely contractual absent a prior finding that the Respondent did not breach any of the substantive

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Claimant's FET and indirect expropriation claims necessarily depend on the alleged wrongfulness of Peru's conduct prior to 1 February 2009 or whether they are based on independently actionable breaches that arose after 1 February 2009."); *id*. ¶¶ 149-150 (outlining the parties' positions as to when claimant's claims arose); *id*. ¶ 151 ("**The Tribunal will need to scrutinize closely which of the foregoing accounts is correct when it turns to the merits of the Claimant's FET claims**. In particular, the Tribunal will need to establish with precision the legal situation as it stood on 1 February 2009 and how it evolved thereafter. The Respondent may yet convince the Tribunal that MEM did nothing but uphold its prior decisions and hold DRP to its existing contractual and environmental obligations. However, **its assertions are insufficient at this stage to deprive the Tribunal of jurisdiction to examine these claims altogether**.") (emphasis added).

[480] *See* Procedural Order No. 4 dated 4 April 2025, ¶ 55(B).

[481] Memorial on Jurisdiction ¶¶ 249-251 ("Honduras understands that the Tribunal may consider that it is not in a position to decide this objection at this stage, as it is linked to the merits of the dispute and may decide to leave it for the next stage in the unlikely event that it rejects all other jurisdictional objections raised."); Letter from Respondent to the Tribunal dated 20 March 2025, at 3 ("Respondent expressly stated that this objection is likely to be intertwined with the merits and it is possible that the Tribunal will join this objection with the merits. However, Respondent included this objection in the current phase only to comply with Procedural Order No. 3."); Procedural Order No. 4 dated 4 April 2025, ¶ 13 ("Respondent acknowledges that this objection is intertwined with the merits and that it is possible that the Tribunal will join it to the merits."), ¶ 51.

standards of the Treaty . . . Accordingly, the Tribunal cannot find in the present bifurcated proceeding that the Claimants' claims are purely contractual."[482] Nevertheless, the Tribunal decided that the Parties should address the legal question whether, and if so, under what conditions, the Tribunal has jurisdiction over purely contractual claims, which it considers to be *prima facie* closely related to two of the bifurcated objections (regarding the MFN clause and the qualification of the Agreements as an investment agreement), and considered, from the perspective of procedural efficiency and coherence, it is appropriate for the Parties to address the legal aspect of this objection.[483] Assessing the legal question without examining the factual aspects of the objection would lead to inefficiencies as the Tribunal will be incapable of disposing of the entire objection without factual findings as to the nature of Claimants' treaty claims. Bifurcation would also not dispose of any part of the dispute, as Respondent's objection is meritless.

201. Assuming that the Tribunal bifurcates the objection and for purposes of this jurisdictional decision, the tribunal should follow the commonly accepted approach mentioned above with respect to the temporal limitation objection, that merits facts should be accepted at the jurisdictional phase, and the Tribunal should base its decision on the claims as alleged by Claimants.[484] The facts as alleged by Claimants, and the Treaty breaches Claimants have asserted, show that the Paizes' claims are not based on a breach of contract. This is sufficient for the Tribunal to find that it has jurisdiction over the claims, and it may examine the substance of Claimants' claims during the merits phase.

202. In sum, considering that the Parties have already briefed its responses to Honduras's additional objections, both objections should be dismissed at this juncture as they are both clearly unmeritorious, to preserve efficiencies in the proceeding. The Tribunal should find that it has jurisdiction over both the limitations period and contract claims objection.

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[482] Procedural Order No. 4 dated 4 April 2025, ¶ 51.

[483] Procedural Order No. 4 dated 4 April 2025, ¶ 52.

[484] *See, e.g.*, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award dated 15 Apr. 2009 (**CL-282**) ¶ 61 ("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 existence is ascertained or not at the merits level.").

A. CLAIMANTS' CLAIMS ARE NOT TIME-BARRED

203. Respondent's limitation-period objection fundamentally misconstrues both the facts and nature of Claimants' claims.[485] Respondent alleges that more than three years have lapsed since Claimants first acquired, or should have first acquired, knowledge of Respondent's breaches, and thus the dispute falls outside the Treaty's three-year limitation period.[486] Respondent ignores that the limitation period in Article 10.18.1 of the CAFTA-DR runs from the moment Claimants acquired actual or constructive knowledge of both Respondent's treaty breaches and the associated damage.[487]

204. The Parties agree that Respondent's Treaty breaches need to have occurred after 24 August 2020, *i.e.*, three years prior to the Request for Arbitration (which Respondent refers to as the cut-off date).[488] It is undisputed that Claimants submitted their Request for Arbitration on 24 August 2023, well within three years of Honduras's enactment of the New Energy Law in May 2022, and its adoption of subsequent measures that breached the Treaty. This is fatal to Respondent's temporal limitation objection.

205. Respondent concedes that the forced renegotiation of the PPA, which Honduras introduced through the New Energy Law, falls within the Tribunal's jurisdiction.[489] This is the correct approach, as the New Energy Law was promulgated within the Treaty's limitations period.[490] Claimants note that Respondent's weaponizing the State's significant and outstanding debt to Pacific Solar and engaging in a public smear campaign against generators, also fall within the Treaty's limitation period, as these measures were adopted after the New Energy Law entered into force.

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485 *See* Memorial on Jurisdiction § III.B.

486 Memorial on Jurisdiction ¶ 9.

487 CAFTA-DR (**CL-1**), Art. 10.18.1 ("No claim may be submitted under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach. . . .").

488 Memorial on Jurisdiction ¶ 115 ("The cut-off date for the purposes of the Tribunal's jurisdiction is 24 August 2020, i.e. three years before Claimants' Notice of Arbitration.").

489 Memorial on Jurisdiction ¶ 129.

490 Memorial on Jurisdiction ¶ 129 ("[T]he only claim by the Claimants that could fall within the Tribunal's temporal jurisdiction concerns the alleged forced renegotiation of the PPA under Decree 46-2022.").

206. In an attempt to undermine the significance of its breaches, Respondent seeks to shift the Tribunal's focus to Honduras's prior payment delays and curtailment of energy. Honduras, however, ignores the critical distinction between the mere delayed payment of invoices, accompanied by Honduras's acknowledgment of the debt and promises to pay, and the State's later message that full payment of the existing debt would not occur with the passage of the New Energy Law and the Government's ensuing statements. The enactment of the New Energy Law was also the first time that Honduras had passed legislation codifying the sovereign threat to expropriate Claimants' investment, impose haircuts on Pacific Solar's outstanding receivables, and initiate criminal proceedings against Claimants should their investment cease generating energy, all in order to intimidate generators into "renegotiations."[491] Claimants could not have acquired knowledge of Respondent's Treaty breaches until Honduras promulgated the New Energy Law that radically upended the *status quo* and caused significant damage to them. As further explained below, with the enactment of the New Energy Law and the state of uncertainty that followed thereafter, Respondent (i) subjected Claimants to expropriatory measures, (ii) denied Claimants the minimum standard of treatment ("**MST**"), and (iii) breached its commitments under the Agreements.

207. So long as the breach and damage first became known or knowable after the cut-off date, the claim is timely and the Tribunal may consider events and State conduct that pre-date the critical date as factual background to the Treaty breaches, without running afoul of the Treaty's limitation period.[492] As the *Mondev v. United States* tribunal explained, "events or conduct prior

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[491] 2022 New Energy Law (**Exh. C-10**), Art. 5.

[492] *See Eli Lilly and Co. v. Canada*, UNCITRAL Case No. UNCT/14/2, Award dated 16 Mar. 2017 (**CL-285**) ¶ 172 ("[M]any previous NAFTA tribunals that have found it [*sic*] appropriate to consider earlier events that provide the factual background to a timely claim. As stated by the tribunal in *Glamis Gold v. United States*, a claimant is permitted to cite 'factual predicates' occurring outside the limitation period, even though they are not necessarily the legal basis for its claim."); *Glamis Gold v. United States*, UNCITRAL, Final Award dated 8 June 2009 (**CL-125**) ¶ 348 ("Both Claimant and Respondent state that a claim brought on the basis of an event properly within the time limit of Article 1117(2) may cite to earlier events as "background facts" or 'factual predicates.' The Tribunal agrees."); *Eli Lilly and Co. v. Canada*, UNCITRAL Case No. UNCT/14/2, Award dated 16 Mar. 2017 (**CL-285**) ¶ 171 ("Although the alleged promise utility doctrine is not the substantive basis of Claimant's claim, it plays a prominent role in Claimant's submissions. Indeed, one critical element of Claimant's case is establishing that judicial decisions issued from 2002 to 2008 effected a dramatic change in the Canadian utility requirement."); *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 Mar. 2015 (**CL-11**) ¶ 282 ("[E]vents prior to the three-year bar . . . are by no means irrelevant. They can provide necessary background or context for determining whether breaches occurred during the time-eligible period."); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (**CL-283**), ¶ 2.105 ("As in *Mondev*, the Tribunal determines that it could remain appropriate for the Claimant to point to the conduct of the Respondent before 13 December 2007. This same approach was adopted by

to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation" as long as the claimant can point to State conduct after the entry into force of the treaty which is itself a breach.[493] The *Grand River v. United States* tribunal likewise held that the limitation period should not be "interpreted to bar consideration of the merits of properly presented claims challenging important statutory provisions that were enacted within three years of the filing of the claim and that allegedly caused significant injury, **even if those provisions are related to earlier events**."[494]

208. The Tribunal thus may consider Honduras's measures that predate August 2020, as background to Respondent's breaches of the Treaty when it implemented the New Energy Law. Such facts do not form the legal basis for Claimants' claims and referring to them to provide context to Respondent's Treaty breaches does not run afoul of the Treaty's limitation period.

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the *MCI* [*Power v. Ecuador*], tribunal, which did not dismiss acts and omissions completed before the treaty's entry into force as irrelevant. It decided that such acts and omissions may be considered: 'for purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force.'").

[493] *Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/22, Award dated 11 Oct. 2002 (**CL-9**) ¶ 69 ("[I]t does not follow that events prior to the entry into force of NAFTA may not be relevant to the question whether a NAFTA Party is in breach of its Chapter 11 obligations by conduct of that Party after NAFTA's entry into force."); *id.* ¶ 70 ("Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after the date which is itself a breach."); *see also The Renco Group, Inc. v. The Republic of Peru (II)*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections dated 30 June 2020 (**CL-284**) ¶¶ 145-146 ("[T]he principle is that, in order not to pass judgment on the lawfulness of conduct predating the entry into force of the Treaty, the allegedly wrongful conduct postdating the entry into force of the Treaty must "constitute an actionable breach in its own right" when evaluated in the light of all of the circumstances, including acts or facts that predate the entry into force of the Treaty."); *Berkowitz et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected) dated 30 May 2017 (**CL-286**) ¶ 217 ("[T]he Tribunal considers that CAFTA Article 10.1.3 does not preclude it from having regard to pre-CAFTA entry into force conduct for purposes of determining whether there was a post-entry into force breach of a justiciable obligation.").

[494] *Grand River Enterprises Six Nationals v. United States*, UNCITRAL, Decision on Objections to Jurisdiction dated 20 July 2006 (**CL-287**) ¶ 86 (emphasis added). The tribunal in *Rusoro v. Venezuela* likewise found that time barred measures taken prior to the cut-off date were still relevant as background to the claims occurring within the treaty's limitation period. *See Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award dated 22 Aug. 2016 (**CL-117**) ¶ 233 ("[W]hile Art. XII.3 (d) of the Treaty bars claims concerning alleged breaches which occurred before the Cut-Off Date, this does not imply that the measures underlying such breaches become irrelevant. They provide the necessary background and context for adjudicating the case, and the legitimate expectations of an investor may depend crucially on matters that occurred before such Cut-Off Date."), ¶ 236 ("To the extent that the Ancillary Claims concern breaches of the Treaty supported by measures having occurred after the Cut-Off Date, such claims are enforceable and are not affected by Art. XII.3 (d). The 2009 Measures may however have some relevance as background and context and to establish the legitimate expectations of the investor."), ¶ 240 ("[T]he fact that any claim based on the 2009 Measures may be declared time-barred, cannot lead to the consequence that Rusoro's other claims, based on other alleged breaches committed by the Republic, automatically also become unenforceable by application of Art. XII.3 (d) of the Treaty.").

209. Respondent has not and cannot meet its burden to show that Honduras's prior payment delays and curtailment of energy that predated the New Energy Law are capable of serving as a separate and distinct basis for Claimants' claims and a violation of the CAFTA-DR. Claimants' claims are within the three-year prescription period and Respondent's meritless objection must be dismissed. In the following sections Claimants demonstrate that: (i) the limitation period in Article 10.18(1) CAFTA-DR begins to run from Claimants' knowledge of both a Treaty breach and resulting loss or damage; (ii) Claimants did not acquire knowledge of any of the alleged breaches and the resulting loss until after May 2022; and (iii) even if Honduras's actions are classified as continuous or composite acts, Claimants' claims would still fall within the Treaty's limitation period.

1. Article 10.18(1)'s Limitation Period Begins to Run From Claimants' Knowledge of Both a Treaty Breach and Resulting Loss or Damage

210. Under Article 10.18.1 of the Treaty, the limitation period only begins to run when a claimant becomes aware of two key facts: (i) the treaty breach; and (ii) the loss or damage resulting from that breach. Article 10.18(1) requires both "knowledge of the breach alleged" under the Treaty, as well as "knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage" as a result of the breach.[495] The critical factor is not the occurrence of the breach or loss on its own, but Claimants' cumulative awareness of both the breach and its resulting damage. Respondent agrees.[496] In the event that the knowledge of the breach and the damage does not occur simultaneously, the three-year limitation period begins to run from the later of the two events.[497]

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[495] CAFTA-DR (**CL-1**) Art. 10.18(1) ("No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, **knowledge of the breach** alleged under Article 10.16.1 **and** knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) **has incurred loss or damage**.") (emphasis added).

[496] Memorial on Jurisdiction ¶¶ 114-115 (*citing Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction dated 4 Dec. 2017 (**CL-98**) ¶ 330).

