ARBITRATION BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/23/43

FERNANDO PAIZ ANDRADE AND ANABELLA SCHLOESSER DE LEÓN DE PAIZ

(Claimants)

v.

REPUBLIC OF HONDURAS

(Respondent)

REPLY OF THE REPUBLIC OF HONDURAS ON JURISDICTIONAL OBJECTIONS

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4 June 2025

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1. In accordance with the Procedural Calendar updated on 20 January 2025, the Republic of Honduras ("**Honduras**," the "**Republic**," the "**State**," or the "**Respondent**") respectfully submits its Reply on Jurisdictional Objections (the "**Reply**"). This is in the context of the present arbitration brought by Fernando Paiz Andrade and Anabella Schloesser de León de Paiz (the "**Paiz**" or "**Claimants**") against the Republic of Honduras (together with Claimants, the "**Parties**") under Chapter 10 of the Free Trade Agreement between the United States, Central America and the Dominican Republic (the "**CAFTA-DR**" or "**Treaty**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**"). Subsequent to Claimants' Statement of Claim on 20 September 2024, Honduras filed its Summary of Jurisdictional Objections and Request for Bifurcation on 21 October 2024. On 20 December 2024, the Tribunal issued its Procedural Order No. 3 ordering the bifurcation of the proceedings. Thereupon, on 25 February 2025, the Republic filed its Memorial on Jurisdictional Objections ("**Memorial on Jurisdiction**"). Respectively, on 5 May 2025, Claimants filed their Counter-Memorial to the Jurisdictional Objections ("**Counter-Memorial**" or "**Response**").

I. INTRODUCTION

2. Claimants are purported foreign investors, owners of an investment in the Honduran renewable energy sector, an investment of which they have not even demonstrated that they are the owners. More importantly, Claimants have initiated this arbitration to resolve a dispute of a contractual nature that is not protected by the Treaty. Aware that they cannot bring contractual claims in this arbitration, Claimants attempt to import an umbrella clause from other treaties entered by Honduras, which is prohibited by the CAFTA-DR. Furthermore, the claims are time-barred, as the dispute arose outside the statute of limitations period contained in the Treaty. In an attempt to salvage their claim, Claimants allege that they executed an investment agreement with the State, when in fact they have a power purchase agreement with a state-owned company, which fails to meet any of the requirements to qualify as an investment agreement under the Treaty.

3. In its Reply, the Republic elaborates all the jurisdictional and/or admissibility grounds on which the Tribunal should dismiss the entirety of Claimants' claims. Before summarizing Honduras' jurisdictional objections (**Section I.B**), Honduras recounts the facts

relevant to this jurisdictional stage, as well as the critical flaws in Claimants' narrative (**Section I.A**).

A. The facts relevant to the Tribunal's jurisdiction confirm the abuse presented by the case brought by Mr. and Mrs. Paiz.

4. The Republic detailed in its Memorial on Jurisdiction the facts relevant to the Tribunal's jurisdiction, as well as those facts that should be before the Tribunal at this stage of the dispute.[1] Below, the Republic outlines facts critical to the jurisdictional stage by virtue of Claimants' misrepresentations in the Counter-Memorial.

5. Claimants are Guatemalan nationals, allegedly owners of the company Pacific Solar Energy, S.A. de C.V. ("**Pacific Solar**"), which operates a solar photovoltaic power plant near the town of Nacaome, Honduras (the "**Nacaome I Plant**"). In a clear abuse of the investor-state dispute settlement system, Claimants seek to use a law passed by the Honduran National Congress (the "**Decree 46-2022**," "**Decree**" or "**New Energy Law**")[2] as an excuse to elevate mere long-standing contractual disputes between Pacific Solar and Empresa Nacional de Energía Eléctrica ("**ENEE**") into an international dispute under the CAFTA-DR. The main subject matter of Claimants' claims stems from the interpretation and alleged breach of Contract No. 002-2014 for the Supply of Power and Associated Electrical Energy entered into between ENEE and Pacific Solar on 16 January 2014 (the "**PPA**" or "**Contract**").[3]

1. Claimants still fail to demonstrate ownership over the alleged investment, which in any event was ceded in its entirety.

6. In its Memorial on Jurisdiction, the Republic demonstrated that Claimants have not submitted a convincing piece of evidence to prove their ownership rights in the corporate chain that allegedly owns Pacific Solar. Claimants attempted to justify their ownership of more than six

[1] Memorial on Jurisdictional Objections ("**Memorial on Jurisdiction**") (25 February 2025), ¶¶ 15-73.

[2] Ley Especial para garantizar el servicio de la energía eléctrica como un bien público de seguridad nacional y un derecho humano de naturaleza económica y social, 2022 (Decreto No. 46-2022) ("**Decree No. 46-2022**") (16 May 2022) (**C-010**).

[3] Contract No. 002-2014, between Empresa Nacional de Energía Eléctrica and Pacific Solar Energy, S.A. de C.V. ("**Contract No. 002-2014**") (16 January 2014) (**C-001**).

companies from different jurisdictions on the basis of a diagram "certified" by a Guatemalan notary, which reflects clear and serious formal deficiencies.[4]

7. The documentation submitted by Claimants in their Counter-Memorial remains insufficient to demonstrate conclusively their ownership of the corporate chain.[5] Claimants only submit as additional evidence purported shareholder registers of the companies that form part of the chain. These lists of shareholders do not prove the existence or legal status of the companies as they are mere charts that are not certified or signed by any authority.

8. In its Memorial on Jurisdiction, Honduras demonstrated that in 2018 Pacific Solar notified ENEE that it assigned all its rights under the PPA in favor of [redacted] through a trust established for the benefit of its international financiers. Claimants, then, cannot be considered as holders of the investment they claim.[6]

9. In their Counter-Memorial, Claimants have provided the trust agreements referred to above. These contracts confirm Honduras assertion. Pacific Solar assigned all of its assets and rights over the Nacaome I Plant to its international financiers.[7] One of the trusts even shows that the majority shareholder of Pacific Solar, [redacted], has assigned all of its shares in Pacific Solar to [redacted] as trustee.[8]

[4] Memorial on Jurisdiction, ¶¶ 137-147. *See also* Organizational Chart of the Shareholder Structure of Pacific Solar Energy, S.A. de C.V. (13 July 2023) (**C-027**).

[5] Briefly, the Republic wishes to address Claimants' unsubstantiated and highly inflammatory allegations. In their Counter-Memorial on Jurisdiction, paragraph 163, Claimants assert that Honduras has used its sovereign powers and violated the rights of private persons in the context of this arbitration. The Respondent firmly rejects these assertions, which have no basis in fact. Claimants allege that the inspection by the Public Prosecutor's Office was a pretext to obtain documentation relevant to this arbitration. This is false. The Tribunal itself has emphasized that it is undisputed between the parties that the Public Prosecutor's Office did not obtain any documentation during the inspection on 30 April 2025, so that Claimants' allegation carries no weight. The Tribunal also reaffirmed the sovereign right of the State to be able to conduct criminal investigations, even during an investment arbitration. *See* Procedural Resolution No. 5 (28 May 2025), ¶¶ 24, 28 ("The Tribunal further observes that this does not as such prevent the Respondent from conducting criminal investigations [...].") ("The Tribunal notes that it is undisputed that no documents were collected during the inspection of 30 April 2025.").

[6] Memorial on Jurisdiction, ¶¶ 148-151. *See also* Letter from Pacific Solar Energy S.A. to J. A. Mejía Arita (ENEE) (12 January 2018) (**R-037**).

[7] Asset Trust Agreement between Pacific Solar, [redacted] DEG and FMO ("**Asset Trust Agreement**") (12 January 2018) (**C-267**).

[8] Share Trust Agreement between [redacted], [redacted], DEG and FMO ("**Share Trust Agreement**") (12 January 2018) (**C-266**).

10. In conclusion, the Paiz have not demonstrated that they are indirect owners of the alleged investment. Even assuming that they are the owners of Pacific Solar, they transferred the ownership and economic benefits of Pacific Solar to [redacted] as trustee, so that the ultimate beneficiary of the investment would not be Claimants but their financiers.

2. The debts for energy supply bills and energy injection limitations are at the heart of Claimants' claim.

11. Claimants cannot cover the sun with a finger. Their only claims are contractual and relate to the debts and energy limitations (hereinafter the "**Essential Claims**").

12. Honduras considers that, before reviewing the legal aspects of each objection, in particular the objection *ratione temporis* or contractual claim, it is necessary for the Tribunal to consider what the core of Claimants' claims are from a factual point of view. This must be the starting point of its analysis. If the Tribunal agrees with Honduras that the Essential Claims are at the heart of Claimants' case, it is highly likely to decide that they are time-barred and/or contractual.

13. In the present case, the evidence that these violations are at the heart of the claims is compelling.

14. *First*, from the language used by Claimants themselves in presenting their claims, it is clear that they are based on two fundamental facts: (i) the non-payment of debts by ENEE and (ii) the energy limitations applied to the plant. All the formulations of the case in their previous submissions—including the Notice of Intent, Request for Arbitration, Memorial on the Merits, Observations on the Request for Bifurcation and Counter-Memorial to Jurisdictional Objections—revolve around these elements. These documents not only make direct reference to these contractual breaches—which Honduras considers to be the core of the claim—but also expressly identify the source of these obligations as being the contractual framework entered into with ENEE, particularly the PPA.

15. In their Request for Arbitration, Claimants alleged, *inter alia*, that Honduras "has repudiated Pacific Solar's compensation rights and improperly curtailed the Plant's energy

dispatch without proper compensation, in contravention of the PPA and the State Guarantee."[9] In the Statement of Claim, they confirmed that one of the relevant conducts—even after the issuance of Decree 46-2022—was "weaponizing the State's significant and outstanding debt to Pacific Solar."[10] However, as is evident, the accumulation of that debt began years ago, with the first defaults on payments that ENEE was required to make under the PPA. The 2022 Act did not alter that situation, nor did it transform it into a new fact.

16. Similarly, in their Observations to the Request for Bifurcation, Claimants reiterated that "Honduras continues to flagrantly violate the Agreements that incentivized the Paiz' investment, withholding millions of dollars in payments to Pacific Solar."[11] Even Claimants' own

[9] Request for Arbitration (24 August 2023), ¶ 4. *See ibid*., ¶¶ 26, 41, 44 ("While the Plant has been delivering clean energy, the Honduran State, on the other hand, has disregarded its obligations toward the Paizes and their Enterprise. In particular, the Government has failed to compensate Pacific Solar, including for energy delivered, and all payments related to the interests and curtailments to which Pacific Solar is entitled.") ("Honduras breached its obligation to accord the Paizes' investments FET by, among other things: [...] (ii) arbitrarily repudiating compensation obligations to which Pacific Solar is entitled to under the PPA, the State Guarantee, and Honduran law.") ("Honduras has expropriated the Paizes' investments and Pacific Solar's cashflows and value under Article 10.7 of CAFTA-DR by repudiating Pacific Solar's legal and contractual rights and withholding its corresponding revenues. This puts Pacific Solar in a precarious financial situation and threatens the viability of the Paizes' Enterprise.").

[10] *See ibid*., ¶¶ 189, 190, 340, 341 ("Honduras is essentially rendering the Agreements ineffective, including by no longer recognizing the State's payment obligations relating to the outstanding receivables and withholding compensation from Pacific Solar.") ("Honduras' acts and omissions constitute a flagrant breach of the PPA and the State Guarantee. Behaving towards Pacific Solar as if the Agreements did not exist, Honduras is not paying the remuneration to which Pacific Solar is entitled for the energy and capacity that the Plant delivered. Honduras has also curtailed the Plant's energy dispatch without providing proper compensation in breach of the PPA.") ("First, Honduras is not paying (i) the remuneration to which Pacific Solar is entitled for the energy and capacity that the Plant delivered, (ii) the Renewables Incentives, including the 10% Incentive, and (iii) and interest that Pacific Solar is duly owed, as promised under the PPA and State Guarantee. By enacting 2022 New Energy Law, the State put into law its intention to repudiate the compensation it owes to Pacific Solar, instructing ENEE to settle the historical debt owed to the generators only 'for up to one year,' and only if the PPA is 'renegotiated' or 'terminated.' After the enactment of the 2022 New Energy Law, the Government has attempted to formally deprive Pacific Solar from key rights under the PPA, including the 10% Incentive and the payments for capacity through the forced renegotiation of the PPA. Honduras' failure to comply with its payment obligations of (i) the energy and capacity that the Plant delivered, (ii) the Renewables Incentives, and (iii) interest owed to Pacific Solar is in breach of Section 1.G and Clauses 9.2 and 9.6.3 of the PPA, Article 4.2 of the State Guarantee and Clause 1.4.7 of the Operations Agreement. As explained in the Compass Lexecon Report, ENEE had accrued a debt of more than [redacted],686 which has resulted in significant harm to Pacific Solar.") ("Honduras has unduly and arbitrarily curtailed the Plant's energy dispatch for reasons not attributable to Pacific Solar in contravention of its obligation to guarantee the dispatch of the energy produced by the plant.").

[11] Claimants' Observations on the Request for Bifurcation ("**Observations on the Request for Bifurcation**") (20 November 2024), ¶ 2. Request for Arbitration (Aug. 24, 2023), ¶ 5 ("The Paizes made this investment based on Honduras' assurances that it would honor its specific commitments, including as set forth in the PPA and the State Guarantee.").

experts have followed this same logic.[12] Both Claimants and their experts agree that the claimed economic harm stems, directly and principally, from the late payment and the limitations on energy injection.

17. In their Counter-Memorial, Claimants argued that the violations would not lie in the breaches *per se*, but in an alleged subsequent intention of the State to fail to comply. However, even under this reformulation, the factual basis remains intact: non-payment and energy constraints. The story changes in form, but not in substance. This is confirmed by Claimants themselves when they state that post-Act measures included aggressive actions such as "energy curtailments" and "retained payments."[13] The terminology may vary, but the facts are essentially the same.

18. *Second*, the numbers do not lie. Compass Lexecon's own damages breakdown and methodology confirm that the alleged damages from unpaid bills and energy curtailments represent a significant portion of the total claimed. To begin with, the damages analysis consists of two main elements:[14]

a. Historical losses as of 30 April 2022 (Valuation Date).

b. Fair Market Value ("**FMV**") of Pacific Solar as of 30 April 2022, in the absence of the claimed measures.

19. On the one hand, Claimants' experts confirm that the historical losses are comprised of "past due invoices and unpaid interest" for both (i) Pacific Solar's energy and capacity, and (ii) energy injection limitations.[15] This alone fully confirms that the legal bases for damages are the two violations that Honduras has indicated.

[12] First Expert Report of Miguel A. Nakhle (Compass Lexecon) ("**Nakhle Report**") (20 September 2024) (**CER-01**), ¶ 63 ("ENEE's failure to make timely and complete payments to Pacific Solar.").

[13] Counter-Memorial on Jurisdictional Objections ("**Counter-Memorial on Jurisdiction**") (5 May 2025), ¶¶ 235 and 236 ("Honduras is not paying the remuneration to which Pacific Solar is entitled for the energy and capacity that the Plant delivered. Honduras has also curtailed the Plant's energy dispatch without providing proper compensation in breach of the PPA.").

[14] Nakhle Report (**CER-01**), ¶ 53.

[15] *Ibid.*, ¶ 53.

20. Moreover, as to Pacific Solar's FMV, the damages calculated correspond to a completely hypothetical scenario, *i.e.* the expropriation of the company by the State.[16] Honduras has already raised its legal arguments on this point.[17] This part of the quantification is therefore irrelevant for the purposes of the objections discussed in this section. In any event, this calculation is also modelled on a discounted cash flow ("**DCF**"), which is based on projections of future generations from the plant, i.e. on the same payments agreed in the PPA that gave rise to the two breaches at the heart of the claim.[18]

21. *Third*, Claimants cannot disassociate themselves from these facts—payments and curtailments—without waiving, at the same time, the corresponding portion of the damages claimed. According to Claimants, "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."[19] However, this assertion is unsustainable. Claimants cannot claim that these facts do not constitute Treaty breaches and, at the same time, claim them as a basis for the economic injury suffered. If it is not these facts that "trigger" the alleged breach, then they should not form part of the subject matter of the litigation and should not give rise to a right to compensation.

22. What Claimants seek is to have the best of both worlds: to include these facts in their damages calculation, but to exclude them from the analysis of statutes of limitations and contractual claims. The Tribunal should not allow this double game. Either the non-payments and curtailments are at the heart of the dispute—in which case they must be considered for purposes of Article 10.18.1 and the analysis of the contractual nature of the claims—or they are irrelevant—in which case they must also be excluded from the analysis of the merits of the dispute. In other words, if the only relevant violations are those arising under Decree 46-2022, Claimants should withdraw their claims for all events occurring before August 2020. But they have not done so. A meaning must be given to this.

[16] *Ibid.*, ¶ 55.

[17] Summary of Jurisdictional Objections and Request for Bifurcation ("**Bifurcation Request**") (21 October 2024), §II.C.

[18] Nakhle Report (**CER-01**), § V.3.

[19] Counter-Memorial on Jurisdiction, ¶ 232.

23. *Fourth*, Claimants fail to make a substantive rebuttal to Honduras arguments in relation to the Treaty's umbrella clause claims, both against the *ratione temporis* objection and the contractual objection, which only confirms them. By way of context, it should be borne in mind that umbrella clause claims are, by definition, contractual claims that can be raised to the level of the Treaty. This is not in dispute.

24. In response to the objection *ratione temporis*, Honduras argued that, as umbrella clause claims are contractual, the relevant time for assessing them is when the respective breaches occurred, i.e. the Essential Claims.[20] Instead of responding to the merits of the argument, Claimants merely assert that the umbrella clause was breached by the measures subsequent to Decree 46-2022.[21] However, this does not answer the main question: whether, as contractual claims, the relevant facts for assessing them are the breaches of the PPA, not the adoption of legislative measures of general application.

25. In the face of the contractual objection, it would be irrational to hold at the same time that there are claims under an umbrella clause, i.e. that they are contractual; but that these are not contractual, rather they are under the treaty. Indeed, this is the purpose of an umbrella clause: to elevate to the international level a State's failure to comply with its contractual commitments. Now, Honduras has already observed that the Treaty does not have an umbrella clause, a premise that Claimants do not dispute, and that it cannot be imported from other treaties. Claimants are silent on this point. The Tribunal, however, must bear in mind that a decision on the umbrella clause objection must have repercussions here.

26. In other words, by relying on non-existent umbrella clauses, Claimants tacitly acknowledge that these claims are contractual. The viability of their argument depends on the Tribunal endorsing the use of an MFN clause to import more favourable procedural terms from other treaties. If this argument does not prevail, there is no doubt that Claimants' respective claims will lack a legal basis to invoke the Treaty and must be dismissed.

[20] *Ibid*., ¶¶ 130-136.

[21] *Ibid*., ¶ 237.

B. Summary of Honduras' Jurisdictional Objections

27. This Reply raises several serious objections, which justify the dismissal of all of Claimants' claims as being outside the Tribunal's jurisdiction or properly inadmissible. Although all of Honduras objections can, and should, be fully accepted, the Republic does not take a fixed position and defers to the Tribunal's best judgment as to the order in which each objection should be addressed in its award on jurisdiction and invites the Tribunal to exercise such discretion in the interest of best serving procedural efficiency and economy.

28. The Republic of Honduras' jurisdictional and/or admissibility objections were set out in its Request for Bifurcation and Summary of Jurisdictional Objections, as well as in its Memorial on Jurisdiction. In this submission, these objections have been organized into three sections.

29. **Section III** presents the six objections to the Tribunal's jurisdiction.

30. *First,* **Section III.A** explains that Honduras validly conditioned its consent to the prior exhaustion of domestic remedies before the commencement of international arbitration under the ICSID Convention through its ratifying legislation, Legislative Decree 41-88. Contrary to Claimants' contention, Article 26 of the ICSID Convention imposes no formality requirements on the manner in which the State's will must be manifested. Nor would the exhaustion of local remedies be inconsistent with CAFTA-DR. Likewise, Claimants could not invoke the doctrine of estoppel given that the Republic has not demonstrated any repeated and relevant conduct that would lead to the conclusion that it has waived its rights. And exhaustion of remedies would not be a futile exercise because Claimants have presented a distorted picture of the Honduran judiciary that should not be associated with reality, especially when they never initiated any administrative or judicial action aimed at resolving the present dispute.

31. *Second*, **Section III.B** explains that Claimants still fail to demonstrate ownership and control of their alleged investment, as the new documentation submitted by them is insufficient and unreliable. In any event, Claimants' own evidence confirms that Pacific Solar and its shareholders are not the owners of the investment as they assigned all of Pacific Solar's shares, as well as its assets and rights over the Nacaome I Plant to a Honduran bank through the constitution of trusts. In addition, Pacific Solar and its shareholders would have ceased to be the beneficiaries

of the alleged investment, *i.e.* the Nacaome I Plant, since the trusts are intended to benefit Pacific Solar's financiers, until the full discharge of their debt obligations and the dissolution of the trusts, which has not occurred.

32. *Third*, **Section III.C** demonstrates that the Tribunal lacks jurisdiction *ratione voluntatis* to hear Claimants' claims under the CAFTA-DR's most favored nation ("**MFN**") clause. First, the application of the MFN clause should be excluded from the present arbitration given that the subject matter of the dispute relates to government procurement, pursuant to Article 10.13(5) of the CAFTA-DR. Claimants submit a bad faith misinterpretation of Article 10.13(5) that does not stand up to any reasonable exercise of interpretation, especially under the precepts of the Vienna Convention on the Law of Treaties ("**VCLT**"). Second, the MFN clause does not permit the importation of new substantive standards of protection. The clause refers to a possible better treatment of existing rights under the CAFTA-DR, not a blank check to allow the creation of entirely new rights.

33. *Fourth*, **Section III.D** explains why Claimants cannot demonstrate that the dispute arises out of an investment agreement, so the Tribunal lacks jurisdiction *ratione materiae.* The PPA, Aval Solidario and Operations Agreement are not investment agreements under the CAFTA-DR, given that (i) they were not entered into with a national authority, (ii) they were not executed between a Honduran national authority and an investment or investor, and (iii) they do not grant rights over natural resources controlled by national authorities.

34. *Fifth*, **Section III.E**, in accordance with Procedural Order No. 4,[22] explains that CAFTA-DR does not grant the Tribunal jurisdiction to decide contractual claims. A contractual breach does not, by itself, constitute a violation of the Treaty.[23]

35. *Sixth*, **Section III.F** demonstrates that Claimants' claims are time-barred, and therefore the Tribunal lacks jurisdiction *ratione temporis.* Claimants' main claims, such as the non-payment of invoices and energy curtailments, concern actions that began well before the period alleged by Claimants. Claimants themselves concede that the statute of limitations under

[22] Procedural Order No. 4 (4 April 2025) ("**Procedural Order No. 4**"), ¶ 52.

[23] United States-Central America-Dominican Republic Free Trade Agreement ("**CAFTA-DR**") (5 August 2004) (**CL-001**), art. 10.16(1).

the CAFTA-DR runs from the time the alleged injury first occurred or should have been known to them.[24] Claimants now attempt to argue that the pre-2022 acts are a form of context for their claim, yet it is clear that Honduras acts prior to 2022 are not mere background, but the essential facts of the violations claimed by Claimants and the beginning of their damages calculation.

36. In **Section IV**, pursuant to Procedural Order No. 4,[25] the Republic addresses the reasons why the Tribunal should bifurcate the additional objections that were raised in the Republic of Honduras' Memorial on Jurisdiction.

37. Based on these objections, the Republic submits its Request for Relief in **Section V**. In addition to the total dismissal of Claimants' claims, Honduras respectfully requests that it be compensated for all costs it has incurred in the present arbitration, with interest.

II. THE PAIZ HAVE FAILED TO SATISFY THEIR BURDEN OF PROOF AT THE JURISDICTIONAL STAGE.

38. It is undisputed that, given that investor-State arbitration tribunals are *ad hoc bodies* appointed by the parties to a particular dispute and limited in their powers, the Claimant has the burden of proving that the Tribunal has jurisdiction to hear its claims.[26] A claimant's burden of proving the facts supporting jurisdiction is particularly applicable where there is a dispute as to the jurisdiction of that tribunal.

39. In this case, the Paízes had the opportunity and, more importantly, the burden, in their Request for Arbitration and Counter-Memorial on Jurisdiction, to demonstrate the basis for the Tribunal's jurisdiction. They have not done so. Aware that the necessary facts do not exist and cannot be proved, Claimants merely assert general notions tending to prove jurisdiction or include flawed evidence.

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[24] Counter-Memorial on Jurisdiction, ¶ 207.

[25] Procedural Order No. 4, ¶ 55(A).

[26] *Capital Financial Holdings Luxembourg SA v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award (22 June 2017) (**RL-174**), ¶¶ 135-138 (noting that the party bringing a claim has the burden of proof, and the claimant must establish the facts on which it relies to establish jurisdiction). *See also Perenco Ecuador LTD v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PETROECUADOR)*, ICSID Case No. ARB/08/6, Decision on Jurisdiction (30 June 2011) (**RL-159**), ¶ 98 (noting that the claimant has the burden of proof to establish the facts supporting its claim of standing).

40. The tribunal in *PSEG Global* recognized that blind acceptance of the facts alleged by a claimant would be inappropriate at the jurisdictional stage with respect to the facts relevant to jurisdiction:

> If [...] the parties have views which are so different about the facts and the meaning of the dispute, it would not be appropriate for the Tribunal to rely only on the assumption that the facts as presented by Claimants are correct. The Tribunal necessarily has to examine the facts in a broader perspective, including the views expressed by the Respondent, so as to reach a jurisdictional determination, keeping of course separate the need to prove the facts as a matter pertaining to the merits.[27]

41. Rather, a claimant has the burden at the jurisdictional stage of actually proving the facts necessary to support the tribunal's exercise of jurisdiction. As the *Phoenix Action case* stated:

> In the Tribunal's view, it cannot take all the facts as alleged by the Claimant as conceded facts, as it should do according to the Claimant, but must look into the role these facts play either at the jurisdictional level or at the merits level, as asserted by the Respondent.[28]

42. Similarly, the tribunal in *Pan American Energy v. Argentina found* that: *"[I*]n the case of *Pan American Energy v. Argentina* found that: "[I]f everything were to depend on characterizations made by a claimant alone, the inquiry to jurisdiction and competence would be reduced to naught, and tribunals would be bereft of the *compétence de la compétence* enjoyed by them [...]."[29]

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[27] *PSEG Global Inc. et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction (4 June 2004) (**CL-216**), ¶¶ 64-65.

[28] *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009) (**RL-076**), ¶ 60; *See also United Parcel Service of America v. Government of Canada*, UNCITRAL, Award on Jurisdiction (22 November 2002) (**RL-130**), ¶ 34 ("[C]laimant party's mere assertion that a dispute is within the Tribunal's jurisdiction is not conclusive. It is the Tribunal that must decide.").

[29] *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (27 July 2006) (**RL-142**), ¶ 50 (emphasis in original).

43. With respect to the facts relating to jurisdiction, the *Phoenix Action* the tribunal determined that it was obliged to take a position as to the existence and significance of those alleged facts in assessing jurisdiction:

> If [...] the alleged facts are facts on which the jurisdiction of the tribunal rests, it seems evident that the tribunal has to decide on those facts, if contested between the parties, and cannot accept the facts as alleged by the claimant. The tribunal must take into account the facts and their interpretation as alleged by the claimant, as well as the facts and their interpretation as alleged by the respondent, and take a decision on their existence and proper interpretation.[30]

44. This "two-pronged approach" to the demonstration of relevant facts has been adopted by other investment arbitration tribunals.[31] In *SGS Société Générale de Surveillance S.A. v. Paraguay*, the tribunal noted:

> The Tribunal's approach here is also consistent in this particular respect with that in Phoenix Action v. Czech Republic, where the tribunal concurred with the respondent that in addition to alleging sufficient facts to support one or more claims on the merits, "the claimant must prove the facts necessary for the establishment of jurisdiction." The Phoenix tribunal went on to endorse this "double approach" to facts relevant to the merits and facts relevant to jurisdiction. As to the former, the tribunal stated that "they have indeed to be accepted as such at the jurisdictional stage, until their existence is ascertained or not at the merits level". However, as to the latter, a different approach is required: "On the contrary, if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage."[32]

45. Accordingly, the Paízes have the burden of producing evidence that is convincingly and reasonably alleged. The *Ampal-American* tribunal concluded that the burden of proof is not

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[30] *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009) (**RL-076**), ¶ 63.

[31] *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Final Award (25 October 2022) (**RL-183**), ¶ 354; *Alverley Investments Limited & Germen Properties Ltd. v. Romania*, ICSID Case No. ARB/18/30, Award (16 March 2022) (**RL-181**), ¶ 363; *Consutel Group S.p.A. in liquidazione v. People's Democratic Republic of Algeria*, PCA Case No. 2017-33, Final Award (3 February 2020) (**CL-232**), ¶ 314; *Tidewater Investment SRL & Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award (13 March 2015) (**RL-168**), ¶ 84; *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility (14 June 2013) (**RL-162**), ¶ 150.

[32] *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction (12 February 2010) (**CL-065**), ¶ 57.

necessarily satisfied simply by the production of evidence, but that: "a party having the burden of proof must not only bring evidence in support of his allegations, **but must also convince the tribunal of their truth, lest they be disregarded for want, or insufficiency of proof**."[33]

46. This section is particularly relevant to Honduras' jurisdictional objections that the claims are time-barred and that it is purely contractual, so that the Tribunal lacks jurisdiction *ratione temporis* and *ratione voluntatis*.[34]

47. Claimants' position on the two objections starts from an untenable premise in relation to the assessment of the relevant facts. According to Claimants, it is the complaining party that defines when a limitation period starts to run and whether the claims it raises are contractual or non-contractual, according to its factual account. Claimants take this logic to its logical extreme by asserting that the existence of the alleged breach must be assessed "based on how they themselves present their case."[35] This formulation reveals the circular and self-referential nature of their argument: the investor controls the factual narrative, when the breach and the alleged damages became known, as well as the nature of the claims.

48. The Republic is aware that, in Procedural Order No. 4, the Tribunal stated that:

> Further, while the qualification of the alleged facts appears to also be a factual issue which may be intertwined with the merits, the Tribunal considers, on a preliminary basis, that there is a possibility that it will prove unnecessary to make an actual factual finding in this respect if (always without prejudice to their right to bring further arguments) the Parties address Additional Objection 1 based **on the assumption that the facts alleged by Claimants as constituting violations of the Treaty are established**.[36]

49. However, Honduras considers it relevant to make some clarifications to complement its position expressed in the Memorial on Jurisdiction and in the preceding

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[33] *Ampal-American Israel Corp, et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction (1 February 2016) (**RL-171**), ¶ 219 (emphasis added).

[34] *See infra* §§ III.E, III.F.

[35] Counter-Memorial on Jurisdiction, ¶ 211 ("The breach alleged by Claimants is determined by Claimants' characterization of its claims.").

[36] Procedural Order No. 4, ¶ 38 (emphasis added).

paragraphs. The Tribunal must "discern the reality of the case" and not take for granted all the facts on which Claimants base their case.[37]

50. In *Pac Rim v. El Salvador*, the case that Claimants cite in support of their position, the tribunal does not say that the facts alleged by the claimant must be taken as true; what it states is that it is impermissible to base its jurisdiction on assumed facts and that the application of the standard of accepting facts as *prima facie* true does not apply to factual issues on which the tribunal's jurisdiction depends, including *ratione temporis* objections:

> [T]he Tribunal considers that it is impermissible for the Tribunal to find its jurisdiction on any of the Claimant's CAFTA claims on the basis of an assumed fact (*i.e.* alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent). **The application of that "*prima facie*" or other like standard is limited to testing the merits of a claimant's case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal's jurisdiction directly depends, such as** the Abuse of Process, **Ratione Temporis** and Denial of Benefits issues in this case. In the context of factual issues which are common to both jurisdictional issues and the merits, there could be, of course, no difficulty in joining the same factual issues to the merits. That, however, is not the situation here, where a factual issue relevant only to jurisdiction and not to the merits requires more than a decision pro tempore by a tribunal.[38]

51. It is clear that Claimants have not only taken the decisions they cite out of context, but that they are completely mistaken as to the legal rule that has been raised by the tribunals in question.[39] In other words, there is no rule that obliges the Tribunal to take as true all the facts and allegations submitted by Claimants, without making an objective and independent assessment of them.

52. On this point, Honduras' position is that, even if the Tribunal were to conclude that the **truth** of the facts alleged by Claimants must be taken as proven, what cannot be left to Claimants is (i) the decision as to which facts form the basis of the claim; (ii) the decision as to

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[37] *Ibid*., note 48.

[38] *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections (1 June 2012) (**RL-085**), ¶ 2.8 (emphasis added).

[39] Counter-Memorial on Jurisdiction, ¶ 195.

which facts are or are not relevant to determine the Tribunal's jurisdiction *ratione temporis*; and (iii) the legal qualification of the claims, as allegations under the treaty or purely contractual. In other words, it is the Tribunal, in exercise of the principle of *kompetenz-kompetenz*,[40] who has the power to decide these questions. Claimants do not have the power to control them unilaterally and at their discretion. They must result from a rigorous, independent and objective analysis by the Tribunal.

53. As we will continue to demonstrate, the Paízes have failed to prove the facts necessary to establish the Tribunal's jurisdiction. The Tribunal has a duty to examine and resolve all factual issues relevant to jurisdiction in order to be in a position to rule on jurisdiction. In a bifurcated proceeding such as the present one, the Tribunal should not defer consideration of those issues to a later substantive stage.

III. THE TRIBUNAL LACKS JURISDICTION TO HEAR THE DISPUTE AND CLAIMANTS' CLAIMS ARE IN ANY EVENT INADMISSIBLE.

A. The Republic of Honduras conditioned its consent to ICSID arbitration on the exhaustion of local remedies.

54. As the Republic of Honduras explained in its Memorial on Jurisdictional Objections, ICSID lacks jurisdiction in the present case, since the Republic of Honduras conditioned its consent to arbitration on the prior exhaustion of local remedies by the investors, and Claimants failed to comply with this jurisdictional condition.

55. In their Counter-Memorial, Claimants deny that the Republic of Honduras conditioned its consent to arbitration on the exhaustion of local remedies. They argue in this regard that: (i) Article 26 of the Convention would peremptorily require that such condition be contained

[40] *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 October 2011) (**RL-016**), ¶ 11 ("It is well established that the Tribunal has the competence to decide upon challenges to its jurisdiction. If it finds that it has jurisdiction, the position is unproblematic. If it finds that it lacks jurisdiction, a pedant might object that it had no right to determine even that question; but the Law has chosen to side with pragmatism rather than pedantry and *Kompetenz-Kompetenz* is a firmly established principle, adopted in Article 41(1) of the ICSID Convention. The Tribunal proceeds accordingly."); *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Interim Resolution on Issues Arising under the Settlement Agreement (19 December 2014) (**RL-166**), ¶ 26 ("the principle of *compétence-compétence*—described by the Claimant during the hearing as 'the fundamental concept of *kompetenz-kompetenz*'—is one of the most widely accepted general principle in international arbitration."); *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction (5 October 2007) (**RL-144**), ¶ 35.

in the same instrument by which the State consents to ICSID arbitration and because Legislative Decree 41-88 would not constitute—nor could constitute—a condition to the Republic of Honduras' consent to ICSID arbitration, as it would be a purely unilateral declaration; (ii) the requirement of exhaustion of local remedies would be incompatible with CAFTA-DR; (iii) the Republic of Honduras would be precluded under the doctrine of *estoppel* from requiring the exhaustion of local remedies as a condition to ICSID consent, since it would have acted in alleged contradiction with its conduct in other arbitrations; and (iv) even if Honduras had conditioned the arbitration on the exhaustion of local remedies, compliance with such requirement would be futile.

56. As we shall see below, Claimants' position defies the clear and precise terms of Article 26 of the Convention, Legislative Decree 41-88 ("**DL 41-88**") and CAFTA-DR. *First*, Article 26 of the ICSID Convention does not require that the exhaustion of local remedies condition be contained in a single, indivisible instrument of consent (**Subsection 1**). *Second*, the Republic of Honduras validly conditioned its consent to ICSID arbitration by Legislative Decree 41-88, the instrument by which it approved and ratified the ICSID Convention, and the terms of which Claimants accepted by instituting the present arbitration (**Subsection 2**). *Third*, the requirement to exhaust local remedies is consistent with the CAFTA-DR (**Subsection 3**). *Fourth*, the doctrine of *estoppel* is not applicable to the present case, nor does it preclude the Republic of Honduras from requiring exhaustion of local remedies as a condition of consent to ICSID (**Subsection 4**). *Finally*, exhaustion of local remedies is not a sterile requirement as Claimants allege (**Subsection 5**). The Republic of Honduras elaborates on each of these arguments below.

1. Article 26 of the ICSID Convention does not require that the exhaustion of local remedies condition be contained in a single, indivisible instrument of consent.

57. As Honduras demonstrated in its Memorial on Jurisdictional Objections,[41] Article 26 of the ICSID Convention allows Contracting States to require investors to exhaust local remedies as a condition precedent to initiating arbitration against them. In exercise of this

[41] Memorial on Jurisdiction, ¶ 76-77.

prerogative, Honduras conditioned its consent to ICSID arbitration by DL 41-88, through which Honduras approved and enacted the ICSID Convention.[42]

58. Claimants seek to controvert this fact, arguing that Honduras should have exercised the prerogative of article 26 by incorporating the requirement of exhaustion of local remedies in the instrument of consent.[43] In their opinion, article 26 would not admit such a requirement by means of—what they qualify in reference to DL 41-88—as a merely unilateral declaration,[44] which would not have been accepted by them nor would it form part of the terms of the arbitral consent.

59. However, as we shall see, neither the literal wording of Article 26, interpreted in accordance with the rules set out in the VCLT,[45] nor the doctrine, case law and precedents referred to by Claimants in their Counter-Memorial on Jurisdiction support their position.

60. *First*, Claimants contend that the main purpose of Article 26 would have been—specifically—to restrict the application of the traditional international law requirement of exhaustion of local remedies, by way of requiring that such a condition must necessarily be contained in the same instrument in which the State expresses its consent to arbitration, without recourse to any other source.[46]

61. Claimants' position openly defies the general rule of interpretation provided for in Article 31 of the VCLT.[47] A reading of the terms of Article 26, interpreted in good faith and in their context, and taking into account its object and purpose, suffices to show that the Convention

[42] Republic of Honduras, Decree on the ICSID Convention (Decree 41-88) (**R-003**), art. 75. *See also* Agreement No. 1-DTTL-86, approving the ICSID Convention (23 May 1986) (**R-070**).

[43] Counter-Memorial on Jurisdiction ¶ 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.").

[44] *Ibid*., ¶ 19 ("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.").

[45] Technically, the VCLT does not apply to the ICSID Convention since, in accordance with article 4 of the VCLT, the VCLT applies to treaties concluded after its entry into force. The VCLT entered into force in 1980, whereas the ICSID Convention dates from 1966. Nevertheless, many of the provisions of the VCLT are considered international custom. Furthermore, Claimants acknowledge the applicability of the VCLT in their submission.

[46] Counter-Memorial on Jurisdiction, ¶ 17.

[47] United Nations General Assembly, Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27, 1155 U.N.T.S. 331 ("**VCLT**") (23 May 1969) (**CL-133**), art. 31.

does not provide for any formality for States to exercise the prerogative recognized in that provision.[48] At best, all that is required is for the receiving State to express its willingness to require exhaustion of local remedies in writing, as might be concluded from the provisions of Article 25(1) of the Convention.[49] It is clear that this requirement is fully satisfied in this case.

62. *Second*, Claimants contend—with reference to the Report of the Executive Directors on the ICSID Convention—that Article 26 of the Convention would reverse the traditional rule of international law, to the effect that local remedies are presumed not to be exhausted unless otherwise stated.[50]

63. On this point, it goes without saying that the Republic of Honduras has never denied this circumstance. But it does not follow—in any way—that States should use a certain sacramental formula to express their will in order to preserve, as the same Report of the Executive Directors acknowledges and allows the traditional rule of international law and "[require] the prior exhaustion of other remedies."[51]

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[48] By contrast, Article 26 of the ICSID Convention is clear in stating that: "Unless otherwise stipulated, the consent of the parties to arbitration under this Convention shall be deemed to be consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the prior exhaustion of its administrative or judicial remedies as a condition of its consent to arbitration under this Convention". *See* International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulations and Rules*, ICSID Doc. No. ICSID/15/3 (2022) ("**ICSID Convention and Rules**") (**RL-048**), Convention, art. 26. p. 12.

[49] It is generally accepted that parties may consent to ICSID arbitration by means of separate or even unilateral instruments, as long as such consent is in writing. *See* S. Schill *et al*., "Article 25" in *Schreuer's Commentary on the ICSID Convention* (2022) (**RL-107**), pp. 348, 353 ("The Convention's only formal requirement for consent is that it must be in writing. […] The possibility that a host State might express its consent to the Centre's jurisdiction through a provision in its national legislation, or through some other form of unilateral declaration, was discussed repeatedly during the Convention's preparation. In Counter-Memorial to several questions, Mr. Broches pointed out that unilateral acceptance of the Centre's jurisdiction constituted an offer that could be accepted by a foreign investor and so become binding on both parties (History, Vol. II, pp. 274-275)."). *See also*, 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* (18 March 1965) (**CL-205**), ¶¶ 23-24 ("Consent of the parties is the cornerstone of the jurisdiction of the Centre. Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally (Article 25(1)). [...] Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, 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.").

[50] Counter-Memorial on Jurisdiction, ¶ 20.

[51] 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* (18 March 1965) (**CL-205**), ¶ 32 ("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

64. *Third*, Claimants refer to what was expressed by Mr. Broches, the first Secretary-General of ICSID, during the negotiation and formulation of the Convention. According to Claimants, Mr. Broches would have confirmed that any exhaustion requirement under Article 26 had to be expressed in the applicable arbitration agreement.[52] This is also untrue.

65. Contrary to Claimants' position, Mr. Broches not only made clear that the Convention did not express any view on the desirability or undesirability of States requiring exhaustion of local remedies, but also expressly mentions the possibility that the intention to require such exhaustion could be included in a **unilateral provision of their domestic law**. Mr. Broches argued:

> Mr. Broches (Chairman) reiterated that the Convention did not express any view with regard to the desirability or undesirability of exhausting local remedies. All the Convention said was that, where there was consent to submit a dispute to the Centre, this would mean that the exhaustion of local remedies has been waived. It, e.g. clarified that **where a State included a unilateral provision in the legislation** for encouraging investments that investment agreements would be subject to international arbitration, such a provision would be taken to exclude local remedies **unless a contrary intention was expressed**.[53]

66. *Fourth*, Claimants argue that the *travaux préparatoires* of the ICSID Convention do not evince the intent of its drafters to allow Contracting States to require exhaustion of local remedies by "merely expressing such an intention."[54] Claimants thus seek to create the impression that the Republic of Honduras would be attempting to impose this requirement simply because that would be its will, without any additional support or manifestation. This, however, does not relate at all to the reality of the facts.

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in the first sentence of Article 26. The same paragraph quoted by Claimants makes clear in the second sentence of Article 26 that "[i]n 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.") (emphasis added).

[52] Counter-Memorial on Jurisdiction, ¶ 21. *See also, ibid.* note 65.

[53] History of the ICSID Convention, Vol. II-2 (1968) (**RL-056**), pp. 756-757 (emphasis added).

[54] Counter-Memorial on Jurisdiction, ¶ 22.

67. In this case, the Republic of Honduras established the referred requirement in DL 41-88, which is—no more and no less—the legislation that approved and put into force the ICSID Convention in Honduras. Moreover, the preparatory work itself expressly envisaged the possibility for States to express such intention in a unilateral provision of their domestic law,[55] which—naturally—will be integrated into any consent that such State may subsequently grant.

68. *Fifth*, Claimants also attempt (unsuccessfully) to discredit the *Lanco v. Argentina* precedent, in which the tribunal recognized that, under Article 26 of the Convention, Contracting States may require the exhaustion of local remedies as a condition precedent to their consent to ICSID arbitration through bilateral investment agreements, domestic legislation, or investment agreements with ICSID arbitration clauses.[56] According to Claimants, the reference to domestic law in *Lanco v. Argentina* refers only to domestic laws containing the State's consent to submit future disputes to ICSID arbitration and, therefore, Legislative Decree 41-88 would be excluded from that characterization.[57] However, this does not—in any way—emerge from the tribunal's considerations.

69. *Finally*, Claimants unsuccessfully attempt to refute the statements of the then ICSID Secretary-General, Mr. Shihata, who held that one of the ways to require exhaustion of local remedies under Article 26 is through a declaration made by the State at the time of signing or ratifying the ICSID Convention, as Honduras did.[58] Claimants argue in this regard that Mr. Shihata's use of the tentative phrase "*might result*" and his clarification that this approach was only undertaken by a single State would demonstrate that Mr. Shihata did not have a strong position on this issue.[59] Acknowledging the weakness of their position, Claimants then argue that,

[55] History of the ICSID Convention, Vol. II-2 (1968) (**RL-056**), pp. 756-757 ("Mr. Broches (Chairman) reiterated that the Convention did not express any view with regard to the desirability or undesirability of exhausting local remedies. All the Convention said was that where there was consent to submit a dispute to the Centre, this would mean that the exhaustion of local remedies has been waived. It, e.g. clarified that where a State included a unilateral provision in the legislation for encouraging investments that investment agreements would be subject to international arbitration, such a provision would be taken to exclude local remedies **unless a contrary intention was expressed**.") (emphasis added).

[56] Counter-Memorial on Jurisdiction, ¶ 24.

[57] *Ibid*.

[58] *Ibid*., ¶ 25.

[59] *Ibid*.

in any event, the former ICSID Secretary's editorial is neither a source of law nor persuasive evidence.[60]

70. The inappropriateness of these arguments is self-evident. Mr. Shihata, Secretary-General of ICSID, argued on that occasion rather the opposite. A simple reading of the editorial cited by Claimants makes it clear that Mr. Shihata acknowledges the possibility for Contracting States to establish the condition of exhaustion of local remedies in the instrument of ratification of the Convention. The fact that—at the time—only one signatory State opted for this option in no way renders this possibility inoperative. According to the then Secretary-General of ICSID:

> Another 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 provision of Article 26 and will require, as a condition of its consent to ICSID arbitration, the exhaustion of local remedies. It should be added, however, that among 97 Contracting States, only one [...] has made such a declaration and moreover has subsequently withdrawn it [...].[61]

71. Finally, the tribunal in *Prospera v. Honduras* in assessing the arguments previously made, acknowledged that:

> The Tribunal is inclined to concur with Honduras. **Article 26 of the Convention provides that "[a] Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention," without specifying the method of implementation**.[62]

72. In light of the foregoing, Claimants' interpretation of Article 26 of the Convention as requiring that the condition of exhaustion of local remedies must necessarily be included in the

[60] *Ibid*.

[61] I. Shihata, "Towards A Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA" (1992) (**RL-057**), p. 14. *See also* C. F. Amerasinghe, "Basis of the Rule" in *Local Remedies in International Law* (2004) (**RL-006**), p. 58 ("[...] the rule results mainly from recognition of the respondent state's sovereignty in what is basically an international dispute."); M.C. Porterfield, "Exhaustion of Local Remedies in Investor-State Dispute Settlement: an idea whose time has come?" 41 *The Yale Journal of International Law Online* (Fall 2015) (**RL-028**), p. 5 ("The central function of the local remedies rule is to protect the sphere of sovereignty that States are entitled to under international law.").

[62] *Honduras Próspera et al. v. Republic of Honduras*, ICSID Case No. ARB/23/2, Decision on Preliminary Objections under Article 10.20.5 of DR-CAFTA (26 February 2025) (**CL-201**), ¶ 102.

same instrument in which the State expresses its consent to arbitration is contrary to the ordinary meaning of the terms of the treaty and seeks to introduce a requirement that does not arise from the text of the rule or from its context, object and purpose.

2. The Republic of Honduras validly conditioned its consent to ICSID arbitration by means of Legislative Decree 41-88.

73. As demonstrated in the Memorial on Jurisdictional Objections, the Republic of Honduras validly conditioned its consent to ICSID arbitration when it approved and promulgated the Convention through Legislative Decree 41-88, thus exercising its prerogative under Article 26 of the Convention.

74. Claimants' central defense in their Counter-Memorial on Jurisdiction is that Legislative Decree 41-88 would not form part of the arbitral consent and, therefore, could not represent the means of exercising the prerogative provided for in Article 26 of the Convention.[63] According to Claimants, Legislative Decree 41-88 would be nothing more than a declaration whose sole purpose is to announce or anticipate the possibility that, in the future, Honduras would require the exhaustion of local remedies as a prerequisite to ICSID arbitration.[64] In addition, they argue that, by raising this jurisdictional objection, Honduras would be contradicting its own conduct in previous arbitrations in which the exception would not have been exercised.[65]

75. As we will see, the foregoing is nothing more than a crude attempt by Claimants to disregard, on the basis of tendentious and ill-conceived arguments, the sovereign will of Honduras clearly expressed in Legislative Decree 41-88. Nothing in Claimants' submissions can controvert the fundamental importance of Legislative Decree 41-88. *Let us see*:

76. *First*, the Republic of Honduras has never maintained that the act of ratification of the ICSID Convention was in itself sufficient to constitute consent to arbitration before this forum. Of course, a further manifestation of consent by the disputing parties is necessary.[66] The point is that DL 41-88, being the legislation approving the ICSID Convention in Honduras, its terms and

[63] Counter-Memorial on Jurisdiction, ¶ 28.

[64] *Ibid*., ¶ 30.

[65] *Ibid*., ¶ 32.

[66] *See* ICSID Convention and Rules (**RL-048**), Convention, Art. 25, p. 11.

conditions are naturally applicable to all arbitration agreements referring to ICSID and involving the Republic of Honduras, whatever the instrument of consent, including—of course—CAFTA-DR.[67]

77. Thus, as much as Claimants may seek to deny it, it is not possible to separate the ICSID Convention from the instrument by which the Republic of Honduras approved and put it into force.[68] Without Legislative Decree 41-88 and the exhaustion condition, there would simply be no consent by the Republic of Honduras to ICSID arbitration.

78. *Second*, Claimants have no way to justify their disregard of Legislative Decree 41-88 and the condition to Honduras consent that it comprises. This is because the instrument of ratification of the ICSID Convention was public information and freely accessible, for as long as the Republic of Honduras was a party to ICSID.[69] In addition, ICSID took note and informed the public of the measures adopted by the Contracting States concerning the Convention. This is recorded in the document issued by ICSID entitled "Contracting States and Measures Adopted by Them for the Purposes of the Convention," making express reference—again—to Legislative Decree 41-88.[70]

	Décret No. 409/PRG du 28 sept. 1968 promulgant une loi de l'Assemblée Nationale portant ratification par la République de Guinée de la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats.
Honduras	Decreto No. 41-88. (Off. Gaz. August 4, 1988)

79. *Third*, Claimants' interpretation of Legislative Decree 41-88—that is, to consider it merely as a prospective statement that only anticipates an eventual conditioning of Honduras'

[67] Memorial on Jurisdiction, ¶ 85.

[68] Claimants dispute that Legislative Decree 41-88 reproduces Agreement No. 8-DTTL and the ICSID Convention, and that the exhaustion condition has been included among Article 75 and the list of ICSID signatory States. As can be seen, Claimants resort to purely aesthetic arguments to disregard the relevance of Legislative Decree 41-88. *See* Counter-Memorial on Jurisdiction, ¶ 28.

[69] One need only check the ICSID website to note that, in the window relating to the Member States of the Convention, express reference was made to Legislative Decree 41-88. *See* List of Contracting States and Other Signatories to the ICSID Convention (ICSID/3) (3 September 2021) (**R-075**).

[70] Contracting States and Measures Taken by Them in Relation to the ICSID Convention (ICSID/8) (28 October 2022) (**R-076**), p. 24.

consent—not only contradicts the clear and manifest meaning of the Decree,[71] but is also contrary to the *principle of effectiveness* or principle of *effet utile* in international law, since it would deprive that provision and the second part of Article 26 of the ICSID Convention of any practical effect.

80. As is well known, the purpose of the principle of effectiveness is to interpret international acts in a useful and not illusory manner, with a view to giving practical effect to the original intention of States.[72] In the field of treaty interpretation, this principle is reflected in Article 31(1) of the Vienna Convention on the Law of Treaties by referring to "ordinary meaning" and "object and purpose" as basic elements of interpretation,[73] according to the annual reports of the United Nations International Law Commission ("**ILC**").[74-75] Likewise, the principle of

[71] Contrary to Claimants' assertion, the letter of Legislative Decree 41-88 leaves no room for doubt. The inclusion of the expression "shall exhaust" clearly reveals the mandatory nature of the exhaustion condition. No exercise in linguistic dissection—such as that attempted by Claimants—can change the letter and meaning of Legislative Decree 41-88. *See* Counter-Memorial on Jurisdiction, ¶ 30.

[72] A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008) (**RL-146**), p. 394 ("The principle of effectiveness is aimed at construing the original consent and agreement of States-parties effectively and not as unreal and illusory.").

[73] 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.").

[74] During the codification work of the Commission, it was proposed to regulate the principle of effectiveness or *effet utile* as an independent criterion of interpretation whereby each provision "rightly conceived, cannot be regarded as a mere mechanical one of drawing inevitable meanings from the words in a text." United Nations General Assembly, *Yearbook of the International Law Commission* Vol. II, A/CN.4/SER.A/1964/ADD.1 (1964) (**RL-120**), p. 53. Subsequently, the Commission determined that it was not necessary to insert a separate provision on this issue and then noted that "[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted." *Ibid*., p. 201.

[75] The principle of *effet utile* has, in turn, been recognized and applied by the International Court of Justice and international arbitral tribunals. In *US Nationals in Morocco*, the ICJ referred to the principle of "economic liberty without any inequality" recognized in various treaties and observed that "this principle was intended to be a binding character and not merely an empty phrase." In the *Peace Treaties* case, the Court stated that "[t]he principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat,* often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit." *See Rights of Nationals of the United States of America in Morocco*, Judgment, I.C.J. Rep. 1952, p. 176 (27 August 1952) (**RL-118**), ¶¶ 184, 191; *Interpretation of Peace Treaties (second phase)*, Advisory Opinion, I.C.J. Rep. 1950, p. 221 (18 July 1950) (**RL-117**), p. 229. *See also Daniel W. Kappes & Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Preliminary Objections (13 March 2020) (**CL-151**), ¶¶ 145-149 ("The Tribunal takes seriously Respondent's arguments about *effet utile*, namely that whatever the strict textual interpretation of Articles 10.16.1(a) and (b) might be, the intent of the Contracting State Parties could not have been to make the first path so broad as to render the second path effectively meaningless. [...] the point is that for a treaty interpretation to rest on an *effet utile* conclusion, beyond simply construing the ordinary meaning of treaty terms in their context, a tribunal must be convinced that the alternative interpretation would leave a treaty provision with no effective meaning at all."); *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 and Enforcement (2 July 2013) (**RL-022**), ¶ 111 ("The words 'in all its aspects' must have a

effectiveness has been used to interpret the scope of unilateral acts and/or declarations of States, since "like any other act or transaction, unilateral acts are performed for a reason and with calculation, and hence they do have an object and purpose."[76] Examples of this can be found in the jurisprudence of the Permanent Court of International Justice.[77]

81. In this case it is clear that the interpretation sought by Claimants is contrary to the principle of effectiveness, insofar as it seeks to strip Legislative Decree 41-88 of any practical effect and, consequently, to nullify the power conferred by Article 26 of the ICSID Convention to condition consent to ICSID arbitration. As has been explained, both the terms of Article 26 and the preparatory works of the Convention leave no doubt as to the object and purpose of the aforementioned provision. To claim otherwise, as Claimants do, is simply inappropriate.

82. Finally, the tribunal in *Próspera v. Honduras* confirmed Honduras' understanding as follows:

> **While the inclusion and placement of the Exhaustion Requirement in the Decreto 41-88 may be unconventional**, as noted above, the Tribunal is unconvinced by Claimants' assertion that it is a forward-looking declaration, instructing future Honduran governments and legislators to insert the exhaustion of local remedies in the State's subsequent consents to ICSID arbitration. Rather, **the terms used and the context in which they were**

meaning according to the principle that all treaty provision must have an '*effet utile*.'"); *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 March 2016) (**RL-091**), ¶ 329 ("Such a reading would not be consistent with the generally accepted rules of treaty interpretation, including the principle of effectiveness, or *effet utile*, which requires that each term of a treaty provision should be given a meaning and effect.").

[76] A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (2008) (**RL-146**), p. 467.

[77] In the *Eastern Greenland* case, the Permanent Court of International Justice refused to interpret the declaration made by the Norwegian Foreign Minister as a recognition of Denmark's sovereignty over Greenland. The Minister had promised Denmark that Norway would not raise any problems about its own efforts to obtain sovereignty over that part of Greenland. Thus, after "a careful examination of the words used," the Court determined that such a declaration could not be interpreted as a definitive recognition of Danish sovereignty. Similarly, in the *Minority Schools in Albania* case, the Permanent Court interpreted Albania's 1921 Declaration addressed to the Council of the League of Nations, in which Albania undertook to guarantee equality to minorities in law and in fact. In this regard, the Court stated that it would interpret this Declaration on the basis of its text and in consideration of the fact that it purported to apply the general *principles of* the treaties on minorities ("As the Declaration of October 2nd, 1921, was designed to apply to Albania the general principles of the treaties for the protection of minorities, this is the point of view which, in the Court's opinion, must be adopted [...]."). *See Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment, P.C.I.J. Series A/B, No. 53 (5 April 1933) (**RL-114**), p. 69; *Minority Schools in Albania*, Advisory Opinion, P.C.I.J. Series A/B, No. 64 (6 April 1935) (**RL-115**), pp. 16-17.

employed seem to reflect Honduras' intention to establish a "condición previa" as permitted by the Convention.

83. All in all, it is clear that the Republic of Honduras provided for the exhaustion of local remedies as a jurisdictional condition in its legislation approving the ICSID Convention. As will be explained in the following section, this applies to all arbitration agreements referring to ICSID and involving the Republic of Honduras, irrespective of whether or not the condition has been expressly included in the instrument of consent.

3. The requirement of exhaustion of local remedies is compatible with the CAFTA-DR

84. Claimants argue that the dispute settlement mechanism established in the CAFTA-DR would be inconsistent with the exhaustion of local remedies requirement established by Legislative Decree 41-88.[78]

85. *First*, Claimants refer to the waiver or *no-u-turn* clause set forth in CAFTA-DR Articles 10.18.2 and 10.18.4. They contend that such clauses—which require investors to refrain from initiating or continuing any action in respect of measures that they allege violate the Treaty or an Investment Agreement—would be inconsistent with the requirement of exhaustion of local remedies.[79]

86. As explained in the Memorial on Jurisdictional Objections, such waiver has been deliberately established for the benefit of Contracting States to protect them against potential

[78] Counter-Memorial on Jurisdiction, ¶ 34.

[79] *Ibid*., ¶ 35.

parallel proceedings.[80] Consequently, it in no way exempts investors from exhausting domestic remedies when required by the laws of the respective State, as is the case in Honduras.[81]

87. Nor is it true that the tribunal in *Metalclad Corporation v. Mexico* endorsed Claimants' argument.[82] The tribunal there merely found that, unlike the Republic of Honduras, Mexico had nowhere required investors to exhaust domestic remedies prior to resorting to arbitration.[83] Obviously, in that case there was no basis for imposing such a requirement on the investors. In this case, by contrast, the Republic of Honduras has clearly and peremptorily established such a requirement through Legislative Decree 41-88. This makes all the difference.

88. In addition, the tribunal in *Corona Materials LLC v. Dominican Republic* concluded—in the same vein—that "the waiver required to submit a claim to international arbitration under Chapter 10 of the CAFTA-DR is clear in its terms"[84] and did not preclude the claimants in that case from exhausting domestic remedies, because "this requirement is immediately qualified by the article's [10.16] subparagraph's 3"[85] which makes "an action seeking

[80] M. Kinnear & C. Mavromati, "Consolidation of Cases at ICSID," in *Jurisdiction, Admissibility and Choice of Law in International Arbitration* (2018) (**RL-100**), p. 244 ("numerous treaties have adopted provisions that reduce the potential for cases arising out of the same measure to proceed in multiple fora. For example [...], to waive their right to pursue a single claim in parallel fora simultaneously, or to elect one dispute resolution forum to the exclusion of others (*e.g.*: *fork in the road or no U-turn clauses*)."); G. Kaufmann-Kohler and M. 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**), ¶ 81 ("In broad terms, *fork-in-the-road* and waiver clauses pursue the same objectives: avoiding parallel proceedings, which entail duplication of costs, risks of double recovery and of inconsistent outcomes.").

[81] Memorial on Jurisdiction, ¶ 76-78.

[82] Counter-Memorial on Jurisdiction, ¶ 38; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) (**CL-007**).

[83] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) (**CL-007**), note 4 ("The question of turning to NAFTA before exhausting local remedies was examined by the parties. However, 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.").

[84] *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on Respondent's Expedited Preliminary Objections pursuant to DR-CAFTA Article 10.20.5 (31 May 2016) (**RL-172**), ¶ 268.

[85] *Ibid*.

interim injunctive relief not involving the payment of damages […] available to a CAFTA-DR claimant (or its enterprise) while it pursues its CAFTA-DR claims for damages."[86]

89. *Second*, Claimants point to the *fork-in-the-road* clause provided for in the CAFTA-DR. They argue that such a clause would be irreconcilable with Legislative Decree 41-88, since had they gone to the Honduran courts to exhaust local remedies, they would have automatically forfeited the possibility of initiating the present arbitration. But this is not true either.

90. As is clear from the very sources cited by Claimants, the *fork-in-the-road* clauses of CAFTA-DR operate on a different plane than the requirement of exhaustion of local remedies.[87] Such clauses prevent investors from initiating arbitration in cases where they have previously claimed an alleged breach of *international law obligations* before domestic courts. This was expressly held by the tribunal in *Bank Melli Iran v. Bahrain*, which Claimants cite, curiously, in purported support of their position.[88]

91. The purpose of the *fork in the road* clauses is to avoid duplication of proceedings involving the same parties, object and cause of action, *i.e*. in cases where there is triple identity, as has been shown by abundant international doctrine and jurisprudence.[89] But these clauses do not

[86] *Ibid*.

[87] Counter-Memorial on Jurisdiction, ¶ 36.

[88] *Bank Melli Iran & Bank Saderat Iran v. Kingdom of Bahrain*, PCA Case No. 2017-25, Award (9 November 2021) (**CL-126**), ¶¶ 526-528. There, the tribunal held that the exhaustion of local remedies requirement did not apply as there was no rule establishing such a requirement ("the Tribunal finds 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"), which is a clear difference with the present case. The tribunal further acknowledged that the *fork-in-the-road* clause included in the applicable treaty would only have been triggered if Claimants had sought redress in local courts for the *treaty breaches* challenged in the ICSID arbitration ("This conclusion is reinforced by the presence of a *fork-in-the-road* clause in Article 11(3) of the BIT [....] by virtue of Article 11(3), the 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 Claimants sought redress **of the violations impugned here** before Bahraini courts, the Tribunal would have been barred from ruling on such claims.") (emphasis added). Here, the local remedies that Claimants were required to exhaust before turning to ICSID were not claims for violations of CAFTA-DR, but challenges to the administrative acts that they allege violated their rights. Consequently, the tribunal's findings in *Bank Melli v. Bahrain* only confirm Honduras' position.

[89] S. Alexandrov, "Article 26," in S. Schill *et al*. (eds.), *Schreuer's Commentary on the ICSID Convention* (2022) (**RL-180**), ¶ 86 ("[t]ribunals have consistently held that a *fork-in-the-road* clause will prevent access to international arbitration, only if the same dispute involving the same parties and cause of action had been submitted to the courts of the host State. The jurisdiction of an ICSID tribunal is not affected by the submission of a related, but not identical dispute to domestic courts."); *Khan Resources Inc. et al. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction (25 July 2012) (**RL-160**), ¶ 390 ("[t]here is ample authority for [the application of the triple identity test]."); *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN 3467, Award

prevent—nor could they prevent—investors from asserting the rights that they may have under the domestic legal system of the host State of the investment, and which are those that—in this case—Claimants should have exhausted.

92. This was also expressly held by the tribunal in *Corona Materials LLC v. Dominican Republic* when analysing these same CAFTA-DR provisions. The tribunal held in this regard that:

> DR-CAFTA Article 10.18.4 then sets out the 'fork in the road' provision. But this applies only to claims of an alleged breach of an obligation under Section A of Chapter 10 in proceedings before a court or administrative tribunal of a Central American State Party or the Dominican Republic. Annex 10-E applies to claims by US investors only. This 'fork in the road' is clearly intended to deal with the situation in certain civil law countries where international treaties have direct effect and thus an alleged breach of an international treaty can form a cause of action under the domestic law of such States. **The Claimant would have fallen afoul of this provision if Walvis (or Corona) had submitted a claim in the local courts for the "same alleged breach" (*i.e.*, a breach of Section A of Chapter 10 of DR-CAFTA) as in the present proceeding. If Walvis had submitted an administrative contentious proceeding which did *not* invoke DR-CAFTA's Chapter 10, it would not have run afoul of Article 10.18.4**.[90]

93. *Third*, Claimants rely on the recent decision of the tribunal in *Próspera v. Honduras*, in which the tribunal found that the condition provided for in Decree 41-88 would be incompatible with the waiver requirement under Article 10.18.2 of CAFTA-DR.[91] However, the Republic of Honduras disagrees with the reasoning of that tribunal because the jurisdictional requirements of the Treaty and the ICSID Convention must be analysed separately.

94. As explained in the Memorial on Jurisdictional Objections, Article 26 of the ICSID Convention, like Article 25, establishes jurisdictional limits that prevail over the underlying treaty

(1 July 2004) (**CL-026**), ¶ 52 ("To the extent that a dispute could involve the same parties, the same subject matter and the same cause of action, it could be considered the same dispute and the '*fork in the road*' mechanism would preclude its submission to concurrent tribunals.").

[90] *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on Respondent's Expedited Preliminary Objections Pursuant to Article 10.20.5 of DR-CAFTA (31 May 2016) (**RL-172**), ¶ 269 (emphasis added).

[91] *Honduras Próspera et al. v. Republic of Honduras*, ICSID Case No. ARB/23/2, Decision on Preliminary Objections under DR-CAFTA Article 10.20.5 (26 February 2025) (**CL-201**), ¶ 119.

provisions, as acknowledged by Claimants.[92] It is a well-established principle that ICSID tribunals assess whether a dispute meets both the requirements of the treaty and the criteria of the Convention, including the *Salini* test for determining the existence of an "investment"[93] and the strict prohibition on dual nationality set out in Article 25(2)(a) of the Convention.[94] Even where a treaty permits claims by dual nationals, the ICSID Convention excludes them, often forcing investors to seek alternative fora such as UNCITRAL. Similarly, when a State invokes the exhaustion of local remedies requirement under Article 26, as Honduras has done in this case, that requirement becomes a binding condition for consent to any ICSID Convention arbitration, even if it is not a binding condition for the other fora available under Article 10.16.3 of the Treaty. Therefore, the Tribunal must separately analyse compliance with the conditions imposed by Article 26 of the ICSID Convention, and the conditions imposed by the Treaty, for example, in relation to the requirement of waiver of domestic proceedings.

95. In light of the foregoing, the provisions of the CAFTA-DR are in no way inconsistent with the requirement of exhaustion of local remedies established by Legislative Decree 41-88, to which Honduras conditioned its consent to ICSID arbitration.

96. In any event, the CAFTA-DR allows Claimant to initiate international arbitration under the UNCITRAL Rules, without having to exhaust local remedies, and does not present any alleged inconsistency with the provisions of the CAFTA-DR. As Honduras explained in its Memorial on Jurisdictional Objections, Honduras is not denying the alleged investor a forum to resolve disputes under the CAFTA-DR. Simply, the investor must comply with the conditions imposed by the State in order to bring a claim under the Treaty and the ICSID Convention. The CAFTA-DR itself provides options other than ICSID, in case the investor does not comply with the requirements of the Convention and decides to submit its claim to arbitration, for example, under the UNCITRAL Arbitration Rules.[95]

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[92] Observations on the Bifurcation Request, ¶ 31.

[93] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (16 July 2001) (**RL-059**), ¶ 52.

[94] ICSID Convention and Rules (**RL-048**), Convention, art. 25(2)(a), p. 11.

[95] CAFTA-DR (**CL-001**), art. 10.16.3.

4. The estoppel doctrine is not applicable to the present case.

97. The notion that the Republic of Honduras would be precluded under the doctrine of *estoppel* from requiring exhaustion of local remedies as a condition to ICSID consent, as it would have acted in alleged contradiction to its conduct in other arbitrations, is as incorrect as it is irrelevant.

98. As Claimants themselves acknowledge,[96] Honduras has claimed the need to exhaust local remedies as a preliminary objection in all cases where, in its view, it was appropriate. Thus, in *JLL Capital* and *Autopistas del Atlántico,* what was at issue were objections of manifest lack of legal merit under ICSID Arbitration Rule 41(5), which—as is well known—are subject to a high standard.[97] Likewise, the Republic of Honduras asserted exhaustion of local remedies as part of its request for bifurcation in the *Palmerola International*[98] and *Inversiones y Desarrollos Energéticos* cases.[99] Moreover, Claimants' position is irrelevant because the submission of jurisdictional objections is neither an imperative nor an obligation, but rather a procedural power whose exercise is at the full disposal of the State. The fact that Honduras has not exercised this power in other cases in no way precludes it from exercising its right in the present case.[100]

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[96] Counter-Memorial on Jurisdiction, ¶ 46-47.

[97] In *ADASA v. Honduras,* the Republic of Honduras raised a plea of manifest lack of legal merit under ICSID Arbitration Rule 41(5). This resulted in an expedited proceeding, with two rounds of written pleadings and a virtual hearing. After the conclusion of these proceedings, the tribunal decided to deny the objection as such, finding that it involved a complex interpretative exercise that exceeded the bounds of obviousness, and postponed its decision on the merits of the objections raised by the Republic of Honduras to a later date, joining them to the merits. It was in this context that the tribunal decided not to bifurcate the proceedings, considering that it was inadvisable for the efficiency of the proceedings after an entire phase devoted to the analysis of the objection of manifest lack of legal merit; a phase that did not take place in the present arbitration. *See* L. Bohmer, "ICSID tribunal rejects Honduras' argument that claims manifestly lack legal merit due to investor's failure to exhaust local remedies," *IAReporter* (5 April 2024) (**RL-193**). In *JLL Capital v. Honduras,* as in the previous case, the tribunal considered that the high standard of Rule 41(5) had not been met and denied the preliminary objection for manifest lack of legal merit. However, the tribunal subsequently bifurcated the proceedings to hear, at a preliminary stage, inter alia, the Republic of Honduras' objection that the claimant had failed to exhaust domestic remedies, as it was entitled to do. *See* L. Bohmer, "ICSID tribunal dismisses Rule 41 objection in financial services dispute with Honduras," *IAReporter* (29 December 2013) (**RL-164**).

[98] *Palmerola International Airport, S.A. de C.V. v. Republic of Honduras*, ICSID Case No. ARB/23/42, Respondent requests to discuss jurisdictional objections as a preliminary issue (16 October 2024) (**R-063**).

[99] *Inversiones y Desarrollos Energéticos, S.A. v. Republic of Honduras*, ICSID Case No. ARB/23/40, Claimant files an observation on the request to discuss the jurisdictional objections as a preliminary issue (18 October 2024) (**R-064**).

[100] Memorial on Jurisdiction, ¶ 87.

99. In any event, and as is well known, the standard for granting an *estoppel* claim is high,[101] which is reflected in its low success rate.[102] In this case, the requirements for applying this doctrine[103] are not met at all for the following reasons.

100. *First*, Honduras has not engaged in any relevant and effective conduct that would allow Claimants to clearly and unambiguously rely on the waiver of the prior exhaustion of local remedies requirement for their consent to ICSID arbitration. Neither the terms of the treaties entered into with third parties by the Republic of Honduras nor the defences it may or may not raise in other arbitrations would allow Claimants to rely, in good faith, that the Republic of Honduras would not require such a precondition.

101. *Second*, the parties involved in the other cases brought against the Republic of Honduras are not the same as in this arbitration. Indeed, the defences raised by Honduras in the earlier arbitrations were not directed at Claimants, who therefore could not have relied on such alleged statements.

102. Claimants cannot claim an alleged breach of the confidence established or a contradictory conduct simply because the Republic of Honduras has not engaged in legally relevant conduct directed at Claimants. The central point of the theory is the trust placed on a party on the basis of prior conduct directed to it, and that the *same* party cannot have that trust defrauded by subsequent contradictory conduct.[104] In conclusion, the theory of *estoppel* invoked by Claimants is clearly inapposite.

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[101] *Chevron Corporation & Texaco Petroleum Corporation v. Republic of Ecuador*, PCA Case No. 2007-02/AA277, Interim Award (1 December 2008) (**RL-075**), ¶ 143, ("[...] it has further to be noted that in all legal systems, the doctrines of abuse of rights, estoppel and waiver are subject to a high threshold.").

[102] A. 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 International Law* 1 (2016) (**RL-092**), p. 113 ("With respect to the outcome of the decisions, the tribunal/dissenting arbitrator rejected the estoppel argument in 33 instances, while only nine decisions came out in favour. In the remaining 11 decisions, the matter remained undecided. It is thus fair to say that arbitrators are rather hesitant to endorse an estoppel claim or argument.").

[103] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award (26 June 2000) (**RL-129**), ¶ 111 ("In international law it has been stated that the essentials of estoppel are (1) a statement of fact which is clear and unambiguous; (2) this statement must be voluntary, unconditional, and authorised; and (3) there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.").

[104] L. Díez-Picazo, *La Doctrina de los Actos Propios* (1962) (**RL-119**), p. 206 ("The binding conduct, i.e. that which sets in motion the rule we are considering, must have been observed vis-à-vis those concerned in the legal situation at

103. *Finally*, Claimants allege that "Honduras has never notified investors of the purported requirement to exhaust local remedies."[105] This position is entirely improper, as it would imply that the Tribunal now disregard Honduras' conditional consent, just because investors were (allegedly) unaware of its existence.

5. Exhaustion of local remedies is not a sterile requirement as alleged by Claimants

104. Claimants argue, alternatively, that resorting to the local courts of the Republic of Honduras would, in any event, be a futile exercise, as local remedies would not provide a reasonable possibility of redress.[106]

105. According to Claimants, the alleged absence of a reasonable possibility of redress would be demonstrated on the basis of four reasons: (i) the "serious" problems of the Honduran judicial system, stemming from its alleged lack of impartiality and delays[107]; (ii) the alleged measures adopted by the current administration to "control" the judiciary,[108] and; (iii) the absence of local procedures available for Claimants' claims,[109] would in their view confirm the alleged futility.

106. At this point, Claimants' strategy comes to the fore. On the basis of a fallacious and distorted account of the facts, Claimants seek to paint a highly caricatured picture of the Republic of Honduras and its democratic institutions in an attempt to circumvent the exhaustion of local remedies.

107. Notwithstanding this, it is well known that the standard for proving the futility or uselessness of exhausting local remedies under international law is admittedly high. As Claimants themselves admit, for this to occur, local remedies must not be capable of providing even a

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issue in each case. Conduct which has been observed towards persons other than those interested in the specific legal situation or conduct which has been observed in different circles of interests cannot be invoked as binding acts of their own, which cannot be contradicted.).

[105] Counter-Memorial on Jurisdiction, ¶ 49.

[106] *Ibid.*, ¶ 53.

[107] *Ibid.*, ¶ 56.

[108] *Ibid.*, ¶ 58.

[109] *Ibid.*, ¶ 59.

reasonable option of an effective remedy.[110] This is not at all apparent from Claimants' tendentious statements, let alone the documents they cite in support.

108. *First*, Claimants allege that the Honduran judiciary is allegedly "plagued" with serious problems such as lack of independence and inexcusable delays. In doing so, they cite the following documents, none of which—as we shall see—actually prove their intemperate allegations:

- They refer to the National Plan for the Eradication of Judicial Delay launched by the current government in 2024, which mentions a 2019 report analysing the serious delays that the Honduran justice system was suffering at that time.[111] This report is not proof of the reality of the current Honduran justice system. On the contrary, the fact that the current government has issued the National Plan referred to by Claimants only demonstrates that Honduran institutions continue to be strengthened to provide an adequate service of justice.

- They refer to the one-sided report of the United States Department of State on the investment climate in Honduras.[112] Suffice it to say in this regard that the Government of Honduras duly rejected and condemned this report as having been issued unilaterally by another State on the basis of subjective considerations, partial interests and without

[110] International Law Commission, *Draft Articles on Diplomatic Protection* (2006) (**CL-217**), p. 47. This standard emphasizes the reasonableness of the existence of a local remedy. According to Gerald Fitzmaurice, such a standard is the correct one to apply, provided that it is taken into consideration that there must be a reasonable likelihood of is the existence of a possible effective remedy, and that the mere possibility that there is no reasonable likelihood of a successful remedy because of the lack of merit of the claim fails to meet the standard. B. Sabahi *et al*. "Exhaustion of Local Remedies," in *Investor-State Arbitration* (2019) (**RL-040**), p. 436, ("This test is acceptable provided it is borne in mind that there must be a reasonable possibility of is the existence of a possibly effective remedy, and that the mere fact there is no reasonable possibility of the claimant obtaining that remedy, because his case is legally unmeritorious, does not constitute the type absence of reasonable possibility which will displace the local remedies rule."). Also, regarding the standard and that general assertions about the local judicial system are not sufficient to establish futility, *see ICS Inspection and Control Services Ltd. v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction (10 February 2012) (**RL-083**), ¶ 269; *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Decision on Jurisdiction (22 December 2015) (**RL-170**), ¶ 97 ("Nonetheless, the doctrine [futility] imposes a considerable burden of proof on a claimant wishing to invoke it to excuse non-compliance with preconditions to arbitrate. A mere showing that the steps a treaty requires to be taken prior to arbitration are unlikely to result in a satisfactory outcome for the investor would not satisfy a requirement of demonstrating that it was futile for the investor even to try. Futility connotes a manifest waste of effort towards a self-evident, even pre-ordained, lack of success."); *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award (2 July 2013) (**RL-163**), ¶ 8.1.10.

[111] Judicial Branch of the Republic of Honduras, *National Plan for the Eradication of Judicial Delinquency* (11 March 2024) (**R-081**); Judicial Branch of the Republic of Honduras, Follow-up Report on the National Plan for the Eradication of Judicial Delinquency (January 2019) (**R-073**).

[112] U.S. Department of State, *Investment Climate Statements 2024: Honduras* (**R-080**).

the participation of the State of Honduras.[113] In no way does this report reflect the reality of the current Honduran justice system.

- They mention the report issued by Centro de Estudio para la Democracia.[114] While this report indicates that there are some concerns about the judicial system, Claimants omit to include that this report also gives some hope for improvements to the system based on "justice operators who uphold their ethical and professional principles."[115] This is consistent with data reported in the World Justice Index, which shows that in recent years Honduras' rule of law rating has improved considerably, moving Honduras several positions up the index.[116]

109. *Second*, Claimants allude to alleged measures taken by the current government to control the Honduran judiciary, in relation to the appointment of the current composition of the Supreme Court.[117] In doing so, they refer mainly to the following actions and documents, none of which—as we shall see—actually prove their intemperate allegations:

- In particular, they refer to the enactment of Decree 74-2022 which modified the nomination process for Supreme Court justices, a legislative measure which purport to illustrate as a political "move" in favor of the current Government.[118] Claimants' claim is wholly unfounded. The enactment of Decree 74-2022 was precisely part of the new government's plan to strengthen institutions and bring greater independence and transparency to the judiciary. Contrary to Claimants' suggestion, Decree 74-2022 does not modify the manner of selection of judges—which is defined by the Constitution—[119] but only modifies the process for the nomination of candidates to the Nominating

[113] Publication of the Secretary of Foreign Affairs and International Cooperation of Honduras, Mr. Enrique Reina, on social network X (24 April 2024) (**R-082**) ("We reject and disavow the HR report issued by the U.S. State Department on Honduras 2023. Out of respect for a fundamental and basic principle, since we do not recognise reports or measures of a unilateral nature carried out by one State on another Sovereign State. Without discussing its content, and given that most of the problems we face as a country are structural and were caused by the narco-dictatorship, the report, being partial and unilateral, does not reflect the important advances, the great efforts and the political will of the government of President @XiomaraCastroZ to establish the rule of law in Honduras, re-establish institutions, respect and promote human rights, and at the same time develop policies of inclusion and protection. Likewise, it does not mention all the actions carried out to fulfil Honduras' commitments under international human rights treaties, conventions and sentences.").

[114] Centro de Estudio para la Democracia, *Percepciones de los profesionales del derecho sobre la corrupción en el Sistema Judicial de Honduras* (March 2025) (**C-291**).

[115] *Ibid*., p. 45.

[116] World Justice Project, *Honduras*, *Country Profile* (2024), *available at:* https://worldjusticeproject.org/rule-of-law-index/country/2024/Honduras/ (**R-079**).

[117] Counter-Memorial on Jurisdiction, ¶ 58.

[118] *Ibid.*

[119] Political Constitution of the Republic of Honduras (20 January 1982) (**R-015**), art. 311 ("The Magistrates of the Supreme Court of Justice shall be elected by the National Congress, with the favorable vote of (2/3) two-thirds of the totality of its members.").

Board. Decree 74-2022, in that sense, allowed those professionals who met the constitutionally established requirements to be judges of the Court to self-nominate, avoiding the need to go through a filtering process by each sector that makes up the Nominating Board, thus democratizing the nomination process.[120]

- Claimants suggest that the President of the National Congress unilaterally modified the way in which the magistrates were nominated, or even that the ruling party directly decided on the selected magistrates.[121] This is flatly untrue. As established in the Constitution of the Republic of Honduras, the appointment of the magistrates of the Court was made by a decision of two thirds of the totality of the members of the National Congress, based on the list of candidates presented by the Nominating Board.[122] Certainly, the selection of the judges was preceded by negotiations and deliberations in Congress, which is quite natural and desirable in a democratic system; all in strict compliance with the Constitution.[123] Claimants' allegations in this regard are devoid of any evidentiary and legal support, are fanciful and highly offensive to the Republic of Honduras.

- In addition, Claimants refer to the questioning of the current President of the Supreme Court of Honduras, in order to undermine the credibility of her statements that her main challenge is to dismantle the networks of corruption, organized crime and drug trafficking.[124] They also refer to statements by the Inter-American Commission on Human Rights, which reportedly expressed its concerns about the concentration of power by Rebeca Lizette Ráquel Obando, President of the Honduran Supreme Court of Justice, and the political influence exercised over the judiciary.[125] In no way do these sensationalist allegations demonstrate that there is no reasonable likelihood of redress for Claimants.

- Finally, they mention that the politicization of the selection process in the Supreme Court of Justice was evident, as right after the selection process, the former president of Honduras, Manuel Zelaya, declared that he had been a protagonist in the constitution

[120] Election of the new Supreme Court of Justice and the Reconstruction of the Rule of Law in Honduras," *Agenda Estado de Derecho* (31 January 2023) (**R-077**), p. 1 ("By way of example, on 31 October 2022, the Nominating Board closed the deadline for nominations of candidates aspiring to the judgeships, with a total of 185 lawyers and notaries who personally decided to apply and submit the documents required by the Nominating Board; unlike in previous processes, when the past Nominating Board Law, in its Article 18 specifically, required each organisation part of the Board to propose the applicants that their sector considered suitable to make the list of 45.").

[121] Counter-Memorial on Jurisdiction, ¶ 58.

[122] Political Constitution of the Republic of Honduras (20 January 1982) (**R-015**), art. 311.

[123] Moreover, it was thanks to that democratic conversation that the National Congress was able to reach a consensus on a single slate in which no political party obtained an absolute majority, a situation that opens the possibility for the country to have a Court with a greater degree of independence and suitability.

[124] Counter-Memorial on Jurisdiction, ¶ 58.

[125] *Ibid. citing* B. Hernández, "La independencia judicial en Honduras, un sistema bajo control político," *Criterio* (16 November 2024) (**C-296**).

> of the Court.[126] These sensationalist allegations by Claimants are undermined by the very meaning of Decree 74-2022, which sought precisely to bring greater independence and transparency to the Honduran judiciary.

110. Claimants also refer to the amendments that the Supreme Court justices introduced in 2023 to the Internal Regulations of the Judiciary, among which is the incorporation of the figure of substitute judges. According to Claimants, the legality of such a measure is questionable as it is not provided for by the Constitution.[127] This argument is irrelevant for the purposes of what is at issue here. Evidently, Claimants attempt to shift the focus of the discussion away from their inability to prove that they lack a reasonable prospect of obtaining a remedy for their claims before the Honduran courts.

111. *Third,* Claimants go a step further and assert that there would be no procedure in Honduras that would guarantee them at least a reasonable likelihood of obtaining the relief they claim.[128] Thus, Claimants, true to form, fabricate a distorted narrative with the intention of showing the Tribunal an allegedly disadvantaged position in the dispute. All of this must be dismissed.

112. Claimants seek to use their procedural inactivity to their own advantage by arguing the futility of unexercised local remedies. Claimants cannot deny that even since they became aware of the facts they present in the present arbitration as measures affecting their alleged investment, their attitude has been one of total passivity.[129] Claimants cannot seriously expect the Tribunal to give any merit to such circular and contradictory behaviour.

113. In addition, Claimants claim to have sought a resolution of the dispute for years,[130] but only refer to the notice of intent in the present case.[131] As the Republic has explained at length, the claims that Claimants have chosen to bring in this arbitration are clearly of a contractual nature

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[126] Counter-Memorial on Jurisdiction, ¶ 58 *citing* "Mel Zelaya expects new Court to reverse re-election," *La Prensa* (20 February 2023) (**C-300**).

[127] Counter-Memorial on Jurisdiction, ¶ 58.

[128] *Ibid.*, ¶ 59-60.

[129] *See infra*, § III.F.

[130] Counter-Memorial on Jurisdiction, ¶ 60.

[131] *Ibid.*, note 152.

of which the parties have been aware and in discussion since the commencement of the commercial operation of the Nacaome I Plant.[132]

114. In sum, it is clear that Claimants' allegations aimed at demonstrating the alleged (and non-existent) futility of exhausting local remedies are entirely frivolous, have been conveniently fabricated in response to the Republic of Honduras' Jurisdictional Objection, and deserve no credit whatsoever.

B. The Paiz continue to fail to demonstrate that they own or control Pacific Solar.

115. In its Memorial on Jurisdiction, the Republic of Honduras demonstrated that the Tribunal lacks jurisdiction since Claimants have failed to provide evidence to establish ownership of the alleged investment and that it was assigned to a Honduran bank through trusts.[133] In this regard, the Tribunal noted that "Claimants' establishment of uninterrupted ownership and control of the investment, through the chain of companies identified in their pleadings thus far, appears to be a narrowly circumscribed issue unrelated to the merits.[134] In their Counter-Memorial, Claimants continue to assert that they are indirect owners of Pacific Solar and propose new documentation in an attempt to support this premise.[135]

116. In this section, the Republic reiterates its position and argues that Claimants have not demonstrated that they own or control Pacific Solar. The new documentation submitted by Claimants is deficient and insufficient to demonstrate the chain of ownership from the Paiz's to Pacific Solar (**Subsection 1**). Furthermore, the trust agreements confirm that Pacific Solar and its shareholders assigned their shares, assets and rights related to the Nacaome I Plant to [redacted] as trustee, making it the owner of these assets under Honduran law. These trusts also assign third parties as the direct beneficiaries of all revenues generated by the Paiz's alleged investment, as well as condition the rights of Pacific Solar's majority shareholder

[132] Memorial on Jurisdiction, ¶¶ 36-58.

[133] Memorial on Jurisdiction, § II.C.

[134] Procedural Resolution No. 4, ¶ 44.

[135] At footnote 33 of the Counter-Memorial, Claimants refer to the Jurisdictional Objection raised by the Republic in the Request for Bifurcation in relation to Ms. Paiz's notice of intent. For greater certainty, the Republic has satisfied itself with the explanation and additional documents that have been submitted by Claimants to satisfy the notice requirement.

to hold meetings and make decisions (**Subsection 2**). Finally, the Republic argues that the transfer of Pacific Solar's shares, assets and rights to a trustee was an event prior to the alleged measures claimed by Claimants and unrelated to the subject matter of the dispute, *i.e*. Honduras' alleged wrongful conduct (**Subsection 3**).

1. Claimants continue to fail to demonstrate indirect ownership of the alleged investment.

117. It is undisputed that Claimants have the burden of proving that they are the owners of all the companies in the corporate chain through which they claim to have made the alleged investment. Failure to meet this fundamental burden would imply that the requirements for establishing the Tribunal's jurisdiction have not been met.[136] As stated by Honduras in its Memorial on Jurisdiction, the Paiz have not presented convincing and reliable evidence of their ownership of the alleged investment.[137] This remains true.

118. Claimants continue to attempt to evade their evidentiary burden of proving beyond any doubt that they are the owners of the alleged investment. This burden is clearly set out in the ICSID Arbitration Rules, which require that "each party has the burden of proving the facts relied on to support its claims or defence."[138]

119. Moreover, Claimants cannot avoid proving their alleged ownership of their putative investment at this stage. In this regard, the tribunal in *Koch Industries v. Canada* stated that:

> It is an accepted principle of international law that a claimant in an arbitration bears the burden of proving that the tribunal has jurisdiction to hear its claims. [...] **Accordingly, if jurisdiction is based on specific facts, the claimant must prove them at the jurisdictional stage**.[139]

[136] *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections (1 June 2012) (**RL-085**), ¶ 2.11 ("As far as the burden of proof is concerned, in the Tribunal's view, it cannot here be disputed that the party which alleges something positive has ordinarily to prove it to the satisfaction of the Tribunal. At this jurisdictional level, in other words, the Claimant has to prove that the Tribunal has jurisdiction.").

[137] Memorial on Jurisdiction, ¶¶ 138-147.

[138] ICSID Convention and Rules (**RL-048**), Rule 36(2), p. 107.

[139] *Koch Industries, Inc. & Koch Supply & Trading, LP v. Government of Canada*, ICSID Case No. ARB/20/52, Award (13 March 2024) (**RL-192**), ¶ 129.

120. Similarly, in *Europe Cement v. Turkey*, the tribunal noted that:

> The Claimant's failure to provide any serious rebuttal to the Respondent's arguments strongly suggests that it never had such ownership, at least at the relevant time for jurisdiction and that perhaps it never had ownership at all. **The burden to prove ownership of the shares at the relevant time was on the Claimant**.[140]

121. The Republic rejects Claimants' characterization of the seriousness of this objection, stating that the Republic's arguments are petty because they only refer to formal aspects of the purported "certificate of structure" contained in Exhibit **C-27**.[141] What is true is that Claimants have not refuted the deficiencies demonstrated with respect to this document, formal or otherwise.

122. Claimants do not dispute the clear and serious formal deficiencies of Exhibit **C-27**,[142] including that the document is in English, lacks the notary's seal, and does not contain the phrase "by me and before me." Furthermore, Claimants completely ignore Honduras' second argument, namely, that Exhibit **C-27** cannot be considered as reliable and sufficient evidence of ownership of the alleged investment.

123. Claimants do not convincingly demonstrate why they fail to present clear evidence of the alleged indirect ownership of the putative investment. Nor do they demonstrate why it would be appropriate to accept this certification in Exhibit **C-27** in lieu of deeds evidencing ownership that should surely exist and be in Claimants' possession. Much less have they established that this notarial certification is equivalent to a title deed.

124. Of course, nowhere does the Guatemalan Notarial Code state that a notary's certification can be valid as a title deed. In case the notary is certifying a factual situation or certifying photocopies, he/she must indicate the documents he/she had in sight for the purpose of

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[140] *Europe Cement Investment and Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award (13 August 2003) (**RL-132**), ¶ 166.

[141] Counter-Memorial on Jurisdiction, ¶ 159.

[142] *See also* Guatemalan Notarial Code (Decree No. 314 of 1946) (30 November 1946) **(R-013)**, arts. 13, 55 ("[...] Public instruments shall be drawn up in Spanish [...].") ("[...] the minutes shall bear the signature and seal of the Notary Public proceeded, in the first case by the words: "before me" and in the second case by the words: "by me and before me.").

issuing such a document.[143] Exhibit **C-27** does not indicate which documents the notary analysed in order to issue such a certification. This is even more serious when we take into consideration that only one of the companies in the structure is from Guatemala, so the notary issued a certification including six other entities that do not even correspond to his jurisdiction.

125. Given that the Republic's criticisms of the proof of ownership of the investment and Exhibit **C-27** are compelling, Claimants have submitted new documentation to justify their alleged indirect ownership of Pacific Solar. However, this new documentation also contains serious deficiencies and cannot be considered as convincing evidence of ownership of the corporate chain and of Pacific Solar's shares.

126. According to Claimants, the Paiz's are the settlors and beneficiaries of the [redacted] established in the British Virgin Islands and in which the entity [redacted] serves as Trustee.[144] [redacted] Claimants claim to hold title to a corporate chain of six companies, [redacted], the latter of which owns 99.99% of the shares of Pacific Solar.[145]

127. However, the documentation submitted by the Paiz has deficiencies and inconsistencies that prevent these documents from having sufficient probative value to establish ownership.[146] The new documents provided by Claimants consist mostly of lists of shareholders.

[143] Notarial Code of Guatemala (Decree No. 314 of 1946) (30 November 1946) **(R-013)**, art. 55 ("The Legalization Act shall contain: [...] The place and date; proof that the reproductions are authentic and a brief account of the data contained in the sheets prior to that on which the act is recorded or of the entire legalized document [...].").

[144] *See* [redacted].

[145] ¶ 159, note 399. *See also* [redacted]; Shareholders' Record Book [redacted]; [redacted]; Shareholders' Record Book [redacted]; Shareholder Register Book of [redacted]; Shareholder Register Book of [redacted]; Shareholder Register Book of [redacted]; Shareholder Register Book of Pacific Solar (22 August 2014) (**C-256**).

[146] The Republic reserves the right to formally object to the authenticity of the documents submitted by Claimants on the ownership of the investment, pursuant to ¶ 16.5 of Procedural Order No. 1.

Instead of explaining at length the corporate chain of which they claim ownership, Claimants attempt to summarize the shareholding percentage of all companies in a footnote.[147]

128. Claimants submit the shareholder ledger of Pacific Solar Energy, S.A. de C.V., duly certified by the Mayor's Office of the Central District of Tegucigalpa in Honduras, which states that [redacted] (Bahamas) owns [redacted] (99.99%) and Mr. Fernando Paiz owns [redacted] (00.01%).[148]

129. According to the chart presented by Claimants, the next company in the chain is [redacted] (Bahamas), which is wholly owned by [redacted] (British Virgin Islands), which in turn is owned by [redacted] (British Virgin Islands) and [redacted] (Guatemala), the owners of the latter being [redacted], [redacted] and [redacted] (Panama). To demonstrate this chain of ownership, Claimants submit the lists of shareholders of each of the aforementioned companies.[149] However, these documents are insufficient and unreliable to demonstrate ownership of the entire chain.

130. *First*, the shareholder registers are not certified by an official authority or registrar. The lack of a certification implies that there was no independent verification of the authenticity or certainty of the register.

131. *Second*, the shareholder registers lack a date of issue. The lack of an issue date makes it impossible to determine whether they represent shareholder ownership as of the date of the filing of the Request for Arbitration or throughout this proceeding.

132. *Third*, the shareholder registers are not signed by any officer, director or authorized representative of the company. The signature of a document, such as these registers, is essential if the registers were prepared and approved by the proper authority.

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[147] Counter-Memorial on Jurisdiction, ¶ 159, note 399.

[148] *Ibid.*, ¶ 159; Pacific Solar Shareholder Register Book (22 August 2014) (**C-256**).

[149] *See* Shareholder Register Book of [redacted]; Shareholder Register Book of [redacted]; Shareholder Register Book of [redacted]; Shareholders' Register Book of [redacted]; Shareholders' Register Book of [redacted].

133. *Fourth*, in combination with the aforementioned points, these shareholder lists do not demonstrate that the companies even exist or are in existence as of today. Claimants have not accompanied these lists with certificates of incorporation or certificates of good standing[150] to demonstrate the legal status of these companies.

134. The documents submitted by Claimants also show inconsistencies. For example, according to the chart contained in Exhibit **C-27**, the company [redacted] is 58% owned by [redacted], 32% by [redacted] (Panama) and 0.001% by [redacted][151] By simple mathematics, these percentages imply that there are about 10% of shares that are unaccounted for.