[497] *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award on the Merits dated 31 Mar. 2025 (**CL-288**) ¶ 240 ("[F]or the statute of limitations to start running, there must be both knowledge of the violation (real or putative) and real knowledge of the damage suffered. In the light of this structure, when there is no simultaneity between the violation and the damage, it can be assumed that the limitation period only begins to run when the damage is known, since the occurrence of the violation logically precedes the existence of the damage."); MEG KINNEAR *ET AL.*, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 (2006) (**CL-289**), at 14 ("[T]he three-year period runs from the date on which the investor acquires, *or should have acquired*, both knowledge of the breach and knowledge that the investor, or, in the case of Article 1117(1), the enterprise on behalf of which the investor is asserting a claim, has been injured by the breach . . . . The three-year

For the limitation period to start running, Claimants must have acquired actual or constructive knowledge of facts sufficient to constitute a claim for the relevant breach;[498] knowledge requires more than just a suspicion of breach or loss.[499]

211. The breach alleged by Claimants is determined by Claimants' characterization of its claims.[500] Respondent's argument that the Tribunal should not consider Claimants' characterization of their own claims is incorrect, and based on an incorrect reading of *Vieira v. Chile*.[501] In that case, the tribunal held that when ascertaining its jurisdiction it was not limited to the "**facts**" raised by the claimant, but that the "**legal characterization**" of claimant's claims depends on the way that the claimant has framed them.[502]

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limitation period presumably runs from the later of these events to occur in the event that the knowledge of both events is not simultaneous.") (emphasis in original); *see also*, *Mobil Investments Canada Inc. v. Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility dated 13 July 2018 (**RL-101**) ¶ 153 ("The date on which an investor or enterprise first acquires (or ought to have acquired) knowledge that it has suffered loss or damage may not be the same as the date on which it first acquires (or ought to have acquired) knowledge of the alleged breach which causes that damage."), ¶ 154 ("It is impossible to know that loss or damage *has been* incurred until that loss or damage actually has been incurred. Thus, even if Mobil had first acquired knowledge of the enforcement of the 2004 Guidelines in 2004, it could not have acquired knowledge that it had incurred loss or damage in consequence until that loss or damage had actually been sustained.") (emphasis in original).

[498] *Gramercy Funds Mgmt. LLC and Gramercy Peru Hdgs. LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2. Award dated 6 Dec. 2022 (**CL-290**) ¶¶ 530-531 ("[F]or the time bar to start tolling, the claimant must have acquired actual or constructive notice of facts sufficient to state a claim for the relevant breach. The Tribunal concurs with this interpretation of the rule.").

[499] *Gramercy Funds Mgmt. LLC and Gramercy Peru Hldgs, LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Award dated 6 Dec. 2022 (**CL-290**) ¶ 528 ("[I]t is not enough that the claimant suspects that it might suffer a loss."); *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility dated 13 July 2018 (**RL-101**) ¶ 155 ("To suspect that something will happen is not at all the same as knowing that it will do so. Knowledge entails much more than suspicion or concern and requires a degree of certainty.").

[500] *See Eli Lilly and Co. v. Canada*, ICSID Case No. UNCT/14/2, Award dated 16 Mar. 2017 (**CL-285**) ¶ 163 ("[T]he 'alleged breach' must, in the first instance, be identified by reference to Claimant's submissions."), ¶ 164 ("The Tribunal has carefully examined Claimant's written and oral submissions to evaluate whether Claimant's characterization of its claim for the purpose of jurisdiction is supported by its position on the merits."), ¶ 165 ("Respondent's attempt to re-characterize Claimant's case cannot be accepted."). *See also Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (**CL-283**) ¶ 2.53 (holding that to determine what State measures are relevant in its analysis of jurisdiction "the Tribunal must necessarily analyse the Claimant's own pleadings."), ¶ 2.72 (holding that for purposes of whether a State act was considered a continuous or composite act, the tribunal should consider "the relevant measure . . . as alleged by the Claimant.").

[501] Memorial on Jurisdiction ¶ 123 (citing *Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Award dated 21 Aug. 2007 (**RL-73**) ¶ 208).

[502] *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Award dated 21 Aug. 2007 (**RL-73**) ¶ 211 ("On the other hand, this Tribunal agrees with VIEIRA in his argument that **it is the CLAIMANT's responsibility to establish the legal characterization of their claims**, thereby determining the factual and legal circumstances to which the RESPONDENT must refer when raising their objection to jurisdiction.") (emphasis added).

2. Claimants Did Not Acquire Knowledge of Any of the Alleged Breaches and the Resulting Loss Until After May 2022

212. Respondent fundamentally mischaracterizes both the facts and nature of Claimants' claims, by selectively referring to two background facts, while disregarding the measures giving rise to Respondent's Treaty breaches, all of which occurred within the Treaty's limitation period.

213. Respondent relies on two background facts predating the New Energy Law in support of its objection that Claimants' claims are time barred: Honduras's (i) failure to pay certain invoices and (ii) curtailment of the Plant's dispatch of energy.[503] These events are not the bases for Claimants' claims.

214. As explained below, prior to mid-2022, Respondent acknowledged that Pacific Solar was entitled to compensation under the Agreements and led Claimants to believe that it would uphold its payment obligations to Pacific Solar for energy supplied to the grid. Claimants relied on Respondent's conduct and assurances that the unpaid invoices would be satisfied. It was only after the new Administration's enactment of the New Energy Law and the arbitrary conduct that followed that Claimants understood that Honduras would not adhere to its prior representations with respect to the outstanding debt owed to Pacific Solar, causing Claimants significant damage, including forcing Pacific Solar to renegotiate terms with its lenders.[504]

215. Respondent's allegation that "Claimants' emphasis on Decree 46-2022 should be understood as an attempt to escape the temporal limitations on jurisdiction"[505] is incorrect. Claimants could not have known prior to the New Energy Law of Respondent's breaches of the Treaty and the losses that they have suffered as a result. Claimants thus did not acquire knowledge of Respondent's breaches and their resulting damages until May 2022.

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[503] *See* Memorial on Jurisdiction § III.B.2.

[504] Notably, the outstanding balance of ENEE's debt with Pacific Solar [redacted]—from [redacted]—demonstrating a dramatic deterioration in the State's fulfillment of its payment obligations towards Pacific Solar. [redacted] ¶ 19; *see also* Quantum Report by Mr. Miguel A. Nakhle dated 19 Aug. 2024 ("**Compass Lexecon**") ¶ 44.

[505] Memorial on Jurisdiction ¶ 117.

(a) Prior To Mid-2022, the Government Acknowledged that Pacific Solar Was Entitled to Compensation Pursuant to the Agreements and Led Claimants to Believe that Honduras Would Uphold its Commitments

216. Honduras's conduct towards Claimants prior to the New Energy Law reveal a marked departure from its subsequent actions. Prior to the New Energy Law, Honduras signaled to Pacific Solar that it intended to respect the Agreements and uphold its payment obligations. As explained in the Memorial, after the Plant entered into partial commercial operation in 2016 and final commercial operation in 2018, ENEE paid Pacific Solar for the energy it delivered and capacity it made available to the electricity grid.[506]

217. As Mr. Paiz explains, prior to 2022, when ENEE's payments to Pacific Solar were delayed or incomplete, the Government always reiterated its commitment to become current in full, reassuring Claimants that it intended to respect its obligations to Claimants.[507] For example, in 2018 and 2019, the Government, including ENEE, worked with international agencies, including the International Monetary Fund, to address inefficiencies in the Country's electrical sector.[508] This involved aiding ENEE to become current on its obligations, which included payments owed to Pacific Solar for energy delivered. In this context, in an October 2018 agreement, Honduras confirmed that "it will act under the legal framework, guaranteeing legal certainty so that the commitments assumed by the [S]tate with national and foreign investors are not affected and can be fulfilled."[509] Honduras's statements confirmed that the State would continue to honor commitments under the State Guarantee. ENEE also "made significant catch-up payments to [Pacific Solar]" in mid-2020, thus "preventing the situation from escalating further," and confirming Pacific Solar's belief that the Government would continue to honor its obligations.[510]

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[506] [redacted] ¶¶ 16, 19; *see also* Compass Lexecon ¶ 38 ("[S]ince reaching Final COD in December 2018, Pacific Solar recorded steady invoiced revenues [redacted]").

[507] Paiz WS I ¶ 19; Paiz WS II ¶ 10.

[508] Paiz I ¶ 19.

[509] October 2018 Agreement (**Exh. C-175**), at 3 ("The Government of the Republic reiterates that it will act under the legal framework, guaranteeing legal certainty so that the commitments assumed by the country with national and foreign investors are not affected and can be fulfilled.").

[510] [redacted] ¶ 19.

218. Further, in an internal legal opinion dated 30 June 2020, ENEE confirmed its obligations to abide by the PPA, including its obligation to pay for the invoices issued for electricity generation and capacity.[511] ENEE stressed that failing to pay the generators would breach its obligations to act in good faith and honor its commitments.[512] Specifically, ENEE concluded that it "cannot refuse to honor the energy supply contracts it has entered into, especially when it receives and markets the electricity sold to it by the generators, which constitutes an act that leads the generators to assume that they will be paid in accordance with what was agreed."[513] Claimants were assured by these representations.[514]

219. Approximately one month later, on 7 August 2020, Pacific Solar wrote to ENEE, noting the outstanding debt as of 13 December 2018, and requested that ENEE indicate "when payment of this debt will be made," particularly given that Pacific Solar "must pay off its loans with local and foreign banks."[515] Respondent relies on this letter, erroneously arguing that it evidences that Claimants' claims are time barred. This is not so.

220. At the time, Honduras had recently and repeatedly represented that it would abide by its payment and other commitments. It was thus reasonable for Claimants to believe that ENEE would be making payments to Pacific Solar for energy delivered and interest accrued for overdue invoices.[516] This letter, in fact, demonstrates that Claimants expected to be paid in full in light of Honduras's recent representations, as Pacific Solar asks ENEE to tell it "**when** payment [of this debt] will be made."[517] And, indeed, shortly after the letter was sent, ENEE "**made significant catch-up payments** to [Pacific Solar]," confirming the reasonableness of Pacific Solar's belief that the Government would continue to honor its obligations.[518] In fact, from 2019 to 2020,

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511 ENEE, Legal Opinion No. D.L. 106-6-2020 dated 30 June 2020 **(Exh. C-126)**, at 5.

512 ENEE, Legal Opinion No. D.L. 106-6-2020 dated 30 June 2020 **(Exh. C-126)**, at 2.

513 ENEE, Legal Opinion No. D.L. 106-6-2020 dated 30 June 2020 **(Exh. C-126)**, at 2.

514 Paiz WS II ¶ 10.

515 Letter from Pacific Solar Energy to ENEE dated 7 Aug. 2020 (**Exh. R-50**).

516 *See* Paiz WS II ¶¶ 10-11; *see also* Memorial on the Merits ¶¶ 86-88; [redacted] ¶¶ 16-19; Paiz WS I ¶ 19.

517 Letter from Pacific Solar Energy to ENEE dated 7 Aug. 2020 (**Exh. R-50**) (emphasis added); Paiz WS II ¶ 11.

518 [redacted] ¶ 19 (emphasis added); *see also* Compass Lexecon ¶ 44.

ENEE's total outstanding debt with Pacific Solar decreased,[519] giving Claimants confidence that Honduras would fully comply with its obligations.

221. As observed by the *Eli Lilly and Co. v. Canada* tribunal, it would be improper for a tribunal to impute knowledge of a future breach and loss to the claimant, as "[a]n investor cannot be obliged or deemed to know of a breach before it occurs."[520]

(b) The Enactment of the 2022 New Energy Law Breached the Treaty and Caused Claimants Damage

222. When President Castro's Administration assumed power, Honduras's official rhetoric and treatment of foreign investors drastically changed. As explained in the Memorial and by Mr. Paiz, in her campaign, President Xiomara Castro sought to demonize the participation of private investors in the energy sector that occurred under the administrations of her political rivals and vowed to modify existing agreements with the solar generators.[521] Upon taking office, President Castro acted swiftly on her campaign promises. Mr. Paiz was in the midst of negotiating the sale of Pacific Solar when President Castro took office. The prospective buyer withdrew and the transaction collapsed when President Castro publicly declared her intention to target energy generators and implement measures that would directly impact the Project.[522]

223. Mere months after taking office, President Castro sent the New Energy Law to Congress for approval. In advocating for the New Energy Law's approval before Congress, Minister Erick Tejada—Secretary of Energy and General Manager of ENEE under President Castro—made clear that the New Energy Law represented a significant change. He described the New Energy Law as legislation that "ha[d] never been proposed, as it [wa]s currently being proposed from this Government, the renegotiation of contracts that will lower the conditions of certain contracts of generation that are harmful to the public interest."[523]

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[519] Compass Lexecon ¶ 44.

[520] *Eli Lilly and Co. v. Canada*, UNCITRAL Case No. UNCT/14/2, Award dated 16 Mar. 2017 (**CL-285**) ¶ 167; *see also id.* ¶ 169 ("Articles 1116(2) and 1117(2) do not require investors to bring claims for possible future breaches on the basis of potential and therefore necessarily hypothetical) losses to their investments or the increased risks of such losses. Thus, the Tribunal declines to impute knowledge of a future breach and loss to Claimant.").

[521] *See* Paiz WS I ¶ 23; [redacted] ¶ 20; Memorial on the Merits ¶¶ 95-98.

[522] [redacted] ¶ 22; Paiz I ¶ 22; Paiz WS II ¶ 12.

[523] Honduran Congress, Debate Regarding 2022 New Energy Law (**Exh. C-76**), at 2:03:34-2:05:57.

224. Claimants agree with Respondent that "what is relevant is the first moment in which the investor became aware of the alleged breaches."[524] In the present case, this only occurred after the New Energy Law was enacted. As one of the Claimants, Mr. Paiz, explains: "I did not and could not have known that Honduras would act this way and harm my investment until it introduced the New Energy Law in 2022. Honduras's policies and actions harming my investment are taking place outside of the PPA, through laws, speeches, attacks, intimidations, and other means that started in 2022, which in turn are affecting Pacific Solar's rights under the Agreements."[525]

225. In particular, it was in the New Energy Law that **the State ordered "renegotiations" with the generators in favor of the State.** Article 5 of the New Energy Law empowers the State to unilaterally mandate the "renegotiation" of generators' PPAs. Specifically, it authorizes the State to "set under its prerogatives and powers . . . the renegotiation of the contracts and the prices at which the State, through . . . ENEE . . . acquires the service of energy."[526] Further, it provides that "if negotiation is not possible, [the State] is authorized to set the termination of the contractual relationship and the acquisition of the State, subject to the payment of a *justiprecio*."[527] Tellingly, the term *justiprecio* is not defined in the New Energy Law.

226. As Minister Tejada stated during the Congressional debate to approve the 2022 New Energy Law, "It is important to mention that for the State, for the Executive, for the Government, it is important to sit at the negotiation table with the generators, with some tools, so that it is not possible to establish a balance[d] renegotiation . . . . That is the spirit of Articles 4 and 5."[528] Put differently, the New Energy Law signaled to the generators that the State would use its sovereign powers to force the "renegotiation" of the PPA in favor of the State.[529]

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[524] Memorial on Jurisdiction ¶ 116.

[525] Paiz WS II ¶ 14.

[526] *See* New Energy Law (**Exh. C-10**), Art. 5.

[527] *See* New Energy Law (**Exh. C-10**), Art. 5.