135. The only other evidence submitted by Claimants to prove their alleged indirect ownership is the witness statement of Mr. Fernando Paiz.[152] A declaration cannot be considered as evidence of ownership, given that it was prepared by one of Claimants, *i.e.* a person interested in the outcome of the proceedings.[153]

136. In sum, the shareholder registers of the companies located in the Bahamas, British Virgin Islands, Panama, and Mr. Paiz's declaration do not constitute clear, sufficient or reliable evidence of Pacific Solar's indirect ownership. The informal presentation of the shareholder lists raises serious doubts as to whether these company records are official or have been endorsed by their directors. In this regard, there are several links in the corporate chain that Claimants have failed to prove, as can be seen from the following picture:[154]

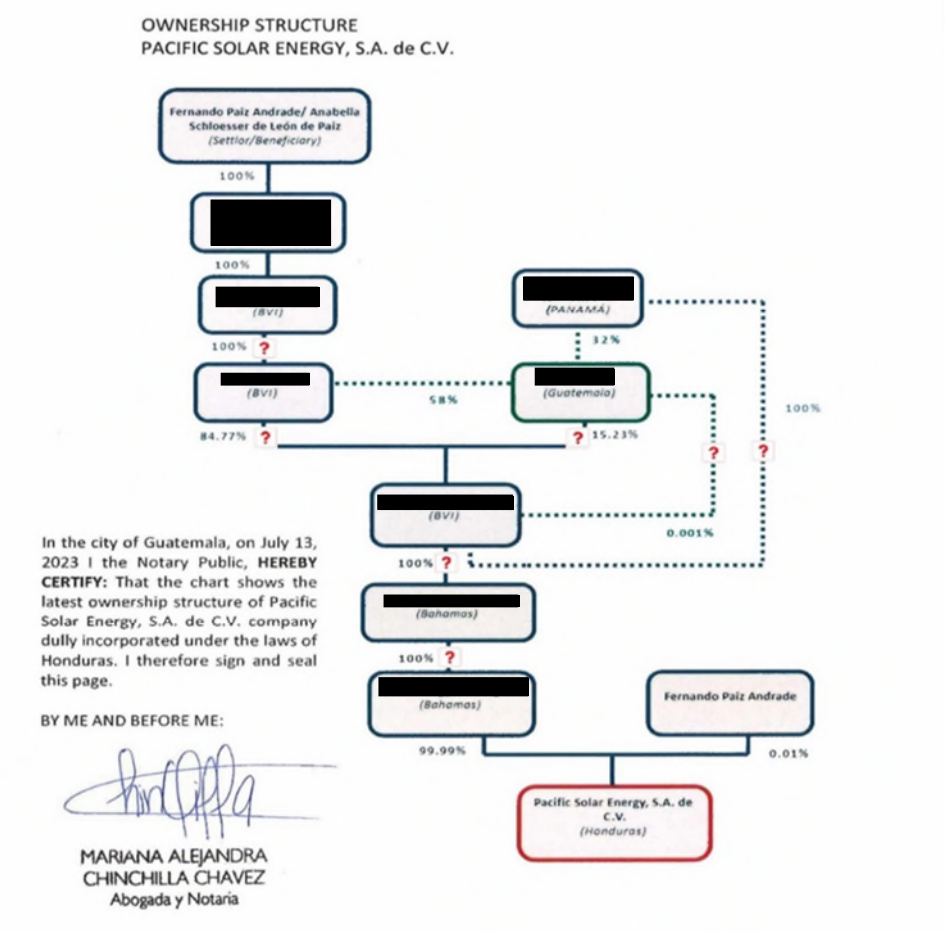
[150] Commonly referred to as *Certificate of Good Standing.*

[151] *See* Organizational Chart of the Shareholder Structure of Pacific Solar Energy, S.A. de C.V. (13 July 2023) (**C-027**).

[152] Counter-Memorial on Jurisdiction, ¶ 160; Second Witness Statement of Fernando Paiz Andrade ("**Second Paiz Statement**") (5 May 2025) (**CWS-03**), ¶¶ 5-6.

[153] *See Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Rep. 2007, p. 659 (8 October 2007) (**RL-145**), ¶ 244 (stating that, as a general rule, "witness statements produced in the form of affidavits should be treated with caution"; "is made by [...] persons not interested in the outcome of the proceedings.").

[154] Organizational chart of the shareholder structure of Pacific Solar Energy, S.A. de C.V. (13 July 2023) (**C-027**).



137. Claimants' indirect ownership of the shares of Pacific Solar, as well as of all other companies forming part of the corporate structure, is a crucial point in determining the jurisdiction of the present Tribunal and it is for them to prove it. As the tribunal in *Leshkasheli v. Azerbaijan* stated, "it is undisputed that Claimants bear the burden of proving all the facts necessary to establish the Tribunal's jurisdiction under the [Treaty] and the ICSID Convention."[155] This position has been reiterated by several tribunals.[156]

[155] *Zaur Leshkasheli & Rosserlane Consultants Ltd. v. Republic of Azerbaijan*, ICSID Case No. ARB/20/20, Award (21 March 2025) (**RL-195**), ¶ 320.

[156] *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009) (**RL-076**), ¶¶ 60-61 ("In the Tribunal's view, it cannot take all the facts as alleged by the Claimant as granted facts [...] if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage."); *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Final Award (25 October 2022) (**RL-183**), ¶ 353 ("The Tribunal agrees with the Respondent that this principle does not override the Claimant's legal burden of establishing the Tribunal's jurisdiction."); *Spence International Investments, LLC et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Provisional Award (Corrected) (30 May 2017) (**RL-097**), ¶ 239 ("The burden is therefore on Claimants

138. In conclusion, the Tribunal must declare that it lacks jurisdiction to hear the present dispute since Claimants have not demonstrated that they own, directly or indirectly, Pacific Solar. Even assuming that Claimants are the owners of the alleged corporate chain that owns Pacific Solar, Pacific Solar assigned all its assets and rights, including the PPA, to [redacted] by means of trust agreements.

2. All of Pacific Solar's shares, assets and rights were transferred to [redacted] prior to the commencement of this arbitration.

139. Claimants have submitted documentation confirming that they currently have no ownership rights in Pacific Solar. As addressed by the Republic in its Memorial on Jurisdiction, Pacific Solar notified ENEE on 12 January 2018 that it had assigned all rights and assets related to the Nacaome I Plant, including the economic rights arising from the PPA, to [redacted] acting as trustee.[157] In accordance with Honduran law, this implies a transfer of title to the trust assets.

140. Contrary to Honduran law, Claimants now argue that the trust agreement does not imply a transfer of ownership and that the Paiz continue to own the Nacaome I Plant. From the documents provided by Claimants themselves, this position has no legal basis.

141. Since the FTA does not define the concept of "ownership," the applicable standard for determining legal ownership of an asset is local law. As explained by the tribunal in *Perenco v. Ecuador*, "[g]iven the absence of detailed general or conventional rules of international law governing the organisation, operation, management and control of an enterprise, **a tribunal should in principle be guided by the more detailed prescriptions of the applicable municipal law**."[158]

142. In the same vein, Professor Douglas points out that:

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to prove the facts necessary to establish the Tribunal's jurisdiction.") *Carlos Sastre et al. v. United Mexican States*, ICSID Case No. UNCT/20/2, Award on Jurisdiction (21 November 2022) (**RL-184**), ¶ 151 ("the burden of establishing jurisdiction lies primarily upon Claimants.").

[157] Memorial on Jurisdiction, ¶ 149.

[158] *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues on Jurisdiction and on Liability (12 September 2014) (**CL-067**), ¶ 522. *See also Mason Capital L.P. & Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, Final Award (11 April 2024) (**RL-194**), ¶ 969 ("As the Tribunal explained in its Decision on Respondent's Preliminary Objections, the ownership of assets can only be determined by reference to the applicable domestic law.").

> General international law contains no substantive rules of property law. Nor do investment treaties purport to lay down rules for acquiring rights in rem over tangibles and intangibles. **Whenever there is a dispute about the scope of the property rights comprising the investment, or to whom such rights belong, there must be a reference to a municipal law of property**.[159]

143. At the outset, it is important to note that there are two trust agreements. First, there is a security trust agreement entered into by [redacted] the German Investment Corporation[160] ("**DEG**") and the Dutch Business Development Bank[161] ("**FMO**") (hereinafter "Share Trust").[162] Secondly, there is a management and guarantee trust agreement between Pacific Solar, [redacted] DEG and FMO (hereinafter "Asset Trust").[163] These contracts confirm the Republic's arguments.

144. On 12 January 2018, [redacted] the majority shareholder of Pacific Solar, assigned and transferred all of its shares in Pacific Solar to [redacted] acting as trustee, through the Share Trust and establishing DEG and FMO as first ranking beneficiaries.[164]

[redacted]

[159] Z. Douglas, *The International Law of Investment Claims* (2009) (**RL-149**), ¶¶ 101-102.

[160] In its native language, *Deutsche Investitions- und Entwicklungsgesellschaft.*

[161] In its native language, *Nederlandse Financierings-Maatschappij voor Ontwikkelingslanden N.V.*

[162] Share Trust Agreement (**C-266**).

[163] Asset Trust Agreement (**C-267**).

[164] Share Trust Agreement (**C-266**), PDG at 3 [redacted]

[165] Memorial on Jurisdiction, ¶¶ 165, 177.

[redacted].[168]

146. Similarly, on 12 January 2018, Pacific Solar assigned all of its assets and rights over the Nacaome I Plant in favour of [redacted] as trustee and setting DEF as first order beneficiary and FMO as second order beneficiary, through the Asset Trust.[169]

[redacted]

[redacted]

[redacted]

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[166] Share Trust Agreement (**C-266**), PDF p. 7, Clause Two.

[167] *Ibid*., PDF pp. 10-11, Obligations of the Settlor.

[168] Pacific Solar Shareholder Record Book (22 August 2014) (**C-256**), PDF pp. 24-29. The book clearly reflects notations on each of [redacted]'s certificates indicating the following language: "Endorsed in trust property in favor of [redacted] [...]."

[169] Asset Trust Agreement (**C-267**), PDF p. 32, § 8.1.2 ([redacted]).

[170] Counter-Memorial on Jurisdiction, ¶¶ 165, 177.

[171] Counter-Memorial on Jurisdiction, ¶ 165 ([redacted]).

[redacted]

149. Knowing that Honduran law and the wording of the trust agreements do not support their position, Claimants selectively cite excerpts from those agreements and the Honduran Commercial Code in an attempt to demonstrate that they retain ownership of Pacific Solar's shares, assets and rights.[173] The Republic proceeds to correct these assertions.

150. *First*, Claimants point out that [redacted] right of ownership is limited to performing only those acts required for the fulfilment of the lawful and determined purpose for which they are intended. They further state that [redacted] authority is limited to transferring the shares and assets to DEG and FMO in the event of Pacific Solar's default, so that [redacted] never has any ownership rights over Pacific Solar's shares and assets.[174] This argument is without merit in the face of the explicit language of the trust agreements, as we have seen above the agreements clearly provide for the assignment and transfer of Pacific Solar's shares, as well as its assets and rights.[175]

151. Furthermore, Claimants do not deny that [redacted] holds title over the shares and assets in trust, but state that ownership rights may be limited based on what is set forth in the trust agreement.[176] [redacted]

[172] Asset Trust Agreement (**C-267**), PDF pp. 22-25, § 5.

[173] Counter-Memorial on Jurisdiction, ¶¶ 173-182.

[174] *Ibid.*, ¶¶ 173-174, 178.

[175] *See supra* ¶¶ 145, 148.

[176] Counter-Memorial on Jurisdiction, ¶ 173 ("Under the Honduras Commercial code, a trustee does not have absolute ownership over the assets transferred in trust […].").

[redacted] In other words, this transfer of ownership in favour of [redacted] is for an indefinite period of time, until Pacific Solar complies with the obligations agreed in the trust agreements.[178]

152. *Second*, Claimants state that the settlors may reserve rights over the trust assets and that they have the right to revoke the trust and obtain the return of the assets.[179] This assertion is misleading. Claimants cite provisions that are certainly found in the Honduran Commercial Code; however, the reality of the trust agreements is different. Both trusts are irrevocable and the settlors waived any right of revocation, until the time they meet their debt obligations.[180] In the Share Trust and the Asset Trust, it was established that [redacted] and Pacific Solar, respectively, will only have the right to receive back title to the shares and assets if the debt obligations are fully discharged.[181] In short, until Pacific Solar is in full compliance with its debt obligations, ownership of Pacific Solar's shares, assets and rights will remain with [redacted] as trustee.

153. *Third*, Claimants contend that [redacted] continues to own the shares because the Share Trust provides that [redacted] must only [redacted][182] This argument lacks seriousness. The idea that there are multiple owners of the trust property during the existence of

[177] Share Trust Agreement (**C-266**), PDF p. 13, Trustee's Rights, paragraph 1; Asset Trust Agreement (**C-267**), PDF p. 40, § 8.10.1.

[178] Share Trust Agreement (**C-266**), PDF p. 9; Asset Trust Agreement (**C-267**), PDF p. 50, § 11.

[179] Counter-Memorial on Jurisdiction, ¶¶ 173-174.

[180] [redacted]

[182] Counter-Memorial on Jurisdiction, ¶ 179; *See also* Asset Trust Agreement (**C-266**), pp. 10-11, Obligations of the Settlor, para. 6.

the trust is incompatible with the very purpose of the trust.[183] The law recognizes [redacted] as the owner of the shares *vis-à-vis* all third parties, including an eventual buyer.[184] Therefore, [redacted] cannot, as a matter of law, dispose of the shares through a transaction with third parties simply because the law will not recognize it as the owner of those assets. Notwithstanding what the parties to the Share Trust agreed to cannot exceed the law, the provisions that Claimants allude to actually appear to be clauses designed to mitigate the possibility of fraud and other similar complications.

154. *Fourth*, Claimants allege that the title to Pacific Solar's shares, assets and rights is demonstrated by the conduct between Pacific Solar and ENEE, and that all it has exercised is a right to encumber under the PPA.[185] First, the Republic rejects that ownership can be determined by the conduct of a state entity, such as ENEE. Second, while Clause 20.6 of the PPA is entitled "Right to Encumber," the content of the clause contains several possibilities, including assignment.[186] While the assignment of the PPA does not imply an assignment of Pacific Solar's obligations under the contract, the assignment does imply the transfer of the revenues generated by the PPA to new beneficiaries. In other words, Pacific Solar only retains the obligation to operate the Nacaome I Plant, which was also agreed in the Asset Trust.[187]

155. In the letter sent to ENEE on 12 January 2018, Pacific Solar itself indicated that "ENEE shall follow the written instructions issued by [redacted] on behalf of [DEG and FMO], in all matters relating to the deposit of any monies to which [Pacific Solar] is entitled under the PPA."[188] And, indeed, all payments made by ENEE since that time have been made to the account at [redacted][189]

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[183] National Banking and Insurance Commission, Norms for the Constitution, Administration and Supervision of Trusts (27 February 2017) (**R-033**), art. 2(q).

[184] Código de Comercio de Honduras, 1950 (Decree No. 73 of 1950) (17 February 1950) (**R-014**), art. 1036.

[185] Counter-Memorial on Jurisdiction, ¶¶ 180-181.

[186] Contract No. 002-2014 (**C-001**), § 20.6 ("The SELLER may encumber, pledge, **assign or transfer this Contract** [...].").

[187] Asset Trust Agreement (**C-267**), PDF p. 38, § 8.7.10.

[188] Letter from Pacific Solar Energy S.A. to J. A. Mejía Arita (ENEE) (12 January 2018) (**R-037**), PDF p. 3.

[189] *See* Payment Vouchers from ENEE to Pacific Solar Energy (2020) (**R-008**); Payment Vouchers from ENEE to Pacific Solar Energy (2021) (**R-009**); Payment Vouchers from ENEE to Pacific Solar Energy (2022) (**R-010**); Payment Vouchers from ENEE to Pacific Solar Energy (2023) (**R-011**); Payment Vouchers from ENEE to Pacific Solar Energy

156. The transfer of ownership under a trust is consistent with Honduran law.[190] Article 1035 of the Honduran Commercial Code states that "[t]he **trust implies the assignment of the rights or the transfer of the domain of the assets in in favour of the trustee**."[191] Likewise, Article 1036 states "**[f]rom third parties, the trustee shall be considered the owner of the rights or assets committed in trust**."[192] For the avoidance of doubt, the trust regulation defines the legal status of the trust property as follows:

> **Trust Estate**: It is the patrimony constituted by the assets or rights transferred in trust and by the profits generated by them. **Said assets or rights constitute an autonomous patrimony and therefore different and independent from the patrimony of the trustor**, the trustee, the beneficiary, as well as from any other patrimony administered by the trustee in fiduciary property [...].[193]

157. By virtue of the foregoing, it is clear that Claimants do not currently hold any ownership rights over Pacific Solar or over the assets and rights related to the Nacaome I Plant. The trust agreements expressly provide for the assignment of ownership and the irrevocability of ownership until full satisfaction of the debt obligations, conditioning any right of revocation or repossession of the shares and assets by the settlers until that time. As long as these conditions have not materialized, [redacted] retains title to the shares, assets and rights of Pacific Solar and Claimants have not demonstrated otherwise.

158. Finally, it is important to draw the Tribunal's attention to a highly suspicious and bad faith conduct committed by Claimants. Both trust agreements contain defined terms that are not found in those agreements; rather, the agreements refer to the definitions set forth in the *Common Terms Agreement* (Exhibit **C-268**), a supplemental document entered into by Pacific Solar, DEG and FMO in connection with their debt transactions. According to the trust agreements, the Common Terms Agreement contains the definitions of various terms such as [redacted]

(2024) (**R-012**). The payment execution documents reflect that the payment was made to an account at [redacted]

[190] Memorial on Jurisdiction, ¶ 150.

[191] Honduras Commerce Code, 1950 (Decree No. 73 of 1950) (17 February 1950) (**R-014**), art. 1035.

[192] *Ibid.*, art. 1036.

[193] National Banking and Insurance Commission, Norms for the Constitution, Administration and Supervision of Trusts (27 February 2017) (**R-033**), art. 2(q). Pursuant to the Honduran Commercial Code, the regulation defines a trustee as the "[i]nstitution to whom the dominical title over [the trust property] is attributed."

[redacted]

all of which are highly relevant to the proper interpretation of the trust agreements.

159. In an attempt to hide information from this Tribunal, Claimants have overly redacted much of the definitions contained in Exhibit **C-268**, precisely covering the definitions of the listed concepts:[195]

ARTICLE I

DEFINITIONS AND INTERPRETATION

Section 1.01. *Definitions*. Wherever used in this Agreement, the following terms have the meanings opposite them:

[redacted]

NYDOCS01/1691476 *Pacific Solar Energy – Common Terms Agreement*

[194] Share Trust Agreement (**C-266**), PDF pp. 4-5, §§ 1.6, 1.7, 1.9; Asset Trust Agreement (**C-267**), PDF p. 13, § 1.28.

[195] Loan Agreement between Pacific Solar, DEG, and FMO (excerpt) (14 December 2017) (**C-268**).

[redacted]

[redacted]

160. This type of behaviour is unacceptable and should result in negative inferences by the Tribunal about Claimants' excessive attempts to create the appearance of jurisdiction.

a. As a result of the trusts, Claimants are not the beneficiaries of the investment.

161. Aware that Pacific Solar's shares, assets and rights have been formally assigned to [redacted] in accordance with Honduran law, Claimants adopt the *beneficial ownership* doctrine under international law for purposes of determining the ownership of the alleged investment and their standing to bring the present arbitration. However, even adopting the *beneficial owner* doctrine, Claimants lack standing to bring the present arbitration since they are not the beneficiaries of the investment, but rather DEG and FMO.

162. Claimants invoke the decision of the Annulment Committee in *Occidental v. Ecuador* and point out that "as regards beneficial ownership is a reflection of a more general principle of international investment law: 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."[196] In that sense, the tribunal's decision in *Saba Fakes v. Turkey*, which was introduced by Claimants, confirms that the use of trusts can create a split between legal owner and beneficiary.[197]

163. Furthermore, Professor Stern noted that, in those cases of imperfect dominion, "international law favours the beneficiary."[198] In her dissenting opinion, the professor cites an article from Margaret Whiteman's *Digest of International Law*, which states:

> Where the beneficial owner of property, with respect to which claim was made before the Foreign Claims Settlement Commission of the United States, was a national of the United States, and where the legal owner or nominee was a nonnational of the United States, the Commission allowed claims if otherwise eligible. But where the legal owner or trustee was a national of the United States, and **the beneficiary or cestui que trust was a nonnational, in claims before that Commission, the claims were denied**.[199]

164. The same doctrine invoked by Claimants points out that:

> The fact that the nominal owner did not have a real interest in the subject property, or that **the beneficial owner was not of a proper nationality, was occasionally the decisive ground for dismissing a claim**.[200]

165. The procedural time for proving beneficial ownership is at the time the arbitration claim is filed.[201] In this regard, the tribunal in *CSOB v. Slovakia* stated that

> [...] it is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of

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[196] *Occidental Petroleum Corporation & Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of Award (2 November 2015) (**CL-273**), ¶ 262.

[197] *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010) (**CL-272**), ¶ 134 ("The Tribunal observes, in this respect, that the division of property rights amongst several persons or the separation of legal and beneficial ownership is commonly accepted in a number of legal systems, be it through a trust, a *fiducie* or any other similar structure.").

[198] *Occidental Petroleum Corporation & Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Dissenting Opinion of Prof. Brigitte Stern (Award) (5 October 2012) (**RL-161**), ¶ 149.

[199] M. Whiteman (dir.), *Digest of International Law*, Vol. 8 (1967) (**RL-121**), pp. 1261-1262.

[200] D. J. Bederman, "Beneficial Ownership of International Claims," in 38 *International and Comparative Law Quarterly* 935 (1989) (**CL-275**), p. 936.

[201] *Ibid*, p. 937 ("A beneficial owner has an interest in a property vested before, or at the time, the claim arises.").

> jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted.[202]

166. The reality is as follows. The nominal ownership of the shares, as well as all the assets of Pacific Solar, including the Nacaome I Plant, is vested in [redacted] As for the identity of the beneficiary of the investment, all income and economic benefits generated by the investment, namely the Nacaome I Plant, are received and administered by [redacted], a company established in the Republic of Honduras, and subsequently transferred to DEG and FMO, entities of the Federal Republic of Germany[203] and the Kingdom of the Netherlands,[204] respectively. Not only was this executed years before the present arbitration was instituted, but the assignment of the benefits of the Nacaome I Plant is irrevocable. The mere possibility of Pacific Solar receiving benefits from the putative investment is conditional upon it having fulfilled its debt obligations to DEG and FMO.[205]

167. On one hand, both the Share Trust and the Asset Trust designate DEG and FMO as creditors and beneficiaries.[206] In the case of the Share Trust, [redacted] is only a trustee for the purpose of repayment of the Pacific Solar shares, in the event that the debt obligations have been met.[207] In addition, the Asset Trust provides that Pacific Solar may obtain the [redacted]

[202] *Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdictional Objections (24 May 1999) (**CL-262**) ¶ 31.

[203] *See* KfW DEG, *About Us* (9 September 2024) (**C-048**).

[204] *See* FMO, *About FMO* (12 September 2025) (**C-054**).

[205] Share Trust Agreement (**C-266**), PDF p. 12, [redacted]

[206] Share Trust Agreement (**C-266**), PDF p. 3 ([redacted]; Asset Trust Agreement (**C-267**), PDF p. 32, § 8.1.2.2. 32, § 8.1.2 ([redacted]

[207] Share Trust Agreement (**C-266**), PDF p. 9, [redacted]

[208] Asset Trust Agreement (**C-267**), PDF p. 42, § 8.13.5.

[redacted]

170. In conclusion, Claimants cannot claim that they are the beneficiaries of the alleged investment, because at least since 2018 they assigned all revenues from the Nacaome I Plant in favour of their creditors, DEG and FMO. Furthermore, they have not submitted evidence to show that they have regained title to Pacific Solar's shares, assets, and right to the revenues of the Nacaome I Plant as of the date of the commencement of this arbitration.

b. The Paiz have not shown that they control Pacific Solar.

171. In their latest attempt to create the Tribunal's jurisdiction over the present dispute, Claimants allege that, if anything, the Paiz retain complete control over Pacific Solar.[213] However,

[209] *Ibid.*, PDF pp. 11-12, §§ 1.20, 1.21, 1.22.

[210] *Ibid.*, PDF pp. 11-12, § 1.21 ([redacted]).

[211] *Ibid.*, PDF p. 11, § 1.20 ([redacted]).

[212] *Ibid.*, PDF p. 12, § 1.22 ([redacted]).

[213] Counter-Memorial on Jurisdiction, ¶¶ 183-188.

Claimants have not shown that they have control over the alleged investment for two reasons: (i) they have not yet shown that they own the investment and (ii) the control that Pacific Solar's shareholders might exercise is limited by the Share Trust.

172. According to the tribunal in *Aguas del Tunari v. Bolivia*, "controlled directly or indirectly" means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity" and that "such legal capacity **is to be ascertained with reference to the percentage of shares held**."[214]

173. In that regard, the tribunal in *BRIF TRES v. Serbia* stated the following:

> **"Control" is generally ascertained through legal control founded on the percentage of ownership title of shares** (direct or indirect), including an analysis of voting rights and shareholders' agreements, or through actual control, which requires establishing the capacity to control and direct a company's day-to-day management and activities.[215]

174. Similarly, the tribunal in *Leshkasheli v. Azerbaijan* stated:

> As noted above, **de jure control derives from majority ownership** or other arrangements providing a minority shareholder the legal capacity to control a company. Typically, de jure control involves the right to appoint a majority of the board of directors and the capacity to exercise significant influence over the company's decision-making process.[216]

175. Control of an investment is reflected by the majority shareholding and the capacity to make decisions in the company. In the present case, it has been demonstrated that the majority shareholder of Pacific Solar is [redacted].[217] However, Claimants did not provide reliable evidence that they are indirect owners of [redacted]. The documentation

[214] *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005) (**RL-137**), ¶ 264.

[215] *BRIF TRES d.o.o. Beograd and BRIF-TC d.o.o. Beograd v. Republic of Serbia*, ICSID Case No. ARB/20/12, Award (30 January 2023) (**RL-189**), ¶ 174.

[216] *Zaur Leshkasheli & Rosserlane Consultants Ltd. v. Republic of Azerbaijan*, ICSID Case No. ARB/20/20, Award (21 March 2025) (**RL-195**), ¶ 405.

[217] Pacific Solar Shareholder Register Book (22 August 2014) (**C-256**).

provided by Claimants simply does not demonstrate a chain of ownership from [redacted] to the Paiz.[218]

176. Claimants' position that, under the Asset Trust, they still have an obligation to operate the Plant and meet their obligations to generate electricity is irrelevant for purposes of determining control.[219] First, Claimants have not shown that they operate and control the Plant. The only evidence they have presented on this is the witness statement of Mr. Paiz, who says "I make all the important decisions relating to Pacific Solar."[220] Second, investment tribunals have established that mere managerial control over the investment is insufficient to obtain treaty protection.[221]

177. On the other hand, even assuming that the Paiz indirectly own [redacted] and thus control Pacific Solar (*quod non*), Claimants have not submitted a single document demonstrating that they actually exercise such control.

178. In their Counter-Memorial, Claimants merely assert that the Share Trust allows [redacted] to exercise its rights as a shareholder.[222] However, they do not cite any evidence that the Paiz have exercised control over Pacific Solar. The only documentation they cite

[218] *See supra* ¶¶ 130-136.

[219] Counter-Memorial on Jurisdiction, ¶ 185.

[220] Second Paiz Declaration (**CWS-03**), ¶ 6.

[221] *Gramercy Funds Management LLC, & Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award (6 December 2022) (**CL-290**), ¶¶ 646-647 ("The tribunal made a clear distinction between 'de facto' control derived from agreements between minority shareholders and a distinct '*de facto*' control exerted by the managers of the company. This latter control, without ownership is not sufficient to grant protection under the treaty [...] B-Mex supports this Tribunal's conclusion that **managerial control is not sufficient for an investor to acquire standing under the FTA**."); *B-Mex, LLC et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award (19 July 2019) (**CL-189**), ¶ 246 ("Article 1117 cannot be read as allowing the nationals of one NAFTA Party to pursue Treaty claims on behalf of an enterprise of another NAFTA Party if they cannot show to have an investment in that enterprise. If Claimants were right, it might be possible, for example, for a Mexican company to appoint a US national as its sole director and for that director then to pursue claims under the Treaty on behalf of the Mexican company against Mexico, **claiming that she need not be an "investor" herself to pursue such Treaty claim if she exercises de facto control. That proposition runs counter not only to the terms of Chapter 11, but also to its fundamental object and purpose, which is the protection of investments by investors of another NAFTA Party**.").

[222] Counter-Memorial on Jurisdiction, ¶ 184.

is Mr. Paiz's witness statement.[223] As discussed above, a witness statement cannot serve as convincing evidence that Claimants own or control the investment.[224]

[redacted]

[redacted]

180. It follows from the foregoing that [redacted] cannot hold meetings and vote without a mandate or proxy from [redacted] as trustee. Claimants have failed to produce such a mandate or proxy in the present arbitration. Therefore, they have not shown that they exercise or have exercised control over Pacific Solar.

181. As such, Claimants' use of the decisions in *Plama v. Bulgaria* and *Bozo v. Panama* are misapplied in the present case.[227] In *Plama v. Bulgaria*, the tribunal ultimately determined that the claimant did own the investment, rendering the discussion of control superfluous.[228] In *Bozo v. Panama*, the claimant had no limitation on the use of its voting rights over the investment and

[223] *Ibid*., ¶ 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.'").

[224] *See supra* ¶ 135.

[225] Counter-Memorial on Jurisdiction, ¶ 184.

[226] Share Trust Agreement (**C-266**), PDF p. 16, § 6.

[227] Counter-Memorial on Jurisdiction, ¶ 169.

[228] *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008) (**RL-148**), ¶ 92 ("[...] the Arbitral Tribunal accepts [that] Mr. Vautrin [...] was and remains the ultimate owner of the shares of those two companies.").

was free to instruct the trustee how to exercise the voting rights.[229] The situation is different in the present case where, as already demonstrated, [redacted] transferred its ownership of the shares to [redacted] and cannot participate in meetings without a prior mandate from [redacted] or make a decision that may cause prejudice to the Trust.

182. In conclusion, Claimants have failed to establish that they exercise control over the alleged investment for the following reasons: (i) Claimants have not submitted documentary evidence demonstrating a chain of ownership linking them as indirect owners of [redacted] the majority shareholder of Pacific Solar; and, (ii) the Share Trust makes [redacted] right to participate in meetings and exercise voting rights conditional upon the prior issuance of a power of attorney by [redacted] which has not been produced.

3. The constitution of the Share Trust and the Asset Trust is completely divorced from the alleged measures taken by Honduras.

183. Pursuant to Procedural Order No. 4, the Republic of Honduras analyses whether the "transfer [t[redacted]] should be disregarded for purposes of establishing Claimants' ownership and control over the investment as a condition for the Tribunal's jurisdiction."[230] The Republic of Honduras submits that the Tribunal should take into consideration the transfer of Pacific Solar's shares, assets and rights to [redacted] through the formation of trusts for the purposes of determining its jurisdiction. However, the Republic insists that the creation of the Share Trust and the Asset Trust was a business decision between Pacific Solar, its shareholders, DEG and FMO, and is completely unconnected to any alleged conduct by Honduras that is now the subject of this arbitration.

184. The trusts were constituted in 2018, *i.e.*, four years before the alleged measures giving rise to this arbitration. Claimants themselves admit that the trusts were created as part of their debt transactions with DEG and FMO long before the present dispute arose.[231] According to

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

[230] Procedural Order No. 4, ¶ 55(B), 2.c.

[231] Counter-Memorial on Jurisdiction, ¶ 164.

Honduras understanding, these are the only trusts currently in existence relating to Pacific Solar and there is no direct link between the formation of these trusts and Honduras alleged conduct.

185. Claimants have indicated that, subsequent to the existence of the dispute, Honduras' alleged actions have forced them to "restructure their debts."[232] In two rounds of written submissions, Claimants have not submitted a single document demonstrating that this restructuring has occurred or what it would entail, notably the do not indicate the creation of a new trust or a modification of the existing trusts. The only evidence they have submitted in an attempt to substantiate this allegation are the two witness statements of Mr. Fernando Paiz, one of the claimants in this arbitration.[233] However, Mr. Paiz does not provide any details or supporting documents about the alleged restructuring or what actions he has had to take.

186. It is undisputed that the effects of the Share Trust and the Asset Trust on Pacific Solar's shares, assets and rights took place prior to the alleged measures and therefore can and should be analysed entirely separately from the merits of the present dispute, as a condition for the Tribunal's jurisdiction.

C. The Tribunal lacks jurisdiction *ratione voluntatis* over the contractual claims brought by means of the MFN clause of the CAFTA-DR.

187. In its Memorial on Jurisdiction, the Republic demonstrated that the Tribunal lacks jurisdiction *ratione voluntatis* over Claimants' contractual claim.[234] As Honduras explains in its Memorial on Jurisdiction, Claimants' claim is expressly excluded from the scope of the Most Favoured Nation ("**MFN**") clause, given that the present case falls under the government procurement exception provided for in Article 10.13(5) of the Treaty.[235] Furthermore, and even assuming that the government procurement exception in Article 10.13(5) CAFTA-DR does not apply to the present case (*quod non*), the Republic has already demonstrated that the MFN clause does not permit the importation of substantive clauses from other treaties signed by Honduras.[236]

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[232] Counter-Memorial on Jurisdiction, ¶ 192.

[233] *Ibid.*, ¶ 192, note 466.

[234] Request for Bifurcation, § II.D; Memorial on Jurisdiction, § III.

[235] Memorial on Jurisdiction, § III.D.1.

[236] *Ibid.*, § III.D.2.

188. In their Counter-Memorial, Claimants argue that "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 favourable than those contained in CAFTA-DR."[237] In particular, Claimants seek to invoke the umbrella clauses contained in the Honduras-Switzerland BIT and Honduras-Germany BIT.[238]

189. According to Claimants, the application of the MFN clause is appropriate because (i) the exception contained in Article 10.13(5) of the Treaty is not applicable to the present case;[239] and (ii) the MFN clause contained in the Treaty has a broad wording that allows the importation of substantive clauses from other treaties entered into by the Republic of Honduras, such as the umbrella clause—which is not included in the CAFTA-DR—contained in the Honduras-Switzerland BIT and the Honduras-Germany BIT.[240]

190. Notably, Claimants decided to advance their argument in a manner that is contrary to the logic and operation of the Treaty. For Claimants, one must first analyse the content of the MFN clause and then analyse the applicability of the Article 10.13(5) exception.[241] As the Republic explained in its Memorial on Jurisdiction,[242] the Tribunal must first determine whether or not the MFN clause applies before ruling on the importation of standards from other treaties through Article 10.04 of the Treaty.[243]

191. Below, the Republic demonstrates, as already set out in its Request for Bifurcation and Memorial on Jurisdiction, that the application of the MFN clause to the present case is limited by the exception contained in Article 10.13(5) of the Treaty, since the present dispute arises out of government procurement (**Subsection 1**). In any event, even if the application of the MFN clause were not limited to the present dispute under the government procurement exception (*quod non*),

[237] Counter-Memorial on Jurisdiction, ¶ 64.

[238] Statement of Claim, ¶ 324.

[239] Counter-Memorial on Jurisdiction, ¶¶ 98-102.

[240] *Ibid*, ¶ 66.

[241] *Ibid*, § II.B.

[242] Memorial on Jurisdiction, ¶¶ 157-159.

[243] Memorial on Jurisdiction, ¶ 156; *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award (24 March 2016) (**RL-031**), ¶ 401.

the importation of more favourable substantive clauses from other agreements signed by Honduras, and in particular the umbrella clause—which is not contained in the CAFTA-DR—is not permitted by the Treaty (**Subsection 2**).

1. The procurement exclusion in the Treaty prevents Claimants from applying the MFN clause to the present case.

192. As noted in the Republic's Memorial on Jurisdiction, the application of the MFN clause to the present case is explicitly prohibited by the Treaty because Article 10.13(5) of the Treaty excludes the application of the MFN clause to procurement.[244]

193. Indeed, Article 10.13(5) of the Treaty provides as follows:[245]

> Article 10.13: Non-Conforming Measures
>
> [...]
>
> Articles 10.3, **10.4** and 10.10 do not apply to:
>
> (a) **procurement**; or
>
> (b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

194. In turn, Article 10.4 of the Treaty refers to the MFN clause.

195. In this regard, in their Counter-Memorial on Jurisdiction, Claimants argue that the present case does not fall within the scope of the exception in article 10.13(5), as the alleged interpretation of the exception would confirm that *procurement* refers to the formal process regulating the acquisition of goods and services.[246]

196. According to Claimants, as the present dispute arises out of Honduras' breaches of its obligations to Pacific Solar and not the procurement process in which those obligations were

[244] Memorial on Jurisdiction, § III.D.(1).

[245] CAFTA-DR (**CL-001**), art. 10.13(5) (emphasis added).

[246] Counter-Memorial on Jurisdiction, ¶¶ 99-102.

acquired, the Article 10.13(5) exception does not apply to the present case.[247] Claimants' interpretation is unfounded and must be rejected by the Tribunal.

197. In their Counter-Memorial on Jurisdiction, Claimants entirely fail to state the reasons why their interpretation of the Article 10.13(5) exception to the Treaty effectively aligns with Article 31(1) of the VCLT and should be adopted by the Tribunal. The reason for this is simple, Claimants' interpretation is blatantly contrary to a good faith interpretation in accordance with the ordinary meaning to be attributed to the term "procurement" in its context and in light of its object and purpose.

198. Below, the Republic demonstrates that the proper interpretation of the term "procurement" in accordance with Article 31(1) of the VCLT, i.e. in good faith (**Subsection a**); in accordance with the ordinary meaning of its terms (**Subsection b**); and from its context (**Subsection c**) and from its object and purpose (**Subsection d**); does frame the present claims within the scope of the exception of Article 10.13(5) of the Treaty. Accordingly, the application of the MFN clause to the present case is not possible.

a. The *good faith* interpretation of the procurement exception demonstrates that the application of the MFN clause is limited to the present dispute.

199. Under a good faith interpretation of Article 10.13(5) Claimants cannot bring claims under Article 10.4 of the Treaty.

200. Claimants argue that the definition contained in Article 2.1 of CAFTA-DR expressly provides that the term "*procurement*" is limited to "process."[248] Thus, according to Claimants, the alleged good faith interpretation of the "procurement" exception limits its application only to disputes arising out of "formal procedures established by a State to regulate the procurement of goods and services, such as the determination of bidding processes, the requirements to qualify as a bidder and to be awarded a contract, the evaluation of such

[247] *Ibid.*, ¶¶ 98-102.

[248] Counter-Memorial on Jurisdiction. ¶ 99.

qualifications, among others."[249] The interpretation put forward by Claimants is blatantly contrary to a good faith interpretation.

201. The International Law Commission has held that a good faith interpretation is essential for the *pacta sunt servanda* rule to have real meaning.[250] In this sense, where a treaty lends itself to two possible interpretations, where one allows the treaty to produce its proper effects and the other does not, good faith and the object and purpose of the treaty require that the first interpretation be adopted.[251]

202. This understanding was reiterated in the *Daimler v. Argentina* award, in which the tribunal considered that the reference to the duty to interpret in *good faith* is reflected in the duty of tribunals to limit themselves to interpretations that are within the framework mutually agreed by the State parties.[252]

203. In the present case, and as already set out in the Memorial on Jurisdiction,[253] the nature of the exception contained in Article 10.13(5) of the Treaty is the need to preserve the sovereign control of the States Parties to the Treaty in critical areas of economic and social policy, such as public procurement.[254]

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[249] *Ibid*., ¶ 102.

[250] International Law Commission, *Draft Articles on the Law of Treaties with Commentaries*, Vol. II, U.N. Doc. A/6309/Rev.1 (1966) (**CL-254**), at 219. ("First, the interpretation of treaties in good faith and according to law is essential if the *pacta sunt servanda* rule is to have any real meaning.").

[251] *Ibid*. ("When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.").

[252] *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2011) (**RL-081**), ¶ 173 ("The Vienna Convention itself unequivocally emphasizes the foundational role of State consent in the law of treaties. The Convention employs the word 'consent' no fewer than 62 times, including in the titles to six articles. Within the Convention's interpretive prescriptions, it is well-known that article 31(1) begins by instructing interpreters to interpret a treaty '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'. While the article does not explicitly mention consent, the reference to 'good faith' nevertheless reinforces the duty of tribunals to limit themselves to interpretations falling within the bounds of the framework mutually agreed to by the contracting state parties. As stated by the International Law Commission in its commentary to the draft version of Article 31, the requirement of interpretation in good faith 'flows directly from the rule *pacta sunt servanda.*'").

[253] Memorial on Jurisdiction, ¶¶ 158-168.

[254] *Ibid*., ¶¶ 161-168. *See also Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award (24 March 2016) (**RL-031**), ¶ 419 ("The Tribunal understands that through the exception carved out by Article 1108(7)(a), the NAFTA Contracting Parties sought to protect their ability to exercise nationality-based preferences in

204. Indeed, the purpose of including this exception in the Treaty is to give Contracting States greater flexibility in discriminating between foreign investors in relation to the expenditure of public funds.[255]

205. This understanding has been reiterated by investment tribunals deciding on the application of this same exception under NAFTA, whose wording is the same as that of CAFTA-DR.[256]

206. In particular, it is relevant to reiterate the tribunal's analysis in *Mesa Power v. Canada*, which found that the exception to the application of the MFN standard is reasonable in light of the important function of the government to procure goods and services in a manner that brings maximum benefits to the local economy.[257] For this reason, it is only logical that some preferential treatment should be allowed to local suppliers or suppliers of other nationalities when a State Party, in the exercise of its functions, is engaged in the formal procurement of goods and services.[258]

207. Clearly, the proper application of the Treaty and the fulfilment of the agreement of the Contracting Parties would not be satisfied if the exception in Article 10.13(5) of the Treaty were only applied to disputes arising out of formal procedures for the procurement of goods or services by the State.

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cases of procurement."); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003) (**CL-010**), ¶ 94 ("The Federal Government of Canada, for instance, provides heavy financial assistance to the provinces for highway construction and many of the provinces receiving this assistance enforce domestic preference regulations in their procurement. In Mexico, too, federal law prescribes preferences for Mexican goods and services in procurement by states wholly or partially funded by the federal Mexican Government. [...] domestic requirements for Government procurement are in place 'in most, if not all, countries.'").

[255] K. Vandevelde, "The General Treatment Provisions," in *U.S. International Investment Agreements* (2009) (**RL-152**), p. 255.

[256] *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award (24 March 2016) (**RL-031**), ¶ 419; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003) (**CL-010**), ¶ 94; *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Final Award (25 July 2022) (**RL-109**), ¶ 410.

[257] *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award (24 March 2016) (**RL-031**), ¶ 420.

[258] *Ibid.*

208. Indeed, a *good faith* interpretation also requires elements such as reasonableness that go beyond a simple verbal and literary analysis of the terms of the treaty.[259] In the present case, Claimants present an interpretation that escapes all reasonableness and sticks to the formalism and literalism of words isolated from the context and the object and purpose of the Treaty.

209. In light of the foregoing, it is absolutely clear that Claimants' interpretation of the "procurement" exception is contrary to good faith and should therefore be disregarded.

b. Interpretation in accordance with the *ordinary meaning of the* procurement exception demonstrates that the application of the MFN clause is limited to the present dispute.

210. In their Counter-Memorial, Claimants do not include an interpretation of the exception in Article 10.13(5) of the Treaty in accordance with the ordinary meaning of the term "procurement" in that article.

211. Claimants omit a fundamental part of the interpretative analysis under Article 31(1) of the VCLT, which consists of analysing the ordinary meaning of the provision that they claim should not be applied to the present case.

212. Consequently, Claimants refer to the definitions contained in Article 2.1 of the Treaty to construct their artificial and convenient interpretation of Article 10.13(5) exception.[260] Claimants then proceed with an interpretation in accordance with the purported ordinary meaning of the terms contained in Article 2.1 of the Treaty.[261]

213. While the definition contained in Article 2.1 is absolutely relevant to the present discussion, it is part of the context of the term "procurement" contained in Article 10.13(5). For

[259] *Poštová banka, a.s. & Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015) (**RL-169**), ¶ 284 ("In the view of this Tribunal, an interpretation in good faith is not simply interpretation bona fides, as opposed to the absence of mala fides, or a principle providing for the rejection of an interpretation that is abusive or that may result in the abuse of rights. **It also means that the interpretation requires elements of reasonableness that go beyond the mere verbal or purely literal analysis**.") (emphasis added).

[260] Counter-Memorial on Jurisdiction, ¶ 101.

[261] *Ibid.*, ¶¶ 99, 102.

this reason, the Republic presents the analysis of Article 2.1 of the Treaty as part of the context relevant to the present interpretation in Section **III.C.1.c.** below.

214. Now, turning to the ordinary meaning of the terms in Article 10.13(5), the Royal Spanish Academy ("**RAE**"), does not include a specific definition of "*contratación pública*", but does include a definition of the term public sector contract (*contrato del sector público*), which it defines as "*[C]ontrato celebrado por las entidades y organismos que tienen naturaleza de administraciones públicas, pero también por otros entes públicos que no tienen naturaleza de tales, o incluso por entes u organismos integrados en el sector público que no tienen la condición de sujetos adjudicadores ni de administraciones públicas.*"[262]

215. Likewise, the RAE defines *an administrative contract as*: "[*C*]*ontrato en el que una de las partes es una administración pública u organismo dependiente de la misma, que tiene como causa una finalidad de interés público o general y que se caracteriza por su sometimiento a un régimen jurídico especial.*"[263]

216. The definitions provided by the RAE are complemented by the definition of *procurement* from Black's Law Dictionary, which defines "*procurement*" as "*The act of getting or obtaining something or of bringing something about.*"[264]

217. Equally relevant is the definition of *procurement contract*[265] which according to Black's Law Dictionary is "[a] *contract in which a government receives goods or services.*"[266]

218. As can be seen from the above, the ordinary definition of *procurement* refers to any act by which a state entity or body **receives or acquires** goods or services for a purpose of public or state interest. In other words, under Article 10.13(5) of the Treaty, the MFN clause does not

[262] Real Academia Española, Diccionario panhispánico del español jurídico, definition of "public sector contract" (2023) (**RL-187**).

[263] Real Academia Española, Diccionario panhispánico del español jurídico, definition of "administrative contract" (2023) **(RL-188**).

[264] Black's Law Dictionary, "Procurement" (2009) (**RL-150**), p. 1327.

[265] While the English version of the Treaty refers only to the term "*procurement*" in Article 10.13(5), the Spanish version refers to "*contratación pública*," i.e. *public procurement* or *procurement contract*. (*See* CAFTA-DR, Chapter 10 (Spanish version) (1 April 2006) (**RL-141**), art. 10.13(5)).

[266] Black's Law Dictionary, "Procurement contract" (2009) (**RL-151**), p. 372.

apply to acts by which a CAFTA-DR contracting party acquires goods or services for a purpose of public or general interest, such as the supply of energy within the national territory.[267]

219. In the present case, the object of the PPA was the acquisition by ENEE, a public State enterprise,[268] of "all the energy and electrical power generated by the Plant that is delivered, measured and invoiced by" Pacific Solar.[269] It is clear that an interpretation **in accordance with the ordinary meaning to be given to** the term "*procurement*" brings the PPA within the exception contained in Article 10.13(5) of the Treaty, and therefore the MFN clause is not applicable to the present case.

220. In any event, and as explained below, the interpretation of Article 10.13(5) according to the context of the term "procurement" also reaffirms that the exception contained therein applies to the present case.

c. Interpretation from *the context of* the procurement exception demonstrates that the application of the MFN clause is limited to the present dispute.

221. As mentioned above, in their Counter-Memorial, Claimants fail to provide an interpretation in accordance with the ordinary meaning of the term "procurement" jumping directly to the context of that term in the text of the CAFTA-DR.