[528] Honduran Congress, Debate Regarding 2022 New Energy Law dated 11 May 2022 (**Exh. C-76**), at 4:36:45-4:38:54.

[529] Although the New Energy Law as first enacted provided a 60-day window for generators to finalize their "renegotiations" with the Government, two years later, the Government issued a new decree that has extended this mandate into perpetuity. *See* New Energy Law (**Exh. C-10**), Art. 5 ("If negotiation is not possible, it is authorized to set the termination of the contractual relationship and the acquisition by the State"); *id.* Art. 15 ("A period of (60) calendar days from the publication of this Law shall be allowed for the renegotiation of power purchase agreements"); Congreso Nacional HN, "*Approving a New Interpretation of the New Energy Law*" FACEBOOK dated 9 Oct. 2024

227. The 2022 New Energy Law sent a clear message that full payment of existing debt would not occur. Article 16 of the New Energy Law codified the State's intention to repudiate its payment obligations owed to generators, like Pacific Solar. Contrary to prior statements, Article 16 instructed ENEE to settle its historical debt owed to the generators only "for up to one year" and only once the PPA at issue was "renegotiated" or "terminated."[530] This provision made clear for the first time that Honduras had no intention of honoring its outstanding obligations to Pacific Solar. Instead, through enactment of the New Energy Law, Respondent sought to leverage the prospect of partial payment to pressure generators into renegotiating their PPAs and relinquishing their contractual and legal rights.

228. The New Energy Law also created a System Operator—an entity wholly controlled by ENEE[531]—with the aim to "return to the State the nucleus for supplying electrical energy" in order to guarantee that "the State be the one to guarantee the supply of electricity.[532] To accomplish this, the New Energy Law eliminated the ODS, the System Operator that was created under the 2014 Electric Power Industry Law and was partly comprised of private sector representatives,[533] and replaced it with a System Operator that "would form part of the structure of ENEE."[534]

(**Exh. C-240**) ("In the sense that the period of 60 calendar days, counting from the publication of the Law, refers to the beginning of the process to renegotiate the contracts, but it **does not represent a strict limit** that prevents the continuation of the renegotiation of other contracts beyond that period, since **this time period cannot be limiting or restricting to the fulfillment of the objectives of the Law**.") (emphasis added).

[530] New Energy Law (**Exh. C-10**), Art. 16 ("**Article 16.- PAYMENT OF AMOUNT IN ARREARS.** The Government of the Republic is hereby authorized, **once the renegotiation or contractual relationship has been concluded** with the generators with whom it has delays of **up to one (1) year**, to proceed to reconcile arrears and to define feasible terms for payment through the National or International Financial System, starting with small and medium-sized generators.") (emphasis added).

[531] New Energy Law (**Exh. C-10**), Art. 19: Ch. 4, Art. 9.A.

[532] Honduran Congress, Debate Regarding 2022 New Energy Law dated 11 May 2022 (**Exh. C-76**), at 2:09:26-2:11:31.

[533] 2014 Electric Power Industry Law dated 20 May 2014 (**Exh. C-8**), Art. 9; New Energy Law (**Exh. C-10**), Art 11 ("CANCELATION OF THE SYSTEM OPERATOR ENTITY. Resolution CREE-017 of May 30, 2016, containing the bylaws of Asociación Operadora del Sistema, is hereby reversed. Resolution No. 1250-2016, dated November 18, 2016, published in the "La Gaceta" Official Gazette, issued by the Secretary of Governance, Justice, and Decentralization, recognizing the Grid Operator (ODS) as an NGO, a non-profit Association that is comprised of four (4) members from the private sector and only one (1) member from the public sector and sets the purchase prices of power in the spot market and decides which companies supply at each hour, as well as the time at which such energy is dispatched, is hereby reversed.").

[534] New Energy Law (**Exh. C-10**), Art. 19: Ch. 4, Art. 9.A. ("OPERATION OF THE NATIONAL ELECTRICITY GRID. The National Electricity Grid shall be operated by an entity that is designated as Grid Operator. The Grid Operator shall be a state-owned entity that shall be part of the structure of Empresa Nacional de Energía Eléctrica (ENEE).").

229. In addition to the pressure to "renegotiate" under threat of non-payment of debt, the threat of expropriation, and the State's takeover of the energy dispatch functions, the New Energy Law's significant departure from prior State action is further illustrated by Honduras's threats to bring criminal charges against the generators in response to any non-delivery of service. In particular, Article 15 provided that, if at any point during the "renegotiation" process, the generators could not deliver energy to ENEE, they would be subject to criminal prosecution.[535] Moreover, Article 17 announced the creation of a National Audit Commission[536] to "fully identify those responsible for the current disaster and looting present in ENEE and the destruction of the [electricity] subsector"[537]—a tool the Government described as helpful to "strengthen its proposal" to the generators.[538]

230. Strikingly, mere hours after the New Energy Law was approved, the Government summoned Pacific Solar and several other solar generators to a meeting at the Presidential Palace where the Secretary of Finance and Minister Tejada were present.[539] There, Pacific Solar learned that its PPA had been chosen by the State as one of the 28 PPAs that it wanted to "renegotiate." Government officials handed out one-page, identical "offers" to all the generators that were

[535] New Energy Law (**Exh. C-10**), Art. 15 ("During the renegotiation process, generators shall ensure the whole and uninterrupted supply of energy to the National Company of Electrical Energy (ENEE), **otherwise the provisions of the Criminal Code and other special laws shall apply**.") (emphasis added).

[536] New Energy Law (**Exh. C-10**), Art. 17 ("There is hereby created a National Audit Commission consisting of one representative from each of the following institutions: Secretariat of Finance, Secretariat of Economic Development, Secretariat of Transparency and Anti- Corruption Enforcement, Revenue Administration Service (SAR), Customs Service, and National Banks and Insurance Commission (CNBS). The Commission thus created has the authority to conduct a comprehensive audit of the financial statements of power generation companies, from the start of their operations in thermal, biomass, solar, wind and hydroelectric plants, coal-based plants, and all other forms of power generation, to quantify their financial costs, fixed operation and maintenance costs, variable fuel costs, variable operation and maintenance costs, and profitability, as well as any other applicable cost of or profit from the plants' operation; the audit shall also assess compliance with operation agreements and legal regulations. The comprehensive audit shall also assess the tax benefits of exemption from Income Tax (ISR) and associated taxes, customs duties, sales taxes, and the fuel tax known as Contribution for Social Program Support and Conservation of Road Assets (ACPV) granted to electricity generators through special laws and power purchase agreements. To fulfill its duties, the Commission shall directly hire auditing firms and technical specialists on an emergency basis. Empresa Nacional de Energía Eléctrica (ENEE) and the National Banks and Insurance Commission (CNBS) are required to promptly provide all requested information and assistance. A period of sixty (60) calendar days from the formation and establishment of the Commission shall be allowed for the audit; the Commission shall issue its own rules. Moreover, the Commission shall present a Public Report to the National Government, defining the measures and actions to be implemented.").

[537] New Energy Bill (**Exh. C-22**), Statement of Reasons, at 3.

[538] Government of Honduras, Report Outlining the Government's Plan for Reforming the Electricity Sector Under the New Energy Law dated 15 July 2022 (**Exh. C-11**), at 6; *see also* ENEE, *The State creates the National Audit Commission,* X (FORMERLY TWITTER) dated 20 July 2022 (**Exh. C-112)**.

[539] [redacted] ¶ 23.

present, "offering" to lower their compensation and eliminate the very rights that incentivized Claimants' investment.[540] A few days later, the New Energy Law entered into force, codifying the sovereign threat to impose haircuts on outstanding receivables, expropriate, and initiate criminal proceedings, and for the State to intimidate generators into "renegotiations."

(c) Following the Enactment of the New Energy Law, Respondent Engaged in Internationally Unlawful Conduct that Harmed Claimants and their Investment

231. The State's conduct in furtherance of the New Energy Law's mandate has substantially harmed the Paizes and Pacific Solar, by (i) pushing for terms that eliminate Pacific Solar's key rights; (ii) weaponizing the State's significant and outstanding debt to Pacific Solar, forcing Pacific Solar into a precarious situation with its lenders and to restructure its project finance loans in an attempt to salvage the Project; (iii) engaging in a public smear campaign against generators; and (iv) failing to satisfy the outstanding debt or compensate Pacific Solar for curtailments of energy. Honduras's actions have had a devastating effect on the economic viability of Pacific Solar.

- **Honduras has sought to eliminate Pacific Solar's key rights through renegotiations.** The "renegotiations" process has lacked transparency. Until recently, the Government was continuously and arbitrarily extending the New Energy Law's deadline to complete the "renegotiations," often informing the generators of an extension only after the deadline's lapse.[541] Then, in October 2024, rather than extending the deadline again, the Government made the "renegotiations" a perpetual mandate.[542] As such, Claimants' investment has a permanent, sovereign black cloud hanging over it. The only feedback from the Government regarding the purported "renegotiations" is contained in a report published on social media in July 2022 that

[540] [redacted] ¶ 23.

[541] *See, e.g.*, ENEE, *The first phase of renegotiations is concluded*, X (FORMERLY TWITTER) dated 19 July 2022 (**Exh. C-224)** (informing the generators that the "first phase" of renegotiations had concluded four days after the Government's deadline to complete the "renegotiation" as outlined in the 2022 New Energy Law).

[542] New Energy Law (**Exh. C-10**) Art. 5 ("If negotiation is not possible, it is authorized to set the termination of the contractual relationship and the acquisition by the State"); *id.* Art. 15 ("A period of (60) calendar days from the publication of this Law shall be allowed for the renegotiation of power purchase agreements"); Congreso Nacional HN, *Approving a New Interpretation of the New Energy Law*, FACEBOOK dated 9 Oct. 2024 (**Exh. C-240**) ("In the sense that the period of 60 calendar days, counting from the publication of the Law, refers to the beginning of the process to renegotiate the contracts, it **does not represent a strict limit** that prevents the continuation of the renegotiation of other contracts beyond that period, since **this time period cannot be limiting or restricting to the fulfillment of the objectives of the Law**.") (emphasis added).

rejected all the solar generators' counter-proposals by proposing yet another reduction to the base price of energy.[543]

- The Government has arbitrarily put forth offers, providing no technical, economic, or legal basis for the terms or the non-acceptance of Pacific Solar's counter-offers. All of the Government's "offers" have been one-to-two-page communications that eliminate the very rights that incentivized Claimants' investments—namely, payments for "the incentive of 10%" and "capacity," as well as the set base price of US$ 114.14 for the payment of energy.[544] At their core, the terms proposed across all "offers" remain unchanged, underscoring the Government's refusal to consider any terms other than the ones that it has unilaterally set. Indeed, before the meetings discussing the "renegotiation" process had ended, on its social media platforms, the Government had already boasted that it "had already set the parameters **and prices** under which the renegotiations [with the private generators] would take place,"[545] showing that it would not be a genuine negotiation process and despite knowing that the most important concern to the generators was "the settlement of the debt" owed to them.[546]

- The Government's intransigence in the "renegotiation" process is illustrated by the State's conduct when Pacific Solar attempted to engage in conversations regarding the Government's takeover of the Plant. The unprecedented and untenable levels of debt owed to Pacific Solar, coupled with the Government's excessive curtailments and refusal to reimburse Pacific Solar, placed Pacific Solar under immense financial pressure, forcing it to explore the sale of the Plant to Honduras.[547] In June 2022, Claimants were instructed by the Government to propose a sales price for Pacific Solar's assets.[548] On 4 July 2022, Pacific Solar provided a proposal which included the sale of the Plant.[549] Honduras failed to respond for seven months, and it was only in February 2023 that "the Government rejected the possibility of acquiring the whole

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[543] *See* Government of Honduras, Report Outlining the Government's Plan for Reforming the Electricity Sector Under the New Energy Law dated 15 July 2022 (**Exh. C-11**), at 2-3 (describing the counterproposals of all solar generators as proposing a reduced energy price of 14.5 to 13.82 [US$] per kWh and "ENEE's proposal [as] reducing [the energy base price] from 15.65 cents per KWH, which is the current average price, to 11 cents per KWh" and proposing the reduction of base price of energy for all generators, regardless of the generator's energy source, to 0.11 US$/KWh); *see also* AHER, Report of Meeting between AHER's Board of Directors and ENEE's General Manager, Minister Tejada dated 14 July 2022 (**Exh. C-188**), at 3 ("[**T]he Government is considering the idea of elaborating an identical solution for all solar plants**.") (emphasis added).

[544] Government's "Renegotiation" Offer dated 12 May 2022 (**Exh. C-23**).

[545] ENEE, *We Set the Parameters of the Renegotiations*, X (FORMERLY TWITTER) dated 3 May 2022 (**Exh. C-206**).

[546] ENEE, *The Important Issues in the Renegotiations*, X (FORMERLY TWITTER) dated 3 May 2022 (**Exh. C-207**) ("For us, as a Government, the issue of prices is important, and for them [the generators], it is the issue of debt reconciliation. . . .").

[547] [redacted] ¶¶ 26-27; Letter from Pacific Solar to ENEE dated 21 June 2022 (**Exh. C-65**) at 1.

[548] Letter from Pacific Solar to ENEE dated 21 June 2022 (**Exh. C-65**) ("[O]ur project continues to face significant challenges due to lack of payment and curtailments, among other reasons attributable to the Government of Honduras.").

[549] [redacted] ¶¶ 27-28; Letter from Pacific Solar to Minister Tejada dated 4 July 2022 (**Exh. C-68)**.

Plant."[550] Instead, the Government "offered to pay US$ 80 million for a 51% interest in the Plant[,] if [Pacific Solar] continued to be the owner of the remaining 49% of the Plant and remained responsible for the operation and maintenance of the Plant."[551] Despite Pacific Solar's insistence on advancing these discussions, the Government failed to take "any concrete or serious steps" and the "discussions [have] never advanced."[552]

- **Honduras has weaponized its outstanding debt**. Concurrent with the "renegotiation" process, Honduras has weaponized its outstanding debt to Pacific Solar. This manipulation has forced Pacific Solar into a precarious situation that pushed it to seek the restructuring of its project finance loans to salvage the Project. Indeed, in the months that followed the enactment of the New Energy Law, Pacific Solar attempted to participate in discussions with the Government to seek a negotiated agreement. During these discussions, Pacific Solar repeatedly expressed that the debt owed to it had reached untenable levels.[553]

- ENEE is the sole purchaser of energy in the country and, as such, the non-payment of its debt effectively severs Pacific Solar's only stream of revenue. In this context, instead of indicating that it would soon settle its outstanding debt as it had done in the past, the Government communicated to Pacific Solar that it will withhold payments until an agreement is reached with the State. Specifically, it stated that it "would commit to the payment of outstanding debt . . . within sixty (60) to ninety (90) business days, **from** the execution of a Memorandum of Understanding" with ENEE[554]—an agreement that signifies an acceptance of the State's "renegotiated" terms and conditions for the PPA.[555] Indeed, Minister Tejada confirmed the State's manipulative intent in a September 2022 meeting that he held with the generators, where he remarked that "**no plant would be paid until the 28 plants have renegotiated, [affirming] that**

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[550] [redacted] ¶ 31; Minutes of the Meeting between Pacific Solar, Ministry of Energy and ENEE dated 1 Feb. 2023 (**Exh. C-216**).