222. Claimants refer to the definition provided in Article 2.1 of the Treaty for the term "procurement" which states that "procurement means the process by which a government obtains the use of or acquires goods or services."[270] According to Claimants, the mere reference to the

[267] Energy supply is a matter of public interest of the State of Honduras, as expressed in the first recital of Decree 46-2022: "the State **has the duty to provide equal and equitable access to electricity to the entire population, ensuring economic and social welfare**. **Electricity is a basic and elementary good to reduce poverty and facilitate development in any part of the national territory, combat unemployment and rescue people's dignity**." *See* Decree No. 46-2022 (**C-010**), recital one (emphasis added). Similarly, Article 1.E. of the General Law of the Electricity Industry stipulates that one of the objectives of the Law is to supply the country's electricity demand. *See* Ley General de la Industria Eléctrica, 2014 (Decree No. 404-2013) ("**Decree No. 404-2013**") (11 April 2014) (**C-008**), art. 1.

[268] Act Establishing the National Electric Power Company, 1957 (Decree No. 48 of 1957) ("**Decree No. 48 of 1957**") (27 February 1957) (**C-006**), art. 1.

[269] Contract No. 002-2014 (**C-001**), p. 21, § 2.1.

[270] Counter-Memorial on Jurisdiction, ¶¶ 99-102.

word "process" indicates that *procurement* under CAFTA-DR is the formal procedure by which an instrument for the acquisition of goods or services by a Contracting State is consolidated. Claimants' position is wrong.

223. As noted above, Article 31(1) of the VCLT provides that a treaty must be interpreted in the **context of** its terms and in the light of its object and purpose.[271]

224. The inconsistency of completely formalistic and literalist interpretations of treaties with the VCLT rule of interpretation was highlighted by the tribunal in *Alemanni v. Argentina*, which considered that the rule of interpretation provided for in Article 31(1) VCLT, according to which a treaty is to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty, "**can by no stretch of the imagination be read as imposing a sort of lexicographical literalism**."[272]

225. Therefore, an interpretation that simply sticks to the limited literalism and formalism of a treaty term is not in line with the rule of interpretation provided for in Article 31 VCLT. On the contrary, when Article 31(1) refers to the ordinary meaning "to be given"[273] to the terms of the treaty:

> [...] it is clear just on the face of it (without even resorting to the preparatory work of the International Law Commission which makes this explicit) **that there can in a given case be more than one 'ordinary meaning', and the question for the interpreter is to decide which among them was intended by the negotiators**, and for that purpose he **must be guided by context** (in its widest sense) **and object and purpose**, and also by the additional and where appropriate the supplementary means enumerated in Article 31(3) and (4) and Article 32.[274]

[271] VCLT (**CL-133**), art. 31(1) (emphasis added).

[272] *Giovanni Alemanni et al. v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (17 November 2014) (**RL-165**), ¶ 270 (emphasis added).

[273] VCLT (**CL-133**), art. 31.

[274] *Giovanni Alemanni et al. v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (17 November 2014) (**RL-165**), ¶ 270 (emphasis added).

226. It is clear then that the ordinary meaning of the terms to be interpreted cannot be taken with completely formalistic and literal interpretations, but that, among others, the context is fundamental for a proper interpretation in good faith.[275]

227. In this regard, Article 31(2) of the VCLT includes the elements to be considered when interpreting from the context:

> The context for the purpose of the interpretation of a treaty shall comprise, **in addition to the text, including its preamble and annexes**:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.[276]

228. In relation to the relevant context for the interpretative exercise, the tribunal in *Eskosol v. Italy* considered that this includes "both **the words and sentences found in close proximity to that passage, including definitional terms, and other provisions** of the same treaty which help illuminate its object and purpose."[277]

229. While Claimants have turned to the definitions provided in Article 2.1 of the Treaty as part of the relevant context for interpreting Article 10.13(5), it is clear that they have stuck to the literal wording of isolated words contained in that provision, taking the definition of "procurement" under CAFTA-DR completely out of context.

230. CAFTA-DR Article 2.1 defines procurement as follows:

> **procurement** 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

[275] *Ibid.*

[276] VCLT (**CL-133**), art. 31(2).

[277] *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on the Request for Termination and Intra-EU Objection (7 May 2019) (**RL-176**), ¶ 80 (emphasis added).

> commercial sale or resale or with a view to use in the production or supply of goods or services for commercial sale or resale.[278]

231. As can be seen from the definition provided in the Treaty, it is fundamentally the same as the definition established for "*contrato administrativo*" by the RAE,[279] and for "*procurement contract*" in Black's Law Dictionary, which also defines this term as the acquisition of goods or services by a State.[280]

232. Clearly, both definitions do not refer to "*procurement*" as a legal procedure for the structuring of the legal instrument enabling the acquisition of goods or services, but to the **instrument itself by which the acquisition of goods or services by the state for governmental purposes is consolidated**.[281] This clearly includes the PPA as the instrument through which ENEE's purchase of energy from Pacific Solar is consolidated.[282]

233. In light of the foregoing, a contextual interpretation of the term "procurement" undoubtedly results in the exception in Article 10.13(5) of the Treaty applying to government procurement instruments, such as the PPA. The object and purpose of Article 10.13(5) confirms this understanding.

d. Interpretation *in light of the object and purpose* of the procurement exception demonstrates that the application of the MFN clause is limited to the present dispute.

234. In their Counter-Memorial, Claimants argue that the interpretation that "procurement" is the formal process regulating the acquisition of goods or services is in line with the object and purpose of the Treaty.[283] Claimants' position is unfounded and must be rejected.

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[278] CAFTA-DR (**CL-001**), art. 2.1.

[279] Real Academia Española, Diccionario panhispánico del español jurídico, definition of "contrato administrativo" (2023) (**RL-188**).

[280] Black's Law Dictionary, "Procurement contract" (2009) (**RL-151**), p. 372.

[281] *See* CAFTA-DR (**CL-001**), art. 2.1; Real Academia Española, Diccionario panhispánico del español jurídico, definition of "contrato administrativo" (2023) (**RL-188**); Black's Law Dictionary, "Procurement contract" (2009) (**RL-151**), p. 372.

[282] Contract No. 002-2014 (**C-001**), p. 21, § 2.1.

[283] Counter-Memorial on Jurisdiction, ¶ 99.

235. As mentioned above, the object and purpose of the Contracting Parties in agreeing to the exception in Article 10.13(5) was to provide Contracting States with greater flexibility in discriminating between foreign investors in relation to the expenditure of public funds when procuring goods or services from other foreign or domestic investors.[284]

236. While one of the general objects and purposes of CAFTA-DR is to increase investment opportunities in the territories of the contracting parties,[285] this does not override the specific purpose of the contracting parties to preserve their sovereign control over critical areas of economic and social policy, such as public procurement.[286]

237. Therefore, it is evident that the interpretation presented by the Republic of Honduras is in good faith in accordance with the ordinary meaning to be attributed to the terms of Article 10.13(5) of the Treaty and is in line with the object and purpose of the Treaty. Thus, the exception in Article 10.13(5) of the Treaty applies to any dispute arising out of procurement, understood as the acquisition of goods or services by the State, and not to the mere formal procedure for the consolidation of a government procurement, as argued by Claimants.

238. In light of the foregoing, the application of the MFN clause to the present dispute is explicitly prohibited by the Treaty in light of the procurement exception in Article 10.13(5).

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[284] K. Vandevelde, "The General Treatment Provisions," in *U.S. International Investment Agreements* (2009) (**RL-152**), p. 255.

[285] CAFTA-DR (**CL-001**), art. 1.2(1)(d).

[286] Memorial on Jurisdiction, ¶¶ 161-168. *See also*, *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award (24 March 2016) (**RL-031**), ¶ 419 ("The Tribunal understands that through the exception carved out by Article 1108(7)(a), the NAFTA Contracting Parties sought to protect their ability to exercise nationality-based preferences in cases of procurement."); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003) (**CL-010**), ¶ 94 ("The Federal Government of Canada, for instance, provides heavy financial assistance to the provinces for highway construction and many of the provinces receiving this assistance enforce domestic preference regulations in their procurement. In Mexico, too, federal law prescribes preferences for Mexican goods and services in procurement by states wholly or partially funded by the federal Mexican Government. [...] domestic requirements for Government procurement are in place 'in most, if not all, countries.'").

2. In any event, if the Tribunal were to consider that the procurement exception does not prevent the application of the MFN clause to the present dispute (*quod non*), the MFN clause under the Treaty does not permit the import of substantive standards.

239. As indicated in the Republic's Memorial on Jurisdiction, the application of the MFN clause enshrined in Article 10.4 of the Treaty does not permit the importation of standards from other treaties.[287] Similarly, the State demonstrates that the objective of an MFN clause is to avoid discrimination between investors in like circumstances, not to create substantive rights that are not expressly enshrined in the base treaty.[288]

240. In their Counter-Memorial, Claimants argue that the MFN clause provided for under CAFTA-DR allows for the importation of substantive standards, such as the umbrella clause of other treaties entered into by Honduras. According to Claimants, this is confirmed by an interpretation of the MFN clause pursuant to article 31 of the VCLT, as well as the alleged intention of the contracting parties to the Treaty to allow for an expansive interpretation of this clause.[289]

241. The MFN clause contained in Article 10.4 of the Treaty provides as follows:[290]

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[287] Memorial on Jurisdiction, ¶¶ 180-203.

[288] Memorial on Jurisdiction, ¶ 180. *See also* Z. Douglas, "The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails," 2 *Journal of International Dispute Settlement* 97 (2011) (**RL-079**), p. 105 (emphasis omitted); T. Cole, "The Boundaries of Most Favored Nation Treatment in International Investment Law," 33 *Michigan Journal of International Law* 537 (2012) (**RL-082**), p. 560 (explaining that incorporation by reference of provisions from an unlimited number of treaties "would potentially be transformed into a replacement for the treaty itself, gathering any more favourable treatment offered to any third party while avoiding any restrictions."). The Paris Court of Appeal, in annulling a preliminary award of the tribunal in *DS Construction FZCO v. Libya*, which allowed the use of MFN provisions to import provisions from third party agreements, had already held that "the ambiguous references [included in Article 8] to the 'context of economic activity' and to 'rights and privileges' do not allow [the Court] to consider that they may extend to the procedural advantages of dispute settlement provided for in other investment protection treaties." *See State of Libya v. D.S. Construction FZCO*, Paris Court of Appeal No. RG 18/05756, Judgment (23 March 2021) (**RL-105**), ¶ 101 ("the equivocal references to 'the context of the economic activity' and to 'rights and privileges' do not allow to judge that they can be extended to the procedural advantages of dispute settlement provided in other investment protection treaties.").

The Republic respectfully submits that it should be no different with respect to Claimants' attempt to create jurisdiction over a cause of action that does not appear in the Treaty. *State Development Corporation "VEB.RF" v. Ukraine*, SCC Case No. V2019/088, Partial Award on Preliminary Objections (31 January 2021) (**RL-104**), ¶ 269.

[289] Counter-Memorial on Jurisdiction, ¶¶ 64-97.

[290] CAFTA-DR (**CL-001**), art. 10.4.

Article 10.4: Most-Favored-Nation Treatment

> 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.

242. Claimants point out that the ordinary meaning of the term "*treatment*," includes the substantive protections that the State grants to investors through investment treaty protections.[291]

243. Although in their Counter-Memorial Claimants mention that their interpretation is supposedly aligned with article 31 of the VCLT, they do not present an analysis of the elements determined by the VCLT for treaty interpretation that would confirm this, nor do they present a comprehensive analysis of the MFN clause, but only an exercise of interpretation of the word "*treatment*" in isolation from the rest of the Treaty provision.

244. Indeed, an interpretation of the MFN clause aligned with the elements of Article 31 of the VCLT leads to the opposite conclusion to that of Claimants.

245. In their Counter-Memorial on Jurisdiction, Claimants refer to Professors Dolzer and Schreuer to assert that different authorities support the thesis that the MFN clause allows claimant investors to benefit from substantive guarantees contained in other treaties.[292] However, at the same time, Professors Dolzer and Schreuer emphasize that "it is too early to conclude in broader **terms in which direction the jurisprudence may evolve in regard to the effect of an MFN clause for the invocation of another treaty**."[293]

[291] Counter-Memorial on Jurisdiction, ¶ 69.

[292] *Ibid.*, ¶ 67.

[293] R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2012) (**CL-082**), p. 211 (emphasis added).

246. Thus, it is not true, as Claimants purport to assert, that the undisputed rule accepted by investment tribunals is that the MFN standard permits the importation of substantive clauses from other treaties. In any event, in the present case that rule would not apply because Article 10.4 itself limits the application of the MFN standard by preventing the importation of substantive clauses from other treaties, let alone clauses that are not even provided for in CAFTA-DR, such as the umbrella clause that Claimants seek to import.

a. A *good faith* interpretation of the MFN clause demonstrates that it does not permit the importation of substantive standards from other treaties entered into by Honduras.

247. As noted above, a good faith interpretation is one that reflects the agreement between the parties and allows the treaty to have proper effect.[294]

248. As evidenced by the text of Article 10.4 of the Treaty, included above, the intention of the contracting parties to the Treaty in agreeing to the MFN clause was to guarantee to investors (or investments) of another contracting party treatment no less favourable than that accorded **in like circumstances** to investors (or investments) of any other party or of any country not party to the Treaty, **with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory**.[295]

249. As can be seen from the literal text of Article 10.4, the intention of the parties in agreeing to the MFN clause was to ensure that their investors would enjoy the same protection as

[294] International Law Commission, *Draft Articles on the Law of Treaties with Commentaries*, Vol. II, U.N. Doc. A/6309/Rev.1 (1966) (**CL-254**), p. 219 ("First, the interpretation of treaties in good faith and according to law is essential if the *pacta sunt servanda* rule is to have any real meaning. [...] When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."). *See also Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2011) (**RL-081**), ¶ 173 ("The Vienna Convention itself unequivocally emphasizes the foundational role of State consent in the law of treaties. The Convention employs the word 'consent' no fewer than 62 times, including in the titles to six articles. Within the Convention's interpretive prescriptions, it is well-known that article 31(1) begins by instructing interpreters to interpret a treaty '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'. While the article does not explicitly mention consent, the reference to '*good faith*' nevertheless reinforces the duty of tribunals to limit themselves to interpretations falling within the bounds of the framework mutually agreed to by the contracting state parties. As stated by the International Law Commission in its commentary to the draft version of Article 31, the requirement of interpretation in good faith 'flows directly from the *rule pacta sunt servanda*.'").

[295] CAFTA-DR (**CL-001**), art. 10.4.

other investors in like circumstances with respect to operational aspects of their investments in the territories of each contracting party.[296]

250. It is clear from the wording of Article 10.4 that the MFN clause must be analysed with respect to the treatment accorded to investors (or investments) of any other party or of any country not party to the Treaty **in like circumstances**.[297] That is, the intention of the contracting parties at the time of agreeing to the MFN clause was to protect an investor of one contracting party by comparing the treatment it was receiving with the treatment accorded to an investor of another nationality.[298] This is a factual analysis of two situations in similar conditions, not a legal analysis of two substantive standards contained in two different treaties, with different contracting parties and different contexts.[299]

251. The United States confirms this position. According to the United States—a State Party to the CAFTA-DR—in order to analyse the application of the MFN clause there must be a

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[296] *Ibid.*

[297] *See also İçkale İnşaat Limited Şirketi v. Turkmenistan,* ICSID Case No. ARB/10/24, Award (8 March 2016) (**RL-091**), ¶¶ 328-329; *Muhammet Çap & Sehil e Ticaret Ltd. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award (4 May 2021) (**RL-106),** ¶ 793.

[298] This understanding is confirmed by the tribunal in *Ickale v. Turkmenistan*, which considered a clause with almost identical wording to the MFN clause in the present Treaty. *See İçkale İnşaat Limited Şirketi v. Turkmenistan,* ICSID Case No. ARB/10/24, Award (8 March 2016) (**RL-091**), ¶¶ 328-329 ("The Tribunal has carefully considered the meaning and effect of the MFN clause in Article II(2) of the BIT, in light of the general rule of treaty interpretation in Article 31 of the Vienna Convention. The ordinary meaning of the terms of the MFN clause, when read in their context and in light of the object and purpose of the Treaty, suggests that each State party to the Treaty agreed to treat investments made in its territory by investors of the other State party in a manner that is no less favourable than the treatment they accord in similar situations to investments by investors of any third State. Thus, **the legal effect of the MFN clause, properly interpreted, is to prohibit discriminatory treatment of investments of investors of a State party (the home State) in the territory of the other State (the host State) when compared with the treatment accorded by the host State to investments of investors of any third State**. However, **this obligation exists only insofar as the investments of the investors of the home State and those of the investors of the third State can be said to be in "a similar situation**". Conversely, the MFN treatment obligation does not exist if and when an investment of an investor of the home State is not in a "similar situation" to that of the investments of investors of third States; in such a situation, there is de facto no discrimination. The terms "treatment accorded in similar situations" therefore suggest that **the MFN treatment obligation requires a comparison of the factual situation of the investments of the investors of the home State and that of the investments of the investors of third States** [...].") (emphasis added).

[299] *Ibid*; *see also Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd. Şti. v. Turkmenistan,* ICSID Case No. ARB/12/6, Award (4 May 2021) (**RL-106**), ¶ 793. ("The Tribunal has concluded that the MFN provision in Article II(2) BIT applies t**o de facto discrimination where two actual investors in a similar situation are treated** differently. That is not the case here. Further, the wording of Article II(2), requiring such factually similar situation, does not entitle Claimants to rely on the MFN provision to import substantive standards of protection from a third-party treaty which are not included in the BIT, and to rely on such standards in the present Arbitration.").

comparison between the *treatment* received by the claimant investor and the investor that would be receiving more favourable treatment.[300]

252. This premise was confirmed by the tribunal in *Ickale v. Turkmenistan*, which analysed an MFN clause with almost identical wording to article 10.4, and concluded that it is not possible to interpret in good faith that the scope of the MFN clause refers to standards of protection included in other investment treaties and when the text of the clause includes the reference to "treatment accorded in like situations," thus requiring a comparison of the treatment accorded to the claimant investor and the investor from a third State.[301]

253. In their Counter-Memorial, Claimants criticized the application of the decision in *Ickale v. Turkmenistan* to the present case, arguing that, allegedly, in this case the application of the MFN clause was different because the investors sought to import four different standards, whereas in this case they only seek to import one.[302] This argument is simply irrelevant to the analysis of the application of the MFN clause, which in that case, under the Turkey-Turkmenistan BIT (1992) provided that each party must grant investors and investments protected under the treaty "treatment no less favourable **than that accorded in similar situations** to investments of its investors or to investments of investors of any third country."[303]

254. Since the wording of the MFN clause of the Turkey-Turkmenistan BIT is the same as that of the CAFTA-DR in that it requires the existence of similar situations between the claimant investor and an investor of a third State,[304] the considerations in this regard of the tribunal in *Ickale v. Turkmenistan* are absolutely relevant to the present case.

255. In the same vein, it is clear that a good faith interpretation of the MFN clause also does not allow the importation of obligations not contained in the applicable treaty, since, as article

[300] Brief of the United States of America as a Non-Disputing Party ("**US NDP**") (20 March 2025), ¶¶ 3-5.

[301] *İçkale İnşaat Limited Şirketi v. Turkmenistan,* ICSID Case No. ARB/10/24, Award (8 March 2016) (**RL-091**), ¶¶ 328-329.

[302] Counter-Memorial on Jurisdiction, ¶ 85.

[303] Agreement between the Republic of Turkey and Turkmenistan Concerning the Promotion and Reciprocal Protection of Investments (2 May 1992) (**RL-124**), art. 2.

[304] CAFTA-DR (**CL-001**), art. 10.4; Agreement between the Republic of Turkey and Turkmenistan concerning the Promotion and Reciprocal Protection of Investments (2 May 1992) (**RL-124**), art. 2.

10.4 requires a comparison between similar situations, it is clear that, if there is no point of comparison between the claimant investor and another investor from a third State, then the application of the MFN clause is not possible.[305]

256. That is, in the absence of the umbrella clause in CAFTA-DR, there is no similar circumstance between Claimants and another third State investor in relation to the standard contemplated by the umbrella clause in other BITs entered into by Honduras.[306]

257. Indeed, Professors Dolzer and Schreuer, cited by Claimants, confirm the above by stating that "[A]s to the limits of the MFN rule, the Tribunal assumed that **the rule is not intended to 'create wholly new rights where none otherwise existed' in the BIT; the reason given is that the MFN rule refers to a standard and not to the extent of rights of third parties**."[307]

258. Thus, from the above it is clear that it is not a good faith interpretation of the MFN clause of the Treaty that the agreement of the contracting parties to the Treaty was to allow the importation of substantive clauses of other treaties entered into by each party, just as it was not the

[305] *Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd. v. Turkmenistan,* ICSID Case No. ARB/12/6, Award (4 May 2021) (**RL-106**), ¶¶ 786, 789, 793.

[306] Memorial on Jurisdiction, ¶¶ 181-182; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award (21 July 2017) (**CL-102**), ¶ 884 ("In the Tribunal's view, in interpreting the scope of the MFN Clause contained in Article IV(2) of the Treaty, meaning must be given to the critical words '[i]n all matters governed by this Agreement.' According to Claimants, this language should be interpreted as referring generally to the protection of foreign investors. This interpretation is too broad and disregards the reference to all 'matters' governed by the Treaty. In the Tribunal's view, 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. The Tribunal accepts that the parties to the Treaty were in all likelihood aware of the existence of umbrella clauses and if they had intended to include such a clause in the Treaty, they would have done so. According to Respondent, use of the MFN Clause to incorporate an umbrella clause into the Treaty would result in the incorporation of a new right or standard of treatment not provided for the Treaty. On the basis of the specific language used by the Parties in the Treaty, the Tribunal finds this argument persuasive."); *Telenor Mobile Communications A.S. v. Hungary*, ICSID Case No. ARB/04/15, Award (13 September 2006) (**RL-072**), ¶ 95 (In interpreting an MFN clause, the tribunal held that it must first refer to the intention of the contracting parties, and went on to state that "what has to be applied is not some abstract principle of investment protection in favour of a putative investor who is not a party to the BIT and who at the time of its conclusion is not even known, but the intention of the States who are the contracting parties."); *Neustar, Inc. and Vercara, LLC v. Republic of Colombia*, ICSID Case No. ARB/20/7, Award (20 September 2024) (**RL-111**), ¶ 726 ("In the present case, Claimant has failed to establish that the intention of the contracting States to the TPA was for the MFN clause to be used to bypass the more restrictive FET provision included in the TPA, and instead import a wider obligation. The fact that the United States (as a party to the TPA and an intervener in this Arbitration) was "silent" on this point in its written submissions and presentation at the Hearing does not mean that the United States agrees with Claimant's interpretation of the TPA. As was made clear at the hearing 'the United States does not take a position here on how the interpretations offered apply to the facts of the case,' and 'no inference should be drawn from the absence of comment on any issue not addressed.'").

[307] R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2012) (**CL-082**), p. 212 (emphasis added).

intention of the contracting parties to the Treaty to allow the importation of obligations that were not even agreed to under the CAFTA-DR.[308]

259. In light of the above, it is clear that a good faith interpretation of the MFN clause, which is in line with the principle of *pacta sunt servanda*, does not allow the importation of substantive clauses from other treaties signed by Honduras, as this was not the agreement of the contracting parties to CAFTA-DR.

b. The *ordinary meaning to be* given *to the terms* of the MFN clause demonstrates that it does not permit the importation of substantive standards from other treaties signed by Honduras.

260. As noted above, in their Counter-Memorial, Claimants take the position that the only term to be interpreted from the Treaty's MFN clause is the word "*treatment*."[309] According to Claimants, the dictionary definition of the word "*treatment*," which refers to "*conduct or behavior towards another*," supports their position that it can encompass treatment provided by right under an agreement, including a treaty.[310]

261. While Claimants include the Merriam-Webster Dictionary definition of "*treatment*,"[311] from the plain ordinary meaning[312] of this word it is not possible to infer that "*treatment*" includes the substantive standards envisaged under the Treaty. In support of this, Claimants rely on decisions of other tribunals that have allegedly analysed similarly worded MFN

[308] In fact, in the CAFTA-DR negotiations the Contracting Parties were clear that the object of the MFN clause was not the importation of clauses from other treaties, which they reflected in a footnote to the text of the Treaty that stated: "The Parties share the understanding and intent that this clause does not encompass international dispute 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 Maffezini case**." In the same footnote the contracting parties made it clear that the scope of the MFN clause was expressly limited to matters in connection with the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investment as follows: "[T]he Most-Favored-Nation Treatment Article of this Agreement is expressly limited in its scope to matters "with respect to the establishment, acquisition, expansion, management, management, conduct, operation, and sale or other dispositions of investments." While the footnote did not end up being included in the final text of the Treaty, the contracting parties to the Treaty agreed that it would be part of their negotiating history so it is absolutely relevant to understanding the scope of their agreements in the text of CAFTA-DR. K. Vandevelde, "The General Treatment Provisions," in *U.S. International Investment Agreements* (2009) (**RL-152**), p. 318 (emphasis added).

[309] Counter-Memorial on Jurisdiction, ¶ 69.

[310] *Ibid.*, ¶ 70.

[311] Merriam-Webster, "Treatment," in *Online Dictionary of the English Language* (**C-288**).

[312] VCLT (**CL-133**), art. 31(1).

clauses and concluded that the word *treatment* in its ordinary sense includes better substantive protections contained in other treaties.[313] Claimants are wrong.

262. The considerations of other investment tribunals cited by Claimants have no relevance to the MFN analysis in the present case.[314]

263. In *EDF v. Argentina*, the MFN clause analysed by the arbitral tribunal in that case, contained in Article 4 of the Argentina-France BIT, had a completely different wording than Article 10.4 of the CAFTA-DR.[315] Indeed, the MFN clause of the Argentina-France BIT does not include limitations to the application of the standard that are included in CAFTA-DR, such as the requirement that the alleged unfavourable treatment must occur in like circumstances between the claimant investor and an investor of another State.[316] Likewise, Article 4 of the Argentina-France BIT also did not include a determination as to what the MFN standard would apply, while Article 10.4 of CAFTA-DR makes it clear that this only applies with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of the investments.[317] Therefore, the analysis of the ordinary meaning of the word *treatment* made by the tribunal in *EDF v. Argentina* is not relevant to the present case where the MFN clause has a different and much more comprehensive wording, where the context clearly limits the scope of this standard of protection.

264. The same is true in *Arif v. Moldova*,[318] cited by Claimants in support of their position that the word *treatment* in its ordinary sense includes better substantive protections contained in other treaties. As in *EDF v. Argentina*, in *Arif v. Moldova* the France-Moldova BIT

[313] Counter-Memorial on Jurisdiction, ¶ 71.

[314] Counter-Memorial on Jurisdiction, ¶¶ 71-73.

[315] Agreement between the Government of the French Republic and the Government of the Argentine Republic for the Promotion and Reciprocal Protection of Investments (3 July 1991) (**CL-234**), art. 4.

[316] CAFTA-DR (**CL-001**), art. 10.4.

[317] *Ibid*., art. 10.4.

[318] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 April 2013) (**CL-097**).

contains a much more generic MFN clause in Article 4,[319] which, unlike CAFTA-DR, does not set limitations on the scope of the MFN standard.

265. Likewise, the tribunal's analysis in *MTD v. Chile*, cited by Claimants,[320] is also irrelevant to the present discussion, as in that case the MFN clause in the Chile-Malaysia BIT,[321] was limited in its application only to treatment related to fair and equitable treatment accorded to investors from a third State, and as in the other cases cited by Claimants, it also did not include limitations to the scope of the MFN standard that are included in CAFTA-DR.

266. As can be seen from the foregoing, Claimants are not relying on the ordinary meaning of the word "*treatment*," they are relying on interpretations of MFN clauses with different wording than that of the CAFTA-DR to fit their interpretation of Article 10.4 of the Treaty, which is in clear contravention of Article 31(1) of the VCLT.

267. Indeed, from the ordinary meaning of the word *treatment* alone, it is not possible to infer the scope of application of the MFN clause under the Treaty.

268. As explained above, an interpretation of a treaty on the basis of the ordinary meaning to be attributed to the terms of the treaty does not mean that a kind of formalistic literalism is being imposed on the interpretative exercise.[322] On the contrary, and bearing in mind that a term may have different meanings, the interpretation must be guided by the context of the words to be interpreted, their object and purpose, as well as the supplementary means of interpretation provided for in Articles 31(3) and 31(4) of the VCLT.[323]

[319] Agreement between the Government of the French Republic and the Government of the Republic of Moldova for the Promotion and Reciprocal Protection of Investments (8 September 1997) (**CL-098**), art. 4.

[320] Counter-Memorial on Jurisdiction, ¶ 72.

[321] Agreement between the Government of Malaysia and the Government of the Republic of Chile on the Promotion and Protection of Investments (11 November 1992) (**RL-126**), art. 3.

[322] *See Giovanni Alemanni et al. v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (17 November 2014) (**RL-165**), ¶ 270.

[323] *Ibid.*, ¶ 270 (emphasis added).

269. In this regard, it is important to emphasize that, contrary to Claimants' assertion, the standard of protection of the MFN clause is not only the *treatment* accorded to a claimant investor or a third State investor.

270. The standard of protection contained in the MFN clause is the *treatment accorded* to the claimant investor **as compared to an investor of another contracting party** or a third State, **in like circumstances**, and in connection with the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of the investments.

271. Thus, in order to obtain a correct interpretation of the MFN clause, it is not possible only to interpret the term "*treatment*" in itself, but it must be interpreted on the basis of its context, object and purpose.

c. Interpretation *in the context of* the MFN clause demonstrates that the MFN clause does not permit the importation of substantive standards from other treaties entered into by Honduras.

272. Claimants analyse the term "*treatment*" in the context of CAFTA-DR, indicating that it is used to refer to the protections that the contracting parties grant to investors under the Treaty, such as National *Treatment* and Minimum Standard of *Treatment*, among others.[324]

273. Claimants' interpretation is incomplete, as it ignores the content of the MFN clause that is part of the relevant context for the interpretative analysis. This is not surprising, as clearly a comprehensive and complete analysis of the MFN clause under the Treaty makes clear the limits to its scope and therefore cannot be used to import substantive standards from other treaties.

274. As stated above, Article 31(1) of the VCLT requires that the terms of a treaty be interpreted in their context,[325] considering the text of the treaty,[326] as well as phrases close to the terms being interpreted.[327]

[324] Counter-Memorial on Jurisdiction, ¶ 70.

[325] VCLT (**CL-133**), art. 31(1).

[326] *Ibid*., art. 31(2).

[327] *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on the Request for Termination and Intra-EU Objection (May 7, 2019) (**RL-176**), ¶ 80.

275. In addition, Article 31(3) of the VCLT determines the supplementary means of interpreting treaties from their context as follows:

> 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**;
>
> **(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation**;
>
> (c) any relevant rules of international law applicable in the relations between the parties.[328]

276. The Republic has already demonstrated that the MFN analysis under the Treaty cannot only be framed within the term *treatment* to determine the scope of Article 10.4 under the Treaty. The entire text of this provision must be analysed as part of the interpretive exercise, including the language close to the term under interpretation.

277. Thus, and as has already been set out by the Republic throughout this section, CAFTA-DR Article 10.4 determines the context from which the word *treatment* must be interpreted, and that is, *in like circumstances*, and in relation to *the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of the investments*.[329]

278. From the full text of Article 10.4 of the Treaty, it is clear that the MFN clause does not permit the importation of substantive standards from other treaties concluded by Honduras because it requires a comparison between the claimant investor and an investor of another CAFTA-DR Contracting Party or a third State, and not a comparison between the respective international investment agreements, to determine the existence of *like circumstances* and unfavourable treatment for the claimant investor in relation to *the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition* of its investment.[330]

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[328] VCLT (**CL-133**), art. 31(3).

[329] CAFTA-DR (**CL-001**), art. 10.4.

[330] *Ibid*. *See also* § III.

279. Indeed, this understanding was also reiterated by the United States in the present case.[331]

280. In its NDP submission, the United States shares the interpretation of Article 10.4 put forward by Honduras that for the MFN clause to apply, the claimant investor has the burden of demonstrating that it or its investments (i) received *treatment*; (ii) were in like circumstances with investors or investments of another Contracting Party or a third State; and (iii) received treatment less favourable than that accorded to investors or investments of another Contracting Party or a third State.[332]

281. Thus, as the United States' NDP submission reiterates, the application of the MFN clause under the Treaty is a question specifically of fact, and not of determining only whether there was less favourable *treatment* towards the claimant investor.[333]

282. Similarly, and importantly, the United States shares Honduras' interpretation that a contracting party to the Treaty does not accord specific *treatment* to one investor or another simply because of the existence of provisions in other international investment treaties.[334] In this regard, and in accordance with the specific wording of Article 10.4 of the Treaty, it is not possible to import substantive standards from other treaties in application of the CAFTA-DR MFN clause.[335]

283. The United States' NDP statement is absolutely relevant in the exercise of interpreting Article 10.4 in the present case.

284. As noted above, the VCLT in Article 31(3) determines that, along with the context, "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" and "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" are to be taken into account.[336]

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[331] US NDP.

[332] US NDP, ¶ 3.

[333] *Ibid.*, ¶¶ 3-5.

[334] *Ibid.*, ¶ 5.

[335] *Ibid.*

[336] VCLT (**CL-133**), art. 31(3).

285. Clearly, the United States' NDP statement confirms that the agreement with Honduras as to the interpretation of Article 10.4 of the Treaty constitutes a relevant element to be interpreted together with the context of Article 10.4 and in terms of Article 31(3) of the VCLT.

286. The relevance of the practice and subsequent manifestations of the contracting parties to a treaty in interpretative exercises has been reiterated on numerous occasions by international tribunals.[337]

287. Indeed, the International Court of Justice has highlighted the importance of the subsequent practice of the parties to a treaty for the interpretation of the treaty, as this constitutes "objective evidence of the understanding of the parties as to the meaning of the treaty."[338]

288. Similarly, in *Mobil v. Canada*, the tribunal considered that the subsequent agreements and practice of the NAFTA contracting parties, in establishing their agreement on the interpretation of the treaty, were of considerable relevance to the interpretation of the treaty in terms of Article 31(3)(b) of the VCLT.[339]

289. The International Law Commission in its *Draft Conclusions on Foreign Agreements and Foreign Practice in relation to the Interpretation of Treaties* has considered that the starting point for interpretation under Article 31(3) of the VCLT is that there must be a

[337] *See, e.g, Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Rep. 1999, p. 1045 (13 December 1999) (**RL-128**), ¶ 49 (citing *Report of the International Law Commission*, Vol. II (1996), p. 221, ¶ 15); *Azpetrol International Holdings B. V. et al. v. Republic of Azerbaijan*, ICSID Case No. ARB/06/15, Award (8 September 2009) (**RL-155**), ¶ 64 ("English law does not normally admit reference to the subsequent conduct of the parties as an aid to the interpretation of a contract. Again, this is in marked contrast to the approach taken by international law, in which the subsequent practice of the parties can be of the utmost importance in the interpretation of a treaty."); *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Award (20 February 2015) (**RL-167**), ¶¶ 370-374; *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Award (5 June 2012) (**RL-018**), ¶ 333.

[338] *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Rep. 1999, p. 1045 (13 December 1999) (**RL-128**), ¶ 49 (citing *Report of the International Law Commission*, Vol. II (1996), p. 221, ¶ 15).

[339] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Damages (22 May 2012) (**CL-47**), ¶¶ 370-374.

"***common understanding***" between the parties to the treaty on its interpretation.[340] That common understanding can be found in a "subsequent agreement"[341] and in "subsequent practice."[342]

290. In relation to subsequent agreements for the purposes of treaty interpretation (Article 31.3(a) of the VCLT),[343] the International Law Commission has considered that these, being *agreements*, must be "reached" between the parties, which "presupposes a deliberate common act or undertaking by the parties**, even if it consists of individual acts by which they manifest their common understanding regarding the interpretation of the treaty or the application of its provisions**."[344]

291. In relation to subsequent practice (Article 31.3(b) of the VCLT),[345] the International Law Commission considers that this may include any kind of "conduct" in the application of the treaty, understood not only as "acts, but also omissions, including relevant silence, which contribute to establishing agreement,"[346] and through which an agreement or "understanding" between the parties to the treaty, in relation to its interpretation, can be identified.[347] This subsequent practice may occur not only in official acts at the international or national level, but

[340] United Nations General Assembly, *Report of the International Law Commission, Seventeenth Session*, UN Doc. A/73/10 (2018) (**RL-175**), p. 75 ("Paragraph 1, first sentence - "common understanding" (1) The first sentence of paragraph 1 sets forth the principle that an "agreement" under article 31, paragraph 3 (a) and (b), requires a common understanding by the parties regarding the interpretation of a treaty. In order for that common understanding to have the effect provided for under article 31, paragraph 3, the parties must be aware of it and accept the interpretation contained therein.").

[341] VCLT (**CL-133**), art. 31(3)(a).

[342] *Ibid.*

[343] *Ibid.*

[344] United Nations General Assembly, *Report of the International Law Commission, Seventeenth Session*, UN Doc. A/73/10 (2018) (**RL-175**), p. 30 (emphasis added).

[345] VCLT (**CL-133**), art. 31(3)(b).

[346] United Nations General Assembly, *Report of the International Law Commission, Seventeenth Session*, UN Doc. A/73/10 (2018) (**RL-175**), p. 31 ("Subsequent practice under article 31, paragraph 3 (b), may consist of any "conduct." The word "conduct" is used in the sense of article 2 of the Commission's articles on responsibility of States for internationally wrongful acts. It may thus include not only acts, but also omissions, including relevant silence, which contribute to establishing agreement.").

[347] *Ibid.*, p. 30.

also in "official statements regarding its interpretation, such as statements at a diplomatic conference, statements in the course of a legal dispute [...]," among others.[348]

292. It is therefore possible that a "subsequent agreement" and a "subsequent practice" are reflected in the same act or coincide in specific cases.[349]

293. In the present case, the common understanding regarding the interpretation and application of Article 10.4 of the Treaty—which does not permit the importation of substantive clauses from other treaties—is evidenced by the individual actions of Honduras[350] and the United States, which constitute both a subsequent agreement and a subsequent practice.

294. Thus, taking into account the context of Article 10.4 of the Treaty, as well as the subsequent agreement and practice demonstrating a common understanding between the Republic of Honduras and the United States regarding the interpretation of the MFN clause, it is clear that the MFN clause does not permit the importation of substantive standards from other treaties entered into by any of the CAFTA-DR contracting parties. This is also confirmed by the object and purpose of Article 10.4.

d. The interpretation *in light of the object and purpose* of the MFN clause demonstrates that the MFN clause does not permit the importation of substantive standards from other treaties entered into by Honduras.

295. In their Counter-Memorial on Jurisdiction, Claimants do not set out the reasons why their expansive interpretation of the MFN clause is in line with the object and purpose of Article 10.4 of the Treaty.

[348] *Ibid*, p. 32 ("This includes not only official acts at the international or at the internal level that serve to apply the treaty, including to respect or to ensure the fulfilment of treaty obligations, but also, inter alia, official statements regarding its interpretation, such as statements at a diplomatic conference, statements in the course of a legal dispute, or judgments of domestic courts; official communications to which the treaty gives rise; or the enactment of domestic legislation or the conclusion of international agreements for the purpose of implementing a treaty even before any specific act of application takes place at the internal or at the international level.").

[349] *Ibid*., p. 30.

[350] Honduras' understanding of the interpretation of Article 10.4 of the Treaty is reflected in its written interventions in the present case. *See* Memorial on Jurisdiction, ¶¶ 180-182. *See also supra* § III.C.2.

296. The reality is that this interpretation is not in line with the object and purpose of the Treaty, for as has been extensively demonstrated by the Republic in this section, in the Request for Bifurcation[351] and in the Memorial on Jurisdiction, the object and purpose of Article 10.4 of the Treaty was to ensure that investors and investments covered by CAFTA-DR obtain the same *treatment* to that accorded to investors of another contracting party under the Treaty or of a third State, who are in **like circumstances** and in connection with the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investment.[352]

297. This understanding is confirmed by the tribunal in *Hochtief v. Argentina*, which considered that the MFN clause dictates the treatment to be accorded to investors enjoying rights conferred to them under a treaty, but this does not mean that, under the MFN clause, these investors will have access to a range of sources and systems of rights and obligations completely different from those provided for under the respective treaty.[353]

298. As has been argued by both Honduras and the United States, both contracting parties to CAFTA-DR, the object and purpose of the MFN clause was to prevent *de facto* discrimination between two investors or two investments protected under the same CAFTA-DR or under different investment treaties.[354] This clearly requires the existence of two conflicting situations that create a less favourable situation for the claimant investor under the Treaty.[355]

299. As already expressed, both by Honduras and by the US NDP submission, the more favourable treatment to which an investor is entitled under CAFTA-DR does not include

[351] Request for Bifurcation, ¶¶ 45-51; Memorial on Jurisdiction, ¶¶ 180, 200-203.

[352] CAFTA-DR (**CL-001**), art. 10.4.

[353] *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 October 2011) (**RL-016**), ¶¶ 79, 81 ("[T]he MFN clause stipulates how investors must be treated when they are exercising the rights given to them under the BIT but does not purport to give them any further rights in addition to those given to them under the BIT. [...] The MFN clause is not a renvoi to a range of totally distinct sources and systems of rights and duties: it is a principle applicable to the exercise of rights and duties that are actually secured by the BIT in which the MFN clause is found.").

[354] *See supra* § III.C.2.a.

[355] *İçkale İnşaat Limited Şirketi v. Turkmenistan,* ICSID Case No. ARB/10/24, Award (8 March 2016) (**RL-091**), ¶¶ 328-329.

provisions contained in other international investment treaties entered into by the respondent State.[356] The same is clear from the object and purpose of Article 10.4.[357]

300. In light of the above, and from the aforementioned, the only natural conclusion in relation to a good faith interpretation in accordance with the ordinary meaning to be attributed to the terms of Article 10.4 of the Treaty in its context and from its object and purpose, is that the MFN clause provided for in Article 10.4 of the Treaty does not permit the importation of substantive clauses of other treaties entered into by Honduras, much less does it permit the importation of obligations not even contained in CAFTA-DR.

D. Claimants still fail to demonstrate that their claims arise out of an investment agreement within the meaning of Article 10.28 of CAFTA-DR and therefore fall outside the Tribunal's jurisdiction *ratione materiae.*

301. As the Republic demonstrates in Section II, Claimants have the burden of proving that the Tribunal has jurisdiction to hear their claim.[358] Accordingly, Claimants have the burden of proving that their claims arise out of an investment agreement within the meaning of Article 10.28 of the Treaty.

302. In the Statement of Claim, Claimants assert that their claims arise out of the "Pacific Solar Investment Agreements."[359] Claimants allege that the Power Purchase Agreement ("**PPA**"), the Solidarity Support and Guarantee Agreement (the "**Aval Solidario**"), and the Operations Agreement for the Generation, Transmission and Marketing of Electric Power (the "**Operations Agreement**") constitute an investment agreement pursuant to CAFTA-DR article 10.28.[360]

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[356] *See* R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2012) (**CL-082**), p. 212; *İçkale İnşaat Limited Şirketi v. Turkmenistan,* ICSID Case No. ARB/10/24, Award (8 March 2016) (**RL-091**), ¶¶ 328-329.

[357] *See supra* § III.C.2.a. *See also* Request for Bifurcation, ¶¶ 45-51; Memorial on Jurisdiction, ¶¶ 180, 200-203.

[358] *See* § II; *see also Capital Financial Holdings Luxembourg SA v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award (22 June 2017) (**RL-174**), ¶¶ 135-138 (noting that the party bringing a claim has the burden of proof, and the claimant must establish the facts relied upon to establish jurisdiction). *See also Perenco Ecuador LTD v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PETROECUADOR)*, ICSID Case No. ARB/08/6, Decision on Jurisdiction (30 June 2011) (**RL-159**), ¶ 98 (noting that the claimant has the burden of proof to establish the facts supporting its claim of standing).

[359] Statement of Claim (20 September 2024), ¶¶ 172-179.

[360] *Ibid.*, ¶ 174.

303. In the Request for Bifurcation, as well as in its Memorial on Jurisdiction, the State has already demonstrated that Claimants have not met their burden of proving that their claims arise out of an Investment Agreement in terms of Article 10.28 CAFTA-DR.[361] The State refers in its entirety to the arguments presented in these Briefs.[362]

304. In their Counter-Memorial, Claimants insist that their claims arise out of an Investment Agreement pursuant to Article 10.28 of the Treaty.[363] According to Claimants, (i) the PPA, the Aval Solidario, and the Operations Agreement must be analysed together to determine the existence of an Investment Agreement under the Treaty;[364] (ii) this alleged "investment agreement" was executed by a Honduran national authority;[365] (iii) and by a protected investor, as well as a protected investment, under CAFTA-DR;[366] which (iv) also granted rights to Pacific Solar over natural resources or other assets controlled by the State of Honduras;[367] and which (v) may simultaneously constitute an investment covered by the Treaty.[368]

305. Below, the Republic reiterates its position and responds to Claimants' arguments to conclude that in the present case, there is no investment agreement covered under Article 10.28 of the Treaty. CAFTA-DR does not permit an investment agreement to be composed of multiple instruments other than **a** written agreement and, therefore, the only document relevant to the analysis of whether or not an investment agreement exists under CAFTA-DR is the PPA (**Subsection 1**). However, and being the only relevant document for the present analysis, in this Section the Republic demonstrates, again, that the PPA does not meet the requirements of Article 10.28 of the Treaty to constitute an investment agreement (**Subsection 2**). Similarly, and only in the event that the Tribunal also considers the Aval Solidario and the Operations Agreement to be

[361] Request for Bifurcation, ¶¶ 63-73; Memorial on Jurisdiction, ¶¶ 204-246.

[362] Request for Bifurcation, § II.E.; Memorial on Jurisdiction, § II.

[363] Counter-Memorial on Jurisdiction, ¶ 110.

[364] *Ibid.*, ¶¶ 113-125.

[365] *Ibid.*, ¶¶ 126-131.

[366] *Ibid.*, ¶¶ 132-140.

[367] *Ibid.*, ¶¶ 141-155.

[368] *Ibid.*, ¶¶ 152-151.

relevant to the present analysis, the Republic demonstrates that these instruments also fail to meet the Treaty's requirements to constitute an investment agreement.

306. Below, the State demonstrates that Claimants fail to meet their burden of proof to demonstrate that the Tribunal has jurisdiction *ratione materiae* to adjudicate their claims arising out of what they have chosen to call an Investment Agreement under Article 10.28 of CAFTA-DR.

1. The PPA together with the Aval Solidario and the Operations Agreement do not constitute an investment agreement under CAFTA-DR Article 10.28.

307. In the Memorial on Jurisdiction, the Republic demonstrated that the PPA, the Aval Solidario and the Operations Agreement, the so-called "Agreements" according to Claimants, do not constitute an investment agreement under Article 10.28.[369] The Republic demonstrates that the so-called "Agreements" do not constitute agreements of the same rank.[370]

308. As explained in the Republic's Memorial on Jurisdiction, the Aval Solidario and the Operations Agreement are derivative and supplementary agreements to the PPA, which is the agreement that establishes the contractual relationship for the purchase and sale of energy.[371] In turn, the Aval Solidario only acts as a payment guarantee in the event of ENEE's default on its payment obligations, without creating substantive rights.[372] The Operations Agreement is only a technical document that authorizes the construction and operation of the Plant, imposing specific conditions on Pacific Solar, but without creating substantive obligations different from those contemplated in the PPA.[373]

309. In the Counter-Memorial on Jurisdiction, Claimants argue that the PPA, together with the Aval Solidario and the Operations Agreement (collectively referred to as the "**PPA Ancillary Documents**"), together constitute an investment agreement within the meaning of

[369] Memorial on Jurisdiction, ¶ 212.

[370] *Ibid.*

[371] *Ibid.*

[372] *Ibid.*

[373] *Ibid*, ¶ 213.

Article 10.28 of the Treaty.[374] According to Claimants, these documents must be analysed holistically to determine the existence of an investment agreement covered by the Treaty.[375]

310. Claimants' arguments again ignore the definition under CAFTA-DR Article 10.28, as well as the very nature of both the PPA and the PPA Ancillary Documents.

311. First, Claimants ignore the text of Article 10.28 of the Treaty, which does not provide for the possibility of an investment agreement to be composed of different documents, or so-called "Agreements" as Claimants indicate (**Subsection a**). Second, and from the latter, it is precisely because of the nature of the PPA Ancillary Documents that the only document relevant to the present analysis of whether or not an investment agreement exists is the PPA (**Subsection b**).

a. CAFTA-DR does not provide for the possibility that an investment agreement may be composed of different documents, or "Agreements."