[551] [redacted] ¶ 31; Minutes of the Meeting between Pacific Solar, Ministry of Energy and ENEE dated 1 Feb. 2023 (**Exh. C-216**).

[552] [redacted] ¶ 31.

[553] Letter from Pacific Solar to ENEE dated 21 June 2022 (**Exh. C-65**) ("**[O]ur project continues to face significant challenges due to the lack of payment and curtailments, among other reasons attributable to the Government of Honduras**. . . .There is also the Special Law to Guarantee the Electricity Service as a National Security Public Asset and an Economic and Social Human Right (Decree No. 46-2022), which threatens to undermine our rights.") (emphasis added); Letter from Pacific Solar to Minister Tejada (Ministry of Energy and ENEE) dated 4 July 2022 (**Exh. C-68)** ("We would like to emphasize that the adverse situation faced by Pacific remains unchanged. As we have previously pointed out to ENEE, this situation is the result of Government actions, most notably ENEE's lack of payment and the energy supply restrictions in breach of Capacity and Associated Electric Power Purchase Agreement No. 002-2014 ("PPA"), as well as the Special Law to Guarantee the Electricity Service as a National Security Public Asset and an Economic and Social Human Right (Decree No. 46-2022), published in La Gaceta on May 16, 2022, which calls for the renegotiation of the PPA.").

[554] Letter from ENEE to Pacific Solar, No. ENEE GG-1083-X-2022 dated 11 Oct. 2022 (**Exh. C-69**), at 2, ¶ 8; [redacted] ¶ 31.

[555] Based on public information, the amended PPAs entered into with other generators cut energy base prices in half and eliminated capacity payments and incentives in the generators' remuneration. *See What are the 18 renegotiated energy contracts that seek to be modified?*, EL HERALDO dated 27 May 2024 (**Exh. C-172)**, at 2-3.

these were the conditions for financing." [556] Minister Tejada has publicly acknowledged that the Government is using the promise of payments to pressure generators into an agreement, noting that Honduras would "pay, above all, those who have renegotiated."[557] As Mr. Paiz explains, this was the first time Claimants heard this messaging, which was in direct contrast to the position of previous administrations when the Government had repeatedly signaled its intention to pay the amounts owed.[558] Honduras is also discriminating against generators like Pacific Solar that have not agreed to "renegotiate" the PPAs, by prioritizing payments to generators that entered into agreements with the State.[559] In fact, Honduras has openly boasted that it will prioritize payment of historical debt to the generators that "agree" to lower their compensation rights under the PPAs.[560]

- **The State's use of punitive measures to coerce Pacific Solar into "renegotiations."** In parallel, the Government has pursued a public smear campaign against the generators. It has characterized the generators as "harm[ing] the interests . . . of the Honduran people"[561] and described PPAs as contracts that are "injurious to the public interest."[562] Further, it has stated that generators who have not "agreed" to the terms outlined in the Government's are "**enemies of the nation**."[563] Frequently, the State also reminds these generators of the ability it has to acquire their plants if they do not reach an agreement.[564]

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[556] AHER, Report of Meeting between COHEP's Energy Committee and ENEE's General Manager, Minister Tejada dated 7 Sept. 2022 (**Exh. C-189**), at 4; *see also* ENEE, *Payment to the generators is assured as long as it is a fair price*, X (FORMERLY TWITTER) dated 22 Aug. 2022 (**Exh. C-228)**.

[557] *See, e.g.*, Radio Interview with Minister Tejada regarding the Government's priority for payments, RADIOHN dated 17 Oct. 2022 (**Exh. C-231**), at 1:03-1:24 (quoting Minister Tejada as stating that the Government would "**meet [its] debt with the generators with whom [it] has come to an agreement** . . . **the Government's priority**"); Radio Interview with Minister Tejada acknowledging that promise of payments is key to unlocking renegotiations, RADIO CADENAS VOCES dated 28 Nov. 2022 (**Exh. C-232**), at 4:29-4:58 ("We have been clear, it has been a pivotal point to unlocking the renegotiations, that we are going to pay, above all, those who have renegotiated" their PPAs.").

[558] Paiz WS II ¶ 12.

[559] AHPEE, Summary of Meeting with COHEP, AHPEE, AHER and ENEE dated 29 Nov. 2022 (**Exh. C-191**), at 2-3 (noting that Minister Tejada states that "priority for payments will be given to the companies that have entered into a Memorandum of Understanding which contains the agreements with ENEE" despite AHPEE reminding the Minister that companies "**who did not reach an agreement also need payment, since ENEE owes many of them payments that correspond to more than 13 invoices, and for that reason, find themselves in a financial deficit**.") (emphasis added). *See also* Corporación Multi Inversiones (CMI), Press Release Regarding MOU with Government dated 2022 (**Exh. C-215**).

[560] *ENEE's delays in payments to energy generators provokes a notice of intent under CAFTA*, DINERO HN dated 1 Nov. 2022 (**Exh. C-170)**.

[561] New Energy Bill (**Exh. C-22**), at 1.

[562] ENEE, *It's Impossible to Rescue ENEE Without Renegotiations*, X (FORMERLY TWITTER) dated 28 Apr. 2022 (**Exh. C-200**).

[563] ENEE, *Not all generators are enemies of the nation*, X (FORMERLY TWITTER) dated 27 June 2022 (**Exh. C-219)** ("**Not all generators are enemies of the nation, this week, we will be announcing some of the generators that are willing to lower the costs of their contracts.**") (emphasis added).

[564] *See Government Warns that It Will Take Over and Acquire Power Plants*, PROCESO DIGITAL dated 13 June 2023 (**Exh. C-28**) ([T]he [G]overnment of the Republic, over the past 15 months, has marked the horizon of the electric subsector through **the [2022 New Energy Law], which empowers and authorizes us to intervene and acquire the [generators'] plants** if necessary.") (emphasis added); Letter from ENEE to Pacific Solar, No. ENEE

- **Honduras has failed to pay its outstanding debt or compensate Pacific Solar for curtailments of energy**. The State has failed to satisfy the outstanding amounts owed to Pacific Solar.[565] In April 2022, ENEE began to accrue significant debt for unpaid energy, and the debt that the Government owed Pacific Solar reached unprecedented levels.[566] As of June 2024, the outstanding balance of ENEE's debt with Pacific Solar totaled [redacted][567] Honduras is still not compensating Pacific Solar for (i) the energy and capacity that the Plant has delivered, and (ii) the Renewables Incentives and interest that it is owed, as promised under the Agreements.[568]

- The Government also has refused to compensate Pacific Solar for improper curtailment of energy produced by Pacific Solar's Plant, further threatening Pacific Solar's financial viability and the Claimants' investment.[569] Prior to the enactment of the New Energy Law, the ODS, the entity responsible for supplying electrical energy (or then-System Operator), was partly comprised of private sector representatives.[570] This meant that private sector representatives provided a different technical perspective, and had a say in whether a generator's energy should be curtailed. However, with the enactment of the New Energy Law, ENEE gained full control over this entity,[571] enabling Minister Tejada to announce the State's new policy to curtail the energy generated by renewable energy generators because the dispatch of their energy allegedly had caused great "economic damage" to the State.[572] Indeed, since President Castro took office, Pacific Solar's Plant has experienced significant curtailments, increasing by more than 40% in 2022.[573] The PPA requires ENEE to compensate Pacific Solar if the Government curtails the Plant's production for more than six hours

GG-1083-X-2022 dated 11 Oct. 2022 (**Exh. C-69**), at 1 ("I am writing to follow up on the compliance with Legislative Decree No. 046-2022 . . . whose section 5 reads as follows: Empresa Nacional de Energía Eléctrica (ENEE) is hereby authorized to conduct . . . renegotiation of the contracts and prices according to which the State purchases hydro, solar, and wind energy supply services. . . . If the renegotiation cannot be conducted, the termination of contracts is hereby authorized along with the purchase by the State").

565 Compass Lexecon ¶ 44.

566 [redacted] ¶ 21.

567 [redacted] ¶ 19; *see also* Compass Lexecon ¶ 44.

568 *See* Compass Lexecon ¶¶ 41-45.

569 Compass Lexecon ¶¶ 46-48.

570 2014 Electric Power Industry Law dated 20 May 2014 (**Exh. C-8**), Art. 9; New Energy Law (**Exh. C-10**), Art. 11 ("Resolution No. 1250-2016, dated November 18, 2016, published in the "La Gaceta" Official Gazette, issued by the Secretary of Governance, Justice, and Decentralization, recognizing the Grid Operator (ODS) as an NGO, a non-profit Association that is comprised of four (4) members from the private sector and only one (1) member from the public sector and sets the purchase prices of power in the spot market and decides which companies supply at each hour, as well as the time at which such energy is dispatched, is hereby reversed.").

571 New Energy Law (**Exh. C-10**), Art. 19: Ch. 4, Art. 9.A. ("**A. OPERATION OF THE NATIONAL ELECTRICITY GRID.** The National Electricity Grid shall be operated by an entity that is designated as Grid Operator. The Grid Operator shall be a state-owned entity that shall be part of the structure of Empresa Nacional de Energía Eléctrica (ENEE) . . . .").

572 ENEE Press Release on Curtailments to Renewables dated 8 July 2022 (**Exh. C-222**), at 1.

573 Compass Lexecon, Figure 7. *See also* [redacted] ¶ 26.

in a month for reasons not attributable to Pacific Solar,[574] with restricted exceptions to this obligation.[575] Honduras has failed to make such payments.[576]

232. Respondent alleges that as early as 2017, Pacific Solar experienced curtailments in energy dispatch by the Government—amounting to over 172 hours—which, according to Respondent, would have caused economic harm under the PPA.[577] On that basis, Respondent argues that the Claimants were already aware of the same measures prior to the cut-off date and are now improperly presenting them as new events.[578] However, just as with the non-payment of invoices, the 2017 curtailment cited by Respondent did not trigger the Treaty breach of which Claimants complain of here. Claimants' Treaty claims are not based on the isolated or occasional curtailment of energy dispatch; rather, they arise, *inter alia*, from the State's policy to curtail the energy generated by renewable energy generators, following the enactment of the New Energy Law.

(d) Honduras's Conduct from Mid-2022 Breached its Treaty Obligations and Resulted in Loss and Damage to Claimants and their Investments

233. Respondent's promulgation of the New Energy Law, along with Honduras's subsequent conduct, trigged Respondent's breaches of the CAFTA-DR and resulted in loss and damage to Claimants. As Mr. Paiz explains, "[e]verything changed when President Xiomara Castro was elected in 2022."[579] Mr. Paiz confirms that he invested because of the Government's support of the legal framework applicable to Pacific Solar's rights, so "**the Government's withdrawal of that support constitutes a fundamental change**."[580] As Mr. Paiz confirms, "I did not and could not have known that Honduras would act this way and harm my investment until it introduced the New Energy Law in 2022."[581]

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574 PPA (**Exh. C-1**), § 2, Cl. 9.5.1.

575 PPA (**Exh. C-1**), § 2, Cl. 2.4.

576 [redacted] ¶ 26.

577 Memorial on Jurisdictional Objections ¶¶ 127-129.

578 Memorial on Jurisdictional Objections ¶¶ 127-129.

579 Paiz WS II ¶ 12; Paiz I ¶ 24. *See also Government Warns that It Will Take Over and Acquire Power Plants,* PROCESO DIGITAL dated 13 June 2023 (**Exh. C-28)**.

580 Paiz WS II ¶ 13 (emphasis added).

581 Paiz WS II ¶ 14.

234. **Respondent unlawfully expropriated Claimants' investments in breach of Article 10.7 of the Treaty**. It was not until the New Energy Law that the State effectively altered the Agreements by authorizing the "renegotiation of the contracts and prices at which the State . . . acquires the service of energy by water, solar, and wind" and stated that "[i]f negotiation is not possible, it is authorized to set the termination of the contractual relationship and the acquisition by the State, subject to the payment of a *justiprecio*."[582] The New Energy Law stripped Claimants of the reasonably expected economic benefits of their investments in a clear case of indirect expropriation and in breach of Article 10.7 of the Treaty.[583] The New Energy Law made clear that Honduras sought to effectively eliminate the very rights that incentivized Claimants' investments, to no longer recognize significant portions of Pacific Solar's debt, and to expropriate Pacific Solar's "assets" if Pacific Solar did not agree to the "renegotiated" terms imposed by the State for the PPA. Mr. Paiz explains that he "understood the passage of the New Energy Law to mean that my investment would be expropriated, at a price, if any, that would be dictated by the Government on a whim, unless we agreed to the PPA terms that the Government wanted to impose on Pacific Solar."[584] These expropriatory measures are embedded in the Law's text and Claimants could not have acquired knowledge of this Treaty breach until the Law was enacted. Mr. Paiz also describes the significant financial harm that has resulted from the Government's order to renegotiate the PPA, and that he has given up hope that the Government will "ever come current with its outstanding debt to Pacific."[585]

235. **Respondent breached the Minimum Standard of Treatment under Article 10.5**. Through the enactment of the New Energy Law, the Government reneged on the legal and contractual framework that underpinned the Agreements.[586] In doing so, Respondent failed to

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[582] *See* New Energy Law (**Exh. C-10**), Art. 5 ("The *Empresa Nacional de Energía Eléctrica* (ENEE) is authorized to, through the Board of Directors and Management, based on national legislation and contractual clauses, set under its prerogatives and powers and, for reasons of public interest, the renegotiation of the contracts and prices at which the State, through the *Empresa Nacional de Energía Eléctrica* (ENEE), acquires the service of energy by water, solar, and wind taking into account the prices of the Central American, Caribbean and Latin America regions. If negotiation is not possible, it is authorized to set the termination of the contractual relationship and the acquisition by the State, subject to the payment of a *justiprecio*.").

[583] Memorial on the Merits ¶ 188; *see generally id.*, § IV.A.

[584] Paiz WS II ¶ 13; Paiz I ¶ 24. *See also Government Warns that It Will Take Over and Acquire Power Plants*, PROCESO DIGITAL dated 13 June 2023 (**Exh. C-28)**.

[585] Paiz WS II ¶ 13.