312. Article 10.28 of CAFTA-DR defines an investment agreement with strict limits as follows:[376]

> **investment agreement** means **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**.

[374] Counter-Memorial on Jurisdiction, ¶ 110.

[375] *Ibid.*, ¶¶ 113-114.

[376] CAFTA-DR (**CL-001**), art. 10.28.

313. In addition, Article 10.28 indicates in footnotes 12 and 13, the following in relation to the definition of "investment agreement":[377]

> "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. For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity or a decree, order, or judgment; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.
>
> For purposes of this definition, **"national authority" means an authority at the central level of government**.

314. In the Memorial on Jurisdiction, the Republic demonstrated that the only instrument that must be analysed to determine the existence or not of an Investment Agreement under Article 10.28 is the PPA.[378] The obligations and rights that, according to Claimants, were enshrined in the Aval Solidario and the Operations Agreement, are the same as those already stipulated in the PPA.[379]

315. In their Counter-Memorial on Jurisdiction, Claimants argue that pursuant to Article 10.28 of the Treaty, the PPA, the Aval Solidario and the Operations Agreement together constitute an investment agreement.[380] Claimants' position is incorrect and should be dismissed by the Tribunal for several reasons.

(1.) An Investment Agreement under Article 10.28 constitutes a single instrument.

316. *First*, a good faith interpretation under Article 31 of the VCLT leads to the conclusion that the definition of an Investment Agreement under CAFTA-DR Article 10.28 refers to a **single written agreement** that is executed at the same time between the investor or its investment, on the one hand, and a national authority, on the other hand.

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[377] *Ibid.*

[378] Memorial on Jurisdiction, ¶ 214.

[379] *Ibid.*, ¶¶ 221-214.

[380] Counter-Memorial on Jurisdiction, ¶ 110.

317. The textual definition in CAFTA-DR is clear. An investment agreement is **a**—singular—written agreement, not several documents, not several agreements.[381] This is also confirmed by the Spanish version of the Treaty.[382] If the Treaty Parties had foreseen the possibility of several documents constituting an Investment Agreement, they would have made this explicit in the text of the Treaty by omitting the express reference to it as **an** agreement.

318. This interpretation is confirmed by footnote 12,[383] which clarifies what the definition in Article 10.28 refers to by a "written agreement" in a singular manner and requires that it be executed by both parties.[384] The inclusion of the word "executed" in the footnote also provides relevant context for the correct interpretation, as it automatically implies that it must be entered into[385] between two parties, who exchange obligations and rights for its proper conclusion: "executed by both parties, that creates an exchange of rights and obligations, binding on both parties."[386]

319. *Second*, the interpretation proposed by Claimants would be contrary to the principle of effective interpretation of Treaties.[387] An effective interpretation of the Treaty's definition of

[381] CAFTA-DR (**CL-001**), art. 10.28 ("**investment agreement** means **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.").

[382] CAFTA-DR, Chapter 10 (Spanish version) (1 April 2006) (**RL-141**), art. 10.28; Real Academia Española, Diccionario de la lengua española, 23rd edition, definition of "uno/una" (2001) (**R-071**) The RAE defines un/una as follows: "un, una. (De *uno*). 1. art. indet. Formas de **singular** en masculino y femenino. Puede usarse con énfasis para indicar que la persona o cosa a que se antepone se considera en todas sus cualidades más características." (emphasis added).

[383] J. Hill, *Aust's Modern Treaty Law and Practice* (2023) (**RL-186**), p. 426-427.

[384] CAFTA-DR (**CL-001**), art. 10.28, note 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. For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity or a decree, order, or judgment; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.").

[385] Black's Law Dictionary, "Execute" (2024) (**RL-191**).

[386] CAFTA-DR (**CL-001**), art. 10.28, note 12.

[387] This has also been recognized by the International Law Commission, during the Commission's codification work, it was proposed to regulate as the principle of effectiveness or *effet utile* as an independent criterion of interpretation whereby each provision "rightly conceived, cannot be regarded as a mere mechanical one of drawing inevitable meanings from the words in a text." United Nations General Assembly, *Yearbook of the International Law Commission* Vol. II, A/CN.4/SER.A/1964/ADD.1 (1964) (**RL-120**), p. 53. Subsequently, the Commission determined that it was not necessary to insert a separate provision on this issue and then noted that "[w]hen a treaty is open to two

"investment agreement" could only mean that its object and purpose is specifically to protect written agreements entered into directly by, and consented to by, the State and an investor or a covered investment under the Treaty for the purposes described in Article 10.28 of the Treaty.

320. This is the only interpretation that can be admitted by the Tribunal of the definition contained in Article 10.28, and which is also in line with the principle of good faith. The interpretation according to the principle of good faith allows for the proper application of the Treaty and reflects the agreement between the contracting parties,[388] whose will, clearly, was not to convert any formal document or domestic contract into a protected investment agreement under the Treaty, but to expressly protect written agreements between a contracting party and an investor or investment of another CAFTA-DR contracting party.

interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted." *Ibid*. p. 201. Similarly, the principle of *effet utile* has itself been recognized and applied by the International Court of Justice and international arbitral tribunals. In the *US Nationals in Morroco* case, the ICJ referred to the principle of "economic liberty without any inequality" recognized in various treaties and observed that "this principle was intended to be a binding character and not merely an empty phrase". In the *Peace Treaties* case, the Court stated that "[t]he principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit." *See Rights of Nationals of the United States of America in Morocco*, Judgment, I.C.J. Rep. 1952, p. 176 (27 August 1952) (**RL-118**), ¶¶ 184, 191; *Interpretation of Peace Treaties (second phase)*, Advisory Opinion, I.C.J. Rep. 1950, p. 221 (18 July 1950) (**RL-117**), p. 229. *See also Daniel W. Kappes & Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Preliminary Objections (13 March 2020) (**CL-151**), ¶¶ 145-149; *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 (2 July 2013) (**RL-022**), ¶ 111; *İçkale İnşaat Limited Şirketi v. Turkmenistan,* ICSID Case No. ARB/10/24, Award (8 March 2016) (R**L**-091), ¶ 329.

[388] International Law Commission, *Draft Articles on the Law of Treaties with Commentaries*, Vol. II, U.N. Doc. A/6309/Rev.1 (1966) (**CL-254**), p. 219 ("When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."). *See also Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2011) (**RL-081**), ¶ 173 ("The Vienna Convention itself unequivocally emphasizes the foundational role of State consent in the law of treaties. The Convention employs the word 'consent' no fewer than 62 times, including in the titles to six articles. Within the Convention's interpretive prescriptions, it is well-known that article 31(1) begins by instructing interpreters to interpret a treaty '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'. While the article does not explicitly mention consent, the reference to '*good faith'* nevertheless reinforces the duty of tribunals to limit themselves to interpretations falling within the bounds of the framework mutually agreed to by the contracting state parties. As stated by the International Law Commission in its commentary to the draft version of Article 31, the requirement of interpretation in good faith 'flows directly from the rule *pacta sunt servanda.*'").

321. Accordingly, the Treaty is clear that an investment agreement is not a set of documents or instruments from which a single written agreement between a State and an investor or investment covered by the Treaty can be holistically constructed.

(2.) Claimants misconstrue the characteristics of the existence of a protected investment and the existence of an Investment Agreement.

322. Aware of the weakness of their argument, Claimants rely on decisions of investment tribunals that have held that a *protected investment* (and not an Investment Agreement) may include multiple interrelated instruments and documents.[389] This position must likewise be dismissed by the Tribunal for at least three reasons.

323. *First*, the existence of a protected investment and the existence of an Investment Agreement are distinct concepts under the CAFTA-DR.

324. On the one hand, a Protected Investment is "every **asset** that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[390]

325. On the other hand, an Investment Agreement is "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."[391]

326. As can be seen, a Covered Investment and an Investment Agreement are two completely different things, and this is recognized by the Treaty itself, not only in its definitions,

[389] Counter-Memorial on Jurisdiction, ¶ 121.

[390] CAFTA-DR (**CL-001**), art. 10.28.

[391] *Ibid.*

but also in the provisions that regulate their application in relation to a Covered Investment and an Investment Agreement.

327. Article 10.16, for example, requires the existence of a protected investment in order to analyse possible breaches that a State may incur concerning (i) obligations stipulated in relation to investments and investors covered under the Treaty (Section A), (ii) an investment authorization, **or** (iii) an investment agreement.[392]

328. Thus, Claimants' reference to investment tribunal decisions that have established that an *investment* may be composed of different instruments is completely irrelevant and has no bearing whatsoever on the definition and constitution of an investment agreement under the Treaty.

329. *Second*, Claimants conveniently omit that the investment tribunal decisions on which their argument rests relate only to the nature of the **investments protected** by the relevant treaties, which may be composed of different instruments or documents,[393] not to the existence of an Investment Agreement.

330. For example, in the *Enron v. Argentina* decision on jurisdiction, cited by Claimants, the tribunal expressly refers to the notion of **investment** by considering that "an investment is indeed a complex process including various arrangements, such as contracts, licenses and other agreements leading to the materialization of such investment, a process in turn governed by the Treaty."[394]

331. The same is true in *Latam Hydro v. Peru*, where the tribunal, also referring exclusively to the notion of investment, and relying on decisions of other investment tribunals,

[392] *Ibid.*, art. 10.16.

[393] *See Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdictional Objections (24 May 1999) (**CL-262**), ¶ 72; *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004) (**CL-162**), ¶ 70; *Ambiente Ufficio S.p.A. et al. v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) (**CL-187**) ¶ 428; *Latam Hydro LLC & CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Award (20 December 2023) (**CL-191**), ¶ 520.

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

states that as is well established, "an investment typically consists of several interrelated economic activities which, step by step, finally lead to the implementation of a Project [...]."[395]

332. As is clear, the tribunals in these cases are not referring to the constitution of investment agreements, but exclusively to the notion of investment, thus their considerations regarding the complexity of the investment process and the documents and instruments through which it may be consolidated are irrelevant to the present discussion.

(3.) Claimants rest their position on *Chevron v. Ecuador (II)* despite the fact that the treaty at issue there did not contain a definition of Investment Agreement.

333. Finally, Claimants rest their position on the decision in *Chevron v. Ecuador (II)* to assert that two different agreements, in that case a concession agreement and a settlement agreement, formed an investment agreement.[396] Claimants mention that the tribunal in *Chevron v. Ecuador (II)* considered the settlement agreement that provided for environmental remediation of activities carried out during the concession.[397]

334. The *Chevron v. Ecuador (II)* decision does not support Claimants' position that an investment agreement under CAFTA-DR can be composed of several instruments.

335. *First*, unlike the present case, the applicable treaty in *Chevron* did not have a definition of investment agreement.[398] This creates a strong difference with the *Chevron* case—on which Claimants rely for the most part to advance their position—given that, in the present case, there is a definition of "investment agreement" provided by the same CAFTA-DR Article 10.28, which makes it very clear that this refers to **a written agreement**.[399]

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[395] *Latam Hydro LLC & CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Award (20 December 2023) (**CL-191**), ¶ 520.

[396] Counter-Memorial on Jurisdiction, ¶122.

[397] *Ibid*., *citing Chevron Corporation & Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility (27 February 2012) (**CL-261**), ¶ 4.32.

[398] *Chevron Corporation & Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility (27 February 2012) (**CL-261**), ¶ 4.30. ("**there is no definition of "investment agreement" in the BIT**.").

[399] CAFTA-DR (**CL-001**), art. 10.28, note 12.

336. *Second*, even in the event that there was no fundamental difference between CAFTA-DR and the Ecuador-US BIT which applied in the *Chevron* case, the present case is also radically different from the *Chevron* case. As indicated by the same tribunal in that case, the settlement agreement contemplated a new exchange of obligations between the State and the investor, related to environmental remediation of the activities carried out under the concession agreement.[400]

337. In the present case, and as already demonstrated by the Republic in this section, the Aval Solidario and the Operations Agreement do not enshrine new obligations and rights to be exchanged between Pacific Solar and ENEE, let alone constitute a continuation of the PPA. Therefore, the considerations of the *Chevron* tribunal are not of assistance to the Tribunal in analysing the existence of an investment agreement, or not, in the present case.

338. It is therefore clear that, under the definition contained in Article 10.28 of CAFTA-DR, it is not possible for multiple documents to collectively, and holistically, as Claimants argue, form a covered investment agreement under the Treaty.

339. Below are the reasons as to why the only document that would be relevant to the analysis of the existence of an investment agreement is the PPA, and why the PPA itself does not constitute an investment agreement under CAFTA-DR either.

b. The only written agreement relevant to determining the existence of an investment agreement protected by the Treaty is the PPA because neither the Aval Solidario nor the Operations Agreement creates an exchange of rights and obligations.

340. Claimants also argue that it is necessary to consider the PPA together with the PPA Ancillary Documents, since the three instruments are interconnected and form a single economic transaction.[401] According to Claimants, all three instruments, both the PPA and the PPA Ancillary Documents, enshrine an exchange of rights and obligations between Pacific Solar and Honduras,

[400] *Chevron Corporation & Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility (27 February 2012) (**CL-261**), ¶ 4.32.

[401] Counter-Memorial on Jurisdiction, ¶¶ 115-120.

and therefore, all three, taken together, constitute an investment agreement under the Treaty.[402] This position is again incorrect.

341. While the State has already demonstrated above, based on the definition of "investment agreement" in the Treaty, that it is not possible for an investment agreement to consist of more than one written agreement between a national authority of one contracting party and a covered investment or investor of another contracting party to the Treaty,[403] below the Republic also demonstrates why the Aval Solidario and the Operations Agreement are not relevant to the present analysis and the Tribunal should only focus its attention on the PPA.

(1.) The Aval Solidario is not a separate written agreement that creates an exchange of rights and obligations binding on both parties.

342. CAFTA-DR requires a written agreement to be considered an Investment Agreement, which must "create an exchange of rights and obligations, binding on both parties under the law applicable."[404] The Aval Solidario does not meet these conditions.

343. *First*, the Aval Solidario acts as a guarantee of payment in case of non-payments by ENEE, in which the Honduran State is solely and directly obligated.[405] The Aval Solidario was one of the accessory documents to the PPA that sought to guarantee ENEE's compliance with its payment obligations, but it was precisely that, a document subordinate to the PPA that contains no new obligations or rights for the parties to the PPA, and which definitely did not constitute an agreement between Pacific Solar and a national authority of the State of Honduras.

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[402] *Ibid.*, ¶¶ 115-120.

[403] *See supra* § III.D.1.a.

[404] CAFTA-DR (**CL-001**), art. 10.28, note 12.

[405] Ley de Promoción a la Generación de Energía Eléctrica con Recursos Renovables (Decreto No. 70-2007) (2 October 2007) (**C-004**), art. 4 ("Renewable energy generation projects that sign an Electricity Supply Contract with ENEE shall be entitled to enter into a Support Agreement with the Office of the Attorney General of the Republic for the Compliance of the Contract with the State of Honduras."); Contract No. 002-2014 (**C-001**), § 9.7. ("The Support Agreement is attached as Annex X."); Counter-Memorial on Jurisdiction, ¶¶ 116-117. Indeed, Claimants themselves confirm that under the Aval Solidario, the only obligated party is the Honduran State, by mentioning that "under the State Guarantee, the Government accepted joint and several liability to Pacific Solar for ENEE's obligations under the PPA." Claimants do not indicate what obligations Pacific Solar would have allegedly acquired under the Aval Solidario, which would enshrine this instrument as an investment agreement, because quite simply, under the Aval Solidario Pacific Solar did not acquire any obligations.

344. *Second*, Claimants' motivation for allegedly acquiring their investment is irrelevant to determining the existence of an Investment Agreement under the CAFTA-DR.[406] Whether the existence of the Aval Solidario would have motivated Claimants' investment in Pacific Solar is irrelevant to the present analysis. As evidenced by the definition of "investment agreement" in the Treaty, this is not a constitutive requirement of an investment agreement.

345. *Third*, the PPA and the Aval Solidario are not interrelated and "co-dependent" documents as Claimants assert.[407] The PPA exists independently of the existence of the Aval Solidario. The Aval Solidario seeks to guarantee a specific obligation enshrined in Article 9.2 of the PPA,[408] the very existence of the Aval Solidario is absolutely based on the PPA. In the absence of ENEE's payment obligation in the PPA, the Aval Solidario would have no purpose.

346. Therefore, there is no doubt that the Aval Solidario does not in itself constitute an investment agreement, nor is it an integral part of the PPA, and should therefore not be subject to analysis by the Tribunal when deciding on whether or not an investment agreement exists in the present case.

(2.) The Operations Agreement is not a separate written agreement that creates an exchange of rights and obligations binding on both parties.

347. Neither does the Operations Agreement create an exchange of rights and obligations between Pacific Solar and a Honduran State entity or company.

348. *First*, the Operations Agreement enshrines only the obligation on Pacific Solar, as the Generating Company, to "construct and put into commercial operation its facilities," as well as the technical requirements for the entry into operation of the Nacaome I Plant, but does not impose any new obligations on ENEE or any other Honduran State entity that were not already contained in the PPA.[409]

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[406] Counter-Memorial on Jurisdiction, ¶ 116.

[407] *Ibid.*, ¶ 118.

[408] Contract No. 002-2014 (**C-001**), p. 21 PDF, § 9.2.

[409] Agreement of Support and Solidarity Guarantee of the State of Honduras for the Performance of the Supply Contract, between ENEE and SPE ("**Decree 113-2014**") (19 November 2014) (**C-002**), § 1.4.2; Operating Contract between Pacific Solar and the Secretariat of State in the Offices of Energy, Natural Resources, Environment and Mines

349. Claimants are unable to indicate what obligations Honduras would have acquired other than those provided for in the PPA. To say otherwise would be to flatly lie about the content and scope of the Operations Agreement.

350. The fact that the Operations Agreement reiterated ENEE's obligations under the PPA, such as authorizing Pacific Solar's connection to the power grid, does not make the Operations Agreement an integral part of the PPA, much less make the existence of the PPA dependent on the existence of the Operations Agreement. As already indicated, the Operations Agreement was the technical instrument whose purpose was to define the conditions and requirements for the commercial operation of the Nacaome I Plant.[410]

351. *Second*, just as the Aval Solidario is the ancillary document to the PPA that supported ENEE's obligation to pay for the purchase of energy, the Operations Agreement is the instrument that supported Pacific Solar's obligation to supply PV energy to ENEE in compliance with specific standards and parameters.[411]

352. For these reasons, the Operations Agreement cannot in itself constitute an investment agreement within the meaning of Article 10.28, let alone be understood as part of the PPA.

353. However, as demonstrated below, despite being the instrument containing the actual exchange of rights and obligations between Pacific Solar and ENEE, the PPA does not constitute either an investment agreement in terms of Article 10.28 of the Treaty.

2. In any event, Claimants have failed to demonstrate that the PPA constitutes a written agreement within the meaning of Article 10.28 of the Treaty.

354. In the Memorial on Jurisdiction, the Republic demonstrated that, despite being the only document relevant to the analysis of whether or not an investment agreement exists, the PPA

(Decree No. 109-2015) ("**Operations Agreement**") (26 October 2015) (**C-003**); Counter-Memorial on Jurisdiction, ¶ 119. In their Counter-Memorial they confirm the foregoing, stating that, through the Operations Agreement, the State of Honduras "expressly granted Pacific Solar the exclusive right to 'use and usufruct' solar resources for the Plant to operate."

[410] Operations Agreement (**C-003**), § 1.1.

[411] *Ibid.*, pp. 4-7.

does not meet the requirements of Article 10.28 of the Treaty.[412] The State demonstrates that the PPA (i) was not executed by a national authority of Honduras or by a covered investment or an investor of another contracting party under the Treaty;[413] (ii) the PPA did not confer rights on Pacific Solar over natural resources or other assets controlled by the State;[414] and (iii) the PPA was not the basis upon which Claimants, or Pacific Solar, constituted or acquired a covered investment under the Treaty.[415]

355. While the PPA is the only document relevant to the analysis of whether or not an investment agreement exists in this case, such analysis can only lead to the conclusion that the PPA does not constitute an investment agreement under Article 10.28 of the Treaty either. Claimants have not met their burden of proving otherwise, as explained below.

356. As set out above, an investment agreement under the Treaty is (i) a written agreement; (ii) that creates an exchange of rights and obligations; (iii) between a national authority of one Treaty party and a covered investment or investor of another Treaty party; (iv) with respect to natural resources or other assets that a national authority controls; and (v) on which the covered investment or investor relies to establish or acquire a covered investment other than the written agreement itself.

357. Below, the Republic demonstrates, again, that the PPA has not been executed by a national authority pursuant to Note 13 of the Treaty **(Subsection a**); nor was it executed by an investor or a covered investment under the Treaty (**Subsection b**); it does not grant rights to a natural resource, or other asset, that is under the control of a national authority of the Republic of Honduras (**Subsection c**); and it was not the basis for Claimants to establish or acquire a covered investment under the Treaty (**Subsection d**). In conclusion, the Republic demonstrates that the PPA is not an Investment Agreement under Article 10.28 of the Treaty.

[412] Memorial on Jurisdiction, § III.

[413] *Ibid.*, § III.E.1.b.

[414] *Ibid.*, § III.E.2.a.

[415] *Ibid.*, § III.E.2.b.

358. Similarly, and as appropriate, the State also demonstrates that, alternatively, Claimants have also failed to prove that the Aval Solidario and the Operations Agreement meet the requirements for the constitution of an investment agreement under the CAFTA-DR.

a. Claimants have not met their burden of proving that the PPA was executed by a national authority since, pursuant to the terms of Note 13 of the CAFTA-DR, ENEE is not an authority of the central level of government of Honduras.

359. In the Memorial on Jurisdiction, the Republic demonstrated that the PPA was not executed by a national authority of Honduras, given that ENEE is not part of the central level of government of Honduras, as required by Note 13 of Article 10.28 of the Treaty.[416]

360. The Republic demonstrated that the determination of what constitutes a national authority must be analysed in light of Honduran law—as is only logical.[417] This approach is in line with CAFTA-DR Article 10.22 which determines that the law applicable to a dispute relating to an Investment Agreement is domestic law.[418]

361. There is no dispute that the PPA was entered into between Pacific Solar and ENEE.[419] ENEE is a decentralized enterprise of the State of Honduras,[420] and is not part of the central level of government of Honduras, so ENEE's execution of the PPA leaves the agreement outside the scope of the definition of Investment Agreement contained in the Treaty.[421]

362. However, in their Counter-Memorial on Jurisdiction, Claimants argue that ENEE would indeed be a national authority of the central level of government of Honduras and that in order to interpret the term "national authority" the applicable law under the general rules of treaty interpretation is CAFTA-DR and not the law of Honduras.[422]

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[416] *Ibid.*, ¶¶ 218-222.

[417] Memorial on Jurisdiction, ¶ 220.

[418] CAFTA-DR (**CL-001**), art. 10.22.

[419] Contract No. 002-2014 (**C-001**), PDF pp. 6, 21.

[420] Decree No. 48 of 1957 (**C-006**), art. 1.

[421] Memorial on Jurisdiction, ¶¶ 220-223.

[422] Counter-Memorial on Jurisdiction, ¶ 128.

363. Claimants' position is not only unfounded but also completely unreasonable and must be rejected by the Tribunal.

364. *First*, a simple reading of Article 10.22 of the CAFTA-DR allows differentiating between the law applicable to a dispute under Section A of the Investment Chapter of the CAFTA-DR, such as the one mentioned in the previous paragraph under Article 10.22.1, and the law applicable to a dispute under an Investment Agreement as in the present case under Article 10.22.2, as follows:[423]

> **Article 10.22: Governing Law**
>
> Subject to paragraph 3, when a claim is submitted under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
>
> 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:
>
> (a) **the rules of law specified in the pertinent investment agreement** or investment authorization, or as the disputing parties may otherwise agree; or
>
> (b) if the rules of law have not been specified or otherwise agreed:
>
> (i) **the law of the respondent**, including its rules on the conflict of laws; and
>
> (ii) such rules of international law as may be applicable.

[423] CAFTA-DR (**CL-001**), art. 10.22. *See also ibid*., art. 10.16.1, which provides for the possibility of a dispute arising under the Treaty from an Investment Agreement ("In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) **that the respondent has breached (A) an obligation under Section A**, (B) an investment authorization, **or (C) an investment agreement**; and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim (i) **that the respondent has breached (A) an obligation under Section A**, (B) an investment authorization, **or (C) an investment agreement**; and (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.") (emphasis added).

365. Claimants' argument that the law applicable to the present dispute is not Honduran law, because Article 10.22 only governs disputes arising out of an Investment Agreement, but not the very definition of "Investment Agreement," is completely unreasonable.

366. In the present case, in order to determine whether or not the PPA constitutes an investment agreement covered by the Treaty, it is necessary to look to the applicable law set out in Article 10.22.2, from which the term "central government authority" must be defined. That is, by turning to the applicable laws pursuant to the PPA[424] or in case it has not been determined under the PPA, to the law of the Republic, as is the present case.

367. Therefore, the applicable law to determine the existence of an Investment Agreement is Honduran law.

368. *Second*, aware of the weakness of their argument, Claimants allege that the key test that would prove that ENEE is a national authority would be an annex to CAFTA-DR, which only serves to determine what existing Honduran measures are not subject to certain obligations under Chapters 10 and 11.[425] Again, Claimants are wrong for several reasons.

369. On the one hand, because the Annex refers to obligations enshrined under a different chapter than Chapter 10 of the Treaty, under which the present dispute is being resolved.[426] On the other hand, because it is the Treaty itself, in Note 13 to Article 10.28, which applies directly to the present dispute, that indicates that a national authority is understood as an authority of the central level of government specifically with respect to an investment agreement,[427] and it is Article 10.22 which, in turn, dictates that the applicable law for defining what is an authority of the central level of government in the context of a dispute relating to an investment agreement is the law of the Respondent State.[428] In this case, the law of Honduras.

[424] Even in the event that the PPA were to be considered an Investment Agreement under the Treaty, the PPA itself defines the law applicable to its execution and does not define CAFTA-DR or international law as part of this regulatory framework. *See* Contract No. 002-2014 (**C-001**), § 1.1, ¶ 49.

[425] Counter-Memorial on Jurisdiction, ¶ 129.

[426] CAFTA-DR (**CL-001**), Annex I, Schedule of Honduras, p. 145.

[427] CAFTA-DR (**CL-001**), art. 10.28, note 13.

[428] CAFTA-DR (**CL-0001**), art. 10.22.

370. It is therefore absolutely clear that the law applicable to the definition of what constitutes an authority of the central level of government of Honduras is the law of Honduras itself.

371. In this regard, as demonstrated by the State in its Memorial on Jurisdiction,[429] the General Law of Public Administration of Honduras provides that the central level of government of Honduras is constituted by the organs of the Executive Branch,"[430] which are the Presidency of the Republic, the Council of Ministers and the Secretariats of State.[431] This does not include the public companies, such as ENEE,[432] as these are part of the decentralized order of government in Honduras.[433]

372. In light of the foregoing, Claimants have not met their burden of proving that ENEE is an entity of the central level of government, and therefore have not met their burden of proving that the PPA constitutes an investment agreement under CAFTA-DR.

b. Claimants also fail to meet their burden of proving that the PPA was executed by an investment, or an investor, covered under CAFTA-DR, since at the time of execution of the PPA, Pacific Solar was a company registered under Honduran law and controlled by Honduran nationals.

373. In the Memorial on Jurisdiction, the Republic demonstrated that Claimants have failed to prove that the PPA was executed by a covered investment or an investor of another contracting party to the Treaty.[434] As the Republic explains, for an Investment Agreement to be considered as such under the Treaty, the non-State party thereto must **at the time of its execution**

[429] Memorial on Jurisdiction, ¶¶ 220-223.

[430] General Civil Service Law (Decree No. 146-86) (29 October 1966) (**C-061**), art. 9.

[431] *Ibid*., art. 10.

[432] ENEE in its constitutive law establishes that it is an "autonomous public service organisation, with legal personality, legal capacity and its own assets, of indefinite duration, [...] and that it shall be governed by this law, its regulations, [...]". *See* Decree No. 48 of 1957 (**C-006**), art. 1.

[433] General Civil Service Law (Decree No. 146-86) (29 October 1966) (**C-061**), Title Two, p. 5.) Article 53 of the General Law on Public Administration regulating public enterprises, which is located within the Title of this Law that regulates "Decentralised Administration," and in the subsection that regulates "Autonomous Institutions." In this same section, it is also indicated that autonomous institutions, such as public enterprises, "enjoy functional and administrative independence, and to this effect, may issue such **regulations** as may be necessary." *See ibid*. art. 54.

[434] Memorial on Jurisdiction, ¶ 225.

be a covered investment or an investor of another party.[435] In this regard, the State has already demonstrated that in the present case, the PPA was executed, on the one hand, by ENEE, and, on the other hand, by Pacific Solar, a company incorporated in Honduras, which at the time of its execution was controlled by, and owned by, Honduran nationals.[436]

374. In their Counter-Memorial, Claimants mention that the alleged "agreements" were executed by Pacific Solar, which is a protected investment under CAFTA-DR.[437]

375. According to Claimants, the Republic is creating an alleged "new requirement" for the constitution of an investment agreement, which is that the protected investment that is part of the agreement must be owned or controlled by an investor protected by the Treaty at the time of its execution.[438] Claimants' position is wrong.

376. *First,* a good faith interpretation of the definition of investment agreement in Article 10.28 makes clear that, at the time of execution of an investment agreement, the non-state party to the agreement must be an investment or an investor protected by the Treaty.[439]

377. Likewise, Note 12 defining "written agreement" refers to an "agreement in writing, **executed by both parties**, that creates an exchange of rights and obligations, binding on both parties."[440] In other words, it follows from the very definition stipulated in the Treaty that an investment agreement to qualify as such, must be executed by a national authority of one Treaty contracting party and a protected investment or an investor of another Treaty contracting party.[441]

378. The Treaty defines covered investment as "every asset **that an investor owns or controls**, directly or indirectly [...]."[442] And it defines investor as "a Party or state enterprise

[435] *Ibid.*, ¶ 228.

[436] *Ibid.*, ¶ 227.

[437] Counter-Memorial on Jurisdiction, ¶ 133.

[438] *Ibid*, ¶¶ 132-133.

[439] CAFTA-DR (**CL-001**), art. 10.28 ("between a national authority of a Party and **a covered investment or an investor of another Party**.") (emphasis added).

[440] *Ibid.*, art. 10.28, note 12 (emphasis added).

[441] Memorial on Jurisdiction, ¶ 227-232.

[442] CAFTA-DR (**CL-001**), art. 10.28 (emphasis added).

thereof, or **a national or an enterprise of a Party**, that attempts to make, is making, or has made an investment **in the territory of another Party** [...]."[443]

379. Then, including the definitions provided by the Treaty itself to the definition of investment agreement, it follows that it is a "written agreement" executed between a national authority of a Treaty party and an asset owned or controlled by a national or enterprise of another Treaty contracting party (an investment), or directly by this national or enterprise of another contracting party (an investor).

380. *Second,* Claimants' proposed interpretation would be contrary to the principle of effective interpretation of the Treaty,[444] as well as to the principle of good faith.[445] The Treaty itself provides that not just any person or company can execute an investment agreement, it must be an investor of another party or a covered investment (the non-state party).[446] Otherwise, any domestic contract concluded by parties of the same nationality could be elevated to an investment

[443] *Ibid.*

[444] The principle of effective interpretation requires that the interpretation of a treaty be based on an effective conclusion, beyond simply interpreting the ordinary meaning of the treaty terms in their context, so a tribunal must be satisfied that the alternative interpretation would leave a treaty provision without any effective meaning. *See Daniel W. Kappes & Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Preliminary Objections (13 March 2020) (**CL-151**), ¶¶ 145-149. *See also 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 (2 July 2013) (**RL-022**), ¶ 111; *İçkale İnşaat Limited Şirketi v. Turkmenistan,* ICSID Case No. ARB/10/24, Award (8 March 2016) (**RL-091**), ¶ 329.

[445] Interpretation in good faith is essential for the *pacta sunt servanda* rule to have real meaning, and thus to respect the agreement of the contracting parties to the Treaty (International Law Commission, *Draft Articles on the Law of Treaties with Commentaries*, Vol. II, U.N. Doc. A/6309/Rev.1 (1966) (**CL-254**), p. 219). *See also Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2011) (**RL-081**), ¶ 173 ("The Vienna Convention itself unequivocally emphasizes the foundational role of State consent in the law of treaties. The Convention employs the word 'consent' no fewer than 62 times, including in the titles to six articles. Within the Convention's interpretive prescriptions, it is well-known that article 31(1) begins by instructing interpreters to interpret a treaty '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'. While the article does not explicitly mention consent, the reference to '*good faith*' nevertheless reinforces the duty of tribunals to limit themselves to interpretations falling within the bounds of the framework mutually agreed to by the contracting state parties. As stated by the International Law Commission in its commentary to the draft version of Article 31, the requirement of interpretation in good faith 'flows directly from the rule *pacta sunt servanda.*'").

[446] CAFTA-DR (**CL-001**), art. 10.28 ("investment agreement means a written agreement [...] between a national authority of a Party **and a covered investment or an investor of another Party**."). Note 12 of the Treaty makes it clear that it is an agreement, "**executed** by both parties." That is, it is an agreement **executed by** a State authority, on the one hand, and **an investor of another party or a covered investment**, on the other.

agreement, simply because there is a potential foreign investment subsequent to its execution.[447] This is not the will of the CAFTA-DR and is clear from the very text of Article 10.28.

381. This is clearly not the agreement of the CAFTA-DR parties, let alone allows for a proper application of the Treaty, thus presenting such an interpretation, as Claimants do, directly contravenes the principle of good faith and should be disregarded by the Tribunal.[448]

382. *Third*, in its Memorial on Jurisdiction, the State demonstrated that several investment tribunals share the interpretation put forward by Honduras.[449] In the face of the cogency of those tribunals' decisions, Claimants can only characterize them as irrelevant.[450] Claimants are wrong again.

383. The tribunal's considerations in *Duke Energy v. Ecuador*[451] as well as in *Burlington v. Ecuador*[452] and in *EnCana v. Ecuador*,[453] are absolutely relevant to the present discussion. While

[447] Memorial on Jurisdiction, ¶ 228; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) (**CL-042**), ¶ 183.

[448] International Law Commission, *Draft Articles on the Law of Treaties with Commentaries*, Vol. II, U.N. Doc. A/6309/Rev.1 (1966) (**CL-254**), p. 219 ("When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."). *See also Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 August 2011) (**RL-081**), ¶ 173 ("The Vienna Convention itself unequivocally emphasizes the foundational role of State consent in the law of treaties. The Convention employs the word 'consent' no fewer than 62 times, including in the titles to six articles. Within the Convention's interpretive prescriptions, it is well-known that article 31(1) begins by instructing interpreters to interpret a treaty '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'. While the article does not explicitly mention consent, the reference to '*good faith*' nevertheless reinforces the duty of tribunals to limit themselves to interpretations falling within the bounds of the framework mutually agreed to by the contracting state parties. As stated by the International Law Commission in its commentary to the draft version of Article 31, the requirement of interpretation in good faith 'flows directly from the rule *pacta sunt servanda*.'").

[449] *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010) (**RL-014**), ¶ 235; *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) (**CL-042**), ¶ 183; *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481, Award (3 February 2006) (**RL-139**), ¶ 167. *See also*, Memorial on Jurisdiction, ¶¶ 226-228.

[450] Counter-Memorial on Jurisdiction, ¶ 136.

[451] *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) (**CL-042**), ¶ 183.

[452] In *Burlington v. Ecuador*, the tribunal denied the existence of an investment agreement under the Ecuador-US BIT on the ground that the agreement in question had been entered into between the Ecuadorian State and an affiliate of the investor, incorporated under the laws of Bermuda, and not by an investor or a covered investment under the applicable treaty (*Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010) (**RL-014**), ¶ 235).

[453] *EnCana v. Ecuador. Ecuador*, the tribunal, following *Duke v. Ecuador* and *Burlington v. Ecuador*, held that there was no agreement precluding the application of the tax exception in the Canada-Ecuador BIT because the agreement

the Ecuador-US BIT, which applied in those cases, does not contain an explicit definition of what is meant by an "investment agreement" under that treaty, it does make clear in Article VII(1) that an investment agreement is one concluded between a contracting party to the BIT and a national or company of the other contracting party to the treaty.[454]

384. By contrast, Claimants' reference to the decision in *Freeport McMoran v. Peru* is irrelevant to the present discussion. In that case, the agreement at issue had been entered into between Sociedad Minera Cerro Verde ("**SMVC**") (the claimant's company in that case) and the Peruvian State in 1998, *i.e*. long before the Peru-US TPA, the applicable treaty, entered into force. In this respect, Peru's position in that case was fundamentally different from that of Honduras in the present case. In *Freeport McMoran*, Peru's argument was that SMCV was not a covered investment at the time the investment agreement at issue was signed.[455]

385. This situation is fundamentally different from the present case, where, at the time of the conclusion of the PPA in 2014, CAFTA-DR was in force and therefore was already protecting investors from another contracting party and covered investments in the territory of Honduras, but as has already been demonstrated, did not cover the PPA.

386. Thus, once again, Claimants fail to meet their burden of proving that the PPA, the Aval Solidario or the Operations Agreement were entered into by a covered investment or an

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at issue in that case had not been entered into by the claimant investor in that arbitration proceeding (*Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) (**CL-042**), ¶ 183).

[454] Treaty between the Republic of Ecuador and the United States of America on the Promotion and Protection of Investments (27 August 1993) (**R-017**), art. VI ("For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company.").

[455] *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/08, Award (May 17, 2024) (**CL-266**), ¶ 17 ("When SMCV purportedly relied on the 1998 Stability Agreement when it invested in "the Concentrator" in October 2004**, the TPA did not exist**. **Thus, SMCV was not (and could not be) a covered investment (at all) under the TPA**, whether of Phelps Dodge or of Freeport. On the same basis, **SMCV's investment in the Concentrator was not (and could not) be a covered investment under the TPA, because the TPA was not in force at the time the investment was made**. Moreover**, neither SMCV nor the Concentrator were "covered investments" of Freeport under the TPA at the time SMCV made its investment in the Concentrator purportedly in reliance of the 1998 Stability Agreement**.") (emphasis added).

investor of another party, and therefore also fail to prove that the PPA is an investment agreement under Article 10.28 of the Treaty.[456]

c. Claimants also fail to meet their burden of proving that the PPA conferred rights to Pacific Solar over a natural resource, or other asset controlled by a national authority of Honduras.

387. In its Memorial on Jurisdiction, the Republic demonstrated that the PPA does not grant rights to Pacific Solar over a natural resource controlled by the State as required by CAFTA-DR Article 10.28 because sunlight is not a natural resource within the control of a Honduran national authority.[457] In general terms, the State demonstrates that it does not exercise, nor can it exercise, any control over the solar resource.[458]

388. In particular, the State demonstrated that the PPA granted Pacific Solar the rights to: (i) construct, operate and maintain an electrical plant *of its own*; (ii) supply energy and electric power at the Delivery Point to the Purchaser; and (iii) design, supply, construct and connect the works necessary to make available and/or distribute the energy and power to be supplied at the Delivery Point.[459] As demonstrated by the Republic, the rights granted to Pacific Solar under the PPA do not relate to solar energy or an asset controlled by a Honduran authority.[460]

389. Similarly, even assuming that the PPA granted rights to Pacific Solar over solar energy (*quad non*), in its Memorial on Jurisdiction the State demonstrates that sunlight is not a natural resource under the control, either physical or legal, of a Honduran authority.[461]

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[456] This same conclusion would necessarily apply to the Aval Solidario and the Operations Agreement, in the remote event that the Tribunal would consider them relevant to the analysis of the existence, or not, of an investment agreement under the Treaty (*quod non*). The Aval Solidario, for its part, was not entered into by a covered investment or an investor from another party, as this document was only entered into by the State of Honduras to guarantee ENEE's payment obligations under the PPA. This document was not entered into by any other party. On the other hand, the Operations Agreement, as well as the PPA, was also not entered into by a covered investment or an investor of another party under the Treaty, given that, at the time of its execution, Pacific Solar was a company incorporated in Honduras and controlled by Honduran nationals.

[457] Memorial on Jurisdiction, ¶¶ 237-243.

[458] *Ibid.*, ¶ 241.

[459] Contract No. 002-2014 (**C-001**), § 2.2.

[460] Memorial on Jurisdiction, ¶¶ 237-238.

[461] *Ibid.*, ¶¶ 239-242.

390. In their Counter-Memorial, Claimants argue that the Honduran legal regime is clear that the State exercises control over solar energy sources in its territory.[462] According to Claimants, the "control" referred to in the definition of Investment Agreement in Article 10.28 is legal and not physical control.[463] They further assert that the State granted rights to Pacific Solar related to power generation, including the right to be connected to the national power grid, which is an asset of the State.[464] Claimants' position is unfounded and must be rejected.

391. *First*, the arguments presented by Claimants themselves concede that Honduras does not and could not control the solar resource. In referring to the notion of "control," Claimants refer to Black's Law Dictionary which defines this term as "[t]o exercise power or authority over" and "to regulate or govern."[465] This is the same definition from which the State has already demonstrated that it exercises no control over the Solar Resource.[466]

392. The definition of control included in the Republic's Memorial on Jurisdiction is complemented by the findings of the tribunal in *Plama v. Bulgaria*, which considered that the notion of control implies the ability to exercise "substantial influence."[467]

393. For Claimants, however, this definition would be what allegedly proves that the State exercises *legal* control over sunlight through its own legislation.

394. Claimants refer to Decree 138-2013,[468] which amended the 2007 Law for the Promotion of Electricity Generation with Renewable Resources, and which provides that renewable energy projects that use natural resources, such as solar energy, will be exempt from

[462] Counter-Memorial on Jurisdiction, ¶ 144.

[463] *Ibid.*, ¶ 143.

[464] *Ibid.*, ¶¶ 148-150.

[465] *Ibid.*, note 362, *citing* Black's Law Dictionary, "Control" (2024) (**CL-268**).

[466] Memorial on Jurisdiction, ¶ 241; Real Academia Española, Diccionario panhispánico del español jurídico, definition of "recurso natural" (2023) **(R-062**).

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

[468] Law on Promotion of Electricity Generation with Renewable Resources (Decree No. 138-2013) ("**Decree No. 138-2013**") (1 August 2013) (**C-005**), art. 3.

any fees for the "use and exploitation" of the renewable resource.[469] Similarly, they refer to the Honduran General Law of the Electricity Industry, which they indicate, "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."[470]

395. Neither Decree 138-2015 nor the General Law of the Electricity Industry demonstrate that Honduras *exercises power or authority over, or regulates,*[471] or *exercises substantial influence* over,[472] the solar resource. On the contrary, they demonstrate the opposite: that it does not.

396. The Republic does not dispute that the laws cited by Claimants refer to solar energy as a renewable resource for power generation. However, **none of these laws regulate sunlight** beyond the energy it generates and the parameters for its distribution and integration into the Honduran energy grid.[473]

397. There is not a single law in the Honduran legal regime in which the State "exercises its control over"[474] or exercises its influence over[475] sunlight as a natural resource or in any way determines that it is a resource controlled by the Honduran State.

398. The reason is simple. Sunlight is not a natural resource that is under the exclusive *control* or *influence* of Honduras for the generation of energy in the national territory. Proof of this is that anyone within the territory of Honduras can acquire the necessary technology and generate their own energy using sunlight, without having to acquire it from a national authority.

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[469] Counter-Memorial on Jurisdiction, ¶ 143.

[470] *Ibid*., ¶ 147.

[471] *Ibid*., note 362, *citing* Black's Law Dictionary, "Control" (2024) (**CL-268**).

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

[473] Decree No. 138-2013 (**C-005**), art. 3; Decree No. 404-2013 (**C-008**), art. 1.

[474] Real Academia Española, Diccionario panhispánico del español jurídico, definition of "recurso natural" (2023) (**R-062**); Black's Law Dictionary, "Control" (2024) (**CL-268**).

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

399. In fact, if the Republic could exercise its control, legal or physical, over the solar resource, it would have done so in the relevant legislation. Proof of this is that Honduras does exercise legal and physical control over hydrocarbons such as natural gas and oil, among others, and this is set out in the Honduran Hydrocarbons Law.[476] In short, over non-renewable resources, which are those that require special attention due to their potential depletion.

400. The Hydrocarbons Law expressly establishes that the State controls these natural resources:

> Oil, natural gas and other **hydrocarbon** deposits **are under the direct, inalienable and imprescriptible domain of the State**, regardless of their location on the surface or in the subsoil of the territory of the Republic, including the territorial sea, its contiguous zone, the exclusive economic zone and the continental shelf.[477]

401. Unlike the Hydrocarbons Law, the laws that make up the renewable energy system do not expressly provide that solar energy is under the "direct, inalienable and imprescriptible domain of the State."

402. This is, again, because sunlight, while clearly a natural resource, cannot be controlled by the State and therefore anyone can use this resource to generate their own energy.

403. What is under the control of the Republic is the energy generated by means of sunlight, its transmission, distribution and commercialization in the territory of the Republic of Honduras, as provided for in the General Law of the Electricity Industry:[478]

> **ARTICLE 1**
>
> [...]
>
> **A. PURPOSE OF THE LAW**. The purpose of this Law is to regulate:

[476] Hydrocarbons Law (Decree 194-84) (25 October 1984) (**R-069**), art. 2.

[477] *Ibid.*

[478] Decree No. 404-2013 (**C-008**), art. 1.

> I. The activities of generation, transmission, distribution and commercialization of electricity in the territory of the Republic of Honduras;
>
> II. The import and export of electricity, in addition to the provisions of international treaties on the subject entered into by the Government of the Republic; and,
>
> III. The operation of the national electricity system, including its relationship with the electricity systems of neighbouring countries, as well as with the electricity system and the Central American regional electricity market.

404. What the laws cited by Claimants regulate is the energy that is generated, whether from sunlight, wind (Eolic),[479] but not the natural resources used to generate it. Claimants' misunderstanding between sunlight and renewable energy does not support their argument that the PPA granted Pacific Solar rights to a natural resource controlled by the State. Clearly, this is not the case, and as has been demonstrated, Honduras does not control sunlight as a natural resource.

405. *Second,* Claimants also allege that the PPA would not only have granted rights to Pacific Solar over sunlight, which has already been shown to be incorrect, but also granted rights to Pacific Solar over other assets such as the national power grid.[480] This position is unfounded and should also be rejected by the Tribunal.

406. As noted in the PPA, the only relationship that Pacific Solar has with the national power grid is that one of its obligations under the agreement was to deliver the energy produced by the Plant to the Delivery Point designated for this purpose in Annex II of the PPA.[481] Once deposited at this point, the energy would be integrated by the Honduran authorities into the national energy grid.[482] This can in no way mean that, because of its obligation to deliver the energy produced at the Plant, Pacific Solar then also had rights over the national power grid.

407. Accordingly, and again, Claimants fail to meet their burden of showing that the PPA granted Pacific Solar rights to a natural resource, or other asset, that is controlled by a state

[479] Decree No. 138-2013 (**C-005**), art. 3; Decree No. 404-2013 (**C-008**), art. 1.

[480] Counter-Memorial on Jurisdiction, ¶ 148.

[481] Contract No. 002-2014 (**C-001**), §§ 1.1 ¶ 62, 2.4, 2.7.

[482] *Ibid.*, Annex III.

authority, and thus also fail to show that the PPA is an investment agreement under Article 10.28 of the Treaty.[483]

d. Claimants also fail to meet their burden of proving that the PPA was the basis for constituting another investment, as the PPA cannot simultaneously constitute an investment agreement and a protected investment.

408. In the Memorial on Jurisdiction, the Republic demonstrated that Claimants also failed to prove that the PPA is the basis upon which they formed or acquired a covered investment, other than the PPA itself.[484] Since this is another requirement under Article 10.28 of the Treaty for an Investment Agreement to be considered as such, the Republic demonstrated that the PPA cannot be one.[485]

409. In their Counter-Memorial on Jurisdiction, Claimants argue that the PPA is the basis upon which they established their investment in Honduras, given that under CAFTA-DR an investment agreement can at the same time be a protected investment.[486] Claimants' argument is unfounded and should be rejected by the Tribunal.