[586] Paiz WS II ¶ 13 ("Since I invested precisely because the Government backed the legal framework applicable to Pacific Solar's rights, the Government's withdrawal of that support constitutes a fundamental change. I no longer count on the Government to ever come current with its outstanding debt to Pacific; to pay at a predictable pace; or to

provide the minimum standard of treatment to Claimants' investments.[587] Since the enactment of the New Energy Law, the State has adopted, and continues to impose, measures that have essentially rendered Pacific Solar's rights in the Agreements ineffective. Pursuant to the New Energy Law's mandate, the Government failed to provide due process and transparency to Pacific Solar during the purported "renegotiations" of the PPA. To gain significant leverage and tilt the "renegotiations" in favor of the State, the Government also engaged in hostile conduct towards generators, like Pacific Solar, and penalized them with aggressive measures, such as energy curtailments. In addition, the State arbitrarily retained payments owed to Pacific Solar, citing its "unwillingness" to agree to a renegotiated agreement as the reason for nonpayment. As such, Claimants could not have had knowledge of Respondent's failure to accord their investment fair and equitable treatment or of the resulting loss until after the enactment of the New Energy Law.

236. **Honduras breached the Treaty by failing to accord Pacific Solar treatment no less favorable than it accords to investors of any other Party or any Non-Party and by breaching its commitments under the Agreements**. As illustrated in Claimants' Memorial on the Merits and confirmed by Mr. Paiz, the acts and omissions that Honduras has undertaken pursuant to the mandate of the New Energy Law constitute a flagrant breach of the Agreements. Behaving towards Pacific Solar as if the Agreements did not exist, Honduras is not paying the renumeration to which Pacific Solar is entitled for the energy and capacity that the Plant delivered.[588] Honduras has also curtailed the Plant's energy dispatch without providing proper compensation in breach of the PPA. Honduras's violations are in direct breach of the PPA and State Guarantee from the Attorney General's Office and the Secretariat of Finance, which confirms that the State is jointly and severally liable for ENEE's breach of its obligations under the PPA. Respondent has breached the Agreements under Articles 10.28 and 10.16(1)(b)(i)(C) of the Treaty, conferring upon Claimants a right of action to claim for Honduras's breaches of the Agreements, including the PPA and the State Guarantee. Honduras's conduct also trigged a breach of MFN

use the Government's resources to pay Pacific Solar instead of other generators it chooses to pay first (as it has since the New Energy Law's enactment). My asset has a dark cloud over it, with complete uncertainty about its present and future rights, because we do not know what the Government will do with the existing Agreements as they stand.").

[587] Memorial on the Merits ¶ 189; *see generally id.*, § IV.B.

[588] Paiz WS II ¶ 13 ("I no longer count on the Government to ever come current with its outstanding debt to Pacific; to pay at a predictable pace; or to use the Government's resources to pay Pacific Solar instead of other generators it chooses to pay first (as it has since the New Energy Law's enactment). My asset has a dark cloud over it, with complete uncertainty about its present and future rights, because we do not know what the Government will do with the existing Agreements as they stand.").

treatment in Article 10.4 of the Treaty, pursuant to which Claimants import the umbrella clauses under the Switzerland-Honduras BIT and the Germany-Honduras-BIT.

237. Respondent argues that "with respect to the umbrella clause, the relevant date for the purposes of the temporal limitations . . . [is] the date on which Pacific Solar became aware of the alleged contractual breaches and their detrimental effects."[589] In so doing, Respondent again misconstrues Claimants' umbrella clause claim. With the enactment of the New Energy Law, Respondent breached the umbrella clauses (invoked through the MFN clause) and Articles 10.28 and 10.16(1)(b)(i)(C) of the Treaty.

238. With the enactment of the New Energy Law, Respondent drastically undermined the Agreements, treating them as if they no longer existed. This marked a definitive turning point: the moment when the Government's failure to perform under the Agreements crystallized into a final and actionable breach under the Treaty. Up until that point, Claimants reasonably believed that Honduras would eventually fulfill its obligations under the Agreements, as previous administrations had acknowledged the debts and expressed a willingness to comply with the Agreements. However, the new Government's promulgation of the New Energy Law, coupled with its subsequent threats and other unlawful conduct, extinguished Claimants' expectations, as it became evident that Respondent would no longer honor the Agreements.

239. Specifically, this was the first time the Government indicated its intention to refuse to honor existing obligations and boasted about its intent to refashion the generators' rights and impose significant haircuts on the existing debt owed to generators.[590] In addition, it marked the first time that the Government directed ENEE not to recognize the full amount of outstanding debt, a clear departure from past practices.[591] This policy was confirmed by Minister Tejada, who warned that only those generators that reach an agreement with the State will be paid for

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[589] Memorial on Jurisdiction ¶ 132.

[590] *See* ENEE, *Government Completes the Third Round of Renegotiation of Power Generation Contracts,* FACEBOOK dated 2 June 2022 (**Exh. C-213**).

[591] *See* New Energy Law (**Exh. C-10**), Art. 5 ("The *Empresa Nacional de Energía Eléctrica* (ENEE) is authorized to, through the Board of Directors and Management, based on national legislation and contractual clauses, set under its prerogatives and powers and, for reasons of public interest, the renegotiation of the contracts and prices at which the State, through the *Empresa Nacional de Energía Eléctrica* (ENEE), acquires the service of energy by water, solar, and wind taking into account the prices of the Central American, Caribbean and Latin America regions. If negotiation is not possible, it is authorized to set the termination of the contractual relationship and the acquisition by the State, subject to the payment of a *justiprecio*.").

outstanding receivables.[592] The 2022 New Energy Law's enactment of the arrears provision sent a clear message that the full payment of existing debt would not be honored, and the push for renegotiation of the PPAs confirmed this shift.[593]

240. Accordingly, the Claimants could not have acquired actual or constructive knowledge of the Respondent's breach of its obligations under the Agreements—or of the resulting damage—until after the New Energy Law came into force. It was only then that Respondent's breach under the CAFTA-DR became apparent, triggering Claimants' Treaty claims.

3. Even if Honduras's Actions Were Classified as Continuous or Composite Acts, Claimants' Claim Would Fall Within the Treaty's Limitation Period

241. Pursuant to the Tribunal's instructions, Claimants set forth below "whether and if so, how, the limitation period applies: a. To continuous acts. b. To composite acts."[594] To be clear, Claimants are not alleging that Honduras's measures that breach the Treaty are continuous or composite acts. However, if the Tribunal were to disagree and find otherwise, Claimants' claims would still fall within the Treaty's limitation period.

242. A continuous act is a single act that extends over a period of time, during which the act continues to breach an international obligation.[595] A composite act consists of a series of

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[592] *See, e.g.,* AHER, Report of Meeting between COHEP's Energy Committee and ENEE's General Manager, Minister Tejada dated 7 Sept. 2022 (**Exh. C-189**), at 4 ("**no plant would be paid until all 28 plants have renegotiated, [affirming] that these were the conditions for financing**.") (emphasis added); Radio Interview with Minister Tejada regarding the Government's priority for payments, RADIOHN dated 17 Oct. 2022 (**Exh. C-231**), at 1:03-1:24 (quoting Minister Tejada as stating that the Government would "**meet [its] debt with the generators with whom [it] has come to an agreement** . . . **the Government's priority**"); Radio Interview with Minister Tejada acknowledging that promise of payments is key to unlocking renegotiations, RADIO CADENAS VOCES dated 28 Nov. 2022 (**Exh. C-232**), at 4:29-4:58 ("We have been clear, it has been a pivotal point to unlocking the renegotiations, that we are going to pay, above all, those who have renegotiated their PPAs."). *See also* ENEE, *Payment to the generators is assured as long as it is a fair price*, X (FORMERLY TWITTER) dated 22 Aug. 2022 (**Exh. C-228)**.

[593] *See* New Energy Law (**Exh. C-10**), Art. 5 ("The Empresa Nacional de Energía Eléctrica (ENEE) is authorized to, through the Board of Directors and Management, based on national legislation and contractual clauses, set under its prerogatives and powers and, for reasons of public interest, the renegotiation of the contracts and prices at which the State, through the Empresa Nacional de Energía Eléctrica (ENEE), acquires the service of energy by water, solar, and wind taking into account the prices of the Central American, Caribbean and Latin America regions. If negotiation is not possible, it is authorized to set the termination of the contractual relationship and the acquisition by the State, subject to the payment of a *justiprecio*."), Art. 16 ("The Government of the Republic is hereby authorized, **once the contractual relationship has been renegotiated** or **terminated** with the generators with whom it has delays for **up to one (1) year**, to proceed to reconcile arrears and to define feasible terms for payment through the National or International Financial System, starting with small and medium-sized generators.") (emphasis added).

[594] *See* Procedural Order No. 4 dated 4 Apr. 2025 ¶ 55(B).

[595] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (**CL-283**) ¶ 2.66-2.67 (explaining that when an internationally wrongful

actions that are legally distinct and defined in aggregate as wrongful.[596] The distinction between continuous acts and composite acts is well-established under customary international law, as reflected in the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts ("**ILC Articles on State Responsibility**") and its Commentary.[597]

243. Under international law, continuing acts and composite acts are treated differently from single acts for purposes of limitation periods. A breach for purposes of continuing acts extends over the entire period during which the act continues and remains not in conformity with the international obligation.[598] An act that begins outside of a treaty's cut-off date and continues into the limitation period will not be time barred. A breach through a composite act occurs with the final action in a sequence that, taken together, is sufficient to trigger the wrongful act.[599] The limitations period, in such case, will only begin to run from the occurrence of the final action that triggers the wrongful act.

(a) Claimants' Claims Remain Timely Even If the Tribunal Considers that the Challenged Measures Are Continuous Acts

244. Even if the Tribunal were to consider that the conduct Respondent identifies prior to the cut-off date, namely, the failure to pay certain invoices and ENEE's limiting the dispatch of energy,[600] triggered a breach of the Treaty and caused Claimants loss or damage, such actions would still fall within the Tribunal's jurisdiction *ratione temporis*. This is because such measures could be classified as acts that continued with the New Energy Law and breached the Treaty as of

act occurs, one of the situations that can arise is "a 'continuous' act, which is the same act that continues as long as it is in violation of rules in force, such as a national law in violation of an international obligation of the State.").

596 *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (**CL-283**), ¶ 2.70 ("[A] composite act is not the same, single act extending over a period of time, but is composed of a series of different acts that extend over that period; or, in other words, a composite act results from an aggregation of other acts and acquires a different legal characterisation from those other acts.").

597 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. INT'L L. COMM'N 31, U.N. Doc. A/56/10 (**CL-79**), Art. 14; *see also id.*, at 59-62.

598 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. INT'L L. COMM'N 31, U.N. Doc. A/56/10 (**CL-79**), Art. 14; *see also id.*, at 60-61 ("conduct which has commenced some time in the past, and which constituted . . . a breach at that time, can continue and give rise to a continuing wrongful act in the present.").

599 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. INT'L L. COMM'N 31, U.N. Doc. A/56/10 (**CL-79**), Art. 15.

600 *See* Memorial on Jurisdiction § III.B.2.

May 2022, which falls within the Treaty's limitation period. Specifically, with respect to this conduct:

- **Non-Payment of Outstanding Debt**: Honduras's first failure to pay its outstanding debt to Pacific Solar pre-dated the enactment of the New Energy Law. This conduct, however, continued—albeit with a changed nature—once Respondent enacted the New Energy Law. Article 16 of the New Energy Law set forth the State's intention to repudiate its payment obligations under the PPA, as it instructed ENEE to settle the historical debt owed to the generators only "for up to one year" and only once the PPA was "renegotiated" or "terminated."[601] Subsequently, Honduras continued the breach by weaponizing the State's significant and outstanding debt to Pacific Solar—acts that were in furtherance of the New Energy Law's mandate—forcing Pacific Solar into a precarious situation with its lenders and to restructure its project finance loans in an attempt to salvage the project.

- **Policy to Curtail the Energy Dispatched to the Grid**: Honduras's limitation of the energy that Pacific Solar's Plant dispatched to the grid started prior to 2022[602] and continued after the New Energy Law. With the enactment of the New Energy Law, however, while the limitation continued, the nature of the State's actions changed. This was because, with the passage of the New Energy Law, ENEE gained full control of the ODS, the entity responsible for supplying electrical energy,[603] which enabled Minister Tejada to announce the State's policy to curtail the energy generated by renewable energy generators on the ground that the dispatchment of their energy had caused great "economic damage" to the State.[604] As envisioned, Pacific Solar's Plant experienced a significant increase in curtailments after the enactment of the New Energy Law, increasing by more than 40% in 2022, under the pretext that the dispatchment of the Plant's energy was causing great economic damage to the State.[605] Honduras has failed to make payments for curtailments and refuses to do so, even though under the PPA, ENEE is required to compensate Pacific Solar if the

[601] New Energy Law (**Exh. C-10**), Art. 16 ("The Government of the Republic is hereby authorized, **once the contractual relationship has been concluded** with the generators with whom it has delays for **up to one (1) year**, to proceed to reconcile arrears and to define feasible terms for payment through the National or International Financial System, starting with small and medium-sized generators.") (emphasis added).

[602] Memorial on Jurisdiction ¶¶ 127-129.

[603] New Energy Law (**Exh. C-10**), Art. 19: Ch. 4, § 9.A. ("The National Electricity Grid shall be operated by an entity that is designated as Grid Operator. The Grid Operator shall be a state-owned entity that shall be part of the structure of Empresa Nacional de Energía Eléctrica (ENEE).").

[604] ENEE Press Release on Curtailments to Renewables dated 8 July 2022 (**Exh. C-222**), at 1 ("From 2015 to the present date, the economic losses sustained by the State of Honduras as a result of supporting the proper operation of the electricity grid given the high variability of private renewable energy generation represented HNL 4.499 billion, while the economic losses caused by energy diversions in the Regional Electricity Market (MER) were tantamount to HNL 59 million. The aggregate **economic damage** for the State is thus HNL 4.558 billion. Through the National Dispatch Center, ENEE will continue applying —with technical thoroughness and pursuant to the Law— the renewable energy generation restrictions as frequently as necessary in order to guarantee the continuous supply of electricity and protect national security.").

[605] Compass Lexecon, Figure 7. *See also* [redacted] ¶ 26.

> Government curtails the Plant's production for more than six hours in a month for reasons not attributable to Pacific Solar.[606]

245. Honduras's introduction of the State's policy to weaponize the State's significant and outstanding debt to renewable energy generators, including Pacific Solar, and to curtail the energy generated, can thus be classified as continuing acts that breached the Treaty as of the promulgation of the New Energy Law and Respondent's subsequent wrongful conduct in furtherance of these policies.

246. Contrary to Respondent's allegation,[607] both NAFTA and CAFTA-DR tribunals have found that treaty breaches based on continuing acts can renew the limitation period, as the time bar begins to run only when the conduct ceases.[608] As the *UPS v. Canada* tribunal acknowledged, this is true generally in law.[609] When analyzing how the NAFTA limitation period works with respect to continuous acts, that tribunal explained that "the use of the term 'first acquired' is not to the contrary, as that logically would mean that knowledge of the allegedly offending conduct plus knowledge of loss triggers the time limitation period, even if the investor later acquired further information confirming the conduct or allowing more precise computation of loss."[610]

247. The *UPS* approach is confirmed by other tribunals. For instance, in an award rendered just last month, the tribunal in *Energía y Renovación v. Guatemala* held that, in cases of continuous acts, the limitation period is suspended until the unlawful situation ceases.[611] That tribunal explained that because the alleged treaty violation does not occur at a single point in time, the claimant's knowledge of the treaty breach and the resulting damage is renewed daily for as long

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[606] PPA (**Exh. C-1**) § 2, Cl. 9.5.1; [redacted] ¶ 26.

[607] Memorial on Jurisdiction ¶ 116 ("what is relevant is the *first* moment in which the investor became aware of the alleged breaches, even if these breaches continue over time . . . several tribunals faced with treaties with a wording similar to that of this case, have rejected the attempts of investors to allege continuous breaches or new facts to avoid temporal limitations of jurisdiction.").

[608] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits dated 24 May 2007 (**CL-292**) ¶ 28 ("[C]ontinuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly.").

[609] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits dated 24 May 2007 (**CL-292**) ¶ 28.

[610] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits dated 24 May 2007 (**CL-292**) ¶ 28.

[611] *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award on the Merits dated 31 Mar. 2025 (**CL-288**) ¶ 246.

as the violation persists.[612] In so holding, the tribunal relied on Article 14 of the ILC Articles on State Responsibility, finding that it explicitly refers to continuous breaches as breaches that extend in time until the violation ceases.[613] The tribunal consequently rejected Guatemala's argument that, because the CAFTA-DR referred to the date when the investor had obtained knowledge of the breach "for the first time," this excluded the continuous act doctrine from the Treaty's scope,[614] holding that derogation from general international law could not be merely tacit and must be clearly stated.[615]

248. The *Energía y Renovación* tribunal further reasoned that the claimant's explanation that it had waited to see if a multisector peace agreement, aimed at reducing social conflict and halting violent acts by social groups opposing hydroelectric projects in the municipality, would resolve the project's difficulties was perfectly plausible; concluding that the claims were time-barred would mean disregarding the peace agreement, which was not an acceptable outcome.[616] The same is true here, as finding Claimants' claims to be time barred would require disregarding Claimants' good-faith reliance on Honduras's prior representations of its intention to comply with its obligations under the PPAs.

249. The *Pac Rim Cayman LLC v. El Salvador* tribunal similarly characterized a *de facto* mining ban as a continuous act, and rejected the respondent's time-bar defense on the basis that the limitation period only began to run from the time the ban was publicly announced (and the dispute thus arose), rather than from the time the ban existed on a *de facto* basis.[617] The *Feldman v. Mexico* tribunal likewise found jurisdiction over the claimant's claim for lost profits during a period after the entry into force of the NAFTA, despite the fact that the measures were adopted by

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[612] *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award on the merits dated 31 Mar. 2025 (**CL-288**) ¶ 246.

[613] *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award on the merits dated 31 Mar. 2025 (**CL-288**) ¶ 243.

[614] *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award on the merits dated 31 Mar. 2025 (**CL-288**) ¶¶ 243, 247-248.

[615] *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award on the merits dated 31 Mar. 2025 (**CL-288**) ¶ 243.

[616] *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award on the merits dated 31 Mar. 2025 (**CL-288**) ¶ 249.

[617] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (**CL-283**) ¶ 3.37. The tribunal dismissed the claim as an abuse of process, because claimant acquired the requisite nationality after the dispute had arisen. *Id.* ¶¶ 2.92-2.94, 3.36.

Mexico before the entry into force of the treaty,[618] explaining that "if there has been a permanent course of action by Respondent which started before January 1, 1994 [the date of NAFTA's entry into force] and went on after that date and which, therefore, 'became breaches' of NAFTA Chapter Eleven . . . that post-January 1, 1994 part of Respondent's alleged activity *is* subject to the Tribunal's jurisdiction."[619] And the *SGS v. Philippines* tribunal concluded that it had jurisdiction over breaches that began prior to the treaty's entry into force and continued thereafter, holding that "the failure to pay sums due under a contract is an example of a continuing breach" which lasts as long as the debt remains unpaid.[620]

250. International law as applied by other international courts and tribunals further supports the finding that the limitation period runs from the end of a continuing breach. The European Commission on Human Rights in *Agrotexim v. Greece* thus rejected a time-bar objection in connection with an expropriation claim, holding that "the applicants' complaints relate to a continuing situation and that in such circumstances the six months period runs from the termination of the situation concerned."[621]

251. In the face of this authority, Respondent relies on two inapposite cases.[622] In *Berkowitz (formerly Spence International Investments) v. Costa Rica*, although the tribunal noted

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[618] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award on the Merits dated 16 Dec. 2002 (**CL-293**) ¶ 199.

[619] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues dated 6 Dec. 2000 (**CL-294**) ¶ 62 (emphasis in original); *see also Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award on the Merits dated 16 Dec. 2002 (**CL-293**) ¶¶ 53-65, 119-134, 179-180, 188 (considering facts that fall outside of the limitation period that relate to measures falling within the limitation period).

[620] *SGS Société Générale S.A. v. Philippine*s, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction dated 29 Jan. 2004 (**CL-129**) ¶ 167.

[621] *Agrotexim Hellas S.A. and Others v. Greece*, ECHR Appl. No. 14807/89, Judgement dated 12 Feb. 1992 (**CL-295**) ¶¶ 55-61. *See also Varnava and Others v. Turkey*, ECHR, Appl. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment dated 18 Sept. 2009, ECHR 2009 (**CL-296**) ¶ 159 ("[T]he six-month time-limit does not apply as such to continuing situations . . . this is because, if there is a situation of ongoing breach, the time-limit in effect starts afresh each day and it is only once the situation ceases that the final period of six months will run to its end"); *McDaid and others v. the United Kingdom*, ECHR Appl. No. 25681/94, Judgement dated 9 Apr. 1996 (**CL-297**), at 5 ("Insofar as the applicants complain that they are victims of a continuing violation to which the six month period is inapplicable, the Commission recalls that the concept of a 'continuing situation' refers to a state of affairs which operates by continuous activities by or on the part of the State to render the applicants victims.").

[622] Memorial on Jurisdiction ¶¶ 112-116. The United States' Non-Disputing Party Submission likewise relies on the *Berkowitz* case which, for the reasons discussed, is inapposite. *See* U.S. Non-Disputing Party Submission dated 20 Mar. 2025, at n. 9. In any event, the United States recognizes in its Submission that "a legally distinct injury can give rise to a separate limitations period," which applies in the present case with Respondent's promulgation of the New Energy Law. *See* U.S. Non-Disputing Party Submission dated 20 Mar. 2025, at n. 14. To the extent that the

that "[w]hile it may be that a continuing course of conduct constitutes a continuing breach, the Tribunal considers that such conduct cannot without more renew the limitation period . . .,"[623] this comment was made in the context of a direct expropriation that occurred prior to the cut-off date.[624] The tribunal rejected the claimants' attempt to bypass the limitations period with their argument that, because compensation had not been paid for the expropriation, the breach was continuing and the claim was timely, as there was no "independently actionable breach" after the expropriation had taken place.[625] This bears no resemblance to the present case, where the New Energy Law was enacted within the limitation period and is a measure that breaches the Treaty; "renewing" the limitation period to the extent the Tribunal considers the Law to be part of a continuous course of conduct is therefore appropriate.

252. Respondent's reliance on *Mobil Investments Canada Inc. v. Canada* is similarly misplaced. There, the tribunal held that the claimant's claims were timely, because although the claimant was aware of the enactment of certain guidelines, which pre-dated the cut-off date, the claimant could not have had known that the guidelines would be enforced against it and that it would incur loss or damage as a result, until the Canadian courts had finally disposed of the claimant's challenge to the guidelines.[626] The *Mobil* tribunal's rejection of the characterization of the measures in that case as continuous acts was thus immaterial. And, here, again, the New Energy Law was enacted after the cut-off date, rendering the *Mobil* tribunal's consideration of continuous acts in the context of the enactment of legislation or guidelines irrelevant.

United States disagrees with Claimants that a continuing course of conduct may extend the limitations period, that view has not been accepted by every Party to the Treaty and, thus, need not be taken into account by the Tribunal in accordance with Article 31(3) of the VCLT. *See* VCLT (**CL-133**), Art. 31(3)(a) ("There shall be taken into account, together with the context: . . . any subsequent agreement **between the parties** regarding the interpretation of the treaty or the application of its provisions.") (emphasis added). *See also supra* ¶ 74.

[623] *Berkowitz et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected) dated 30 May 2017 (**CL-286**) ¶ 208.

[624] *Berkowitz et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected) dated 30 May 2017 (**CL-286**) ¶¶ 252, 264.

[625] *Berkowitz et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (corrected) dated 30 May 2017 (**CL-286**) ¶¶ 222, 229, 231-232, 270-271. The tribunal found that other claims fell within the limitations period. *Id.* ¶¶ 270, 286.

[626] *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018 (**RL-101**) ¶¶ 152, 154.

(b) Claimants' Claims Are Timely Even if the Tribunal Considers the New Energy Law to Form Part of a Composite Act

253. Claimants' claims also would fall within the Treaty's limitation period if the Tribunal considers that the New Energy Law forms part of a composite act. A composite act consists of a series of actions that are legally distinct and defined in aggregate as wrongful.[627] As set forth in Article 15(1) of the ILC Articles on State Responsibility, in the context of a composite act, "[t]he breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful **occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act**."[628] When assessing when composite acts amount to a treaty breach, tribunals consider the point at which the combined and interconnected actions take on a legal character different from the prior actions viewed in isolation.[629]

254. In light of the following facts, Respondent's Treaty breaches may be considered a composite breach because:

- Honduras's conduct preceding the enactment of the New Energy Law—specifically, its failure to pay invoices and its curtailment of Pacific Solar's energy dispatch to the grid—were, in isolation, insufficient to constitute a breach of the Treaty;
- With the change of Government and the enactment of the New Energy Law, Honduras introduced a policy to weaponize the State's significant and outstanding debt to renewable energy generators and to curtail the energy generated by Pacific Solar's Plant.[630] Further, Honduras closed all safety valves in the PPA to protect Pacific Solar in the case of non-payment by ENEE, including by (i) threatening Pacific Solar with criminal charges if it ceased supplying energy to the grid; (ii) failing to honor the State Guarantee; (iii) preventing Pacific Solar from selling energy to third parties; and, (iv) refusing to compensate Pacific Solar for curtailments.[631] Honduras, moreover, has

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[627] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002), Commentary to Article 15 (**CL-298**) ¶ 2; *see also*, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections dated 1 June 2012 (**CL-283**) ¶ 2.70.

[628] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. INT'L L. COMM'N 31, U.N. Doc. A/56/10 (**CL-79**), Art. 15 (emphasis added).

[629] *See, e.g.*, *Interconexión Eléctrica S.A. E.S.P. v. Republic of Chile*, ICSID Case No. ARB/21/27, Award dated 13 Dec. 2024 (**CL-299**) ¶¶ 641-642.

[630] *See supra* ¶ 245; New Energy Law (**Exh. C-10**), Arts. 5, 16.

[631] Memorial on the Merits ¶¶ 16, 149-150, 337-355, 405; [redacted] ¶ 26.

made clear that it does not intend to satisfy the outstanding debt owed to Pacific Solar, unless Pacific Solar agrees to forego its rights through the renegotiation of the PPA.[632]

- This conduct, along with the enactment of the New Energy Law and subsequent measures are all legally distinct actions that, when considered cumulatively, give rise to a composite act that triggers Respondent's breaches of the Treaty.

255. An investor cannot acquire knowledge of a composite act that breaches the Treaty with the first act in a series. Rather, knowledge of a composite act occurs from the moment of the later act, considered within the context of the prior act, which breaches the treaty.[633]

256. Accordingly, if the Tribunal considers that Honduras's conduct constitutes a composite act, Claimants' claim is not time-barred. This is because Claimants acquired knowledge of the composite act that breached the Treaty only once the New Energy Law was enacted and when Respondent subsequently engaged in unlawful conduct in furtherance of the New Energy Law, all of which occurred within the three years of the Treaty's limitation period.

B. THE PAIZES' CLAIMS ARE TREATY-BASED AND HONDURAS'S CONTRACT CLAIMS OBJECTION SHOULD BE REJECTED

257. Claimants' case is based on Honduras's breach of the Treaty and is not a contract claim, as Honduras alleges. Honduras adopted a series of measures, beginning with enactment of the New Energy Law, that violate Honduras's obligations under the Treaty and have caused substantial damage to Claimants and their investments in Pacific Solar. Nevertheless, Honduras erroneously argues that the Paizes' claims are contractual disputes disguised as treaty violations, for three reasons. First, Honduras contends that the core of the dispute lies in the interpretation and alleged breach of the PPA between Pacific Solar and ENEE, particularly concerning payments based on a disputed energy price.[634] Second, while Honduras concedes that the 2022 New Energy Law is a sovereign act, it contends that the Paizes' reliance on this Law is a pretext to escalate a contractual dispute to a treaty claim, because the core issues are rooted in the contractual

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[632] *See supra* ¶ 231.

[633] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002), Commentary to Article 15 (**CL-298**) ¶ 7 ("[T]he time when the act is accomplished **cannot be the time when the first action or omission of the series takes place**. . . . **Only after a series of actions or omissions takes place will the composite act be revealed**, not merely as a succession of isolated acts, but as a composite act.") (emphasis added); *Interconexión Eléctrica S.A. E.S.P. v. Republic of Chile*, ICSID Case No. ARB/21/27, Final Award dated 13 Dec. 2024 (**CL-299**) ¶ 642; *see also Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award dated 13 Sept. 2016 (**CL-303**) ¶ 209.