410. *First*, Claimants' argument runs counter to the literal meaning of Article 10.28.[487] This provision provides for the obvious difference between an investment agreement and a protected investment, by stating that an investment agreement is a written agreement, concluded

[483] From this same reasoning, it is absolutely clear that neither the Aval Solidario nor the Operations Agreement granted Pacific Solar rights over a natural resource or other asset controlled by a Honduran authority. The Aval Solidario, for its part, was not an agreement to which Pacific Solar was a party and merely obligated the State as guarantor of ENEE's compliance with its payment obligations under the PPA. The same is true for the Operations Agreement, which, as stated above, simply sets out the technical conditions and requirements for the Plant to be built by Pacific Solar to enter into operation. In addition, and as stated in the PPA itself, the Plant whose construction and entry into operation was guided by the Operations Agreement, is owned by Pacific Solar and does not constitute any asset under the control of Honduras. *See* Decree 113-2014 **(C-002**), § 1, 1.4.2; Operations Agreement (**C-003**); Contract No. 002-2014 (**C-001**), § 2.2.

[484] Memorial on Jurisdiction, ¶¶ 245-246.

[485] *Ibid.*

[486] Counter-Memorial on Jurisdiction, ¶¶ 153-154.

[487] CAFTA-DR (**CL-001**), art. 10.28 ("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: (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**.") (emphasis added).

between a national authority and a protected investment or an investor of another party, upon which the latter "**relies in** establishing or acquiring a covered investment **other than the written agreement itself**."[488]

411. *Second,* as already demonstrated by the State above in Section III.D.1.a, the context[489] of the definition of Investment Agreement confirms the clear difference between a Protected Investment and an Investment Agreement. Article 10.16 requires the existence of a protected investment in order to analyse possible breaches that a State may incur concerning (i) obligations stipulated in relation to covered investments and investors under the Treaty (Section A); (ii) an investment authorization; or (iii) an investment agreement.[490] This provision makes it clear that not only are an Investment Agreement and a Covered Investment two entirely different things under the Treaty, but also that the same dispute cannot arise under a Covered Investment and an Investment Agreement simultaneously. It follows from the same Article 10.16 that in order to determine the existence of a breach related to a protected investment or investor (Section A), it is necessary to determine the very existence of a protected investment.[491]

412. Furthermore, Article 10.22, which is also part of the relevant context of Article 10.28, establishes that Covered Investment and Investment Agreement are two different terms under the Treaty by stating that the law applicable to disputes arising in connection with covered investments and investors under the Treaty (Section A) is different from the law applicable to disputes arising out of alleged breaches of an investment agreement.[492]

[488] CAFTA-DR (**CL-001**), art. 10.28.

[489] Part of the relevant context for treaty interpretation under Article 31(1) of the VCLT includes words and phrases close to the terms being interpreted, including definitional and other provisions of the treaty itself. *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on the Request for Termination and Intra-EU Objection (7 May 2019) (**RL-176**), ¶ 80.

[490] CAFTA-DR (**CL-001**), art. 10.16.

[491] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (16 July 2001) (**RL-059**), ¶ 44.

[492] CAFTA-DR **(CL-001**), art. 10.22.

413. In this regard, the clear legal—and logical—difference between an Investment Agreement and a Covered Investment under the Treaty demonstrates that an Investment Agreement cannot be the basis for its very existence as a Covered Investment under the Treaty.

414. Accordingly, Claimants also fail to demonstrate that the PPA,[493] as the purported investment agreement at issue in this case, is the basis upon which Claimants formed or acquired another investment.

415. For the foregoing reasons, the Tribunal lacks jurisdiction *ratione materiae* because Claimants have failed to meet their burden of showing that the present dispute arises out of an investment agreement protected by the CAFTA-DR.

E. Claimants' claims are purely contractual, and the Tribunal lacks jurisdiction to preside over them.

416. Claimants argue that the Tribunal is "unable" to resolve the objection to the nature of the claims without making factual determinations.[494] This assertion is incorrect and reveals a fundamental misunderstanding of the applicable standard. The Republic does not purport to tell the Tribunal what it can or cannot do. Simply put, its objection does not require evidence, but rather a legal qualification of Claimants' allegations, based on their own narrative, as permitted under CAFTA-DR.

417. Claimants insist that their case is based on the Treaty. However, the facts (the evidentiary material adduced by both parties up to this point in the proceedings) show otherwise. The real dispute before this Tribunal revolves around the interpretation of the PPA and the payment of the amounts demanded by Pacific Solar, in particular: (i) the invoices owed by ENEE, and (ii) the energy limitations.[495] As already demonstrated by Honduras, both situations are regulated in

[493] The same applies to the Aval Solidario and the Operations Agreement, assuming that the Tribunal also considers them relevant to the analysis of the existence, or not, of an investment agreement in the present case (*quod non*).

[494] Counter-Memorial on Jurisdiction, ¶ 258 ("In response to the Tribunal's question regarding whether, and under what conditions, it has jurisdiction over purely contractual claims, and as addressed below, the Tribunal has jurisdiction over claims relating to a contract or arising out of a contractual breach as explained herein. 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.").

[495] *See supra* § I.A.2. *See also infra* ¶ 565.

detail by the PPA itself and do not derive from any rule of international law.[496] The interpretation of ENEE's obligations, the existence of a breach and its effects, are all matters that are resolved by the application of the Contract, not the Treaty.

418. In the case of the Republic's objection to the contractual nature of Claimants' claims, it is for the Tribunal to assess the basis of the claim.

419. From the *Vivendi I* decision, which both Parties have cited in these proceedings, it is clear that, in deciding whether a claim is under a contract or under a treaty, the tribunal must consider "the fundamental basis of the [claimant's] claim."[497] Other tribunals, such as *Safa v. Greece*, have referred to the "*essential basis*" of the claim. The variety in language does not make a significant difference.[498] In the same vein, it is what the Republic refers to in this Reply as the "core" of Claimants' claims.

420. The tribunal in *Pantechniki*, for its part, indicated that the tribunal's task is to determine whether the claim truly has an autonomous existence outside the contract.[499] Honduras notes that, referring to this language, the tribunal in *Crystallex v. Venezuela* explained that the starting point must be the claimant's requests and the formulation of its claims.[500] It is precisely this criterion that Honduras uses below to demonstrate the contractual nature of the Essential Claims.

421. Now, as the Crystallex tribunal rightly warned in the same paragraph, "it would of course not be sufficient for a claimant to simply label contract breaches as treaty breaches to avoid the jurisdictional hurdles present in a BIT"[501] and this is a matter to be determined objectively, so

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[496] Memorial on Jurisdiction, ¶¶ 27 *et seq*.

[497] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002) (**RL-060**), ¶ 101.

[498] *Iskandar Safa & Akram Safa v. Hellenic Republic*, ICSID Case No. ARB/16/20, Decision on Jurisdiction and Liability (24 July 2020) (**RL-178**), ¶ 330.

[499] *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (9 July 2009) (**RL-154**), ¶ 64.

[500] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) (**CL-092**), ¶ 475 ("The Tribunal's starting point will be the Claimant's prayer for relief and the formulation of its claims.").

[501] *Ibid.*

that, if the Tribunal disagrees with the claimant's approach, it can (and should) properly recharacterize the alleged breaches.[502] This comports with the Republic's fundamental premise in this section of the Memorial: these findings must result from an objective and autonomous assessment by the Tribunal, not from Claimants.

422. In any event, it is telling that Claimants do not contest that their claims are essentially contractual. Instead, they attempt to present them as contractual breaches that would also constitute breaches of the Treaty, thus inadvertently confirming the contractual nature of their case.[503] While Claimants classify their claims as breaches of the Treaty,[504] it is clear from reviewing the substance of their claims that at their core is the constant reference to contractual breaches.[505] The attempt to dress them up as Treaty breaches does not change their true nature.[506] In this context, all that Honduras again asks of the Tribunal is an independent and objective analysis of the claims. Below, the Respondent will explain the applicable legal framework: the difference between contractual claims and investment treaty claims (**Subsection 1**). It will then demonstrate that the Essential Claims are purely contractual (**Subsection 2**). Finally, it will

[502] *Ibid.*

[503] Counter-Memorial on Jurisdiction, ¶ 7 ("Claimants' case is based on Honduras' breach of the Treaty and is not a contract claim […] Claimants' case, which is not based merely on a breach of the PPA. […] Respondent also ignores that State measures that amount to a breach of a contract can also result in a breach of international law."). The complainants first mention that their claims are not based on breach of contract and then go on to say that they are not based solely on breach of the PPA. They also point out that the defendant forgets that a measure that violates a contract can be in breach of a treaty. In that vein, the Claimant admits that its claims have a contractual connotation, regardless of whether these contractual breaches amount to a breach of the Treaty. *See also ibid.*, ¶¶ 258, 262-263 ("Honduras' objection rests on a mischaracterization of Claimants' case, which is not based merely on a breach of the PPA. Rather, the dispute concerns Honduras' 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' obligations under the Treaty […]. [A] State's conduct relating to a contract with a foreign investor or its investments may result in a breach of an investment treaty […] State measures that amount to a breach of contract may also result in a breach of international law.").

[504] *Ibid.*, ¶ 257 ("Claimants' case is based on Honduras' 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' obligations under the Treaty and have caused substantial damage to Claimants and their investments in Pacific Solar.").

[505] Statement of Claim (Sept. 20, 2024), ¶¶ 98, 217 ("State's intent to (i) repudiate its compensation and other key obligations towards Pacific Solar […].") ("[T]he Government's intentions are clear: to cripple Pacific Solar's rights under the Agreements.").

[506] Memorial on Jurisdiction, ¶ 262 *citing Rachel S. Grynberg et al. v. Grenada*, ICSID Case No. ARB/10/6, Award (10 December 2010) (**RL-078**), ¶ 7.3.7.

indicate why the cases cited by both Parties confirm that Claimants' claims are contractual (**Subsection 3**).

1. The applicable legal framework: difference between contractual claims and investment treaty claims

a. Claimants ignore the difference between contractual and Treaty claims

423. Claimants assert that Honduras ignores the fundamental principle of international law that State measures that give rise to a breach of contract may also result in a breach of international law.[507] There is no such "fundamental principle" of general application in international law. Claimants merely attempt to reintroduce a self-applying rule that is without merit. Their own references confirm this conclusion: as the doctrine cited by Claimants to support their false premise indicates, this only occurs in "special circumstances."[508]

424. There is no doubt that a cause of action under an international treaty is legally distinct from a contractual cause of action.[509] This distinction has been reiterated by multiple international tribunals,[510] and is well recognized by Claimants.[511] Honduras also recognizes this

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[507] Counter-Memorial on Jurisdiction, ¶ 258 ("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.").

[508] Counter-Memorial on Jurisdiction, note 636 *citing* C. F. Amerasinghe, *State Breaches of contracts with Aliens and International Law*, 58 *American Journal of International Law* 881 (1964) (**CL-202**), p 912 ("There are special circumstances which bring about a violation of international law simultaneous with a breach of contract.").

[509] Counter-Memorial on Jurisdiction, note 636, *citing Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of P*akistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005) (**CL-204**), ¶ 148.

[510] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (12 October 2005) (**RL-136**), ¶ 53 ("*The Tribunal recalls the well-established rule of general international law that in normal circumstances per se a breach of a contract by the State does not give rise to direct international responsibility on the part of the State.*") *Robert Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (1 November 1999) (**RL-127**), ¶¶ 82-83 ("Arbitral jurisdiction under Section B is limited not only as to the persons who may invoke it (they must be nationals of a State signatory to NAFTA), but also as to subject matter: claims may not be submitted to investor-state arbitration under Chapter Eleven unless they are founded upon the violation of an obligation established in Section A. [...]. To put it another way, a foreign investor entitled in principle to protection under NAFTA may enter into contractual relations with a public authority, and may suffer a breach by that authority, and still not be in a position to state a claim under NAFTA. It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints. It may safely be assumed that many Mexican parties can be found who had business dealings with governmental entities which were not to their satisfaction; Mexico is unlikely to be different from other countries in this respect. NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.").

[511] Counter-Memorial on Jurisdiction, ¶ 262 ("Respondent overlooks the fundamental distinction, widely recognized by international tribunals, between treaty claims and contract claims. As put by many tribunals, a State's conduct

point. It is equally true that an investment tribunal has jurisdiction over the assessment of "treaty breaches," even if they relate to contractual claims.[512]

425. However, intentionally or accidentally, Claimants have missed the substantive debate. Honduras argument is not that the presence of a contract *ipso facto* nullifies the jurisdiction of an investment tribunal. Indeed, such a position would be irreverent in the face of arbitral precedents. In other words, what is at issue is not whether the same set of facts can give rise to claims under treaty and contract, but whether Claimants have, in this arbitration, raised claims that are purely contractual, however much they attempt to label them as breaches of the CAFTA-DR.

426. Since the points that Claimants present as disputed matters are not actually disputed, the numerous precedents they cite have little or no relevance to the legal issues at stake in this case, and especially with respect to the Tribunal's question in Procedural Order No. 4: whether it has jurisdiction over "**purely** contractual claims."[513] The answer is in the negative.

427. Treaty claims are just that: allegations of the breach of an investment agreement. They may relate to the performance of a contract. There may even be parallel claims under the treaty and under the contract. It may even be the case that the claims in one and the other forum relate to the same facts. But this will not make the claims "contractual". If they were, they would have to be litigated in the forum chosen by the parties to the contract.[514]

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relating to a contract with a foreign investor or its investments may result in a breach of an investment treaty."). *See also ibid*. note 37 *citing Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 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.").

[512] Counter-Memorial on Jurisdiction, ¶ 262.

[513] Procedural Order No. 4, ¶ 52.

[514] *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award (7 February 2011) (**RL-080**), ¶ 103c. ("The protection afforded by investment treaties does not necessarily cover purely contractual claims where the parties to the contract have agreed on another clause granting jurisdiction, provided the parties are the same.") *citing SGS Société Générale de Surveillance SA v. Republic , Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction (29 January 2004) (**CL-129**); *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) (**RL-064**); and *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction (12 July 2006) (**RL-070**).

b. A purely contractual claim alone does not amount to an investment claim: something more is needed.

428. Claimants cite the *Bayindir*, *South32 and Gemplus* cases, among others, to assert that a state measure that breaches a contract can also constitute a breach of international law. But this assertion, again, is irrelevant. The question is whether Claimants' claims are purely contractual, which would exclude them from the scope of application of the Treaty. The answer, in light of the case law cited by Claimants themselves, is yes. In reaching this conclusion, the Tribunal can be guided by the criteria that have been developed by other tribunals, and that Honduras has taken up in this section.

429. *First*, international jurisprudence is categorical: the breach of a contract by a State does not automatically imply a breach of an investment treaty (**Criterion No. 1**).[515] The Commentaries to the ILC Articles point out that the mere breach of a contract by a State does not engender international responsibility unless it is accompanied by an additional fault, for example, a denial of justice in the protection of the rights of the contractor.[516] This was affirmed, in similar terms, by the tribunal in *Glamis Gold v. Mexico.*[517] In the same vein, investment agreements are not meant to protect investors from mere contractual breaches, as this would elevate a myriad of domestic claims to the international plane.[518]

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[515] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Case No. ARB/97/3, Decision on Annulment (July 3, 2002) (**RL-060**), ¶ 113; *Consorzio Groupement L.E.S.I. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award (10 January 2005) (**RL-134**), ¶ 25 ("[t]he measures taken must amount to a breach of the Bilateral Agreement. [...] [t]hat is not necessarily the case with every breach of contract."); *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (27 July 2006) (**RL-142**), ¶ 91 ("The Tribunal wishes to make it clear that [...] cannot entertain purely contractual claims which do not amount to a violation of the BIT.").

[516] U.N. General Assembly, Report of the International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, UN Doc A/56/10 (Vol. II, Part Two) (2001) (**CL-079**), p. 41, commentary 6 to Article 4 ("Of course, the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party.").

[517] *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (**CL-125**), ¶ 620 ("The Tribunal agrees that mere contract breach, without something further such as denial of justice or discrimination, normally will not suffice to establish a breach."); *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) (**CL-014**), ¶ 316 ("*It is in principle admitted that with respect to a BIT claim an arbitral tribunal has no jurisdiction where the claim at stake is a pure contract claim.*").

[518] *Robert Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (1 November 1999) (**RL-127**), ¶ 87 ("NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches.

430. In *Gemplus v. Mexico*, the case cited by Claimants, it was established that it is clear that "a contractual breach cannot simply be converted juridically into a treaty breach."[519] One of the fundamental differences between the two claims lies in the nature of the obligations invoked: a contractual claim is based on domestic law duties, such as the contract and its applicable law, whereas a treaty claim alleges the breach of international obligations assumed in the treaty.

431. *Second*, international tribunals have consistently developed a high threshold for converting contractual breaches into treaty claims.[520] Thus, these tribunals emphasize that a breach of contract by the state does not, by itself, constitute a breach of international law; something more is required, such as a public act of authority (**Criterion No. 2**). Following this same line of argument, in *BIVAC v. Paraguay*, the tribunal held that:

> 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.[521]

432. In this sense, for a contractual issue to be reviewable in investment arbitration, sovereign conduct of the State (*jure imperii*) that injures the rights of the investor is required, as opposed to simply acting as an ordinary commercial party (*jure gestionis*).[522] For example, one

Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes.").

[519] *Gemplus S.A. et al. v. United Mexican States*, ICSID Case Nos. ARB (AF)/04/3 and ARB (AF)/04/4, Award (16 June 2010) (**CL-306**), ¶ 6.25.

[520] *South32 SA Investments Ltd. v. Republic of Colombia*, ICSID Case No. ARB/20/9, Award (21 June 2024) (**CL-305**), ¶ 172 ("the threshold of non-compliance for an international wrong is higher and based on a different legal standard.").

[521] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Jurisdictional Objections (29 May 2009) (**CL-307**), ¶ 127 (emphasis added).

[522] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) (**CL-018**), ¶ 458 ("[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.").

tribunal emphasized that a contractual breach does not imply *ipso facto* a breach of the applicable international treaty, as the state may well have acted in a purely commercial capacity, just as a private party would.[523]

433. If the impugned state conduct is not qualitatively different from that of an ordinary contracting party, then the case typically falls outside the scope of the treaty for lack of a sovereign element.[524] On the other hand, if the State used powers of public authority (legislative, administrative, judicial) in a way that affected the investment to such an extent as to amount to a treaty breach, this is indicative of a possible treaty claim. In contrast, if the state acts solely as a contractual party (e.g., by delaying payment or breaching a commercial obligation), there will normally be no treaty breach.

434. *Third*, the jurisprudence consistently establishes that, if the investor maintains the availability of ordinary contract remedies, such as local courts or commercial arbitration, there will normally be no treaty breach for mere breach of contract (**Criterion No. 3**). In *Waste Management*

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[523] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007) (**CL-050**), ¶¶ 315-316, 332, 448 ("Fair and equitable treatment is denied when the investor is treated in such an unjust or arbitrary manner that the treatment is unacceptable from an international law point of view. Indeed, many tribunals have stated that not every breach of an agreement or of domestic law amounts to a violation of a treaty. For instance, in the Saluka v. Poland case, the Tribunal stated: The Treaty cannot be interpreted so as to penalise each and every breach by the Government of the rules or regulations to which it is subject and for which the investor may normally seek redress before the courts of the host State. [...] something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements."); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1 Award (9 January 2003) (**CL-010**), ¶ 190 ("But something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1)."); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006) (**CL-025**), ¶ 315 ("The Tribunal agrees that contractual breaches by a State party or one of its instrumentalities would not normally constitute expropriation. Whether one or series of such breaches can be considered to be measures tantamount to expropriation will depend on whether the State or its instrumentality has breached the contract in the exercise of its sovereign authority, or as a party to a contract. As already noted, a State or its instrumentalities may perform a contract badly, but this will not result in a breach of treaty provisions, 'unless it be proved that the state or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign.'"); *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award (22 December 2003) (**RL-133**), ¶ 65 ("For there to be a right to compensation, it is necessary for the expropriated person to prove that it was the object of measures taken by the State acting not as a co-contractor, but as a public authority") (translation by the Republic, original in French): "*Pour qu'il y ait droit à compensation il faut que la personne de l'exproprié prouve qu'il a été l'objet de mesures prises par l'Etat agissant non comme cocontractant mais comme autorité publique*.").

[524] *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009) (**RL-156**), ¶ 103 ("As a general rule, a mere non-performance of a contractual obligation does not by itself fall within the scope of the State's undertakings under the Treaty.") *citing Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (22 April 2005) (**RL-068**), ¶ 268.

II it was emphasized that as long as there is "some remedy open to the creditor," there is no "unfair dealing or expropriation".[525] This was reiterated in the *BIVAC* case, where it was stated that the "unfettered availability" of a contractual forum is interpreted in favour of the claim being truly contractual.[526] Similarly, in *SGS v. Philippines* it was held that a mere refusal to pay a debt is not an expropriation of property where there are remedies for such refusal.[527]

435. Claimants also attempt to rely on *Vivendi* and other cases to argue that the interpretation of a contract may form part of the analysis of a treaty claim.[528] However, in subsequent cases against Argentina, such as *Azurix*, tribunals have reiterated that a state or its entities may misperform a contract, but this does not result in a treaty breach unless it is proven that the State or its entity has gone beyond the exercise of sovereign prerogatives to frustrate the investor's rights.[529]

436. Moreover, Claimants' criticisms of the cases cited by the Republic are futile, as they merely reiterate their own narrative and assume, without demonstrating, that their allegations about the nature of their claims are true.[530] In that sense, their objections are purely circular. For example, in referring to the *Salini* case, Claimants do not dispute the fact that the tribunal found that the claimant in that case failed to prove state conduct that exceeded the ordinary conduct of a contracting party; they simply assert, without further support, that sovereign conduct exists in this

[525] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (**CL-024**), ¶¶ 115-116.

[526] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Jurisdictional Objections (29 May 2009) (**CL-307**), ¶¶ 110, 114, 116-117.

[527] *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction (29 January 2004) (**CL-129**), ¶ 161 ("A mere refusal to pay a debt is not an expropriation of property, at least where remedies exist in respect of such a refusal.").

[528] Counter-Memorial on Jurisdiction, ¶ 263.

[529] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006) (**CL-025**), ¶ 315 ("The Tribunal agrees that contractual breaches by a State party or one of its instrumentalities would not normally constitute expropriation. Whether one or series of such breaches can be considered to be measures tantamount to expropriation will depend on whether the State or its instrumentality has breached the contract in the exercise of its sovereign authority, or as a party to a contract. As already noted, a State or its instrumentalities may perform a contract badly, but this will not result in a breach of treaty provisions, 'unless it be proved that the state or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign.").

[530] Counter-Memorial on Jurisdiction, ¶ 264.

case.[531] This way of responding evades legal analysis and does not undermine the precedent cited by Honduras.

437. In sum, the jurisprudence is clear: a breach of contract does not, in and of itself, amount to a treaty violation.

2. The Essential Claims are purely contractual.

438. Claimants wrongly insist that Honduras "mischaracterizes Claimants' claims" by calling them contractual.[532] Honduras has exhaustively explained why Claimants' claims are purely contractual measures.[533]

439. Given Claimants' persistent refusal to acknowledge this self-evident legal reality, it is pertinent to summarize the main points that conclusively demonstrate that, applying the criteria defined above, the Essential Claims are contractual and cannot automatically amount to Treaty breaches (**Subsection a**). Subsequently, the reasons why Honduras argues that Claimants have failed to prove that the measures they claim go beyond the Contract will be set out (**Subsection b**). Finally, it is recalled that Claimants have the contractual forum to litigate the Essential Claims (**Subsection c**).

a. Criterion No. 1: Essential Claims are contractual and cannot automatically rise to Treaty violations.

440. The Essential Claims are the basis of Claimants' case and, in doing so, have already presented the Tribunal with the main reasons why they are purely contractual.[534] In order not to

[531] *Ibid*., ¶ 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[.]' 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.").

[532] *Ibid*., ¶ 260 ("Honduras argues that this dispute is confined to the relationship between Pacific Solar and ENEE under the PPA, 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.' In so arguing, Honduras focuses on payment disagreements and energy curtailments in the years prior to Honduras' enactment of the 2022 New Energy Law, 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.").

[533] *See supra* § I.A.2.

[534] *See supra* § I.A.2.

repeat these considerations, the Republic will simply refer to the main pillars to be taken into account by the Tribunal.

441. In Section I.A.2 *above,* Honduras set out the following key points:

a. *First,* the legal nature of the Essential Claims is contractual.[535] Claimants themselves base the dispute on the PPA and the Aval Solidario.[536] Furthermore, the obligations at issue are fully and comprehensively regulated by the PPA, under Honduran law;[537] no equivalent obligation arises under CAFTA-DR. Finally, Claimants' cause of action is the Contract, not the Treaty.[538]

b. *Second,* Claimants' unambiguous language reveals the contractual nature of their claims.[539] In all of their submissions[540] and in contemporaneous correspondence with ENEE,[541] Claimants characterize the events as "breaches of the PPA." This admission is devastating to their argument in these proceedings.

c. *Third,* the damages analysis unequivocally confirms the contractual nature of the claimed damages.[542] In short, the historical loss claim consists of "past due invoices and unpaid interest" and the FMV claim takes as its fundamental input

[535] *Ibid.*

[536] Request for Arbitration (24 August 2023), ¶ 4.

[537] Contract No. 002-2014 (**C-001**), arts. 2.1, 2.3 and clause 9 ("The purpose of this contract is the supply of energy and power by the SELLER to the BUYER during the Term of the Contract. As stipulated in this Contract, the BUYER shall purchase all the electric energy and power generated by the Plant and which is delivered, measured and billed by the SELLER [...] THE BUYER undertakes to purchase and pay the SELLER for all energy and power invoiced in accordance with the prices, terms and conditions set forth in this Agreement. The Parties acknowledge that the SELLER's obligation under this Contract shall be to deliver energy and capacity to the SIN at the Point of Delivery [...]. Clause 9 Prices, Billing and Payments.").

[538] Request for Arbitration (24 August 2023), ¶ 21. As Claimants themselves confirmed in their Request for Arbitration, the payment obligation "originates, and may be required" upon "the sole failure of the same payment by ENEE to [Pacific Solar] on the dates on which it corresponds according to the PPA." Moreover, in their Statement of Claim, they expressly stated that the alleged breaches gave them a "right of action in this arbitration to claim for Honduras' breaches of the Agreements, including the PPA and the State Guarantee." *See* Statement of Claim, ¶ 191.

[539] *See supra* ¶¶ 14-17.

[540] Counter-Memorial on Jurisdiction, ¶ 236 ("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. Honduras has also curtailed the Plant's energy dispatch without providing proper compensation in breach of the PPA.").

[541] *See infra* ¶¶ 527-528.

[542] *See supra* ¶¶ 18-20.

future invoices that would be collected by the plant during the term and in reliance on the PPA (and a short period thereafter).

d. *Fourth*, there is an insurmountable contradiction between the facts alleged and the Treaty violations invoked.[543] Claimants assert that the Essential Claims are not the Treaty violation,[544] but use them as the primary basis for their damages. The Tribunal should not allow this attempt to have the best of both worlds: to base damages on these violations and exclude them from the objections.

e. *Fifth*, the invocation of the umbrella clause confirms the implicit recognition of the contractual nature of Claimants' claims.[545] An umbrella clause is only invoked when the Claimant acknowledges that its complaint is contractual and needs to be "elevated" to the treaty.[546] Thus, Claimants implicitly confess the contractual essence of the dispute while attempting to reclassify it as an international breach.

442. The five pillars converge on one incontrovertible point: the claims revolve around obligations arising from and governed by the PPA. This is their objective legal nature. According to Criterion No. 1 established in Section III.E.1.b *above*, Claimants cannot automatically and artificially transform these contractual disputes into Treaty violations simply by reformulating their allegations.

b. Criterion No. 2: Claimants have failed to prove that the measures they claim go beyond the Contract.

443. Claimants struggle to fit together two pieces of a puzzle that simply cannot coexist.

444. They invoke Decree 46-2022 as the alleged triggering act for the breach of the Treaty.[547] Honduras has already demonstrated that this characterization is legally untenable.[548] While this norm could be characterized as a measure attributable to the State, it is not a public act

[543] *See supra* ¶¶ 21-22.

[544] Counter-Memorial on Jurisdiction, ¶ 232.

[545] See *supra* ¶¶ 23-26.

[546] See *supra* ¶ 23.

[547] Counter-Memorial on Jurisdiction, ¶ 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' 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.").

[548] Memorial on Jurisdiction, §§ II.B, II.C.

of authority (*puissance publique*) that modifies the nature of the Essential Claims, as summarized again below.

(1.) Decree 46-2022 did not alter the pre-existing Essential Claims in any way.

445. Decree 46-2022 did in no way affect the Essential Claims, which had been developing for years prior to its enactment. The fundamental events underlying this dispute—the energy curtailments and non-payment of bills—preceded the entry into force of the Decree (from 2017 and from 2018 respectively) and continued to develop under the same contractual dynamics after its implementation.[549] This temporal continuity demonstrates that the Decree did not create new rights, obligations or legal situations, but merely provided a regulatory framework for pre-existing contractual relationships.

446. Claimants assert that their case "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."[550] However, they immediately thereafter contradict this assertion by basing their claims precisely on the breach of specific contractual obligations.

(2.) In the Essential Claims, Honduras acted as a contractual party, not as a sovereign State.

447. When Claimants assert that "Honduras, moreover, did not act as a mere commercial party when it breached its contractual commitments towards Pacific Solar,"[551] they reveal a deficient understanding of the distinction between sovereign and commercial acts. The determinative question that the Tribunal must ask is clear and direct: "Did Honduras act as a contractual party when it breached its payment obligations under the Contract?" The answer is a resounding and unequivocal yes.

[549] Memorial on Jurisdiction, ¶¶ 37-44, 264-265. *See also* ENEE Payment Vouchers to Pacific Solar Energy (2022) (**R-010**); ENEE Payment Vouchers to Pacific Solar Energy (2023) (**R-011**); ENEE Payment Vouchers to Pacific Solar Energy (2024) (**R-012**).

[550] Counter-Memorial on Jurisdiction, ¶ 261.

[551] *Ibid.*, ¶ 259.

448. None of the measures identified by Claimants evidences an exercise of public power inconsistent with the State's obligations under the Treaty. To the contrary, each of these actions reflects the typical and predictable behaviour of a contractual counterparty in an ordinary commercial dispute. Non-payment of invoices, negotiations over contractual terms, and discussions in relation to compensation are inherent elements of commercial relations, not manifestations of sovereign power that merit protection under an international investment treaty.

(3.) The Contract was never renegotiated and continues to run on the same terms existing prior to 2022.

449. Claimants attempt to create an argumentative smokescreen by arguing that the measures invoked "clearly far exceed a mere contractual dispute about unpaid receivables that predate the 2022 Energy Law, as Honduras contends."[552] This is incorrect.

450. *First*, Claimants erroneously allege that Decree 46-2022 codifies the State's intent to deny compensation due to Pacific Solar by failing to recognize its debt, interest, and compensation for reductions allegedly promised under the PPA.[553] This interpretation is legally untenable. Nowhere in this rule does it state that Honduras "will no longer recognize its payment obligations," and it requires no more than a minimum of reading comprehension to confirm this.

451. Moreover, the Contract was never renegotiated and continues to be executed under exactly the same terms that existed prior to 2022.[554] The total absence of any contractual modification and continuation of payments on the same terms since the commencement of performance demonstrates conclusively that the Decree did not alter the underlying legal relationships or create new obligations or rights that could support claims under the Treaty.

452. *Second*, Claimants falsely insist that Article 5 of Decree 46-2022 imposes mandatory renegotiation of the PPA, which would allegedly constitute a breach of the Treaty.[555] This argument is based on the illogical and untenable premise of assuming that a state enterprise cannot request renegotiation of its commercial contracts. Such a position violates the most basic

[552] *Ibid.*, ¶ 272.

[553] Memorial on Jurisdiction, ¶ 263; Statement of Claim, ¶¶ 125, 313, 314.

[554] Memorial on Jurisdiction ¶ 129.

[555] *Ibid.*, §II.B, ¶¶ 266-274; Statement of Claim, ¶¶ 98, 118-119.

precepts of contractual good faith and the fundamental principle of party autonomy. Moreover, article 18.1 of the PPA itself expressly provides for the possibility for the parties to amend the Contract by mutual agreement, which demonstrates that any renegotiation would be perfectly within the established contractual framework.[556]

453. Moreover, the alleged "forced renegotiation" alleged by Claimants has no legal relevance, as the unpaid sums existed prior to Decree 46-2022, and the latter did not order to disregard them or alter their contractual nature.

454. *Third*, contrary to Claimants' unfounded assertions, Decree 46-2022 contains no threat of expropriation.[557] Honduras, like any other sovereign State, possesses the inherent and inalienable right to expropriate all kinds of property within its territory, if it complies with the legally established conditions and procedures. This power is recognized both in the Honduran Constitution and in the very Investment Treaty invoked by Claimants.

455. Honduras had the full power to expropriate Claimants' alleged investment, in compliance with the relevant legal requirements, prior to the enactment of Decree 46-2022. The Decree does not grant new power to ENEE on this matter but merely authorizes it to propose the termination of the PPA and the acquisition of the plant, upon payment of the corresponding price. This distinction is legally crucial, as it demonstrates that there is nothing new in the State's powers that could support claims under the Treaty.

456. *Fourth*, Claimants mischaracterize as a "threat" from the State the possibility of criminal prosecution for failure to supply electricity.[558] This characterization reveals a fundamental misunderstanding of the Honduran regulatory framework. Decree 46-2022 has the legitimate and constitutional objective of protecting access to electricity as a human right of an economic and

[556] Contract No. 002-2014 (**C-001**), p. 47, art. 18.1.

[557] Memorial on Jurisdiction, ¶¶ 271-272.

[558] *Ibid.*, ¶ 273; Statement of Claim, ¶ 16.

social nature in the Honduran territory.[559] In that sense, any action that compromises this fundamental right can be investigated to preserve the constitutional rights of Honduran citizens.[560]

457. Any sanctioning process would be subject to due process in accordance with the Honduran Constitution and international human rights standards.

458. *Fifth*, Claimants culminate their argument with what constitutes the best example of their internal logical inconsistencies. They allege that "the Government has pursued public smear campaigns against solar generators, vilifying those who did not 'agree' to the terms of the Government's 'offers.'"[561]

459. This allegation raises a fundamental question that exposes Claimants' argumentative weakness: what legal relationship can there be between alleged smear campaigns and outstanding debts arising from a commercial contract? The answer is categorical: none. Reference to alleged smear campaigns or political pressure in no way alters the fundamental legal conclusion that the basis of the claims remains the non-payment of sums contractually due, not an autonomous sovereign act that may constitute a breach of the Treaty.

460. Even if there were subsequent state acts of the alleged nature (*quod non*), this would not turn the dispute into a breach of the Treaty if the source of the damage is and remains contractual. Jurisprudence is consistent on this point: ancillary or supplementary acts cannot transform the fundamental legal nature of a dispute where the principal damage derives from contractual breaches; what the Tribunal must take into account is the essence of the claim.[562]

461. In conclusion, Claimants' claims undoubtedly constitute classic contractual breaches rather than breaches of the Investment Treaty. Their attempt to recharacterize an ordinary

[559] Memorial on Jurisdiction, ¶ 273 ("Decree 46-2022 aims to protect access to electricity as a human right in Honduran territory [...]."); Decree No. 46-2022 (**C-010**), Arts. 1.

[560] Memorial on Jurisdiction, ¶ 273; Decree No. 404-2013 (**C-008**), art. 26.B(c)(j).

[561] Counter-Memorial on Jurisdiction, ¶ 274.

[562] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Case No. ARB/97/3, Decision on Annulment (3 July 2002) (**RL-060**), ¶ 101; *Iskandar Safa & Akram Safa v. Hellenic Republic*, ICSID Case No. ARB/16/20, Decision on Jurisdiction and Liability (24 July 2020) (**RL-178**), ¶ 330; *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (9 July 2009) (**RL-154**), ¶ 64; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) (**CL-092**), ¶ 475.

commercial dispute as a breach of international law is legally, factually and logically unfounded, and must be rejected by the Tribunal outright.

c. Criterion No. 3: Claimants have the contractual forum to litigate the Essential Claims

462. The unmistakably contractual character of the Essential Claims finds its strongest confirmation in an irrefutable legal fact: Claimants maintain full and free access to the dispute resolution forum established in the PPA. The preservation of these mechanisms intact demonstrates that Honduras has not exercised any sovereign power but has consistently acted as a contractual party.

463. As these are contractual breaches, it is not only natural but legally appropriate that such disputes be heard before the dispute resolution forum specifically provided for and designed for such circumstances in the Contract. Honduras not only continues to perform the PPA under its normal and ordinary terms, but has in no way adopted measures that obstruct, limit or compromise Claimants' real and effective possibility to bring their claims before the relevant and competent contractual forum.[563] This fact is not in dispute.

464. Claimants' flagship measure to avoid the contractual nature of their claims, Decree 46-2022, has in no way affected Pacific Solar's full and effective access to the dispute resolution forum set out in the Contract.

465. It is not only inappropriate but absurd to unnecessarily wear out the specialized investor-State dispute settlement system with disputes of a purely contractual nature that can and should be resolved expeditiously and efficiently before the forums specifically designed and agreed by the parties for such purposes.

466. In view of the foregoing, Honduras has argued that this Tribunal lacks jurisdiction to rule on the present dispute, precisely because the relevant contracts provide for their own specific and legally binding dispute settlement mechanism.[564] The Republic demonstrated that the

[563] Contract No. 002-2014 (**C-001**), p. 44, arts. 15.1, 15.2, Annexes VIII, XIII; Operating Contract (**C-003**), p. 11, tenth clause; Decree 113-2014 (**C-002**), p. 3, clause 1.2. *See also* Memorial on Jurisdiction, § III.F.3.

[564] Memorial on Jurisdiction, ¶ 284.

decisions in *Vivendi I* and *Malicorp*, among others, confirm that claims of a contractual nature must be brought and resolved in accordance with the mechanism specifically provided for in the relevant contract, and cannot be unilaterally transferred to an international arbitration forum under a bilateral treaty by the mere will or procedural convenience of the claimant.[565] Claimants acknowledge this premise.[566]

467. In response, Claimants assert that tribunals "have routinely ruled that contractual choice-of-forum or choice-of-law clauses do not preclude the exercise of treaty jurisdiction."[567] Moreover, they cite numerous awards that, in their view, support this premise. The truth is that, in doing so, they again lose sight of the relevant discussion. The Republic's point, and this is confirmed by the cited cases, is that purely contractual claims cannot be elevated to Treaty violations, in disrespect of the dispute settlement clause, which is the ideal mechanism for resolving these disputes.

468. But this is not the case in the present circumstances. Honduras has already demonstrated that Claimants' Essential Claims are contractual in nature.[568] In turn, Claimants acknowledge that their argument about the enforceability of the dispute resolution clauses in the contract depends on the Tribunal accepting that their claims are under the Treaty.[569] In other words, the Tribunal's decision on the nature of the claims should bear on this point, so that if the claims are contractual it should indicate that the forum to which the dispute should be brought is the one provided for in the respective contracts.

469. Along these lines, other tribunals have recognized the application of the doctrine of *forum non conveniens*.[570] This principle seeks to avoid duplicity of proceedings by preventing

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[565] *Ibid.*, ¶¶ 289-291.

[566] Counter-Memorial on Jurisdiction, ¶ 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.").

[567] *Ibid.*, ¶ 278.

[568] *See supra* §§ I.A.2, III.E.2.a and b. *See also* Memorial on Jurisdiction, § III.

[569] Counter-Memorial on Jurisdiction, ¶ 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.").

[570] *MOX Plant Case (Ireland v. United Kingdom)*, PCA Case No. 2002-01, Order No. 3 (24 June 2003) (**RL-131**), ¶¶ 24-28.

litigation between the same parties and on the same issues.[571] Accordingly, Claimants' contractual claims must respect the jurisdiction clause contained in the Contract itself and the same applies to claims under the Treaty.

470. The preservation of Claimants' full access to the contractual forum specifically designed to resolve disputes of this nature constitutes irrefutable evidence that the challenged measures lack sovereign character and must be resolved where they belong: in the contractual dispute resolution mechanism.

3. The cases cited by both Parties confirm that Claimants' claims are contractual.

471. Claimants submit that "[a]s 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."[572] However, a close analysis of the facts of some of the leading cases allows one to discern that they in fact contradict Claimants' position.

472. In *Gemplus v. Mexico*, the claimants claimed the termination of a concession contract by means of executive acts.[573] In the present case, however, the PPA remains in force. So much so that Claimants are still collecting payments under that contractual relationship. Thus, there is no sovereign act that has effectively deprived Claimants of their investment or affected the Contract.

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[571] *OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, Partial Award on Jurisdiction (28 September 2010) (**RL-158**), ¶ 92 ("A Resolution adopted in 2003 by the Institut de Droit International on the doctrine of *forum non conveniens* in private international law, concluded that '[p]arallel litigation in more than one country between the same, or related, parties, in relation to the same, or related, issues, should be discouraged.' It can be similarly concluded here that any concurrent international legal title to jurisdiction would require identical parties and issues, and that even then parallel litigation should be discouraged.").

[572] Counter-Memorial on Jurisdiction, ¶ 262.

[573] *Gemplus S.A. et al. v. United Mexican States. United Mexican States*, ICSID Case Nos. ARB (AF)/04/3 and ARB (AF)/04/4, Award (16 June 2010) (**CL-306**), ¶ 8.4 ("Each of these sovereign acts of Mexican government authorities had the effect of depriving Claimants of the use and enjoyment of their investment, by rendering the Concessionaire's effective operation of the Registry impossible. Taken together the acts initially constituted an indirect and/or creeping expropriation of Claimants' investment and then a direct expropriation following the Revocation in December 2002. Interference with Claimants' investment began shortly after the commencement of the Concession Agreement, and increased to the point that Claimants were deprived of the totality of their control, economic use and enjoyment of their investment. The measures taken by Mexico did not fulfill the requirements of Article 5.1 of the two BITs, and accordingly violated these provisions.").

473. In *BIVAC v. Paraguay* the tribunal noted that Paraguay's failure to pay did not in itself constitute the exercise of sovereign authority, especially when other remedies are available.[574] In that sense, this case demonstrates that a state's failure to pay does not by itself constitute an exercise of *puissance publique*.

474. Finally, in *Waste Management v. Mexico II*, the claimant considered that the Banco Nacional de Obras y Servicios Públicos and the Municipality of Acapulco violated the minimum standard of treatment and expropriation obligations by refusing to pay invoices under a concession. The tribunal made it clear that showing a breach of contract is not sufficient, including persistent non-payment of debts.[575] Thus, the tribunal found that there was no breach by Mexico of either obligation.

475. In sum, the information available at this stage demonstrates that Claimants' "Essential Claims" are born and die in the PPA. There is no identifiable sovereign act that elevates an ordinary default or an operational adjustment of dispatch into the realm of international law; nor has the concurrence of the criteria developed by the case law to transform a contractual breach into a breach of the Treaty been demonstrated. On the contrary, Claimants retain intact the forum agreed in the contract itself to ventilate these commercial disagreements. The cases cited by the Parties only confirm that the dispute should be referred to the mechanism provided for in the PPA, and the claims, as formulated, should be rejected in their entirety.

[574] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Jurisdictional Objections (29 May 2009) (**CL-307**), ¶ 115-117 ("'The mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation.' [...] The Encana award supports the proposition that a 'final refusal to pay (combined with effective obstruction of legal remedies)' could amount to an expropriation. The facts alleged by BIVAC do not meet that standard. Even assuming there to have been 'a final refusal' to pay, which Paraguay apparently disputes, BIVAC does not allege any obstruction of the legal remedies provided for by the Contract. The fact that BIVAC has opted not to have recourse to such remedies or believes them for some unstated reason to be unattractive or ineffective, cannot contribute to a claim of expropriation. [...] the Tribunal is not satisfied prima facie that the Claimant's claims are capable of constituting the alleged breach of the Treaty. We reach this conclusion even assuming that it could be shown that Paraguay acted in exercise of a *puissance publique* [...]."). The Tribunal in this case cites both *Waste Management v. Mexico* and *Encana v. Ecuador*.

[575] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (**CL-024**), ¶ 73.

F. The Tribunal lacks jurisdiction *ratione temporis* because Claimants' claims were submitted outside the time limit set out in the Treaty.

476. Claimants have failed to demonstrate that their claims were filed within the maximum statute of limitations period provided by CAFTA-DR.

477. In its Memorial on Jurisdictional Objections, the Republic of Honduras proved that (i) the Tribunal cannot take cognizance of any alleged breach that occurred prior to 24 August 2020[576]; (ii) Claimants knew or should have known of the alleged breaches and damages alleged prior to the cutoff date of 24 August 2020[577]; (iii) even if the Tribunal considers that it has jurisdiction to hear the claims of expropriation and breach of the minimum standard of treatment, it is clear that the umbrella clause claims are outside the Tribunal's jurisdiction *ratione temporis.*[578]

478. In their Counter-Memorial on Jurisdiction, Claimants argue that (i) the limitation period in Article 10.18(1) begins to run from the time Claimants become aware of both a breach of the Treaty and the resulting injury or damage[579]; (ii) Claimants did not become aware of any of the facts underlying the alleged breaches or the resulting injury until after May 2022[580]; (iii) even if Honduras' actions were deemed as continuing or composite acts, Claimants' claims would fall within the limitation period set forth in the Treaty.[581]

479. *Pro memoria*, and for the purposes of this section, Honduras recalls two fundamental concepts explained in Section II *supra*. On the one hand, in assessing the objections, the Tribunal must objectively and autonomously consider what is the essential basis of the claims. On the other hand, Claimants' Essential Claims are non-payment of bills and energy limitations under the PPA.

480. In the present section, the Republic demonstrates that the Parties agree that the statute of limitations begins to run from the first moment such knowledge occurs or should have

[576] Memorial on Jurisdiction, ¶¶ 111-117.

[577] *Ibid.*, ¶¶ 118-129.

[578] *Ibid.*, ¶¶ 130-136.

[579] Counter-Memorial on Jurisdiction, ¶¶ 210-212.

[580] *Ibid.*, ¶¶ 213-240.

[581] *Ibid.*, ¶¶ 241-256.

occurred on the part of the investor, thus the Tribunal cannot take cognizance of any alleged breach occurring prior to 24 August 2020 (**Subsection 1**); Claimants incorrectly disclaim when "first knowledge" is established to trigger the statute of limitations (**Subsection 2**); Claimants knew or should have known of the alleged breaches and alleged damages prior to the August 24, 2020 cutoff date, their prior knowledge is not "mere context" (**Subsection 3**); Claimants acknowledge their prior knowledge of the alleged breaches but attempt to conceal it with Honduras' "change of intention" thesis (**Subsection 4**); Honduras has already established that, even taking Claimants' facts as true, the Essential Claims predate the cutoff date (**Subsection 5**); Claimants do not allege continuing or composite acts and, even if they did, this would not prevent the claims from being time-barred (**Subsection 6**).

1. The Parties agree that the statute of limitations begins to run from the first moment such knowledge occurs or should have occurred on the part of the investor, therefore, the Tribunal cannot hear any alleged breach that occurred prior to 24 August 2020.

481. The arguments contained in this section are without prejudice to Honduras' position that Claimants' claims are essentially contractual in nature and therefore not covered by the Treaty. The legal criteria relevant to a proper understanding of the operation of this time-limit are discussed below, including an interpretation in accordance with the rules of customary international law, previous arbitral decisions, and considerations of the purpose of this clause in relation to, *inter alia,* legal certainty and due process.

482. Honduras' objection is based on CAFTA-DR Article 10.18.1, which provides as follows:

> **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**.[582]

[582] CAFTA-DR (**CL-001**), art. 10.18(1).

483. This provision must be interpreted in accordance with the general rule of interpretation reflected in Article 31 of the VCLT.[583]

a. Good faith interpretation means not putting the interpretation in the hands of one of the parties.

484. In accordance with the principle of good faith interpretation, it is essential that the application of Article 10.18.1 of the CAFTA-DR is not left to the unilateral determination of one of the parties to the proceedings. As discussed in detail in Section II *supra*, allowing Claimants to discretionally decide the parameters of application of the limitation clause contravenes fundamental principles of international law. A good faith interpretation requires, on the contrary, that the rules be applied in a clear, predictable and uniform manner, without reliance on purely subjective considerations that allow a party to manipulate procedural rules to gain undue advantage to the detriment of legal certainty and due process.

b. The Parties agree on the ordinary meaning of CAFTA-DR Article 10.18.1.