[634] Memorial on Jurisdiction ¶¶ 253-258.

relationship that existed before the 2022 New Energy Law was enacted. Finally, Respondent argues that, insofar as the Paizes' claims are contractual, the forum selection clauses in the Agreements take precedence over the arbitration provisions under the Treaty.[635]

258. Honduras's objection rests on a mischaracterization of Claimants' case, which is not based merely on a breach of the PPA. Rather, the dispute concerns Honduras's repudiation of the Agreements, which includes its serious departure from the very commitments that incentivized Claimants to invest, embodied in the State's commitments under the Agreements, in breach of Honduras's obligations under the Treaty. In making its objection, Honduras ignores the fundamental principle under international law that State measures that amount to a breach of a contract also can result in a breach of international law.[636] In response to the Tribunal's question regarding whether, and under what conditions, it has jurisdiction over purely contractual claims,[637] and as addressed below, the Tribunal has jurisdiction over claims relating to a contract or arising out of a contractual breach as explained herein.[638] Claimants have addressed this legal question in light of the facts as developed in Claimants' Memorial on the Merits, as assessing the law in isolation from the facts is not impossible for the purposes of assessing Respondent's objection and would lead to inefficiencies. The Tribunal will be incapable of disposing of the entire objection without factual findings as to the nature of Claimants' treaty claims.

259. Honduras, moreover, did not act as a mere commercial party when it breached its contractual commitments towards Pacific Solar. Starting with the adoption of the 2022 New Energy Law and the series of unlawful measures against Pacific Solar, from weaponizing its debt

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635 Memorial on Jurisdiction ¶¶ 284-293.

636 Chittharanjan F. Amerasinghe, *State Breaches of contracts with Aliens and International Law*, 58 AM. J. INT'L. L. 881 (1964) (**CL-202**) at 912 ("There are special circumstances which bring about a violation of international law simultaneous with a breach of contract"); *Interocean Oil Development Co. and Interocean Oil Expl. Co. v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Decision on Preliminary Objections dated 29 Oct. 2014 (**CL-203**) ¶¶ 111-112 ("[T]he Tribunal notes that the existence of contractual claims under the JVA does not preclude the Claimants from filing a separate set of claims pursuant to international law, which would be subject to the Tribunal's jurisdiction."); *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction dated 14 Nov. 2005 (**CL-204**) ¶ 148 ("As a preliminary matter, the Tribunal notes that Pakistan accepts that 'treaty claims are juridically distinct from claims for breach of contract, even where they arise out of the same facts.' . . . The Tribunal considers that this principle is now well established.").

637 Procedural Order No. 4 dated 4 April 2025 ¶¶ 41 ("[T]he 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."), 55(B) ("[D]iscuss whether and if so, how, the limitation period applies: (i) to continuous acts and (ii) to composite acts."), 55(3).

638 *See infra* ¶ 262, n. 645.

to force a renegotiation of the PPA, to its arbitrary actions interfering with Pacific Solar's right to sell electricity to third parties, to the energy curtailments in an electricity system that the State owns and controls, are all acts against Pacific Solar taken by Honduras in an exercise (and abuse) of its sovereign power. In such circumstances, where the claims are for treaty violations and not contractual breaches, the forum selection clause in the Agreements do not preclude the exercise of treaty jurisdiction.

1. The Paizes' Claims Arise Directly Out of Honduras's Breaches of Its Obligations under the Treaty, Independent of Any Contractual Dispute

260. Honduras argues that this dispute is confined to the relationship between Pacific Solar and ENEE under the PPA,[639] and that Claimants have "unsuccessfully attempt[ed] to identify some sovereign act by Honduras that would allow them to assert a claim of an international character."[640] In so arguing, Honduras focuses on payment disagreements and energy curtailments in the years prior to Honduras's enactment of the 2022 New Energy Law,[641] in an effort to anchor the dispute on alleged pre-existing contractual breaches of the PPA. This fundamentally mischaracterizes Claimants' claims in what amounts to a recycling of its unsound limitations objection.

261. The present investment dispute is not a mere contractual dispute between ENEE and Pacific Solar, nor is it a dispute over the interpretation of the PPA and ENEE's performance thereunder. The Paizes' Treaty claims arise out of Honduras's radical disregard for the very framework that it put in place to attract investors like the Paizes and their investments in Pacific Solar, including the specific commitments in the Renewables Laws and the Agreements. Honduras has repudiated these commitments through a series of sovereign acts summarized herein.[642] Critically, through the implementation of the 2022 New Energy Law, Honduras forced a unilateral "renegotiation" of the PPA under threats of expropriation and criminal liability, while weaponizing its debt to Pacific Solar, all in breach of the Treaty.

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[639] Memorial on Jurisdiction ¶ 254 ("The correct interpretation of the PPA, and the payment of the amounts claimed by Pacific Solar, constitute the true dispute between them"); *see also* Memorial on Jurisdiction ¶¶ 278, 291, 293.

[640] Memorial on Jurisdiction ¶ 259.

[641] Memorial on Jurisdiction ¶¶ 36-44, 261 ("[T]hese same claims have been aired for years at the contractual level between Pacific Solar and ENEE."); *see also id.* ¶ 265.

[642] *See supra* § III.A.2; *see also infra* § III.B.2.

262. Respondent overlooks the fundamental distinction, widely recognized by international tribunals, between treaty claims and contract claims.[643] As put by many tribunals, a State's conduct relating to a contract with a foreign investor or its investments may result in a breach of an investment treaty.[644] A tribunal has jurisdiction to assess treaty breaches, even if they arise from contractual claims. As the tribunal in *Crystallex v. Venezuela* observed, the "fact that a contract may exist between the Parties and that issues relating to its performance or termination may play a role in the Parties' pleadings, does not per se entail that the Tribunal is faced with

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[643] *See, e.g.*, *Jan de Nul N.V. and Dredging Int'l N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction dated 16 June 2006 (**CL-304**) ¶¶ 79-80 (confirming that the "distinction between treaty and contract claims . . . is now well established in ICSID jurisprudence," and that "the fact that a dispute involves contract rights and contract remedies does not in and of itself mean that it cannot also involve treaty breaches and treaty claims"); *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award dated 14 July 2006 (**CL-25**) ¶ 54 ("The Tribunal has no doubt that the same events may give rise to claims under a contract or a treaty"); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/03, Decision on Jurisdiction dated 6 Aug. 2003 (**CL-192**) ¶¶ 146-147 (distinguishing between BIT claims and contract claims, and confirming that, "[a]s a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders"); *Sempra Energy Int'l v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction dated 11 May 2005 (**CL-185**) ¶ 95 ("A claim can . . . originate in a violation of a contractual obligation that at the same time amounts to a violation of the guarantees of the treaty.").

[644] *See, e.g.*, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008 (**CL-18**) ¶¶ 457-460 ("[T]he critical distinction is between situations in which a State acts merely as a contractual partner, and cases in which it acts '*iure imperi*', exercising elements of its governmental authority. These are often termed '*actes de puissance publique*', where the use by the State of its public prerogatives or imperium is involved in the actions complained of."); *South32 SA Investments Ltd. v. Republic of Colombia*, ICSID Case No. ARB/20/9, Award dated 21 June 2024 (**CL-305**) ¶ 172 ("An internationally wrongful act may be based on a domestic wrong, as is in fact often the case, but the threshold of non-compliance for an international wrong is higher and based on a different legal standard."); *Gemplus, S.A., SLP, S.A., and Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award dated 16 June 2010 (**CL-306**) ¶ 6.25 ("It is clear that a contractual breach cannot simply be converted juridically into a treaty breach, but equally it is clearly necessary for a claimant to recite the factual basis for a treaty breach which may, in appropriate cases, include allegations of fact amounting also to a contractual breach, even if no contractual claim is pursued in the particular BIT arbitration."); *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction dated 29 May 2009 (**CL-307**) ¶ 127 ("It is well established that there is a significant distinction to be drawn between a treaty claim and a contract claim, even if there may be a significant interplay between the underlying factual issues. . . . The fundamental basis of the claim under Article 3(1) of the BIT, over which this Tribunal has jurisdiction, turns on the interpretation and application of that provision and alleged acts of Paraguay (as '*puissance publique*'), not on the interpretation and application of the Contract as such, although the Contract will necessarily be part of the overall factual and legal matrix."); *Azurix Corp. v. The Argentine Republic (I)*, ICSID Case No. ARB/01/12, Award dated 14 July 2006 (**CL-25**) ¶ 374 (holding that a State's decision to terminate a concession contract—based on its allegation that the investor had abandoned the project—constituted "a clear case of breach of the fair and equitable treatment standard," where the tribunal found that the facts did not support the State's abandonment theory.); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability dated 3 Oct. 2006 (**CL-44**) ¶ 137 ("Argentina also has acted unfairly and inequitably in forcing the licensees to renegotiate public service contracts, and waive the right to pursue claims against the Government, or risk rescission of the contracts. Even though the Gas Law provided for the renegotiation of public service contracts, in practice there was no real renegotiation, but rather the imposition of a process.").

contract claims rather than treaty claims."[645] In so finding, the *Crystallex* tribunal relied on the conclusions of the seminal *Vivendi I* annulment committee decision——an authority on which Respondent itself relies—holding "evident that a particular investment dispute may at the same time involve issues of the interpretation and application of the BIT's standards and questions of contract."[646] On the relationship between a breach of contract and a breach of a treaty, the *ad hoc* committee remarked that "whether there has been a breach of the BIT and whether there has been a breach of contract are different questions[.]"[647] In other words, "[a] state may breach a treaty without breaching a contract, and *vice versa*" and "whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights,"[648] as Honduras argues in this case.

263. State measures that amount to a breach of contract may also result in a breach of international law. This is also why the *Vivendi II* tribunal, relying on the findings of the *Vivendi I ad hoc* committee, found that it was open for the tribunal, in deciding the treaty claims, to interpret the contract and "come to a view as to whether either of the parties failed to live up to its terms."[649]

264. In support of its objection, Honduras relies on the findings of the tribunals in *El Paso v. Argentina*, *Joy Mining v. Egypt* and *Salini v. Jordan*,[650] all of which actually undermine its position. In *El Paso v. Argentina*, the tribunal rejected Argentina's objection that the dispute was purely contractual, finding that if the State interferes with contractual rights through a unilateral act that violates the BIT's standards of protection, the tribunal has jurisdiction over all

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[645] *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2), Award dated 4 Apr. 2016 (**CL-92**) ¶ 474.

[646] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment dated 3 July 2002 (**RL-60**) ¶ 60.

[647] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment dated 3 July 2002 (**RL-60**) ¶¶ 95-96; *see also Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award dated 14 July 2006 (**CL-25**) ¶ 54 (explaining that, even if a contract and a treaty claim factually "coincide they would remain analytically distinct, and necessarily require different enquiries.").

[648] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment dated 3 July 2002 (**RL-60**) ¶¶ 95, 110.

[649] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Award dated 20 Aug. 2007 (**CL-86**) ¶ 7.3.9.

[650] *See* Memorial on Jurisdiction ¶¶ 256-257.

claims, including those arising from contractual rights.[651] Like the respondent in *El Paso*,[652] Honduras's actions show a clear pattern of unilateral and arbitrary interference with Pacific Solar's contractual rights under the Agreements, rendering essentially worthless the value of the Paizes' investment.[653]

265. Respondent's reliance on *Joy Mining v. Egypt* is equally misplaced. That case concerned a contract between Joy Mining and the Egyptian state-owned entity, IMC, for the supply of equipment. The claimant acknowledged that it had been paid for the equipment, but complained that IMC had failed to release bank guarantees that the claimant was required to provide under the equipment supply contract.[654] The claimant argued that Egypt had prevented it from completing the requisite commissioning and testing of the equipment required for the release of the guarantees. The tribunal found that the bank guarantees fell outside the definition of an investment under the applicable treaty because they constituted a contingent liability, reasoning that it was necessary to draw a fundamental distinction between "ordinary sales contracts, even if complex, and an investment," because otherwise "any sales or procurement contract involving a State agency would qualify as an investment."[655]

266. The facts in *Joy Mining* are in no way analogous to the present case. The Paizes' investment in Pacific Solar involves a project to develop a PV plant that has been generating clean energy for Honduras for almost a decade.[656] Critically, the Plant assisted Honduras in solving its energy supply outages and in meeting its renewable energy commitments.[657] The Paizes invested in Pacific Solar in reliance on the continuous application of the Renewables Law as well as the

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[651] *El Paso Energy Int'l Co. v. The Argentina Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction dated 27 Apr. 2006 (**CL-116**) ¶ 84 ("[T]here is no doubt that if the State interferes with contractual rights by a unilateral act, whether these rights stem from a contract entered into by a foreign investor with a private party, a State autonomous entity or the State itself, in such a way that the State's action can be analyzed as a violation of the standards of protection embodied in a BIT, the treaty-based arbitration tribunal has jurisdiction over all the claims of the foreign investor, including the claims arising from a violation of its contractual rights.").

[652] *El Paso Energy Int'l Co. v. The Argentina Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction dated 27 Apr. 2006 (**CL-116**) ¶¶ 84-88.

[653] *See supra* § III.A.2; *see also infra* § III.B.2.

[654] *Joy Mining Machinery Ltd. v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction dated 6 Aug. 2004 (**RL-64**) ¶ 19.

[655] *Joy Mining Machinery Ltd. v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction dated 6 Aug. 2004 (**RL-64**) ¶ 58.

[656] Memorial on the Merits § II.C.

[657] Memorial on the Merits § II.A.

Agreements with various State entities, all confirming specific economic rights and obligations.[658] The State trampled on those commitments by enacting the 2022 New Energy Law and taking various unlawful measures thereafter.[659] Honduras's unlawful measures giving rise to this dispute cannot be compared to the dispute over a commercial deal for the procurement of goods and services in *Joy Mining.*

267. Respondent's reliance on *Salini v. Jordan* is also unavailing. In that case, the tribunal rejected certain contract claims, reasoning that the claimant had not shown State behavior "beyond that which an ordinary Contracting Party could adopt," and that "[o]nly the State, in the exercise of its sovereign authority (*puissance publique*) . . . has assumed obligations under the bilateral agreement[.]"[660] By contrast, the measures in this case include, *inter alia*, the State's enactment of legislation and its subsequent conduct pursuant thereto, which are purely public acts that only the State can engage in.

2. Honduras's Unlawful Acts Against Pacific Solar Constitute an Exercise of Sovereign Power that Has Left the Paizes' Investments Nearly Worthless

268. Honduras contention that the Paizes' claims are not genuine treaty claims because the State did not use sovereign powers (*puissance publique*) or otherwise engage in conduct different from that of a purely commercial actor when allegedly breaching its commitments under the PPA must be rejected.

269. **First**, the enactment of the 2022 New Energy Law is a sovereign act, which Honduras recognizes, as it must.[661] Respondent, however, repeats the same arguments it advances in support of its similarly meritless limitations period objection, in seeking to avoid the inevitable conclusion that Claimants are challenging Honduras's sovereign conduct in this Arbitration. In particular, Honduras argues that the Paizes are challenging the State's purported right to renegotiate the PPA.[662] This is incorrect. Claimants acknowledge that, pursuant to Article 18.1

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[658] Memorial on the Merits § II.B.

[659] Memorial on the Merits § II.F.

[660] Memorial on Jurisdiction ¶ 257 (citing *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award dated 31 Jan. 2006 (**RL-69**) ¶ 155).

[661] Memorial on Jurisdiction ¶ 260 ("The main sovereign act that . . . would have allegedly violated the Treaty would be the enactment of Decree 46-2022").

[662] Memorial on Jurisdiction ¶ 267.

of the PPA, either party may seek the renegotiation of the agreement.[663] As a matter of fact, Pacific Solar and Honduras held renegotiation discussions in 2019-2020.[664] Unlike these consensual discussions, however, the "renegotiation" called for by the 2022 New Energy resulted in (i) the State's unilateral express mandate to lower energy prices "to be adjusted by reference to prices applied in the Central American, Caribbean and Latin American regions,"[665] (ii) a threat to expropriate the Plant if Pacific Solar did not accept the terms imposed by Honduras,[666] and (iii) a threat of criminal prosecution if the generators ceased to deliver energy to ENEE.

270. It is telling that, in 2022, Honduras did not rely on Article 18.1 of the PPA to trigger a renegotiation. Instead, it passed the 2022 New Energy Law to force a renegotiation and render the Agreements ineffective.[667] Such legislative interference of the legal framework governing investments, by which the State pressures generators to alter their existing contractual terms, is a hallmark arbitrary use of sovereign authority. The threat of expropriation is an inherent power of the State, signifying a direct exercise of its sovereign prerogative. Honduras's insistence that the 2022 New Energy Law provided for an agreed renegotiation between two commercial parties,[668] and that that it did not act with sovereign powers, is fanciful.

271. **Second**, Honduras's argument that this dispute is a mere "contractual conflict" with Pacific Solar fails to engage with key aspects of Claimants' case that underscore the arbitrary, unfair and inequitable nature of Honduras's actions. Honduras clearly was not acting as an ordinary contracting party to a commercial transaction when it implemented a series of sovereign measures that repudiated its commitments under the Agreements and breached the assurances it made in the Renewables Laws:

- **Honduras weaponized the existing debt with Pacific Solar to force a renegotiation of the PPA under the terms of the 2022 Energy Law.** The 2022 New Energy Law introduced a State mandate to "renegotiate" the PPA under the threat of "termination" of the contractual relationship and "State acquisition" of Pacific Solar's assets if it did not agree to the renegotiated terms imposed by the State, which included Pacific Solar's waiver of its rights to the Renewable Incentives.[669] Honduras put in motion its

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663 PPA (**Exh. C-1**) § 2, Cl. 18.1.

664 Memorial on Jurisdiction ¶ 268.

665 *See* Memorial on the Merits ¶¶ 203, 213, 289, 306, 312, 329, 374.

666 Memorial on Jurisdiction ¶ 66.

667 *See, e.g.*, Memorial on the Merits ¶¶ 93, 98, 116.

668 Memorial on Jurisdiction ¶ 268.

669 Memorial on the Merits § II.F.1.

sovereign machinery to repudiate Pacific Solar's rights under the Agreements, utilizing the existing debt with Pacific Solar to exert pressure and lower the Plant's remuneration to the bare minimum, to drain Pacific Solar and force it to accept the renegotiation terms unilaterally imposed by the State.

- **Honduras used its sovereign powers to limit the energy Pacific Solar could inject into the electrical system**. Through the CND, the ODS and ENEE, the State directly interfered with Pacific Solar's operational and contractual rights, damaging the Plant's equipment and causing severe financial harm.[670] The Government has curtailed Pacific Solar's energy dispatch and refused to compensate Pacific Solar, as provided under the PPA.[671] This is certainly not the type of conduct that an ordinary commercial party could adopt in a transaction. It inherently entailed the (mis)use of sovereign powers to arbitrarily interfere with Pacific Solar's rights under the PPA and the Operations Agreement.

- **The State prevented Pacific Solar from selling to third parties**. Honduras controls the electricity system through the ODS (now in ENEE's hands).[672] Honduras's refusal to allow Pacific Solar to sell energy to third parties (as it was contractually and legally entitled to do) is yet another example of Honduras acting with sovereign powers. In a commercial relationship between two parties on equal footing, the generator would be able to sell its generation output to third parties without any restriction. ENEE's refusal to allow Pacific Solar to sell its energy output to third parties, as provided for under the Agreements, is not the type of conduct that could be undertaken by a commercial party.[673]

272. These measures clearly far exceed a mere contractual dispute about unpaid receivables that predate the 2022 Energy Law, as Honduras contends.[674]

273. **Third**, Honduras has publicly and privately announced that it will no longer recognize its payment obligations relating to outstanding receivables under the PPA and the State Guarantee.[675] While the Renewables Laws and the Agreements expressly provide for Pacific Solar's entitlement to the Renewables Incentives, since the enactment of the 2022 New Energy Law, Honduras has made clear that it is willing to pay only up to one year of the historical debt owed to generators such as Pacific Solar, without the interest agreed under the PPA.[676] It has

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670 [redacted] ¶ 26.

671 Memorial on the Merits § II.F.2(a).

672 *See* Memorial on the Merits ¶ 156.

673 Memorial on the Merits § IV.C.3.

674 *See* Memorial on Jurisdiction ¶¶ 36-44, 261, 265, § II.C; [redacted] ¶ 19; Paiz WS I ¶ 19.

675 Memorial on the Merits ¶¶ 125, 130, 209, 314, 340

676 *See* New Energy Law (**Exh. C-10**), Art. 16 ("The Government of the Republic is hereby authorized, **once the renegotiation or contractual relationship has been concluded** with the generators with whom it has delays of **up to one (1) year**, to proceed to reconcile arrears and to define feasible terms for payment through the National or International Financial System, starting with small and medium-sized generators.") (emphasis added).

further threatened to dismantle the tax incentive regime provided for renewable energy generators.[677] A State's decision to renege on its explicit guarantees is an exercise of its sovereign will, distinct from a commercial entity's potential inability to pay.

274. **Finally**, the Government has pursued public smear campaigns against solar generators, vilifying those who did not "agree" to the terms of the Government's "offers," branding them as "enemies of the nation" that are harming the interests of the Honduran people and describing PPAs as injurious to the public interest.[678] These campaigns are an additional illustration of the State using its sovereign authority and influence to shape public opinion and to exert pressure on investors.

275. These measures, individually and collectively, demonstrate that Honduras has acted in its capacity as a State, wielding its sovereign powers through legislation, executive action, and control over key sectors. These acts go far beyond the realm of ordinary commercial interactions and directly impact the legal and economic framework under which the Paizes' investments were made, thus constituting acts of *puissance publique.* Honduras's measures entail the exercise of sovereign power (*jure imperii*) that have violated the Treaty and effectively destroyed the Paizes' investment.

3. Forum Selection Clauses Governing Contract Disputes Do Not Preclude the Paizes' Treaty Claims

276. Honduras's argument that the choice-of-forum clauses in the Agreements deprive the Tribunal of jurisdiction to hear the Paizes' claims is equally flawed.[679] It is clear from the face of these clauses that they have no bearing on the Paizes' claims for Treaty breaches that are subject to the Treaty's dispute resolution mechanism.[680]

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[677] *See, e.g.*, Memorial on the Merits ¶¶ 125, 130, 157-159, 209, 314, 340.

[678] ENEE, *Not all generators are enemies of the nation,* X (FORMERLY TWITTER) dated 27 June 2022 (**Exh. C-219)** ("Not all generators are enemies of the nation, this week we will be announcing some of the generators that are willing to lower the costs of their contracts[.]); ENEE, *It's Impossible to Rescue ENEE Without Renegotiations,* X (FORMERLY TWITTER) dated 28 Apr. 2022 (**Exh. C-200**). *See also* Honduran Congress, Debate Regarding 2022 New Energy Law dated 11 May 2022 (**Exh. C-76**), at 2:08:15-2:08:53; *The scenario of legal certainty for renewable generators in Honduras worsens,* ENERGÍA ESTRATÉGICA dated 12 May 2022 (**Exh. C-210**).

[679] Memorial on Jurisdiction ¶¶ 284-293.

[680] PPA (**Exh. C-1**), Cl. 15.4 ("If it concerns Other Disputes and they cannot be resolved by the Operating Committee within a period of sixteen (16) Business Days from the date the Disputes were submitted to it, they will be resolved by submission to the highest executive officer of the BUYER and the SELLER, who will have the broadest freedom to agree and resort to the means of resolution and legal procedures they consider suitable and appropriate. If within six (6) weeks such officers have not agreed on a resolution procedure, they will submit to arbitration at the

277. Honduras relies on the decision of the annulment committee in *Vivendi I* and the award in *Malicorp v. Egypt* to support the uncontroversial position that a contract claim must be submitted to the dispute resolution mechanism envisaged in the relevant contracts.[681] Honduras's contention, however, is based on the circular argument that the Paizes' claims are contractual, and not treaty-based, which, as shown above, is wrong.

278. Tribunals have routinely ruled that contractual choice-of-forum or choice-of-law clauses do not preclude the exercise of treaty jurisdiction.[682] As early as 1998, the *Lanco v. Argentina* tribunal found that a forum selection clause in the underlying concession agreement did not deprive the tribunal of jurisdiction to hear the treaty claim, even if the treaty claim arose out of conduct that was allegedly in breach of the concession agreement.[683] This approach has been followed consistently, including by the *Vivendi I ad hoc* committee, on which decision Honduras relies. That committee found that the jurisdiction of a tribunal in a treaty arbitration is not affected

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Center for Conciliation and Arbitration of the Chamber of Commerce and Industries of Tegucigalpa, applying the rules of such center."); State Guarantee (**Exh. C-2**), Cl. 1.2 ("This Agreement constitutes a valid, binding, and enforceable legal obligation of the State in accordance with its terms, designating the Civil Court of Francisco Morazán as the competent court to hear any judicial proceedings in this regard."); Operations Agreement (**Exh. C-3**), Cl. 10 ("The parties will carry out their duties and obligations contained in this agreement in a spirit of mutual cooperation and good faith and will make their best efforts to resolve any difference, dispute, or controversy related to this Contract in an amicable manner. If any difference, dispute, or controversy cannot be resolved by the Parties within a period of thirty (30) Business Days from the date such difference, dispute, or controversy was submitted to the other Party, then, unless the Parties agree otherwise, such difference, dispute, or controversy will be resolved by submission of the Parties to binding and unappealable arbitration as established in Decree No. 161-2000: Law of Conciliation and Arbitration or in the recourses established by the Laws.").

[681] Memorial on Jurisdiction ¶¶ 289-291 (citing *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment dated 3 July 2002 (**RL-060**) ¶¶ 98-99; *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award dated 7 Feb. 2011 (**RL-080**) ¶ 103(c).

[682] *See, e.g.*, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction dated 9 Nov. 2004 (**RL-65**) ¶ 96 ("[T]he dispute settlement procedures provided for in the Contract could only cover claims based on breaches of the Contract. Those procedures cannot cover claims based on breaches of the BIT (including breaches of those provisions of the BIT guaranteeing fulfilment of contracts signed with foreign investors)."); *Sempra Energy Int'l v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction dated 11 May 2005 (**CL-185**) ¶ 122 (holding that a forum selection clause "cannot affect the essence of the distinction" between contract-based and treaty-based claims); *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability dated 2 Sept. 2009 (**CL-48**) ¶¶ 158-159 (finding that "national courts and contractually stipulated clauses constitute only alternatives to arbitration, but do not prevail over it," and that a dispute resolution clause in a contract did not preclude the claimant from bringing a treaty claim, as "[t]hese are distinct actions").

[683] *Lanco Int'l Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction dated 8 Dec. 1998 (**RL-58**) ¶¶ 26-28.

by a clause in the underlying concession agreements providing for the jurisdiction of the local courts.[684]

279. Other tribunals have followed the same approach. The tribunal in *SGS v. Paraguay*, for example, held that "in the absence of an express waiver, a contractual forum selection clause should not be permitted to override the jurisdiction of a tribunal to hear Treaty claims."[685] In the same vein, the tribunal in *Bureau Veritas v. Paraguay* held that a choice of forum clause in the contract providing for jurisdiction to the [local] courts . . . did not apply, because "[t]he issue of fair and equitable treatment, and related matters, was not one which the parties to the Contract agreed to refer to the exclusive jurisdiction of the [local] courts."[686] Similarly, the tribunal in *TSA Spectrum v. Argentina* held that a contractual clause "does not exclude recourse to the settlement procedure in the treaty, unless there is a clear indication in the contract itself or elsewhere that the parties to the contract intended in such manner to limit the application of the treaty."[687] And in *Daimler v. Argentina*, the tribunal likewise held that a forum selection clause had "no bearing upon [its] jurisdiction."[688]

280. As the Paizes are asserting treaty claims and not contract claims, contractual forum selection clauses in the Agreements do not preclude the Tribunal's jurisdiction to hear the Paizes' claims under the Treaty.

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[684] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment dated 3 July 2002 (**RL-60**) ¶ 76.

[685] *SGS Société Générale de Surveillance v. Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction dated 12 Feb. 2010 (**CL-65**) ¶ 180.

[686] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction dated 29 May 2009 (**CL-307**) ¶ 127 (stating that the respondent "has argued that the existence of an agreed forum for the resolution of disputes under Article 9 of the Contract means that it is to that forum that the dispute should go. We disagree. . . . The issue of fair and equitable treatment, and related matters, was not one which the parties to the Contract agreed to refer to the exclusive jurisdiction of the courts of Asunción. The treaty issue is therefore not one for that forum, and there can be no question of an independent or self-standing treaty claim over which we have jurisdiction being inadmissible by reason of the choice of forum for the resolution of a disputes under the Contract.").

[687] *TSA Spectrum de Argentina S.A. v. The Argentine Republic*, ICSID Case No. ARB/05/5, Award dated 19 Dec. 2008 (**CL-308**) ¶ 58.

[688] *Daimler Financial Services AG v. The Argentine Republic*, ICSID Case No. ARB/05/1, Award dated 22 Aug. 2012 (**RL-81**) ¶ 61.

IV. REQUEST FOR RELIEF

281. For the foregoing reasons, Claimants respectfully request a decision:

(a) Rejecting Respondent's bifurcated objections;

(b) Denying Respondent's request to bifurcate the limitations period and contract claims objection, or if bifurcation is granted, dismissing both objections during the bifurcated phase;

(c) Finding that Respondent has withdrawn the objection with respect to Ms. Paiz's notice, and it should be precluded from subsequently raising it;

(d) Ordering Respondent pursuant to ICSID Arbitration Rule 52 to pay all the costs of this Arbitration, including without limitation, Claimants' legal costs, expert fees, and in-house costs, the fees and expenses of the Tribunal, and ICSID's costs, with interest running as of the date of the decision at a rate to be established in due course.

Respectfully submitted,

White & Case LLP

Counsel for Claimants

5 May 2025