485. Under the ordinary meaning of the terms of Article 10.18.1, two main points stand out in this arbitration:

- *First*, the article provides that the claimant "**first acquired or should have first acquired**." The underlined expression is composed of two preterit conjugations of the verbs "should" and "have," *i.e.*, it refers to actions that should have been completed in the past. In this case, they indicate that, for the limitation period to begin to run, it is sufficient that the claimant actually knew of the facts alleged to be in violation of Article 10.16.1, and it is also sufficient that it reasonably should have known, even if it did not. This is what is known in the case law as "**constructive** knowledge."[584]

[583] VCLT (**CL-133**). Article 31 provides that a treaty shall be interpreted (i) in good faith (ii) in accordance with the ordinary meaning to be given to the terms of the treaty (iii) in their context and (iv) having regard to its object and purpose.

[584] *Spence International Investments, LLC & Berkowitz et al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Corrected Interim Award (30 May 2019) (**CL-286**), ¶ 209 ("As the language of Article 10.18.1 makes plain, the requirement of knowledge on the part of a claimant is a requirement of actual knowledge or of constructive knowledge. As the actual knowledge of a claimant will often be difficult to determine, tribunals are frequently called upon to consider what a claimant must be deemed to have known. The 'should have first acquired knowledge' test in Article 10.18.1 is an objective standard; what a prudent claimant should have known or must reasonably be deemed to have known.").

- *Second*, the text of Article 10.18.1 employs the conjunction "***and***," stating that knowledge must encompass both elements: (i) "*the breach*," and (ii) that the enterprise "has incurred loss or damage."

- *Third*, the clause indicates that the limitation period begins to run "from the date" on which the actual or constructive knowledge provided for therein materializes.

486. Claimants expressly acknowledge all three parts of this standard, including the notion of "constructive knowledge."[585]

487. In line with the principle of good faith in treaty interpretation, constructive knowledge is interpreted **objectively**. This means that it imputes to the investor what a reasonable person in its position would have known with the exercise of due diligence.[586]

488. Moreover, Claimants concede that the time period starts to run from the **first moment** such knowledge occurs or should have occurred.[587] This interpretation is consistent with the jurisprudence under similar treaties such as NAFTA, where it has been established that "knowledge for the first time" cannot be acquired more than once. In this regard, the tribunal in *Mobil v. Canada* stated unequivocally:

> [T]he Tribunal accepts Canada's argument that the fact that the limitation period begins to run when a would-be claimant first acquires (or should first have first acquired) the requisite knowledge is significant; as Canada points out, **an investor cannot first acquire knowledge of the same matter on more than one occasion**.[588]

[585] Counter-Memorial on Jurisdiction, ¶ 203 ("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.").

[586] *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (**RL-071**), ¶¶ 58-59, 66 ("Constructive Knowledge. The Tribunal accordingly must consider whether Claimants 'should have' first acquired knowledge of these matters. The word 'should' is the past tense of 'shall'—ordinarily implying a duty or obligation [...]. Constructive knowledge' of a fact is imputed to person if by exercise of reasonable care or diligence, the person would have known of that fact.").

[587] Counter-Memorial on Jurisdiction, ¶ 207 ("So long as the breach and damage first became known or knowable after the cut-off date, the claim is timely.").

[588] *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Liability (13 July 2018) (**RL-101**), ¶ 147 (emphasis added).

489. Likewise, the tribunal in *Feldman v. Mexico* established this fundamental principle: Once an investor has knowledge, or should have had knowledge, of the facts that form the basis of its claim, the limitation period begins to run and cannot be restarted and is not suspended, prolonged or affected in any way.[589] Subsequent developments, obtaining additional evidence, or clarification of specific aspects of the damage do not restart the running of the limitation period.

c. The context of the limitation period indicates that it is clear and rigid.

490. Article 31(2) of the VCLT indicates that the context includes, *inter alia,* the text, including its preamble and annexes. In this case, the best reference to the context of the Treaty is the very heading of the relevant section where the limitation period is found: "Article 10.18: Conditions and Limitations on Consent of each Party". This means that the paragraphs under this heading include issues that must be satisfied in order for the consent of States Parties to be established. This is reaffirmed by the beginning of Article 10.18.1, which states "no claim may be submitted to arbitration under this Section".

491. This is in line with the case law on limitation clauses. In this regard, it has been established that the three-year time limit is a strict time limit[590] set as a condition to the consent of the State Parties and its breach deprives the tribunal of jurisdiction *ratione temporis* over the claim. This is also confirmed by the United States' Non-Disputing Party Submission in this same arbitration, citing several decisions under NAFTA Articles 1116 and 1117, which are analogous.[591]

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[589] *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (**RL-061**), ¶ 63.

[590] *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (**RL-061**), ¶ 63; *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (**RL-071**), ¶ 29; *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Liability (13 July 2018) (**RL-101**), ¶ 146.

[591] US NDP, ¶¶ 7-8 ("The limitations period is a "**clear and rigid**" requirement that is not subject to any "suspension," "prolongation," or "other qualification" [...] Article 10.18.1 imposes a ratione temporis jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute. As is made explicit by Article 10.18.1, the Parties did not consent to arbitrate an investment dispute 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' and 'knowledge that the claimant [...] or the enterprise [...] has incurred loss or damage.'").

It is for these reasons that the time provisions in the treaties are considered to be jurisdictional in nature and of strict interpretation, without suspensions, extensions or other qualifications.[592]

d. The object and purpose of the limitation period is to prevent the indefinite proliferation of historical claims.

492. In order to interpret Article 10.18.1 in accordance with its object and purpose, it is important to understand the logic of a limitation clause within the treaty architecture in general, and in investment agreements in particular. In this sense, it must be taken into account that these are clauses that extinguish, through the passage of time, a right of action.

493. The doctrine of prescription rests, according to international doctrine and case law, on two pillars: (i) unjustified delay in bringing the claim and (ii) negligence attributable to the claimant itself.[593] On that basis an adverse presumption operates against the claimant that its right is time-barred, which seeks to protect additional interests: to provide certainty to the host State about the time limit of its exposure to international disputes (*interest reipublicae ut sit finis litium*) and to avoid the inequity of litigating facts that are too old, when the evidence becomes less reliable and the defence more burdensome.[594]

494. In international jurisprudence, it is clearly established that these clauses protect State parties, even in State-State dispute systems, by sanctioning the conduct of a claimant that took too long to bring its claims.[595] In the investment arbitration, the tribunal in *Renco v. Peru* made clear that these clauses fulfil one of the objectives of investment agreements to establish a

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[592] *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (**RL-071**), ¶ 29; *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (**RL-061**), ¶ 63; *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility (14 June 2013) (**RL-162**), ¶ 327.

[593] B. Cheng, "Extinctive Prescription," in B. Cheng & G. Schwarzenberger (eds.), *General Principles of Law as Applied by International Courts and Tribunals* (2006) (**RL-138**), pp. 378-379.

[594] *Ibid*., p. 380.

[595] *Gentini Case*, Italy-Venezuela Mixed Claims Commission, Opinion (7 May 1903) (**RL-113**), p. 558 ("We are told with truth that this is a Commission whose acts are to be controlled by absolute equity, and that equity will not permit the interposition of a purely legal defence, as prescription is said to be [...]. But is this position correct? As appears from the foregoing citations, the principle of prescription finds its foundation in the highest equity-the avoidance of possible injustice to the defendant, the claimant having had ample time to bring his action, and therefore if he has lost, having only his own negligence to accuse."); *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Judgment, I.C.J. Rep. 1992, p. 240 (26 June 1992) (**RL-125**), ¶ 32 ("The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible.").

predictable legal framework by protecting States from late claims.[596] This was also confirmed by the tribunal in *Berkowitz*, which found that these clauses entailed a "*policy choice*" by States to prevent the indefinite proliferation of historic claims by setting a cut-off date.[597]

495. This, of course, is relevant because, as the tribunal in *Rusoro v. Venezuela* explained, time limitation clauses must be interpreted in a way that effectively fulfils their purpose of providing certainty and finality. An interpretation that would allow claimants to postpone indefinitely the commencement of the limitation period would frustrate these fundamental objectives.[598]

496. Considering good faith, the ordinary meaning of the terms of Article 10.18.1, as well as its context and object and purpose, a relevant remaining legal question to be answered is when "**first knowledge**" of both the facts underlying the alleged violations and the harm suffered is established.

2. Claimants incorrectly disclaim when "first knowledge" is established to trigger the limitation period.

497. In its Memorial on Jurisdictional Objections, the Republic demonstrated that (i) the temporal limitation is not a minor issue, but a condition of the State's consent;[599] (ii) what is relevant is the *first* moment when the investor became aware of the alleged breaches and losses,

[596] *The Renco Group, Inc. v. Republic of Peru*, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections (30 June 2020) (**CL-284**), ¶ 226 ("The Parties seem to agree, as does this Tribunal, that one of the objectives of the Treaty is to provide a predictable legal framework, and that Article 10.18.1 in particular aims at providing legal predictability by protecting State respondents against late claims, not least to ensure that claims will be resolved when evidence is reasonably available and fresh.").

[597] *Spence International Investments, LLC & Berkowitz et al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Corrected Interim Award (30 May 2019) (**CL-286**), ¶ 208 ("Such an approach would also encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period. This does not comport with the policy choice of the parties to the treaty. While, from a given claimant's perspective, a limitation clause may be perceived as an arbitrary cut off point for the prosecution of a claim, such clauses are a legitimate legal mechanism to limit the proliferation of historic claims, with all the attendant legal and policy challenges and uncertainties that they bring.").

[598] *Rusoro Mining Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (**CL-117**), ¶ 208 ("In certain situations, the view that time concerning limitation should be extended so as to begin at the moment the act ceases to exist has been supported, but with the limit that it should not result in a continued extension of the limitations period as this might end up affecting the necessary certainty and legal stability. Otherwise claims might be introduced years after the first events took place. It is of course necessary to avoid a consequence that the rule was precisely meant to prevent.").

[599] Memorial on Jurisdiction, ¶¶ 112-113.

even if these continue over time, so tribunals have rejected attempts to disguise claims as continuing breaches or new facts;[600] and (iii) Claimants' emphasis on Decree 46-2022 should be understood as an attempt to escape these temporal limits because their claims predate the cut-off date.[601]

498. However, in their Counter-Memorial, Claimants argue that "knowledge requires more than just a suspicion of breach or loss."[602] As explained *supra*, the standard does not require absolute certainty of breach, precise quantification of harm, or definitive documentary confirmation of the breaching act.[603] So much so that the treaties that require such certainty expressly say so.[604]

499. Honduras argues that what is required is knowledge of the **essential facts** that are then alleged to be a violation, together with an awareness of having suffered some resulting harm. This is the case even if the exact amount or full extent of the harm is only determined later. The decision in *Ansung v. China*, with an analogous clause, reiterated that the time limit starts when the investor knows "**the fact** that some loss has occurred," not when it knows the final amount of the loss.[605] This same position was previously held by the *Mondev v. United States* tribunal, which

[600] *Ibid.*, ¶ 116.

[601] *Ibid.*, ¶ 117.

[602] Counter-Memorial on Jurisdiction, ¶ 210.

[603] *See supra* §§ III.F.1 and 2.

[604] Agreement between the Republic of Colombia and the Kingdom of Spain for the reciprocal promotion and protection of investments. For example, some treaties require that, in the case of the statute of limitations applicable to certain types of public acts, these must be final or definitive for the computation of the term to begin to run. *See* Agreement between the Republic of Colombia and the Kingdom of Spain for the reciprocal promotion and protection of investments (31 March 2005) (**RL-135**), art. 10.5 ("Without prejudice to the provisions of paragraph 1 of this article, in the case of administrative acts, the three years referred to in this paragraph shall be counted from the date on which such acts are considered final or definitive."). Similarly, tribunals such as *Clayton et al v. Canada* have concluded that an overly flexible interpretation of the time requirement would add a disproportionate burden on the State and provide complete uncertainty about compliance with the time limit for filing a request for arbitration. *See William Clayton v. Government of Canada*, PCA Case No. 2009-4, Award on Jurisdiction and Liability (17 March 2015) (**CL-011**), ¶¶ 275, 277 ("The Tribunal agrees with the reasoning of its predecessors on this point. The plain language of Article 1116(2) does not require full or precise knowledge of loss or damage [...] [t]o require a reasonably specific knowledge of the amount of loss would, however, involve reading into Article 1116(2) a requirement that might greatly prolong the inception of the three-year period and add a whole new dimension of uncertainty to the time-limit issue [...] [a] host state can be prejudiced by a loss of institutional memory or documents on its part concerning the alleged breaches. Delay in bringing a claim might result in a situation where a host state is unknowingly carrying on acts or omissions for which it might be ordered to pay compensation.").

[605] *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award (9 March 2017) (**RL-173**), ¶ 111 ("As aptly stated by the ICSID tribunal in the Interim Award in Spence v. Costa Rica, 'the limitation

stated that: "[a] claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear."[606]

500. This means that Article 10.18.1 requires reasonable knowledge, sufficient to trigger the claimant's obligation to investigate, analyse and—if it deems it appropriate—act.

501. The very case law invoked by Claimants makes clear that Article 10.18.1 requires "a certain degree of certainty," not an exhaustive understanding: it is enough that the investor knows (or should know) of the breach and the injury, without being able to postpone the term indefinitely under the theory of "progressive knowledge."[607] Honduras submits that the objective criterion for fixing that moment is based on verifiable facts, such as (i) the official publication or direct communication of the challenged State measure; (ii) the ascertainment of its economic impact; and (iii) the actions that the investor itself deploys (internal correspondence, legal advice, initiation of proceedings or disputes).

502. In doing so, Honduras has demonstrated that, according to an interpretation of Article 10.18.1 under Article 31 of the VCLT, the three-year period begins when the investor first had or should have had simultaneous knowledge of the alleged breach and of the loss suffered. The standard is an objective one, based on the diligence to be expected of a reasonable operator, and cannot be left to the unilateral discretion of the claimant. Thus, the Tribunal's role is to determine whether such dual knowledge occurred prior to 24 August 2020, the undisputed cut-off date.[608] If so, the claims are time-barred and cannot move forward.

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clause does not require full or precise knowledge of the loss or damage [...] such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result.'").

[606] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) (**CL-009**), ¶ 87.

[607] Counter-Memorial on Jurisdiction, ¶ 210; *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Liability (13 July 2018) (**RL-101**), ¶ 157 ("The Tribunal nevertheless sees certain difficulties with this argument. It would render Articles 1116(2) and 1117(2) largely ineffective in cases of a change in regulatory framework, since it could always be argued that each day's instance of application or enforcement of a measure was a separate act.").

[608] Counter-Memorial on Jurisdiction, ¶ 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).").

3. Claimants knew or should have known of the alleged breaches and alleged damages prior to the 24 August 2020 cutoff date, their prior knowledge is not "mere context."

503. In its Memorial on Jurisdiction, the Republic demonstrated that Claimants had their first knowledge of the facts supporting the alleged breaches and resulting damages prior to the cutoff date, as (i) there is contemporaneous correspondence demonstrating that, as of 13 December 2018, Pacific Solar was aware of these issues;[609] (ii) as early as 2017 Pacific Solar was documenting power curtailments;[610] and (iii) the allegations about the renegotiation of the Contract are unfounded because the Contract remains unchanged since 2014.[611]

504. In their Counter-Memorial, Claimants attempt to preserve their claims from the statute of limitations objection by arguing that the acts prior to 24 August 2020 merely constitute factual "context," and not the legal basis for their claims.[612] Claimants' position is incorrect and should be dismissed by the Tribunal.

505. *First*, the cases cited by Claimants do not support their position. In the sections cited by Claimants, *Mondev v. United States*[613] and *Feldman v. Mexico*[614] deal with the non-retroactivity of NAFTA (events occurring prior to its entry into force), not with statute of limitation clauses such as Article 10.18.1. The issue here is not whether the Treaty was in force when the measures occurred; the key issue is whether the alleged breach and the damage were known or should have been known before 24 August 2020.

[609] Memorial on Jurisdiction, ¶ 126.

[610] *Ibid*., ¶¶ 127-128.

[611] *Ibid*., ¶ 129.

[612] Counter-Memorial on Jurisdiction, ¶ 207 ("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.").

[613] *Ibid*. ("As the *Mondev v. United States* tribunal explained, "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" as long as the claimant can point to State conduct after the entry into force of the treaty which is itself a breach.").

[614] *Ibid*, ¶ 249 ("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 Mexico before the entry into force of the treaty.").

506. Moreover, in the sections that Claimants do not cite, both cases confirm Honduras interpretation. The *Mondev* tribunal rejected the idea that the time limitation only runs when the exact extent of the damage is known to the investor.[615] And in *Feldman*, far from favouring Claimants, it upheld the pre-treaty acts exclusion[616] and strictly applied the three-year limit under NAFTA Articles 1116 and 1117, a standard that is fully transposable to CAFTA-DR Article 10.18.1.[617]

507. *Second*, the attempts to recharacterize the acts constituting the breach and the damage as mere context should not be accepted. On the one hand, international jurisprudence consistently applies the principle that substance prevails over form.[618] According to the *Inceysa v. El Salvador* tribunal, the distinction between constitutive acts and context must be based on objective legal analysis, not on tactical characterizations of the parties.[619] Similarly, in *CME v.*

[615] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) (**CL-009**), ¶ 87.

[616] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Questions (12 June 2000) (**CL-294**), ¶ 63 ("[T]he Tribunal concludes that only measures alleged to be taken by the Respondent after January 1, 1994, when NAFTA 29 came into force, and which are alleged to be in violation of NAFTA, are relevant for the support of the claim or claims under consideration.").

[617] *Ibid.*, ¶ 41, 44 ("NAFTA Article 1117 (2) [...] it is obvious that this provision adopts, as it is usual in both litigation and arbitration, a time limitation period, and sets it at three years [...] the time at which the notice of arbitration has been received by the Secretary General rather than the time of delivery of the notice of intent to submit a claim to arbitration is apt to interrupt the running of limitation period under NAFTA Article 1117 (2).").

[618] *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009) (**RL-076**), ¶ 34 ("According to the Czech Republic [...] 'this Tribunal should not elevate form over substance and simply accept Phoenix as the "paper" claimant. [...] The conclusion of the Tribunal is therefore that the Claimant's initiation and pursuit of this arbitration is an abuse of the system of international ICSID investment arbitration.").

[619] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award (2 August 2006) (**RL-143**), ¶¶ 209-211 ("Before deciding whether the investment made by Inceysa is protected by the BIT ~ considering that it was made in accordance with the laws of EI Salvador, it is important to repeat that, as the legality of the investment is a premise for this Tribunal's jurisdiction, the determination of such legality can only be made by the tribunal hearing the case, *i.e*. by this Arbitral Tribunal. Consequently, any resolutions or decisions made by the State parties to the Agreement concerning the legality or illegality of the investment are not valid or important for the determination of whether they meet the requirements of Article 25 of the Convention and of the BIT, in order to decide whether or not the Arbitral Tribunal is competent to hear the dispute brought before it. Sustaining an opinion different than the one described above would imply giving signatory States of agreements for reciprocal protection of investments that include the "in accordance with law" clause the power to withdraw their consent unilaterally (because they would have the power to determine whether an investment was made in accordance with their legislation), once a dispute arises in connection with an investment.").

Czech Republic, it was established that tribunals must examine the substantive nature of the alleged acts, not the labels assigned to them by the parties.[620]

508. Claimants' strategy of labelling the Essential Claims, which form the factual and legal basis of their case, as "background" does not stand up to scrutiny. It is not about "context": it is about the core of their case. To not go any further, it is clear that it is these facts, prior to the cut-off date, which set the legal basis for the alleged violations and the source of the alleged harm.

509. In this vein, it is clear that Claimants' allegation that these measures should only be "context" must be rejected by the Tribunal.

4. Claimants acknowledge their prior knowledge of the alleged breaches but attempt to conceal it with Honduras "change of intention" thesis.

510. As Claimants acknowledge, Honduras alleges that, prior to the cut-off date, Claimants had knowledge of the facts they allege as breaches and the resulting damages, if any, as a result of the facts underlying the Essential Claims.[621] Claimants take issue with the Republic's alleged change in intent.

511. Claimants' circular argument is based on the following tactical choices:

512. *First*, in their Counter-Memorial on Jurisdiction, they introduce an artificial distinction: they accept having known these facts but assert that only after the adoption of Decree 46-2022 did they understand that Honduras "did not want to pay."[622] This narrative, formulated *ex post facto*, has the clear procedural purpose of bringing Claimants' claims within the statute of

[620] *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award (13 September 2001) (**CL-080**), ¶¶ 545-546 ("The Parties' interpretation of the March 15, 1999 letter differs. While the Claimant is of the opinion that the letter is a Treaty violation, the Respondent's view is that the letter expressed the Council's general policy, not binding in the specific situation of ČNTS. The witness Josef Josefík, at that time Chairman of the Council, interpreted the letter as a recommendation and the witness Musil said that the letter reflected the Council's model, the Council's policy and that this letter was used as a model by the Council. [...] The Arbitral Tribunal's assessment is that the letter cannot be interpreted without taking the circumstances into consideration.").

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

[622] *Ibid.*, ¶ 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 [...]. This provision made clear for the first time that Honduras had no intention of honoring its outstanding obligations to Pacific Solar.").

limitations of Article 10.18.1 of the Treaty. This must be rejected because, as the Republic demonstrates below, it does not comport with the contemporaneous evidence.

513. *Second*, they assert that the "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."[623] In other words, Claimants not only claim to not have known prior to the cutoff date about the facts supporting the claimed breaches and damages, they claim **to not have even been able to do so**, since, by that time, the alleged breaches and damages **did not exist**. With this formulation, Claimants argue that they comfortably satisfy the Treaty's requirements for both actual knowledge and constructive purposes. This is nothing more than a tactical manoeuvre.

514. In support of their thesis, Claimants cite the award in *Eli Lilly v. Canada*, stating that "an investor cannot be obliged or deemed to know of a breach before it occurs."[624] However, this case is completely inapplicable to the present dispute. In that arbitration, the tribunal concluded that the time limitation had not expired because the alleged breach only occurred when the Canadian courts *actually* enforced it against the investment and their rulings became final.[625] Nothing could be further from the truth in this case, which is not even about court decisions. The existence of unpaid contractual amounts, which form the basis of the Essential Claims, is well known and quantifiable from their origin.

515. *Third*, in their desperate attempt to justify the thesis that they "could not even have known" the facts of the alleged breaches and alleged damages before 2022, Claimants submit a second witness statement by Mr. Fernando Paiz, who states: "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."[626] This statement, however, lacks credibility and is suspiciously assertive. In particular, it is clearly self-serving testimony, issued by the Claimant himself after the commencement of the arbitration, which is unsupported by contemporaneous documentary

[623] *Ibid.*, ¶ 215.

[624] *Ibid.*, ¶ 221.

[625] *Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award (16 March 2017) (**CL-285**), ¶¶ 161-170.

[626] Counter-Memorial on Jurisdiction, ¶ 224; Paiz Declaration (**CWS-02**), ¶ 14 ("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.").

evidence, and which contradicts Claimants' own prior acts. This position does not withstand the most basic standard of good faith. The Tribunal should give no evidentiary weight to this statement because of the obvious conflict of interest.

516. In turn, the Republic submits that the Tribunal should take into account the following points that undermine Claimants' position.

517. *First*, Article 10.18.1 does not require that the investor know the "intention" of the debtor, but only that it had—or should have had—knowledge of the breach of a legal obligation and the resulting damage. The text of the Treaty is clear, and its application does not admit of the subjective reading that Claimants seek to impose. As demonstrated in Section II above, the Tribunal must independently and objectively analyse the legal nature of the obligations at issue.

518. *Second*, an obligation to pay is not affected or legally transformed by an alleged future intention not to perform. Such an obligation exists or not, and its non-performance arises from the moment non-payment or underpayment occurs, not from when a party in default declares that it will not pay. Similarly, damage occurs with non-payment. Consequently, the debtor's attitude is legally irrelevant for the purposes of the commencement of the time limitation period.

519. *Third*, Claimants' new thesis presupposes two basic premises that delimit the conditions for the possibility of the claim:

- Claimants **<u>do not deny that</u>** they knew before the cut-off date of the facts of the alleged breaches which, for Honduras, are the basis of the claim.
- Rather, they seek to exclude those facts from the statute of limitations analysis on the ground that they are not the "legal basis" of the claim.[627]

520. In other words, if the Tribunal finds that, to use Claimants' own terms, the facts of the alleged breaches prior to the cutoff date are the legal basis for Claimants' allegations, then the statute of limitations objection must succeed. In Section I.A.2 *supra,* Honduras has already

[627] Counter-Memorial on Jurisdiction, ¶ 208 ("The Tribunal thus may consider Honduras' 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.").

demonstrated that the Essential Claims, which Claimants seek to dismiss, are in fact the basis of their case.

5. Even taking Claimants' facts as true, the Essential Claims predate the Cutoff Date.

521. In Procedural Order No. 4, the Tribunal instructed the Parties to treat the objection *ratione temporis* "based on the assumption that the facts alleged by Claimants qualify as violations of the Treaty."[628] Without prejudice to the Republic's position on the distinction between facts linked to the merits of the dispute and facts necessary to establish jurisdiction, which was already expressed in Section II *supra*, Honduras will demonstrate that, even taking as true the facts raised by Claimants and assuming that the claims constitute violations of the Treaty, it is clear that the facts of the alleged violations and the damages that are at the heart of the claims were known prior to the cut-off date.

522. In this section, Honduras will demonstrate that Claimants explicitly acknowledge that the energy injection limitations have existed since 2017 (**Subsection a**); Claimants explicitly acknowledge that the delays in payments by ENEE began on 13 December 2018 and were clearly quantified (**Subsection b**); Claimants' "change of intent" thesis is untenable because there was no change in conduct before and after Decree 46-2022 (**Subsection c**), and Claimants' communications subsequent to the commencement of the dispute should be of limited probative value (**Subsection d**).

a. Claimants explicitly acknowledge that energy injection limitations have been in place since 2017

523. The Tribunal will find that there are contemporaneous executive reports, prepared by Pacific Solar, which demonstrate that the company was aware of the energy constraints long before the cut-off date.

524. In a report from **October 2017** (almost three years before the cut-off date), Pacific Solar reports the following, along with a table detailing the dates, times, values of the constraints and their duration:

[628] Procedural Order No. 4, ¶¶ 38, 55(B)(1).

> During the month of October, limitations were presented by the national dispatch centre on the following dates and with the following durations. For a total of 10 hours of limitations during the month.[629]

525. Likewise, in a **December 2017** report, it again reports power cuts of more than 6 hours, in a detailed table, along with which the following is indicated:

> During this month there were several generation limitations by the National Dispatch Centre due to lower energy demand in the system. On 20 December, the limitation was due to a fault on the Cajón to Progreso line. It was 14:56 hours.[630]

526. As Claimants acknowledge, these limitations to the injection of energy had already generated economic damage.[631] Accordingly, it is clear that Claimants knew of these facts about alleged breaches and the resulting losses long before the cut-off date.[632]

b. Claimants explicitly acknowledge that ENEE's payment delays began on 13 December 2018 and were clearly quantified.

527. Moreover, Respondent refers the Tribunal to the communication issued by Pacific Solar on **10 July 2020**[633] (more than a month before the cut-off date), where it indicated that:

- ENEE owed them a clearly quantified sum of USD 9,789,891.40 in principal plus Lps. 49,199,993.96 in interest, under the PPA.
- The debt had been in existence since **13 December 2018** (almost two years pre-cut-off date).

[629] PSE, Nacaome I Project Executive Report (October 2017) (**R-034**).

[630] Letter from L. Bulnes (PSE) to E. Torres and D. Aguilar (PSE) (30 January 2018) (**R-038**).

[631] Request for Arbitration (24 August 2023), ¶ 4. *See ibid*., ¶¶ 26, 41, 44 ("While the Plant has been delivering clean energy, the Honduran State, on the other hand, has disregarded its obligations toward the Paizes and their Enterprise. In particular, the Government has failed to compensate Pacific Solar, including for energy delivered, and all payments related to the interests and curtailments to which Pacific Solar is entitled.") ("Honduras breached its obligation to accord the Paizes' investments FET by, among other things: [...] (ii) arbitrarily repudiating compensation obligations to which Pacific Solar is entitled to under the PPA, the State Guarantee, and Honduran law.") ("Honduras has expropriated the Paizes' investments and Pacific Solar's cashflows and value under Article 10.7 of CAFTA-DR by repudiating Pacific Solar's legal and contractual rights and withholding its corresponding revenues. This puts Pacific Solar in a precarious financial situation and threatens the viability of the Paizes' Enterprise."). *See supra*, § I.A.2.

[632] Historical Record of Limitations on the Nacaome I Solar Plant (**R-074**).

[633] Letter from R. Barahona (PSE) to G. Perdomo (ENEE) (10 July 2020) (**R-049**).

528. Also, on **7 August 2020**[634] (weeks before the cut-off date), Pacific Solar sent an almost identical communication to ENEE, in which:

- It updated the amounts due under the Contract to USD 10,346,066.18 of principal and Lps. 51,500,112.53 in interest.
- The debt origination date of 13 December 2018 is confirmed.

529. This demonstrates that, at least two years before the cut-off date, Claimants had *first* knowledge of the fact of ENEE's contractual breach and the resulting damage, to the extent that they were keeping accurate and up-to-date track of the amounts owed.[635]

c. Claimants' "change of intention" thesis is untenable because there was no change of conduct before and after Decree 46-2022.

530. Claimants' thesis that the relevant facts for assessing the statute of limitations are only those after the New Energy Law depend, *inter alia*, on the existence of a change in the State's conduct after this date. However, this argument has no objective factual support. The same payment and curtailment practices that existed since 2017 continued after 2022.[636] Moreover, in the face of allegations that Decree 46-2022 gave renegotiation powers to ENEE, the Contract has not been altered.[637]

531. The Tribunal has payment vouchers proving that Pacific Solar continues to invoice and ENEE continues to pay, as they had been doing since 2016. In particular, it can consult the vouchers for the years 2020 to 2024, to compare dates prior to Decree 46-2022 and where the

[634] Letter from R. Barahona (PSE) to G. Perdomo (ENEE) (7 August 2020) (**R-050**).

[635] ENEE, Oficio SGF-453-VI-2025, Estado de pagos relativo al Contrato 002 Pacific Solar (4 June 2025) (**R-085**); Payment Vouchers from ENEE to Pacific Solar Energy (2025) (**R-083**); Payment Vouchers from ENEE to Pacific Solar Energy (2024) (**R-012**); Payment Vouchers from ENEE to Pacific Solar Energy (2023) (**R-011**); ENEE Payment Vouchers to Pacific Solar Energy (2022) (**R-010**); ENEE Payment Vouchers to Pacific Solar Energy (2021) (**R-009**); ENEE Payment Vouchers to Pacific Solar Energy (2020) (**R-008**).

[636] ENEE, Oficio SGF-453-VI-2025, Payment Statement Regarding Contract 002 Pacific Solar (4 June 2025) (**R-085**); Payment Vouchers from ENEE to Pacific Solar Energy (2025) (**R-083**); Payment Vouchers from ENEE to Pacific Solar Energy (2024) (**R-012**); Payment Vouchers from ENEE to Pacific Solar Energy (2023) (**R-011**); Payment Vouchers from ENEE to Pacific Solar Energy (2022) (**R-010**); Comprobantes de Pago de ENEE a Pacific Solar Energy (2021) (**R-009**); Comprobantes de Pago de ENEE a Pacific Solar Energy (2020) (**R-008**); Registro histórico de limitaciones a la planta solar Nacaome I (**R-074**); *Ver también* Tribunal Superior de Cuentas, Informe No. 003-2015-DASII-ENEE-A (19 February 2018) (**R-072**), p. 29.

[637] Memorial on Jurisdiction, ¶ 129.

"change of intent" allegedly occurred.[638] The Tribunal will also find in the file contemporaneous IMF documentation showing Honduras' over-indebtedness to meet ENEE's payment obligations, even beyond 2022.[639] Indeed, in order to continue honouring its commitments, Honduras has approved the issuance of sovereign bonds and the acquisition of debt for the sole purpose of continuing to meet its commitments.[640]

532. In conclusion, there is not a before and after that is legally significant with respect to the Essential Claims. What exists is a deliberate attempt by Claimants to relabel facts involving alleged contractual breaches known and suffered years before the cutoff date, in order to avoid the temporal limits of Article 10.18.1 of the Treaty. This strategy does not withstand the slightest scrutiny.

d. Claimants' communications subsequent to the commencement of the dispute must be of limited probative value.

533. Finally, the Republic notes that, in Procedural Order No. 4, the Tribunal has identified as relevant certain communications in which Claimants themselves qualify the facts supporting their case.[641] Honduras considers it essential that the Tribunal not lose sight of the time at which such communications were issued: they are post-cut-off date statements, so there is a risk of a tactical use by Claimants to rehash their claims *ex post facto.*

534. Indeed, such documents may have been formulated with the aim of resetting Claimants' factual narrative and thus circumventing the "clear and rigid" temporal limitations provided for in Article 10.18.1 of the Treaty. In other words, the Republic's position is that the

[638] *Ibid.*, § II.C. *See also* ENEE Payment Vouchers to Pacific Solar Energy (2020) (**R-008**); ENEE Payment Vouchers to Pacific Solar Energy (2021) (**R-009**); ENEE Payment Vouchers to Pacific Solar Energy (2022) (**R-010**); ENEE Payment Vouchers to Pacific Solar Energy (2023) (**R-011**); ENEE Payment Vouchers to Pacific Solar Energy (2024) (**R-012**).

[639] International Monetary Fund, Honduras Country Report No. 18/206 (29 June 2018) (**R-042**), p. 65 PDF ("**External debt increased in 2017**. The increase in 2 percentage points of GDP (from 35½ percent of GDP in 2016 to 37½ percent of GDP in 2017) reflected the above-mentioned bond placement. The procedures from the placement were used to pay liabilities from the public electricity company ENEE."); International Monetary Fund, *Country Report: Honduras No. 23/337* (21 September 2023) (**R-078**).

[640] Decrees No. 12-2025 and No. 13-2025 regarding the issuance of sovereign bonds for the payment of debt (10 March 2025) (**R-084**).

[641] Procedural Order No. 4, ¶ 41, note 49; Claimants' Letter to the Tribunal (10 March 2025), p. 2.

Tribunal's independent and objective analysis must be based on contemporaneous documentation, issued prior to the Cut-off Date and available in the record of this arbitration.

6. Claimants do not allege continuing or composite acts and, even if they did, this would not avoid the statute of limitations on the claims.

535. Claimants expressly and unambiguously admit that they are not alleging that Honduras measures alleged to be in breach of the Treaty are continuing or composite acts.[642] This admission constitutes a definitive procedural waiver of any argument based on the theory of continuing or composite acts. Claimants cannot rework their claims on the fly, and it is not within the Tribunal's power to rectify this or decide *extra petita*. This is a matter of due process.[643] Notwithstanding the foregoing, Claimants develop extensive hypothetical arguments on the continuing and composite breaches, and Honduras will respond to these.

536. However, it should be noted that, by admitting that their claims are not based on continuing or composite acts, Claimants implicitly acknowledge that their allegations consist of instantaneous acts occurring at specific moments in time, thus subject to the temporal limitations set forth in Article 10.8.1 of the Treaty. This admission is binding and cannot be reversed by subsequent hypothetical speculation. Likewise, the Tribunal must reject out of hand any consideration of arguments that Claimants themselves have expressly excluded from their case.

537. In line with the foregoing, the Republic demonstrates below that the Essential Claims concern instantaneous acts with prolonged effects, not continuous acts (**Subsection a)**; and that these, moreover, are a repeated series of instantaneous acts, not composite acts (**Subsection b**).

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[642] Counter-Memorial on Jurisdiction, ¶ 241 ("To be clear, Claimants are not alleging that Honduras' 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.").

[643] *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Annulment (28 November 2022) (**RL-185**), ¶ 301 ("the Committee recognizes that the disrespect of the claims as presented by the parties or the development of a claim that has not been asserted may at the same time amount to a serious departure from a fundamental rule of procedure, because adjudication of claims *extra petita* as well as *infra petita* may discredit the integrity of the procedure. The Committee has to determine whether, indeed, the Tribunal developed a claim ex proprio motu and/ or whether it failed to deal with a claim or a crucial argument.").

a. Essential Claims concern instantaneous acts with prolonged effects, not continuous acts.

(1.) Legal basis for continuing acts

538. Honduras agrees with the conceptual distinction between continuing and composite acts as presented by Claimants.[644] However, Honduras submits that Claimants base their hypothetical argument on a legally incorrect premise: that continuing acts are exempt from the statute of limitations[645] and that the limitation period can only begin to run once the continuing act has completely ceased. This interpretation constitutes a fundamental distortion of both customary international laws, and the text of the CAFTA-DR and established arbitral jurisprudence.

539. The doctrine of continuing and composite acts, as codified in the ILC Articles, does not establish a general exemption from limitation periods, as Claimants misleadingly suggest.[646] At the outset, it should not be lost sight of that the purpose of the ILC Articles is to determine the international responsibility of the State for an internationally wrongful act, not to determine the Tribunal's jurisdiction *ratione temporis.*

540. No reference is made in these documents to the statute of limitations on the right of action.[647] What these instruments, as well as the decisions of international tribunals, do say is that the determination of whether conduct constitutes a continuing or composite act depends both on the primary obligation breached and on the specific circumstances of the particular case. In particular, the Commentaries to the ILC Articles make clear that an act does not have a continuing character merely because its effects or consequences extend over time; it must be the wrongful act

[644] Counter-Memorial on Jurisdiction, ¶ 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. A composite act consists of a series of actions that are legally distinct and defined in aggregate as wrongful.").

[645] *Ibid*., ¶ 243 ("An act that begins outside of a treaty's cut-off date and continues into the limitation period will not be time barred.").

[646] *Ibid.*

[647] U.N. General Assembly, Report of the International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, UN Doc A/56/10 (Vol. II, Part Two) (2001) (**CL-079**), pp. 60-62, commentaries to Article 14.

itself that continues into the period in which the treaty is in force.[648] It is precisely here that Claimants once again misconstrue fundamental concepts.

541. International jurisprudence has consistently and clearly established the crucial distinction between continuing wrongful acts and the mere prolonged effects of instantaneous acts. The paradigmatic case of *Phosphates in Morocco* before the Permanent Court of International Justice illustrates this distinction perfectly.[649] Italy challenged the 1925 French decision to exclude Italian nationals from the phosphates industry in Morocco, arguing that this decision, together with subsequent acts, constituted a continuing violation. The ICJ categorically rejected this characterization, emphasizing the need to identify the "definitive act" which, on its own, would entail international responsibility. The Court concluded that the 1925 decision was an instantaneous act, and that the subsequent acts were mere derivative effects of that earlier conduct, not part of a continuing wrongful act.

542. This judicial authority establishes a clear precedent: the fact that a wrongful act produces effects that manifest themselves over time does not automatically transform that act into a continuing violation.[650] Prolonged effects, however persistent, cannot be used to circumvent the temporal limitations set out in the treaties. This distinction is essential to preserve legal certainty and prevent limitation periods from becoming a dead letter.

543. These principles have been replicated in the investment arbitration framework, including in the decisions cited by Honduras and Claimants.[651]

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[648] *Ibid*., p. 60, commentary 6 to Article 14 ("An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues.").

[649] *Phosphates in Morocco (Italy v. France)*, Judgment, C.P.J.I. Series A/B No. 74 (14 June 1938) (**RL-116**), p. 24 ("The principal duty of the Court is to examine the conditions which determine whether the objection submitted by the French Government is well-founded. The question whether a given situation or fact is prior or subsequent to a particular date is one to be decided in regard to each specific case, just as the question of the situations or facts with regard to which the dispute arose must be decided in regard to each specific case. However, in answering these questions it is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction disputes having, actually arisen from situations or facts subsequent to its acceptance. But it would be impossible to admit the existence of such a relationship between a dispute and subsequent factors which either presume the existence or are merely the confirmation or development of earlier situations or facts constituting the real causes of the dispute.").

[650] *Ibid.*

[651] *Rusoro Mining Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (**CL-117**), ¶ 208; *The Renco Group, Inc. v. Republic of Peru*, PCA Case No. 2019-46, Decision on Expedited

544. Claimants attempt to distinguish *Berkowitz v. Costa Rica* and *Mobil v. Canada* through arguments that reveal a poor understanding of the principles applied by those tribunals.[652] In both cases, the tribunals expressly rejected attempts by the claimants to circumvent temporal limitations by artificially characterizing measures as continuing acts.[653]

545. In *Berkowitz*, the tribunal found that failure to pay compensation for an expropriation did not constitute a continuing act that could renew the limitation period. It stressed that a clear distinction should be drawn between continuing acts and continuing effects, expressly rejecting the proposition that the absence of compensation transforms an instantaneous expropriation into a continuing violation.[654] Claimants acknowledge that this was the tribunal's reasoning and, accordingly, do not dispute that, as a legal rule, an instantaneous breach cannot be presented as a continuing act for the purpose of circumventing a statute of limitations.[655]

546. However, they argue that *Berkowitz* would not be applicable to the present case because—according to them—the enactment of the New Energy Law, subsequent to the cut-off

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Preliminary Objections (30 June 2020) (**CL-284**), ¶ 226. *Spence International Investments, LLC & Berkowitz et al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Corrected Interim Award (30 May 2019) (**CL-286**), ¶ 208.

[652] Counter-Memorial on Jurisdiction, ¶¶ 251-252.

[653] *Spence International Investments, LLC et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) (30 May 2017) (**RL-097**), ¶ 208. *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Liability (13 July 2018) (**RL-101**), ¶ 157.

[654] *Spence International Investments, LLC & Berkowitz et al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Corrected Interim Award (30 May 2019) (**CL-286**), ¶¶ 269, 280, footnote 187 ("[T]he Claimants' allegations, in all of their various permutations contained in Claimants' seven-point matrix of alleged breaches and elsewhere, are all so deeply rooted in pre-entry into force conduct as not to be meaningfully separable from that conduct. While the Tribunal is not drawn to the Respondent's 'lingering effects' characterisation of such acts, as the notion of lingering effects suggests de minimis conduct, which the Tribunal considers understates their importance and consequence, the Tribunal agrees that the post-entry into force and post-critical limitation date conduct by the Respondent of which Claimants complain is 'dependent' conduct, or, in the Respondent's words, is not independent of the pre-1 January 2009 and pre-10 June 2010 conduct in respect of the properties in question. [...] For the avoidance of doubt, the Tribunal considers that Claimants' delay / promptness allegations in respect of the payment of compensation cannot be separated from the Respondent's alleged pre-entry into force and pre-limitation period conduct. It is therefore 'dependent' conduct, as described above and is not justiciable in the present proceedings. [...] In the Tribunal's view, Claimants' adequacy of compensation allegations is not justiciable in the present proceedings by reference to either Article 10.7.1(c) or Article 10.7.2(b). To adopt such an approach would amount to an assumption of jurisdiction over Claimants' expropriation claims more widely. As the Tribunal has already concluded, these claims are barred by the terms of both Article 10.1.3 and Article 10.18.1. Insofar as there may be a justiciable claim before the Tribunal, it cannot therefore be about the lawfulness of the alleged expropriatory conduct by reference to Article 10.7.").

[655] Counter-Memorial on Jurisdiction, ¶ 251.

date, would have restarted the computation of the limitation period.[656] This position is unfounded and must be rejected by the Tribunal.

547. Claimants' position is no more than a dogmatic repetition of their central thesis, without any substantive analysis of three key aspects, *inter alia*: (i) their knowledge of measures adopted prior to the New Energy Law; (ii) whether that regulation effectively modified the relevant factual or legal conditions; and (iii) the nature of the alleged violations—*i.e.* whether they are instantaneous events with continuing effects, **such as the non-payment of an invoice**, or genuine continuing acts under international law. On the contrary, Honduras argues that the decision in *Berkowitz* is directly applicable to this case. Just as the failure to compensate for an expropriatory act does not nullify its instantaneous character, neither does the non-payment of debts under a PPA alter the instantaneous nature of a payment obligation. Claimants simply seek to portray a series of specific contractual measures as continuing breaches, relying solely on their subsequent effects.

548. This strategy does not withstand legal scrutiny, nor can it serve as a basis for evading the effects of a clear and rigid statute of limitations clause such as that contained in CAFTA-DR Article 10.18.1.

549. *Mobil v. Canada* is equally relevant and directly undermines Claimants' position. The latter correctly summarizes the facts of the case by pointing out that the tribunal considered the claims to be timely filed because the claimant could not be certain of the application of the measures until the domestic courts rejected its challenges.[657] However, Claimants dismiss the relevance of the case with untenable arguments: they call it "immaterial" that the tribunal refused to characterize the measures as continuing acts and assert that the decision in *Mobil* would be "*irrelevant*" because the New Energy Law was enacted after the cutoff date.[658]

550. Claimants do not dispute that—as a matter of law—the strategy of avoiding the application of a statute of limitations by artificially reclassifying instantaneous events as continuing acts has been rejected by case law. Additionally, its attempt to downplay the value of

[656] *Ibid.*

[657] *Ibid.*, ¶ 252.

[658] *Ibid.*

the *Mobil* precedent only demonstrates the same circular logic: insisting that the New Energy Law post-dates the cut-off date, but without offering any analysis of the prior acts, their legal nature, or whether there was a substantial change in circumstances since the New Energy Law.

551. Honduras, on the contrary, argues that the *Mobil* precedent is highly relevant to analyse whether it is faced with instantaneous or continuing acts. This case clearly illustrates the difference between situations where legal uncertainty prevents the knowledge necessary to start the computation of the time period, and those—such as the present case—in which the claimant had full, direct and immediate knowledge of the allegedly damaging facts. In *Mobil*, the investor knew of the regulatory measures, but not that they would be applied to them.[659] In the present case, Claimants knew that a breach of contract with direct economic consequences was occurring from the moment they stopped receiving payments under the PPA. It is therefore untenable that the commencement of the time limitation period depended on the issuance of the New Energy Law.

552. Claimants further attempt to rely again on NAFTA cases, such as *Grand River*,[660] *Feldman*,[661] and *UPS*,[662] by taking them out of context. In *Grand River*, the tribunal found that the investor should have known it faced a loss or damage before the cut-off date.[663] With respect to *Feldman*, Honduras has already demonstrated that Claimants misunderstand the legal issue discussed[664] and, in any event, this decision fully supports the application of the statute of limitations. Moreover, the sections of this case cited by Claimants do not address the figure of continuing acts at all.

[659] *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Liability (13 July 2018) (**RL-101**), ¶¶ 152, 154.

[660] Counter-Memorial on Jurisdiction, ¶ 207.

[661] *Ibid.*, ¶ 249.

[662] *Ibid.*, ¶ 246.

[663] *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (**RL-071**), ¶ 83 ("Accordingly, the Tribunal holds that Claimants should have known prior to March 12, 2001 of the MSA, the escrow statutes, any related measures and enforcement actions taken prior to that date, and of loss or damage they incurred as a result in relation to off-reservation sales of their products. Claimants' claims with respect to all of these matters are accordingly barred by NAFTA Articles 1116(2) and 1117(2).").

[664] *See supra*, ¶¶ 505-506.

553. In the face of *UPS*, there is no doubt that this case is the source of Claimants' misconstruction. [665] While it is true that the tribunal cites the decision in *Feldman*, it mixes up acts that began before but continued after the entry into force of NAFTA with acts that occur outside the statute of limitations period. Such mistake is clearly demonstrated. For example, the tribunal in *Mobil* made it unequivocally clear that "apart from *UPS*, Mobil's continuing breach argument has attracted comparatively little support in the jurisprudence of NAFTA arbitration tribunals" and that for this reason the decision in *UPS* should be "at the very least [...] treated with caution."[666] The decision was also criticized in *Berkowitz*.[667] This cannot form the basis of any principle of law, as Claimants illusorily seek to suggest.

(2.) The continuing acts doctrine does not apply in a void: it must take into account the text of the Treaty.

554. Now, even if there were some sort of general rule of international law excluding continuing acts from the statute of limitations (*quod non*), Article 10.18.1 of the Treaty provides a clear exception. As Honduras has already demonstrated, an interpretation of this provision under Articles 31 and 32 of the Vienna Convention leaves no room for doubt: what must be identified in order to start counting the limitation period is the **first** knowledge of the breach and of the damage, whether actual or **constructive**.[668] Claimants themselves have confirmed that they agree with this interpretation.[669] Neither is complete or perfected knowledge required, nor can the count be restarted by alleging progressive events. This has also been done by numerous tribunals.

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[665] Counter-Memorial on Jurisdiction, ¶¶ 246-247.

[666] *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Liability (13 July 2018) (**RL-101**), ¶ 161 ("Finally, apart from *UPS*, Mobil's continuing breach argument has attracted comparatively little support in the jurisprudence of NAFTA arbitration tribunals. While Mobil rightly points out that none of the awards on these subject concerned facts directly comparable to those in the present case, it is now over ten years since the award in *UPS* and the absence of any subsequent endorsement of that tribunal's views on continuing breach means that, at the very least, they should be treated with caution.").

[667] *Spence International Investments, LLC & Berkowitz et al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Corrected Interim Award (30 May 2019) (**CL-286**), ¶ 208 ("In this regard, the Tribunal disagrees with the analysis in the UPS Award that 'continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly.' While 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 as this would effectively denude the limitation clause of its essential purpose, namely, to draw a line under the prosecution of historic claims.").

[668] *See infra*, § III.F.1 and 2.

[669] Counter-Memorial on Jurisdiction, ¶ 207.

555. Claimants' legal premise in their hypothetical argument of continuing acts—i.e., that such a rule does exist—turns this interpretation on its head.[670] There is no doubt that the duration of a breach can be extended in time, either because it is a continuing act or because it is an instantaneous act with prolonged effects.[671] However, what is required by Article 10.8.1 of the Treaty is different: first knowledge of its occurrence.[672] These are entirely different legal issues. If the State Parties had intended what Claimants suggest, they would have said so expressly. However, they did not. This will must be respected.[673]

556. At most, this would be a situation where the parties would have expressly departed from customary practice. In such cases, the Treaty constitutes a *lex specialis* and the Tribunal must give it preferential application.[674] Otherwise, the temporal limitation clauses set out in the Treaty would be rendered ineffective. If it were accepted that any measure producing continuing effects over time constitutes a continuing act exempt from the statute of limitations, the temporal limitations would be significantly reduced.[675] Moreover, as explained above, these clauses provide

[670] *Ibid*., ¶ 246 ("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.").

[671] U.N. General Assembly, Report of the International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, UN Doc A/56/10 (Vol. II, Part Two) (2001) (**CL-079**), Comments 2, 6 to art. 14 ("Internationally wrongful acts usually take some time to happen. The critical distinction for the purpose of article 14 is between a breach which is continuing and one which has already been completed. In accordance with paragraph 1, a completed act occurs 'at the moment when the act is performed,' even though its effects or consequences may continue [...]. (6) An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged.").

[672] CAFTA-DR (**CL-001**), 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 [...] or the enterprise [...] has incurred loss or damage.") (emphasis added).

[673] *Spence International Investments, LLC & Berkowitz et al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Corrected Interim Award (30 May 2019) (**CL-286**), ¶ 208.

[674] *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Liability (15 January 2008) (**RL-147**), ¶ 76 ("The rules on State responsibility (of which, it is accepted, the most authoritative statement is to be found in the ILC Articles) are in principle applicable under the NAFTA save to the extent that they are excluded by provisions of the NAFTA as *lex specialis*.").

[675] US NDP, ¶ 9 ("where a "series of similar and related actions by a respondent state" is at issue, a claimant cannot evade the limitations period by basing its claim on "the most recent transgression" in that series. To allow a claimant to do so would "render the limitations provisions ineffective[.]"); *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on Respondent's Expedited Preliminary Objections Pursuant to Article 10.20.5 of DR-CAFTA (31 May 2016) (**RL-172**).

that sophisticated international investors must be able to estimate their losses arising from a new regulation or policy within the three-year period.[676]

557. Indeed, following this same flawed logic, Claimants commit a fundamental error by invoking precedents from human rights tribunals and attempting to overlap that system's precedents to investment arbitration.[677] Investment treaties and human rights instruments differ substantially on issues such as their object, purpose, normative structure and implementation mechanisms. This has led several investment tribunals to decide that they do not have jurisdiction to rule on human rights issues.[678] While both systems are structured on the basis of an asymmetrical relationship between state and individual, this gap is considerably smaller in arbitration.[679] Through provisions such as limitation periods, investment treaties recognize the sophistication of investors and the greater demands that this warrants.[680]

558. In particular, Claimants rely on *Agrotexim v. Greece* before the European Commission on Human Rights to support their interpretation of continuing acts in the context of

[676] *See supra* ¶ 487.

[677] Counter-Memorial on Jurisdiction, ¶ 250.

[678] *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability (27 October 1989) (**RL-122**), ¶ 61 ("This Tribunal's competence is limited to commercial disputes arising under a contract entered into in the context of Ghana's Investment Code. As noted, the Government agreed to arbitrate only disputes in respect of the foreign investment. Thus, other matters-however compelling the claim or wrongful the alleged act-are outside this Tribunal's jurisdiction. Under the facts of this case it must be concluded that, while the acts alleged to violate the international human rights of Mr Biloune may be relevant in considering the investment dispute under arbitration, this Tribunal lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights.").

[679] M. Hirsch, "Investment Tribunals and Human Rights: Divergent Paths," in P. M. Dupuy *et al*. (eds.), *Human Rights in International Investment Law and Arbitration* (2009) (**RL-153**), pp. 107-114.

[680] *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (**RL-071**), ¶ 67 ("The Tribunal agrees in this respect with other NAFTA and ICSID arbitration tribunals which have emphasized that agreements intended to protect international investment are not substitutes for prudence and diligent inquiry in international investors' conduct of their affairs. As the tribunal in *MTD Equity v. Chile* observed 'it is the responsibility of the investor to assure itself that it is properly advised, particularly when investing abroad in an unfamiliar environment'. The *Maffezini v. Spain* tribunal similarly noted that treaties for the protection of investment 'are not insurance policies against bad business judgments.' And, the tribunal in *Feldman v. Mexico* rejected claimant's expropriation claim growing out of the enforcement of a long-standing statutory requirement, partly based upon its conviction that as the claimant's business "depended substantially on the terms of the IEPS law, the Claimant was or should have been aware at all relevant times that the separate invoice requirement existed […].'").

investment arbitration.[681] Although a common mistake,[682] this analogy is legally flawed and should be rejected by the Tribunal. The contradiction is evident when they attempt to put this case on the same level with other investment arbitration precedents, such as *Berkowitz,* where the conclusions are completely opposite: the former tribunal found that the expropriation is a continuing breach, while the latter found, without a doubt, that it is an instantaneous event with prolonged effects. Certainly, the legal sources, object and purpose of the instruments, as well as the logic of the tribunals, cannot simply be transplanted from one system to another.

559. The distinction is clear when considering concrete examples. An expropriation of an investment occurs at a specific and determinable point in time, even if its economic effects persist over time.[683] The same is undoubtedly true for contractual obligations of instantaneous performance, such as the payment of an invoice. In contrast, an unlawful detention of a person constitutes a violation that is continuously renewed throughout the period of detention.[684] Attempting to apply the criteria developed for the latter type of situation to the former is an incorrect analogy that distorts both international investment law and human rights law.

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[681] Counter-Memorial on Jurisdiction, ¶ 250.

[682] *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction (5 October 2007) (**RL-144**), ¶ 39 ("When it comes to Article 31(3)(c), the position may be different. Here the reference is to 'any relevant rules of international law applicable in the relations between the parties.' 'Applicable in the relations between the parties' must be taken as a reference to rules of international law that condition the performance of the specific rights and obligations stipulated in the treaty-or else it would amount to a general licence to override the treaty terms that would be quite incompatible with the general spirit of the Vienna Convention as a whole. The cases cited by the Claimant relate almost in their entirety to human rights treaties and to the constituent instruments of international organizations. It is however plain that both of these are special cases: the former (human rights) because they represent the very archetype of treaty instruments in which the Contracting Parties must have intended that the principles and concepts which they employed should be understood and applied in the light of developing social attitudes (as has repeatedly been held by national as well as international judicial bodies); the latter (international organizations) because it is generally understood that, given the changing nature of the problems and circumstances international organizations have to confront, a degree of evolutionary adaptation is the only realistic approach to realizing the underlying purposes of the organization as laid down in its constituent instrument. It is difficult to see what bearing any of this might have on the jurisdiction of an arbitral tribunal, which remains, as it has always been, a matter of specific consent by the parties.").

[683] *Spence International Investments, LLC & Berkowitz et al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Corrected Interim Award (30 May 2019) (**CL-286**), ¶¶ 269, 280, note 187.

[684] United Nations General Assembly, Report of the International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, UN Doc A/56/10 (Vol. II, Part Two) (2001) (**CL-079**), commentary to art. 14 ("(3) Examples of continuing wrongful acts include [...] unlawful detention of a foreign official [...]. (5) Moreover, the distinction between completed and continuing acts is a relative one. A continuing wrongful act itself can cease: thus, a hostage can be released.").

560. In conclusion, Claimants have failed to demonstrate the existence of any principle of international law that exempts continuing acts from the temporal limitations of an investment treaty. Their interpretation contradicts established international jurisprudence, distorts the fundamental distinction between continuing acts and long-lasting effects, and would lead to the absurd result of rendering the Treaty's statute of limitations clauses meaningless. In any event, however, Honduras draws the Tribunal's attention to the legal and factual nature of the alleged breaches relevant to this analysis, which will be addressed in the next section of this Reply.

(3.) The alleged violations in question, by their legal and factual nature, cannot constitute continuous acts.

561. A rigorous analysis of the legal and factual nature of the alleged breaches alleged by Claimants reveals unequivocally that they cannot be characterized as continuing acts. Payment defaults are, by definition, discrete and perfectly time-bound events that are legally configured at the precise moment when payment is incomplete or late.[685]

562. This characterization reflects fundamental principles of contract and obligations law that are recognized in various legal systems.[686] Each failure to pay constitutes an autonomous legal event that generates specific and quantifiable legal consequences at the very moment of its occurrence. The obligation to pay, once due, is breached instantaneously, without there being any "continuity" in the breach itself, even if its economic effects last in time.

563. This instantaneous nature is confirmed by the fact that the damages arising from each non-performance are calculated on an individual, case-by-case basis, and not on a cumulative

[685] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) (**CL-009**), ¶ 58 ("For its part the Tribunal agrees with the parties both as to the non-retrospective effect of NAFTA and as to the possibility that an act, initially committed before NAFTA entered into force, might in certain circumstances continue to be of relevance after NAFTA's entry into force, thereby becoming subject to NAFTA obligations. But there is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage. Whether the act which constitutes the gist of the (alleged) breach has a continuing character depends both on the facts and on the obligation said to have been breached.").

[686] R. Zimmerman, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (1992) **(RL-123**), p. 783 ("Every contractual promise engenders expectations in the person of the promisee. These expectations can be disappointed in various ways: the promisor may fail entirely to perform, he may offer performance belatedly or at the wrong place, or his performance may turn out to be unsatisfactory. In all these cases the promisor has not complied with the duties imposed upon him by the contract."). G. Ospina-Fernández, *Régimen General de las Obligaciones* (2005) (**RL-112**), p. 91 ("There is total or partial non-performance of the obligation when the obligor pays nothing to the obligee or when he pays only part of what he owes him, respectively").

or continuous basis. Each incomplete or late payment generates a specific and quantifiable damage that materializes at the moment of non-performance. The respective interest is also incurred. The fact that there may be multiple defaults does not transform the legal nature of each default, which remains a discrete and temporally defined event.

564. This is only replicated in cases decided under NAFTA and CAFTA-DR. Thus, the tribunal in *Berkowitz* decided that the non-payment of compensation for an expropriation did not renew or extend in time the expropriatory act.[687] Similarly, in *Grand River*, the tribunal acknowledged that the fact of having to make periodic payments by legal mandate did not, with each payment, renew the statute of limitations, and added that this interpretation "seems to render the limitations provisions ineffective [...] since a claimant would be free to base its claims on the most recent transgression, even if it had knowledge of earlier breaches and injuries." [688]

565. The payment obligations alleged by Claimants to be breached are clearly set out and defined in the PPA,[689] which constitutes the primary source of rights and obligations between the parties. The Contract specifies precisely what the payment obligations consist of, by whom they are owed, when they are to be performed, and what the consequences of non-performance are. This contractual framework is the core for determining the exact moment when the breach occurs.

566. Honduran law, which is the law applicable to this contract by its own terms,[690] provides the definitive legal framework for determining the moment of breach. The Honduran Civil Code, following the universal principles of civil law systems, establishes that the breach of a payment obligation occurs automatically with the expiry of the established term or with the

[687] *Spence International Investments, LLC & Berkowitz et al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Corrected Interim Award (30 May 2019) (**CL-286**), ¶¶ 269, 280, note 187.

[688] *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction (20 July 2006) (**RL-071**), ¶ 81.

[689] Contract No. 002-2014 (**C-001).**

[690] *Ibid.*

making of an incomplete payment.[691] There is no concept of a "continuous breach" of payment obligations in Honduran law.

567. When the due date of a payment obligation arrives and the obligation is not fully performed, the default occurs *ipso facto*, without the need for a judicial or administrative declaration, as in the *Mobil* case. The PPA reinforces this conclusion by establishing clear billing and payment mechanisms that allow the precise timing of each default to be identified.[692] Within its own obligations, Pacific Solar invoiced according to the contractual terms and ENEE had a corresponding obligation to pay within the established deadlines.[693] Each unpaid or underpaid invoice constituted a discrete and instantaneous breach, not part of a continuing breach.

568. A crucial element that dismantles any attempt to characterize these breaches as continuing acts is the proven fact that Claimants had full, detailed and timely knowledge of each breach from the very moment of its occurrence. In the context of contractual payment obligations, knowledge of the breach occurs simultaneously with the act itself, especially where there is an established system of billing and monitoring.

569. Assuming the truthfulness of Claimants' facts, Honduras has demonstrated that, as of 10 July 2020—a date well before the temporal cut-off established in the Treaty—Claimants maintained a clear, detailed and exhaustive record of all amounts owed to them by ENEE since December 2018, when the first breach allegedly occurred.[694] This record is contemporaneous and was not the product of a later investigation or belated discovery, but of the routine and systematic monitoring that any sophisticated commercial enterprise maintains over its accounts receivable.

570. Additionally, it is credited on its own facts that Claimants were keeping a systematic report of energy limitations as far back as 2017, evidencing early and continuous

[691] Honduran Civil Code, 1906 (Decree No. 76 of 1906) (**C-114**), art. 1355 ("The obligor incurs in default: 1o.- When he has not fulfilled the obligation within the stipulated term, unless the law, in special cases, requires that the obligor be required to constitute him in default. 2nd - When the thing could not be given or executed except within a certain period of time, and the debtor has allowed it to pass without giving or executing it. 3rd - In other cases, when the debtor has been judicially counterclaimed by the creditor.").

[692] Contract No. 002-2014 (**C-001**).

[693] *Ibid.*

[694] Letter from R. Barahona (PSE) to G. Perdomo (ENEE) (10 July 2020) (**R-049**). *See also* Letter from R. Barahona (PSE) to G. Perdomo (ENEE) (Aug. 7, 2020) (**R-050**).

knowledge of all of the measures they now allege to be in violation.[695] This proactive monitoring demonstrates that Claimants not only knew of the breaches, but systematically monitored and documented them, which is wholly inconsistent with any argument about ignorance of facts involving alleged violations or the continuing nature of the violations.

571. This timely knowledge eliminates any justification for delaying the filing of claims on the basis of alleged continuing breaches. Where an investor knows of the breach from its occurrence and keeps a detailed record of it, it cannot later claim that the breach was continuing and that therefore the statute of limitations had not begun to run.

572. In interpreting the meaning of constructive knowledge in article 10.18.1 of the Treaty, Honduras established that this includes factors such as the sophistication of the investor and the notoriety of the measures.[696] Honduras submits that, based on the evidence available before this Tribunal, it is undisputed that both requirements are met in this case and that Claimants' claim is unquestionably time-barred.

b. The Essential Claims are a repeated series of instantaneous acts, not composite acts.

573. Claimants have already made it clear that their claims do not involve composite acts. Moreover, in their latest submission, they devote only four paragraphs to this thesis.[697] Honduras will rebut Claimants' brief analysis, without prejudice to its general position that deciding on this basis would be an *extra petita* pronouncement by the Tribunal.

574. The Republic agrees with Claimants that, as suggested by Article 15(1) of the ILC Articles, a composite act requires a degree of "materiality."[698] This is so since a composite act occurs "when the action or omission occurs which, taken together with actions or omissions, is

[695] PSE, Nacaome I Project Executive Report (October 2017) (**R-034**). *See also* Letter from L. Bulnes (PSE) to E. Torres and D. Aguilar (PSE) (30 January 2018) (**R-038**).

[696] *See supra* ¶ 501.

[697] Counter-Memorial on Jurisdiction, ¶¶ 253-256.

[698] *Ibid.*, ¶ 253. This is without prejudice to the Respondent's point in ¶ 539 *supra* about the object of the ILC Articles and the difference between it and the Tribunal's determination of jurisdiction *ratione temporis*.

sufficient to constitute a wrongful act."[699] Likewise, for Claimants, in determining when this occurs the Tribunal must consider the point at which the combined actions acquire a different legal character than they had individually.[700] Honduras also agrees.

575. However, the Republic does not agree that an investor cannot acquire knowledge of a composite act "with the first act in series."[701] Much less that this can only occur "from the moment of the later act."[702] The sources cited by Claimants do not support their case.[703] What the Commentary to the ILC Articles says is that the composite act occurs "only after **a series of actions**," which is quite distinct from the later act, as misleadingly suggested by Claimants.[704] This is the same logic followed by the tribunal in *ISA v. Chile*, a case that Claimants also wrongly cite to support their argument.[705]

576. Moreover, in *ISA*, the tribunal concluded that the facts giving rise to the composite act postdated the cut-off date because the facts that predated it only covered one of the alleged treaty breaches.[706] By contrast, in this case Honduras has demonstrated in Section I.A.2 *supra* that the Essential Claims are the foundation of Claimants' entire case. On the other hand, in the *ISA* case, the tribunal did not agree that a series of individually considered acts constituted a composite

[699] U.N. General Assembly, Report of the International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, UN Doc A/56/10 (Vol. II, Part Two) (2001) (**CL-079**), art. 15.

[700] Counter-Memorial on Jurisdiction, ¶ 253; *Interconexión Eléctrica S.A. E.S.P. v. Republic of Chile*, ICSID Case No. ARB/21/27, Award (13 December 2024) (**CL-299**), ¶¶ 641-642.

[701] Counter-Memorial on Jurisdiction, ¶ 255.

[702] *Ibid.*

[703] Counter-Memorial on Jurisdiction, ¶¶ 253-256; *Interconexión Eléctrica S.A. E.S.P. v. Republic of Chile*, ICSID Case No. ARB/21/27, Award (13 December 2024) (**CL-299**); *Víctor Pey Casado and Fundación Presidente Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (13 September 2017) (**CL-303**).

[704] Counter-Memorial on Jurisdiction, note 633 *citing* J. Crawford, "Article 15," in *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) (**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).

[705] *Interconexión Eléctrica S.A. E.S.P. v. Republic of Chile*, ICSID Case No. ARB/21/27, Award (13 December 2024) (**CL-299**), ¶ 643 ("to determine the application of the statute of limitations period in Article 9.18.1 Treaty to ISA's claims based on Chile's two alleged composite wrongful acts, the Tribunal must ask whether by 12 January 2018 sufficient *acts* or omissions by Chile had already occurred for the breaches of the FET and PSP standards to have already been consummated and Claimant already had (or should have had) knowledge of those breaches and the resulting damages.").

[706] *Ibid.*, ¶¶ 644-646.

act and clarified that the claimant had neither alleged nor proved that, in addition to the cumulative effect of the individual acts, the sum of all of them could give rise to a cumulative effect that would constitute an unacceptable injustice under the treaty and international law.[707]

577. The ILC Articles clearly state that "composite acts covered by article 15 are **limited to breaches of obligations which concern some aggregate of conduct**."[708] As explained above,[709] payment obligations are not of this nature and therefore have nothing to do with composite acts.

578. Following this logic, in *Pac Rim*, a case frequently cited by Claimants, the tribunal found that the act in question was not a composite act because the succession of facts pointed out by the claimant "are similar acts the aggregation of which does not produce a different composite act under international law."[710] The same is true in this case. The aggregation of the Essential Claims does not, overnight, turn the Essential Claims into a composite act of a distinct legal nature. Moreover, however much Claimants may strive to rationalize this *ex-post*, Honduras has already demonstrated in Section III.F.5.c. *above* that there was no change in patterns of conduct after the New Energy Law, so the theory of a change in the State's intent is completely unfounded and illusory.

[707] *Ibid.*, ¶¶ 1174-1175, 1180-1185, 1190-1192.

[708] U.N. General Assembly, Report of the International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, UN Doc A/56/10 (Vol. II, Part Two) (2001) (**CL-079**), p. 62, commentary 2 to article 15 ("Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such.").

[709] *See supra* ¶¶ 561-567.

[710] *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections (1 June 2012) (**RL-085**), ¶ 2.88; *LSF-KEB Holdings SCA et al. v. Republic of Korea*, ICSID Case No. ARB/12/37, Award (30 August 2022) (**RL-182**), ¶ 354 ("The basic issue is to determine what is the 'composite act' which has 'acquired a different legal character' from its composite parts. In the Tribunal's view, Claimants have not identified a cluster of facts to which a post-2011 act of Korea brought into existence a separate and distinct treaty violation (an act of a 'different legal character'). The only candidate for 'composite act' is the allegation of systemic harassment, but in that regard the alleged post-2011 harassment simply added new and different episodes to Claimants' earlier grievances. Claimants have not established a scheme of systemic harassment separate and distinct from a series of acts or omissions which they claim individually give rise to State liability."); *Antonio del Valle Ruiz et al. v. Kingdom of Spain*, PCA Case No. 2019-17, Final Award (13 March 2023) (**RL-190**), ¶ 400 ("a composite act is composed of a series of different acts that extend over that period. In other words, a composite act results from an aggregation of other acts and has acquired a different legal characterization than those other acts.").

579. In conclusion, Honduras notes that Claimants make no reference to the interpretation of this thesis in the context of Article 10.18.1. However, Honduras reiterates that the acts doctrine should not be applied in a void and must take into account the Treaty. Article 10.18.1 is *a lex specialis* and requires a constructive and reasonable understanding. In addition, based on an interpretation of this provision under Article 31 of the VCLT, as confirmed by numerous courts, the clause must be applied in good faith and in a manner that respects its object and purpose, removing the possibility that Claimants can rely on legal appearances to circumvent the restrictive nature of the limitation periods.

IV. THE ADDITIONAL JURISDICTIONAL OBJECTIONS MEET THE BIFURCATION CRITERIA AND CAN BE DECIDED AT A PRELIMINARY STAGE.

580. The Respondent submitted its Summary of Jurisdictional Objections and Request for Bifurcation on 21 October 2024. Honduras also reserved its right to file additional jurisdictional objections at a later date.[711] The Original Objections were decided by the Tribunal in Procedural Order No. 3 on 20 December 2024. In addition, with this decision, the Tribunal requested the Respondent to submit any additional objections in its Memorial on Jurisdictional Objections.[712] As requested by the Tribunal, Honduras filed the following Additional Jurisdictional Objections on 25 February 2025 in its Memorial on Jurisdiction:

- *Additional Objection 1*: Claimants' claims are time-barred on the basis of the limitation period set forth in the Treaty.
- *Additional Objection 2*: Claimants have not proven ownership of the alleged investment they allege.
- *Additional Objection 3*: Claimants' claims are purely contractual.

581. In view of the above, the Tribunal issued Procedural Order No. 4 on 4 April 2025 and requested the Parties to address in their subsequent pleadings the Additional Objections and whether they should be bifurcated.[713]

[711] Request for Bifurcation, ¶ 102.

[712] Procedural Order No. 3 (20 December 2024) ("**Procedural Order No. 3**"), ¶ 70.

[713] Procedural Order No. 4, ¶ 55(A).

582. In particular, in Procedural Order No. 4, the Tribunal requested the Parties to submit their arguments on the following issues:[714]

> 1) With respect to Additional Objection No. 1 on the Treaty's limitation period:
>
> a. Address the Objection on the basis of the assumption that the facts alleged by Claimants qualify as violations of the Treaty.
>
> b. Discuss whether and, if so, how the limitation period applies (i) to continuous acts and (ii) to composite acts.
>
> 2) With respect to Additional Objection No. 2 on Claimants' ownership and control over the investment:
>
> a. Discuss whether Claimants had or have ownership and/or control over the investment through the chain of corporations notably referred to, in paragraph 167 of Claimants' Memorial by reference to Exhibit **C-27**, for the purpose of determining the Tribunal's jurisdiction.
>
> b. Discuss the potential impact of the agreement between Pacific Solar and [redacted] on such ownership and/or control and on the Tribunal's jurisdiction.
>
> c. Discuss whether, assuming that, as Claimants allege, Pacific Solar was forced by Respondent's behaviour to transfer its rights to [redacted] this transfer should be disregarded for purposes of establishing Claimants' ownership and control over the investment as a condition for the Tribunal's jurisdiction.
>
> 3) With respect to Additional Objection No. 3 on the alleged purely contractual nature of Claimants' claims and the lack of jurisdiction of the Tribunal over such claims:
>
> a. Focus on the *legal* question, and if so, under what conditions, the Tribunal has jurisdiction to over purely contractual claims.

583. The Republic appreciates the opportunity afforded by the Tribunal to expand on the grounds underpinning the discussion of the Additional Objections at the bifurcated stage and notes preliminarily that:

- The Parties and the Tribunal agree that the Ownership Objection should be bifurcated.[715]

[714] Procedural Order No. 4, ¶ 55(B).

[715] Procedural Order No. 4, ¶ 44 ("Briefing this issue in the present bifurcated proceeding thus contributes to an efficient use of the time allocated to said proceeding."). Moreover, Claimants have not objected in their Counter-

- The Parties and the Tribunal also agree that the contractual objection is linked to the merits.[716] However, the Parties disagree on the feasibility of bifurcating the legal issue. The Tribunal has indicated that the legal question of whether contractual claims can be heard can be discussed.[717]
- The Parties disagree on the bifurcation of the objection *ratione temporis*. However, the Tribunal has indicated that it can be discussed at a preliminary stage on the assumption that the facts alleged by Claimants are violations of the Treaty and from the perspective of legal issues, such as the applicability of the statute of limitations to continuing or composite acts.[718]

584. Below, Honduras explains why it considers it appropriate for the Tribunal to hear the ownership and *temporis* objections at the bifurcated stage, as well as to decide on the legal question of the contractual objection.

585. Honduras set out the relevant criteria for deciding a bifurcation in its Summary of Jurisdictional Objections and Request for Bifurcation.[719]

586. The Republic reiterates that the Tribunal will find the relevant guidance in Articles 41(2), 42(6) and 43(4) of the ICSID Rules, as well as Article 44(2) of the same rules and settled arbitral case law. That said, Honduras broadly agrees with the bifurcation criteria formulated by Claimants themselves.[720] Accordingly, the Respondent considers that an objection is suitable for a separate phase when:

a. it is capable of eliminating all or a substantial part of the dispute.

b. is not so intertwined with the merits as to make early resolution impracticable.

c. it contributes to efficiency and fairness.

Memorial that this objection is suitable for bifurcation; they merely note that the Tribunal allowed Respondent to raise it with respect to two clearly defined issues, ¶ 156.

[716] Memorial on Jurisdiction, ¶¶ 249-251; Letter from the Republic of Honduras to the Tribunal (20 March 2025), p. 3; Procedural Order No. 4, ¶¶ 13, 51; Counter-Memorial on Jurisdiction, ¶ 200 ("**Second**, Honduras' 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.").

[717] Procedural Order No. 4, ¶¶ 50-52.

[718] Procedural Order No. 4, ¶¶ 34-42.

[719] Request for Bifurcation, ¶¶ 74-81.

[720] Counter-Memorial on Jurisdiction, ¶ 194.

587. Based on these criteria, Honduras' three additional objections—ownership and control of the investment, the contractual nature of the investment, and the time-barring of the claims—are fully capable of being decided in a bifurcated phase.

1. Each of Honduras' additional objections may eliminate all or a substantial part of the dispute.

588. The dispositive potential of a jurisdictional objection is satisfied when it can, if successful, completely eliminate the case or significantly reduce its scope. As the tribunal in *Glamis Gold v. United States* recognized, this is precisely one of the central objectives pursued by bifurcation: to avoid unnecessary litigation on issues that may be excluded from the scope of the dispute by a preliminary determination.[721]

589. All of Honduras' objections have a clear and uncontroversial potentially dispositive impact on the case. If the Tribunal accepts any of the objections raised by the Republic, it will entail either a total rejection of Claimants' claims or, in a conservative scenario, a substantial narrowing of the case, leading to a more efficient and equitable process. In particular:

- *The objection of ownership and control of the investment*, if accepted, would dispose of the entirety of the claims brought by Claimants. As acknowledged by the Tribunal.[722]
- *With respect to the statute of limitations objection*, the Tribunal could conclude that all of the claims are time-barred or that some of the claims are time-barred. In either scenario, this would completely remove those claims from the case and substantially reduce the scope of the dispute.
- *Finally, the objection of contractual claims* goes directly to the jurisdiction of the Tribunal *ratione materiae*, so a finding that all or even some of Claimants' claims are purely contractual would eliminate them entirely or in significant part, substantially narrowing the subject matter of discussion. As the Tribunal itself acknowledges, this issue is "closely" related to the MFN objections (Original Objection 4) and the existence of an investment agreement dispute (Original Objection 5).[723]

590. Thus, an early decision on these objections is not only possible, but necessary to clearly delineate the contours of the Treaty and the scope of the Tribunal's jurisdiction, thus

[721] *Glamis Gold, Ltd. v. United States of America*, UNCITRAL Procedural Order No. 2 (Revised) (31 May 2005) (**RL-007**), ¶ 12(c).

[722] Procedural Order No. 4, ¶ 47.

[723] Procedural Order No. 4, ¶ 52.

avoiding unnecessary litigation on facts or damages that are not covered by arbitral jurisdiction. The case law cited by Honduras confirms that this test is met even if, despite failing in its entirety, the objection allows the tribunal to delimit the contours of the next procedural stage, for example by clarifying the legal criteria relevant to the final decision.[724]

591. All of Honduras' objections fully satisfy the criterion of dispositive potential, as each can eliminate all or a substantial part of the dispute, thus contributing to a more efficient conduct of the arbitral proceedings.

592. On the other hand, as the tribunal in *Resolute Forest v. Canada* established, the assessment of whether preliminary objections are serious and substantial does not involve a decision on their merits, but a determination of whether they are credible and presented in good faith, without being frivolous or manifestly unfounded.[725]

593. The Tribunal itself has identified relevant legal and factual issues in the Additional Objections and has expressly requested both Parties to address them in their subsequent submissions, which is unequivocal evidence that it does not consider them frivolous. Moreover, the argumentative efforts deployed by Honduras in this Reply, through the development of legally rigorous criteria, confirm that these are substantial objections which, if accepted, would significantly reduce the scope of the case or dismiss it in its entirety. The complexity of the issues raised, and the depth of the analysis required reinforce their substantial nature. Finally, full compliance with all the other requirements for bifurcation confirms that these objections are not dilatory manoeuvres or meritless claims, but serious issues that merit independent consideration.

2. Each of Honduras' additional objections is not so intertwined with the merits as to render their early resolution unfeasible.

594. The relationship of the three Additional Objections to the merits of the case appears to be the crux of the discussion on their bifurcation. In that vein, Honduras will demonstrate that the investment ownership objection is a specific question of law that should be bifurcated

[724] *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 (22 September 2015) (**RL-027**), ¶ 34.

[725] *See Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Procedural Order No. 4 (Bifurcation Decision) (18 November 2016) (**RL-033**), ¶ 4.4.

(Subsection a); the legal aspect of the contractual objection can be assessed at a preliminary stage (**Subsection b**); and the narrow factual and legal aspects of the objection *ratione temporis* can be decided without addressing the merits (**Subsection c**).

a. The investment ownership objection is a point of law that must be bifurcated.

595. In their Counter-Memorial, Claimants do not address whether or not the present objection should be bifurcated, implicitly acknowledging that it should be heard by the Tribunal on a preliminary basis.[726] In any event, in accordance with Procedural Order No. 4, the Republic of Honduras submits that the present objection should be bifurcated.[727]

596. As the Tribunal has seen in Section III.B. *above*, the question of ownership and control of the investment is a question isolated from the merits and exclusive of the Tribunal's jurisdiction. The Tribunal must determine only those facts necessary to establish its jurisdiction.[728] Furthermore, the Tribunal has already explained that the "establishment of Claimants' uninterrupted ownership and control of the investment, through the chain of companies identified in their submissions thus far, appears to be a narrowly circumscribed question unrelated to the merits."[729]

597. Similarly, the Tribunal has acknowledged that the present objection "deals with a well circumscribed legal issue [...] issue [that] may potentially [...] put an end to the entire proceeding."[730] The Tribunal need not analyse any factual or merits issues relating to the violations alleged by Claimants in the present arbitration, so this objection is entirely separate from the merits of the dispute.

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[726] Counter-Memorial on Jurisdiction, ¶ 156 ("The Tribunal allowed Respondent to raise its objection concerning ownership and control over the investment to assess two 'well-circumscribed' issues.").

[727] Procedural Order No. 4, ¶¶ 49, 55(A).

[728] *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 April 2009) (**RL-076**), ¶ 63 ("If [...] the alleged facts are facts on which the jurisdiction of the tribunal rests, it seems evident that the tribunal has to decide on those facts [...].").

[729] Procedural Order No. 4, ¶ 44.

[730] *Ibid.*, ¶ 47.

b. It is possible to assess at a preliminary stage the legal aspect of the contractual objection.

598. In relation to the objection that Claimants' claims are contractual and not investment claims (*ratione materiae*), the Tribunal asked the Parties to "address the legal question of whether the Tribunal has jurisdiction to hear purely contractual claims and, if so, under what conditions."[731]

599. Claimants argue that the objection regarding the contractual nature of their claims is so intertwined with the merits that it would not be suitable for bifurcation, further arguing that both Honduras and the Tribunal have recognized this, and that the objection is neither serious nor substantial.[732] However, whether or not the objection has **any** bearing on the merits of the dispute is clearly not at issue in the present round of written submissions.

600. Claimants fundamentally misrepresent the scope of the legal issue that the Tribunal has put before the parties. Procedural Order No. 4 clearly delineated the legal issue to be addressed and expressly recognized that it "is *prima facie* closely related" to other objections already bifurcated, concluding that "it is appropriate to address this legal issue."[733] In addition, the Tribunal asked the Parties to discuss whether it has jurisdiction over purely contractual claims and, if so, under what conditions.

601. This distinction is crucial: this is a strictly legal question that does not require an assessment of the merits, but only an objective analysis of the applicable rules of law and the legal nature of the claims as formulated by Claimants themselves. As has been exhaustively demonstrated in Section III.E. *above*, the Tribunal can reach this conclusion solely on the basis of an objective reading of the text of the Treaty and the claims submitted by Claimants, without the need to review any aspect of the merits of the dispute.

[731] *Ibid.*, ¶ 52.

[732] Counter-Memorial on Jurisdiction, ¶ 200.

[733] Procedural Order No. 4, ¶ 52.

c. The narrow factual and legal aspects of the objection *ratione temporis* can be decided without addressing the merits.

(1.) The facts at issue in this objection are narrow and do not require a decision on the merits.

602. The Tribunal correctly observed that the disagreement between the Parties on the merits of this objection relates to the determination "as to what the relevant facts are and how they may qualify."[734] It further concluded that "there is a possibility that it will prove unnecessary to make an actual factual finding in this respect if [...] the Parties address Additional Objection 1 based on the assumption that the facts alleged by Claimants as constituting violations of the Treaty are established."[735]

603. Honduras agrees with this premise. Indeed, as noted in Section III.D *above*, Respondent's objection *ratione temporis* was addressed in this submission by taking Claimants' facts as true. Precisely, Respondent's point is that no substantive decision on the veracity or otherwise of these facts is necessary to reach the same conclusion: the claims are time-barred because Claimants had knowledge of the facts prior to the applicable cut-off date under the Treaty.

604. Thus, by narrowing the factual question at issue in this objection, the Tribunal made it possible to decide it at a preliminary stage.

(2.) A decision on facts relevant to jurisdiction is not necessarily an issue on the merits.

605. It is clear at this stage of the arbitration that not all factual issues in dispute are necessarily issues on the merits. This has been argued by the Respondent and confirmed by the Tribunal in making a distinction between factual issues that require review on the merits and factual issues that are relevant to establish jurisdiction, based on the Tribunal's considerations in *Phoenix*.[736]

606. Following this line, the Respondent demonstrated in Section II *above* that, even taking as true the facts alleged by Claimants, the Tribunal should not leave it to a party to assess

[734] *Ibid.*, ¶ 35.

[735] *Ibid.*, ¶ 38.

[736] *Ibid.*, ¶¶ 31-32.

issues such as which facts form the basis of the claims and which are relevant to the analysis of certain jurisdictional issues. This must be the result of an independent and objective analysis.

607. An objection *ratione temporis* is the best example of this legal rule. Assessing the temporality of the claims in principle has nothing to do with the merits of the dispute.[737] What this determination is relevant for is to define whether the claims were timely and to establish the jurisdiction of the court. Thus, the factual issues associated with this analysis pertain to the jurisdictional stage and not to the merits stage.

608. Moreover, the central point that Claimants fail to rebut is that, even accepting the factual version most favourable to Claimants, their claims are time-barred, rendering any assessment of the merits of the dispute unnecessary. In particular, Honduras demonstrated that the temporality of the Essential Claims can be assessed without going beyond Claimants' own formulation of allegations and damages.

(3.) There is no rule that objections *ratione temporis* cannot be bifurcated.

609. Finally, Claimants make a fundamental error in arguing that the objection based on the statute of limitations clause in CAFTA-DR Article 10.18.1 would not be appropriate for bifurcation.[738] Their main argument—that tribunals under CAFTA-DR have **only** bifurcated statute of limitations objections when automatically required to do so by the treaty itself—is misleading, inaccurate, and without merit.[739]

610. There is no rule in CAFTA-DR, the ICSID Rules or arbitral jurisprudence that states that objections *ratione temporis* must necessarily be decided together with the merits. On the contrary, the bifurcation power must be exercised by considering the particular facts of the case and the relevant text of the respective treaty, as the tribunal in *Westwater v. Turkey* correctly

[737] *Carlos Sastre et al. v. United United Mexican States*, ICSID Case No. UNCT/20/2, Procedural Resolution No. 2 (Decision on Bifurcation) (13 August 2020) (**RL-044**), ¶ 68.

[738] Counter-Memorial on Jurisdiction, ¶ 195.

[739] *Ibid.*, ¶ 196 (emphasis added).

pointed out.[740] Arbitral practice confirms that the viability of bifurcation must be assessed on a case-by-case basis, in light of the specific criteria applicable and not on the basis of allegedly non-existent general rules.

611. *First*, Claimants make the mistake of purporting to establish a general rule on the basis of only two cases (*Pac Rim v. El Salvador*[741] and *Kappes v. Guatemala*[742]), making a logically invalid inference that does not allow for the derivation of a pattern of conduct. For the remainder of their argument, they rely on a tribunal that did not even decide under CAFTA-DR (*Renco v. Peru*), rendering their references completely irrelevant to support their purported "general rule."

612. *Second*, Claimants completely misinterpret *Pac Rim*. In that arbitration, the tribunal did not establish that the sole reason for deciding preliminary objections *ratione temporis* was an automatic CAFTA-DR obligation. The passage cited by Claimants merely indicates that a preliminary objection was being decided under Rule 41, without suggesting that this was the only enabling circumstance. In addition, the tribunal was to decide other preliminary objections, such as abuse of process and denial of benefits.[743] More importantly, the tribunal in its two decisions makes extensive references to the reduction of costs and time,[744] confirming that bifurcation allowed the dispute to be partially resolved.[745] These are exactly the benefits that Honduras invokes in the present case.

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[740] *Westwater Resources, Inc. v. Republic of Turkey*, ICSID Case No. ARB/18/46, Procedural Resolution No. 2 (28 April 2020) (**RL-177**), ¶ 16.

[741] Counter-Memorial on Jurisdiction, note 473.

[742] *Ibid*., ¶ 197.

[743] *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections (1 June 2012) (**RL-085**), ¶ 1.17 ("[t]he Respondent submitted its Objections to Jurisdiction under ICSID Arbitration Rule 41(1) on 3 August 2010, leading to the further procedure resulting in this Jurisdiction Decision. The Respondents Objections comprise four independent grounds to this Tribunals jurisdiction: (i) Abuse of Process by the Claimant; (ii) Ratione Temporis; (iii) the Respondents Denial of Benefits under CAFTA Article 10.12.2; and (iv) the Investment Law.").

[744] *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 (2 August 2010) (**RL-157**), ¶ 264 ("as regards these particular claims, much of the costs so far incurred by the Parties will not have been wasted. Much of the work required to bring these proceedings forwards to a conclusion has now been done. In the Tribunal's view, it is unlikely that much time, effort and expenditure will have been lost overall.").

[745] *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Respondent's Jurisdictional Objections (1 June 2012) (**RL-085**), ¶ 6.79 ("the Tribunal considers that neither the Claimant nor the

613. *Third*, the *Berkowitz* case, also under CAFTA-DR, categorically refutes Claimants' narrative. In that case, the tribunal bifurcated the preliminary objection *ratione temporis* without invoking Article 10.20.5 of the Treaty or ICSID Arbitration Rule 41 as an automatic ground, demonstrating that CAFTA-DR tribunals can and should conduct a substantive analysis of the feasibility and desirability of bifurcation.[746]

614. *Fourth*, Claimants' position loses even more weight when we look at tribunals that bifurcated objections *ratione temporis* under treaties that did not have automatic bifurcation mechanisms similar to CAFTA-DR Article 10.25, such as NAFTA. In *Tennant Energy v. Canada*, the tribunal decided to bifurcate a statute of limitations objection, arguing that "it is only necessary to consider whether or not the claimant knew at the relevant time, or reasonably should have known, about the alleged breaches and losses."[747]

615. Under the present objection, the Tribunal would only need to analyse certain point-in-time factual scenarios and determine whether Claimants knew or should have known about the losses suffered by the Essential Claims. The Tribunal need not analyse whether or not Honduras' conduct at the time was in breach of the Treaty, only that such conduct existed more than three years before Claimants filed this arbitration.

616. In this regard, the tribunal in *Carlos Sastre v. Mexico* explains that:

> [T]he objection is not intertwined with the merits of the case. While the Tribunal may have to examine the measures taken by Respondent to determine, inter alia, whether they constitute continuous or separate acts, this question is primarily a question of international law. The factual basis necessary to conduct such analysis does not touch upon the issue of whether the alleged

Respondent can be regarded as having either wholly succeeded or wholly lost their respective cases. Whilst the Claimant's CAFTA Claims can no longer proceed in this arbitration as a result of this Decision, the Claimant's Non-CAFTA Claims may now proceed to the merits of the Parties dispute.").

[746] *Spence International Investments, LLC & Berkowitz et al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Corrected Interim Award (30 May 2019) (**CL-286**), ¶¶ 300, 304 ("it warrants emphasis that the Tribunal, in this Award, is principally addressing questions that go to its jurisdiction and the justiciability of Claimants' case under the CAFTA […] [t]he preceding discussion addresses issues of jurisdiction only. Although it summarises the arguments of the Parties on the issues of liability and damages, it reaches no view on their submissions.").

[747] *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 9 (10 March 2021) (**RL-179**), ¶ 36 ("*The Tribunal need only consider whether the Claimant knew or did not know at the material time, or whether it should have reasonably known about the alleged breaches and losses* […].").

> measures taken by Respondent breached the Argentina-Mexico BIT or any of the Treaties invoked by Claimants.[748]

617. For all the foregoing reasons, Honduras' objection *ratione temporis* is clearly not so intertwined with the merits as to render its early resolution impracticable. Claimants have failed to demonstrate the existence of any normative or practical impediment to bifurcation, merely constructing fallacious arguments based on erroneous interpretations of the available case law. Honduras has done the opposite: demonstrate that the objection *ratione temporis* can be decided without going to the merits of the dispute and that its resolution at a preliminary stage would serve the efficiency of the process.

3. Bifurcation favours efficiency and justice

618. The criterion of procedural efficiency is satisfied when the preliminary resolution of an objection can eliminate or substantially reduce subsequent litigation, avoiding the waste of resources on issues that can be definitively resolved at an earlier stage of the proceedings. For its part, the Tribunal noted in Procedural Order No. 3 that the orderly conduct of the proceedings may favour the joint decision of two or more preliminary objections when they deal with related factual or legal issues:

> In addition, the orderly conduct of the proceeding may militate in favor of addressing two or more Preliminary Objections together at the same stage of the proceeding, because they raise related legal issues or concern the same set of facts. Decisions on bifurcation should also have regard to the impact on the substantive quality of the proceeding, which may impact on substantive justice but also, again, on efficiency.[749]

619. A preliminary decision on the three relevant objections would significantly contribute to reducing the time and costs of the proceedings. Since the objections have the potential to dispose of the case in whole or in significant part, they automatically satisfy the criterion of contributing to reducing time and costs. In particular:

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[748] *Carlos Sastre et al. v. United Mexican States*, ICSID Case No. UNCT/20/2, Procedural Resolution No. 2 (Decision on Bifurcation) (13 August 2020) (**RL-044**), ¶ 68.

[749] Procedural Resolution No. 3, ¶ 34.

- *On the objection of ownership and control of the investment*, as Procedural Order No. 4 indicates, "unless the Tribunal were to find that it lacks jurisdiction on another basis, Claimants will have to address this issue in any event" and "briefing this issue [...] thus contributes to an efficient use of the time allocated" to the [bifurcated] proceedings.[750]
- *With regard to the time bar objection*, if the Tribunal were to determine that this is appropriate in whole or in part, the scope of the dispute would be significantly reduced or even a decision could be taken "on the *interpretation of* the limitation period, leaving its application to the merits phase."[751] This generates significant savings in terms of time and costs.
- *Finally, the contractual claims objection* is related to two other jurisdictional objections, so that from "the viewpoint of procedural efficiency and coherence, it is therefore appropriate to address this legal aspect of Additional Objection 3" at a preliminary stage.[752]

620. Additionally, in the specific case at hand, Honduras' preliminary objections raise legal and factual issues clearly distinct from the merits which, irrespective of bifurcation, would necessarily have been addressed by the Parties and decided by the Tribunal. This includes the relevant legal criteria for interpreting the statute of limitations of Article 10.18.1 of the Treaty and the precise limits to the Tribunal's jurisdiction over purely contractual claims.

621. This means that, even in the hypothetical scenario that Honduras' preliminary objections are not accepted, there will be no waste of resources, because the Parties' written and oral submissions at the later stage of the proceedings will be substantially reduced thanks to the fact that the relevant legal discussions will already have been advanced and clarified. This reinforces the efficiency of bifurcation, eliminating any concerns about duplication of effort.

V. REQUEST FOR RELIEF

622. For all of the foregoing reasons, the Republic of Honduras respectfully requests the Tribunal to render an Award in which it:

1. Dismisses all of Claimants' claims for lack of jurisdiction and/or admissibility;

[750] Procedural Order No. 4, ¶ 44.

[751] *Ibid.*, ¶ 40.

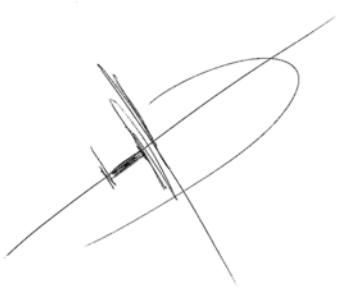
[752] *Ibid.*, ¶ 52.

2. Orders the bifurcation of the Additional Objections to address or decide all or any of the additional objections as a preliminary matter; and

3. Orders Claimants to pay all costs associated with this arbitration, including costs and professional fees incurred by the Republic of Honduras, the Tribunal, and ICSID, with interest.

623. The Republic of Honduras reserves the right to supplement, amend or supplement these pleadings and to submit any additional pleadings as may be necessary in accordance with the ICSID Rules, the Procedural Orders and the orders of the Arbitral Tribunal for the purpose of responding to any allegations made by Claimants in connection with this case. Furthermore, the Republic reserves the right to raise additional jurisdictional objections in the future on the basis of new evidence adduced or allegations made by Claimants.

Respectfully submitted,



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